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NON-REPAIR OF FOOTPATHS: A NEEDED REFORM OF THE LAW.

III.

The nonfeasance rule, as particularly applied to footpaths and footways situated within the area administered by a local highway authority, is well summarized in the judgments of the High Court of Australia in *Buckle* v. *Bayswater Road Board* (*supra*), especially in the judgment of Mr. Justice Dixon. In that case, no want of proper care was imputed to the plaintiff. It was conceded that the cause of his fall from which he suffered injury was a hole in the grass-grown highway. No question as to contributory negligence on his part arose. The question in issue was solely whether the road board was under a civil liability to the plaintiff for the particular damage sustained by him in consequence of the state of non-repair of the road.

In his judgment, at pp. 280, 281, Dixon, J., said :

> The duty of a road authority towards individual members of the public exercising the common right of passage over the highway has no similarity or even analogy to the duty or duties of occupiers of property to safeguard those who lawfully come upon the premises they occupy from dangers arising from their character or condition. The principles upon which the road authority's liability, or absence of liability, depends have nothing to do with the ownership or occupation of property or the relation between an owner or occupier and persons whose presence he may solicit or suffer.
>
> A highway is devoted to public use and its use is an advantage enjoyed as of common right. The public right is independent of the ownership of the soil, which might be vested in the frontagers or in other persons not in the least concerned in the state of the way. In order that the public right may be enjoyed to best advantage, road authorities are established and armed with powers in relation to the highways. For that purpose a legal authority is given to them to construct, maintain and repair roads and to keep them free of obstruction and in an orderly condition. But the existence of such powers gives rise to no civil liability for the consequences of the defective state of a road. Even where a parish was liable to indictment for failure to repair a highway, no action would lie against it for the recovery of damages sustained by an individual as a result of the disrepair of the road, and this notwithstanding the general rule that particular damage arising from a public nuisance is actionable. It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway. Such a liability may, of course, be imposed by statute. But to do so a legislative intention must appear to impose an absolute, as distinguished from a discretionary, duty of repair and to confer a correlative private right (*cf. City of Vancouver* v. *McPhalen*, (1911) 45 S.C.R. (Can.) 194).

His Honour went on to say that no civil liability arises from the incorporated character of the road authority, or from the fact that it is expressly made liable to be sued : *Gibson* v. *Mayor of Preston*, (1870) L.R. 5 Q.B. 218. Nor is its responsibility affected by statutory provisions vesting the soil of the highway in it, or placing the highway under its management and control : *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345, and *Sydney Municipal Council* v. *Bourke*, [1895] A.C. 433.

The learned Judge continued, at pp. 281, 282 :

> The purpose of giving the road authority property in and control over the road is to enable it to execute its powers in relation to the highway, not to impose upon it new duties analogous to those of an occupier of property. The body remains a public authority charged with an administrative responsibility. It must decide upon what road work it will expend the funds available for the purpose, what are the needs of the various streets and how it will meet them. A failure to act, to whatever it may be ascribed, cannot give a cause of action. No civil liability arises from an omission on its part to construct a road, to maintain a road which it has constructed, to repair a road which it has allowed to fall into disrepair, or to exercise any other power belonging to it as a highway authority. It is not surprising that attempts to escape the application of this doctrine should be made and renewed from time to time on behalf of persons suffering personal injury through the defective condition of public highways. Striking illustrations are to be found in the facts of some of the cases in which such attempts have been defeated. In *Cowley* v. *Newmarket Local Board* ([1892] A.C. 345) the road authority had failed to reconstruct a dangerous footpath and had, on the contrary, spread its surface. A ramp existed across the footpath into an adjoining owner's premises. It fell to a depth of 18 in. below the path, which was retained by a low wall. Thus pedestrians were confronted with a sheer drop in the footpath of a foot and a half. The road authority gravelled the footpath for its whole width and otherwise left the danger. The House of Lords, affirming the Court of Appeal ((1890) 7 T.L.R. 29), and *Denman*, J., ((1890) 6 T.L.R. 321), decided that a pedestrian who fell into the trap by dark had no cause of action against the road authority.

Then follow some cases that are of particular relevance to the subject under discussion here.

In *Maguire* v. *Liverpool Corporation*, [1905] 1 K.B. 767, the road authority constructed a crossing of slabs of stone. As the result of water and traffic, a hole 5 in. deep and 9 in. wide was formed in the crossing, and this was left unrepaired. The Court of Appeal held that the authority was under no civil liability for injury caused by the dangerous crossing.

In *Moul* v. *Thomas Tilling, Ltd.*, (1918) 88 L.J. K.B. 505, the road authority had made a street of wood blocks, a surface which might, under the influence of water, swell and bulge, and so become dangerous. This in fact happened, and the authority neglected either to

fence off the area affected or to set it right. Again, it was decided that it incurred no liability for damages suffered in consequence of the dangerous condition of the surface.

In *Sheppard* v. *Glossop Corporation*, [1921] 3 K.B. 132, Sheppard on a dark night fell down a stone retaining-wall into a road upon which he thought he was walking. In fact, he had taken a road which branched from it and ran above it, and then he had taken a course which led him to the edge of the wall, where he fell. At the point where the roads branched, a light had been maintained by the borough, but, from motives of economy, it had been put out early on the night when Sheppard missed his way. The failure of the borough to maintain the accustomed light involved them in no liability to Sheppard. Scrutton, L.J., said, at p. 145 :

> It is left to their discretion to light or not to light ; therefore they need not light at all ; if for a time they light they may discontinue either wholly or partially in point of time or in point of space, and the mere discontinuance is no breach of duty.

And, at pp. 284, 285, of *Buckle's* case (*supra*), Dixon, J., said :

> The improper nature of the original act of the road authority must always be the foundation of the complaint against it. Cases in which but for continual subsequent safeguards the work actively done by the road authority would make the highway dangerous must be distinguished from the very different class of case in which the operations of the road authority put the highway in a condition perfectly proper and safe, but liable in the course of time through wear and tear and deterioration to become unsafe. Whenever an artificial road surface is provided, neglect to maintain it is likely to result in its destruction by wear and weather. Its last condition may be expected to be worse than its first. But these considerations do not throw upon the road authority which fails to maintain a road any civil liability for the consequences, although at the time of construction they might have been foreseen. If, judged according to the standards of the time and the circumstances then prevailing, the design and execution of the work were not improper or unsafe, the development of a defective or dangerous condition of the highway is to be attributed to the failure to maintain or repair, which involves no civil liability for particular damage. It cannot be regarded as a dangerous condition "caused by," because necessarily resulting from, the original construction of the roadway.

Illustrations are found in two of the cases His Honour had already cited.

In *Maguire* v. *Liverpool Corporation*, [1905] 1 K.B. 767, 779, 780, 781, the paving stones were exposed to the action of water and traffic in such a way that the resultant condition of the surface could scarcely have been unforeseen. Yet counsel's contention that the road authority was liable for the consequences of the mode of construction failed.

In *Moul* v. *Croydon Corporation*, (1918) 119 L.T. 318, the plaintiff relied upon the known tendency of wood blocks to expand under the influence of water and form a danger in the roadway. He contended that upon using them it became incumbent upon the defendant road authority to take measures to avert injury when this happened. The Court held, however, that, wood blocking being a usual method of construction, no duty of subsequent action was incurred by the defendant road authority.

In *Short* v. *Hammersmith Corporation*, (1910) 104 L.T. 70, the highway authority used on a sloping footway gravel siftings, which tended to slip down with traffic. They incurred no responsibility for a hole or depression thus formed in the path.

His Honour then gave some further examples, in order to show more clearly the operation of this principle, which, he said, was perhaps the determining consideration in the present appeal.

In *Holloway* v. *Birmingham Corporation*, (1905) 69 J.P. 358, pitch or tar, owing to hot weather, oozed up between wood blocks which had been laid upon it some time before. The mode of construction imposed upon the road authority no obligation to deal with the condition of the surface thus occasioned.

IV.

From the foregoing, it is abundantly clear that no Court will now give damages to a pedestrian who, through no fault of his own, suffers injury by reason of the faulty condition of a footpath owing to its non-repair by the local authority. But, as we have shown, the *ratio* of the decision in *Russell* v. *Men of Devon* has long since disappeared everywhere. Furthermore, the *ratio* of such decisions as *Cowley* v. *Newmarket Local Board* is absent in New Zealand, since there was never any duty or obligation resting on anyone in this country to repair streets and footpaths that could be transferred to highway authorities when they were created and incorporated by statute in this country. If ever there were a case for the application of the principle *Cessante ratione legis, cessat ipsa lex*, it is here.

That this state of the law is unsatisfactory in other jurisdictions, where the above-stated local objections do not apply, is shown in a number of judgments.

Over fifty years ago, in *Thompson* v. *Mayor, &c., of Brighton*, [1894] 1 Q.B. 332, 337, Lindley, L.J. (as he then was), in speaking of the rule that a local authority is not responsible legally for the non-repair of a highway, said :

> The law on this subject is, in my opinion, very unsatisfactory ; but I cannot on that account declare it to be different from what it is.

In that case, his Lordship said, at p. 337 :

> The injury to the plaintiff was caused by a breach of duty on the part of the defendants ; but that breach of duty was omitting to keep the road in such a state as to be safe for traffic, having regard to the sewer grating which was lawfully in the road, and was not itself out of repair. Apart from the state of the road, no breach of duty can be imputed to the defendants, and consequently no cause of action has accrued to the plaintiff. But for the only breach of duty which can be imputed to the defendants I am now compelled to say that no action lies.

Under the modern authorities, a transfer to a public corporation of the obligation to repair roads does not of itself render the corporation liable to an action for damages for nonfeasance as distinguished from misfeasance ; and the question whether such a liability is imposed upon them must be determined by the language of the particular Act of Parliament.

In *Guilfoyle* v. *Port of London Authority*, [1932] 1 K.B. 326, Humphreys, J., said, at p. 346 :

> I do not think there can be any real doubt as to the general principle of law which applies. If the defendants are in the position of a surveyor of highways, they are not liable [for nonfeasance]. However unsatisfactory the law may be—and I am only saying what has been said repeatedly by other Judges and indeed by many members of the House of Lords, when I say the law is unsatisfactory in this respect—it is the law, and I am bound to pronounce it.

In *Attorney-General* v. *Todmorden Borough Council*, [1937] 4 All E.R. 588, Goddard, J. (as the learned Lord Chief Justice then was), after referring to the ancient law of the immunity of highway authorities from actions for nonfeasance, observed, at p. 593 :

> Many people, however, may think that the time has come when it is desirable to reconsider this question of the immunity of the council, an immunity which exists at common law. Although the great virtue of the common law is that it can be moulded and developed by the Judges so as to be fitted to the requirements, and to the changing requirements, of modern life, with respect either to commerce or to habits of life or to other social matters, yet, where a rule of law has become fixed by decision, it is not open to Judges to-day to alter the law in this respect, which has always been the law from its development, and the remedies that are to be found in the legislation.

In *Winfield on Torts*, 4th Ed. 449, it is said that the law on this point is settled, but that some of the Judges, while admitting this, rightly criticize the distinction between misfeasance and nonfeasance, and the tendency of recent decisions is to construe "nonfeasance" narrowly: *Thompson* v. *Mayor, &c., of Brighton*, [1894] 1 Q.B. 332, 337, 344, *Sydney Municipal Council* v. *Bourke*, [1895] A.C. 433, and *Swain* v. *Southern Railway Co.*, [1939] 2 K.B. 560, 576; [1939] 2 All E.R. 794, 807.

In *Salmond on Torts*, 10th Ed. 275, the exemption of highway authorities from liability for nonfeasance is referred to as "unsatisfactory."

V.

The question is: How can the position be remedied, so that, when a pedestrian is injured by reason of the faulty repair of a footpath, the local highway authority may not avoid liability to him or her? Help may be found in the legislation of the various Canadian Provinces, each of which has either abrogated or modified the rule which has its origin in *Russell* v. *Men of Devon*. For example, s. 320 of the Vancouver Incorporation Act, 1921 (2nd Sess. (Brit.Col.), c. 55), as re-enacted in 1928 (c. 58, s. 38), is as follows:

> Every public street, road, square, lane, bridge, and highway in the city shall . . . be kept in reasonable repair by the city.

The authorities useful in construing this legislation have been exhaustively collected in *Woodcock* v. *Vancouver*, [1928] 1 D.L.R. 1080.

Again, s. 225 of the Rural Municipality Act, 1934-35 (Saskatchewan) (c. 30), imposes upon the highway authority the duty of maintaining roads and culverts in repair. *Prima facie*, the duty is imperatively obligatory, and its consequences can be got rid of only by some valid excuse for a failure to discharge the duty so imposed: *Vancouver City* v. *Cummings*, (1912) 2 D.L.R. 253, *Jamieson* v. *Edmonton City*, (1916) 36 D.L.R. 465, *Shupe* v. *Pleasantdale*, [1932] 1 W.R. 627, and *McComb* v. *Pleasantdale Rural Municipality*, [1938] 3 D.L.R. 807; and see *Gunderson* v. *Calder*, (1922) 66 D.L.R. 595.

In *McComb's* case, the facts were that the plaintiff was riding on horseback along a highway within the boundaries of the defendant municipality when the near front leg of his horse went through a culvert, and the plaintiff was thrown to the ground, thereby suffering injuries. The accident was caused by the rotten condition of the poles in the covering of the culvert. The learned Judge said that the fact of the horse's hooves going through the culvert was conclusive evidence that the culvert was not in proper repair, and *prima facie* evidence of negligence on the part of the municipality, which could only be met by the municipality showing that it had inspected the culvert at reasonable and proper times, and that proper inspection did not disclose anything from which it could be suspected that the poles were becoming so rotted as to render the culvert unsafe. No proper inspection had been made at any time, and, consequently, there was judgment for the plaintiff.

It would seem that a section similar to those quoted above is a good precedent for similar legislation in this country, as it appears to meet half-way the objections likely to be raised by local highway authorities to their being rendered liable for nonfeasance.

In *Vancouver City* v. *Cummings*, (1912) 2 D.L.R. 253, Idington, J., said, at pp. 258, 259:

> No one would think of saying that when the forces of nature have suddenly destroyed or put out of repair a road, or someone has maliciously and negligently wrought the same result, and an accident has taken place as a result thereof, that the municipality must be held as insurers and so, regardless of all opportunity to have repaired the road so destroyed, be cast in damages . . .
>
> The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become acquainted with such possible occurrences, and if it has done so can possibly answer the presumption.

We must leave the matter there. But we think that the Law Revision Committee would be doing a public service if it devoted some attention to the unsatisfactory nature of the law in this Dominion with regard to injured pedestrians who are unable to recover damages from a local authority which has no obligation to repair its footpaths, even in these days of qualified engineering staffs. This state of affairs is due, as we hope we have shown, not to any statutory immunity of local authorities, but simply because of the application of an ancient common-law rule enunciated when the conditions were wholly dissimilar to those prevailing in respect of streets and footpaths at the present time.

SALES OF RURAL LAND.

Interpretation of the term "Farm Land."

What constituted "farm land," and who is to decide whether or not a transaction requires the consent of the Land Valuation Committee, was recently the subject of a statement by the Minister of Lands, the Hon. Mr. Corbett. He said solicitors from various parts of New Zealand were asking what evidence a District Land Registrar would require to satisfy himself that land affected by a transfer or other disposition was not "farm land" as defined in s. 2 of the Servicemen's Settlement and Land Sales Act, 1943, and, as such, still subject to control by the Land Valuation Court.

"The Registrar-General of Land has already arranged to meet the situation in a practical and inexpensive way," said Mr. Corbett, "and has advised that the officers of his Department will, in most cases, be able to tell from the document itself whether or not land is likely to be subject to control, but, in cases of doubt, will be satisfied with a declaration from the

purchasers as to the relevant facts. The District Land Registrar will decide whether, in his opinion, the land is 'farm land,' and, if a solicitor was in doubt whether or not any piece of land came within the definition, he would naturally consult the District Land Registrar before settling the transaction. Of course, if a party is dissatisfied with the decision of the District Land Registrar, he can apply for a ruling from the Land Valuation Court."

Mr. Corbett added that the Registrar-General had already circularized the District Land Registrars throughout New Zealand along these lines, and that, consequently, solicitors presenting transfers for registration should not meet with any difficulty.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Participating Rights of Preference Shares. *209 Law Times Jo.*, 34.

CONTRACT.

Implied Term—Shipment of Jute from India to Italy—Export permitted only under Licence and subject to Quota—Contract not expressed to be subject to Quota—Conditions governing Sellers' Ability to perform Contract under Quota System known to Both Parties. In July and September, 1947, the sellers, who carried on business in Calcutta, entered into contracts with the buyers, a company registered in England and carrying on business in London, to ship certain quantities of jute to Genoa. The time for shipment was originally from October, 1947, to January, 1948, but it was extended by consent to October, 1948. The contracts were on c.i.f. terms and expressed to be on the terms and conditions of the London Jute Association contract. At all material times, the export of jute from India was permitted only under licence from the Government of India, and during 1947 exports were allowed only on a quota system, whereby a shipper had to choose as his basic year one of the years from 1937 to 1946 and was allotted a quota in regard to the countries to which he had shipped in his basic year. The sellers chose 1946 as their basic year, but they had made no shipments to Italy in the year, with the result that they obtained no quota for Italy, and were unable to make any shipments under the contracts until 1948, when, under new regulations, they were allowed a small quota for Italy against evidence of firm contracts. As a result, they were able to ship less than a third of the amount of jute which they had agreed to ship under their four contracts of July and September, 1947. The buyers, as well as the sellers, knew of the regulations which were in force in regard to the export of jute, but the contracts were not expressly stated to be "subject to quota." On a claim by the buyers for damages for breach of contract, the sellers based their defence on the lack of quota, and contended that, to give business efficacy to the contracts, a term must be implied in them that they were subject to quota. The buyers contended that such a term could not be implied. *Held*, That the Court would read an implied term into a contract only where it was clear that both parties intended that term to operate; although both parties knew that the contracts could only be met out of the sellers' quota, the question whether that quota would suffice for the purpose depended on matters concerning the conduct of the sellers' business which were peculiarly within their knowledge, as opposed to that of the buyers—*e.g.*, the sellers alone would know (*a*) which year they had chosen as their basic year, and what quota they were likely to receive as a result of their choice, and (*b*) what contracts with other buyers had to be satisfied out of their quota—and an unqualified provision, to the effect that the contract was subject to the quota's being sufficient and to the seller's using his best endeavours to obtain a sufficient quota, would be quite inadequate to secure the business efficacy of the contracts; as, therefore, the parties could not be taken to have intended that the term sought by the sellers to be implied should be incorporated in the contracts, it was impossible to read into the contracts of July and September, 1947, the term contended for by the sellers. (*Re Anglo-Russian Merchant Traders and John Batt and Co. (London)*, [1917] 2 K.B. 679, distinguished.) *C. K. C. Sethia (1944), Ltd.* v. *Partabmull Rameshwar*, [1950] 1 All E.R. 51 (C.A.).

As to Implied Terms, see *7 Halsbury's Laws of England*, 2nd Ed. 322, 323, para. 451; and for Cases, see *12 E. and E. Digest*, 607-613, Nos. *5028-5066*.

Time of Performance—Sale of Goods—Work and Labour—Contract to build Motor-car Body—Time of the Essence—Original Condition in regard to Time waived—Subsequent Notice fixing Time for Completion—Reasonableness—Conduct amounting to Waiver. By a contract made between the plaintiffs and O., the plaintiffs agreed to supply a motor-car chassis to O. and to have a body built on to it within seven months, time being of the essence of the contract. The plaintiffs gave the work of building the body to subcontractors and authorized them to accept instructions in regard to the work direct from O. The subcontractors failed to complete the work within the time stipulated, but O. waived the original condition in regard to time by pressing for delivery to be made on successive later dates. Eventually, on June 28, 1948 (about three months after the date originally fixed for delivery), the subcontractors' manager informed O. that the car would be ready in two weeks' time, and on the following day O. gave a written notice to the subcontractors stating that, unless he received the car within four weeks, he would be unable to accept delivery. The subcontractors sent the notice on to the plaintiffs after eight or nine days. The car was not delivered within four weeks, and was not completed until October 18, 1948, when O. refused delivery. The plaintiffs brought an action against him claiming the price of the body-work, and he counterclaimed for the chassis or its value. *Held*, (i) That, as there was an initial stipulation making time of the essence of the contract, O., after waiving that initial stipulation, was entitled to give a reasonable notice making time of the essence of the matter, whether the contract was for the sale of goods or for work and labour. (ii) That the reasonableness of the notice had to be judged at the time at which it was given, and it could not be held to be bad because, after it was given, there were unanticipated difficulties in making delivery. (Observations of *Lord Parker of Waddington* in *Stickney* v. *Keeble*, [1915] A.C. 419, followed.) (iii) That, on the facts of the case, the notice of June 28, 1948, was reasonable, and it was a good notice to the plaintiffs, even though it was given by O. only to the subcontractors. (iv) That waiver of the notice could be inferred only from conduct which showed an intention to affect the legal relations of the parties, and, therefore, O.'s failure to reply to a letter from the plaintiffs, written on July 16, 1948, in which they assumed that he would take delivery of the car at a later date, notwithstanding the notice of June 28, did not amount to a waiver of the notice, and O. was entitled to rescind the contract and to receive the chassis or be repaid its value. *Charles Rickards, Ltd.* v. *Oppenheim*, [1950] 1 All E.R. 420 (C.A.).

As to Time of Performance of Contract, see *Halsbury's Laws of England*, 2nd Ed., Vol. 7, pp. 190-194, paras. 268-273, and Vol. 3, pp. 220-222, paras. 376-380; and for Cases, see *12 E. and E. Digest*, 309-317, Nos. *2554-2621*.

CONVEYANCING.

The Perpetuity Rule and Statutory Trusts for Next-of-kin. *209 Law Times Jo.*, 38.

COSTS.

Claim—Counterclaim—Recovery by Plaintiff of Larger Sum on Claim than that recovered by Defendant on Counterclaim—Form of Judgment—Amount of Costs recoverable by Plaintiff. The plaintiffs claimed £909 9s. 6d. for work done under a contract between them and the defendants, who denied liability and counterclaimed for damages for breach of the contract. Eight days before the day fixed for hearing, the defendants paid £250 into Court in full satisfaction of the claim, but the plaintiffs (who were not notified of this within the prescribed seven days) did not take this sum out of Court, and the action was heard. The Commissioner of Assize awarded the plaintiffs £350 on the claim, gave the defendants £300 1s. 9d. on the counterclaim, and gave judgment for the plaintiffs for the balance, £49 18s. 3d. *Held*, (i) That the sum awarded to the defendants was for damages for breach of contract and should not be treated as a set off against the award to the plaintiffs. (*Stooke* v. *Taylor*, (1880) 5 Q.B.D. 569, applied.) (ii) That, where a plaintiff succeeds on his claim and the defendant succeeds on his counterclaim, the more convenient course is,

not to enter judgment for the balance in favour of the party entitled thereto, but to enter judgment for the plaintiff for the amount for which he succeeds on the claim and to enter judgment for the defendant for the amount for which he succeeds on the counterclaim. In the ordinary course, if there are costs on both claim and counterclaim, each party is entitled to the costs which he has had to incur to recover the sum recovered on the claim and counterclaim respectively. (iii) That the payment of £250 into Court did not exceed the amount awarded to the plaintiffs, and the fact that it exceeded the balance of £49 18s. 3d. did not deprive the plaintiffs of costs after the date of the payment into Court. *Chell Engineering, Ltd.* v. *Unit Tool and Engineering Co., Ltd.*, [1950] 1 All E.R. 378 (C.A.).

As to Costs Awarded on Claim and Counterclaim Succeeding, see *29 Halsbury's Laws of England*, 2nd Ed. 518, 519, para. 768; and for Cases, see *40 E. and E. Digest*, 433-436, Nos. *548-568*.

CRIMINAL LAW.

The Prerogative of Mercy. *209 Law Times Jo.*, 5.

Trial—Irregularity—Communication from Jury to Judge—Answer given in Absence of Prisoner. At the conclusion of the trial of the appellant on a charge of receiving stolen property, the jury, having retired to consider their verdict, sent to the Recorder a written note in which they asked a question relating to the case. The Recorder received and answered the note in his private room, without returning to Court, and so the contents of the communication were not made known to the prosecution or to the appellant or his counsel. *Held*, That any communication between a jury after their retirement and the presiding Judge, even thought it may be purely immaterial, must be read out in open Court and the answer given in the presence of the prosecution and the accused person; this procedure had not been followed; and the conviction must be quashed. *R.* v. *Green*, [1950] 1 All E.R. 38 (C.C.A.).

As to Communications with a Jury out of Court, see *19 Halsbury's Laws of England*, 2nd Ed. 312, para. 650; and for Cases, see *30 E. and E. Digest*, 236, 237, Nos. *312-327*.

DEATH DUTIES.

Acquisition of Reversion by Life Tenant. *209 Law Times Jo.*, 5.

DIVORCE.

Costs—Security for Wife's Costs—Trial of Issue after Decree Absolute—Jurisdiction of Court to order Security—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523/L.9), r. 74 (2) (Cf. Matrimonial Causes Rules, 1943 (N.Z.), R. 65). By the Matrimonial Causes Rules, 1947, r. 74 (2), it is provided: "After the Registrar's certificate under r. 30 has been granted, or with leave at an earlier stage of the cause, a wife who is petitioner or has filed an answer may apply for security for her costs of the cause up to the hearing and of and incidental to such hearing." In 1941, a wife obtained a decree *nisi* for the dissolution of her marriage on the ground of her husband's adultery. In 1942, the decree was made absolute, and a consent order of £130 a year for the wife's maintenance was made. On July 28, 1948, the husband applied to vary the maintenance by decreasing its amount on the ground that the wife was living in adultery, and on July 14, 1949, *Pilcher*, J., directed that an issue be tried as to the wife's adultery. The wife applied to the Registrar for an order for security of the costs of the issue. *Held*, That the costs for security for which the wife applied could not be said to be "of and incidental to" the hearing of the divorce suit eight years previously within the meaning of r. 74 (2) of the Matrimonial Causes Rules, 1947, and, accordingly, the wife was not entitled to security thereunder, but the rule was not exclusive, the Court had an inherent jurisdiction to order security for a wife's costs in a proper case, and, on the facts, the present was a proper case for the exercise of the jurisdiction. *Gower* v. *Gower*, [1950] 1 All E.R. 27.

As to Security for Wife's Costs, see *10 Halsbury's Laws of England*, 2nd Ed. 724-727, paras. 1107-1115: and for Cases, see *27 E. and E. Digest*, 421-424 Nos. *4277-4307*.

Cruelty—Standard of Proof—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (2) (as substituted by the Matrimonial Causes Act, 1937 (c. 57), s. 4) (cf. Divorce and Matrimonial Causes Act, 1928 (N.Z.), s. 19). By s. 178 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by the Matrimonial Causes Act, 1937, s. 4: "If the Court is satisfied on the evidence that (i) the case for the petition has been proved . . . the Court shall pronounce a decree of divorce." A husband petitioned for divorce on the ground of his wife's cruelty. The learned Judge found that cruelty had not been proved with the same degree of strictness as is required for proof of a criminal offence in a criminal Court, and dismissed the husband's petition. Per *Bucknill* and *Somervell*, L.JJ., The word "strict" is sufficiently apt to describe the measure and standard of proof required of a charge of cruelty in the Divorce Court, and it is unnecessary to introduce any question of the standard of proof required of a criminal charge. Per *Denning*, L.J., Section 178 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (as substituted), lays down a sufficient test by providing that a decree shall be pronounced if the Court is "satisfied on the evidence that the case for the petition has been proved." That puts the burden on the person who makes the allegation, but it is not a burden of extraordinary weight. The same standard of proof as that required in criminal cases is not needed, to say nothing of the rules as to corroboration of the evidence of accomplices and so on which apply in criminal Courts. *Per curiam*, The charges of cruelty were proved beyond reasonable doubt, and the husband was entitled to a decree. *Davis* v. *Davis*, [1950] 1 All E.R. 40 (C.A.).

As to Cruelty, see *10 Halsbury's Laws of England*, 2nd Ed. 649-654, paras. 954-962; and for Cases, see *27 E. and E. Digest*, 281-293, Nos. *2513-2694*.

Evidence—Privilege—Meeting between Parties and their Solicitors with view to Reconciliation—Admissibility of Evidence of Proceedings at Meeting. On the hearing of cross-petitions for divorce on the ground of desertion, the husband sought to adduce evidence of what had taken place at a meeting between the parties and their solicitors at which a reconciliation was discussed. The wife objected to the evidence being given, on the ground that what occurred at the meeting was privileged. *Held*, That what took place at such a meeting was not to be taken as being without prejudice, and, consequently, privileged, if it was not specifically stated to be so, and, therefore, the evidence tendered was admissible. (*McTaggart* v. *McTaggart*, [1948] 2 All E.R. 754, explained and distinguished.) *Bostock* v. *Bostock*, [1950] 1 All E.R. 25.

As to Communications "Without Prejudice," see *13 Halsbury's Laws of England*, 2nd Ed. 703-705, para. 774; and for Cases, see *22 E. and E. Digest*, 375-378, Nos. *3836-3860*.

The Solicitor's Duty in Divorce: Knowledge of Other Party's Affairs. *209 Law Times Jo.*, 5.

FINANCE.

Finance Emergency Regulations, 1940, Amendment No. 7 (Serial No. 1950/19). Regulation 6 of the Finance Emergency Regulations, 1940, is amended by adding a new clause, Reg. 6 (7).

Sterling Area Currency and Securities Exemption Notice, 1950 (Serial No. 1950/20). The foreign securities, which are registered or inscribed in any of the countries of the Sterling Area as specified in the Schedule to this Notice, are exempted from the restrictions imposed by Reg. 3 (1) (*d*) of the Finance Emergency Regulations, 1940 (No. 2), and foreign currency of any of those countries is exempted from the operation of Reg. 6, while foreign securities, which are domiciled in any of those countries, are exempted from the operation of Reg. 7. The foregoing exemptions do not apply to any foreign securities or foreign currency held by any of the trading banks in respect of its New Zealand business.

INCOME-TAX.

Capital or Income? *100 Law Journal*, 115.

LANDLORD AND TENANT.

Covenant to Repair—Breach—Measure of Damages—Diminution to Value of Reversion—Cost of Redecoration—Repairs Necessary to make Premises fit for Reletting—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1). The premises comprised in a tenancy agreement, dated March 25, 1943, consisted of four rooms on the first floor and one room on the ground floor of a dwellinghouse, and by the agreement the tenant covenanted to deliver up the premises in good and tenantable repair at the termination of the tenancy. When the tenant gave up possession on May 19, 1949, the landlord found the premises in a bad state of repair, and had to have them redecorated to put them in a fit state for reletting. In an action by the landlord claiming damages for breach of covenant, the evidence for the landlord did not deal with the actual question of damage to the value of the reversion, but the County Court Judge held that there was damage of that character, by reason of the want of repair, and gave judgment for the landlord for £36, the costs of the repairs necessary to make the premises fit for occupation. On an appeal by the tenant to the Court of Appeal, it was contended

by him that there was no evidence that the value of the reversion had been diminished by the breach of covenant, that the fact that repairs were necessary was not *prima facie* evidence of damage to the value of the reversion, and that, therefore, under the Landlord and Tenant Act, 1927, s. 18 (1), the landlord was not entitled to recover damages. *Held*, That, as the repairs done by the landlord were repairs within the covenant, and were no more than were reasonably necessary to make the five rooms fit, according to ordinary standards, for occupation for residential purposes, there was evidence on which the County Court Judge could hold that the proper cost of the repairs represented a diminution in the value of the reversion due to the tenant's breach of covenant, and, therefore, the cost of the repairs was recoverable by the landlord under the Landlord and Tenant Act, 1927, s. 18 (1). (*Hanson* v. *Newman*, [1934] Ch. 298, *Salisbury* (*Marquis*) v. *Gilmore*, [1942] 1 All E.R. 457, and *Portman* v. *Latta*, [1942] W.N. 97, distinguished.) *Per curiam*, We find nothing in the earlier authorities to justify the conclusion as a matter of law that in no case and in no circumstances can the fact that repairs are necessary, and the cost of those repairs, be taken as at least *prima facie* evidence of damage to the value of the reversion and of the extent of such damage. There must be many cases in which it is, in fact, quite obvious that the value of the reversion has, by reason of a tenant's failure to do some necessary repair, been damaged precisely to the extent of the proper cost of effecting the repair in question. (Dictum of *Lynskey*, J., in *Landeau* v. *Marchbank*, [1949] 2 All E.R. 175, disapproved.) *Jones* v. *Herxheimer*, [1950] 1 All E.R. 323 (C.A.).

As to Damages for Breach of Covenant to Leave Premises in Repair, see *20 Halsbury's Laws of England*, 2nd Ed. 220, 221, para. 241.

For the Landlord and Tenant Act, 1927, s. 18 (1), see *10 Halsbury's Complete Statutes of England*, 375, 389.

Effects of Fraud and Illegality. *93 Solicitors Journal*, 752.

Flats and Schemes. *93 Solicitors Journal*, 819.

LAW PRACTITIONERS.

Exempted Goods and Services (Control of Prices) Notice, 1950, No. 2 (*1950 New Zealand Gazette*, 261). Pursuant to s. 18 of the Control of Prices Act, 1947, the Price Tribunal gives notice that the goods and services specified in the Schedule to this Notice are exempt from the provisions of Part III of the Control of Prices Act, 1947, as from March 7, 1950. Attention is drawn to the fact that the rates or fees charged for the performance of any services rendered in, *inter alia*, the legal profession are removed from control as from that date.

MASTER AND SERVANT.

Employment of Rehabilitation Trainee—Undertakings by Master and Servant respectively with Rehabilitation Department—Three Years' Term of Service contemplated in Such Undertakings—Undertakings Insufficient Memorandum in Writing to satisfy Statute of Frauds—Statute of Frauds, 1677 (20 Car. 2, c. 3), s. 4—Practice—Defence of Statute of Frauds—Notice not required—Magistrates' Courts Rules, 1948, r. 113. H. employed C., by arrangement with the Rehabilitation Department. The "Trade Training Subsidized Contract," signed by H., addressed to the District Rehabilitation Officer, was in the form of an undertaking by the employer to employ the trainee for a term of 156 weeks from December 5, 1947, and to pay him a gross weekly wage graduated in half-yearly periods. C. signed the "Undertaking by Trainee." On May 19, 1949, C. voluntarily left the employment without the consent of the Rehabilitation Board. In an action by H. claiming £300 damages for the loss of C.'s services from May 19, 1949, to January 31, 1950, when H. sold his business owing to ill health (such sum being computed at 8s. per hour with allowance for lost time and holidays, and less the net wage to be paid to C.), and for such further or other relief as to the Court seemed just, *Held*, 1. That, as the documents referred to and set out in the judgment were merely two undertakings with the Rehabilitation Department, and did not necessarily give the plaintiff any right, and as the Department or its officer was not an agent for either party for the purpose of making a contract of employment with the other, there was not a sufficient memorandum in writing to satisfy the Statute of Frauds; and the plaintiff could not support his claim as based on a contract for the term mentioned. (*Tweddle* v. *Atkinson*, (1861) 1 B. & S. 393; 121 E.R. 762, followed.) (*Crane* v. *Powell*, (1868) L.R. 4 C.P. 123, distinguished.) 2. That, as the defendant was a weekly worker, and as, under the award under which he considered he was working, he should have given the plaintiff a week's notice, the plaintiff was entitled to damages in relation to the defendant's work for one week on the basis of estimated damages submitted by the plaintiff in his claim. *Hastings* v. *Chapman*. (Palmerston North. February 21, 1950. Herd, S.M.)

NEGLIGENCE.

Principal and Agent—Husband and Wife—Wife's Negligence while driving Husband's Motor-car—Husband not in Car at Time of Accident—Retention of Control by him—Wife, in Circumstances, Agent of Husband—Husband liable, with Wife, for Damages. A husband, the owner of a motor-car, handed it over to his wife after they had attended a football match together, and arranged that she should call for him at his club later. In the meantime, she intended, with her husband's knowledge and consent, to drive to her sister-in-law's and fill in time there while waiting to return to the club for him. On her way to her sister-in-law's, she negligently caused damage to the plaintiff. In an action against the husband and wife, *Held*, 1. That, on the facts, the wife, in making the two journeys (from the club to her sister-in-law's, and back to the club), was on her husband's business, or acting in his interests and on his behalf, in a manner directly sanctioned by him; and, consequently, the husband, though not in the car at the time of the accident, had control of it. (*Timaru Borough* v. *Squire*, [1919] N.Z.L.R. 151, and *Joel* v. *Morison*, (1834) 6 C. & P. 501; 172 E.R. 1338, distinguished.) 2. That, accordingly, the husband having retained the right of control of his car throughout, and his wife having been upon his business at the time of the accident, he was liable for the negligence of his wife as his agent in its management. (*Parker* v. *Miller*, (1926) 42 T.L.R. 408, followed.) Judgment was accordingly given against both husband and wife defendants. *Wong* v. *Ewen et Ux.* (*Wong, Third Party*). (Feilding. January 17, 1950. Coleman, S.M.)

Res ipsa loquitur—*Highway—Omnibus—Accident due to Tyre-burst—Impact Fracture of Tyre—Supervision of Condition of Tyre—Duty of Owners of Vehicle—Breach of Regulation—Right of Action—Motor Vehicles (Construction and Use) Regulations, 1941 (S.R. & O., 1941, No. 398), Reg. 71.* The appellant's husband was killed while travelling as a passenger in the respondents' omnibus, which at the time of the accident was being driven at a speed of some 25 miles per hour in a blackout. After the offside front tyre had burst, the omnibus veered across the road and fell over an embankment. Evidence was given that the cause of the bursting of the tyre was an impact fracture due to one or more heavy blows on the outside of the tyre, leading to the disintegration of the inner parts. Such a fracture might occur without leaving any visible external mark, but a competent driver would be able to recognize the difference between a blow heavy enough to endanger the strength of the tyre and a lesser concussion. The appellant contended that, in the circumstances, the speed at which the omnibus was driven was excessive, and caused it to be thrown off the road when the tyre burst, that the defect in the tyre would have been revealed had adequate steps been taken regularly to inspect it, and that the respondents were negligent in not requiring their drivers to report occurrences which might result in impact fractures. The respondents contended that they had a satisfactory system of tyre inspection, which took place twice a week, and that impact fractures were so rare as to be a negligible risk which the public using their vehicles must take. *Held*, (i) That the application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting *onus* of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but although it was the duty of the respondents to give an adequate explanation, if the facts were sufficiently known the question ceased to be one where the facts spoke for themselves, and the solution must be found by determining whether or not, on the established facts, negligence was to be inferred. (ii) That it could not be said on the evidence that the speed at which the omnibus was being driven at the time of the tyre-burst had any causal connection with the subsequent accident. (iii) That, despite the statements of the respondents' witnesses that their system of tyre inspection was satisfactory and accorded with the practice of other omnibus companies, the evidence showed that the respondents had not taken all the steps they should have taken to protect passengers, because they had not instructed their drivers to report heavy blows to tyres likely to cause impact fractures. (iv) That the cause of the accident was a defect of the tyre, which might have been discovered by due diligence on the part of the respondents, and the respondents were liable, although it was not possible to affirm that the fracture would have been discovered by the exercise of due diligence. By the Motor Vehicles (Construction and Use) Regulations, 1941, Reg. 71: "All the tyres of a motor vehicle . . . shall at all times, while the vehicle . . . is used on a road be maintained in such condition as to be free from any defect which might in any way cause . . . danger to persons on or in the vehicle." *Held*,

That this regulation gives no right of action to persons injurde by a breach of it. Decision of the Court of Appeal, [1948] 2 All E.R. 460, reversed. *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392 (H.L.).

As to the Presumption of Negligence, see *23 Halsbury's Laws of England*, 2nd Ed. 671-675, paras. 956-958; and for Cases, see *36 E. and E. Digest*, 88-92, Nos. *589-607*.

Ship—Invitee—Injury to Employee of Independent Contractor during Ship's Trial—Ship under Command of Employee of Shipbuilders—Negligence of Purchasers' Servants on board—Common Interest of Shipbuilders and Purchasers in Success of Trial—Control of Purchasers' Servants by Shipbuilders' Employee—Liability of Shipbuilders. The plaintiff was employed by a company which was engaged by the defendants to instal refrigerating machinery in a ship which they (the defendants) were building for the Argentine Government. When the ship was taken on its trial at sea, the plaintiff was invited by the defendants to accompany it, to complete the work which he was doing. On the trial, the defendants' general manager was in charge, and the ship was worked by a crew provided by the defendants. In addition, there was an Argentine crew on board, but their only purpose was to observe the ship's performance before it was accepted by the purchasers. On October 1, 1947, the plaintiff was working near a hatchway, which was battened down, the place being lighted by a lamp. During the plaintiff's temporary absence, the hatch was opened and the lamp removed by members of the Argentine crew, who wished to examine the hold. On his return to work, the plaintiff fell down the hatchway and was injured. On a claim by the plaintiff against the defendants for damages for negligence, *Held*, That the fact that there was a common interest between the defendants and the purchasers in the inspection of the hold was not sufficient to make the Argentine crew, who were the servants of the purchasers, the agents of the defendants; the fact that the defendants' manager (who was in the position of captain) necessarily had control over all the acts of all persons in the ship did not make those persons his agents for all purposes; and, there being no evidence that the defendants had delegated any duties to any member of the Argentine crew, they (the defendants) were not liable for the injury caused by the Argentine seamen's negligent acts. *Hobson* v. *Bartram and Sons, Ltd.*, [1950] 1 All E.R. 412 (C.A.).

PRACTICE.

Court of Appeal—Appeal—Consent to Dismissal—Consent initialled by President of Court—No Order drawn up or entered—Discretion of Court to allow or refuse Appeal to be proceeded with. On November 11, 1949 *Lynskey*, J., made an order giving the plaintiffs leave to sign final judgment for the sum claimed by them from the defendants in an action on a bill of exchange. On November 14, the defendants gave notice of appeal against that order. On the same day, the defendants paid to the plaintiffs the sum claimed and signed a form of consent to the dismissal of their appeal. This consent was initialled by the President of the Court of Appeal, but no order dismissing the appeal was drawn up or entered On November 23, the defendants gave a fresh notice of appeal. *Held*, That, until an order had been drawn up and entered, the appeal was not dismissed; the Court of Appeal had a discretion to allow or to refuse the appeal to be proceeded with on either a fresh or the original notice of appeal; and, in the circumstances of the present case, the Court, in the exercise of its discretion, would allow the appeal to proceed. *James Lamont and Co., Ltd.* v. *Hyland, Ltd.*, [1950] 1 All E.R. 341 (C.A.).

Practice and Procedure in 1949. *100 Law Journal*, 102.

PUBLIC REVENUE.

Death Duties—Estate and Succession Duty—Joint Tenancy—Liability of Interest of Non-contributing Joint Tenant to Death Duty — Death Duties Act, 1921, s. 5 (1) (e) (g) (h). In Going's case, the deceased and her husband were, at the time of her death in 1945, registered as joint tenants of an estate in fee simple in a piece of land, being their house property, so that, upon the death of the deceased, her husband became by survivorship the sole beneficial owner of the land. The property was purchased in 1937, subject to mortgage. The husband paid the whole of the purchase-money over and above the amount secured by the mortgage, arranged for title to be taken in the names of his wife and himself as joint tenants, and in 1941, out of his own moneys, paid off the amount secured by the mortgage. The memorandum of transfer of the property was preceded by an agreement for sale and purchase, which, although missing, appeared on the evidence to have been signed by the deceased (or one of the purchasers). In computing the final balance of the estate of the deceased wife, the Commissioner of Stamp Duties included therein one-half of the value of the land, and assessed duty on the final balance as so computed. In Todd's case, the deceased, who died in 1947, was, at the time of his death, by virtue of the provisions of the will of his mother, who died in 1918, a joint tenant with a sister and a brother in land and chattels, so that, upon his death, the sister and brother became by survivorship the beneficial owners of the land and chattels as joint tenants. In computing the final balance of the estate of the deceased, the Commissioner included therein one-third of the value of such land and chattels, and assessed duty on the final balance as so computed. The appellant objected to each assessment, in so far as the Commissioner included in the final balance of the estate the proportion of the value of the property held in joint tenancy. The Commissioner contended that the interest of the deceased in each case fell within s. 5 (1) (*g*) or s. 5 (1) (*h*) of the Death Duties Act, 1921, and in Going's case within s. 5 (1) (*e*) also, the deceased, through signing the agreement for sale and purchase, being not in fact a non-contributing joint tenant. On appeal under s. 62 of the Death Duties Act, 1921, from that determination, *Held*, 1. That, in Going's case, the signing of the agreement for sale and purchase by the deceased wife was simply a preliminary to the transfer, and that the substance of the matter was that the agreement and the subsequent transfer were one transaction, and, accordingly, the wife was to be regarded as a non-contributing joint tenant, and s. 5 (1) (*e*) of the Death Duties Act, 1921, did not apply to her interest. (*Attorney-General* v. *Gretton and Shrimpton*, [1945] 1 All E.R. 628, applied.) 2. That, assuming, but without deciding, that s. 5 (1) (*g*) of the Death Duties Act, 1921, applied to interests held in joint tenancy, a non-contributing joint tenant's interest did not come within it. (*Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, applied.) (*Little* v. *Commissioner of Stamps*, [1923] N.Z.L.R. 773, referred to.) 3. That s. 5 (1) (*h*) did not apply to interests held in joint tenancy, for the reason that the right of disposal thereof possessed by the deceased was an incident of the estate or interest vested in him, and did not arise out of a "power or authority" enabling him to dispose of property. (*Commissioner of Stamp Duties* v. *Pratt*, [1929] N.Z.L.R. 163, applied.) (*Dent* v. *Commissioner for Stamps*, (1909) 9 N.S.W.S.R. 180, *In re Parsons, Parsons* v. *Attorney-General*, [1943] Ch. 12; [1942] 2 All E.R. 496, and *Ochberg* v. *Commissioner of Stamp Duties*, (1949) 49 N.S.W.S.R. 248, referred to.) *In re Todd, Public Trustee* v. *Commissioner of Stamp Duties*: *In re Going, Public Trustee* v. *Commissioner of Stamp Duties*. (S.C. Wellington. March 7, 1950. Hutchison, J.)

SALE OF LAND.

Vendor and Purchaser. *100 Law Journal*, 101.

SALES TAX.

Sales Tax Exemption Order, 1950 (Serial No. 1950/22). As from March 10, 1950, the goods of the classes and kinds specified in the Schedule to this Order are exempted from sales tax.

SAMOA.

Samoa Amendment Act Commencement Order, 1950 (Serial No. 1950/17). The Samoa Amendment Act, 1949, will come into force on April 1, 1950.

Reminiscences of Sixty Years in Practice.—To what was surely an "extraordinary" general meeting of the Canterbury District Law Society on February 20, Dr. H. F. von Haast gave a delightful talk upon his nearly-completed book, *Sixty Years a Lawyer*. His Honour Mr. Justice Northcroft and about one hundred members of the profession were present. The President of the Society, Mr. Edgar Bowie, introduced the speaker, who read some extracts from his forthcoming book, and declaimed or sang others. A correspondent, who was present, writes: "He embellished his lecture with a few songs, which greatly diverted his audience." A vote of thanks was moved by Sir Arthur Donnelly, who added his share of anecdotes to the evening. The latter provoked Dr. von Haast to two more reminiscences, which really capped the whole performance.

CASE AND COMMENT.

Contract: Impossibility of Performance.

(*Concluded from p. 59.*)

By a contract in writing of June 20, 1902, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the Coronation processions would take place and pass along Pall Mall. The contract contained no express reference to the Coronation processions, or to any other purpose for which the flat was taken. A deposit was paid when the contract was entered into. As the processions did not take place on the days originally fixed, the defendant declined to pay the balance of the agreed rent:—

Held (affirming the decision of *Darling*, J.), from necessary inferences drawn from surrounding circumstances, recognized by both contracting parties, That the taking place of the processions on the days originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract; that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently that the plaintiff was not entitled to recover the balance of the rent fixed by the contract.

Taylor v. *Caldwell* ((1863) 3 B. & S. 826) discussed and applied.

KRELL *v.* HENRY, [1903] 2 K.B. 740.

Reverting now to *Krell* v. *Henry*, [1903] 2 K.B. 740, the Court of Appeal's decision was delivered on Tuesday, August 11, 1903, the Lords Justices having reserved their decision for four weeks, and having summarily disposed of the *Herne Bay* case on the preceding Thursday. Vaughan Williams, L.J., delivered the only reasoned judgment. After setting out the classic passage from *Taylor* v. *Caldwell*, he went on to say, at p. 748:

> Whatever may have been the limits of the Roman law, the case of *Nickoll* v. *Ashton* ([1901] 2 K.B. 126) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express [*sic*] condition or state of things, going to the root of the contract.

Except that the condition or state of things is not required to be express, there can be no doubt that the passage just cited is an accurate statement of the relevant principle; and it has been recognized as such.

But, from this point onwards, it is submitted, Vaughan Williams, L.J., went astray. Continuing his exposition of principles, he said, at p. 749:

> I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited.

It will be observed that this proposition is entirely different from that laid down in the previous part of the same judgment, as also in *Taylor* v. *Caldwell* and the line of cases that had followed it (including *Nickoll and Knight* v. *Ashton, Edridge and Co.*, [1901] 2 K.B. 126), and in *Jackson* v. *Union Marine Insurance Co., Ltd.*, (1874) L.R. 10 C.P. 125, and the line of cases that had followed that case. According to the rule as previously understood, you did not have to ascertain what was the "substance" of the contract, and were thus absolved from the necessity of considering what, if any, meaning ought to be attached to that phrase. As at present advised, it seems to the present writer that the phrase in its context means something which, *ex hypothesi*, is not contained in the terms of the contract, but which is, nevertheless, the substance of the contract. The present writer not being able to understand how the substance of a thing can be anything but part of it, nor how part of a contract can exist outside its terms, the whole passage seems to him to involve an unintelligible concept, like saying that a man is sitting in the Supreme Court with his liver on the King's Wharf.

But, in any case, as the rule existed when Vaughan Williams, L.J., was speaking of it, you did not have to ascertain the substance of the contract. You had to consider the nature of the contract, and whether, in all the circumstances, the parties must have known that the failure of some basic assumption on their part would render performance impossible, and have intended it to be discharged if and when that assumption should fail. It is submitted, therefore, that Vaughan Williams, L.J., founded himself upon a premiss that was unsupported by authority, and, further, that *ipso facto* he enlarged an exception upon a general rule, without saying anything to show that he was conscious of doing either.

Having thus indicated what he might perhaps have called the substance of his judgment, or perhaps the assumption his judgment needed for its foundation, the learned Judge went on to hold that the taking place of the processions was regarded by both contracting parties as the foundation of the contract. Having said that, he went on to say that he thought it could not have been in the contemplation of the parties that the processions would not be held. This, it is plain from the rest of his judgment, he regarded as an essential factor in the discharge of the contract, for a little further on he says, at p. 751:

> In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?

From all this, it appears to be quite plain that the Court of Appeal omitted, just as Darling, J., omitted, to decide whether the rule in *Taylor* v. *Caldwell* discharged the defendant in *Krell* v. *Henry*. Vaughan Williams, L.J., did not enter upon the question, although he plainly thought he had grappled with and disposed of it; and the other judgments add nothing.

It should be said, however, that, in holding it to be essential that the postponement of the Coronation should have been *outside* the contemplation of the parties, Vaughan Williams, L.J., referred to a passage in the judgment of the Court of Queen's Bench in *Baily* v. *De Crespigny*, (1869) L.R. 4 Q.B. 180, 185:

> where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be

> held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

But this dictum is taken out of its context. The defendant had covenanted that neither he nor his assigns would build on certain lands. Then an Act of Parliament was passed giving powers to a railway company, who took the land and built a railway station on it. What was really decided was that the railway company were not the defendant's assigns within the meaning of the covenant, because the assignment to them had been made under compulsion. The question, then, in *Baily* v. *De Crespigny* was a question of construction : it was not a question whether terms should be implied. For the purposes of *Krell* v. *Henry*, therefore, it was manifestly irrelevant that in *Baily* v. *De Crespigny* the Court held, as Vaughan Williams, L.J., in *Krell* v. *Henry* points out, that a particular event was not within the contemplation of the parties. In *Baily* v. *De Crespigny*, the Court did that for the purpose of ascertaining the meaning of the words the parties had used, and not for the purpose of implying in the contract a term that was not expressly contained in it.

At a later stage, Vaughan Williams, L.J., says, at p. 754, that the Court has to ask itself whether the object of the contract was frustrated by the postponement of the Coronation. This, again, is a far cry from *Taylor* v. *Caldwell*, in which what was looked at, *inter alia*, was the *subject-matter* of the contract. It is surely loose, and, therefore, dangerous, to talk about the object of the contract in attempting to lay down some general test of discharge. In the vast majority of contracts, the parties do not have a single object. In most cases, one party has one object or set of objects and the other has a different set. When a man lets his house, his object is to let it and the tenant's object is to be the tenant of it. To speak of the " object " of a contract must be quite meaningless unless the parties have a common object, and probably unless that object is the only object that either of them has. Taking, then, the phrase " the object of the contract," according to its only possible gloss, as meaning the purpose of the parties, it must be pointed out that failure of the purpose of the parties, or of a party, is not necessarily accompanied by impossibility of performance.

Such was the process by which Vaughan Williams, L.J., arrived at the conclusion that Henry was discharged. He said that the authorities required him to look at the substance of the contract, which they did not. He said that the authorities required him to look at the object of the contract, which they did not. He said that the question was whether the postponement was outside the contemplation of the parties, when the question was whether it must have been within their contemplation. He said, in effect, that the happening of the procession was the foundation of the contract, and that, therefore, performance became impossible. Performance of what, by whom ? Henry could not see the procession, because it was not there : had he promised Krell to look at it ? Or, if we take it that Krell promised that Henry should see the performance, was that not discharge by breach ? And, if so, what became of *Taylor* v. *Caldwell* ? Lastly, it must be observed that Vaughan Williams, L.J., asserted more than once that he was following *Taylor* v. *Caldwell*, whereas it is surely plain that he was flying in the face of that authority. Stirling, L.J., in what appears to have been unconscious paradox, said, first, that he entirely agreed with Vaughan Williams, L.J., and, secondly, that he thought the case came within *Taylor* v. *Caldwell*. Romer, L.J., with some hesitation, also agreed with the leading judgment.

It is interesting to read Vaughan Williams, L.J.'s, reasons for distinguishing the *Herne Bay* case. The illustration of the hiring of the brake to go to Epsom on Derby Day had apparently been put forward during the argument of *Krell* v. *Henry* in July. In the *Herne Bay* case, on August 6, Vaughan Williams, L.J., had himself used and applied the illustration, without acknowledging his debt to counsel for Krell, who had supplied it some weeks previously. In his judgment in *Krell* v. *Henry*, he expressed the view that the illustration did not hold, because the brake (though, now that he was quoting the argument from an acknowledged source, he said the cab) would not have any special qualifications that would lead to its selection for the particular purpose. (Yet the *Cynthia* was not hailed in the street.) From that he went on to say, at p. 751, that the rooms were offered and taken because of their peculiar suitability for a view of the processions. That is, one supposes, Henry chose a flat in Pall Mall in preference to one in Ponder's End for much the same reason as Hutton preferred the *Cynthia* to a punt or a submarine, and the racing man chose a cab instead of a coster's barrow. If, however, the position of the flat is to be taken as a point of distinction from the *Herne Bay* case, then surely it ought to be remembered that there must have been a great many more suitable flats than steamers. It is submitted, therefore, that, if it was necessary to distinguish the two cases, the attempt to distinguish them was unsuccessful. But surely, in truth, no distinction existed : in each case, performance, as distinct from profitable enjoyment, was entirely possible. Or, if a distinction does exist, is it not in the fact that Hutton's purpose was written in the contract, and was thus more difficult to confuse with the company's performance ?

For the reasons now stated, *Krell* v. *Henry* was, it is submitted, wrongly decided. It is not actually binding authority in New Zealand, though it might be difficult to induce a single Judge to refuse to follow it. It seems plain, moreover, that, if the decision in *Krell* v. *Henry* is to be taken as a valid application of the rule in *Taylor* v. *Caldwell*, or as being otherwise good law, then almost any party to almost any contract may lose what he has bargained for because of some unforeseen event that renders the contract unprofitable to the opposite party. But *Krell* v. *Henry* has never been followed ; the tests of discharge it purports to lay down have not been adopted in preference to what was previously thought to be the law ; and the decision has been adversely commented on.

In *Horlock* v. *Beal*, [1916] 1 A.C. 486, the House of Lords had to consider the case of seamen who had been imprisoned for a long time in Germany and sued for wages on their return to England. It was not, of course, necessary to go beyond the strict rule ; and the judgments do not appear to indicate that the House would have been disposed to extend the rule. In *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397, 406, 407, Lord Haldane set himself to formulate the rule of law, and he put it in a form that made it clear that actual impossibility of performance was an essential requisite to discharge. In the result, the House held, by a majority, that the interpretation of the charterparty due to the requisitioning of the steamer was not such as the parties

must be held to have impliedly contracted should release them. *Krell* v. *Henry* was not referred to.

In *Scottish Navigation Co., Ltd.* v. *W. A. Souter and Co.*, [1917] 1 K.B. 222, 238, Swinfen Eady, L.J., referred to *Krell* v. *Henry* as illustrating the proposition that impossibility " in a commercial sense " is enough. The case, however, was one of enforced delay; and there is no such case in which " commercial " impossibility has been held to have been created by anything but enforced delay. In *Krell* v. *Henry*, there is no talk of commercial impossibility. It is simply said, in effect, that, as the processions were cancelled, the contract (which was not a commercial contract) could not be performed. The phrase " impossible in a commercial sense " might, of course, mean almost anything. But it seems clear from the context that Swinfen Eady, L.J., meant to indicate the kind of case in which, because of altered circumstances due to delay, the parties would be performing a substantially different contract if they did what the original contract required of them.

In *Blackburn Bobbin Co., Ltd.* v. *T. W. Allen and Sons, Ltd.*, [1918] 1 K.B. 540; aff. on app., [1918] 2 K.B. 467, there had been an agreement to sell unascertained goods. It was held, as part of the *ratio*, that such a contract could not be dissolved by the operation of the principle in *Krell* v. *Henry*, unless most special facts were to present themselves: see *per* McCardie, J., at p. 550. The learned Judge added that the rule should not be unduly extended; and he referred, as did Scrutton, L.J., in *Metropolitan Water Board* v. *Dick, Kerr and Co.*, [1917] 2 K.B. 1, 30; aff. on app., [1918] A.C. 119, to what they both called the " difficulties of application " appearing from a comparison of *Krell* v. *Henry* with the *Herne Bay* case. (Each of the learned Judges, it should be recalled, was bound by *Krell* v. *Henry*.) In two other cases, *The Penelope*, [1928] P. 180, 194, and *First Russian Insurance Co.* v. *London and Lancashire Insurance Co.*, [1928] Ch. 922, 940, the dictum of Vaughan Williams, L.J., in which he referred to *Nickoll and Knight* v. *Ashton, Edridge and Co.*, [1901] 2 K.B. 126, was relied on as a correct statement of principle, without comment on the actual decision in *Krell* v. *Henry*.

In *Larrinaga and Co., Ltd.* v. *Société Franco-Americaine des Phosphates de Médulla, Paris*, (1923) 29 Com. Cas. 1, 9, Lord Finlay referred, but *obiter*, to his view that *Krell* v. *Henry* was a questionable decision. In *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] A.C. 524, Lord Wright, in delivering the judgment of the Privy Council, drew a complete parallel between the facts in that case and those in *Krell* v. *Henry*, criticized that decision, and decided the case before him on other grounds. He said of *Krell* v. *Henry*, at p. 529:

> The authority is certainly not one to be extended: it is particularly difficult to apply where, as in the present case, the possibility of the event relied on as constituting a frustration of the adventure (here the failure to obtain a licence) was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility. It may be asked whether in such cases there is any reason to throw the loss on those who have undertaken to place the thing or service for which the contract provides at the other parties' disposal and are able and willing to do so.

The difficulty in applying the doctrine in *Krell* v. *Henry* to the facts before Lord Wright was, it would seem, commensurate with the difficulty of applying the doctrine in *Krell* v. *Henry* to the facts in *Krell* v. *Henry*: it arose in each case from the difference between getting what you bargain for and making use of it when you have got it.

It is interesting to note that in this country, as early as 1904, Edwards, J., had doubts about *Krell* v. *Henry*, and Sir Robert Stout, C.J., was insisting upon impossibility of performance: *Corby* v. *Macarthy*, (1904) 23 N.Z.L.R. 725, 732, 741. But, upon the facts of that case, it was not necessary to dissent from *Krell* v. *Henry*. Again, in *Bell* v. *Ellis and Manton*, [1918] N.Z.L.R. 718, it was unnecessary to decide whether *Krell* v. *Henry* should be followed. In *Trustees of Fountain of Friendship Lodge Friendly Society (No. 349)* v. *Tait*, [1939] N.Z.L.R. 571, 577, Ostler, J., referred to *Krell* v. *Henry* as the classic example of the class of cases in which the parties are released from performance because the purpose for which the contract was made has failed. But it seems to be clear that *Krell* v. *Henry* is the only reported example of that " class." Even in *Krell* v. *Henry*, it would be necessary to assume that Krell's purpose, as well as Henry's, was that Henry should see the processions, if one is to say that the purpose for which the contract was made had failed. It is suggested, however, that the case actually before Ostler, J., was a case of construction. A contract was to last " for the period of the operation of the National Expenditure Adjustment Act," which a subsequent statute extended indefinitely. Surely, therefore, the question was what the parties had meant by what they said, as it was in *Baily* v. *De Crespigny*, and not whether they had contracted upon the tacit footing that performance would be impossible (or, if we must have *Krell* v. *Henry*, of no real value to one party) in a particular event. Nor, with respect, can the present writer see how, in the *Fountain Lodge* case, it could be said that the " purpose of the contract " had failed. The only purpose the parties can have had was to settle their rights during an ascertainable period; and the question how to ascertain the period was a question of construction, and not of implication. While, however, there is no doubt that Ostler, J., treated the case as one of frustration, his reference to *Krell* v. *Henry* was *obiter*. He did not purport to apply any special principle arising out of *Krell* v. *Henry*, and relied on the *Tamplin* case.

Krell v. *Henry*, then, has not as yet had any reported effect upon any subsequent contract, unless possibly in Australia or Canada, as might appear if indices of English cases followed in those countries were available here. Moreover, the case has been criticized by the only English tribunals upon which it is not binding. It is not possible to explain the absence of decisions following the case by pointing to the special nature of its facts, for, though no Coronation has since been postponed, there have been two wars that have postponed innumerable events, and, besides that, a very large number of persons must in times of peace have made contracts in anticipation of events that did not occur, so as to leave one party or the other lamenting a vanished profit.

Where, then, are the cases in which such disappointments have been solaced by discharge of contract? The truth, it is suggested, is that *Krell* v. *Henry* did not actually widen any rule, but misapplied the existing rule. There can be no doubt that the existing rule (omitting reference to illegality) was compendiously stated by Vaughan Williams, L.J., in the passage already referred to, at p. 748. His pronouncement is in exact accord with the previous cases, as also with the

subsequent decisions up to the present day—*e.g.*, in *Morgan* v. *Manser*, [1947] 2 All E.R. 666. Apparently, moreover, this was the rule that Vaughan Williams, L.J., set himself to follow, although he proceeded to ask himself, at p. 751, a question, his answer to which excluded the rule. For these reasons, it is submitted that the best way to regard *Krell* v. *Henry* is as a case which made no new law, and was merely wrong on its own facts. It is clear that the Court did not purport to make new law. It seems equally clear that any new principle that would square at once with the facts and the decision would be far-reaching and incalculable. Surely, then, it is best to treat the case as *lusus incuriae*.

—PULEX.

TRANSFER OF UNDEDICATED STREETS.

Surrender of Rights by Owners of Allotments on Deposited Plan.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

Before the coming into operation of the Public Works Acts Amendment Act, 1900, there was no statutory provision compelling a subdividing owner of land to provide each allotment with a frontage to a public highway. The deposit of a plan under the Land Transfer Act did not (and still does not) operate as a dedication to the public of roads or streets shown on the plan of subdivision. Although deposit of a plan did not (and still does not) *ipso facto* act as a dedication to the public of such roads and streets, it is evidence of the *animus dedicandi—i.e., of the intention to dedicate to the public*: s. 107 of the Land Transfer Act, 1870, s. 173 of the Land Transfer Act, 1885, s. 179 of the Land Transfer Act, 1915, *Bank of New Zealand* v. *Auckland District Land Registrar*, (1907) 27 N.Z.L.R. 126, *Walker* v. *Auckland District Land Registrar*, [1923] G.L.R. 456.

The mere deposit of the plan does not give the public any rights, for, as Williams, J., said in *Bank of New Zealand* v. *Auckland District Land Registrar*, (1907) 27 N.Z.L.R. 126, 138:

> All that can be said is that by the deposit he [the subdividing owner] has promised that they should be appropriated to public use, a promise which, so far as the public is concerned, is without any consideration.

But, with regard to plans deposited before the coming into operation of the Public Works Acts Amendment Act, 1900, the roads or streets may have become effectually dedicated as public highways by acceptance on behalf of the public of the dedication by the appropriate local authority (usually established by proof of the expenditure by the local body of money in the upkeep or maintenance of the roads or streets), if the land was not situated in a city, borough, or town board district (as in *Walker* v. *Auckland District Land Registrar*, [1923] G.L.R. 456, and in *Mayor, &c., of Grey Lynn* v. *Assets Realization Board*, (1908) 27 N.Z.L.R. 849), or, if the land was situated in a city, borough, or town district, by operation of s. 174 of the Municipal Corporations Act, 1933, which resembles very much the common-law doctrine of implied dedication, as to which, see the article by the learned editor in (1935) 11 NEW ZEALAND LAW JOURNAL, 137, 153.

As pointed out by Herdman, J., in *Walker* v. *Auckland District Land Registrar* (*supra*), when dedication is complete, the dedicator's ownership in the land is extinguished altogether; it is not then simply a case of the fee's remaining vested in the subdividing owner, subject to easements in favour of each purchaser of the allotments.

In many cases, a search of the Land Transfer Office will not disclose the status of these streets or roads in respect of which no formal instrument of dedication has ever been executed. A search may, indeed, indicate that the fee remains vested in the subdividing owner or his successor in title, but in actual fact the streets or roads may have become public highways: this is one of the exceptions (and, from a practical point of view, a very necessary exception) to the conclusiveness of the Land Transfer Register: *Martin* v. *Cameron*, (1893) 12 N.Z.L.R. 769, *Mayor, &c., of Wellington* v. *Stafford and District Land Registrar*, [1927] N.Z.L.R. 552, and s. 70 of the Land Transfer Act, 1915.

This rather unsatisfactory position (for which there appears to be no practical remedy) does not prevail with regard to plans deposited after the coming into operation of the Public Works Acts Amendment Act, 1900, for, as pointed out by Edwards, J., in *Parkes and Wright* v. *Wellington District Land Registrar*, (1914) 33 N.Z.L.R. 1449, since the passing of the Public Works Acts requiring dedication of roads, no road which is a necessary portion of a scheme of subdivision can be dedicated except in accordance with the statutory conditions, and those statutes require dedication by registration of an instrument of dedication in the Land and Deeds Registry Office.

In the foregoing, I have dealt with the rights of the public rather than with those of the purchasers of the allotments on the deposited plan of subdivision. These rights are clearly and minutely analyzed by Williams, J., in *Bank of New Zealand* v. *Auckland District Land Registrar*, (1907) 27 N.Z.L.R. 126, 138. First, unless expressly excepted (which is most unlikely), they have a right-of-way over the roads and streets, for s. 179 of the Land Transfer Act, 1915, provides that, on the deposit of the plan, a right-of-way over all such roads (which would include, of course, streets) shall be appurtenant to every portion of the land in such subdivision, unless expressly excepted, and every instrument in which land is described by reference to a deposited plan shall take effect, according to the intent and meaning thereof, as if such plan were fully set out thereon. But each purchaser has an additional right: he has a contractual right to compel the subdividing owner to dedicate the roads or streets as public highways, for there is no lack of consideration moving from each purchaser to the sub-

dividing owner. But these rights may be surrendered by each purchaser, as was done in *Bank of New Zealand* v. *Auckland District Land Registrar*. Where, therefore, there has been no dedication to the public (express or implied), and where the person in whom the fee is vested procures registrable surrenders of the rights of all purchasers of the allotments, he can transfer a clear title to the fee of the roads and streets, or otherwise deal with them. Before registering any such dealings, of course, the District Land Registrar would require to be satisfied that the roads or streets had not been dedicated to the public. No owner of any allotment could effectively surrender his rights without the consent of his mortgagee or lessee, if he had mortgaged or leased his allotment.

PRECEDENT.

MEMORANDUM OF TRANSFER.

I A.B. of Palmerston North settler being registered as the proprietor of an estate in fee simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in all that piece of land situated in the Provincial District of containing [*set out here area*] be the same a little more or less being the unnamed streets shown on Deposited Plan Number 600 and endorsed hereon and being the balance of the land comprised in Certificate of Title Register Book Volume folio Registry as the same are delineated on the plan endorsed hereon and coloured red and blue respectively IN CONSIDERATION of the sum of ONE HUNDRED POUNDS (£100) paid to me by C.D. and E.F. both of Palmerston North farmers the receipt of which sum is hereby acknowledged DOTH HEREBY TRANSFER to the said C.D. [*set out here area*] being that portion of the unnamed streets coloured blue on the plan drawn hereon and to the said E.F. [*set out here area*] that portion of the said unnamed streets coloured red on the said plan.

In witness whereof I have hereunto subscribed my name this day of 1950

SIGNED on the day above-named by the said A.B. in the presence of: } A.B.

G.H.,
Solicitor,
Palmerston North.

I G.J. of Palmerston North farmer being the owner of lots on Deposited Plan Number 600 Township of DO HEREBY CONSENT to the within memorandum of transfer and agree to the closing of the roads therein mentioned and to the extinguishment of all rights of way thereover and do hereby transfer and surrender to the registered proprietor all my rights thereto and thereover.

SIGNED by the said G.J. in the presence of: } G.J.

K.L.,
Solicitor,
Palmerston North.

[*Here follow similar consents of other proprietors of other lots on Deposited Plan Number 600.*]

[*If any lots are mortgaged or leased, the consents of such mortgagees and lessees are also to be endorsed hereon.*]

The County Council being the controlling authority within whose jurisdiction the within-described land is situated DOTH HEREBY CONSENT to the within memorandum of transfer and doth hereby certify that the lands comprised therein have not become public highways.

IN WITNESS whereof the common seal of the Chairman Councillors and Inhabitants of the County of was affixed pursuant to a resolution of the County Council passed on the day of 1950 in the presence of: } L.S.

N.B. *This certificate would not constitute conclusive evidence as to non-dedication*: Cherry *v.* Snook, (1893) 12 N.Z.L.R. 54. *The District Land Registrar would be entitled to ask for further evidence.*

Correct for the purposes of the Land Transfer Act.
Solicitor for the transferee.

ROAD TRANSPORT LAWS.

Changes Effected by the Transport Act, 1949.

By R. T. DIXON.

The Transport Act, 1949, while principally a consolidation of the large number of enactments described in its Third and Fourth Schedules, also effected numerous changes in the law, some being of an important nature. There follows an explanation of these changes, and, for convenience in reference, the sections will be taken *seriatim*. The changes effected by the Transport Law Amendment Act, 1948, are not referred to, as they were reviewed in (1949) 25 NEW ZEALAND LAW JOURNAL, 45, 59.

Short Title and Commencement.—Section 1 provides that the Act comes into force on November 1, 1949.

Interpretation.—Section 2 contains the definitions. Of these, the following require some examination for changes:

"Agricultural purpose": this is a new definition, and is linked principally with the definition of "agricultural tractor" (next examined) and s. 17 (3) (relating to exemption of agricultural tractors from registration fees) and s. 62 (1) (relating to refund of petrol tax on motor-spirit used in agricultural tractors). It will be noted that the definition does not include the transport on a road of the produce of or requisites for a farm; thus, the exemptions above-mentioned cease to apply to such type of transport.

"Agricultural tractor" is also a new definition, and applies only to those tractors used exclusively for agricultural purposes as above defined.

"Goods-service vehicle" is a new definition, but no comment is required.

"Heavy motor-vehicle" is a new definition, but is similar to the definition of "heavy motor-vehicle" already contained in the Heavy Motor-vehicle Regulations, 1940.

The definition of "motor-car" is amended slightly by adding the words "inclusive of the driver."

Trailers which are designed exclusively as part of the armament of the Armed Forces are by para. (*d*) thereof excluded from the definition of "motor-vehicle."

The definition of "road" is new, but requires no comment.

In the definition of "taxicab," a slight alteration occurs in the wording of para. (*c*), the former words "by each passenger" being replaced by the words

" by passengers." The effect of this is to exclude any argument that the use of a taxicab when some passengers pay separate fares and others do not is a legal use under a taxicab service licence.

The definitions of " traction-engine " and " tractor " are new, but require no comment.

The term " Traffic Officer " replaces the former term " Traffic Inspector."

A very important definition is that of " use," as it includes " permitting to be on any road."

Part I. Administration.

Commissioner of Transport and Other Officers.—Subsections 2, 3, and 4 of s. 6 are new, and provide for the appointment of a Deputy Commissioner of Transport.

Inquiries for Purposes of Transport Co-ordination.—Section 7 (3) is new, and has drafting purpose only.

Part II. Registration and Licensing of Motor-vehicles and Licensing of Drivers.

Motor-vehicles to be registered and to have Registration-plates and Annual Licences.—Paragraph (*b*) of subs. 1 of s. 15 is new, and enables regulations to provide for either a general registration-plate system of the annual licence label system for licensing of motor-vehicles.

From subs. 3 is omitted the former proviso (in s. 3 (2) of the Motor-vehicles Act, 1924) whereby it was permissible to use an unregistered motor-vehicle while the latter was being taken to be registered.

Applications for Registration.—Section 17 contains a new subs. 5, which makes it an offence to apply for registration of a motor-vehicle already registered.

Registration.—Section 18 contains new wording to provide for simultaneous registration and licensing of vehicles.

Exemptions from Annual Licence Fees.—The Main Highways Board is newly included in s. 21, and its vehicles are entitled to exemption in the circumstances described.

Details of Registers to be supplied to Applicants.—In s. 25, automobile associations are now included among those who are entitled to free information from the register of motor-vehicles.

Notification of Change of Ownership of Motor-vehicles.—Section 26 (2) is an important new provision which applies this change-of-ownership section to cases when a vehicle is repossessed under a hire-purchase agreement, and the vendor under the agreement must in every case give the required notice.

Court may disqualify Convicted Persons, or endorse Drivers' Licences.—Paragraph (*b*) of subs. 1 of s. 31 is amended so as to conform in the latter part with para. (*c*) relating to endorsement of drivers' licences issued in the future.

Part III. Road Traffic.

Exemption from Speed-limits of Police, Traffic Officers, and Ambulance and Fire-brigade Drivers.—In s. 37, the exemption of ambulances from speed restrictions is now made to apply only to those ambulances fitted with a siren or bell.

Duties of Motor-drivers in Cases of Accidents.—By s. 47 (2), the requirement to supply on demand names and addresses and other particulars following an accident, may be made by a Traffic Officer as well as a constable.

On demand by Constable or Traffic Officer, Driver of Motor-vehicle to stop and give Name and Address.—By s. 48, the obligation of the driver to stop on demand of a constable in uniform or Traffic Officer is made to apply only when the latter is wearing a distinctive cap with badge of authority thereon.

Restriction of Heavy Traffic on Roads.—In s. 52, the powers for restriction of heavy traffic on roads are newly extended to the Main Highways Board in the case of a main highway.

By-laws as to the Use of Roads.—By s. 54, the various by-law powers set out therein may now be exercised by the Main Highways Board as well as by local authorities.

Extended Operation of Licences in respect of Heavy Traffic and Vehicles plying for Hire.—The term " plying for hire " which governs s. 57 is extended by inserting " or otherwise available for hire."

Part V. Motor-vehicles Insurance (Third-party Risks).

Special Provisions in respect of Change of Ownership.—The former provision making it obligatory for the owner of a motor-vehicle to notify the insurance company of a change of ownership has now (by s. 71) been omitted.

Owner to give to Insurance Company Notice of Accidents, &c.—In s. 73 (2), the notice now requires to be in writing. In subs. 3, the words " or any other person that the insurance company is liable to indemnify under a contract of insurance under this part of the Act " have been inserted after " owner."

Insurance Company may settle Claims.—Section 74 also has been amended on similar lines to the amendment explained above to s. 73 (3).

Provisions Applicable where a Premium Less than the Proper Premium is paid.—Section 79 (3) now provides that any additional premium shall be paid to the Deputy Registrar, and not (as formerly) to the insurance company direct.

Part VI. Road Transport Services and Harbour-ferry Services.

The legislation in this part now includes, with the control of road passenger-services, provisions of former Orders in Council providing for the licensing control of road goods-services and harbour-ferry services.

The Regulations relating to goods-services were the Transport (Goods) Applied Provisions Order, 1948 (Serial No. 1948/206), and the Regulations relating to harbour-ferries were the Transport (Harbour-ferry Services) Applied Provisions Order, 1949 (Serial No. 1949/61), and Amendment No. 1 (Serial No. 1949/91). These have been revoked by s. 169 (2) of this Act.

Constitution of Goods-service Districts, and Licensing Authorities therefor.—In s. 83, the term " goods-service district " replaces the former term " controlled area " for describing the areas of goods-service licensing control.

Constitution of Harbour-ferry Service Districts and Licensing Authorities therefor.—Section 84 (4) enables the Minister of Transport to appoint the Licensing Authority for a harbour-ferry service district as a one-member Authority or a three-member Authority, an

alternative which was formerly not available to him so far as harbour-ferry services were concerned.

Special Provisions as to Metropolitan Authorities.—Section 85 applies to Metropolitan Authorities the obligation to give reasons for decisions and to cause them to be entered in the minute-book. This formerly applied only to District Licensing Authorities.

Disqualification from Appointment as Licensing Authority.—By s. 86, in addition to the other disqualifications of membership of Licensing Authorities, persons are now excluded if interested, directly or indirectly, in carrying on aircraft services.

Passenger-services, Goods-services, and Harbour-ferry Services to be licensed.—The former special penal provision applying to companies and directors of companies is now (by s. 95) omitted.

Certain Services declared to be Goods-services.—Words are newly inserted in s. 96, making it clear that there is no conflict between the "goods-service" described in this section and the "goods-service" described in s. 2.

Exemptions from Transport Licences.—In para. (*c*) of subs. 1 of s. 97, it is now provided that the Minister is to approve of the exemption of the service, and not, as formerly, of the vehicle used in the service. The exemptions described in paras. (*c*)–(*h*) were formerly applied by the Transport (Goods) Applied Provisions Order, 1948 (Serial No. 1948:206), but are now statutory.

Defining Proper Licensing Authority to grant Licences or exercise Jurisdiction in respect thereof.—Section 99 (1) (2) (3) provides the Minister with greater scope than formerly for the appointment of Licensing Authorities, and for the delegation to them of the control of the transport services.

Licensing Authority to advertise Receipt of Application and hold Public Sitting.—The notice under s. 101 (1) is now to be fourteen clear days' notice, instead of seven clear days' notice, as formerly.

Matters to be considered before determining Applications for Licences.—Paragraph (*b*) of subs. 1 of s. 102 includes the new words "or any parts thereof" (in its reference to districts). Paragraph (*a*) of subs. 2 includes the word "area," para. (*d*) has added to it the words "and in the case of an existing service, the manner in which it has been carried on," and para. (*e*) has had added to it the words "if it is intended to be of a regular nature."

The former para. (*g*) of s. 26 (2) of the Transport Licensing Act, 1931 (relating to transport requirements), has been omitted, possibly as it was considered unnecessary in view of para. (*b*) of subs. 1 of s. 102.

(To be continued.)

OBITUARY.

Mr. Eric Russell (Invercargill).

Mr. Eric Russell, who had been in practice in Invercargill for many years, died on March 12. He was 67 years of age, and had retired from practice some years before his death.

His father, William Russell, who was born in Auckland, where his parents had arrived in 1840, became articled to his elder brother, Thomas Russell, who was then a partner in the firm of Whitaker and Russell. Thomas was the leading spirit in the foundation of the Bank of New Zealand, the New Zealand Insurance Co., the New Zealand Loan and Mercantile Co., and the Colonial Sugar Co. In 1862, William Russell went to Invercargill. He joined T. M. Macdonald in partnership, but retired from the partnership to become the first District Land Registrar in Southland. He signed the first certificate of title, Volume 1, Folio 1, on May 3, 1871. He later resumed the partnership with T. M. Macdonald, and in 1889 set up the firm of Russell and Son, with his son Eustace, whose son is now in the firm.

The late Mr. Eric Russell was born in Invercargill, and was educated there. He took up engineering in his youth, and was an apprentice in the old-established Johnston's Foundry. While there, he decided to study law, and later he was taken into partnership with his father and brother, Mr. Eustace Russell, and the legal firm of Russell and Son became Russell and Sons. His years of practice were interrupted by a period of military service overseas in the 1914-18 war, in which he rose to the rank of captain.

Upon his return from overseas, Mr. Russell decided to practise on his own account. When he retired, he took up farming at the family home. His knowledge of law and farming led to his appointment as chairman for Southland of the Mortgagors' and Lessees' Rehabilitation Commission, an office he discharged with distinction to himself and satisfaction to everyone who appeared before his Commission.

Mr. Russell's association with the sport of horse-racing extended back to the days when Listening Post, a popular galloper bred from his own importation, the mare Eager Eyes, raced in his colours and won several important events. In recent years, his colours were carried successfully by Tea for Two, Absentee, Doulton, and other useful horses.

Mr. Russell's interests in racing were not confined to ownership and stake money. He took an active part in the administration of racing in Southland, and for the past twenty-five years he was a member of the committee of the Southland Racing Club. He was a vice-president of the club for the past ten years, and a member for several years of the district committee.

His brother, Mr. Eustace Russell, now on a visit to England, is the surviving member of a family of six sons and daughters. Mr. Eric Russell did not marry.

LEGAL LITERATURE.

New Books and Publications.

Paterson's Licensing Acts with Forms, 58th Ed. (1950), by F. Morton Smith. Pp. cxxviii + 1684, with Index (196 pp.). London: Butterworth and Co. (Publishers), Ltd. Price 58s. post free.

Tristram and Coote's Probate Practice, 19th Ed. Second Cumulative Supplement, by H. A. Darling and G. M. Green. Pp. xiii + 73. London: Butterworth and Co. (Publishers), Ltd. Price 8s. 6d. post free (Book and Suppt. 91s. 6d. post free).

Employer's Liability, by John H. Munkman. Pp. xxxvi + 308 and Index. London: Butterworth and Co. (Publishers), Ltd. Price 27s. 6d. post free.

Mozley and Whiteley's Law Dictionary, 6th Ed. (1950), by J. Asterley Jones, LL.B., M.P., and J. C. Fisher, B.A. Pp. 376. London: Butterworth and Co. (Publishers), Ltd. Price 23s. 6d. post free.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"**Aforesaid.**"—It was recently suggested to Scriblex that he should bring columnistic strictures to bear upon the continued use of the word "aforesaid." At first sight, he was disposed to agree; but more mature reflection raises considerable doubt in his mind. Here is an inoffensive little word that has done its work well in hundreds of thousands of documents and, as far as we know, harmed nobody. Most legal dictionaries and phrase-books other than *Stroud* ignore it completely. *Wharton's Law Lexicon*, 14th Ed. 40, dismisses it in two words as "already mentioned." In a weighty pronouncement, Lord Denman, C.J., in *Peake* v. *Screech*, (1845) 7 Q.B. 603, 610; 115 E.R. 616, 620, says it "naturally refers to the places named immediately before." Shakespeare tends to confuse the issue when, in *Troilus and Cressida*, he writes: "Thersites is a foole, and, as aforesaid, Patroclus is a foole." Fowler, who ought to know better, cites it in his *Modern English Usage* as an example of pedantic humour along with "ergo," "nasal organ," and "nether garments." In its more whimsical aspect, it is to be found in *The Lawyer's Invocation to Spring*, by H. H. Brownell:

> "*Whereas, on certain boughs and sprays*
> *Now divers birds are heard to sing,*
> *And sundry flowers their heads upraise,*
> *Hail to the coming on of Spring!*
>
> "*The birds aforesaid—happy pairs—*
> *Love, 'mid the aforesaid boughs, enshrines*
> *In freehold nests; themselves their heirs,*
> *Administrators and assigns.*
>
> "*O busiest term of Cupid's Court,*
> *Where tender plaintiffs actions bring,*
> *Season of frolic and of sport,*
> *Hail, as aforesaid, coming Spring!*"

Index Note.—Scriblex is indebted to a learned contributor from Gisborne, who, induced by the note in this column on the index to the *Fifty Forensic Fables* of "O" (Theobald Mathew), has looked up the Preface to *Spencer Bower's Actionable Misrepresentation*, wherein he writes:

> I have tried to put myself in the shoes of a series of variously constituted persons, and imagine what sort of clue-words or entries even the most eccentric or abnormal of such persons might look for. I do not pretend to have gone quite so far in this direction as the author of the famous index which under the entry of "Mind," invited the reader to contemplate and revere "the great—of Best, C.J.," or even as far as the compilers of the index to at least the first eight editions of *Smith's Leading Cases*, who at p. 978 (8th Ed., 1879) to the heading "Eagle's Eyes" append the two comforting assurances, in the form of sub-entries, that "the Court will not always look with,—" and further, "will not spy variance after verdict."

This entry, he says, has, indeed, disappeared from the later editions, but for many years the author and successive editors of the great treatise referred to must have imagined that somewhere in the world there existed, or might thereafter come into being, an individual who would desire to slake his thirst for information at this sequestered fountainhead, and at this particular side-entrance seek admission to the mysteries and oracles of the law.

"**Without Prejudice.**"—Where the husband in a divorce case sought to adduce evidence of what had taken place at a meeting between the parties and their solicitors, at which a reconciliation was discussed, Ormerod, J., considered that the evidence ought to be admitted, on the ground that a meeting arranged by the parties to a matrimonial dispute to discuss a possible reconciliation could not by itself be taken to be without prejudice if it was not specifically stated to be so: *Bostock* v. *Bostock*, [1950] 1 All E.R. 25. On the other hand, in *McTaggart* v. *McTaggart*, [1948] 2 All E.R. 754, the Court of Appeal considered that what had taken place at an interview between husband and wife before a Probation Officer who wanted to effect a reconciliation could not be admitted in the evidence of the officer if objection was taken, because, as Denning, L.J., said, at p. 756:

> There is no chance of reconciliation unless the parties are able to talk with frankness to the Probation Officer and with complete confidence that what they say will not be disclosed. If they are genuinely seeking his assistance they must be taken to negotiate on that understanding even though nothing is expressly said.

The two cases are hard to reconcile, but there seems in principle no reason why the parties' solicitors ought not to be able to encourage free discussion towards settlement in matrimonial disputes under the same protection that is afforded when a Probation Officer or conciliator is present.

Recorder's Error.—In *R.* v. *Green*, [1950] 1 All E.R. 38, the appellant was convicted at the Bolton Quarter Sessions of receiving stolen cloth—60,947 yards of it—valued at more than £7,000. There was no doubt in the opinion of the Court of Criminal Appeal that, on the evidence, the conviction was amply justified; but, after the jury were enclosed, they sent the Recorder before whom he was tried a communication, which he received in his private room, and he then sent an answer to the jury in their rooms without disclosing what the question or answer was, and without coming into Court. It was stated to be a simple matter with which he had dealt in his summing-up. Nevertheless, Lord Goddard, L.C.J., pointed out that no departure could be authorized from the well-organized rule that these matters must be dealt with openly in Court; and the conviction was quashed. Green was lucky—and so are we, who are privileged to practise under a system of justice that renders such a decision possible.

From My Notebook.—"A drastic revision of our present fiscal system will become imperatively necessary if we are to remain a great nation": Lord Macmillan in an article in *The Sunday Times*.

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace . . . I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the Minister": Lord Atkin in *Liversidge* v. *Anderson*, [1942] A.C. 206, 244; [1941] 3 All E.R. 338, 361.

PRACTICAL POINTS.

1. Adoption of Children.—*Adopted Child dying Intestate—Natural Brothers and Sisters—Whether Next-of-kin sharing with Adoptive Brothers and Sisters—Infants Act, 1908, s. 21 (Statutes Amendment Act, 1949, s. 27).*

QUESTION: A.B. died on October 26, 1947. A.B. had three sisters of full blood and a sister of half-blood, who all survived him. On November 25, 1914, A.B. had been legally adopted by C.D. and E.D., who both predeceased him. Before the adoption, C.D. and E.D. had children, who still survive. Are these children of C.D. and E.D. entitled to share with the sisters of the blood in the estate of A.B.? (Reference may be made to s. 6 (1) (*e*) of the Administration Amendment Act, 1944, *In re Carter (deceased)*, (1905) 25 N.Z.L.R. 278, *In re Taylor*, [1932] N.Z.L.R. 1077, 1081, *In re Carter*, [1941] N.Z.L.R. 33, 36, s. 27 of the Statutes Amendment Act, 1949, and (1950) 26 NEW ZEALAND LAW JOURNAL, 1.)

ANSWER: It is assumed that the adoption order was made in New Zealand and that property is distributable according to New Zealand law. There appears to be no case where it has been held that natural relations are entitled to share in the estate of a person whose relationship to them has in law been terminated by the making of an adoption order. Section 21 (2) of the Infants Act, 1908, provides that the order of adoption terminates all rights and legal responsibilities and incidents between the child and its natural parents except the *right of the child* to take property as heir or next-of-kin of its natural parent, directly or by right of representation. There is no provision preserving to the natural relatives any right to share in their natural relative's estate after the latter's adoption. In the case referred to by the inquirer, the natural sisters and half-sister ceased in law to be related to their brother after his adoption. Thereafter, he was in law a stranger in blood to them, and became the child of the adopting parents, born to them in lawful wedlock: Infants Act, 1908, s. 21 (1).

Y.2.

2. Land Transfer.—*Execution of Instrument by Person physically unable to sign—Attestation Clause.*

QUESTION: A memorandum of transfer requires execution by a person who is not illiterate (in fact, he is quite well-educated), but who cannot sign his name because of a physical disability. Can you suggest a suitable attestation clause? We presume that in such a case it would be preferable if a solicitor witnessed the transferor's signature.

ANSWER: In such a case, it would be advisable to get a solicitor to witness the instrument. The District Land Registrar has the right to have the signature *proved* under s. 170 or s. 171 of the Land Transfer Act, 1915. The following attestation clause, it is suggested, would be suitable: "Signed by the said A.B. after the same had been read by the said A.B. (by making his mark hereto he being unable to write owing to a physical disability) in the presence of:—

C.D., Solicitor."

X.1.

3. Death Duties.—*Gift Duty—Gift to Anti-vivisection Society—Liability to Gift Duty.*

QUESTION: Is a gift of £1,000 to an anti-vivisection society exempt from gift duty if it is made in New Zealand?

ANSWER: If the property is real property or leasehold situate in New Zealand, or is property other than real property or leasehold property situate or deemed to be situate in New Zealand because the donor is domiciled in New Zealand, the gift will be liable to gift duty in New Zealand, because an anti-vivisection society is not a charity: see the House of Lords decision, *National Anti-vivisection Society* v. *Inland Revenue Commissioners*, [1947] 2 All E.R. 217.

X.1.