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DIPLOMATIC IMMUNITY FROM COURT PROCESS: RESIDENT FOREIGN LEGATIONS.

THE immunities of a public minister are extended to his wife and family living with him, because of their relationship to him. The others who participate in the inviolability attached to his public character are the secretaries and attachés of an embassy or legation, who are especially entitled as official persons, because of their necessity to him in his official relations. Domestic servants and others in his employ, because of their necessity to his dignity and comfort also enjoy exemption from local jurisdiction. The immunity of these persons is not independent, but derives solely through, and because of, the diplomatic agent himself.

In *4 Hackworth's Digest of International Law*, by the Legal Adviser to the Department of State, Washington, and published by that Department, at pp. 513, 514, it appears that the immunity from criminal and civil process of any public minister, authorized and received as such by the President, and any domestic or domestic servant of any such minister, is identical in terms with the Diplomatic Privileges Act, 1708: see United States Code, ss. 252, 254.

The Diplomatic Privileges Act, 1708, or the common law of which it is declaratory, does not extend to consuls, as a consul is not a public minister: *Clarke* v. *Cretico*, (1808) 1 Taunt. 106, 127 E.R. 772; and a consul is therefore, not *eo nomine* entitled to diplomatic privilege: *Viveash* v. *Becker*, (1814) 3 M. & S. 284; 105 E.R. 619. But persons accredited as diplomatic agents and accepted (in Great Britain, by the Foreign Office) as such enjoy diplomatic immunities even though their duties may be consular in nature: *Engelke* v. *Musmann*, [1928] A.C. 433.

III.—Legation Staffs and Servants.

With general reference to the extent of the immunity granted to diplomatic agents and their staffs and servants, Scrutton, L.J., in *Fenton Textile Association, Ltd.* v. *Krassin*, (1921) 38 T.L.R. 259, 261, said:

> The immunity of diplomatic representatives in England rests partly upon statute and partly upon common law. The statute law is contained in 7 Anne, c. 12, passed in consequence of an arrest of the Russian ambassador. That statute declares that all writs issued whereby the person of any ambassador or other public minister of any foreign power "authorized and received as such by her Majesty" or the domestic servant of such ambassador may be arrested and his goods seized, shall be null and void. The common law clearly gives some further protection. For instance, the staff of the embassy who are not "domestic servants" have immunity from process in England; as also may be the case in respect to special diplomatic representatives for a particular purpose (see *Service* v. *Castaneda*, 2 Coll., 56) and chargés d'affaires, who represent their country but are not received by the King, but by the Foreign Office. Lord Ellenborough's opinion in *Viveash* v. *Becker*, (1814) 3 M. & S. 298, that the statute "must be considered as declaratory not only of what the law of nations is, but of the extent to which that law is to be carried" cannot, in view of the variety of diplomatic representatives at the present day, be considered accurate. The difficulty is to draw the line between those diplomatic representatives who have immunity from process and those who have not. Consuls clearly have not such immunity (*Viveash* v. *Becker*, (*supra*)). As to trade agents, Lord Talbot, L.C., in *Barbuit's* case (Cas. temp. Talbot, 281) was inclined to draw the line between trade agents employed to help the commerce of citizens of their country who were not immune from process and persons authorized to transact matters of trade between two Sovereign States who might have such immunity though they were not accredited to His Majesty or received by him. The question of the exact limits of diplomatic privilege is so important as to justify me in declining to lay down any general principle unless the facts of the case require it. It is sufficient to say that so long as our Government negotiates with a person as representing a recognized foreign State about matters of concern as between nation and nation, without further definition of his position, I am inclined to think that such representative may be entitled to immunity though not accredited to or received by the King.

Lord Justice Atkin, at pp. 262, 263, said:

> But it appears to me that even if the official agents when received in this country would, in the absence of agreement, have been entitled to full immunity, yet if the respective governments by whom and to whom respectively they are sent choose to agree as to the precise immunity to be given them, such an agreement must prevail. I see no reason why Sovereign States should not come to an agreement as to the rights and duties of their respective envoys, ordinary or extraordinary, or why such agreements should not enlarge or restrict the immunities which otherwise would be due under the well established usage of nations. Here an agreement has been made clearly defining the status of the agents, and, as on ordinary principles of construction it clearly limits the immunity of the agent, such restricted immunity alone can be recognized by the municipal Courts.

The Court held that, if a person is sent by a foreign government as a special diplomatic representative for a temporary purpose, without being acknowledged or received by the Sovereign as an ambassador or a public minister, recourse must be had to the terms of the special agreement governing his mission, and the existence and extent of diplomatic privilege must be determined therefrom as a question of fact. On the facts, the Soviet Government's official agent under a trading agreement was held not to have the immunities of a diplomatic agent.

Lord Buckmaster, in commencing his speech in *Engelke* v. *Musmann*, [1928] A.C. 433, 440, said that the Diplomatic Privileges Act, 1708, draws no distinction between the ambassadors and what, in the language

of that Act of Parliament, is described as the "domestic" or "domestic servant" of any such ambassador; and it seemed difficult to understand when the principle is admitted with regard to the one that it should not apply in relation to the other, for the privilege is the same in each case.

Viscount Dunedin, in his speech at p. 447, said that the appellant enjoyed the privilege not because he was styled Consular Secretary to the German Embassy, but because he, as an accredited member of the Ambassador's household, had such privilege as such, and did not forfeit it because he did some consular work. His Lordship proceeded:

> In the case of *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797, in this House it was pointed out that the acknowledgment of diplomatic privilege entitling immunity from being sued in the tribunals of this country rests on comity, and that the statute of Anne does no more than confirm the common law and annex certain penalties to those who transgress it. Mr. Engelke is, in the words of the statute, "a domestic of the Ambassador." In the Oxford Dictionary, "domestic" as a substantive is defined as "a member of the household; one who dwells in the same house as another; an inmate"; and in 1656 there is a quotation, "From that time he had his accesses to His Majesties presence as a domestique without ceremony."

Before leaving this branch of the subject, we quote from the lucid exposition of the law of diplomatic immunity given by that expert in international law, Lord Phillimore, where, at p. 449 *et seq.*, he says:

> By international law, which is part of the common law of this country, an Ambassador, by which term I intend to include diplomatic agents of all sorts—the stately Ambassador, in the restricted sense of the word, the special envoy, the resident minister, and the chargé d'affaires—is sent by the one country and received by the other upon the term that he has among his other diplomatic privileges immunity from legal process in the Courts of the country which receives him. The reasons for this immunity are well expressed in *Magdalena Steam Navigation Co.* v. *Martin* (2 El. & El. 94) [*cit. supra*].
>
> This immunity being accorded to him in order that he may transact his Sovereign's business, is a privilege which he cannot waive unless under direction from his Sovereign.
>
> The Ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children if living with him, his diplomatic family, as it is sometimes called, that is to say, his counsellors, secretaries, and clerks, whom I take to be intended by the word "domestic" in the statute of Anne, and his ordinary servants, described in the statute as "domestic servants," with a possible reservation in the case of domestic servants who are nationals of the receiving country. The privilege of all these persons is a derived privilege created for the benefit of the Ambassador and may be waived by him, but should unless waived, be taken by them for the Ambassador's benefit. . . .
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> When we come to the ordinary domestic servant, it may well be, that if he be a British subject, the Foreign Office may intimate that they cannot accept him so as to give him privilege. But according to English law (which may in respect of the domestic servant who is a national go somewhat beyond general international law) once the man is tendered as a domestic or as a domestic servant, and the tender is accepted, the status is created and the privilege attached.

It follows, in *Wheaton's* view, from the principle of the exterritoriality of the minister, his family, and other persons attached to the legation, or belonging to his suite, or in his service, and their exemption from the local laws and jurisdiction of the country where they reside, that the civil and criminal jurisdiction over these persons rests with the minister, so far as he is authorized to act according to the laws and usages of his own country; but it has long been recognized by other authorities that a diplomatic agent, of whatever rank, has no such power. Thus, in respect of criminal offences committed by his domestics, although in strictness the minister might be given a right to try and punish them, the modern usage merely autho him to arrest and send them for trial to their country. He may, also in the exercise of his cretion, with the approval of his government, disch them from his service, or deliver them up for under the laws of the receiving State; and, simil in their regard he may renounce any other privile which he is entitled.

The Chilean chargé d'affaires, with the assent o government, in 1906 surrendered his son to the Be Courts on a charge of murder of the secretary o Chilean legation, although the Belgian autho took no steps to arrest him. He was tried in Belgian Courts and acquitted. On the other h as we have already shown, the Italian ambassad London, in 1916, objected to a coroner investig the suicide of the first secretary of the legation a hotel. Again, when, in 1915, a member of the l legation in Berlin embezzled legation moneys, Swiss Government asked the German Governme arrest him and extradite him to Switzerland; an was subsequently tried and punished at Berne. in 1904, when Mr. Gurney, the secretary to the B Embassy at Washington, was fined by a police M trate for furiously driving a motor-car, the judg was afterwards annulled, and the fine was remitt

An illustration of United States practice may be f in the case of the Iranian Minister, who, in 1935 stopped by Maryland police and he and his chauffeur charged with violating the traffic regulations: *Hackworth*, op. cit, 527, 528. The Minister an chauffeur were arrested and taken before a Justice o Peace, the Minister himself being handcuffed. Justice dismissed the charges, and suspended the imposed on the chauffeur, but compelled him to 75 cents as costs. The Minister protested to the De ment of State. The Secretary of State replied th had been informed by the Governor of Maryland the offending police officers had been tried and and they were no longer in the public service. Governor expressed apologies for the incident. Secretary also expressed regret on the part o Government of the United States that the Mi had been subjected to discourteous treatment pointed out that according to the available inform the incident would not have occurred if the cha had observed the traffic regulations. He conclud

> In this connection I may state that this Government all times impressed upon its own diplomatic officers in countries that the enjoyment of diplomatic immunity i on them the obligation and responsibility of acc scrupulous regard to the laws and regulations both n and local of the countries to which they are accredi feel confident that the Iranian Government will sha view that this Government is justified in expectin foreign diplomatic officers accredited to the United will manifest a similar regard for the laws and regulat force in this country.

Per contra, in May, 1908, the Commissioners District of Colombia called to the attention of th partment of State the unlawful rate of speed at a taxicab occupied by the Swedish chargé d'affair operated on May 23. The State Department r that it saw no reason why the case against the of the taxicab should not be allowed to take its or course in the courts of the District. He was not a se

The position of chauffeurs who are members staff of a public minister was the subject of an i made of the State Department, which was ask the Maryland Attorney-General for a ruling w such a chauffeur could be arrested for violati

provisions of the State motor-vehicle law of Maryland in the following cases: (1) When the foreign minister was in the car; (2) when the foreign minister was not in the car and the chauffeur was operating it alone (*a*) on business for the foreign minister, (*b*) for his own pleasure. The reply of the Department of State is instructive. It replied that

> in all these situations the chauffeur of a foreign minister should be regarded as immune from arrest irrespective of the statutory provisions which have been enacted in the United States and which seem to bear upon the matter. However, after the termination of such employment, the chauffeur of a foreign minister would be subject to arrest for a violation of the law committed during his employment.
>
> The authorities upon international law have attached great importance to the immunity from local jurisdiction of the vehicular equipage of foreign diplomatic representatives, as essential for their freedom of movement, which constitutes such a large part of their independence in the State where they represent their Governments. Therefore, the Department considers, that irrespective of the statutory enactments, the latitude in this respect granted by the generally accepted international usage should govern the action of the authorities in the United States in dealing with the servants of foreign diplomatic representatives whose duty it is to convey their employers from place to place. It is recognized that some inconvenience may in given cases result from an exercise of this indulgence, but presumably any dereliction, committed by the chauffeur of a foreign minister if called to the latter's attention through the Department, would result in a satisfactory adjustment of the matter. (*Hackworth, op. cit.* 527, 528).

A person who claims the benefit of the Diplomatic Privileges Act, 1708, or at common law, as domestic servant to a public minister must be in actual fact, and *bona fide* the servant of such minister at the time when process is served upon him, and further, he must prove that he is not a trader or subject to the bankruptcy law.

It is not necessary that the public minister's servant (as, for example, his English secretary) must live in his house: it is sufficient if the nature of his employment required his attendance there: *Evans* v. *Higgs*, (1728) 2 Stra. 797, 93 E.R. 854. Thus, a chaplain who lived elsewhere and did no duty in the ambassador's residence was not protected: *Seacombe* v. *Bowlney*, (1744) 1 Wils. 20; 95 E.R. 469. It is not necessary that every individual act of the service should be particularly specified: it is enough if any actual *bona fide* service be proved: *Triquet* v. *Bath*, (1764) 1 Wm. Bl. 471; 97 E.R. 936; *Fisher* v. *Begrez*, (1833) 2 Cr. & M. 240; 149 E.R. 750. If, however, a person claiming immunity is acting as a servant of a public minister only in a secondary or intermittent capacity, protection will be disallowed, as in *Darling* v. *Atkins*, (1770) 3 Wils. 33, 95 E.R. 917, where, when privilege was claimed by the defendant as an English secretary to an ambassador, it was proved that his main occupation was that of a purser to a ship of war. In other words, the appointment of the servant must not be merely colourable: *Delvalle* v. *Plomer*, (1811) 3 Camp. 47, 170 E.R. 1301, where it was shown that a housekeeper to a public minister kept a boardinghouse on her own account, was a dealer in coals, and was, accordingly a trader, and not protected. And, thus, where an ambassador's servant did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house, not being necessary for the convenience of the ambassador, but in use in his capacity of lodging-house keeper, were liable to be distrained for rates: *Novello* v. *Toogood*, (1823) 1 B. & C. 554, 107 E.R. 204.

Furthermore, the servant must be in the service of the public minister at the time when process issues against him: the process of the law may not take a person out of the service of a public minister, but, on the other hand a public minister cannot take a person out of custody of the law by afterwards taking him into his service: *Heathfield* v. *Chilton*, (1767) 4 Burr. 2015, 98 E.R. 150. A recent decision as to the immunity of the servant of a public minister was *Assurantie Compagnie Excelsior* v. *Smith*, (1923) 40 T.L.R. 105, where the Court of Appeal held that the rule as to immunity from civil proceedings, on the ground of diplomatic privilege, extended to a domiciled subject of the United States, who was the chief of the mail department of the United States Embassy in London; as, in the words of McCardie, J., whose decision was affirmed, the rules of international comity extended not only to the person of the minister, but to his family, suite, and servants, and the defendant stood in the same position as a secretary or amanuensis in the embassy. In this case, the ambassador did not claim privilege for the defendant, but adopted a neutral position.

It is, in fine, a question of fact in each case whether the nature of the service or employment is sufficient to afford protection; that is to say, whether it is in fact actual service necessary for the interest or convenience of the minister, since the privilege claimed is his and not the servant's.

IV.—British Subjects on Legation Staffs.

Diplomatic privilege applies even to a British subject accredited to His Majesty in Great Britain or in a Dominion by a foreign government as a member of its embassy or legation. Unless he has been received by the receiving government upon the express condition that he shall be subject thereto, he is exempt from the local jurisdiction of his own country. Thus, in general, the local British nationals who are servants of a public minister, and not subject to any qualification expressed by their own Government, are, equally with his foreign servants, exempt from legal process. As Lord Mansfield said in *Lockwood* v. *Coysgarve*, (1765) 3 Burr. 1676, 1677, 97 E.R. 1041, 1042.

> The privilege of a foreign minister extends to his family and his servants, and this privilege has long been settled to extend to the servants who are natives of the country where he resides, as well as to his foreign servants whom he brings over with him.

The following rule is given in *1 Halleck's International Law*, 3rd Ed., 331, and seems to have general application by most Governments:

> It was at one time contended that the subjects of the State to which a public minister is accredited, do no participate in his rights of exterritoriality, but are justiciable by the tribunals of their country. But the better opinion seems to be that, although such State may very properly prohibit its subjects from becoming the employees or servants of a foreign minister, if it do not so prohibit them, they are, while so employed, to be considered without the limits of its jurisdiction.

It follows, therefore, that a British subject, accredited by a foreign government as a member of its embassy, is, unless he has been received by the British Government upon the express condition that he shall be subject thereto, exempt from the local jurisdiction of his own country. Where this condition has not been imposed on him, he is privileged in respect of any legal process by the British Courts. It was so held in *Macartney* v. *Garbutt*, (1890) 24 Q.B.D. 368, 369, where Mathew, J., said:

> The plaintiff, Sir Halliday Macartney, who was an English subject, had been appointed by the Chinese Government English Secretary of the Chinese Embassy, and had been

received in that capacity by the British Government. His name had been submitted to the Foreign Office in the usual way, and his position as a member of the embassy recognized without reservation or condition of any sort. He would therefore seem to be clearly entitled to the privileges of the "corps diplomatique," and it would follow that his personal effects would be exempt from seizure . . .

For the defendant it was conceded that the plaintiff, if he had been a foreigner, might be entitled to the exemption which he claimed; but it was argued that, as a British subject, he remained liable to the laws of his own country; and it was said that he was not within the description of persons exempt by the local Act, for the operation of the Act was limited by the words "or any other person not liable by law to pay such rate."

In support of this contention, reliance was placed on passages of Chapter XI of Bynkershoek "De Foro Legatorum," which, it was said, showed that the minister of a foreign state accredited to his own country remained subject to the laws of the State to which he owed allegiance. But the view of the learned author would seem to be that the envoy would be entitled to exemption from the local jurisdiction in all that related to his public functions, and this would seem to be the opinion of later writers on the subject (see *Wheaton, International Law*, 2nd Ed., edited by Lawrence, p. 189, and the authorities there referred to). If this be the rule, the plaintiff would be protected from the seizure in question, which unquestionably interfered with the performance of his duty as a member of the embassy.

But there is another principle which appears to afford the plaintiff the protection which he claims. *Bynkershoek*, in Chapter VIII, and all the later writers on the subject, recognize the right of the State to impose such conditions as are thought proper upon the reception of a member of a foreign embassy. But it is said, if the envoy be received without reservation, the condition is to be tacitly implied that he fully enjoys the "jus legationis." Bynkershoek points out that the only mode of escaping from the doctrine of exemption is to impose on the envoy, when received, a condition that he shall be subject to the local jurisdiction. This principle is, as it would seem, with much good sense, extended by later writers to the case of the envoy accredited to his own government. Thus *Wheaton, International Law*, p. 395, suggests that the privilege of the envoy to exemption from the civil jurisdiction of his own country is not lost where there has been no express condition to the contrary at the time when the member of the embassy is received by his own government. Again, Calvo, "*Droit International*," 2nd Ed., Vol. 1, book X, sect. 438, refers to the practice of some governments to impose upon their own subjects, when received as envoys, the obligation to remain subject to the laws of their own country. He adds: "These conditions ought always to be expressly stated before or at the time that the member of the embassy is received." The rule is stated in similar terms in *Phillimore's International Law*, Vol. II, sect. 135. The learned author refers to many authorities in support of this position. In this case it appears from the correspondence which passed between the Home Office and the defendants, that no such condition had been imposed upon the plaintiff.

In accordance with principles already stated, privilege cannot be claimed where there is only a colourable service given by a British subject for the ulterior motive of avoiding payment of his just debts. In *Lockwood* v. *Coysgarne*, (1765) 3 Burr. 1676, 97 E.R. 1041, protection was refused to a medical practitioner retained as honorary physician to an ambassador, as it was proved that his service was not *bona fide*, his retainer illusory, and his attachment to the public minister was for the purpose of screening him from his creditors; and, to the like effect, see *In re Cloele, Ex parte Cloele*, (1891) 65 L.T. 102.

V.—The Claim of Immunity.

Once, therefore, it is established apart altogether from the Diplomatic Privileges Act, 1708, that a person, whether he be a foreign national or a British subject, comes within the privilege of a diplomatic agent, it follows, as Slesser, L.J., said in *The Amazone*, [1940] 1 All E.R. 269, 272, from all authorities from Grotius downwards, that he may claim the immunity. Thus, it was held, distinguishing *Novello* v. *Toogood* (*supra*), in *Parkinson* v. *Potter*, (1885) 16 Q.B.D. 152, that the payment of rates on a dwellinghouse was not enforceable against the attaché of a foreign embassy, because, as the defendant was not carrying on trade or letting lodgings, the house was simply the private residence of himself and his family, and he was held not liable to pay the rates assessed on him in respect of his occupation.

The privilege may be waived by a foreign Sovereign or ambassador, or by the servant of an embassy with the sanction of his official superior. Thus, in the case of an ambassador or head of mission, the consent of the foreign government for waiver is necessary, as the privilege is not his but belongs to his Sovereign by whom he is accredited. As to other members of a legation staff it appears that, in civil matters, the head of mission can waive the privilege, as it attaches to them because of its necessity for his convenience: *In re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139, or he may adopt a neutral attitude, as in *Assurantie Compagnie Excelsior* v. *Smith* (*supra*). In criminal matters probably the consent of the foreign government itself is required. If a member of a legation staff or a servant of the minister appears in Court it is then too late to have the proceedings stayed: *Taylor* v. *Best*, (1854) 14 C.B. 487; 139 E.R. 201.

In *Dickinson* v *Del Solar*, [1930] 1 K.B. 376, the defendant, who was First Secretary of the Peruvian Legation, took out a policy of insurance against legal liability to members of the public in connection with the driving of his motor-car, the policy providing that "the company is entitled to take absolute control of all negotiations and proceedings."

The plaintiff brought an action for personal injuries against the defendant, and the latter served on the insurance company a third-party notice claiming an indemnity. An appearance without protest was entered in the action on behalf of the defendant, and, as the Peruvian Minister forbade the defendant to raise the plea of diplomatic immunity, no such plea was inserted in the defence. The jury found a verdict for the plaintiff for damages; and the insurance company repudiated liability on the ground that the defendant had broken the conditions of the policy by insisting that the plea of diplomatic immunity should not be raised. It was held, that the privilege of diplomatic immunity was waived by the entry of appearance without protest, and as the defendant was bound to obey the direction of his Minister there was no breach of the conditions of the policy, and the defendant was entitled to the indemnity claimed. It should be observed that, if the privilege had been pleaded as a defence, the defence could, in the circumstances, have been struck out. The learned Chief Justice, Lord Hewart, said that the first secretary was bound to obey the directions of his minister in the matter.

Nothing short of appearance amounts to submission to the jurisdiction, and the privilege cannot be waived by anything done before action is brought. Even where the immunity to the jurisdiction has been waived, immunity may be pleaded as a bar to execution of the judgment: *In re Suarez, Suarez* v. *Suarez*, [1918] 1 Ch. 176.

In a final article, we propose to consider the position of persons entitled to diplomatic privilege in relation to their giving evidence in the Courts of the receiving country; and also the means whereby the identity of persons entitled to claim such privilege may easily be ascertained.

SUMMARY OF RECENT JUDGMENTS.

SAIL v. TAIGEL.

SUPREME COURT. Christchurch. 1946. March 26. JOHNSTON, J.

Rent Restriction — Dwellinghouse — Unfurnished Dwellinghouse vacated—House later furnished and let at Increased Rent—Whether Statutory Restriction on Increase of Rent applicable—"Dwellinghouse"—"Let as such"—Fair Rents Act, 1936, ss. 2, 9—Fair Rents Amendment Act, 1942, ss. 3, 4—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 26 (c).

When a landlord, on the determination of the tenancy of an unfurnished dwellinghouse, furnishes and lets it furnished to a new tenant, the dwellinghouse loses its character as an unfurnished dwellinghouse, and the landlord is entitled to determine the new rent unhampered by the restrictions upon the raising of the rent imposed by s. 4 of Fair Rents Amendment Act, 1942; and Reg. 26 (c) of the Economic Stabilization Emergency Regulations, 1942, does not apply.

Counsel: *A. W. Brown*, for the appellant; *Young*, for the respondent.

Solicitors: *Crown Solicitor*, Christchurch, for the appellant; *Young and Hunter*, Christchurch, for the respondent.

COURTNEY v. WOODS.

SUPREME COURT. Auckland. 1945. November 30; 1946. March 19. CORNISH, J.

Practice—Trial—Special Jury—Application for Trial by Special Jury—Action for Damages by Dairy-farmer against his Attorney during his Absence Overseas—Alleged failure to inspect Dairy-farm leased to Two Tenants in Succession and see that Land being efficiently farmed and Stock kept at Efficient Standard—Whether Questions raised subject-matter for Special Jury—"Difficult questions in regard to scientific, technical, business or professional matters"—Statutes Amendment Act, 1939, s. 37.

Practice—Joinder of Parties—Defendant seeking Joinder of Tenants as Defendants—Intention of found negligent to settle Quantum of Contribution in Same Action—Plaintiff's objection that Defendant's Liability to him Sole Issue—Joinder refused.

The plaintiff, a dairy-farmer, sued the defendant, a solicitor, for damages for alleged negligence in the management of his affairs while he was overseas on active service. The farm had been leased to two tenants in succession. In his statement of claim, the plaintiff alleged (*inter alia*) that "the defendant further failed from time to time to make or have made such inspections of the said dairy-farm and to take such steps as would enable him to determine whether and ensure that the land was being efficiently and properly farmed and the stock kept at an efficient standard; by reason whereof the plaintiff's land and stock have greatly depreciated in value and the plaintiff has been deprived of the full use and enjoyment and of some of the profits thereof."

On a summons by the defendant for a special jury.

Held, ordering a special jury, That the plaintiff's allegations raised the question whether what the defendant saw, or ought to have seen was, or was not, evidence of bad farming: that was not a simple question of fact that could be easily answered by the ordinary townsman, but necessitated an inquiry that was scientific in character into questions that were fit subject-matter for a special jury.

Mills v. Kirkpatrick, [1921] G.L.R. 320, distinguished.

On a summons by defendant to join with him as co-defendants the lessees in succession of the plaintiff's farm in order that, if defendant were found guilty of negligence causing damage to the plaintiff, the Court might determine what amount of contribution they ought to make to the defendant,

Held, dismissing the summons, That the joinder should not be made, as the plaintiff should be allowed to proceed against the defendant of his choice.

White v. Carrara Ceiling Co., Ltd., [1944] N.Z.L.R. 577), and *McCheane v. Gyles (No. 2)*, [1902] 1 Ch. 911, followed.

Croston v. Vaughan, [1937] 4 All E.R. 249, and *Montgomery v. Foy Morgan and Co.*, [1895] 2 Q.B. 321, distinguished.

Counsel: *Leary*, for the defendant; *Trimmer*, for the plaintiff.

Solicitors: *Trimmer and Teape*, Auckland, for the plaintiff; *Leary and Giesen*, Auckland, for the defendant.

EDYVANE v. DONNELLY AND OTHERS.

SUPREME COURT. Wellington. 1946. March 8. FAIR, J.

Wages Protection and Contractor's Liens—Practice—Mortgagee—Joinder as a Defendant of Every Person "to whom the claimant is required . . . to give Notice of having made the claim of lien or charge"—Whether Plaintiff entitled to join Mortgagee as Defendant—"Required"—Wages Protection and Contractor's Liens Act, 1939, s. 34 (2).

The word "required" in s. 34 (2) of the Wages Protection and Contractor's Liens Act, 1939, is used in the sense that it is mandatory, *viz.*, necessarily and absolutely required by Part II of the statute. Reading that section in conjunction with s. 28 (2) of the Act, notice is not required to be given to the mortgagee, as a mortgagee is not included in the definition of "owner" in s. 20 (1) and the plaintiff is not entitled to join the mortgagee as a defendant. If, however, there are special reasons why the mortgagee should be joined, the Court can make an order under the power conferred by the concluding sentence of s. 34 (2).

Pitcaithly and Co. v. John McLean and Son, (1912) 31 N.Z.L.R. 648, referred to.

Counsel: *Harding*, for the plaintiff; *Ellingham*, for the defendant mortgagees.

Solicitors: *Salek, Turner, and Brown*, Wellington, for the plaintiff; *Atkinson, Dale, and Mather*, Wellington, for the defendant.

RETURNED WELLINGTON PRACTITIONERS.

Refresher Lecture Courses.

The Wellington District Law Society draws the attention of all returned practitioner servicemen to the Society's refresher lecture classes now being held in Wellington at the Supreme Court Library. They are reminded, also, that no more registrations for the classes will be accepted by the Secretary after May 17.

EXECUTORS AND ADMINISTRATORS.

Order of Application of Assets for Payment of Debts.

By J. H. CARRAD.

The author of this article felt very diffident about preparing it for publication, and agreed to do so only because of the insistence of the Editor of the LAW JOURNAL. The subject is an important one, and one very difficult to put on paper in an understandable form. Most of the matter was compiled some years ago as the result of many hours of delving into text-books and cases. The editions of *Williams's Law of Executors and Administrators* issued before the passing of the English Administration of Estates Act, 1925, and the first edition of *Halsbury* proved mines of information, and stated the law in England (since put into statutory form with alterations and amendments by that Act), which, with some modification, is still applicable also to New Zealand as to the marshalling of assets in payment of debts. The author hopes that if this article does nothing more than put practitioners on guard, he will have done something worthwhile.

EXPLANATORY REMARKS.

1. The rules hereinafter given as to the order in which the assets of an estate are to be applied in payment of debts regulate the administration of such assets only among the deceased's representatives, devises, and legatees, and have no reference to the rights of the creditors, but, in so far as the creditors, in the exercise of their rights, derange or upset such order, it is the duty of the executor or administrator to re-adjust matters as between the beneficiaries. Moreover, the rules do not take into consideration assets which are protected against debts.

2. The "residuary personal estate" hereinafter referred to means the personal estate, other than the specific bequests under the will, which remains after provisionally setting apart therefrom sufficient funds to pay the pecuniary legacies and annuities bequeathed by the will. The residuary personal estate includes personalty which is subject to a general power of appointment and which passes under a residuary gift by virtue of s. 27 of the Wills Act, 1837, or which is by the terms of the will included in the gift of the residuary personal estate. Personalty which is bequeathed as part of the residuary personal estate, but which is subject to a secret trust, is not part of the residuary personal estate as regards the payment of debts.

3. The residuary personal estate of the testator is the primary fund for payment of his debts, but this primary liability may be displaced by the testator's will. Thus, where a testator has charged a specific portion of his personal estate with the payment of his debts, that portion is the primary fund for such payment provided he has disposed of his residuary personal estate, but not where the residuary personal estate is not disposed of, or the disposition thereof wholly fails.

4. The testator may, of course, make his realty, or part of it, the primary fund for payment of his debts, but in order to do so, he must either expressly exonerate his residuary personal estate, or use language which shows a manifest intention that his residuary personal estate shall be exonerated. An express charge upon his realty, or an express devise thereof in trust for payment of debts is in itself insufficient to displace the ordinary rule that the residuary personal estate is the primary fund; the charge or trust is treated as the constitution merely of an auxiliary fund, and the ordinary rule is only displaced where from the rest of the will it can be clearly gathered that the testator intended to exonerate the residuary personal estate. This right of exoneration does not enure for the benefit of the person who takes the residuary personal estate as on an intestacy owing to the total failure of the disposition thereof contained in the will.

5. Where the testator creates a "mixed fund" of realty and personalty for payment of his debts, the real and personal estate comprising the mixed fund must be applied rateably according to their respective values. It is sometimes difficult to decide whether a mixed fund has been created, but a gift of real and personal estate coupled with the direction to sell and apply the proceeds in payment of debts creates a mixed fund as also does a direction that realty is to be sold and that the proceeds are to be considered as part of the personal estate. *The mere gift of real and personal estate together, coupled with the direction to pay debts, is not sufficient to constitute a mixed fund.* The testator's intentions to create the fund must be gathered from the will as a whole.

6. It will thus be seen that while the will must be carefully perused to ascertain the testator's intentions as to the incidence of his debts upon the assets of his estate, yet effect is not always given to the apparent intention of the testator to be gathered from such will.

7. As most wills simply direct payment of the debts out of the residuary real and personal estate the administration is usually very simple. In that event the residuary personal estate will be first applied and the residuary realty will be next applied in payment of the debts, unless the residuary realty is directed to be sold and the proceeds thereof and the residuary personalty are made a "mixed fund" for payment of the debts, in which case, the realty and personalty are so applied rateably according to the values thereof.

8. Where a will is silent as to the payment of debts it should be remembered that the gift of the residuary real estate is a specific devise which is liable for debts only with the other devises and the specific bequests rateably according to the values thereof.

ORDER OF MARSHALLING.

As between beneficiaries, the order in which the assets of an estate should be applied in payment of the debts of the deceased is as follows:—

(*a*) The residuary personal estate, if it is not exonerated or exempted from payment of debts, or if, though it is exonerated the bequest thereof wholly fails, *and* residuary real estate which is made part of a mixed

fund of realty and personalty created for the payment of debts.

Note: A lapsed share of the residuary personal estate is applicable in the same order and manner and to the same extent as if the bequest of such share had not lapsed.

(*b*) Personal estate, or a mixed fund of realty and personalty charged with the payment of debts, provided the residuary personal estate is bequeathed and the bequest thereof does not fail.

(*c*) Real estate particularly appropriated to, or devised in trust for, the payment of debts in exoneration of the residuary personal estate and not merely charged with the payment of debts, but, as regards the exonerated personalty, only if the trusts of such personalty do not wholly fail.

(*d*) The residuary personal estate not included in class (*a*).

(*e*) Real estate (whether acquired before or after the making of the will) which does not pass under a residuary or other devise and which does not come within class (*a*), (*b*), or (*c*).

Notes: (i). The realty within this class is usually referred to as "Real estate descended."

(ii). Some difference of opinion has arisen as to the effect of s. 11 (*b*) of the Administration Act, 1908 (now repealed by the Amendment Act, 1944, as regards the estates of persons dying after December 31, 1944). Some writers contend that in view of s. 11 (*b*) this class (intestate realty) should be omitted but in *In re Pharazyn*, (1897) 15 N.Z.L.R. 709, 723, the Chief Justice in giving judgment, stated that he saw nothing in the Administration Act, 1908, which affected the question of the order in which assets should be applied in payment of debts; see also *Re Starr*, [1926] G.L.R. 465.

(iii). The Administration Amendment Act, 1944, makes no provision as to the payment of debts. Section 4 of the Act gives *power* to the administrator to sell real and personal estate distributable as on intestacy (with power to postpone conversion) and the Act then goes on to provide for the distribution of the estate. The contention that s. 4 makes the real and personal estate a "mixed fund" seems hardly tenable. The position is different in England for the Administration of Estate Act, 1925, contains a *trust* for conversion of intestate estates (with power to postpone conversion) and express provision is made as to the marshalling of assets in payment of debts. Such provision has not been copied in New Zealand and the English cases are not now of much assistance here.

(*f*) Real estate devised but charged with the payment of debts.

(*g*) General pecuniary legacies (including annuities and demonstrative legacies which have become general), *pro rata*.

Note: As indicated in paragraph 2 of the Explanatory Remarks (above) when fixing or ascertaining the incidence of debts the general pecuniary legacies are provisionally set apart in order to determine what is residuary personalty.

(*h*) Residuary and other devises and specific bequests not charged with the payment of debts.

Notes: (i) Section 16 of the Administration Act, 1908, provides as follows:—

"If any testator's estate primarily liable for the payment of his debts is insufficient for that purpose, each of his specifically devised or bequeathed estates (if more than one) shall be liable to make good the deficiency, in the proportion that the value of each of those estates bears to the aggregate value of the specifically devised or bequeathed estates of the testator."

The effect of this section is discussed in *Garrow's Law of Wills and Administration*, at p. 633; the section was applied in the case of *Tingey* v. *Tingey*, [1918] N.Z.L.R. 618, but the author of this article doubts the correctness of the decision.

(ii). It will be noted that general pecuniary legacies lapse before *residuary devises not charged with the payment of debts*. Where, however, legacies are given generally and there is a gift of the residue of the real and personal estate, the legacies are charged upon the entire residue: *Greville* v. *Browne*, (1859) 7 H.L. Cas. 689, 11 E.R. 275. The practical effect therefore may be the same as if the debts had been paid from the residuary devise.

(*i*) Real or personal property which the testator has appointed by his will under a general power of appointment, but excluding personalty which passes under the residuary gift by virtue of s. 27 of the Wills Act, 1837, or which is by the terms of the will included in the gift of the residuary personal estate.

Note: This is the order stated in the text-books as regards this class of property, but in view of the decision in *Williams* v. *Williams*, [1900] 1 Ch. 152, the position may be that where real property over which the testator has a general power of appointment passes under a residuary devise by express disposition or by virtue of s. 27 of the Wills Act, 1837, or is appointed in trust for the payment of debts, or is charged with the payment of debts, the contention that such property must be applied in the same order as if it had actually belonged to the testator at his death, must in such cases receive serious consideration. Does not s. 27 or the appointment make the appointed property part of the testator's estate at his death?

(*j*) Property subject to a *donatio mortis causa*.

Note: Gifts *mortis causa*, being in the nature of legacies, are subject to the donor's debts.

A Touch of Sarcasm.—Lord Justice Mathew once observed on the occasion of the judicial appointments of one Lord Chancellor: "He is careful to select only persons of tried incompetency!" But this utterance is at least equalled if not excelled, by a remark passed by Lord Ellenborough when, on one occasion, Lord Westmoreland was speaking at great length in a debate in the House of Lords. In the course of his speech, he stopped to say: "My Lords, at this point I asked myself a question," whereupon Lord Ellenborough in a loud aside said: "And a damned stupid answer you'll be sure to get!"

On Murder.—"If once a man indulges himself in murder, very soon he comes to think little of robbing; and from robbing he comes next to drinking and Sabbath-breaking, and from that to incivility and procrastination. Once begin upon the downward path, you never know where you are to stop. Many a man has dated his ruin from some murder or other that perhaps he thought little of at the time."—Thomas de Quincy.

JUDGMENT SUMMONS.

Second Order of Committal.

In ascertaining whether or not there is jurisdiction to make a second order of committal under the Imprisonment for Debt Limitation Act, 1908, we must first of all take into account whether or not the second order is applied for in respect of instalments not the subject of the previous order; or whether the application is made not in respect of instalments, but merely of a lump sum.

That in the case of instalments there is jurisdiction to make a second order, is clear both from the wording of the Act itself and of the Rules made thereunder, as well as from authority: *Evans* v. *Wills*, (1876) 1 C.P.D. 229.

In the case of a lump sum, however, the position appears to be more involved, but it is clear (this is said with respect to those who think otherwise) that if the first order is inoperative and no execution has taken place thereunder, then the jurisdiction to make the second order exists. This has indeed been decided in the case of *R.* v. *Stonor*, (1888), 57 L.J.Q.B. 510, 511. In that case it was said by Field, J. (arguendo) in regard to a submission based on *Horsnail* v. *Bruce*, (1873) L.R. 5 C.P. 378, and *Evans* v. *Wills*, that the Judge had no power to make the second order:

> These cases do not apply, for in each of them an absolute committal of the debtor to prison had taken place, which is not the case here. A mere order to commit and a committal to prison are two different things.

And in his judgment he says, regarding the cases cited:

> It is true that no application for its extension—[*i.e.*, of the order] was made before its expiration: but being as it was dead and gone, and no arrest or imprisonment having ever taken place under it—which distinguishes the present case from those of *Horsnail* v. *Bruce* and *Evans* v. *Wills*—I am clearly of opinion that the learned County Court Judge had jurisdiction to adopt the course he did—[*i.e.*, to make the second order.]

In the same case Wills, J., said, at p. 512:

> No arrest or imprisonment having taken place under the order of the 4th March, 1886, and that order having expired, the course taken by the . . . Judge is in no way inconsistent with the provisions of the 5th section of the Debtors Act, 1869.

That case seems to be both good law and good sense, but doubts have been raised as to whether the jurisdiction to make a second order exists, and certain cases have been claimed as evidencing a different effect. The main authority cited in opposition is the one about to be discussed at length viz; *Church's Trustee* v. *Hibbard*, [1902] 2 Ch. 784. But in my view there is nothing in that case which really conflicts with the view that the jurisdiction exists. In that case a debtor had been imprisoned under an order made for his attachment for default in payment of a sum of money which he had been ordered to pay; but he was by mistake released before the expiration of the one year limited for imprisonment. It was held that there was no jurisdiction to make a second order for attachment for the same default; though, semble, an order for re-arrest might have been made under the original order for attachment.

In the course of his judgment, Vaughan Williams, L.J., says at p. 791:

> In my judgment you can only punish for fraudulent offences of this sort once: you cannot punish twice in respect of the same offence, or give two sentences in respect of the same offence. . . . Here, upon the face of this order, it is made perfectly clear that the offence for which the debtor is being attached is the identical offence for which he was punished under the first order . . . ; and according to my view of the Act—a view which is entirely in accordance with the decision in *Horsnail* v. *Bruce*, (1873) L.R. 8 C.P. 378)—there cannot be a second writ of attachment issued in respect of the same offence.

That was a case in which the debtor had been actually imprisoned, and the cases show very definitely that in such circumstances a second attachment cannot be made; and the learned Lord Justice in the passage just cited says that his view of the law coincides with the decision in *Horsnail* v. *Bruce* (*supra*). There is however one phrase in the citation to which one must call attention as it seems *prima facie* to be in conflict with the view that a second order can be obtained even if there is no previous arrest or imprisonment—namely "you cannot . . . give two sentences in respect of the same offence." I think the meaning of that statement is that you cannot have two sentences, so that a debtor could be imprisoned under both. Two valid sentences cannot be imposed, as you cannot punish a person twice for the same default. It appears this view is supported by a passage in the judgment of Mathew, L.J., which reads:

> I agree with my Lord that, before we hold that writs of attachment can issue in succession, we should see that the Act of Parliament permits that to be done. Now, nothing is clearer to my mind than that the Act only contemplates one writ of attachment; any other conclusion would lead to this, that a Judge or Court might issue an attachment and order imprisonment, in the first instance say for six months, and then, if that were not found to be effective, might issue another attachment for another six months; and that is a thing which the Act does not justify.

Previously the learned Lord Justice had said:

> The debtor in this case has not atoned for his offence to the Court by enduring the imprisonment which was ordered to be inflicted upon him; and it has scarcely been disputed that if another mode were taken for continuing his imprisonment the desired result might be arrived at.

Correctly to interpret that case, one must bear in mind that the debtor had actually been imprisoned under the writ of attachment; and the Court held that in such circumstances it was not competent to make a second order of attachment under which the debtor could again be imprisoned. The reference to the case of *Horsnail* v. *Bruce* makes the effect of the judgment clear. Vaughan Williams, L.J., says indeed that a debtor can be punished only once in respect of a particular offence, and that no Court can "give two sentences in respect of the same offence," so that a person would be liable to suffer a double term of imprisonment. And when he speaks of "two sentences" the learned Lord Justice must mean such sentences as would result in a double term of imprisonment—in other words, punishment twice for the same offence. In the case he was considering there had been imprisonment for an offence, and a second term of imprisonment

had been imposed; and the learned Lord Justice held that the second order ought not to have been made.

The effect of the case just discussed is thus stated in the *1944 Yearly County Court Practice*, p. 531:

> The Court has no power to issue a second writ for the enforcement of the order for attachment if the first writ has been executed. So, where a debtor is released by mistake he cannot be re-arrested under a second writ in respect of the same offence.

In the case, then, of an order on a judgment summons which has lapsed by effluxion of time, and on which no execution has taken place, there cannot of course be any question of punishing twice for the same offence, and it is very necessary to bear in mind that in those cases in which it has been held there is no second power of committal, the essential fact was that an arrest had actually taken place.

Speaking of *R.* v. *Stonor* (*supra*), the *1944, Yearly County Court Practice* says, after referring to the right of renewal conferred by the English Rules, but absent from ours: "In a case where the order had expired by effluxion of time and no renewal has been applied for the plaintiff should issue a fresh judgment summons."

Speaking of the case of *Church's Trustee* v. *Hibbard*, *Lewin on Trusts*, 12th Ed., p. 1193, says:

> The jurisdiction (to commit) being punitive, there cannot be a second punishment for the same offence, and therefore if the debtor is released before the expiration of the year, a second order for attachment for the same default cannot be made, though perhaps an order for re-arrest might be made under the original order for attachment.

And in *Godefroi on Trusts*, 4th Ed., p. 538, we find this statement touching the case mentioned:

> The order for attachment is in the nature of a punishment for an offence, and once an order has been made for attachment a second order cannot be made, because the offence has been purged.

Both of these statements plainly recognize the principle that a second order cannot be made so that a person would be liable to suffer two terms of imprisonment for the one default or offence—in other words, a person cannot be punished twice for the same offence.

That a second order cannot be made in such circumstances has been recognized in the cases of *Jacobus* v. *McLean*, (1927) 22 M.C.R. 130, and of *Shaw* v. *Brew*, (1928) 24 M.C.R. 21.

"No person shall be punished twice in respect of the same default" (see Rule 26); and this principle is the determining factor whether or not a second order can be made. It is clear that if an order expires by effluxion of time, then there can be no question of imprisonment thereunder; and consequently there is jurisdiction in such circumstances to make a second order.

LAW SOCIETIES' ANNUAL MEETINGS.

WELLINGTON.

The annual general meeting of members of the Wellington District Law Society was held on March 6, 1946. Sixty members attended, among whom were a number of practitioners recently returned from service with the Forces.

The President, Mr. H. R. Biss, occupied the Chair until the election of his successor, Mr. W. P. Shorland.

Before proceeding with the ordinary business of the meeting, Mr. Biss referred to the loss suffered through the death of Messrs. W. P. Coles, H. J. V. James, T. Jordan, W. L. Rothenberg and C. W. Tringham, and more recently of Mr. J. J. McGrath.

Annual Report.—In moving the adoption of the report and balance-sheet Mr. Biss referred to the work of the past year, and in particular to the amicable arrangement that had existed between the profession and the Man-power Department. As the Regulations applying to non-essential industries had been revoked the scheme was no longer necessary.

Mr. Biss stated that the Oil Fuel Committee had dealt with forty-nine applications for oil fuel during the year and the Society was very indebted to the sub-committee who, by its careful handling of the applications had preserved the confidence of the Controller.

Many of the complaints received during the year could have been avoided, Mr. Biss stated, if practitioners had endeavoured to avoid delays in settlements and in the rendering of statements. In one case the Council had found it necessary to make a charge to the Disciplinary Committee.

Questions and complaints under the Servicemen's Settlement and Land Sales Act had been dealt with by a special sub-committee.

Mr. Biss also referred to the question which as under consideration concerning an application for an increase in legal costs. He reported that a Committee of Wellington members had been appointed to act on behalf of the New Zealand Law Society and evidence of increased overhead costs would be called for before a decision was reached as to whether an application was justified.

Mr. Biss spoke appreciatively of the work of the Staff during the year and the appointment of Mrs. D. I. Gledhill as Secretary of the Society.

Finance.—The Treasurer, Mr. Bennett, in seconding the motion of the President reported that after a series of losses during the years of war, the accounts in 1945 had shown a surplus of £269 over expenditure.

This healthy condition of the finances was due to the increases in admission fees and practising fees, the former being probably an abnormal number.

The Society's Solicitors' Benevolent Fund had received from the estate of the late E. T. D. Bell a legacy of £50. Mr. Bennett drew the attention of members to the need for building up this fund so that it might be used in affording pecuniary assistance to members of the Society or their dependents who may be in need.

The report and balance-sheet was then formally adopted.

Election of Officers.—The following officers were elected: *President*: Mr. W. P. Shorland, the only nominee, was duly elected.

On taking the chair Mr. Shorland expressed his appreciation of the honour conferred upon him, and referred to the valuable services given to the Society by the retiring President, Mr. Biss, throughout his year of office.

Vice-President: Mr. J. R. E. Bennett, the only nominee, was duly elected.

Treasurer: Mr. G. C. Phillips, the only nominee, was duly elected.

Members of Council: The following ordinary members of the Council were elected: Messrs. P. B. Cooke, K.C., H. R. Biss, E. D. Blundell, W. E. Leicester, N. H. Mather, E. F. Rothwell, F. C. Spratt and C. A. L. Treadwell.

Elected by Branches.—Palmerston North: As no nomination was received Mr. G. I. McGregor continues in office. *Feilding*: As no nomination was received, Mr. J. Graham continues in office. *Masterton*: As no nomination was received, Mr. R. McKenzie continues in office.

The President referred to the frequent attendance at the meetings of Mr. G. I. McGregor and Mr. J. Graham, and also to the interest shown and help given by the country branches. Reference was also made to the fact that under the "oldest inhabitant" rule the Council was losing as a member Mr. A. M. Cousins, who had given seven years of faithful service to the profession. As a recently appointed member of the Council of Law Reporting, however, the Society would continue to benefit by the experience and knowledge gained over the years by Mr. Cousins in matters of interest pertaining to the profession.

Auditors.—Messrs. Clarke, Menzies, Griffin and Co. were elected auditors for the ensuing year.

Delegates to New Zealand Law Society.—Messrs. H. F. O'Leary, K.C., G. G. G. Watson and W. P. Shorland were elected to represent the Society on the Council of the New Zealand Law Society.

On behalf of Mr. Watson, Mr. Shorland, and himself, Mr. O'Leary thanked the members for electing them. Mr. O'Leary then briefly referred to the work of the Council of the New Zealand Society during the past year (as set out in its annual report). He also referred in detail to the excellent work carried out by the various committees of the New Zealand Society whose members consisted mainly of Wellington practitioners.

In regard to the Legal Conference, Mr. O'Leary suggested that as the venue of the next conference should be in Wellington, the Society should now give the matter some consideration.

Mr. Cresswell thanked Mr. O'Leary for the information concerning the Guarantee Fund, a matter which he considered was of considerable interest.

Mr. C. A. L. Treadwell submitted a report on the work of rehabilitation in the Wellington District and stated that during the past year fifteen ex-servicemen were successfully introduced to employers requiring clerks and since the vacation of this year some twenty-four had also been successfully assisted. The success of the post-war work had been largely due, he stated, to the whole-hearted co-operation of the Committee and the Secretary, and also of the Wellington profession as a whole. The work in producing the Digest, for instance, had involved fourteen contributors. Each contribution was reviewed by two practitioners and the final work edited by Professor McGechan, to whom the Society was greatly indebted for the interest he had taken in post-war matters. Mr. Treadwell also reported that he had been asked by the Rehabilitation Department to represent the Society on its advisory committee in reference to subsidy grants to Wellington ex-servicemen law clerks, and already the Committee had met and disposed of several applications. The refresher classes had been continued throughout the year and had been well appreciated and a further series was at present being organized. To the members of the profession who had freely and generously given their services as lecturers, the Post-War Aid Committee tendered its sincere thanks.

Mr. Treadwell made reference to the efforts of the Committee on behalf of two law clerks who had failed to qualify as solicitors following their war service in the 1914-18 war on account of their inability to pass Latin. Both men were held in high esteem by the profession. The application had been refused by the University of New Zealand, but it was hoped that the renewed efforts of the Committee would in the near future meet with success.

Mr. von Haast, on behalf of the members of the Society, expressed appreciation of the work done by the Council, its various committees and by the delegates of the New Zealand Law Society.

Easter Vacation.—It was decided that the Easter vacation should be observed from the usual closing time, Thursday, April 18, to the usual opening hour on Monday, April 29.

Mr. M. M. F. Luckie.—The President referred to the fact that on February 11, 1946, Mr. M. M. F. Luckie had completed his fiftieth year since his admission as a barrister and solicitor. On behalf of the Society hearty congratulations were extended to Mr. Luckie. The announcement was received with acclamation. Mr. Luckie, who attended the meeting, thanked the President for his remarks

Granting of Probates.—Mr. Webb referred to the practice adopted during the war by the office of the Supreme Court of telephoning practitioners when probates had been granted. Although not an entirely satisfactory arrangement, practitioners had accepted the practice as a temporary measure, but felt that the time had arrived when notice should be given in writing. It was decided that the matter should be referred to the incoming Council for the necessary action.

Servicemen's Christmas Parcels.—Mr. Arndt, on behalf of the returned servicemen, expressed thanks for, not only the parcels which had been received from time to time by the servicemen overseas, but also for the kind remembrance, which had throughout their absence served as a bond between them.

Memorial Tablet.—Sir William Perry referred to the memorial tablet in the Library which recorded the names of those who had given their lives in the Great War. He suggested that the incoming Council should consider the provision of a suitable memorial and record of the names of those who had paid the supreme sacrifice during the present war and also suggested that Mr. J. S. Hanna should be approached in compositing the recording of names.

HAWKE'S BAY.

The annual general meeting of members of the Law Society of the District of Hawke's Bay was held on April 5, 1946.

In moving the adoption of the annual report and accounts the retiring President, Mr. M. R. Grant, referred to this being the first general meeting since the conclusion of hostilities and said that all must feel a deep and humble sense of gratitude to Providence for the successful outcome of the war with the Axis powers. He extended a welcome to returned servicemen and new members, and thanked Mr. C. H. Bisson for his services as Hon. Auditor. Mr. Grant mentioned that some slight improvement regarding valuations by the Valuation Department had become manifest, but that the Council considered that until the Napier Office was placed on a footing similar to the Gisborne Office, there would continue to be complaint about delays in the supply of valuations. He regretted that the Society's remit to the New Zealand Law Society for an improvement in the status of the legal profession, so as to make it more attractive to young men, had been unsuccessful.

The election of officers resulted as follows:—President: Mr. W. G. Wood (Napier); Vice-President: Mr. A. E. Lawry (Napier); Council: Messrs. M. R. Grant, A. H. Robinson (Napier), E. T. Gifford, E. J. W. Hallett, J. H. Holderness (Hastings) and C. V. Chamberlain (Wairoa); Delegate to New Zealand Law Society: Mr. W. G. Wood; Hon. Auditor: Mr. C. H. Bisson; Library Committee: Messrs. Grant, Hallett, Mason, Willis, and Wood.

After returning thanks for his election as President, Mr. Wood expressed appreciation of the services rendered by Mr. Grant in that office and congratulated him upon being appointed a member of the Disciplinary Committee of the New Zealand Law Society.

A resolution increasing the annual levy upon members from one guinea to two guineas was carried, it being explained that this was necessary in order to stem the drain upon the Society's resources and maintain its efficiency.

Mr. Chamberlain urged that a Bar Dinner be held as a welcome to returned servicemen and the incoming Council was asked to explore all avenues which might lead to the holding of such a function in the near future.

The meeting closed with a vote of thanks to the chair.

HAMILTON.

In presenting the annual report at the annual general meeting of the Hamilton District Law Society the retiring President, Mr. A. L. Tomkins, said that the report recorded the fact that from this district one member served abroad in the Navy, twelve in the Army, and four in the Air Force, and in addition twenty-three served in the various forces in New Zealand. Mr. E. P. H. Cotton made the supreme sacrifice. In addition, most members who were able to do so, as well as carrying on their own practices, gave generously of their time to the war effort in some other manner.

The election of officers resulted as follows: President: W. C. Tanner; Vice-President: D. J. Lundon. Hamilton members: E. F. Clayton-Greene, W. J. King, H. J. McMullin,

J. F. Strang, and A. L. Tompkins. Country members: G. G Bell, E. M. Mackersey, and K. B. Morton. Auditor: W. B. L. Williams.

The question of holding a peace dinner was discussed and although it was foreseen that there would probably be some difficulty in obtaining a hotel in which to hold it, the Council was asked to make the necessary arrangements, if at all possible.

A vote of thanks was passed to Mr. F. A. Swarbrick, who did not stand for the Council again, for his services as President and member over a very long period. Mr. S. S. Preston was also thanked for his services on the Council over a number of years.

The Chairman reported on representations made by the Council for the establishing of branch offices of the Stamp Duties Department, Land Registration Office, Crown Lands Office, and Valuation Department Offices at Hamilton.

After the meeting, in order to enable country and town members to meet socially, light refreshments were provided.

NEW ZEALAND LAW SOCIETY.

Annual Meeting.

(*Concluded from p. 95.*)

Concessions in Law Course.—The following letter was received from Mr. K. M. Gresson, Dean of the Law Faculty, Canterbury University College:—

"Considerable dissatisfaction is felt by some of the ex-servicemen law students in regard to the concessions granted to them. I have attended a meeting of the local law students and also have had of necessity to interview each of the students personally in relation to their course for the year. Such grave handicap is imposed upon some of them through the unwillingness of the War Concessions Committee to excuse Latin and/or Roman Law that I am addressing to the Law Society the enclosed communication with a view to some pronouncement being made by the Society.

"If the views I have expressed find general acceptance I hope that the War Concession Committee may be induced to dispose of the cases with which they have to deal in consonance."

Enclosure:

"It is suggested that the New Zealand Law Society should examine and express an opinion upon, the nature and extent of the War Concessions granted by the University in relation to the law course. The Law Society is probably better qualified than the War Concessions Committee (or the Council of Legal Education from which advice was sought) to appreciate the difficulties that confront the ex-servicemen on resuming his studies and the relative importance of the subjects of the course.

"There is a general recognition that concession in respect of the law subjects proper is not practicable except where a student has devoted some study to, and acquired some knowledge of, the subject. For that reason concessions have, very properly, been limited to Division I (which comprises Latin and Roman Law with four optional subjects of the B.A. course) and from Division IV (which comprises Jurisprudence, Constitutional Law, International Law and Conflict of Laws).

"It would appear that there is an unwillingness amounting almost to a refusal to excuse Latin or Roman Law, though as regards the former this attitude has been modified to the extent that a high mark in Entrance (Matric.) has been held in some cases to warrant exemption in Latin. The Council of Legal Education expressed a wish that no exemption should be granted in Latin, and since Roman Law, as well as Latin, is a compulsory subject, the War Concessions Committee has attributed to both a greater importance than is warranted. As a result there are cases of ex-servicemen, who, after several years' service, are now required to complete Latin and/or Roman Law and who are dismayed at the prospect of having to suffer this hindrance to the study of the essential subjects they must undertake in their task of qualifying for practice.

"It is proposed that, for the guidance of the War Concessions Committee, the Law Society should affirm the following proposition, namely—that neither Latin nor Roman Law is of such importance as to warrant, in the case of an ex-serviceman who has served (whether in New Zealand or overseas) for a period of not less than three years an insistence that he secure a pass in either or both with a consequent delay to him in the passing of the professional subjects. Even in normal times it has always been a controversial question whether there is much (or any) value in the compulsory study of Roman Law and there has always been a considerable body of opinion which held that a knowledge of Latin to Entrance (Matric.) standard was sufficient for the lawyer. To ask a man who has spent three years or upwards in service to take up, or return to, Latin or Roman Law is to impose upon him a hardship out of all proportion to any advantage to himself. In short *all who have served three years and upwards might well be excused the whole of Division I or any subjects thereof remaining to be completed*; if such a proposition were to be affirmed by the Law Society it might induce the War Concessions Committee to adopt a more liberal policy.

"To require an ex-serviceman after three, four, or five years lost in service still to complete Division I, be it in Latin, Roman Law, or any other subject is, from a psychological point of view, quite wrong. He feels he is resuming where he left off—still in Division I. Nor is a grant of one or more of the subjects of Division IV an effective corrective. The necessity of completing Latin and/or Roman Law engenders a feeling of frustration and is a disheartening factor at the very point at which he needs help and encouragement to overcome the necessarily abrupt change over from the dependence of corporate army or navy life to the individualism of personal study. Even if (which is disputable) it will *constitute a handicap to him to* lack a knowledge of Latin and/or Roman Law it is better he should be so handicapped than suffer the discouragement and further delay completion of Division I will impose. *For men whose service is three years or upwards Division I should be eliminated.*

"Some illustrative cases are appended to show the extent to which in some cases students already well on in years are suffering hardship and hindrance by having to take up, or to complete Latin and/or Roman Law, or other subjects of Division I, and it is not too much to say that this requirement will lead some to discontinue the law course and to seek rehabilitation in some other vocation. It is a question whether the course is not over long anyhow, and a shortening to the essential practical law subjects for men who have sacrificed three years in a service would, even if only to some extent, offset the considerable disadvantage which are inescapable by reason of their years of service. The question warrants the attention of the New Zealand Law Society."

A summary was attached showing in eleven instances the subjects of Division I to be completed. In each case Roman Law was shown to be a subject yet to complete, and four students still had to complete Latin.

It was pointed out by Mr. Johnstone that for the solicitor's examination Roman Law had already been deleted from the syllabus.

After discussing the matter at length, on the motion of Mr. Hutchison it was decided that in the view of this Council, Roman Law was not of such importance as to warrant, in the case of an ex-serviceman who had served (whether in New Zealand or overseas) for a period of not less than three years an insistence that he should secure a pass in this subject with a consequent delay to him in the passing of the professional subjects.

War Concessions.—Mr. Shorland stated that the Wellington Society was disturbed by the fact that the University of New Zealand had refused the application made by the New Zealand

Law Society for an exemption in latin to allow the above men to qualify as solicitors.

Mr. Treadwell had accordingly been asked by the Wellington Council to take the matter up again with the authorities and he had been advised in view of the fact that power had now been given to the War Concessions Committee to grant latin in certain cases that the Society should again present the application to the University.

On the motion by Mr. Shorland, seconded by Mr. Grant, it was therefore unanimously resolved that urgent representations should again be made to the University that an exemption in latin should be granted to these two men in order that they might be admitted as solicitors.

Delegates were therefore asked to report to the Societies and that urgent attention should be given to the matter.

Legal Conference.—It was decided to ask the Wellington Society to sponsor the next conference and that, subject to difficulties such as accommodation, being overcome, the conference should be resumed next year.

Legal Conference Fund.—It was decided to revive the collection of the 5s. fee when the next practising fees were being paid.

Council—New Zealand Law Society.—The following letter was received from Wellington:

"In view of the fact that amendments to the Law Practitioners Act, 1931, are contemplated, the Council of the Wellington District Law Society requests that consideration be given to the amending of the Act so as to increase the representations of Wellington on the Council of the New Zealand Society.

"Attention is drawn to the fact that fairly onerous duties fall upon the Wellington members who comprise the only members of the Standing Committee available for urgent meetings and work. The provision of the Rules require a quorum of three members of the Standing Committee which renders it desirable that there should be not less than four available members of the Standing Committee in Wellington. This would appear to support the request that there should be increased representations."

On the motion of Mr. A. H. Johnstone, K.C., it was resolved for the reasons set out in the Wellington letter that the Law Practitioners Act be amended to provide that the Wellington District Law Society have four members on the New Zealand Council, the alteration to be included in the amendments going forward.

Servicemen's Settlement and Land Sales Act: Delay in Distribution of Copies of Statutes.—The Wanganui Society complained that no copies of the Servicemen's Settlement and Land Sales Amendment Act, 1945, were available to practitioners, particularly in country towns, until long after the Act came into force and asked that the printing and distribution be expedited.

The Standing Committee were asked to see the Government Printer on the matter.

Appointment: Land Sales Court Judge.—The President reported that at the request of the Auckland and Wellington Societies the Standing Committee recently waited on the Prime Minister. The Minister of Justice and the Minister of Lands also attended.

It was pointed out by the Committee that the Land Sales Court had been unable to hear appeals for some months owing to the fact that no Judge was available and that in the meantime extreme inconvenience and hardship was caused.

The fact was also pointed out that owing to the Court's infrequent sittings, the public had refrained from lodging appeals and it was thought that the purpose of the Act was being circumvented.

It was stressed that the work of the Court could not be satisfactorily dealt with from the point of view of the profession and of the public if a Judge had other judicial functions to perform and it was felt that under this arrangement there would be continued cause for complaint.

Instances were given where appeals had been waiting six months for a hearing.

The Committee was informed that an appointment had been made but if the arrangement proved unsatisfactory the matter could be reviewed.

Council of Legal Education Report.—The following report from the Law Society representatives on the Council of Legal Education was received:

"During the year the members of the Council of Legal Education reconsidered the conditions under which war concessions in Latin might be granted to law students. Formerly such concessions had been sparingly granted, but upon further consideration it was decided to recommend that exemption in Latin should be granted upon the same basis as in any other arts subject provided—

"(1) The student had passed in Latin at the entrance examination.

"(2) The student had a substantial period of war service.

"This recommendation was adopted by the War Concessions Committee of the University and it was arranged that the Committee would review in the light of the recommendation all cases in which application had already been made for exemption in Latin."

DUTIES OF MOTORISTS AT RAILWAY LEVEL CROSSINGS.

Magistrates at Variance.

The judgment *Kehoe* v. *Blenkiron* (to be reported) by Mr. Goulding, S.M., is of interest both from the legal points involved, and also by reason of Mr. Goulding's departure from the earlier decisions of two other Magistrates on the identical issues raised.

Section 29 (*c*) of the Government Railways Act, 1926, makes it an offence to drive a vehicle across a railway at a crossing when an engine is approaching within half a mile.

Section 9 of the Government Railways Amendment Act, 1928, similarly provides that the driver of a motor-vehicle shall not attempt to cross at a railway-crossing unless the line is clear.

In all of the three prosecutions mentioned the defendant driver was charged under s. 29 (*c*) of the 1926 Act. In the Police prosecutions of *Withers* v. *Cole*, (1944) 39 M.C.R. 90, and *Police* v. *Saunders*, (1945) 4 M.C.D. 331, the respective Magistrates dismissed the charges on the ground that the above s. 29 (*c*) is repugnant to and impliedly repealed *pro tanto* by above s. 9, as regards motor-vehicles; or alternatively that the s. 9, being a special section having reference to motor-vehicles, should be treated as an exception from the general section, *i.e.* s. 29 (*c*).

In the *Kehoe* case, Mr. Goulding, S.M., disagrees with these views. He considers that the purpose of s. 9 of the 1928 Act, is to provide for the many instances in which the motorist cannot, for topographical reasons, see whether the line is clear for half a mile, and is therefore protected from prosecution under s. 29 (*c*) by reason of lack of *mens rea*: *vide Broad* v. *The King*, (1914) 33 N.Z.L.R. 1275, aff. on app. (1915) N.Z.P.C.C. 658. If there is half a mile visibility of the line at the crossing in the direction from which the train is approaching, then, in Mr. Goulding's view s. 29 (*c*) is an appropriate section under which to prosecute an offender; but if this visibility is not available, then the prosecutor must fall back on s. 9 of the 1928 Act.

In this connection the learned Magistrate considers that if warning is being given by bells or lights, this provides knowledge that the line is not "clear"; and if the approaching train is visible and within half a mile, then also the line is not "clear."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Wartime Marriages.—It must be assumed that our legislators were temporarily Reno-minded when they provided in Part II of the Matrimonial Causes (War Marriages) Emergency Regulations, 1946, that the validity of any decree or order made by any Court of any State of the United States of America in any proceedings for divorce or for nullity of marriage in relation to any marriage is to be recognized in all New Zealand Courts, notwithstanding that the husband may not have been, at the time of the commencement of the proceedings, domiciled in the State to which the Court belongs, and that the validity of the decree or order may not be recognized in the Courts of the State or country in which the husband was then domiciled. This enactment, no doubt, is designed to cover those unfortunate cases where women who had a New Zealand domicil at the time of their marriage now find themselves divorced upon proceedings with which they were never served and upon grounds startling in their novelty. Amongst those recently recognized in the States as justifying a husband obtaining his freedom are that his wife took more than her share of the bedclothes and that his wife threatened to have him cremated, mix his ashes with fertilizer, and spread "him" on the lawn; while a wife was successful on proving that her husband, although nice to her, was unpleasant to her mother, that he refused to carry groceries home as it was unbecoming to his military rank and that he neglected her in order to play with model electric trains. The Regulations also leave unremedied the apparent anomaly created by the 1930 amendment to the Divorce and Matrimonial Causes Act, recognizing in this country divorce based upon residential domicil. As Reed, J., pointed out, such a divorce is not entitled to international recognition, and a woman who, upon the strength of it, married again in England would be liable there to be prosecuted for bigamy: *Worth* v. *Worth*, [1931] N.Z.L.R. 1109, 1132.

MacKinnon Incidents.—Since the death of Lord Justice MacKinnon, last January, to which reference has already been made in this column, instances of his pungent wit are being recalled. One of his best has reference to a decision of the House of Lords in which the Law Lords were almost equally divided—a decision, he observed, of "the voices of infallibility by a narrow margin." In his twenty-seven years at the Bar he had never conducted a criminal case, so on his appointment to the Bench he set out on the Northern Circuit with considerable trepidation. "I sat with my finger in the index of Archbold," he said afterwards, "and I hope my uneasiness was not too apparent." One incident that appealed to his sense of humour is mentioned by Lord Simon in an appreciation of him published in *The Times* newspaper. Sir Frank MacKinnon had, in his scholarly and charming book, *On Circuit*, made a number of suggestions as to the reform and improvement of the somewhat antiquated circuit system. He was highly amused to learn that in a local library it was classified as a treatise on electricity!

Charitable Motives.—One of the last of MacKinnon's judgments manifests his fondness for apt literary allusion. The case is *Inland Revenue Commissioners* v. *National Anti-Vivisection Society*, (1946) 62 T.L.R. 156—an appeal from the judgment of Macnaghten, J., reversing the decision of the Special Commissioners of Income Tax in favour of the society which claimed to be exempt from income-tax on its income from investments on the ground that it was a body established for charitable purposes only. Its main argument was that it was a charitable object to prevent cruelty or pain to animals, because such an object induced in human beings a feeling of kindness to animals and that that, in turn, tended to the moral uplift of the human race. MacKinnon, L.J., declined to follow the reasoning of Chitty, J., in *Re Foveaux*, *Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501, 11 T.L.R. 540, that the Court should "stand neutral" upon and decline to decide the issue as to whether the practice of vivisection was or was not of benefit to the community, and his assumption that such societies must be held to be charitable as their purpose was to prevent cruelty to animals. This seemed to MacKinnon, L.J., to confuse the motives of those who supported such a society with their money with the purposes of the society which received and used the money. He considered that the motive of those who provide the money is immaterial; and that the opinion of the donor of a gift or the creator of a trust that the gift or trust is for the public benefit does not make it so. The matter was one to be determined by the tribunal upon the evidence before it. He added

> On the reasoning and assumption of Mr. Justice Chitty I conceive that a society, the object of which was to secure legislation making illegal the manufacture and sale of rat-traps and rat-poisons, would have to be held established for charitable purposes; and that the more readily if the tribunal insisted on "standing neutral" on the question whether rats are, or are not, vermin which are a menace to mankind. Indeed, if it be true, as some may think, that—
>
> "the poor beetle, that we tread upon,
> In corporal sufferance finds a pang as great
> As when a giant dies,"
>
> a society to promote legislation to prohibit the manufacture and sale of all insecticides would seem to have good ground for a like claim.

The answer to this contention may be that Shakespeare is dealing here with the "sense of death is most in apprehension," and not with the principle of charitable trusts; but, however this may be, Scriblex is indebted to the learned contributor whose eagle eye lit upon this excellent judicial reference to rats and who referred the passage to him.

Knights Bachelor.—In addition to Mr. Justice Blair, four other members of the Judiciary appear in the New Year Honours List as Knights Bachelor. Sir Horace Hector Hearne is the Chief Justice of Jamaica, and Sir Carleton George Langley, the Chief Justice of British Honduras. A puisne Judge of the High Court of Madras, Sir Sidney Wadsworth, was called to the Bar by the Middle Temple in 1931—some forty-one years after Blair, J., was called there. The fourth member is U Ba, Judge of the High Court, Rangoon, whose title in practical everyday use seems to have about it the Shakespearian savour of Bottom's companions. The academic side of the profession is represented by Sir Roland Burrows, K.C., LL.D., his recent work *Words and Phrases* proving a most valuable contribution to the literature of the law.

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. Executors and Administrators.—*Application of Assets—Secured and Unsecured Creditors—Rent in Administrator's Hands—Insufficient Funds to meet Claims of Unsecured Creditors—Administration under Part IV of Administration Act, 1908, recommended.*

QUESTION: We are acting for the administrator in a deceased estate. There are five successors, three of whom are infants. The main assets are blocks of shops having a capital value of approximately £7,500, which show a substantial return in rents. There are overdue bank mortgages in the blocks amounting to approximately £6,900 and, should the properties be sold, there will be little left for distribution after the unsecured debts, amounting to approximately £800, are paid. The Bank mortgagee has demanded the net income from the shops to be applied towards interest under the mortgage and then in reduction of principal. This will result in the unsecured creditors receiving nothing, and eventually taking action.

Is the administrator entitled to apply the rents, firstly towards rates, insurances and interest under the Bank mortgages, then rateably between the Bank and the unsecured creditors?

We appreciate that this action may force the Bank to apply for leave of the Court under the Mortgagees Emergency Extension Regulations, 1940, to enter into possession of the properties.

With careful shepherding there is every prospect of the bank mortgages eventually being paid off: but should the administrator be precipitated into selling the properties there is every likelihood of the estate being unable to pay all its creditors.

ANSWER: From the figures given, it would seem that the estate should be administered under Part IV of the Administration Act, 1908, and the fact that the administrator is aware that there is a "likelihood of the estate being unable to pay all its creditors" makes it imperative for him to be specially careful in administering the estate.

Where an estate is clearly solvent, the administrator can pay the debts in any order he pleases; but any administrator with business knowledge would recognize that if a secured creditor does not receive preferential treatment in respect of the property over which he holds his security, he will take steps to protect himself by entering into possession of such property or by exercising his power of sale, subject, in each case, to any necessary consent of the Court to the exercise of the power. It should be borne in mind that it is not necessary for a mortgagee to enter into possession of its mortgaged property in order to obtain the benefit of the rentals produced by the letting of that property: he may notify the tenants to pay the rentals to him without actually entering into possession: see *Moyes* v. *Pollock* (1886) 32 Ch.D. 53. If, however, any rent is actually received by the mortgagee or his representative (the mortgagee not having previously required payment thereof by the tenant to him), the mortgagee has no special claim in respect thereof and has no charge thereon: see *23 Halsbury's Laws of England*, 2nd Ed p. 323.

Such rent in the hands of the mortgagor's administrator is an asset available for payment of the secured and unsecured debts of the deceased generally. In the case under discussion, the administrator could "play safe" and administer the estate as if it were being administered under Part IV; but the result would almost certainly be that the mortgagee would take the necessary steps to exercise his power of sale, or of entry into possession, or would apply for an order to adminsiter the estate under Part IV, having, of course, obtained any consent necessary.

The administrator would probably be well advised to comply with the mortgagee's demand, as this course seems to give greater protection to the estate. The matter could be explained to the unsecured creditors with a request that they should give their consents to the course proposed.

Payment of the debts is, of course, the primary duty of the administrator; and beneficiaries come into the picture only when the liabilities have been paid.

Y2.

RULES AND REGULATIONS

Remounts Subsidy Regulations Revocation Order, 1946. (Remounts Encouragement Act, 1914, and the Emergency Regulations Act, 1939.) No. 1946/31.

Cook Islands Fruit Control Regulations, 1937, Amendment No. 2. (Cook Islands Act, 1915.) No. 1946/32.

Industrial Conciliation and Arbitration Amendment Regulations, 1946. (Industrial Conciliation and Arbitration Act, 1925.) No. 1946/33.

Licensed Industries General Regulations, 1940, Amendment No. 2. (Industrial Efficiency Act, 1936.) No. 1946/34.

Agricultural Workers Extension Order, 1942, Amendment No. 2. (Agricultural Workers Act, 1936.) No. 1946/35.

Minimum Wage Regulations, 1946. (Minimum Wage Act, 1945.) No. 1946/36.

Samoa Quarantine (Aircraft) Regulations, 1946. (Samoa Act, 1921.) No. 1946/37.

Cook Islands Quarantine (Aircraft) Regulations, 1946. (Cook Islands Act, 1915.) No. 1946/38.

Motor-spirits Prices Regulations, 1942, Amendment No. 3. (Motor-spirits (Regulation of Prices) Act, 1933.) No. 1946/39.

Government Railway Classification and Pay Regulations, 1942, Amendment No. 3. (Government Railway Act, 1926.) No. 1946/40.

Bill of Exchange Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1946/41.

Revocation of the Shipping Radio Emergency Regulations, 1941. (Emergency Regulations Act, 1939.) No. 1946/42.

Rationing Emergency Regulations, 1942, Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1946/43.

Cream Rationing Order, 1946. (Rationing Emergency Regulations, 1942.) No. 1946/44.

Social Security Contribution Regulations, 1939, Amendment No. 4. (Social Security Act, 1938.) No. 1946/45.

Matrimonial Causes (War Marriages) Emergency Regulations, 1946. (Emergency Regulations Act, 1939.) No. 1946/46.

Crown Legal Business Regulations, 1932, Amendment No. 3. (Public Revenues Act, 1926, and the Justices of the Peace Act, 1927.) No. 1946/47.

Wool Disposal Commission (Travelling-allowances) Regulations, 1946. (Wool Disposal Act, 1945.) No. 1946/48.

Transport (Goods) Applied Provisions Order, 1942. (Transport Licensing Act, 1931.) No. 1946/49.

Travelling-allowances Regulations, 1941, Amendment No. 1. (Regulations Act, 1936.) No. 1946/50.

Customs Import Prohibition Order, 1946, No. 2. (Customs Act, 1913.) No. 1946/51.

Industry Licensing (Cement-manufacture) Revocation Notice, 1946. (Industrial Efficiency Act, 1936.) No. 1946/52.

Labour Legislation Suspension Orders revoked. (Labour Legislation Emergency Regulations, 1940.) No. 1946/53.

National Research Scholarship Regulations, 1946. (Scientific and Industrial Research Act, 1926.) No. 1946/54.

Revocation of the Sale of Fruit and Vegetable Containers Emergency Regulations, 1945. (Emergency Regulations Act, 1939.) No. 1946/55.

Royal New Zealand Air Force Pay and Allowances Emergency Regulations, 1946. (Emergency Regulations Act, 1939.) No. 1946/56.

Tires and Tubes Control Notice, 1942, Amendment No. 2. (Supply Control Emergency Regulations, 1939, and the Munitions Emergency Regulations, 1941.) No. 1946/57.