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CHARITABLE TRUST: ESSENTIALS OF VALID CHARITABLE TRUST FOR EDUCATIONAL PURPOSES.

WE are apt now to classify all charities by reference to Lord Macnaghten's division in *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A.C. 531, 583; but, as Lord Simonds observed in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31, 33, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class—namely, "other purposes beneficial to the community." That, His Lordship added, is certainly wrong, except in the anomalous case of trusts for the relief of poverty.

The question arose in the course of an appeal to the House of Lords, the facts of which were as follows:

On March 24, 1930, John Phillips and Elizabeth Phillips, his wife, executed a settlement and appointed the respondent, Tobacco Securities Trust Co., Ltd., the trustees, and assigned to them certain investments in the British-American Tobacco Co., Ltd. (hereinafter referred to as "the company"), and its subsidiary and allied companies, and certain real estate in Trinidad (together with some property in Scotland, as to which no question arose in the appeal) to be held on certain trusts during the lives of the grantors and the survivor of them, and thereafter on trust to apply the income of the trust premises:

> in providing for or assisting in providing for the education of children of employees or former employees of British-American Tobacco Co., Ltd. . . . or any of its subsidiary or allied companies in such manner and according to such schemes or rules or regulations as the acting trustees shall in their absolute discretion from time to time think fit and also at the discretion from time to time of the acting trustees to apply all or any part of the corpus of the said trust for the like purposes.

The expression "acting trustees" meant the grantors during their lives and the directors for the time being of the company, or, in the event of the reconstruction or amalgamation of the company, such other persons as were therein mentioned, in which event a variation was made also in the beneficiaries under the trust.

Elizabeth Miller Phillips died on October 8, 1940, leaving John Phillips her universal legatee and devisee. He died on June 26, 1947, and his will was duly proved by the other respondent, Barclays Bank (Dominion, Colonial, and Overseas). The probate value of the trust premises was over £125,000, including £2,000 which represented the proceeds of the property in Scotland. It appeared that in Trindad the English common law and doctrines of equity have been in force since 1848.

In these circumstances, the question arose whether the trust, as above set out, was a valid trust. It is clear that it created a perpetuity. It was, therefore, invalid unless it could be supported as a charitable trust.

There was no evidence of any connection of the grantors with the company, except that John Phillips was clearly a large stockholder. It appears that the number of employees of the company and its subsidiary and allied companies was large. It exceeded 110,000.

This question coming before Roxburgh, J., in the Chancery Division, it was conceded, and he held, that, having regard to the decisions of the Court of Appeal in *Re Compton*, [1945] 1 All E.R. 198, and *Re Hobourn Aero Components, Ltd.'s, Air Raid Distress Fund*, [1946] 1 All E.R. 501, he was bound to declare the trust void except as to the property in Scotland, and on February 10, 1949, he made an order accordingly. On appeal to the Court of Appeal, the same view was taken, and the appeal was dismissed. In neither Court was more than a formal decision given. Lord Simonds said that their Lordships must look to the cases cited for the reasoning which led to it.

In the House of Lords, Lords Simonds, Normand, Oaksey, and Morton were in favour of dismissing the appeal. Lord MacDermott dissented. In the course of his speech, Lord Simonds made some preliminary observations:

> It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that trust is not charitable if it confers only private benefits. In the recent case of *Gilmour* v. *Coats*, [1949] 1 All E.R. 848, this principle was reasserted. It is easy to state and has been stated in a variety of ways, the earliest statement that I find being in *Jones* v. *Williams*, (1767) Amb. 651, 652; 27 E.R. 422, in which *Lord Hardwicke*, L.C., is briefly reported as follows: "Definition of charity; a gift to a general public use, which extends to the poor as well as to the rich . . ." With a single exception, to which I shall refer, this applies to all charities.

Lord Simonds went on to say that, in the case of trusts for educational purposes, the condition of public benefit must be satisfied:

> The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it. If I may begin at the bottom of the scale, a trust established by a father for the education of his son is not a charity. The public element, as I will call it, is not supplied by the fact that from that son's education all may

benefit. At the other end of the scale the establishment of a college or university is beyond doubt a charity. "Schools of learning, free schools, and scholars in universities" are the very words of the Preamble to the Charitable Uses Act, 1601 (43 Eliz., c. 4). So also the endowment of a college, university, or school by the creation of scholarships or bursaries is a charity; and none the less because competition may be limited to a particular class of persons. It is on this ground, as *Lord Greene*, M.R., pointed out in *Re Compton*, [1945] 1 All E.R. 198, 206, that the so-called "founder's kin" cases can be rested. The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a "section of the community" as to satisfy the test of public benefit.

These words "section of the community" have no special sanctity, Lord Simonds explained; but, he added, they conveniently indicate (i) that the possible (he emphasised the word "possible") beneficiaries must not be numerically negligible, and (ii) that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *Re Compton*, [1945] 1 All E.R. 198, of a number of families cannot be regarded as charitable. A group of persons may be numerous; but, if the *nexus* between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

His Lordship then considered the present case, where the class of beneficiaries was numerous, but the difficulty arose in regard to their common and distinguishing quality. That quality was being children of employees of one or other of a group of companies. He continued:

> I can make no distinction between children of employees and the employees themselves. In both cases the common quality is found in employment by particular employers. The latter of the two cases to which I first referred, the *Hobourn* case, [1946] 1 All E.R. 501, is a direct authority for saying that such a common quality does not constitute its possessors a section of the public for charitable purposes. In the former case, *Re Compton*, [1945] 1 All E.R. 198, *Lord Greene*, M.R., had by way of illustration placed members of a family and employees of a particular employer on the same footing, finding neither in common kinship nor in common employment the sort of *nexus* which is sufficient. My Lords, I am so fully in agreement with what was said by *Lord Greene* in both cases and by my noble and learned friend, then *Morton*, L.J., in the *Hobourn* case, [1946] 1 All E.R. 501, that I am in danger of repeating its purport without improving on their words. No one who has been versed for many years in this difficult and very artificial branch of the law can be unaware of its illogicalities, but I join with my noble and learned friend in echoing the observations which he cited (*ibid.*, 510) from the judgment of *Russell*, L.J., in *In re Grove-Grady* ([1929] 1 Ch. 557, 582), and I agree with him that the decision in *In re Drummond, Ashworth* v. *Drummond*, [1914] 2 Ch. 90, " . . . imposed a very healthy check upon the extension of the legal definition of 'charity.'" It appears to me that it would be an extension, for which there is no justification in principle or authority, to regard common employment as a quality which constitutes those employed a section of the community. It must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established.

With the single exception of *Re Rayner*, (1920) 89 L.J. Ch. 369, which all their Lordships of the majority regarded as of doubtful authority, no case had been brought to their notice in which such a claim as this had been made, where there was no element of poverty in the beneficiaries, but just this and no more, that they were the children of those in a common employment.

Lord Simonds said that he would end where he began—by saying that he concurred in the reasoning of the Court of Appeal in the *Hobourn* case, [1946] 1 All E.R. 501. He concluded his speech as follows:

> I would also, as I have previously indicated, say a word about the so-called "poor relations" cases. I do so only because they have once more been brought forward as an argument in favour of a more generous view of what may be charitable. It would not be right for me to affirm or to denounce or to justify these decisions. I am concerned only to say that the law of charity, so far as it relates to "the relief of aged, impotent, and poor people" (I quote from the Charitable Uses Act, 1601) and to poverty in general, has followed its own line, and that it is not useful to try to harmonize decisions on that branch of the law with the broad proposition on which the determination of this case must rest. It is not for me to say what fate might await those cases if in a poverty case this House had to consider them, but, as was observed by *Lord Wright* in *Admiralty Commissioners* v. *Valverda* (*Owners*), [1938] 1 All E.R. 162, 174: "This House has, no doubt, power to overrule even a long-established course of decisions of the Courts, provided it has not itself determined the question . . . but in general this House will adopt this course only in plain cases, where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law." I quote with respect those observations to indicate how unwise it would be to cast any doubt on decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole.

Lord Normand said that the trust was an educational trust, and, therefore, it satisfied one of the conditions for acceptance as a charitable trust. But there was another condition which must also be satisfied—namely, that it was a trust beneficial to the community or to a section of the community. No general rule had yet been formulated by which to distinguish trusts which have this essential element of public benefit from those which have not. That element of public benefit must be found in the definition of the class of persons selected by the creator of the trust as the objects of his bounty. That seemed to follow the principle that the trust purpose must be directed to the benefit of the community or a section of the community: *Tudor on Charities*, 5th Ed. 11, approved by Lord Greene, M.R., in *Re Compton*, [1945] 1 All E.R. 198. After observing that, in principle, he was unable to say that any public element could be borne out of the several private contracts between a particular employer and his employees, His Lordship said that to admit the present trust to the category of charity would be an innovation contrary alike to principle and to the trend of authority.

Lord Oaksey agreed with the opinion expressed by Lord Simonds.

Lord Morton agreed with Lord Simonds and Lord Normand, but, as he had been a party to the decision of the Court of Appeal in *Re Compton*, [1945] 1 All E.R. 198, and *Re Hobourn Aero Components, Ltd.'s, Air Raid Distress Fund*, [1946] 1 All E.R. 501, he thought it would be appropriate that he should say a few words about those and certain other cases. He had reconsidered with great care the observations of Lord Greene, M.R. (with which he had concurred), in *Re Compton*, [1945] 1 All E.R. 198, in the light of the argument submitted to their Lordships on the present appeal; and he saw no reason to qualify any of them.

Lord Morton went on to say that Lord Simonds in the last portion of his speech had referred to the "poor relations" cases, of which, perhaps, the most notable was *Isaac* v. *Defriez*, (1754) Amb. 595; 27

E.R. 387. In *Re Compton*, [1945] 1 All E.R. 198, 206, Lord Greene, M.R., considered these cases, and observed: "The cases must at this date be regarded as good law although they are, perhaps, anomalous."

Lord Morton continued:

In the course of the argument, your Lordships' attention was called to a line of much more modern decisions which might possibly be described as the descendants of the "poor relations" cases. Recently, in *Gibson* v. *South American Stores (Gath and Chaves), Ltd.*, [1949] 2 All E.R. 985, the Court of Appeal had to consider the trusts of a fund called "Employees' Health and Relief Fund" established by the defendant company. The board of the company had executed a deed vesting a fund in trustees and declaring (by cl. 3) that it was to be used for granting, at the discretion of the board, gratuities, pensions, or allowances to beneficiaries. By cl. 4 it was declared that the class of beneficiaries included: "all persons who in the opinion of the London board are or shall be necessitous and deserving and who for the time being are or have been in the company's employ or in the employ of any agents of the company or in the employ of [a subsidiary company] and the wives widows husbands widowers children parents and other dependants of any person who for the time being is or would if living have been himself or herself a member of the class of beneficiaries."

The Court of Appeal first held that, as a matter of construction, the trusts established in cl. 3 and cl. 4 were limited to necessitous beneficiaries. *Sir Raymond Evershed*, M.R., having stated the above decision, continued at p. 992: "That left as the next point for discussion what, it appeared, might well be a question of law of great difficulty and no little importance. The question may, I think, be put thus: Under the law as it has now been established, and in the light of several recent decisions, both in this Court and in the House of Lords, is a trust for a class of poor persons defined by reference to the fact that they are employed by some person, firm, or company, a good charitable gift, a good charitable trust, or does it fail of that qualification through the absence of the necessary public element?" If one omits the word "poor," the question thus posed is, in substance, the same as the question which arises on the present appeal. The learned Master of the Rolls then went on to consider *Spiller* v. *Maude*, (1881) 32 Ch. D. 158*n.*, *Re Gosling*, [1900] 48 W.R. 300, *Re Buck*, [1896] 2 Ch. 727, and *Re Sir Robert Laidlaw's Will Trusts* (an unreported case decided by the Court of Appeal in 1935), and he felt constrained by the last-mentioned authority to decide that the trust in *Gibson's* case, [1949] 2 All E.R. 985, was a valid charitable trust, notwithstanding the limited nature of the class of beneficiaries. The element of poverty of the beneficiaries was present in each of the cases considered by the learned Master of the Rolls, and, therefore, each case fell into the first of the four classes of charitable trusts laid down by *Lord Macnaghten* in *Pemsel's* case, [1891] A.C. 531, 583, whereas the present case falls into the second class. I think that for this reason your Lordships are of opinion that it is neither necessary nor desirable to express any view, on the present occasion, on the cases to which I have just referred. I am content to fall in with this opinion, only observing that they may require careful consideration in this House on some future occasion.

Their Lordships, therefore, came to the conclusion (Lord Macdermott dissenting) that the common employment of the beneficiaries of the bounty of the creator of the trust in question was not a quality which constituted them a section of the community so as to afford to the trust the necessary public character to render it charitable; and, there being for that purpose no distinction between the company's employees and their children, the gift was void for perpetuity.

SUMMARY OF RECENT LAW.

CONVEYANCING.

Alteration of Instruments. *4 Australian Conveyancer and Solicitors Journal*, 61.

Completion "on or before." *101 Law Journal*, 538.

The Revocation of Wills. *101 Law Journal*, 494.

CRIMINAL LAW.

Police Offences—Inciting Disorder—Police dispersing Procession composed of Thousand or More Persons—Considerable Disorder in Progress—Some Members of Procession retiring from Scene of Conflict—Use of Words "Come back, you yellow bastards, and get those cops" proved—Such Words calculated to stir up or incite Hearers to Acts which would increase and aggravate Existing Disorder—Offence complete when Words uttered in Hearing of Persons who might be expected to be influenced by Them—Police Offences Act, 1927, s. 34. There was a conflict in a public street between the members of a procession mainly composed of members of the deregistered Waterside Workers' Union and members of the Police Force, when the Police, acting under powers conferred by the Waterfront Strike Emergency Regulations, 1951, considered it necessary to disperse the procession. Considerable disorder resulted, and for a time the position was out of control. Some of the waterside workers were retiring from the scene of the conflict by walking along a path which led to an adjoining park, and they were proceeding peaceably to disperse. To these men, it was alleged, the appellant used the words: "Come back, you yellow bastards, and get those cops." She was charged, under s. 34 of the Police Offences Act, 1927, with inciting disorder, and was convicted by a Magistrate. From that conviction, she appealed. *Held*, 1. That the use of the particular words by the appellant was proved. 2. That, in the existing circumstances (including the facts that the procession was composed of a thousand or more persons, including a number of women, that determined opposition to the Police had been shown, and that it was still possible that this large body of disappointed and dissatisfied citizens might be rallied to even more determined and consequently successful opposition), such words, coming from a woman in the prominent position of the appellant, were calculated to stir up or incite the hearers to acts which would increase and aggravate the existing disorder; and it was no answer to the charge to prove that they did not in fact produce that result. 3. That the offence was complete when the words were uttered in the hearing of persons who might be expected to be influenced by them; and that the appellant had been properly convicted. *Barnes* v. *Packman*. (S.C. Auckland. September 25, 1951. Stanton, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Divorce Abroad and Natural Justice. *101 Law Journal*, 510.

Evidence—Privilege—Discussions in Counsel's Chambers to effect Reconciliation—Words "without prejudice" not specifically used. Before the trial of a petition for divorce filed by the wife, two meetings were held in counsel's chambers, at which there were present counsel and solicitors for the parties. The husband attended the meetings, but the wife did not. The sole purpose of the meetings was to effect a reconciliation between the parties, and it was proved in evidence that the words "without prejudice" were not actually used. The husband contended that the meetings were privileged, and that evidence of the discussions thereat, was inadmissible. *Held*, That, in the circumstances, the inference must be drawn that there was a tacit understanding that the conversations were "without prejudice," and the meetings were, therefore, privileged. (Observation of *Denning*, L.J., in *Mole* v. *Mole*, [1950] 2 All E.R. 329, applied.) (*Bostock* v. *Bostock*, [1950] 1 All E.R. 25, not followed.) *Pool* v. *Pool*, [1951] 2 All E.R. 563 (P.D.A.).

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

The Standard of Persuasion in establishing Matrimonial Offences. (Part 2.) (R. P. Roulston.) *25 Australian Law Journal*, 109.

HUSBAND AND WIFE.

Formal Validity of Foreign Marriages. *25 Australian Law Journal*, 165.

Wife's Rights in Property in Joint Names. *95 Solicitors' Journal*, 442.

INNKEEPERS.

Innkeepers, Guests, and Travellers. *4 Australian Conveyancer and Solicitors Journal*, 67.

INVITOR AND INVITEE.

An Invitor's Duty. *101 Law Journal*, 493.

JUDICIAL CHANGES.

Mr. Colin Hargreaves Pearson, C.B.E., K.C., has been appointed a Justice of the High Court as from October 1, 1951, to fill the vacancy caused by the retirement of Mr. Justice Humphreys.

LIBEL.

Interrogatory—Fair Comment—Malice—Interrogatories as to Defendants' Sources of Information or Grounds of Belief—R.S.C., Ord. 31, r. 1A. The plaintiff brought an action for damages for libel in respect of an article printed and published by the first defendants and written by the second defendant. The article stated, *inter alia*, that the plaintiff had boasted that " he sends many letters to anti-British newspapers and politicians in the United States ' exposing the plight of the unemployed ' and says that they use his outpourings for propaganda against Marshall Aid." The defendants pleaded fair comment made *bona fide* on a matter of public interest. The plaintiff, by his reply, pleaded that the defendants were actuated by malice, and he applied for leave to administer to the defendants ten interrogatories, of which the first, second, third, and fifth were in the following terms: " 1. Before you published the words complained of or caused them to be published had the plaintiff to your knowledge sent any letter or letters to any and what anti-British newspaper or newspapers and/or politician or politicians in the United States of America ? If yea, identify the said letter or letters. 2. Before you published the words complained of or caused them to be published did you know of any and what anti-British newspaper or newspapers politician or politicians having on any and what date or dates in any and what way or ways used any and what utterances of the plaintiff for propaganda against Marshall Aid ? 3. Before you published the words complained of or caused them to be published had the plaintiff to your knowledge used on any and what date or dates in any and what way or ways the plight of the unemployed for an attack on Britain ? 5. What steps and/or precautions did you take and what inquiries did you make before publishing the words complained of or causing them to be published to ascertain whether the expressions of opinion contained therein were founded on fact ? " *Held*, That, in substance, the interrogatories were as to the defendants' sources of information or grounds of belief, and, under R.S.C., Ord. 31, r. 1A, must be disallowed. *Adams* v. *Sunday Pictorial Newspapers (1920), Ltd., and Another*, [1951] 1 All E.R. 865 (C.A.).

PHARMACY.

Vincent's Tablets described as " A.P.C. "—Preparation corresponding substantially to Compound Aspirin Tablets—Sold under Trade-name of Proprietor—Preparation a " drug "—Sale of Same by Person not authorized or qualified to sell Drugs an Offence—" Proprietary medicine " defined—" Drug "—Pharmacy Act, 1939, ss. 2, 32 (1) (a) (b), *First Schedule, Part II.* The expression " proprietary medicine " as used in s. 32 and in the First Schedule of the Pharmacy Act, 1939, connotes not only a proprietor, but a proprietor of a particular kind of medicine, in which there is either some secret ingredient or some secret mode of composition, or of a medicine compounded according to some formula which no one but the manufacturer and persons authorized by him have the right to make use of. Such proprietorship would normally arise either from original discovery of the whole or part of the ingredients of a medicine or from the exclusive ownership of a formula or process. The ownership of a trade-name or of the label or name under which a medicine is sold is insufficient in itself to satisfy the expression, as the ownership must include the right of mixing or compounding the particular preparation so that it is not the property of all the world. Therefore, it is not permissible to treat any drug as a " proprietary medicine " merely because it is sold under a trade-name or trade-mark of which some person is the proprietor. Dictum of *Williams*, J., in *Sharland and Co., Ltd.* v. *Commissioner of Trade and Customs*, (1892) 11 N.Z.L.R. 557, 570, and *Farmer* v. *Glyn-Jones*, [1903] 2 K.B. 6, applied.) (*Pharmaceutical Society* v. *Armson*, [1894] 2 Q.B. 720, and *Pharmaceutical Society* v. *Piper and Co.*, [1893] 1 Q.B. 686, referred to.) The preparation sold by the appellants, Vincent's Tablets, described as A.P.C., corresponds substantially with the " Compound Aspirin Tablets " described in the *British Pharmaceutical Codex* (the standards of which were adopted for the purposes of the New Zealand legislation by Reg. 179 of the Food and Drug Regulations, 1946); and such preparation is, therefore, a " drug " within the meaning of that term as defined by s. 2 (1) of the Pharmacy Act, 1939. The prominence given on the packages to the letters " A.P.C." represented the sale of a drug under its own name with the addition of a trade-name or trade-mark; and the tablets here in question were not, in the circumstances, really differentiated from those dealt with by the Court of Appeal in *Woolworths (N.Z.), Ltd.* v. *Wynne* ([1949] N.Z.L.R. 90). Vincent's Tablets, as so described, are, accordingly, on the facts, not a " proprietary medicine " within Part II of the First Schedule of the Pharmacy Act, 1939; and, therefore, they are not within the exception in s. 32 (1) (*a*) and (*b*) of the statute. *So held* by the Court of Appeal (*Stanton* and *Hay*, JJ., *F. B. Adams*, J., dissenting) on a case on appeal to the Supreme Court from the decision of a Stipendiary Magistrate, removed into the Court of Appeal under s. 5 of the Justices of the Peace Amendment Act, 1946. *Woolworths (N.Z.), Ltd., and Another* v. *Wynne*. (C.A. Wellington. September 3, 1951. Stanton, Hay, F. B. Adams, JJ.)

PRACTICE.

Costs: Appeals to Privy Council. *95 Solicitors' Journal*, 327.

Foreign Judgments and Double Satisfaction. *101 Law Journal*, 509.

Foreign Judgment—Reciprocity in Enforcement—Order for Costs made in Suit in England—Costs to be paid out of Estate—Executor as such not a Party to Suit—Probate not resealed in Victoria—Judgment not registrable in Victoria—Supreme Court Act, 1928 (No. 3783), ss. 179, 181, 183. In s. 179 (1) of the Supreme Court Act, 1928, judgment debtor " includes any person against whom the judgment is enforceable in the place where it was given." *Held*, That the word " enforceable " in the above provision means enforceable by some form of execution. On its proper construction, subs. 3 (*b*) of s. 181 of the Act limits the effect of registration of a judgment under the section to execution. Before any execution by writ of *fi. fa.* or other writ, or by way of equitable execution, will lie to enforce an order for costs out of an estate, there must be a judgment or order to which the executor or administrator, as such, is a party. It makes no difference that the executor is a party in his personal capacity but is not a party as executor; in such a case, *semble*, the judgment creditor for costs must bring a separate administration action as a creditor against the executor to obtain payment. In the course of a probate suit in the High Court of Justice in England, orders for costs out of a deceased person's estate, the subject of the suit, were made in favour of the plaintiff. The defendant, subsequently to the suit, obtained probate in England of the will of the deceased. The deceased left assets in Victoria, and, the costs not having been paid, the plaintiff applied to register the judgment for costs in Victoria pursuant to Div. 12 of Part VIII of the Supreme Court Act, 1928. At the date of the application, probate had not been resealed in Victoria, nor had the defendant obtained a separate grant of probate there. *Held*, That the application must fail, inasmuch as (i) the power of the Court under the Act was limited to enforcing the judgment, if registered, by execution, and there was no judgment or order to which the executor, as such, was a party, which was a condition precedent to execution; (ii) in any event, as the judgment was not enforceable by execution in England, the Court, as a matter of discretion under s. 181 of the Act, would not order its registration in Victoria; (iii) the defendant being a foreign personal representative, and, therefore, not under any liability in Victoria, execution could not issue against the assets of the deceased in Victoria until the English probate had been resealed there or a fresh grant obtained. *Semble*, The plaintiff's proper remedy was either to apply for administration as a creditor or to sue as a creditor under the English judgment for the administration of the Victorian estate either as soon as reseal was granted, or even (on the authority of *Re Lane*, (1886) 55 L.T. 149, and *Alliance Bank, Ltd.* v. *Irving*, (1865) 4 S.C.R. (N.S.W.) Eq. 45) before the reseal, seeking a receiver and an injunction. *Semble*, On granting an application for registration of a judgment, the Court may act under Order XLIA, r. 8, of the Rules of the Supreme Court, 1938, by giving directions as to rate of exchange, interest from date of registration, and costs, for the purposes of execution, but may not include interest on the judgment under the foreign law. The form of the order for costs considered. *Re Linley*, [1951] V.L.R. 319.

Pleading—Damage—Special Damage—Breach of Contract—Sale of Goods—Goods Supplied alleged to be Valueless—Full Purchase Price claimed—Alternative Claim where Goods not Valueless, but Depreciated. Per *Devlin*, J., There exists an impression in some circles that, when pleading special damage, one can plead a certain figure and then set up a lower figure in Court and seek to justify it. In my view, that is not the

proper way to plead special damage . . . If the plaintiff wishes to say that the goods are valueless, the special damage will be pleaded in the way in which it was done in this case [*viz.*, the plaintiff will plead that the goods are valueless, and that he is, therefore, entitled to recover their full value], but, if he also wishes to say that, if they are not valueless, they have depreciated substantially in value, then it is his duty to plead in the alternative that they have depreciated in value nd to set out the method of calculation by which he arrives at the figure claimed in the alternative, so as to enable the defendant to know what is the case against him and to obtain evidence for his defence. If, on the other hand, the goods have depreciated so little that the measure of damage is to be arrived at by ascertaining what would be the small cost of putting them right, still more is it necessary to put that in as a further alternative, so that the defendant may know what he has to meet. *Anglo-Cyprian Trade Agencies, Ltd.* v. *Paphos Wine Industries, Ltd.*, [1951] 2 All E.R. 873 (K.B.D.).

"The Jury during the Hearing." *211 Law Times*, 262, 276.

PUBLIC REVENUE.

Death Duties—Estate Duty—Beneficial Interest as Tenant in Common in Land situated in England—Testator domiciled in New Zealand—Nature of Interest according to English Law—Effect of Statutory Conversion under New Zealand Law—Interest comprising "Chattel interest in land"—Not "personal property" for Estate-duty Purposes—Exemption from Death Duty in New Zealand—Death Duties Act, 1921, ss. 2, 7—Law of Property Act, 1925 (15 and 16 Geo. 5, c. 20), ss. 4, 28, 34 (2), 35. The deceased died domiciled in New Zealand on December 7, 1948. On January 1, 1926, the Law of Property Act, 1925 (Eng.), came into force. Before that date, certain lands in fee simple in London (herein described as "the Notting Hill Gate" freeholds) were vested, subject to leases expiring in June, 1951, in a number of persons as tenants in common. By virtue of the will of a testator who died in 1852, and in the events which had since happened, the legal estate had come, before January 1, 1926, to be held in two undivided moieties. One such moiety belonged, as to five equal undivided seventh parts, to five persons (the Bull family), of whom the deceased was one. They held their five parts as beneficial tenants in common in equal shares. The other two equal undivided seventh parts were held by the Bull trustees. The Law of Property Act, 1925 (Eng.), abolished legal tenancies in common as from January 1, 1926, and on that date the entirety of the lands became vested in the Public Trustee upon the statutory trusts, but subject to a proviso enabling persons interested to appoint new trustees upon the statutory trusts in the place of the Public Trustee. In October, 1926, that power was exercised in respect of the lands by a deed of appointment by which trustees were appointed in the place of the Public Trustee and the legal estate was vested in them upon the statutory trusts. By agreement, the lands were later partitioned, and the new trustees conveyed five equal undivided one-seventh shares of the lands to the Bull family and the Bull trustees to hold. The Bull family included the deceased; and the conveyance operated so as to vest the legal fee simple of the entirety in the deceased and the three next named persons as joint tenants, but upon the statutory trusts. The Commissioner of Stamp Duties claimed that the beneficial rights of the deceased in respect of the conveyed lands were part of his dutiable estate by virtue of s. 5 (1) (*a*) and s. 7 of the Death Duties Act, 1921. On appeal from such determination, *Held*, 1. That the deceased acquired, by the conveyance of the Notting Hill Gate freeholds referred to above, not only an equitable interest as one of the owners in common of the five equal one-seventh shares, and a further equitable interest in undivided shares, as one of the Bull trustees, but also a legal estate in fee simple jointly with three other members of his family, such legal estate being held upon the statutory trusts for the benefit of the Bull family and the Bull trustees; and that, at his death, he still held the legal and equitable rights acquired by him under the conveyance. 2. That the statutory trust for sale effected an equitable conversion, and the interests of persons holding land beneficially in undivided shares are now in English law personal property, and not realty, and so pass under a general bequest of personal property, and not under a general devise of real property. (*In re Warren, Warren* v. *Warren*, [1932] 1 Ch. 42, *Re Bradshaw, Bradshaw* v. *Bradshaw*, [1950] 1 All E.R. 643, and *In re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268, referred to.) 3. That the rights of the deceased in respect of the Notting Hill Gate freeholds were governed partly by English common law and equity, and partly by the Law of Property Act, 1925 (Eng.), superimposed thereon; and they comprised, in English law, personal property in the usual sense of that term; and, under the doctrine of conversion, a New Zealand Court must apply the same principle as the English Courts, with the result that there is in equity conversion to personalty, and the deceased's beneficial rights would thus be "personal property" within the meaning of that term as used in s. 7 of the Death Duties Act, 1921, but for the fact that the definition of "personal property" in s. 2 excludes "leaseholds and other chattel interests in land." 4. That the above-described beneficial rights of the deceased constituted "chattel interests in land"; and, as such, they are excluded from the definition of "personal property" in s. 2 of the Death Duties Act, 1921, and, accordingly, they do not form part of the deceased's dutiable estate in New Zealand. (*Brasch* v. *Commissioner of Stamp Duties*, [1921] N.Z.L.R. 1038, distinguished.) (*In re Balmforth, Public Trustee* v. *Richards*, [1934] N.Z.L.R. 190, and *In re O'Neill, Humphries* v. *O'Neill*, [1922] N.Z.L.R. 468, referred to.) *Quaere*, Whether a mortgage of land situated outside New Zealand is personal property for the purposes of the Death Duties Act, 1921. *New Zealand Insurance Co., Ltd.* v. *Commissioner of Stamp Duties*. (S.C. Hamilton. July 5, 1951. F. B. Adams, J.)

SHARE-MILKING AGREEMENTS.

Share-milking Agreements Order, 1951 (Serial No. 1951/221). This Order revokes the Share-milking Agreements Order, 1946, as from September 27, 1951, and provides new standard terms and conditions of share-milking agreements applicable in cases where the farm-owner supplies the herd. Provision is made in the Schedule for certain conditions which had previously been included in the agreement by implication rather than by specific reference.

SETTLEMENT.

Capital or Income—Tenant for Life and Remaindermen—Capital Profits Dividend—Profit on Sale of Part of Company's Interests—Sale during Testator's Lifetime—Dividend payable in respect of Date during Testator's Lifetime, but not paid until after His Death. By his will, made on January 15, 1948, the testator gave his residuary estate to his trustees on trust to pay the income thereof to a niece during her lifetime, and after her death to hold both capital and income on trust for his great-niece on her attaining the age of twenty-five or marrying, with an ultimate gift over. The testator held £200 ordinary stock of a company whose interests included passenger road transport and road haulage undertakings. During the testator's lifetime these interests were acquired from the company by the British Transport Commission for the sum of £24,800,000, which was satisfied by an allotment to the company of British Transport 3 per cent. guaranteed stock at 101 per cent., the interest on the purchase price accruing as from January 1, 1948, and the profits from the transport interest passing to the Commission from that date. On February 21, 1949, notice was sent to the testator of an extraordinary general meeting of the company to be held on March 17, 1949, to consider an ordinary resolution to pay a special capital profits dividend on its ordinary stock by distributing to each stockholder on the register on February 21, 1949, £5 British Transport stock for each £1 of the company's ordinary stock held by him. On February 27, the testator died. At the meeting of the company on March 17, the resolution with regard to the special profits dividend was passed, and on April 1 the dividend was paid. As a result, the trustees of the testator's estate received £1,000 British Transport stock, and the question to be determined was whether it was to be treated as capital or income of the estate. *Held*, That, as the dividend was paid in respect of a transaction completed before the testator died, and was made payable in respect of a date during his lifetime, even though it was not actually paid until after his death, what was received should be regarded as income which accrued due before his death, and, accordingly, formed an asset of his estate before his death, and, therefore, the sum of British Transport stock was to be regarded as capital of the testator's residuary estate for the purposes of the will. (*Re Muirhead*, [1916] 2 Ch. 181, applied.) (*Re Sechiari*, [1950] 1 All E.R. 417, distinguished.) *Re Winder's Will Trusts, Westminster Bank, Ltd.* v. *Fausset and Another*, [1951] 2 All E.R. 362 (Ch.D.).

As to Distribution by Company of Profits as Dividends or Capital, see *29 Halsbury's Laws of England*, 2nd Ed. 647-650, paras. 929, 930; and for Cases, see *40 E. and E. Digest*, 662-666, Nos. *1999-2042*.

STATUTE.

Ejusdem Generis. 211 Law Times, 359.

TENANCY.

Evidence—Admissibility—Extrinsic Evidence Admissible to show Extension of Term of Original Tenancy Agreement—Tenancy Act, 1948, s. 48 (before repeal and substitution)—Tenancy Amendment Act, 1950, s. 2 (1). An agreement in writing created a tenancy between the plaintiff as landlord and the defendant as tenant for a term commencing on November 30, 1949, of one year less one day. By this agreement, the tenant agreed to vacate "not earlier than May 30, 1950, and not later than November 29, 1950," on being given one month's notice. Approval in writing by a Rents Officer was endorsed on the agreement. In an action for possession, it was sought to tender extrinsic evidence as to some extension of the term after November 29, 1950, but objection was taken that, as the agreement was required, under s. 48 of the Tenancy Act, 1948 (which, as originally enacted, applied here), to be in writing, no oral evidence could be given to vary, modify, or add to it. *Held*, 1. That the original s. 48 of the Tenancy Act, 1948 (before its repeal and the substitution of a new s. 48 by s. 2 (1) of the Tenancy Amendment Act, 1950), did not require the whole tenancy agreement to be in writing, but it required the agreement that the statute should not apply to be in writing and to be approved by a Rents Officer. 2. That oral evidence tendered to prove an extension of the term of the tenancy should not be excluded on the ground that the tenancy agreement itself was by law required to be in writing. 3. That the agreement for a term wholly subsequent to that agreed upon was not inconsistent with the original agreement. 4. That, accordingly, extrinsic evidence of an agreement in respect of the period subsequent to the expiry of the term expressed in the original agreement could be admitted. *Allen* v. *Arnold*. (Palmerston North. July 31, 1951. Herd, S.M.)

Possession—Tenancy not within Part III of Statute—Six-months Term—Notice requiring Possession served One Month before Expiry—Landlord agreeing to Extension of Term and accepting Six Months' Rent—One Month's Notice to Quit served during Extended Term—Such Notice Unnecessary—Tenancy Act, 1948, s. 48—Tenancy Amendment Act, 1950, s. 2 (1)—Property Law—Tenancy Agreement extended for Further Term of Six Months—Provision for Refund of Part of Rent if Tenant vacated Premises was one. They held their five parts as beneficial tenants in *during That Term—Agreement not terminable on Month's Notice—Extension providing "Proof to the contrary"—Property Law Act, 1908, s. 16—Statutes Amendment Act, 1949, s. 48 (1).* An agreement in writing created a tenancy between the plaintiff as landlord and the defendant as tenant for a term commencing on November 30, 1949, of one year less one day, two periods being contemplated, the first of six months to May 30, 1950, and the second of six months less one day to November 29, 1950. By this agreement, the tenant agreed to vacate "not earlier than May 30, 1950, and not later than November 29, 1950," on being given one month's notice. Approval in writing by a Rents Officer was endorsed on the agreement. On October 20, 1950, the landlord gave the tenant one month's notice of the termination of the agreement. A further half-year's rent was demanded and paid, the landlord's evidence being that he agreed to extend the term under protest, and there was evidence that there would be a refund of part of the rent if the tenant vacated the premises before May 29, 1951. A month's notice to quit was served on the tenant on April 7, 1951. *Held*, 1. That the notice of October 20, 1950, was sufficient to have terminated the tenancy on November 29, 1950; but the tenancy was subsequently extended for six months to May 29, 1951. 2. That the arrangement for refund of part of the rent paid in advance if the tenant vacated the premises during the six months before May 29, 1951, did not turn the tenancy from one for a definite term into one coming within s. 16 of the Property Law Act, 1908, the fact of the extension to May 29, 1951, being "proof to the contrary" within the meaning of those words in that section, as amended by s. 48 (1) of the Statutes Amendment Act, 1949. 3. That the notice of April 5, 1951, was unnecessary to terminate the tenancy, since the tenant knew for the whole of the extended six-months term that the landlord required possession on or before May 29, 1951. 4. That, the agreement having been made and approved under the original s. 48 of the Tenancy Act, 1948, the tenancy did not come within Part III thereof; and the landlord was entitled to an order for possession. *Allen* v. *Arnold (No. 2)*. (Palmerston North. September 7, 1951. Herd, S.M.)

Possession—Order for Possession made, "the warrant to be in Court" until Named Day—Landlord gaining Entry to Premises on Day after Such Named Day—Warrant afterwards applied for—Tenant Trespasser when Period of Grace expired—No Forcible Entry—Landlord not estopped from pursuing Common-law Remedies—"May"—Tenancy Act, 1948, s. 43 (2)—Magistrates' Courts Act, 1947, s. 79 (3). An order for possession was made against B. on May 5, 1951, "the warrant to lie in Court until May 25, 1951. Costs to plaintiff." On May 26, the landlord, during B.'s temporary absence, gained entry to the premises and placed certain of her belongings therein, but did not either eject or damage any of B.'s property. B. remained in possession. On May 28, the landlord applied for a warrant for recovery of the land and for the costs awarded by the Court. The costs were collected, but there was no record of any other action having been taken under the warrant. On June 1, the landlord, by letter, demanded the return of the keys of the premises. B. brought an action against the landlord claiming that he was the tenant of the premises and that the landlord had entered them unlawfully and had unlawfully dispossessed or evicted him, and claimed damages. The landlord counter-claimed for damages for trespass and for continuing trespass, by reason of the tenant's failure to remove his goods, and for possession of the keys. *Held*, 1. That at common law B., after May 25, 1951, when the period of grace allowed him by the Magistrate had expired, was himself a trespasser, and the landlord, merely by electing to take Court proceedings for his ejectment, was not estopped from also pursuing such other remedies as she might possess at common law. (*Jones* v. *Foley*, [1891] 1 Q.B. 730, applied.) 2. That the remedy by way of warrant was provided to cover the case where a person in *de facto* possession of the land remained in possession in defiance of a Court order, and in circumstances in which he could be removed only by force. 3. That on May 26 B. did not have "lawful possession" within the meaning of s. 43 (2) of the Tenancy Act, 1948, and the landlord's actions were not such as to constitute a forcible entry. (*Snell* v. *Mitchell*, [1951] N.Z.L.R. 1, distinguished.) 4. That the word "may" in s. 79 (3) of the Magistrates' Courts Act, 1947, is used in a permissive sense. 5. That, on the facts, at least at one stage, the landlord offered to provide storage for B.'s goods, and B. was left with the impression that no objection would be taken to their remaining in the house for a reasonable period; and, in the circumstances, no damages were awarded for trespass. Judgment was given for the landlord on the claim; and, on the counterclaim, judgment was given for the value of the keys (5s.) and for £2 10s. as damages for their retention. *Baylis* v. *Bramley*. (Auckland. September 12, 1951. Kealy, S.M.)

TRANSPORT.

Licensing Authority—Taxicab Service Licence Applications—Eleven Applications heard by Authority—Authority advertising for Further Applications—Further Applications received—Original Applicants asking for Mandamus to compel Authority to hear and determine Their Particular Applications first—Authority's Power to regulate Its Own Proceedings—Sensible and Proper Procedure adopted—General Powers of Authority in hearing Applications—Transport Act, 1949, ss. 101A, 102—Transport Amendment Act, 1950, s. 26 (1). The Auckland Transport Board was, by virtue of s. 82 of the Transport Act, 1949, the Licensing Authority for the Auckland Transport District, and the other defendants constituted the Committee, to which, in pursuance of s. 85 (3) of the statute, the Licensing Authority delegated its powers, functions, and duties. The plaintiffs, eleven in number, made separate applications for taxicab service licences, and their applications, with certain others, which brought the total up to sixteen, were heard by the Committee on April 23 and 30 and May 3, 1951. The Committee reserved its decision, and on May 15, 1951, passed the following resolution: "(*a*) That as it is the present view of the Authority that the authorization of additional licences is necessary and desirable, the Authority proposes calling for further applications for the issue of new public taxicab service licences such applications to be lodged at the office of the Authority not later than 4.30 p.m. on Friday, June 8, 1951. (*b*) That the Authority's decision on the applications at present before it is reserved." In pursuance of this resolution, an advertisement was published inviting applications for taxicab service licences; and, in response, 262 further applications were received. The plaintiffs claimed that the Licensing Authority, having heard their applications, was bound to dispose of them without regard to any applications received since the conclusion of the hearing. On motion for a writ of mandamus commanding the Licensing Authority to determine the applications of each of the plaintiffs "on the merits, prior to, and without reference to," the subsequent applicants; for a writ of injunction to restrain the Licensing Authority from considering the subsequent applications until after it had determined the plaintiffs' applications; in the alternative, for a writ of prohibition prohibiting the Licensing Authority from considering the subsequent applications until after it had determined the plaintiffs' applications, *Held*, That, as s. 93 of the Transport Act, 1949, gave to every

Licensing Authority the power to regulate its own procedure, the question raised in the motion was, in substance, one of procedure; but, whether it were so or not, it was competent for the Licensing Authority to act in all respects as it did, as the procedure was sensible and proper, and was the only procedure by means of which the Authority could hope to act with perfect justice to all who might be concerned. (*Newman Brothers, Ltd.* v. *Allum and S.O.S. Motors, Ltd. (in Liquidation)*, [1934] N.Z.L.R. 694, applied.) *Quaere*, Whether, if the plaintiffs had made out their alleged right, it would have been possible for the Court to interfere, or how far such power is now limited by s. 93A of the Transport Act, 1949 (as inserted by s. 25 of the Transport Amendment Act, 1950). *Semble*, 1. That, where a Metropolitan Authority considers an application for a taxicab service licence, the proceedings of the Authority are governed primarily by ss. 101A and 102 of the Transport Amendment Act, 1950. By reason of the provisions of s. 101A, the Metropolitan Authority is no longer required to hold a public sitting or to receive "evidence" or "representations" (though it may presumably do so if it thinks fit), so that, with regard to applications for such licences, the Metropolitan Authority may proceed summarily, while the Licensing Appeal Authority may not do so. 2. That s. 102 does not purport to be exhaustive as to the matters required to be considered; as a whole, its purpose is to insist on consideration of the specific matters referred to therein, but to leave the Licensing Authority free to consider other relevant matters which may come before the Authority in the form of "evidence" or "representations" as contemplated by s. 102 (2) (*h*); and the tribunal is also entitled to exercise its own mind and give effect to relevant considerations which occur to it, even though they be not referred to in s. 102 or in evidence, or representations referred to in subs. 2 (*h*) thereof. 3. That, consequently, there is no reason why the Licensing Authority should not, in any proper case, gather for itself such materials or information as may assist it in its deliberations, though presumably, in cases where there is a public sitting, the principles of natural justice may require that the tribunal should give to the applicant and other persons affected the same reasonable opportunity to reply in regard to such matters as it is required to give under the proviso to s. 102 (2) (*h*); but, in cases where there is no public sitting and no formal hearing, as under s. 101A, the right of the applicant and other persons to be heard is limited to their right to be heard on appeal. 4. That there is no ground in the Transport Act, 1949, or in the Regulations made thereunder, specifically requiring a Licensing Authority to dispose of applications either in the order in which they are lodged or in the order in which they are heard, or in any other order. *Short* v. *Auckland Transport Board and Others.* (S.C. Auckland. July 9, 1951. F. B. Adams, J.)

WILL.

Construction — Devisees and Legatees — Gift to Unnamed "persons board or institution" having Control of Moneys raised for Patriotic Purposes for Payment to Injured Servicemen "resident in the Province of Auckland"—Description of Beneficiary as at Date of Testator's Death—Auckland Provincial Patriotic Council designated. The testator by his will made on December 21, 1942, directed his trustees to hold two-fifths of the residue of his estate upon trust "to pay the same to the "persons board or institution for the time being having the "control or administration of the moneys raised and being "raised for patriotic purposes in the City of Auckland and "surrounding districts such persons board or institution shall "hold the said two-fifths of my residuary estate upon trust "to pay and apply the same in such way as they or it shall "determine in assisting and relieving members and ex-members "of the New Zealand armed forces (land air and sea) who are "suffering from injuries disabilities or sickness arising from "war service in the present war whether in or beyond New "Zealand who are for the time being resident in the Province "of Auckland." At the date of the will, the "persons board or institution" referred to was the Auckland Provincial Patriotic Council, constituted under the Patriotic Purposes Emergency Regulations, 1939, and having for its district the area called the Auckland Provincial Patriotic District, which comprised the whole of the Provincial District of Auckland, except an area comprising Gisborne and East Coast districts, but also including a portion of the Taranaki Provincial District. In September, 1944, portions of the Auckland Provincial Patriotic District (Northland, Waikato, and Bay of Plenty) were severed from it and constituted as separate provincial districts. The Auckland Provincial Patriotic District remained in existence, but its area of administration was confined to a relatively small portion of the Provincial District of Auckland centring on and handy to the City of Auckland and extending to Thames, Coromandel, and Tauranga, as was authorized by the Patriotic Purposes Emergency Regulations, 1939, Amendment No. 7. At the death of the testator in June, 1946, the only body which answered the description used by him was the Auckland Provincial Patriotic Council. On originating summons asking to what persons, board, or institution the two-fifths share of the residue was payable, and asking the meaning of the expression "Province of Auckland" used in the will, *Held*, 1. That the Auckland Provincial Patriotic Council was entitled to the two-fifths share of the residue mentioned in the will; and the meaning of the expression "Province of Auckland" used therein was the Provincial District of Auckland originally constituted in 1875, superseding the Province of Auckland as theretofore existing. (*In re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726, applied.) 2. That the Auckland Provincial Patriotic Council, in administering the trust, was not bound to spend any of it outside its own district; and, if it confined the benefit to persons residing inside that district, it would not be departing from the terms of the trust. *In re Montgomery (deceased), New Zealand Insurance Co., Ltd., and Another* v. *Auckland Provincial Patriotic Council and Others.* (S.C. Auckland. August 21, 1951. Stanton, J.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Sprain caused by Lift or Lifts in Work Period of Three to Four Hours—"Accident"—Workers' Compensation Act, 1922, s. 3. A sprain caused by a lift or lifts at work within a period of three to four hours is an occurrence that satisfies the meaning of the word "accident" as used in s. 3 of the Workers' Compensation Act, 1922. (*Ormond* v. *C. D. Holmes and Co., Ltd.*, [1937] 2 All E.R. 795; 30 B.W.C.C. 254, applied.) Thus, where a worker was in good health when he began a shift, but after some three to four hours' work his back got sore and gradually got worse, in the circumstances set out in the judgment, the later lifts seeming to worsen the condition, the occurrence was such as to entitle him to compensation for "personal injury by accident arising out of and in the course of his employment" under s. 3 of the Workers' Compensation Act, 1922. *Rollinson* v. *Residential Construction Co., Ltd.* (Comp. Ct. Wellington. February 20, 1951. Ongley, J.)

Assessment—Commuted Lump-sum Payment—No Reasonable Certainty of fixing Amount—Lump-sum Payment not to be awarded—Workers' Compensation Act, 1922, s. 5 (3) (6)—Workers' Compensation Amendment Act, 1947, s. 39—Workers' Compensation Amendment Act, 1949, s. 4 (a). A lump-sum commuted payment should not be awarded under s. 5 (3) of the Workers' Compensation Act, 1922 (as substituted by s. 39 of the Workers' Compensation Amendment Act, 1947, and amended by s. 4 (*a*) of the Workers' Compensation Amendment Act, 1949), if it cannot be fixed with reasonable certainty, because of the difficulty of fixing the present value of the payments which would become due to the worker during the period of his permanent incapacity. Plaintiff's award wage as a driver at the time of the accident on February 8, 1949, was under £8 (the exact amount was not stated), but he was paid £8 clear, and earned another £4 per week overtime, making his weekly earnings £12. His award wage as a taxi-driver at the time of the hearing was £7 1s. per week. His earnings from August 8, 1949, when he went to the taxi work, to September 17, 1950 (fifty-eight weeks), were £600 15s. 3d.—an average of £10 7s. 2d. per week. Plaintiff claimed a commuted lump sum under s. 5 (3) based on a wage loss of £1 12s. 10d. (the difference between £10 7s. 2d. and £12), giving £1 4s. 7½d. per week compensation. Counsel said the compensation period was about nineteen years on this basis. The evidence showed that at the time of the accident (February 8, 1949) the plaintiff's average weekly earnings for the first three months on taxi-driving work were £8 17s. 1d., his average for the fifty-eight weeks was £10 7s. 2d., his average for the last three months was £11 9s. 2d., and for the last six months £11 2s. 2d. His average weekly loss for the first three months was £3 2s. 11d.; for the whole period, it was £1 12s. 10d.; and, for the last three months, it was 10s. 10d. His weekly compensation on the basis of his last three months' earnings was 8s. 1½d. per week, not £1 4s. 7½d., and the period was not nineteen years, but was sixty-three, by which time plaintiff would be 101.* *Held*, That a lump sum could not be fixed with reasonable certainty, and, in the circumstances, a lump-sum payment should not be awarded. *Tonner* v. *Child Bros., Ltd.* (Comp. Ct. Wellington. October 16, 1950. Ongley, J.)

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* See now Workers' Compensation Amendment Act, 1950, s. 44: Weekly payments of compensation under subsection six of section five of the principal Act shall in no case extend over a longer aggregate period than six years.

EXTINGUISHMENT OF EASEMENTS AFFECTING LAND TRANSFER LAND

By Unity of Seisin or Merger.

By E. C. ADAMS, LL.M.

Apropos of my recent article, "Release of An Easement under the Land Transfer Act, 1915" (*Ante*, p. 176), the learned eiditor of this JOURNAL has received the following interesting and informative letter from Mr. W. N. Blyth:

The writer begs leave to doubt the statement of Mr. E. C. Adams in his article on "Release of Easements" [*Ante*, p. 176] that, on registration of the transfer to the registered proprietor of the servient tenement, the easement becomes extinguished by unity of seisin. This would be the effect if the particular form of transfer given in the article were adopted. The statement as a statement of general law is, with some important qualifications, correct, but it seems doubtful whether unity of seisin will operate to extinguish an easement over land under the Land Transfer Act.

The point came before the local District Land Registrar on one occasion, and, while he took the view that the easement merged in the fee simple, he was not apparently sufficiently confirmed in his opinion to merge a right-of-way himself, but (probably with s. 11 of the Property Law Act, 1908, in mind) required from the registered proprietor an application to merge supported by a declaration that there were no outstanding equities to prevent such merger. Parenthetically the writer is aware of the strictures in *Challis's Real Property* on the confusion of merger, surrender, and extinguishment.

Since this occasion, the writer has acquired a copy of *Kerr on the Australian Land Titles* (*Torrens System*) wherein the learned author at p. 306 gives it as his opinion that unity of seisin does not extinguish an easement under the Torrens Systems. It seems that in Western Australia and Victoria unity without more will not extinguish; there must be intent. This seems to have been the view held also by the late Mr. R. F. Baird, who wrote the New Zealand notes for the above work. Unfortunately, no cases are quoted in support of the statement, and no cases dealing with extinguishment in respect to land under a Torrens Act can be found in the New Zealand, Australian, Canadian, or *English and Empire* digests.

The subject is somewhat confused by three factors:

(*a*) The looseness of use of the words "unity of seisin," "unity of possession," and "unity of ownership" as being practically synonymous, as discussed in *Gale on Easements*.

(*b*) The distinction drawn by text-book writers and Judges between rights-of-way on the one hand and the remaining classes of easement on the other. The view seems to emerge that a right-of-way will be extinguished by unity of seisin, but that, for example, a right to drainage (*Longton* v. *Winwick Asylum* (*Visitors Committee*), (1911) 75 J.P. 348) will be suspended only so long as the unity continues.

(*c*) The absence, so far as the writer has been able to find, of any authorities dealing with easements affecting land under a Torrens System of land tenure.

The doctrine of extinguishment by unity of seisin is traced from a statement at *Co. Litt.* 313 a, b. It is necessary, in order that an extinguishment may take place, (i) that the right to the collateral thing and an estate in the land itself should come to the same hands, and (ii) that the estate in the land be not less, in point of quantum and duration, than the estate in, or right to, the collateral thing. If the estate in the land should be less than the other estate or right, or if it should be defeasible, the rent or other collateral thing will only be suspended during the continuance of the estate in the land, and it will be revived upon the latter's determination or defeasance. This doctrine emerges in *Gale on Easements* and *Goddard on Easements* as a categorical statement of law, but the statement was doubted in *Richardson* v. *Graham*, [1908] 1 K.B. 39. In that case, it was held that unity of seisin for an estate in fee simple will not cause an easement of ancient light to be extinguished where there is not already unity of possession and enjoyment. In other cases where application of the doctrine would work patent injustice, the Courts have been only too ready to hold that unity of seisin, even for an estate in fee simple in both the servient and dominant tenements, would only suspend an easement, and not extinguish it: *James* v. *Plant*, (1836) 4 Ad. and El. 749, 761; 111 E.R. 967, 971; and, as stated above, the doctrine was summarily brushed aside in *Longton* v. *Winwick Asylum* (*Visitors Committee*), (1911) 75 J.P. 348. In a Canadian case, *Brightman* v. *Hazel*, (1921) 54 N.S.R. 81, an easement was held to have been revived after it had apparently been extinguished by unity of seisin and possession. The Australian Courts have also held that an easement can be revived: *Cuvet* v. *Davis*, (1883) 9 V.L.R. 390. Both these cases concerned rights-of-way, and, in the latter, Higinbotham, J., impliedly recognized revivor even in relation to a right-of-way, when he said, at p. 396: "As to the right-of-way, the authorities seem to show that when an easement is merged by unity of possession, it has to be recreated by some words used by the owner showing that he intended to create the easement again, or that he recognized it as existing."

Both *Garrow* and *Cheshire* are content, with regard to rights-of-way, to accept the statement of *Gale* as to extinguishment by unity of seisin, but the subject is treated more cautiously in *11 Halsbury's Laws of England*, 2nd Ed. 318 (1).

It is admitted that the authorities quoted in *Halsbury* and the various text-book writers are not authoritative as regards land under the Land Transfer Act and the writer would be interested to know Mr. Adams's views on whether extinguishment does occur where the dominant and servient tenements come into common ownership without any intention on the part of the owner that a right-of-way should be extinguished, as, for example, when the dominant tenement is immediately resold together with an appurtenant right-of-way.

I am much indebted to Mr. Blyth for his citation and explanation of authorities, and shall do my best to answer his last question, which is indeed a poser.

In my opinion, unity of seisin will, as a general rule, operate to extinguish an easement over land under the Land Transfer Act, 1915, where the easement is appurtenant to land: where an easement is in gross, merger will ensue when the easement and the servient land come into common ownership. In neither case will there be an extinguishment of the *jus in re aliena*, if extinguishment would work "patent injustice" to any person having an interest in the land or the easement.

If unity of seisin does not operate to extinguish an easement over land under the Land Transfer Act, 1915, then, as pointed out by Jessup in his invaluable *Land Titles Office Forms and Practice*, 2nd Ed. 216, it would not be possible to release an easement over Land Transfer land by a registrable instrument, for, although the Land Transfer Act sets out a form for a surrender of lease, no separate form is provided for the release of an easement.

In New Zealand, the Courts, as well as the Legislature, have recognized the doctrine of merger with regard to Land Transfer land. If the doctrine of merger applies to Land Transfer land, then it is logical to hold that an easement of land under the Land Transfer Act may be extinguished by unity of seisin.

We may take first as to merger the case of *Smith* v. *Davy* (*District Land Registrar*), (1884) N.Z.L.R. 2 S.C. 398. C., the owner of a freehold property, the title to which was under the Land Transfer Act, 1915, executed three mortgages over the fee. He was also the assignee of a leasehold interest in the same land, which leasehold was subject to a mortgage. The third mortgagee

Continued from cover i.

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under his power of sale sold the fee to S., and executed a transfer to him, which was not registered for some days. In the meantime, S. paid off the mortgage over the lease and registered the release. The day after this registration, and before the transfer of the fee to S. was registered, C. assigned an agreement to assign the lease to B. who entered a caveat to protect his rights. It was held that B. had no title of any kind which he could set up as against S. It was also held that, although at the date of B.'s agreement S. had no complete title, he had a complete equitable title against B. Finally, it was held that *the lease absolutely merged in the fee when the release of the mortgage of the lease was registered. Quaere,* Whether the lease did not merge on the purchase by C. of the fee, subject to the rights of the mortgagee of the lease, for the leasehold interest had subsisted for the benefit of the mortgagee thereof alone.

It would appear, therefore, that the noting of a merger by the District Land Registrar is purely evidential.

Our second case is *Bevan* v. *Dobson*, (1906) 26 N.Z.L.R. 69, which implicitly decides that the legal doctrine of merger, as modified in equity, does apply to Land Transfer land. (The statement in the headnote that the legal doctrine of merger does not apply to land under the Land Transfer Act, 1915, appears to be wrong.) Where a lessee under the Land Transfer Act, 1915, whose lease is subject to a registered mortgage, acquires the fee simple of the land leased to him, it is the duty of the District Land Registrar, when the transfer of the fee simple is presented to him for registration, to keep the memorials of the lease and of the mortgage thereof on the Register Book, and the memorial of the lease on the outstanding certificate of title. Similarly, the transfer should be made subject to the lease and the mortgage thereof.

The Legislature has recognized the doctrine of merger in s. 3 of the Land Transfer Act, 1939, which provides the machinery for the removal of easements and *profits a prendre* from the Register when they have become determined or extinguished. Subsection 2 thereof provides that, before making the entry of determination or extinguishment on the Register, the Registrar shall give certain notices, unless the determination or extinguishment was by effluxion of time *or merger*. The word " merger " in this subsection must, I think, include extinguishment by unity of seisin.

It certainly appears to follow that, where the dominant and the servient tenement get into common ownership, and the dominant tenement is mortgaged or subject to a lease, the easement must not be noted as determined or extinguished or merged in the servient tenement. If the dominant tenement was leased, the lessee would still have the use and enjoyment of the easement, and the easement would not determine until the lease had terminated or otherwise determined. If the dominant tenement is mortgaged, the operation of the easement would be suspended until the mortgagee entered into possession or exercised his power of sale : if he exercised his power of sale, he could and doubtless would pass the benefit of the easement to the purchaser.

I cannot see how a person can have an easement over his own land except as a mining privilege under the Mining Acts. This general rule is expressed in the maxim, *Nulli res sua servit. Stroud's Law of Easements*, 147, expresses the general rule thus :

> No man can have an easement over his own land, because by the very terms of its definition an easement is *jus in re aliena*. So, where by devolution of title the fees simple absolute of the dominant and servient tenements come into one hand, the easement becomes extinguished. Where, however, the common ownership of the two tenements is not co-extensive in point of estate, there is no extinguishment, but merely a suspension of the easement, which will revive upon a cessation of the unity of ownership.

At p. 184, *Stroud* points out that what are known as *natural* easements are not extinguished by unity of seisin of the tenements concerned :

> And, if they cease or become interrupted, *e.g.*, by unity of ownership of the respective tenements enjoying and affected by them, they will immediately revive *ex jure naturae* on cessation of those circumstances which caused the interruption, *e.g.*, on reseparation of the ownerships of the two tenements concerned,—in which respect they differ entirely from any kind of easements.

This rule has been applied to land subject to the Land Transfer Act, 1915, by the New Zealand Court of Appeal in *Bailey* v. *Vile*, [1930] N.Z.L.R. 829. It may be pointed out here that a natural easement does not require registration under the Land Transfer Act, 1915 ; of course, any variation of the respective rights arising *ex jure naturae* would have to be registered as an easement in order to be effective.

I can understand an easement's not becoming extinguished by unity of seisin where the two tenements become vested in the one person but in different rights. For example, me may own the servient tenement in his own right but the dominant as trustee : in such circumstances, extinction of the easement would amount to a " patent injustice."

As to revival of easements by severance after they have been merged by unity of seisin, *Gale on Easements*, 12th Ed. 454, has this to say :

> It has been contended that if he neglect to do so, and again sever the tenements, all easements having the qualities of being both continuing and apparent, as well as those which existed by necessity, will be revived upon the severance . . . It will be found that the classes of easements with respect to which revivor is supposed to take place correspond with those already considered, as being acquired by the *implied* grant resulting either from the disposition of the owner of the two tenements, or from the easement being of *necessity*. It is practically immaterial whether the foundation of the right be a new grant or a revival of the old right ; but the former is the more correct view of the title to them, and it is certainly more in harmony with the general principles of the law of easements.

If the doctrine of revival of easements, after there has been common ownership, is confined to *implied* easements or to easements of *necessity*, then the doctrine does not apply to the Land Transfer Act, 1915. An easement cannot arise by implication under the Land Transfer Act : *Mackechnie* v. *Bell*, (1909) 28 N.Z.L.R. 348. As Williams, J., pointed out in that case, at p. 352, in order to create an easement under the Land Transfer Act, there must be a registered instrument (a memorandum of transfer) *expressly* purporting to create one, and a memorial of the easement must be entered on the title of the servient tenement before any right to the easement passes. Similarly, an easement by necessity cannot arise over land subject to the Land Transfer Act : see article in (1934) 10 NEW ZEALAND LAW JOURNAL, 234.

Perhaps we are now in a position to attempt an answer to Mr. Blyth's poser. Does extinguishment occur where the dominant and servient tenements come into common ownership without any intention on the part of the owner that a right-of-way should be extinguished, as, for example, when the dominant tenement is immediately resold together with an appurtenant right-of-way ? In my opinion, extinguishment does occur, except where, at the date the two tenements came into common ownership, the dominant tenement was

subject to some estate or interest vested in a third person, such as a mortgage or a lease. I think that in support of my argument there may be cited *Smith* v. *Davy* (*District Land Registrar*), (1884) N.Z.L.R. 2 S.C. 398; and as *Garrow's Real Property in New Zealand*, 3rd Ed. 318, says:

> Where the dominant and the servient tenements come into the same ownership in fee, that is where there is unity of seisin, the easement is at an end, for one cannot have an easement over his own land, one's use of what would otherwise be a right-of-way, for example, being merely the use of one's own land, by virtue of the ownership of that land.

In this respect, I can see no difference in principle between a right-of-way and other easements. One possible exception which occurs to my mind is the statutory drainage easement arising under s. 232 of the Municipal Corporations Act, 1933. That easement, I take it, inheres against and in favour of each parcel of land, and, if suspended by common ownership, will revive on subsequent severance of ownership. There is provision for registration of a certificate of the easement, but no provision for its removal. In principle, these drainage rights appear to me to resemble *prescriptive* rights of light and air, which have been held in several cases not to be extinguished by unity of seisin.

To revert to Mr. Blyth's question, when the dominant and servient tenements come into common ownership, it is the duty of the District Land Registrar to hold his hand until he ascertains whether there are facts which prevent extinguishment of the easement. If there are no such facts, then I think that it is his duty to mark the easement as extinguished on the titles for both the dominant and servient tenements. Mr. Blyth puts the case where the dominant tenement is immediately resold together with the appurtenant right-of-way. But the transfer to the purchaser must be presented for registration *after* the transfer by which the common ownership of the dominant and servient tenements came about. Theoretically, at least, when the transfer to the purchaser is presented for registration, the memorials of the easement will have been expunged from the Register Book, and, therefore, the transfer purporting to be together with the appurtenant right-of-way should be rejected as not correctly stating the facts. In these circumstances, the transferor will have to grant by memorandum of transfer a new right-of-way over the tenement retained by him in favour of the tenement sold to the purchaser.

But, in practice, unfortunately, it is not quite as simple as this. Often the two tenements, the dominant and the servient, become owned by the same person in the same right without the Land Registry officials becoming apprised of the union. The memorial of the right-of-way remains against the titles for both tenements. It is one of the fundamental principles of the Land Transfer system that any person proposing to deal with land may take the Register Book as he finds it. In the words of that great Judge Williams, J., in *Mackechnie* v. *Bell*, (1909) 28 N.Z.L.R. 348, 353:

> The principle is that the register of title to land is to show on its face what the title is, and that everyone is entitled to rely on the title as it appears on the register without further investigation.

If a memorial of an easement is entered against the title for the servient tenement, the easement is entitled to State guarantee like any other estate or interest registered under the Land Transfer Act, 1915. If the easement does not exist, the memorial thereof should not remain on the servient title: *District Land Registrar* (*Auckland*) v. *Kauri Timber Co.*, (1902) 22 N.Z.L.R. 260, 266.

Therefore, in the example taken by Mr. Blyth, if the Land Registry officials, when they register the transfer to the purchaser, do not notice that there is common ownership of the two tenements, it appears to me that both the District Land Registrar and the transferor are estopped from subsequently denying that the right-of-way exists. The right-of-way, it is true, was dead before the transfer to the purchaser was registered, but the transfer accepted for registration, containing the statement together with the appurtenant right-of-way, operates, not only as a transfer of the dominant tenement, but also as a regrant of a right-of-way under the same terms and conditions as set out in the transfer originally creating the right-of-way.

PARLIAMENTARY PROCEDURE.

The Rule and the Example of Westminster.

Writing in 1641, William Hakewil expressed the wish that "the same course were taken by the House of Commons, as was by the Lords in 18 Jacobi Regis, who appointed a Committee for the collecting of the rules and orders of that house; which being collected, they caused to be fairly ingrossed in a roll of parchment, which by order is alwaies read in the beginning of every Parliament, and resteth in the custody of the Clarke of that house, to be presently resorted unto upon all occasions, whereby much of their pretious time is saved, which otherwise perhaps would have been spent in the debating of the Rules and Orders of their house."

It is remarkable, says a special correspondent to *The Times* (London), that the Commons have not accepted Hakewil's "poore opinion"; the only roll of parchment on the Table of the House is that on which every new member signs his name. For a hundred years past, however, in an atmosphere markedly official, the Table has borne a copy of a large private work, of which the fifteenth edition is published to-day.* On the left hand of the Speaker's chair, too, there is a built-in shelf, of a size which exactly houses those thousand-odd pages which are, from time to time, most effectively "resorted unto" by the occupant, whenever he desires to reinforce, by an appeal to the judgment of his great line of predecessors, the soundness of his own decisions.

Librarian and Clerk.

When the author, Thomas Erskine May, first published the work in 1844 he was assistant librarian of the House of Commons. He was soon transferred from the then narrow scope of the library and in 1856 Mr. Speaker Shaw Lefevre appointed him Clerk Assistant, thus inaugurating the modern regime which demands that

* *Sir T. Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 15th Edition, edited by Lord Campion (Butterworth and Co. (Pub.), London).

the House of Commons shall be served at its Table by the highest available standard of professional merit and by nothing else. When Sir Thomas Erskine May retired in 1886 his work was in its ninth edition. He had accomplished the first stage in disseminating to the world knowledge of the practical working of the British Parliament, which is beginning to be called her greatest contribution to civilization.

The changes in normal procedure since the war have been many. The Parliament of 1945-49 was at least as active as any of its predecessors in its contribution to procedural development. The importance of the work of the Select Committee on Procedure, which made its final report in 1946, is emphasized by the record, in chapter after chapter, of far-reaching changes directly or indirectly resulting from its work.

Questions to Ministers.

The practice of Questions to Ministers is perhaps the most brilliant single contribution that any nation has made to the processes of modern democracy. (A hundred years ahead of democratic competitors in this field, we read with something like complacency that in the United States House of Representatives, in July, 1950, the first parliamentary question has been asked.) Here are noted further refinements in its practice, and by a razor's-edge distinction the House seems, at any rate for the moment, to have solved the problem of questioning, without harrying, the multiple operations of a nationalized industry.

The intricate machinery of supply has been improved, to enable the Opposition to use more days in more effective criticism of the Government: as a counterbalance, the work shows how the knife of the "guillotine" has been honed to provide for more ruthless incision whenever a Government feels impelled to use its majority to force controversial legislation through the House. Since the last edition there have been new forms of proceeding, as well as new machinery.

Scotland to-day appears to enjoy a very considerable control of its own legislation and finance within the Parliament at Westminster. Since 1948 the standing committee, which includes every member elected by a Scottish constituency, has virtually taken over from the House of Commons the vital second reading stage of Bills relating exclusively to Scotland. Not until the Scottish Standing Committee has first considered the principle of the Bill, and then made amendments to it in Committee, does the House of Commons as a whole have a say, and then its comment is limited by the rules applicable to the later stages of legislation. In addition, the Scottish Standing Committee, whose recent development may effectually counter any serious demand for a separate Scottish parliament, may now consider, on six days each session, the financial Estimates for the public services of Scotland, an innovation which also dates from 1948.

The growing complexity in the processes of government is reflected, too, in the statement that it is the duty of the librarian and his staff "to assist members in their researches." Parallel with recent major changes of procedure, May's first employer, the House of Commons library, has been undergoing a major development to enable it to fulfil most of the functions which fall under the modern head of Information. In 1818 it consisted of a single room 17 ft. square. But for a century after Barry built the noble range which is still the library, the institution remained what a legislature of country gentlemen and the other "superior" classes required—a replica of their own comfortable and often out-of-date libraries at home. In 1946, as the result of the report of a select committee, a thorough reorganization was instituted and has just been completed. Under the authority of the present Speaker and of the then librarian, Mr. Hilary St. George Saunders, the staff, of which the higher grades are now all drawn from the universities, has been increased, and the library has been reconstructed in three divisions. It comprises the original parliamentary division, brought up to date by the addition of books selected by outside specialists. There is a research division, including a statistical section, composed of staff whose duties include the provision of bibliographies of sources in time for debates in the House. Finally a fully equipped reference division is intended to arm members with the most up-to-date information upon any subject.

Commonwealth Speakers.

It is not without procedural significance that for the first time Erskine May has been dedicated jointly to the Speaker of the House of Commons and to the Speakers of the Commonwealth. It is an indication that the scope of parliamentary practice has become so much wider that the time is approaching when this great subject can no longer be dealt with in a single volume devoted almost exclusively to the practice of the Parliament of the United Kingdom. Just as the parliaments of the Commonwealth afford mutual support to one another in the constitutional field, so the rulings by one Speaker may give guidance to another in the narrower field of practice.

The solution to a problem of procedure sought by one House may already have been found and applied by another; and it is clearly desirable that the experience of one assembly should be permanently accessible to all. The procedures of legislative assemblies outside the British sphere may also offer fruitful comparisons, and the new international institutions may in time demand co-ordination in procedure as well as in political action. Where the forms of proceedings are linked, or at least understood, the opportunity for political agreement between assemblies may also be enhanced.

Since his retirement in 1948 Lord Campion has visited many of the Dominions and colonies. The unifying power of parliamentary procedure throughout the Commonwealth, which Sir Bryan Fell so consistently stressed, is now widely recognized. The officers of legislatures many thousands of miles from Westminster are furnished with the same familiar precedents and authorities, though the problems are often new. Might not the present editor consider collating his vast parliamentary reading and knowledge into a work to record not only the procedure of one parliament but of all parliaments throughout the world? It would be a great task but Lord Campion is perhaps the only man with sufficient authority and experience to undertake it.

NOTES FROM ENGLAND.

By APTERYX.

The Identity Card Case.—The desire not to be compelled to disclose one's identity is a powerful human instinct, and there are many who would have rejoiced had Mr. Clarence Willcock, a sometime unsuccessful Liberal candidate for Parliament, succeeded in his appeal by way of case stated to the Divisional Court from his conviction by Justices for failing to produce his National Registration Identity Card when required to do so by a constable in uniform, contrary to s. 6 (4) of the National Registration Act, 1939. He would also have had the sympathy of Trollope's Mr. Crawley, who, when calling on the Bishop of Barchester, answered the footman's inquiry with: "My name is Crawley. I am not bound to carry with me my name printed on a ticket. If you cannot remember it, give me pen and paper, and I will write it." Mr. Willcock, however, was held to be bound. Nevertheless, for a time the Press treated him as another Hampden, and at least one dinner was given in his honour.

Because of the importance of the case, an unusually strong Court was constituted—the Lord Chief Justice, the Master of the Rolls, Somervell and Jenkins, L.JJ., and Hilbery Lynskey, and Devlin, JJ. The Law Officers were invited to attend as *amici curiae*, and the case for the respondent was, in fact, almost wholly argued by the Attorney-General, Sir Frank Soskice, with whom appeared Mr. J. P. Ashworth, who succeeded Mr. H. L. Parker as Junior Common Law Counsel to the Treasury when the latter was elevated to the Bench. The present Attorney-General is perhaps not yet of the stature of his predecessor, Sir Hartley Shawcross, and, as Solicitor-General, his experience was largely in Revenue work, but he emerged from a trying argument fairly unruffled. It is an interesting reflection that, but for the consequences of political intransigence, one of these offices might now be held by a New Zealander. Mr. Vernon Gattie, who has been Treasury Counsel for Middlesex Sessions since 1920, and who actually appeared for the respondent constable, came under heavy fire from the Bench when he was faced with the task of explaining why the Police demanded the production of identity cards when interviewing motorists in connection with minor traffic offences—a use of the power scarcely contemplated by Parliament when passing the National Registration Act, and of which all members of the Court emphatically disapproved. Lord Goddard has since repented his disapproval in a debate in the House of Lords, thus exemplifying an aspect of the United Kingdom constitution which might shock a purist in the matter of the separation of powers. The appellant, however, did not seek to base any argument on the use to which the power of the constable had been put. His case was rested solely on the contention that the Act conferring the power was no longer in force.

This contention derived from a provision in the Act that it was to continue in force only:

> until such date as His Majesty may by Order in Council declare to be the date on which the emergency, that was the occasion of the passing of this Act, came to an end.

Some thirty-two Acts passed at about the same time contained virtually the same formula. It was contended that, as a matter of interpretation, the emergency that occasioned the passing of all these Acts was the same emergency, and hence that an Order in Council purporting to terminate any one of them must *ipso facto* terminate all. Several such Orders in Council had been made, the first of them in 1945. The argument was supported by reference to language that could have been used—and, in fact, was used, in certain other Acts—to make it clear that the Executive could terminate different Emergency Acts at different dates.

One of the thirty-two Acts was the Rent Restriction Act, 1939, extending the life of the principal Acts of 1920 and 1933, which would otherwise have expired in 1942. Mr. A. P. Marshall, K.C., the experienced senior counsel for the appellant (who has had political affiliations and, sadly enough, experiences similar to those of his client), confessed to their Lordships that "one of his anxious moments" occurred when he had to agree that his argument had involved the destruction of this edifice. But after lunch on the second day of the hearing, when Mr. Marshall replied, it soon became apparent that the tide had turned against him; and, after a retirement of about half an hour, the Court returned to dismiss the appeal.

Lord Goddard said that, owing to the importance of the case, it was desirable to give a decision forthwith, and read with difficulty—possibly the hand was not his own—the judgment of himself and four of his colleagues, which in effect did no more than summarize the main arguments on either side and state that their conclusion was that, to bring to an end any one of the Acts using the formula in question, there must be an Order in Council dealing in terms with that particular Act. The reasoning that led to this conclusion was not stated. In a separate judgment, Sir Raymond Evershed, M.R., said that he did not dissent, but indicated that *prima facie* he would have inclined to the view that all the relevant Acts did contemplate the same emergency. Having regard to the view taken by the majority, however, he thought "it would be impertinent to suggest" that the language was not fairly and equally open to different constructions. Since the Legislature had, by passing between 1939 and 1945 a number of amendments to Acts containing the formula, indicated that it considered those Acts to be still in force, he thought that the rule in *Clarkson's* case, [1900] 1 Q.B. 156, was let in. This rule (which was applied recently by Finlay, J., in *Jeune* v. *New Zealand National Airways Corporation*, [1950] N.Z.L.R. 665) is in substance that, when, to give effect to a later Act dealing with the same subject, it is necessary to adopt a certain construction of an earlier Act which would otherwise be doubtful, it is permissible to do so. Since the rule in effect allows the Legislature to become the interpreter of Acts of an earlier Legislature, it seems to be clearly founded on convenience rather than on logic. The learned Master of the Rolls also mentioned the difficulty there would be, if the appellant's construction were accepted, in attributing any effect at all to the Orders in Council already made purporting to terminate individual Acts containing the formula, since miscellaneous Orders in Council would, on that construction of the formula, have been made *alio intuitu*. Devlin, J., who is widely regarded as one of the very ablest of the High Court Judges, indicated that he was

in doubt about (apparently) the whole matter; but that, as the case was of great importance and it was accordingly desirable to have a speedy decision, and as a majority had reached a clear conclusion, he thought no public advantage would be served by his taking time to resolve his doubts.

It does seem—if one may say so with great respect—that some of the public advantage of convening such a strong Court is lost if no fully reasoned judgment is given and if the decision is arrived at in some haste. As to the argument of extreme urgency, the alleged offence was committed on December 7, 1950, the decision of the Justices was given on February 14, 1951, and the appeal came before a Divisional Court, consisting of the Lord Chief Justice and Lynskey and Devlin, JJ., on June 12, 1951. The case was then argued, but was finally adjourned, so that the Law Officers might be heard. The hearing before the augmented Court took place on June 25 and 26, 1951. Moreover, Parliament is not to adjourn for the summer recess until August 2, although it is true that the precise date had not been announced when judgment was given.

Another aspect of the case striking to a visitor was the fact that Somervell, L.J., who was Attorney-General from 1936 to 1945 (and who, incidentally, is sometimes spoken of as having strong claims to even higher judicial office when a Conservative Government is elected), sat. One would think that it would have been difficult for even that learned Lord Justice to have approached the matter with complete detachment. Certainly it seemed obvious at any rate to the present writer, from the discussion between Bench and Bar, that from quite an early stage in the argument Somervell, L.J., was somewhat disposed to form an opinion that the appeal should fail, although no one would, of course, suggest for a moment that this was due to any conscious predilection for the Crown's case on the part of His Lordship. Bearing in mind the principle that justice should not only be done but should also appear to be done, it is submitted with great respect that, although there are no doubt constitutional cases in which it is of advantage that a former Law Officer should sit, it may be undesirable that one should do so in a case turning on the interpretation of important emergency legislation passed at the instance of the Government to whom he was chief legal adviser.

What is a Name?—A word which is "according to its ordinary signification . . . a surname" may not be registered as a trade-mark without special evidence of distinctiveness. The Court of Appeal had recently to decide whether the word "Morny" fell within this category. The argument was entertaining. The mark is apparently well known in connection with cosmetics. Nevertheless, it seems that the Master of the Rolls, Jenkins, L.J., and Hodson, L.J., were all unfamiliar with it; and, indeed, Jenkins, L.J., remarked that all he associated it with was "a sauce that usually disguises rather indifferent fish." Counsel for the proprietors, Mr. J. N. K. Whitford, thereupon told their Lordships a solemn cautionary tale about a departmental officer who, faced with the same question in respect of the word "Jupiter," had recourse to a telephone directory, where he duly found listed the number of "Jupiter, D." He accordingly declined the application for registration; but his error was triumphantly demonstrated by the industrious applicant, whose researches disclosed that the number was that of one of two flats, both of which had telephones. The owners of the building lived in one flat themselves, and it was their habit to lend the other flat to a succession of different friends. Not wishing both numbers to appear under their own name, the owners cast round for an alternative, and alighted upon that of their dog. This was Jupiter, and D for "Dog" seemed the only possible initial. The question of Sir Raymond Evershed, M.R., as to how the dog signed the necessary contract with the Postmaster-General was left unanswered. A further difficulty in the way of Mr. Whitford's argument was that the name of his client company had once been Morny Freres, Ltd. Counsel was, of course, scornful of the suggestion that this was any indication that "Morny" was other than an invented word. Evershed, M.R., observed *obiter*, however, that he had always taken the view that there was a strong *prima facie* presumption that there were in existence certain brothers called Marx.

The Prettiest Silk.—He would be a stony-hearted juror who saw no force in the submissions of Miss Rose Heilbron, K.C., who is in private life the wife of a doctor and in public the only woman practising as a King's Counsel in the United Kingdom, Miss Helena Normanton, K.C., having recently retired. But the success at the Bar which Miss Heilbron has attained well before reaching middle age is probably due less to the advantages accruing from her vivid and very English beauty, or, indeed, to learning, than to a sound intuitive judgment and a silver tongue. She practises on the Northern Circuit and made her name at the Liverpool Bar, where there is a tradition of taking a strongish line with the Bench and also with the Police, one of Miss Heilbron's victories over whom goes down to posterity as *Christie* v. *Leachinsky*, [1947] A.C. 573; [1947] 1 All E.R. 567. She herself believes success to lie in the observance of three simple rules: if the law is on your side, address the Judge; if the facts are on your side, address the jury; and, if neither the facts nor the law are on your side, just bang on the table.

Miss Heilbron's latest *cause célèbre* was the dockers' case, in which she was leading counsel for the Merseyside contingent of the accused. Some of the immediately unsatisfactory consequences of the proceedings are indicated by Scriblex's note in this JOURNAL (*Ante*, p. 163); but not every member of the public would agree with the comment in (1951) *100 Law Journal*, 226, that "the result of these proceedings can only be described as lamentable," for the determined fairness with which the Crown's case was conducted must surely have impressed all except the most purblind striker.

During the trial, there were various demonstrations by the dockers, who idled outside the Old Bailey in considerable numbers. Sir Hartley Shawcross adroitly asked the jury not to allow such demonstrations to influence their minds in the slightest degree against the accused. As Scriblex has mentioned, the jury disagreed on the first count, which involved "conspiring to invite dock workers to take part in trade disputes" contrary to what was originally an Emergency Order, but found the accused guilty on the second, which involved "otherwise than in connection with a furtherance of a trade dispute" conspiring between the same dates to invite workers to break their contracts. After taking time to consider the matter, Sir Hartley expressed the view that these findings were inconsistent, in that at least some members of the jury, when considering the first count, must have decided that the existence of a trade dispute was proved, but, when considering the second count, must have changed their minds on this

point. He accordingly, " in fairness to the defendant," and with the approval of the Lord Chief Justice, entered a *nolle prosequi*. Juries sometimes move in a mysterious way their wonders to perform, and it would seem a nice question whether, as a matter of law, such a change in the opinion of some jurors must be presumed. However that may be, there seems to have been wisdom and foresight in the lenient course adopted by the Crown.

Miss Heilbron does a great deal of criminal and *nisi prius* work, and it is her practice to see her clients personally before trial. She feels that she is sometimes better able than a man would be to understand the mind of an accused and to win his confidence, and she finds information obtained in such interviews particularly helpful if she has to address the Court on the question of sentence. This practice of hers is in contrast to that of Sir Patrick Hastings, for whom she has deep admiration. Curiously enough, Sir Patrick departed from his practice and saw his client in *Constantine* v. *Imperial Hotels, Ltd.*, [1944] 1 K.B. 693 ; [1944] 2 All E.R. 171, the only case in which he ever led Miss Heilbron, where the great West Indian cricketer recovered nominal damages from an innkeeper for wrongfully refusing to receive and lodge him, although, since he was provided with accommodation at another hotel owned by the defendant company, he was unable to prove special damage. But Sir Patrick's interests are wide, and Miss Heilbron reports that at the interview the case itself was not discussed.

Another story that Miss Heilbron tells is of a visit she has just paid to Western Germany. She is keenly interested in comparing systems of criminal justice, and she accordingly attended a sittings which corresponded to English Quarter Sessions. A man was tried on a charge of receiving stolen wireless sets. To her surprise, the prosecution were permitted at once to give evidence of previous convictions of the accused for various dissimilar offences. A conviction was duly secured. When she afterwards asked the presiding Magistrate on what ground the evidence was admitted, she received the puzzled reply : " But how else would we know whether he was guilty ? "

Impressions.—Sixteen new King's Counsel waiting to be called within the Bar at the beginning of the Easter Sittings while a layman, of whom Sir Raymond Evershed, M.R., subsequently said that he who argues his case in person " should assume that the Court is at least capable of apprehending points when they are put to it," persisted in " arguing many points with tenacity and at great, and indeed undue, length," until the Master of the Rolls with a marked effort overcame his own singular charm sufficiently to enable himself actually to order the man to sit down . . . The humility with which the Court of Appeal tried to learn from Mr. F. W. Beney, K.C., what really was the law established by previous Divisions of that Court as to trespassing children and negligence . . . Singleton, L.J., finding it suddenly quite impossible to hear a junior counsel who, in seeking to explain why his client may have been advised not to go into the box when being prosecuted for drunken driving, used the expression " sink himself " . . . Mr. W. A. Fearnley-Whittingstall, K.C., discussing in the Court of Appeal the duty of counsel, who calls a witness known by him to be of doubtful credibility by reason of past convictions, not by his line of questioning actively to mislead the Court, and coining the happy expression that counsel must " not put the lid on the pot, although he need not actually take it off " . . . Parker, J., less happily observing, in an oral judgment, " This lady, although, if I may say so, she does not look it, is a woman of sixty " . . . Mr. A. P. Marshall, K.C., suavely submitting in the identity card case that a certain measure was " obviously an Emergency Act, for it provides for the making of Orders prohibiting the sale of alcoholic liquor " . . . Mr. D. N. Pritt, K.C. ("On the whole you will see that the Russian system of criminal justice is much the same as ours, but in one or two respects they are ahead of us "), in an address on Soviet Law and Practice, handing out what seemed so transparently a Party line as to bring home to one sharply realization of the courses to which Communism can compel the keenest of intellects.

The Nature of the Commonwealth

" There can be no formal bonds to hold the Commonwealth together. Even the position of the Crown has changed, but not our respect for the Crown or our devotion to the King. The Commonwealth has no formal constitution. To-day it has become a free association of free nations which used to be linked together politically, and now are associated because of a common attachment to certain political ideals. All of us in the Commonwealth stand for the maintenance of a large measure of freedom for the individual within the community, for genuine control by the citizens over their governments, and, underlying both these concepts, for the view that nations, large or small, have a right to order their own affairs in their own way, so long as in doing so they do not menace the existence or the freedom of their neighbours. There are still some people who feel that these ideals are so general that they can be and, in fact, are shared by most of the free nations which are not in the Commonwealth ; and that therefore the Commonwealth as such has ceased to have any real meaning. With this conclusion I cannot agree, though I certainly agree with the premise. To me the greatest attraction of the Commonwealth is that it is not exclusive in its ideals : that it is founded upon conceptions that could, with advantage to the world, be extended to all other nations."—From an address by the Rt. Hon. L. S. St. Laurent, Prime Minister of Canada, to the Canada Club in London on January 8, 1951.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Jessel.—The visit of Sir Raymond Evershed, M.R., recalls to mind the story told by Sir George Jessel's son of how, in 1881, his father ceased to be a Judge of first instance and thereafter sat only in the Court of Appeal:

> It was entirely owing to my father's position that the Master of the Rolls became a permanent Judge of the Court of Appeal. In 1881, Lord Justice James died, and there was no one of sufficient weight in the Court of Appeal to hear appeals from a man like Sir George Jessel. It was therefore much to his regret that it became necessary to pass a special Act of Parliament by which the Master of the Rolls ceased to be a Judge of first instance, and, though he had up to that date been *ex officio* a member of the Court of Appeal, he now became permanently a Judge in that Court.

From 1873 to 1881, when his chief function as Master of the Rolls was to sit as Judge of first instance in the Rolls Court, Jessel built up an outstanding reputation for decisions that were as "unerring as they were expeditious." Never once did he reserve judgment, not even in the famous *Sewers Commissioners* v. *Glasse*, (1874) L.R. 19 Eq. 134, which lasted twenty-three days in Court. More than a hundred witnesses were called, statutes extending back to the time of King John cited, innumerable documents produced; but, despite all this, there was an oral judgment running into sixteen pages at the conclusion of counsel's arguments. "No better illustration of his method," says Professor Goodhart, "can be cited than this case, for it shows with what skill he was able to analyse the complicated facts, and how clearly, in short staccato sentences, he was able to state his conclusions."

Of Judges and Horses.—Now that the politicians have made this country, if not safer for democracy, at least more financially secure for themselves, Scriblex diverts their uneasy gaze to that little-known body, the Court of Common Council in London, which has started the ball rolling in the matter of Judges' salaries. The City Judges, according to recommendations now approved, are to go up £500 a year, which means that the Common Sergeant now receives £3,000 a year, a Judge of the Mayor's Court and the City of London Court gets a like amount, while his assistant gets £2,500. The Recorder stays at £4,000 a year, but his personal pension is now fixed at £2,800, plus a lump sum equal to one year's reduced pension and a widow's pension, in accordance with the Administration of Justice (Pensions) Act, 1950. He does not, of course, personally receive the widow's pension, but otherwise Scriblex hopes that his meaning is clear and that a hint is better than a nod to a blind horse. And, speaking of horses, have you heard the story of the carrier who took his horse in a bar with him. After several rounds of drinks, the horse began to sag a bit at the knees, and the licensee, who was worried about a possible endorsement of his licence, wondered whether the horse should have another. "Oh, that's all right," said the carrier, "I'm driving!"

Sir Arthur Goodhart.—The elevation of Professor A. L. Goodhart to the Mastership of Oxford University directs attention to one of the most amazing legal scholars of all time. An American by birth, he was educated at Yale, and went from there to Trinity College, Cambridge, returning to the U.S.A. to become Assistant to the New York Corporation Council. In 1919, he accepted an appointment as University Law Lecturer at Cambridge. During his twelve years at Cambridge, he edited the *Cambridge Law Journal* and served for a period as counsel to the American mission in Poland. In the meantime, he had become an officer of the French Academy, and in 1931 he received the Chair of Jurisprudence at Oxford, an office he has held ever since. K.C. in 1943, Curator of the Bodleian Library, President of the International Association of University Professors, founder of the Oxford Leave Courses for Allied servicemen, he is a Fellow of both University College and Nuffield College, a Bencher of Lincoln's Inn, and a member of almost every major legal committee convened in Britain and America. In his spare time, he edits the *Law Quarterly Review* and writes biographies and articles on government and the common law.

CORRESPONDENCE.

Elimination of Latin as A Degree Subject.

The Editor,
New Zealand Law Journal,
Wellington.

Dear Sir,

I understand that the Council of the New Zealand Law Society has informed the University of New Zealand that in its opinion Latin should no longer be a compulsory subject for law examinations. This decision, arrived at contrary to the recommendation of a special committee appointed to report on the subject, is to be regretted, and does not, I hope, coincide with the views of the majority of the members of the profession. It certainly does not represent the opinion of those interested in the teaching of law with whom I come into contact.

I would have thought it unanswerable that some knowledge of Latin is essential to enable us to understand and value the foundations of Western civilization and the origins and development of our system of law. Perhaps if we wish to be merely tradesmen that knowledge may be unnecessary, but should we not aspire to a higher standard, even though difficulties may be in the way? The severance of this one of the last remaining cultural links from the training of the young lawyer will not assist him to justify his claim to be a member of a learned profession.

I write this letter in the hope that a correspondence will be initiated in which the views of individual members of the profession may be revealed.

Yours, &c.,
T. P. McCarthy.

The Co-operative Dairy Companies Act, 1949.

The Editor,
New Zealand Law Journal,
Wellington.

Dear Sir,

We wish to refer to the article "Co-operative Dairy Companies Act, 1949" (*Ante*, p. 224). The following paragraph appears therein:

> "Finally, it is desired to remind practitioners that, unless a co-operative dairy company registered under Part III of the Dairy Industry Act, 1908, at the time of the date of the coming into operation of the Co-operative Dairy Companies

Act, 1949, re-registers under the latter statute before October 20, 1951, it loses the privileges which that registration confers. As previously pointed out, Part III of the Dairy Industry Act, 1908, has been repealed, but a company which was registered under that Act at the date of the coming into operation of the Co-operative Dairy Companies Act, 1949, is deemed in the meantime—*i.e.*, until October 20, 1951—to be registered under the Co-operative Dairy Companies Act, 1949."

We act for several dairy companies, each of which was registered under Part III of the Dairy Industry Act, 1908, before October 20, 1949, and each of which has since adopted new articles of association, including regulations in the form of the regulations specified in subs. 2 of s. 2 of the Co-operative Dairy Companies Act, 1949.

Our opinion is that these companies were deemed to be registered under that Act as co-operative dairy companies by virtue of s. 6 of the Act, and that, having adopted the necessary regulations, they will not cease to be so registered on October 20, 1951. In our opinion, there is no need to " re-register " in these cases.

We would be grateful if you would refer this letter to the author of the article in question for his comments.

Yours, &c.,

BLAKISTON, BLAKISTON, AND NELSON.

Dannevirke, per T. G. Nelson.

August 22, 1949.

[There is no doubt that the law is correctly stated in the penultimate paragraphs of the above letter. The companies referred to will not cease to be registered under the Co-operative Dairy Companies Act, 1949, on October 20, 1951, as they have done all that the statute requires them to do—namely, adopted the compulsory articles set out in the Co-operative Dairy Companies Act, 1949, and registered such new articles. This is really what the writer of the article intended to say, but he admits that he used the word "re-registers" in rather a loose fashion.—EDITOR.]

PRACTICAL POINTS.

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

1. Mortgage.—*Overdue Land Transfer Mortgages—Non-payment of Interest for Several Years—Effect of Limitation Act on Same.*

QUESTION: We act for a second mortgagee whose mortgage is registered under the Land Transfer Act, 1915. The mortgage fell due on June 1, 1929, and no interest has been paid, nor has there been any acknowledgment of liability since March 16, 1938. Judgment was obtained against the mortgagor on February 3, 1942, for arrears of interest to December 1, 1941, but no part of the judgment has been satisfied.

Our client is not anxious to press the mortgagor in the meantime, but he desires to preserve his rights, not only against the land, but also under the mortgagor's personal covenant. We wish to advise him as to his position in view of the Limitation Act, 1950, which comes into force on January 1, 1952.

As we understand the law at present, subject to the provisions of s. 43 of the Statutes Amendment Act, 1936, the mortgagee's title as regards the land is indefeasible, by virtue of s. 61 of the Land Transfer Act, 1915, and the provisions of the Real Property Limitation Act, 1833, do not apply: *Campbell* v. *District Land Registrar of Auckland*, (1910) 29 N.Z.L.R. 332; but action on the personal covenant, whether for the recovery of principal or for the recovery of interest, is barred after twenty years by s. 3 of the Civil Procedure Act, 1833.

So far as the remedies against the land are concerned, the position seems to be the same under the Limitation Act, 1950, which by s. 6 (2) is expressed to be subject to the Land Transfer Act, 1915, so far as it is inconsistent with anything contained in that enactment. It would appear, however, that s. 4 (3), which partly replaces s. 3 of the Civil Procedure Act, 1833, must be read subject to the provisions of s. 20, in which case the period of limitation for actions on the personal covenant is twelve years for the recovery of principal and six years for the recovery of interest.

Is our opinion a correct interpretation of the law as it now stands and as it will be when the new Act comes into force?

ANSWER: The law which will be in force on January 1, 1952 (when the Limitation Act, 1950, comes into force), appears to be correctly stated above, and the opinion expressed in the above question is concurred with.

It was held by the Court of Appeal in *Chambers* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504, 526, that, where there is a covenant to pay rent or interest secured on land, in proceedings not against the land, but upon the covenant to pay, the period of limitation is twenty years, not six years, because such a case comes within s. 3 of the Civil Procedure Act, 1833, and not s. 42 of the Real Property Limitation Act, 1833. Apparently, on and after January 1, 1952, this part of the law laid down in *Chambers's* case will no longer apply: the period for the recovery of interest under a mortgage will apparently be reduced to six years by reason of the proviso to s. 4 (3) and s. 20 (4) of the Limitation Act, 1950. Likewise the period allowed for recovery of the principal sum will be reduced from twenty years to twelve years. Proviso (*a*) to s. 20 (4) will lengthen the period for recovery of interest where applicable.

X.2.

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2. Company.—*Formation—Promoters desiring to use Word " Co-operative " in Name—Whether permissible.*

QUESTION: Seven persons have given me instructions to form a company under the Companies Act, 1933. They desire, if possible, to use the word " co-operative " as part of the name of the new company. Are there any restrictions on the use of the word " co-operative "? What is a co-operative company?

ANSWER: This question cannot be accurately answered until the exact nature of the intended company is disclosed.

There is a general restriction as to the use of the word " co-operative " in s. 30 of the Companies Act, 1933. The word cannot be used without the consent of the Governor-General. This consent is applied for through the Registrar of Companies. In practice, consent is not granted unless it is established that the company is to be formed on a truly co-operative basis and is likely to remain truly co-operative. No satisfactory definition of a co-operative company appears possible, with the exception of the special companies coming within the statutory provisions hereinafter mentioned, but some assistance may be obtained from the Australian case, *Shelley* v. *Federal Commissioner of Taxation*, (1929) 43 C.L.R. 208.

There are special provisions as to pig-marketing, fish-marketing, and egg-marketing companies in the Co-operative Companies Act, 1933, s. 13 of the Statutes Amendment Act, 1939, and the Co-operative Egg Marketing Companies Act, 1950, and as to co-operative dairy companies in the Co-operative Dairy Companies Act, 1949, all of which have their own special definition. Under these special Acts, the consent of the Governor-General is not necessary, but declarations (or other acceptable evidence) are filed by the promoters in the office of the appropriate Assistant Registrar of Companies.

X.1.