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THE NEW LAW OF DESCENT OF INTESTATE ESTATES.

V.

Power to Sell Real and Personal Estate.

SECTION 4 (1) gives the administrator power to sell real and personal estate and also gives him power to postpone conversion. As the statute does not direct conversion—*i.e.*, does not contain a *trust* for conversion, the principle of the case of *In re Mayo, Mayo* v. *Mayo*, [1943] 2 All E.R. 440, would not apply in New Zealand. In that case trustees could not agree to postpone conversion, and in consequence the Court held that under a *statutory trust* for conversion the assets in question must be sold immediately: see, also, *In re Horsnaill, Womersley* v. *Horsnaill*, [1909] 1 Ch. 631; and *In re Kipping, Kipping* v. *Kipping*, [1914] 1 Ch. 62.

Section 4 (2) gives the administrator power to sell assets even though the administration duties have been completed and he holds merely as a trustee. It is otherwise under s. 7 of the principal Act: *In re Johannes Andersen*, [1921] N.Z.L.R. 770.

Section 4 (3) provides that where the deceased leaves a will, the power of sale is to have effect subject to the provisions of the will. If, therefore, the will should prohibit the sale of assets under a certain price or should direct sale at a time which has not arrived, then notwithstanding that the assets are distributable as on an intestacy, the administrator could sell them only under an order of the Court: see, in this connection, *Hatrick* v. *Bain*, [1930] N.Z.L.R. 490, and s. 81 of the Statutes Amendment Act, 1936.

Powers of Maintenance and Advancement.

(a) Existing Legislation.

As the law stands to-day, the statutory powers of maintenance and advancement conferred on trustees for the benefit of infants are unsatisfactory. Moreover, as we hope to show, they are entirely inadequate for the purposes of the statutory trusts for the benefit of infant successors created by s. 7 of the Administration Amendment Act, 1944, which, however, adds nothing to the powers previously conferred by statute in this respect.

Powers of maintenance and advancement are conferred on trustees generally by ss. 93 and 113 of the Trustee Act, 1908, and by s. 6 of the Trustee Amendment Act, 1924, relative, *inter alia*, to the duties incidental to the office of personal representatives of a deceased person.

Before considering these sections in detail, it is well to remind ourselves that the interest taken by an infant under the statutory trusts created by s. 7 of the Administration Amendment Act, 1944, is a contingent interest *in capital*. An infant takes no *vested* share in the *income* of the contingent interest in the intestate estate.

Section 93 of the Trustee Act, 1908, is as follows:—

> (1) In any case where no provision or no sufficient provision is made in a will or trust deed for paying moneys for the maintenance or advancement in life of the beneficiaries, a Judge, on an application made to him in Chambers in a summary way by a trustee, may order such sum out of the estate as the Judge thinks fit to be paid and applied from time to time for the maintenance or advancement in life of any beneficiary under age.
>
> (2) Any payment so made in accordance with the Judge's order shall, in the event of such beneficiary attaining the age of twenty-one years, be deemed to be in full or in part satisfaction, as the case may be of the moneys to which he would then become entitled, and shall, in so far as such Judge's order extends, bar all claims of other persons who but for this enactment would have been entitled to the whole or to a distributive share of such estate.

As this section is limited by its terms to cases where there is a will or a trust deed, it is of no assistance in the administration of an intestate estate.

Section 113 of the Trustee Act, 1908, is as follows:—

> (1) Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may at their sole discretion pay to the infant's parent or guardian (if any), or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose or any person bound by law to provide for the infant's maintenance or education or not.
>
> (2) The trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time on securities on which they are by the instrument (if any) under which the interest of the infant arises or by law authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise, but so that the trustees may at any time, if they think fit, apply those accumulations or any

part thereof as if the same were income arising in the then current year.

(3) This section applies only if and so far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

From the terms of the section, it will be seen that it relates to the *income* or any part of the *income* of the administered property. It then makes provision for accumulation of the unexpended income, with power to resort to accumulation of the unexpended income for the aforesaid purposes; and unapplied accumulations are to be held upon trust for the person who ultimately becomes entitled to the property from which the accumulations arose.

The powers given by s. 113 of the Trustee Act, 1908, are exercisable only if and so far as a contrary intention is not expressed in the trust instrument, and are exercisable subject to the terms of that instrument. Under the definition in s. 2 of the statute, "trust" and "trustee" include "the duties incidental to the office of personal representative of a deceased person." The powers exercisable under s. 113 are accordingly available to the administrator of an intestate estate. It has been held that an express trust for accumulation of income *without more*, is not an expression of "a contrary intention" within the meaning of those words in subs. 3: *In re Darling, Darling* v. *Darling*, [1921] N.Z.L.R. 542, applying *In re Thatcher's Trusts*, (1884) 26 Ch.D. 426, and *In re Whiteford, Inglis* v. *Whiteford*, [1903] 1 Ch. 889; but, of course, the trust instrument must be scrutinized to see whether or not there is "a contrary intention" expressed by its terms apart from the trust for accumulation.

It should be noted that the powers given by s. 113 are exercisable even though the infant's interest is merely a contingent life interest, and that the section authorizes the application only of *income* for "maintenance, education, or benefit" of an infant. If the infant takes contingently on attaining an age greater than twenty-one the section does not apply, as it expressly makes the contingency the attainment of the age of twenty-one years.

Section 6 of the Trustee Amendment Act, 1924, is as follows:—

(1) Where the estate of a person deceased leaving a widow and surviving children or only surviving children does not exceed three hundred pounds in value after providing for all liabilities, it shall be lawful for the trustee of such estate to apply from time to time a reasonable portion thereof towards the maintenance and support of such widow and children, and towards the education of such children during their respective minorities.

(2) This section is in substitution for section ninety-two of the principal Act as amended by subsection five of section forty-six of the Finance Act, 1920, and the said section ninety-two is hereby repealed accordingly.

It is difficult to fit this provision into a distribution according to the express provisions of a will fixing the shares of the individuals. Even in a case where the will contains a class gift to children in equal shares, would the trustee use the shares of all the members of the class as a whole, irrespective of the requirements of the individuals? The provision seems to have been intended to apply to intestate estates, not exceeding £300, of husbands and fathers. It can hardly have any force under the Administration Amendment Act, 1944, in view of the benefits thereby given to a widow.

Section 81 of the Statutes Amendment Act, 1936, provides:

Where in the management or administration of any property vested in trustees, any . . . disposition, or any . . . expenditure, . . . , is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees . . . by law, the Court may by order confer upon the trustees . . . the necessary power for the purpose, . . .

In view of the paucity of the provisions authorizing administrators, or empowering the Court to make orders authorizing administrators to maintain, educate, or advance infants out of *capital* where the statutory trusts created by the Administration Amendment Act, 1944, apply, some endeavour will possibly be made to obtain the necessary authority under the last-named section. But, it must be admitted, the framers of that section probably never had in mind an application of such a nature. Nevertheless, the section is very wide in its terms.

Section 25 of the Public Trust Office Act, 1908, gives the Public Trustee power to apply *income* and *capital* of an infant's *vested* share in an intestate estate for the infant's maintenance, education, advancement, and benefit. But this power will be nugatory and valueless where the statutory trusts apply, except where an infant is married and thus attains a vested interest.

Section 26 of the same statute is in similar terms to those of s. 113 of the Trustee Act, 1908, *cit supra.*, and authorizes the application of *income* only for maintenance, advancement, &c. Section 27 authorizes the application of the presumptive or contingent shares of infants in the *capital* of class funds held by the Public Trustee for their education, maintenance, or advancement; but the section is a difficult one to interpret or apply.

As s. 6 (1) (*a*) of the Administration Amendment Act, 1944, entitles a widow on her husband's intestacy to the personal chattels and £1,000 with interest, s. 21 of the Public Trust Office Act, 1908, can no longer have any force if the intestate leaves a widow. Similarly, s. 22 becomes obsolete where the intestate dies after 1944.

(b) Suggested Legislation.

It is suggested that the Law Revision Committee should give its early attention to the amendment of the Trustee Act, 1908, by incorporating in our statute-law the sections of the English statutes of 1925 that were in the contemplation of the Parliamentary Law Draftsman in England when he drafted the paragraph corresponding to s. 7 (1) (*b*) of the Administration Amendment Act, 1944. We think that any practitioner reading the sections above set out will agree that the present powers conferred on trustees are inefficient and inadequate for the proper and effective management of the statutory trusts.

In this connection, attention is directed to the fact that s. 7 (1) (*b*) of the Administration Amendment Act, 1944, declares:

The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest.

At the time the corresponding paragraph in s. 47 (1) (ii) of the Administration of Estates Act, 1925 (Eng.) became law, there were already in existence the pre-

viously-enacted Trustee Act, 1925, and the Law of Property Act, 1925. "The statutory power of advancement" is clearly s. 32 of the Trustee Act, 1925, "the statutory provisions which relate to maintenance and accumulation of surplus income" are contained in s. 31 (*20 Halsbury's Complete Statutes of England*, 125, 122). By. s. 21 of the Law of Property Act, 1925 (*ibid.*, Vol. 15, p. 198) power is conferred on a married infant to give receipts for income (including statutory accumulations of income made during the minority).

These sections from the English property legislation are too long to reproduce here; but a perusal of them will show how they give practical effect to the powers intended to be conferred by s. 7 (1) (*b*) of our Administration Amendment Act, 1944, which, in its original context, was, as we have seen, part of the closely-knit series of English statutes to which reference has been made.

The final part of s. 7 (1) (*b*), it may be noted, refers only to the income of an infant's share under the statutory trusts. Under both the English and the New Zealand legislation, the share of capital under the statutory trusts in favour of an infant indefeasibly vests on that infant's attaining twenty-one years or marrying *under that age*. On such marriage, the infant is entitled to his or her share of capital. But our legislation does not confer on such infant, on his marriage under twenty-one years of age, any power to give receipts for *capital*. Though the capital indefeasibly vests in such an infant on marriage, the married infant cannot receive his or her share of capital until he or she attains the age of twenty-one years, since there is no power for a trustee to accept an infant's receipt for the capital of his share. The English legislation also seems defective in this regard,* and the only protection available thereunder to the personal representatives would appear to be payment into Court on the infant's marriage, and obtaining an order directing appropriation.

It is clear that the deficiency as to the giving of receipts for the capital of infants' shares on their indefeasibly vesting on marriage before attainment of the age of twenty-one years, should be rectified when amendments of the Trustee Act, 1908, are made generally for the purpose of rendering workable the provisions of s. 7 of the Administration Amendment Act, 1944, relating to infants.

The proposed amendments, suggested above, should, we think, be made of general application to all trustees, including the Public Trustee; and certain of the additional powers now conferred on the Public Trustee in his capacity as the personal representative of deceased persons, testate or intestate, should be extended to all trustees alike.

The Trustee Companies.

At the present time a large amount of work in administering intestate estates is undertaken by the trustee companies operating in New Zealand under their special statutes. Owing to the postponement of the vesting of the shares of persons contingently entitled under the statutory trusts, it is certain that the assistance of these companies will be increasingly sought as relatives or friends of an intestate become aware of the onerous and protracted nature of an administrator's duties under the Administration Amendment Act, 1944. It is suggested, therefore, that the restrictions imposed on any such trustee company in respect of its acting as administrator of an intestate estate should be removed. This may usefully be effected by an amendment of the relevant statutes empowering the Supreme Court to grant representation to a trustee company. This could usefully follow s. 161 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 19 (1) of the Administration of Justice Act, 1928: see *8 Halsbury's Complete Statutes of England*, 372.

Such an amendment would enable letters of administration to be granted to a trustee company, either solely or jointly with another person; it would remove the present necessity for the grant being made to a syndic on behalf of the trustee company, with further application on the death of such syndic; and it would vest in the trust company itself all interests in intestate estates vested, at the time the amending statute became law, in the syndic for the time being. The usefulness of such a provision and the saving of expense to estates, need no elaboration.

Infant's Use of Personal Chattels.

Section 7 (1) (*c*) of the Administration Amendment Act, 1944, is as follows:—

> *The administrator may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the administrator may consider reasonable, and without being liable to account for any consequential loss.*

"Personal chattels" are defined in s. 2 of the Amendment Act, 1944: see p. 31 *ante*.

This provision will have effect where the intestate is not survived by a spouse who, by virtue of s. 6 (1) (*a*), if he or she had survived the intestate would have taken the personal chattels absolutely. It can be applied only when no spouse survives, and then for the benefit of infants contingently entitled to share under the statutory trusts.

The power conferred on the administrator by s. 7 (1) (*c*) is a discretionary one; and accordingly it does not affect the power of sale in respect of personal property conferred by s. 4 (1). It can, however, be exercised during the currency of the discretionary power to postpone sale thereby given.

Redistribution.

It has been stated, *ante*, p. 43, that if the statutory trusts in favour of issue fail, and the intestate was survived by a spouse and a parent or parents, the spouse, on such failure, takes one-half of the portion of the entire estate held upon the statutory trusts and the parent or parents take the other half. It cannot, however, be stated dogmatically that this is the true legal position.

After the surviving spouse has taken the personal chattels and £1,000 with interest, one third of the remainder goes to the surviving spouse, and the administrator holds two-thirds upon the statutory trusts in favour of issue. During the subsistence of such trusts, income may be used for maintenance, advancement, &c., and unexpended income is accumulated. Moreover, if capital can be used for the maintenance, education, and advancement of the

* If reference be made to s. 4 (1) (ii) (*b*) of the Administration of Estates Act, 1925 (Eng.), it will be seen that power is given to personal representatives to appropriate property with consent; and, if the consent of an infant is required, it may be given on his behalf by his parents, or parent, or guardian, or, where there is no parent, or guardian, by the Court on the application of his next friend.

issue, and is so used, the capital will be depleted accordingly.

The question for consideration is how the "estate" is to be redistributed upon the failure of the statutory trusts in a case where, the intestate being survived by a spouse and a parent or parents, s. 6 (1) (*a*) (ii) applies. Section 6 refers to the distribution of "the estate." Section 7 (1) refers to "the estate or any part thereof . . . directed to be held on the statutory trusts." Section 7 (2) (*a*) refers to "the estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much *thereof* as may not have been paid or applied under any power affecting the same."

A redistribution on the failure of the statutory trusts may take place many years after the surviving spouse has received one-third of the remainder; and, in the meantime, the assets retained on the statutory trusts may have increased or decreased in value. It is possible that the whole of such assets may have been used for the maintenance, education, and advancement of the intestate's issue. If the spouse must, in effect, bring into hotchpot the one-third previously received when the distribution is made pursuant to s. 6 (1) (*a*) (ii), then it will be found in some cases that the spouse has been overpaid. At what value will such one-third be assessed in such distribution—the value at the time the spouse received the assets, *or* the value at the time of the redistribution when possibly they may have disappeared, been sold, depreciated, or increased in value? The problem is one which will, no doubt, receive earnest consideration.

Construction of Documents.

Section 10 of the Administration Amendment Act, 1944, is as follows:

> 10. (1) *References to any Statutes of Distribution in an instrument* inter vivos *made, or in a will coming into operation, after the commencement of this Act, shall be construed as references to this Act; and references in such an instrument or will to statutory next-of-kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Act.*
>
> (2) *Trusts declared in an instrument* inter vivos *made, or in a will coming into operation, before the commencement of this Act, by reference to the Statutes of Distribution, or to the statutes relating to the distribution of intestates' estates, shall, unless the contrary thereby appears, be construed as referring to the enactments relating to the distribution of estates of intestates which were in force immediately before the commencement of this Act.*

Subsection (1) applies only to instruments *inter vivos*—the reason for the limitation is obscure†—and to wills, made or coming into operation after 1944. The subsection could hardly be read so as to give the Crown the trust property as *bona vacantia* in a case where the Crown would so take, if it were an actual and not a hypothetical intestacy.

In respect of wills made before January 1, 1945, which necessarily form the majority of wills now extant, it seems that the subsection should have provided that, where the distribution would be to the Crown as *bona vacantia*, the distribution should be among the persons who would take under the statutory provisions in force on December 31, 1944.

Where the statutory trusts are incorporated into the trusts or dispositions of a will or settlement made or coming into operation before 1945, difficulties will arise in many cases. Subsection (2) applies the law as to the distribution of the estate of intestates as at December 31, 1944, "unless the contrary thereby appears." These words are certain to be the subject of much interpretation by the Court.

Many of the documents to which s. 10 (2) will apply, expressly provide that the law of intestate distribution in force at the time of the failure of earlier trusts is to be the law applicable; and this can, of course, be said of many wills prepared and executed before 1945, but coming into operation thereafter, to which s. 10 (1) will apply. The answer, in a particular case, to the question whether the Administration Amendment Act, 1944, or the law in force on December 31, 1944, should be incorporated may be of great importance; for the 1944 statute may not contain any provision to meet the case, except the provision for the Crown to take as *bona vacantia*. Incidentally, there would arise, in many cases, the question of the application of the principle of *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551, 41 E.R. 1379, and *Hancock* v. *Watson*, [1902] A.C. 14.

The rule against perpetuities will receive much serious consideration in the future where the Administration Amendment Act, 1944, is incorporated, and the statutory trusts apply; because there may be a breach of the rule owing to the beneficiaries taking contingently on attaining twenty-one years or earlier marrying, though, at the time the instrument was drafted, the draftsman did not contemplate the possibility of persons taking contingent interests in intestate estates. Again, if the trusts fail, by reason of a breach of the rule, the possible application of the principle of *Lassence* v. *Tierney* and *Hancock* v. *Watson* would require consideration.

† The declaration of a trust by deed poll seems to have been overlooked.

BUTTERWORTH'S NEW MANAGER.

Mr. C. A. Allen appointed.

Mr. W. H. Nichols, who, since 1928, has been Manager, and, since 1939, Director in New Zealand of Messrs. Butterworth and Co. (Aus.), Ltd., has been appointed Resident Director of the company for Australia and New Zealand. Next week, Mr. Nichols will leave for Sydney, where his new headquarters are situate. He will visit New Zealand from time to time.

Mr. C. A. Allen, who has been a representative of the company for many years, and who is well known to practitioners throughout the Dominion, has been appointed Branch-manager for New Zealand. He will reside in Wellington. Mr. Allen, who had a distinguished career in the last War, in which he was awarded the Military Cross and Bar, and rose to the rank of Major, was a member of Earl Balfour's mission to the United States in 1917.

SUMMARY OF RECENT JUDGMENTS.

WESTON AND THE GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. COMMISSIONER OF STAMP DUTIES.

COURT OF APPEAL. Wellington. 1945. March 22, 28. JOHNSTON, J.; FAIR, J.; NORTHCROFT, J.

Public Revenue—Death Duties (Succession Duty)—Charitable Trust—Income of Trust Fund directed to be paid to "British and Foreign Bible Society of New Zealand"—"Such income to be expended in the missionary activities of that society"—Whether a "Charitable trust in New Zealand"—Death Duties Act, 1921, ss. 16 (1), 18—Finance Act, 1940, s. 27 (8).

The crucial test, in ascertaining if a charitable trust is "a charitable trust in New Zealand" and so exempt from succession duty by virtue of s. 18 of the Death Duties Act, 1921, is whether the trust property must be applied to objects in New Zealand.

Appeal from the judgment of *Myers*, C.J., [1945] N.Z.L.R. 192, dismissed.

Counsel: *Weston*, K.C., and *E. P. Hay*, for the appellant; *Byrne*, for the respondent.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the appellant; *Crown Law Office*, Wellington, for the respondent.

PUBLIC TRUSTEE v. SCHNEIDER AND OTHERS.

SUPREME COURT. Auckland. 1944. December 12, 19. CALLAN, J.

Will—Devisees and Legatees—Condition as to Religion—Forfeiture—Uncertainty—"Adherent to Church of England."

A gift by will upon condition that the donee should be an "adherent of . . . the Church of England" is void for uncertainty.

The standard of certainty required is the same whether the condition is a condition precedent or a condition subsequent.

Clayton v. *Ramsden*, [1943] A.C. 320, [1943] 1 All E.R. 16, and *In re Lockie, Guardian, Trust, and Executors Co. of New Zealand Ltd.* v. *Gray*, [1945] N.Z.L.R. 230, applied.

The case is reported on this point only.

Counsel: *Ryan*, for the Public Trustee; *Johnstone*, K.C., and *J. S. Burt*, for the first defendant.

Solicitors: *Solicitor for the Public Trust Office*, Auckland, for the plaintiff; *J. S. Burt*, Auckland, for the defendant of the first part; *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the defendants of the second part.

CONVICTION AND ORDER TO COME UP FOR SENTENCE.

Procedure to Call Up for Sentence.

The power to convict and order to come up for sentence is given by s. 92 (1) (*b*) of the Justices of the Peace Act, 1927, which provides that in cases where the offence is of a trifling nature the Justices, in convicting the person charged, may discharge him "conditionally on his giving security, with or without sureties to appear for sentence when called upon . . ." A person is called up to appear before the Court by means of a summons. A summons must however be based upon an information or complaint. As the purpose of the proceedings is to obtain punishment, and not an order of any description, the proper proceeding is by way of information. It is right that the defendant should have a chance of answering the allegation that he has committed an act which would justify calling him up for sentence: see *R.* v. *Pine*, (1932) 24 Cr. App. Rep. 10. "Where an Act confers a jurisdiction, it impliedly grants, also, the power of doing all such acts, or employing such means, as are essentially necessary to its execution": *Maxwell on the Interpretation of Statutes*, 6th Ed. 623; and see, also, *R.* v. *Spratling*, (1911) 80 L.J. K.B. 176. Such person must be brought before the Court in some manner; to do this, the ordinary means are employed to this end, and he must be given an opportunity of showing cause why he should not be punished.

Under s. 16 of the Offenders Probation Act, 1920, any person convicted of an offence—that is to say, employing the definition of "offence" in that Act, an offence punishable by imprisonment—is deemed to be subject to the provisions of that statute.

It seems, however, that the best course in circumstances to which s. 92 of the Justices of the Peace Act, 1927, would apply, would be to convict and admit to probation. Of course, the Offenders Probation Act would not apply to every case to which s. 92 of the former Act would apply, but only to those where the punishment prescribed for the offence is imprisonment. If a breach of the offender's probationary license is committed, the offender may be arrested without warrant (s. 14); and this gets rid of any trouble about calling up for sentence.

The Justices of the Peace Act, 1927, requires, in express terms, that a person conditionally discharged under s. 92 should enter into a recognizance with or without sureties. This requirement is systematically disregarded. It does seem, however, that it may well be the position that, if a person were convicted and ordered to come up for sentence when called upon without being required to enter into a bond, he could attack the proceedings calling him up for sentence because of this failure to require the bond.

However, it appears that in the majority of cases, the simplest course is to admit an offender to probation, when the Offenders Probation Act, 1920, may apply. Such an offender would be liable to prosecution under s. 13 of the Act if he commits a breach of his probationary license (as would no doubt a person convicted and ordered to come up for sentence, who is deemed to be on probation). But for the reason just stated it may be that, in strict law, he cannot be regarded as ordered to come up for sentence when called upon if he is not required to enter into a recognizance.

An interesting case in respect to breach of probationary license with its consequences is *Re Martinovich*, [1936] N.Z.L.R. 238.

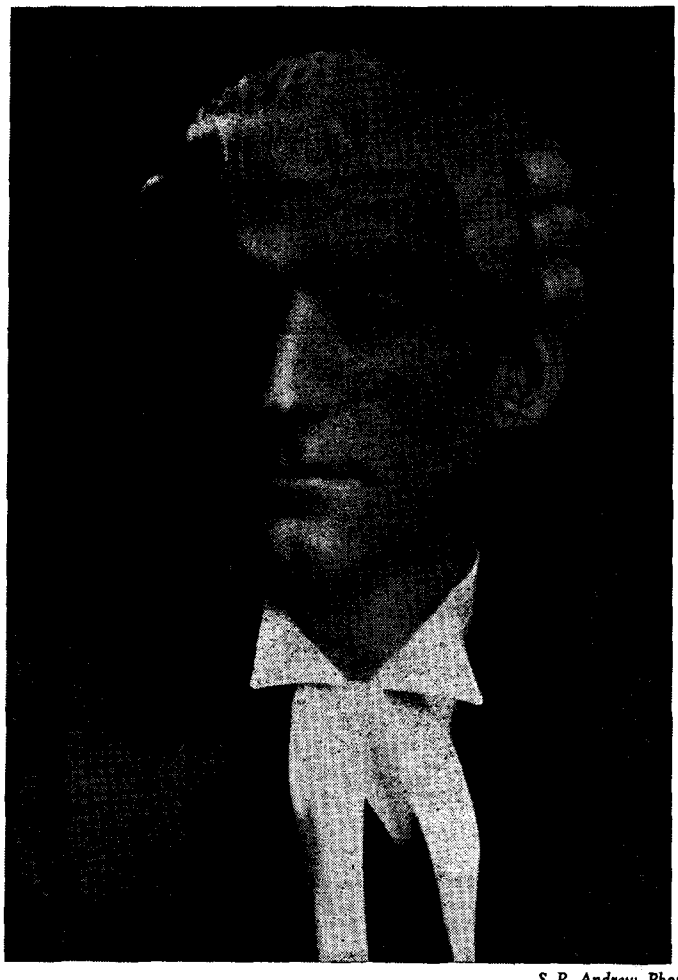
It will be noted that s. 92 does not apply to cases concerning the "stealing, taking, and dishonestly *obtaining money*" under s. 239 of the Act, where the amount involved exceeds £2.

THE LATE MR. H. J. V. JAMES.

Editor of the New Zealand Law Journal, 1926–1931.

As has been said, the funeral service of the late Herbert John Vincent James at St. Paul's was the greatest tribute ever paid to a man of his years in the capital city. From law clerks to the Chief Justice, his professional friends came to do him final honour. In the assembly that filled the church were people of all the professions, of many walks of life, and of all ages.

It may be asked by those who did not know him personally, What manner of man was this whom everyone vied in honouring, who was dear to so many diverse men and women, and who, at an age before most lives have reached their prime, had become a tradition in the legal profession? To speak of his charm in adequate words is difficult; but a brief answer may be that James was a young man in whom were united a rare intellect and an engaging and human personality, and that he was remarkable not only for his learning in the law, but also for the intensity of all his varied interests.



S. P. Andrew, Photo

The late Mr. H. J. V. James.

James showed himself a model advocate. Excellent in a Banco argument, he was at his best in the Court of Appeal. His simple directness of address, the clarity and force of his submissions, and his discriminating selection of authorities indicated the power of his mind and the meticulous care devoted to the preparation of his brief. His manner in Court was ever in the best traditions of the Bar. In short, his forensic work reflected the poise and balance of his qualities.

He was thirty-four years of age when the hand of his malady touched him. The promise of his natural endowments had already been signally fulfilled, and no legal eminence seemed beyond his reach. But only six years of life remained to him, years during which he was seldom able to leave his bed. He proceeded to face his long ordeal of illness with extraordinary courage. Textbooks were brought to him, clients succeeded one another at his bedside, and in opinions on the most intricate problems he exercised his incisive mind. He allowed no one, not even himself, to consider him a sick man. Those who knew what he suffered were amazed at his industry, and his intellectual ardour seemed to increase as his strength waned. In his profession he lived, moved, and had his being. The visits of professional brethren to his bedside were his perpetual recreation. The lighter forms of legal literature, biographies of lawyers, periodicals, and even novels with a legal background diverted him in his few leisure hours.

In knowledge of the outside world few men could have surpassed this invalid. His interest in people was all-embracing. Many came to understand the force of friendship during cheerful hours in his well-known room. He looked for the best in those who visited him, and the consciousness that they were in the presence of a fine character brought their own good qualities to the surface. His suffering was never obtruded, but this kind and considerate man was always eager to help his friends in their passing troubles. It was from no sense of duty that people visited and did what they could for him. To share his conversation, courteous, informed, and illuminating, was a privilege. His sense of humour—one of his most marked characteristics—was exhilarating. He delighted in all kinds of stories and jokes, whether simple or subtle, and his own comments on men and events of the day were delivered with a spirited and sagacious wit. He was truly one of those who "warmed both hands before the fire of life," and those who came to him departed knowing that they had gained something. For his part he was unremitting in his expressions of gratitude for the kindness shown to him, and, particularly, for that of the members of his firm.

Even those who knew him only through a window felt affection for him. One remembers a party of girls from the Dental Clinic hostel, with whom he had been accustomed to exchange a wave of recognition every morning, gathering outside his room last Christmas Eve to sing him carols which they had learnt for the occasion; and the small newspaper boy, who, when his father's ship was in port from the Pacific Islands, surreptitiously left oranges on his window-sill.

The most remarkable quality of James's mind was its power of sudden and acute perception. In the problems of life, as well as in problems of law, his rapid appreciation of the real issues at stake was almost disconcerting. Nor did he hesitate to condemn anything sham or spurious. He had an instinctive mastery of legal principles, which few knew at first hand better than he, and he was also a master of fact—not an altogether common combination.

James's knowledge of literature was remarkable. He could have made his mark in the world of letters. His taste was catholic, but he was, perhaps, most deeply read in the English classics. One of the features of his book-lined room was a valued set of Shakespeare, of which he had an intimate knowledge and a genuine love. He was a lover, too, of the *mot juste*: his own lucid writings proclaimed the man. An opinion written by James was expressed not—as opinions can so easily be—in technical and conventional phrase, but in prose at once ordered, simple, and crystal clear.

For five years he was editor of this JOURNAL. Here, as in everything else he did, he set himself a high standard, and he gave of his best. His sense of professional rectitude, and his reverence for the traditions of his calling, were reflected in these pages. As editor, he gave freely of the treasures of his learning to his readers not merely in his modest disarming way, but in a form that was always of practical help to busy practitioners. His increasing practice compelled him to retire from the editorship. But the influence of his example remained, and became a compelling inspiration to his successor.

The affliction which cut short his career was tragic. None the less, there is consolation in the thought that his life was fuller and richer for his misfortune. Under the trial of adversity, he achieved a distinction surpassing any that the law, or any other calling, can give.

Frater, ave atque vale.

TRIBUTES OF BENCH AND BAR.

A remarkably representative gathering attended at the Cathedral Church of St. Paul on March 27 to honour the memory of the late Mr. H. J. V. James. His Honour the Chief Justice, Mr. Justice Smith, and Mr. Justice Cornish represented the Judiciary, the last-named being also one of the pall-bearers. The legal profession, headed by the Attorney-General, attended in great numbers, while members of the other professions supplemented their ranks. The Mayor of Wellington, Mr. W. Appleton, was present, in addition to heads of Government Departments, and members of the Council of the Associated Chambers of Commerce.

There was a large attendance of members of the profession at the Supreme Court on the following morning. His Honour the Chief Justice presided, and with him were Mr. Justice Smith, Mr. Justice Johnston, Mr. Justice Fair, and Mr. Justice Cornish. The Magistracy was represented by Mr. W. F. Stilwell.

THE ATTORNEY-GENERAL.

Addressing their Honours, the Attorney-General (Hon. H. G. R. Mason), speaking on behalf of the New Zealand Bar, said: "Though Herbert John Vincent James was a Wellington practitioner and his name was not widely known beyond the city, it is yet fitting that tribute be paid to his memory on behalf of the whole profession, for what he achieved in a few short years, when truly appreciated, will be a matter of pride not only to his brethren in Wellington but also to all who follow the calling of the Law throughout the country.

"It is fitting, too, that tribute be paid by one speaking on behalf of the Crown, for on many occasions in matters that were both difficult and delicate the Crown enjoyed the great advantage of his advice, given at all times willingly and not infrequently without fee or reward.

"At the beginning of 1938, after years of assiduous preparation, Mr. James attained the prize of membership in an old established and widely known partnership which seemed to offer to him the advantages of extensive, congenial, and indeed distinguished practice. The firm that he joined had already in recent years contributed two members of the Judiciary, one of them a Chief Justice. No prize of the profession could have seemed beyond attainment. At this moment he was struck down by illness which prevented him from ever again appearing at the Bar, or indeed attending at his office. It was an illness, too, of which he had peculiar reasons to dread the outcome, for it had prematurely only a few years before ended the life of his only brother, also a young man of singular gifts and promise. Thus to have the door of opportunity closed in his face just as he was entering it was a cruel blow. It seemed the end of everything, but it was not. Here, indeed, on the contrary, began the best part of his life, the part richest by fulfilment, if by 'fulfilment' we mean the showing forth of the finest qualities that man possesses, high courage and the will to fight on against multiplying odds without bitterness or repining or envy of those to whom Fate has been kinder.

"Gradually it became known in our city, and beyond it, that among us there was an unusual spirit working brilliantly under the gravest physical handicap and doing it not only cheerfully but as it seemed joyfully. And so it came about that men from all parts of the Dominion, men of all callings and professions, came to his bedside and came again not out of pity, for that he would have hated, but for the joy of making contact with so delightful a personality. The years during which he was laid aside were times of national anxiety and tragedy. His faith in the ultimate triumph of his country's cause never failed. The men who visited his bedside were not men free from care. Who could be? But in the society of these men who had such grave cause for personal concern something seemed to be dispelled, and those who came went away feeling that it had been good for them to be there. These last six years were filled with work, useful, difficult work, solving unusual problems, giving to all who sought his advice the worth of his clear and powerful intellect and his grasp of affairs. He worked indeed until the day before his death, finishing tasks that he had set himself to complete.

"It would be wrong to think of such a life in terms only of frustration or of the race not usefully run, or of the prize withheld. There were all these, of course, but there was also the capacity for loyal friendship increasing in scope as the years went by, and the opportunity for manifesting to others the quality that he most admired, courage. These last six years of trial were also truly years of triumph. There was the broken wing certainly, but there was also the unbroken spirit and that is man's highest achievement whether death comes soon or late.

"To his devoted mother and wife, we say with deep respect that they can permit pride to struggle with grief. We extend our very real sympathy to them, and to his partners to whom, as to him, the tie of partnership was the bond of brotherhood."

THE WELLINGTON LAW SOCIETY.

The next speaker was the President of the Wellington District Law Society, Mr. H. R. Biss, who said that the members of the Wellington Bar had assembled in Court that morning to ask Their Honours' indulgence to enable them to pay tribute to the memory of the late Mr. H. J. V. James.

"Mr. James was born in Wellington in 1905, receiving his earlier education in Wellington, graduating from Victoria University College," the President continued. "He has practised as a barrister and solicitor in this Court for some sixteen years past, and has spent the whole of his professional career as a member of this Society, and mostly in this very Court.

"To those whose privilege and pleasure it was to be associated with him in his professional work it soon became apparent that in Mr. James we had a no mean member of our profession. He was amply endowed with those qualities which go to the making of a successful advocate, a sound judgment,

a clear analytical mind, and an exceptional knowledge of the law, were in him combined with an industry and perseverance that could not fail to bring him to a place of eminence among his professional brethren.

"His qualities were known, too, beyond the immediate confines of his legal practice. For some years he was a member of the Council of the Associated Chambers of Commerce, and a member of the Executive of the Wellington Chamber. For a period too he was the Editor of the NEW ZEALAND LAW JOURNAL. For three years he was a member of the Council of the Wellington District Law Society, to whose problems he brought that high knowledge, integrity, and sound judgment, which his professional brethren learned to prize.

"There are many in this Court who though perhaps his senior in years always welcomed and profited from an opportunity of discussing complex legal problems with him. Unfortunately, however, his qualities as a lawyer were not to achieve that full reward which seemed so certainly put within his reach. As the learned Attorney-General has said, some six years ago he suffered a very severe illness from which he was not to recover; and yet, though so gravely afflicted, his great courage and sense of loyalty kept him actively engaged in the profession of the law almost to the very end. I feel I can truly say that had the late Mr. James been spared to live man's allotted span there was no position or place of preferment which our profession can offer to its members which was not within his reach.

"And so the members of the Wellington Bar and of the Wellington District Law Society deem it fitting that we should assemble in this Court to pay tribute to one whom we all respected and regarded with affection, and in whose care the highest principles of the profession and its strictest requirements were always in safe keeping. To his widow and his mother I offer on behalf of that Society our very real and deep sympathy in their loss, and I trust that those who mourn his passing may in some degree be comforted by the knowledge that his professional brethren realise that they have lost an able member and a highly respected friend."

THE CHIEF JUSTICE.

The Chief Justice, the Rt. Hon. Sir Michael Myers, feelingly addressed the assembled members of the Bar, as follows:—

"My colleagues and I desire to associate ourselves with your tribute to the memory of your deceased comrade. The tribute is well deserved. Every word of eulogy that has been spoken, by the Attorney-General and by your President, of this exceptional man is true. We all knew Mr. James; we all liked him. It would have been impossible not to like so charming a personality. We all respected him for his high character and great ability. We all paid to him occasional visits during his long period of illness, and we all admired his cheerfulness, his courage, and his fortitude.

"I can myself perhaps speak of him with a greater knowledge than most others can possess, for he was my assistant during the last five years of my practice at the Bar. I always regarded him as one of the few men I have met with what we are wont to call a natural legal mind; and, such was my opinion of him, that I predicted that with good health he would undoubtedly take his place at an early age amongst the leading lawyers and Banco advocates in the Dominion; and so he would have done. He was rapidly approaching that rank when six years ago, a young man of thirty-four, approaching the zenith of his powers, he was stricken down by an illness which kept him prostrated and bedridden till his death, prostrated but courageous and undismayed, bedridden, but working tirelessly, seeing clients, looking into their problems, and giving opinions in writing until the last few weeks when physical weakness made a continuation of work impossible.

"Those of us who enjoyed his friendship have lost a loyal friend, and the State has lost a man of fine intellect, who, had Providence endowed him with good health, would have reached the highest positions open not only in the law but probably in other fields as well. Notwithstanding his protracted illness I do not believe that he was ever unhappy. He always maintained a cheerfulness and buoyancy, which, I am sure, was due almost entirely to the unremitting care and devotion of his wife, to whom in her sorrow, as well as to his mother, we offer our word of deepest sympathy."

DEED OF FARMING PARTNERSHIP BETWEEN FATHER AND SONS.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

The common practice both in Australia—*e.g.*, *Turner* v. *Turner*, (1918) 25 C.L.R. 570—and New Zealand of farmers' children working on farms for no (or inadequate) wages, often leads to unpleasant revenue demands when later on the parents endeavour to carry out their moral obligations to the children, who have rendered these services usually from a laudable appreciation of filial duty. Thus, in *McConnell* v. *Commissioner of Stamp Duties*, [1941] N.Z.L.R. 599, the executrix (the mother) when she transferred a farm to a son in pursuance of a moral obligation owed by her deceased husband, was held by the Supreme Court to have made a dutiable gift. The *locus classicus* (so far as New Zealand is concerned) is perhaps *Riddiford* v. *Commissioner of Stamp Duties*, (1913) 32 N.Z.L.R. 929, where there was the following recital in the deed of partnership:

> And whereas all the said sons have aided the said E.J.R. in his said business and occupation, and have given their time and labour wholly to that service without remuneration or reward beyond their mere maintenance, by the reason of the understanding and engagement always existing between their said father and themselves that ultimately they should become partners with him in certain of the said properties, and should share with him in the profits and benefits thereof. And whereas the time has now arrived at which it is convenient and proper to give effect to such understanding and engagement, and accordingly the said E.J.R. has agreed to take his said sons into partnership with him in the properties defined in the schedule to these presents, and upon the terms and conditions set forth in these presents, and the said sons have agreed to enter into such partnership with their father in the said properties and upon the said terms and conditions.

As pointed out by Sir Robert Stout, C.J., and Edwards, J., the deed did not disclose anything which could be recognized in law as a good consideration for the benefits which the sons took under the deed. The important point is that work done by children for their parents, when the children are living with their parents and are part of the household, cannot afford any evidence of an implied contract for remuneration, and a promise to pay for such work *after* it has been performed, is a promise made upon no consideration: *In re Hume, Ex parte Official Assignee*, (1909) 28 N.Z.L.R. 793; *Stevens* v. *Stevens*, (1897) 15 N.Z.L.R. 620; *Crawshaw* v. *Public Trustee*, [1925] N.Z.L.R. 212; and *Te Ira Roa* v. *Materi*, [1919] N.Z.L.R. 681.

The following precedent effectually removes this difficulty, for the sons thereunder acquire by contract valuable rights. The father's original capital remains intact, but the sons, if the times are prosperous as at present, may in the course of time build up substantial interests in the partnership, which is far more satisfactory than working for no or inadequate wages.

If during the continuance of the partnership, the father makes a gift of the land or chattels described in

the schedules to the deed and lives for more than three years thereafter, the property comprised in the gift will not be liable to death duty on his death, unless he continues to receive the rents (wholly or partially and whether advertently or inadvertently), or unless such gift is accompanied by a benefit to him: *Munro* v. *Commissioner of Stamp Duties*, [1934] A.C. 61, and *In re Nichol, Johnstone* v. *Commissioner of Stamp Duties* (*No.* 2), [1931] N.Z.L.R. 718. In other words the careful conveyancer in these circumstances need not be caught by s. 5 (1) (*c*) of the Death Duties Act, 1921, whose tentacles often stretch very far indeed, as in *Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761, G.L.R. 338.

In drafting such a partnership deed the conveyancer should, if possible, avoid all element of gift. It is usually prudent to draw a contemporaneous deed of lease and bailment, under which the partnership is to pay an adequate rental for the use of the father's property; to prevent the lease and bailment from attracting gift duty the annual rental should as a rule be not less than five per cent. of the capital value of the property. In the present case the partnership is to pay all rates, taxes, insurance premiums, interest, and other outgoings payable in respect of the said lands: if the land is heavily mortgaged these payments may constitute adequate consideration. It will be observed that by cl. 4 the partnership is to have the free use of the machinery plant and implements: from a gift duty point of view this is sailing very close to the wind; in ordinary circumstances such a clause should be avoided.

It is not considered that the provision that the partnership is entitled to the *increase* of the stock would *per se* render the instrument liable for gift duty, for whereas the sons must devote the whole of their time and attention to the business of the partnership, the father is not bound to render any such service—a very convenient provision if he is getting old and desires to retire from active work.

If the father exercises *inter vivos* his right of nomination conferred by cl. 13 that would constitute a gift liable to gift duty, if the value thereof exceeded £500.

If the father does not exercise such right *inter vivos* the land described in the first schedule, the farming stock to the original numbers and quality, and the machinery and implements, will be assets in his estate for death-duty purposes under s. 5 (1) (*a*) of the Death Duties Act, 1921. For death-duty purposes the values of the stock are the real market values as at date of death, and not necessarily the standard values, which it is customary for accountants to adopt for balance-sheet purposes. If any person under the father's will or under the deed of partnership has on the father's death the right to acquire the stock at less than their real value, then to the extent of the difference between the price for purchase and their real value, such person is a successor and liable to succession duty accordingly, either under s. 16 (1) (*a*) or 16 (1) (*f*), as the case may be.

The stamp duty on this deed of partnership is 15s., under s. 168 of the Stamp Duties Act, 1923.

PRECEDENT.

THIS DEED made this day of one thousand nine hundred and forty- BETWEEN A.B. of in the Dominion of New Zealand Sheepfarmer of the first part C.D. of the second part E.F. of the third part G.H. of the fourth part and I.J. of the fifth part all of Hastings aforesaid farmers

WHEREAS the parties hereto are desirous of entering into partnership as sheep cattle and general farmers as from the first day of one thousand nine hundred and forty upon the terms and conditions hereinafter appearing AND WHEREAS it is desirous that an instrument setting out such terms and conditions be signed by the parties NOW THIS DEED WITNESSETH and it is mutually agreed that the said parties hereto shall be and continue to be partners in the business of sheep-farmers cattle-farmers and general farmers upon the terms and conditions hereinafter contained namely:—

1. The partnership shall be deemed to have commenced on the first day of one thousand nine hundred and forty- and shall continue for a term of fifteen years as from that date subject to the provisions hereinafter contained.

2. The partnership business shall be carried on upon the freehold lands of the said A.B. as the same are more particularly described in the first schedule hereto which said lands shall remain and be the property of the said A.B. and he shall not during the continuance of the partnership sell lease or otherwise dispose of the said lands. All rates taxes insurance premiums interest and other outgoings payable in respect of the said lands shall be paid by the partnership.

3. The live stock depasturing on the property as at the said first day of one thousand nine hundred and forty- and consisting of the numbers and descriptions as set out in the second schedule hereto are the property of the said A.B. and at the determination of the partnership in accordance with any of the provisions herein expressed or implied the partnership shall leave on the said lands stock of the like numbers and descriptions.

4. The partnership shall be entitled to the free use of all machinery plant and implements (being the property of the said A.B.) at present in and about the said lands which machinery implements and plant shall be kept in good order repair and condition at the cost of the partnership but the partnership shall not be called upon to replace any of such machinery plant and implements rendered unfit or worn out by fair wear and tear.

5. The capital of the partnership shall consist of any live-stock at present on the said lands (other than the live stock referred to in paragraph 3 hereof) and any other stock to be acquired by the partnership in substitution for or additional to such stock and the natural increase of all stock together with any implements machinery or other chattels acquired by the partnership and shall be deemed to be contributed by the partners in equal shares.

6. If either partner shall have advanced or shall advance any sum of money to the partnership over and above his due contribution to capital he shall be entitled to be paid by the partnership interest at the rate of five pounds per centum per annum on such sum and such sum shall be a debt due to him by the partnership and shall be repaid to him out of the partnership assets on the dissolution of the partnership by effluxion of time or otherwise. No sum so lent shall be deemed to be an increase of the capital of the partner advancing the same or entitle him to an increased share in the properties of the partnership.

7. The bankers of the partnership shall be the Bank of Limited or such other bank or firm as may be mutually agreed upon and may be operated on by any two of the partners or otherwise as the partners may elect. Such account to be known as Station Account.

8. The parties hereto of the second third fourth and fifth parts shall devote the whole of their time and attention to the said business and generally shall manage the said business engage control and dismiss all labour required for the efficient working of the said business but shall not buy or sell stock without the consent of the said A.B.

9. Proper account shall be kept of the partnership business by Messrs. of Hastings public accountants or such other person or persons as the partners may appoint and as soon as practicable after the thirtieth day of June in each year during the continuance of the partnership proper accounts of the partnership to the thirtieth day of June in each year shall be prepared and submitted to and signed by each partner who shall be bound thereby unless some manifest error shall be discovered within three months in which case such error shall be rectified. Immediately after the preparation of such accounts the net profits (if any) shown by such accounts shall be divided.

10. The net profits of the partnership shall be divided between the partnership equally and they shall in like proportion bear all losses including loss of capital.

11. No partner shall give credit or lend any of the partnership moneys to any person firm or company whom any other

partner shall have previously forbidden him to trust or give any bill note of security or contract any debt on account of the said partnership except in the usual and regular course of the business and for the benefit thereof or compound release discharge or postpone any debt duty or demand due to the said firm or neglect to punctually pay his private debts or do or suffer anything which shall be prejudicial to the partnership.

12. No partner shall without the consent of the other partners aforesaid sell assign or otherwise part with his share or interest in the said partnership business capital stock or effects or knowingly or wilfully do commit or permit any act matter or thing whatsoever whereby or by means whereof the said partnership moneys or effects or his interest therein shall be seized attached or taken in execution or prejudicially effected.

13. It shall be lawful for the said A.B. at any time to nominate any one or more of his sons to be a partner or partners in the partnership business and upon such nomination to appoint to the nominee the whole of his share in the capital assets and future profits of the partnership business any such nomination or appointment may be made by the said A.B. while still a partner or on retiring from the partnership by notice in writing to the other partners or on his death while still a partner may be made by will or codicil. Any such nomination or appointment shall take effect on the first day of July next following the making thereof and for this purpose a nomination or appointment by will or codicil shall be deemed to have been made on the day of death of the said A.B. On the day when such nomination takes effect as aforesaid the nominee shall be admitted as a partner accordingly and be entitled to his appointed share and shall be bound by the provisions of this deed so far as applicable and if required by the other partners shall execute a deed covenanting to perform the same.

14. In the case of the death of any partner during the continuance of the partnership the share of the deceased partner (subject always to the provisions of the last preceding paragraph in respect of the share of the said A.B.) in the capital assets and future profits of the partnership business shall accrue to and be purchased by the surviving partners in equal shares.

15. On the death of any partner during the continuance of the partnership an account and balance sheet similar to that prescribed by paragraph 9 hereof shall be taken up to the day of such death and the sum which upon the taking of such accounts shall appear to be due to the deceased partner shall with all convenient speed be paid to his representatives and as soon as conveniently may be proper deeds or other instruments shall be executed for securing the moneys payable to the representatives of the deceased partner and for indemnifying them against the debts and liabilities of the partnership and for vesting the share of the deceased partner in the partner or partners entitled thereto under the provisions of this deed.

16. Upon the dissolution of the partnership by effluxion of time as hereinbefore provided or otherwise howsoever the business shall with all convenient speed be wound up and the assets got in and the liabilities paid and the balance applied first in paying to each partner or his representatives any moneys advanced by him to the partnership in accordance with paragraph 6 hereof together with any interest on such moneys accrued due and unpaid and secondly in paying to each partner or his representatives the amount contributed by him towards the capital of the business and the surplus (if any) divided between the partners or their representatives in equal shares.

17. All disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or their respective representatives or between any partners or partner and the representatives of any other partner touching this deed or the construction or application thereof of any clause or thing herein contained or any account valuation or division of any assets debts or liabilities to be made hereunder or as to any act deed or omission of any partner or as to any other matter in any way relating to the partnership business or the affairs thereof shall be referred to a single arbitrator in case the parties hereto agree upon one otherwise to two arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Arbitration Act 1908 and its amendments.

AS WITNESS the hands of the parties hereto.

FIRST SCHEDULE.

[*Set out here description of land.*]

SECOND SCHEDULE.

[*Set out here numbers and description of live stock.*]

SIGNED by the said A.B. in the presence of— A.B.
X.Y.,
Solicitor,
Hastings.

SIGNED by the said C.D. in the presence of— C.D.
X.Y.,
Solicitor,
Hastings.

SIGNED by the said E.F. in the presence of— E.F.
X.Y.,
Solicitor,
Hastings.

SIGNED by the said G.H. in the presence of— G.H.
X.Y.,
Solicitor,
Hastings.

SIGNED by the said I.J. in the presence of— I.J.
X.Y.,
Solicitor,
Hastings.

RETIREMENT OF MR. JAMES CHRISTIE.

Parliamentary Law Draftsman and Compiler of Statutes.

High tributes to his service and personal qualities were paid to Mr. James Christie, C.M.G., at a farewell gathering, held in Parliament House, on March 29, to mark the end of his official association with the Parliamentary Law Drafting Office.

Mr. Christie joined the Law Drafting Office in 1907. He became Parliamentary Law Draftsman in 1918, from which office he retired in 1938. Since 1938 he has been counsel to the Law Drafting Office and Compiler of Statutes.

From the time when he typed and checked every word of the late Sir John Salmond's Native Land Bill in 1909, Mr. Christie was intimately connected with the inception of much varied legislation. For instance, he drafted the first War Pensions Bill during the War of 1914–18, and he was responsible for the drafting of the War Pensions Bill in 1944. Mr. Christie drafted many important Bills of an original nature, including the Social Security Act, 1938. Another piece of original drafting which has stood the test of time was his Motor-vehicles Insurance (Third-party Risks) Act, 1928.

Mr. Christie was Consulting Editor and a member of the Editorial Board which supervised the compilation of *The Public Acts of New Zealand* (*Reprint*), 1908–1931, in connection with which he visited England; and his intimate association with this great work, which has been copied in other Dominions in recent years, is recorded in Volume I, pp. ix, x, and xiv.

During his visit to England in connection with the *Reprint*, in 1930, Mr. Christie was consulted upon the drafting of the Statute of Westminster, and that famous enactment contains suggestions of form made by him.

At the farewell function, the heads of Government Departments and others associated with the work of the Law Drafting Office gathered to honour Mr. Christie.

The Attorney-General (the Hon. H. G. R. Mason) expressed his own and the Government's appreciation of the high standard attained by the Law Drafting Office under Mr. Christie.

Mr. Mason said it was his firm conviction that that standard would bear comparison with the work done in any part of the Empire. Mr. Christie had been one of a team, but he had been the leader and his methods and personal ability had entered into all the work. Mr. Mason referred to the demands made on the Law Drafting Office, which involved working under pressure, he said, with no time on many occasions for calm reflection. No one who knew the conditions would think slightingly or lightly of the task. Mr. Christie had worked for the Government for well over forty years, and for the greater part of his service he had been associated with the Law Drafting Office. The excellence of the New Zealand statutes and the excellent standard established by the Law Drafting Office would be a perpetual memorial to him. The Government was presenting a chair to Mr. Christie which, because of its association with his work, would, he was sure, recall to him in his retirement happy memories of his service—hard work well and truly done.

The Hon. W. Perry, M.L.C., a member of the War Cabinet, said he had a recollection that Lord Bledisloe, a former Governor-General, had said that Mr. Christie's work would compare more than favourably with the work of any other law draftsman in the British Commonwealth, if indeed it was not better.

The Hon. Mr. Justice Cornish, taking as his theme "The Hero as Parliamentary Law Draftsman," paid a high tribute to Mr. Christie's worth and work. He said: "I do not think that Emerson ever included a parliamentary law draftsman in his category of heroes. That is possibly explained by his never having known one; at any rate a modern one. But this at least is certain, that the valiant *No*, which he properly finds so admirable plays as large a part in the life of the good law draftsman as it does in the hero as man of business.

"By this I mean to say seriously that moral courage and integrity are the prime qualities of the law draftsman. The clear brain is necessary of course. The draftsman must be able to envisage the results of the plan that is submitted to him for formulation, and the ability to do that requires intellect of a high order, aided by knowledge not only of law but also of human reactions in varying circumstances. But while there can be no good draftsman without intellect and experience and understanding of human behaviour the quality that is of first importance is integrity. A man may have a first-class intellect yet lack the courage and force of character to resist what is unfair or oppressive.

"Mr. Christie was in the first rank as a draftsman because he was so well endowed with the quality of integrity. A proposal that it is desired to translate into legislation may seem on the face of it to be fair enough. In any case its manifest purposes and obvious result are there for all men to see, and for the Legislature to vote upon, and the will of the majority when expressed must prevail. But there may be implications and results which are not so fair, and which if timeously brought to light and stated in explicit terms would be rejected, or would at any rate give rise to separate controversy. It is the duty of the good draftsman to see these implications and bring them into the open so that the Executive may know of them, and have an opportunity of accepting or rejecting them. But the task of doing this is often a thankless one. No one, whether he be legislator or private individual, finds pleasure in having a plan that is dear to his heart shown to be impracticable or unfair, whether in whole or in part, or productive of results that may be found to be unacceptable. One who points out such consequences will sometimes be unpopular. He will be thought to be insufficiently co-operative or even an obstructionist. Yet, in reality he is neither. He is the truer friend of the Minister or head of a Department than the one who would gloss over difficulties, or leave them to be detected in the Legislature or the Court. Mr. Christie never did that, and the men whom he has trained to succeed will not do so either.

"If I seem to harp upon the importance of this aspect of a draftsman's work it is because it is so important. Not every person whose legitimate interests are prejudiced by legislation, and prejudiced perhaps in a way that neither Government nor the Legislature ever intended, can afford to go to Court to have the harm undone. Litigation is costly; and the end of it, like that of war, is uncertain. Many men put up with inconvenience or loss as the lesser of alternative evils.

"Your first-class draftsman is not made in a day or a year. He is never made at all, unless he be first a man of character and courage, resolute to bypass no difficulty that he can foresee, and to be scornful of evasions, equivocations, and ambiguities. He must be a direct man, sparing no pains to make clear the meaning of what he is charged to write.

"With better justification than the man who first said it, Mr. Christie may say 'What I have written I have written,' and, if so minded, he may legitimately add 'I am not ashamed of it.'"

The Under-Secretary of Internal Affairs, Mr. J. W. Heenan, recalled some humorous incidents relating to the Law Drafting Office, in which he spent fifteen years. He said he thought none more than he and those of the Law Drafting Office knew what a thankless task law drafting was. Although in recent years statute law had not been so great in volume, there had been a vast volume of emergency regulations all the year round. How the office had stood up to it and how they stuck it, he did not know. Nothing sloppy ever passed Mr. Christie, and apart from his own merits as a draftsman he was outstanding in all his experience as a critic of other people's drafting. He was going into retirement not only with their good wishes, but he could also go with something even more soul-satisfying to himself, and that was the knowledge that he had never let either the Government or himself down.

In returning thanks to the gathering for their good wishes, Mr. Christie traced his career from the time he left school and referred to a number of people to whom he said he had been indebted for helping him on his way through life. Among those he mentioned were his father and mother, Mr. Justice Tyndall's father (who was his first school teacher), the late Colonel Collins, Messrs. E. Y. Redward and William Jolliffe, Sir Francis Bell, and Sir John Salmond. He also expressed his appreciation of the co-operation of the Government Printing Office, the members of the Law Drafting Office, and the messengers and staff generally of Parliament Building.

The function concluded with cheers for Mr. and Mrs. Christie, who was also present, and musical honours.

LAW SOCIETIES' ANNUAL MEETINGS.

WELLINGTON DISTRICT LAW SOCIETY.

The Annual General Meeting of the Wellington District Law Society was held on February 28, at 8 p.m., in the Small Court-room, Supreme Court Buildings, when there was an attendance of fifty-one members.

The President (Mr. A. M. Cousins) occupied the chair until the election of his successor.

The minutes of the annual meeting held in 1944, as circulated, were taken as read and confirmed.

Before moving the adoption of the report and balance-sheet, the retiring President reviewed the matters which had engaged the attention of the Council during his year of office.

Reference was made to the death of Sir Walter Stringer and Sir Hubert Ostler, retired Judges of the Supreme Court, and also to the deaths of a number of members of the Society, some of whom had died under tragic circumstances; and also to the death of Mrs. J. I. Rains who was for twenty-two years a member of the Society's staff.

Mr. Cousins further referred to the fact that Mr. J. W. Card, of Featherston, had recently attained his fiftieth year in practice; and it was accordingly decided to forward to him the congratulations and best wishes of the Society. Mr. J. P. Innes, of Palmerston North, had also reached his fiftieth year since his admission and a suitable letter had been forwarded to him.

In addition to the names of the men appearing in the annual report who had recently returned from overseas Mr. Cousins

included the names of Messrs. H. R. C. Wild, E. F. Page, E. L. Pocock, B. W. T. Jowett, and J. P. M. Bertram, to all of whom was extended a welcome back to their civil occupation.

Mr. Cousins referred to the recent appointment of a member of the Society as Judge of the Supreme Court, and the following resolution was accordingly carried unanimously:

"That this Society tenders to Mr. Justice Cornish its congratulations upon his appointment as a Judge of the Supreme Court, and places on record its appreciation of his services to the Society over several years as President and as a member of the Council."

The report drew attention to the fact that the books and portraits previously stored at Masterston for safe custody had now been returned, and in this connection Mr. Cousins stated that the Society was indebted to Messrs. Gawith, Biss, and Griffiths who had kindly arranged for storage in their Masterton office.

A resolution was passed expressing regret at the retirement of Mr. G. S. Clark from the office of Registrar of the Supreme Court and further expressing the appreciation of the profession of his unfailing courtesy and help to members of the Society.

Before concluding his remarks Mr. Cousins thanked the members of the Council, the Secretary and the staff for their help and co-operation given to him during his term of office.

Mr. Cousins then formally moved the adoption of the report and balance-sheet.

The annual report and balance-sheet were then formally adopted.

Mr. C. A. L. Treadwell, Chairman of the Post-war Aid Committee, reported on the year's work in the interest of practitioners serving or having served with the Forces. The Refresher Course of lectures, he stated, had been well attended; and it had been very gratifying to the Committee to learn that the lectures had proved of great assistance to the ex-servicemen practitioners. The Digest containing notes of the changes in law was completed, and it was hoped would be printed and distributed to the servicemen and ex-servicemen as soon as was practicable.

The donations given by members of the Society and resident Judges had made it possible for a substantial Christmas parcel to be sent to members and clerks overseas.

Much had been done by way of advice to returned practitioners regarding rehabilitation problems and a register of partnerships offering and positions vacant had been kept by the Secretary, who had in this way already been of considerable assistance, not only to Wellington practitioners, but also to those from other districts.

Mr. E. D. Blundell, recently returned from the Middle East, spoke on behalf of the men serving with the Forces and expressed appreciation and thanks for the parcels which were said to be the best parcels received by the soldiers. He also thanked the Society for the interest being taken in the general welfare of serving practitioners.

Election of Officers.—The following officers were elected for the coming year: President: Mr. H. R. Biss; Vice-President: Mr. W. P. Shorland; Treasurer: Mr. J. R. E. Bennett; Members of Council: As the nominations for ordinary members of the Council exceeded the number required, a ballot was taken, resulting in the following members being elected: Messrs. E. D. Blundell, P. B. Cooke, K.C., A. M. Cousins, W. E. Leicester, N. H. Mather, G. C. Phillips, F. C. Spratt and C. A. L. Treadwell.

Members Elected by Branches.—Palmerston North, Mr. G. I. McGregor; Feilding, Mr. J. Graham; Masterton, Mr. R. McKenzie.

On taking the chair, Mr. Biss thanked the members for electing him, and referred to the very valuable work carried out by the retiring President, Mr. A. M. Cousins.

The President expressed regret that under the "oldest inhabitant" rule Mr. T. P. Cleary had retired from the Council after seven years of faithful and loyal service.

In addition a tribute was paid to the work done and the interest taken by Mr. J. W. Rutherfurd, who had represented the Palmerston North Branch since the country branches were first represented on the Council.

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

The President thanked Messrs. H. F. O'Leary, K.C., G. G. G. Watson, and A. M. Cousins on behalf of the profession for the work carried out by them as delegates and as members of the Standing Committee of the New Zealand Law Society.

Mr. O'Leary, on behalf of Mr. Watson, Mr. Biss and himself, thanked members for electing them as the delegates to the New Zealand Society. The work of the President of the New Zealand Society would, he stated, be very difficult were it not for the co-operation of the other representatives of the Wellington Society. Mr. Watson had been an immense help, and no one had been of greater assistance than Mr. Cousins during the past year. As the annual report of the New Zealand Law Society was being circulated to all members, Mr. O'Leary briefly traversed the details of the year's activities of that Society.

Mr. O'Leary was thanked for his report.

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

Easter Vacation.—It was decided that the Easter Vacation should be observed from the usual closing time, Thursday, March 29, to the usual opening hour on Monday April 9.

Christmas Vacation.—The matter of the Christmas Vacation was left to the incoming Council to decide. It was, however, recommended that the dates be fixed as early as possible so as to give reasonable notice thereof to legal offices.

Servicemen's Settlement and Land Sales Act.—A Committee appointed by the Wellington Society had been asked by the New Zealand Society to also act on its behalf in conjunction with the Standing Committee of that Society in matters arising out of the operation of the Servicemen's Settlement and Land Sales Act. The Committee had made a number of suggestions with a view to simplifying the regulations. Representations had at various times been made, as a result of which many sources of complaint had been removed.

General.—It was decided to send the good wishes of the members to Messrs. H. J. V. James, A. J. Luke, and J. J. McGrath who were laid aside through illness.

It was noted that the City Solicitor, Mr. J. O'Shea, had retired from office, and it was decided that the best wishes of the profession should be sent to him.

SOUTHLAND DISTRICT LAW SOCIETY.

At the annual meeting of the Southland District Law Society, held on March 8, in the Supreme Court Library, Invercargill, the following office-bearers were elected for the ensuing year: President, Mr. John Tait; Vice-president, Mr. L. F. Moller; Hon. Secretary, Mr. J. H. B. Scholefield; Hon. Treasurer and Librarian, Mr. K. G. Roy.

The following were elected members of the Council: Messrs. J. R. Hanan, A. B. Macalister, T. V. Mahoney, H. E. Russell, and W. H. Tustin.

New Zealand Law Society Delegate, Mr. John Tait; Chamber of Commerce Delegate, Mr. J. C. Prain; Southland Progress League, Mr. J. R. Hanan; Hon. Auditor, Mr. M. M. Macdonald.

Amongst the matters discussed were various aspects of the Land Sales Committee's procedure and practice, and the desirability of decentralizing the work of the Stamp Duties Department in respect of duty on estates.

The new Council was authorized to make a levy of up to £3 a member for library funds.

RULES AND REGULATIONS.

Education (Post-primary Teachers) Regulations, 1945. (Education Act, 1914.) No. 1945/24.

Engineers Registration Regulations, 1945. (Engineers Registration Act, 1924.) No. 1945/25.

Poultry Board Regulations, 1939, Amendment No. 3. (Poultry-runs Registration Act, 1933.) No. 1945/26.

Wool Board (Travelling-allowance) Regulations, 1945. (Wool Industry Act, 1944.) No. 1945/27.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

H. J. V. James.—In the history of the New Zealand Bar, there can rarely have been heard, in the case of a young man, such eulogies as those of the Chief Justice, the Attorney-General, and the President of the Wellington Law Society at the gathering of practitioners called to pay tribute to the memory of the late "Ben" James. In apt words, Myers, C.J., who had James in his Chambers during his last five years of practice as a King's Counsel, referred to his possession of "a natural legal mind": indeed, James (like Jessel) could with swiftness and sureness thread his way through a jungle of the most complicated facts and strip a case of its non-essential features. His facility in this respect marked him as in the tradition of Skerrett, C.J., whose incisive judgment has become legendary. Although his courage and the charm of his personality were remarked upon by all speakers, chief among his qualities were his loyalty, his humour, and his gift for friendship. Love of the law and the desire not to allow his illness to deprive his firm of his services led him to make a daily advancement in legal knowledge: even on the day of his death he dictated a memorandum of things remaining to be done. The footnotes, anecdotes, and marginalia of his professional work were a never-ending source of interest and joy to him; and, as a necessary accompaniment, he had the quality of quick laughter, and a joviality that led him invariably to conceal from the outside world the dark hours through which he must often have passed. He found the essential happiness of his life in friendship; his company was an everlasting pleasure, and he was always ready to comfort his many friends in their afflictions, despite the greater magnitude of his own. The outstanding phase of his fine character can be summed up in Henry's reference in *King Henry IV* to the Earl of Westmoreland: "Here is a dear, a true industrious friend!"

International Court of Justice.—The election last year of Myers, C.J., as an Honorary Bencher of the Inner Temple—the first Bencher of an Inn of Court to have been born in this Dominion—has now been followed by a further honour, his selection as New Zealand's representative on the United Nations Committee of Jurists which is to prepare or draft a Statute of an International Court of Justice and which is expected to make changes in the previous Hague Court.*

From the thirty United Nations' delegates, he was one of two appointed to reply to the welcome of the Secretary of State, Mr. Stettinius, and he sagely remarked,

> "No person or nation can reasonably expect to have its own way in everything. There must be a readiness to give and take. Either we go forward to peace and security, or back to barbarism."

It can confidently be said that, in the person of her representative, New Zealand, in this arena of high juristic discussion, will bring to the conference table a contribution far in excess of her proportionate size and population. By the time this note appears, the Chief Justice will have commenced his work in Washington, where Salmond, J., was a member of the British delegation to the Arms Conference of 1921. If the memory of O. W. Holmes is correct, Salmond called upon him during that visit and said that New Zealand which had been held up as the Garden of Eden consisted simply of ordinary men wanting to make some money—a salutary, if unflattering, criticism. A suaver diplomacy can be expected from Smith, J., if ever his appointment as arbitrator in disputes between Peru and the United States takes him to South America. Upon hearing of this unusual appointment, a friend wrote to him wittily, "*Fiat justitia*, peru*at coelum*."

Caustic Corrective.—A fault common to many, if not most, *nisi prius* advocates is to state a proposition or to ask a question several times in the belief that the jury does not understand them the first time. Whether they are right or wrong is difficult to say since the composite mind of a jury remains a mystery upon which even Freud has been unable to throw any light. Nevertheless, the habit has been, and still remains, a source of irritation to Blair, J.; and there is now reported from Auckland another instance of his much-repeated sarcasm: "Do you think that I don't know that the sun rises in the east and sets in the west?" It may be that counsel is incorrigible in the matter and stands in need of this panacea for his oral misdemeanours; but he is apt sometimes to overlook the rapidity with which the facets of a case communicate themselves to the Bench. May the time not come when some erring advocate, his mind dwelling upon disturbing features of his brief, will reply, in dulcet tones of the deepest respect: "Your Honour, I think in your heart you *do* know that the sun rises in the east and sets in the west, but, from the number of times you have put this question to counsel you appear to be in need of constant reassurance upon the point!"

Judicial Conception.—Joshua Strange Williams, who was appointed a Judge of the Supreme Court seventy years ago, had a dry sense of humour which he was disinclined to exercise in Court. For many years District Land Registrar for Canterbury, he was "one of the few members of the Colonial Judiciary whose fame as a lawyer extended beyond the confines of his own Colony." An instance of his wit occurred in the Court of Appeal, where counsel, who had been addressing the Court at considerable length and wearied the Bench by his tediousness, was stigmatising an opponent's argument as quite untenable and began, "Your Honour, I cannot conceive . . ." He paused; and Williams, J., whispered to Denniston, J., in an aside loud enough to reach the ears of junior counsel: "He may not be able to conceive, but he can certainly labour."

Judicial Timidity.—"The commonest fault of the judgments of most modern Judges is a timidity which tries to escape, by dwelling on the details of the particular case, from the enunciation of a definite general principle."—Viscount Bryce (1903).

* It is noted that Mr. C. C. Aikman, according to the daily newspapers, is to accompany him *as adviser*—a pleasing statement, but one that might have been more happily expressed. Mr. Aikman is on the staff of our "Foreign Office," the Department of External Affairs. He was admitted in 1941.

PRACTICAL POINTS.

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

1. Will.—*Parent Testator—Bequest to Child predeceasing—Whether Bequest to Child lapsed.*

QUESTION: A., who died in March, 1943, leaves a very short will. After appointment of executors the will reads: "I give devise and bequeath all my property real and personal between my four children in equal shares share and share alike absolutely." There is no gift over on default. Three children survive A., but the fourth child, X., died three years ago intestate leaving a widow and three children, all of whom survived the testator. Will X.'s widow and her three children share in A.'s estate, which is worth approximately £5,000? We refer you to *Re Stanhope's Trusts*, (1859) 27 Beav. 201, 54 E.R. 78; *Sanders* v. *Ashford*, (1860) 28 Beav. 609, 54 E.R. 500; and *Re Coleman and Jarrom*, (1876) 4 Ch.D. 165, all of which would suggest that X.'s share has lapsed and is divisible equally between A.'s other three children.

ANSWER: X.'s widow and her three children will become entitled to X.'s one-fourth share in A.'s estate. X.'s share is saved from lapse by s. 33 of the Wills Act, 1837, as to which see *Garrow on Wills and Administration*, 329, and *34 Halsbury's Laws of England*, 2nd Ed., para. 179. It is true that that section does not apply to a *class* gift: *Garrow, op. cit.*, 330. But this is not a class gift as *In re Stansfield, Stansfield* v. *Stansfield*, (1880) 15 Ch.D. 84, definitely shows. This case appears exactly in point.

The three cases referred to in the question are all distinguishable. All that *Re Stanhope's Trusts* (*supra*) decides is that a gift may be none the less a class gift because some of the members are referred to by name: the gift was to my four named daughters and "all my after-born daughters." *Sanders* v. *Ashford*, *supra*, was a class gift, because there were words added implying a contingency: a gift to testator's five great nieces, A., B., C., D., and E., equally to be divided between them, if more than one. The class was thus to be ascertained at the date of death of testator.

Re Coleman and Jarrom (*supra*) was clearly a class gift: to "all and every the children of my late brother J. C. who shall be living at my decease or who shall have died in my lifetime leaving issue at my death in equal shares."

The point to be borne in mind is that what appears at first glance to be a gift to a class may really be a gift to individuals. The members of a group (as in the instant case) may be individualized in other ways than by naming them.

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2. Probate and Administration.—*Native Land—Intestate Estate—Death since 1944—Whether Administration Amendment Act, 1944, applies to Natives—Native Land Act, 1931, s. 177.*

QUESTION: Is the real and personal estate of a member of the Maori race, who died intestate after January 1, 1945, leaving surviving his widow and children, divisible amongst his children alone in accordance with the provisions of ss. 176 and 177 of the Native Land Act, 1931, or does the estate, or any part of it—*e.g.*, personalty—devolve upon his widow alone or widow and children under the provisions of the Administration Amendment Act, 1944? In other words, have the Natives been overlooked so that the Administration Amendment Act has impliedly repealed the provisions as to succession on intestacy of Natives under the Native Land Act?

The facts are as follows: A., a Native, died intestate in February, 1945, leaving him surviving a wife and four children, all of whom are Natives. The estate consists of sundry Native lands, no European lands, the only personalty being a life insurance policy for about £275. The value of the Native land interests would not exceed £500.

The question is, does the widow take the whole estate, or does it all go to the four children equally, subject to the rights of the widow to apply for a share under s. 177, Native Land Act: or possibly does the real estate go by one method and the personal estate by the other?

ANSWER: The real and personal estate of deceased Native devolves in accordance with ss. 176–178 of the Native Land Act, 1931, and not in accordance with the Administration Amendment Act, 1944, s. 1 of which enacts that that Act shall be read together with and deemed part of the Administration Act, 1908. The corresponding parts of the Administration Act, 1908, always had to be read subject to ss. 139–141 of the Native Land Act, 1909 (now ss. 176–178 of the 1931 Act); therefore ss. 6 and 7 of the Administration Amendment Act, 1944, must also be read subject to these sections.

The doctrine of implied repeal is not favoured by the Courts; it is submitted that it could not apply here, because s. 176 (1) of the Native Land Act, 1931, enacts that the persons entitled on the complete or partial intestacy of a Native to succeed to his estate, whether real or personal, except a beneficial freehold interest in Native land, and in the shares in which they are so entitled, shall (so far as otherwise expressly provided in that Act) be determined in the same manner as if he was a European. This wording suggests that the Legislature both in 1909 and 1931 anticipated a possible change in the laws of descent applying to Europeans, and made separate provisions for Natives accordingly. There is no conflict between the Native Land and Administration Acts which would induce the Courts to apply the doctrine of implied repeal: both Acts may and, it is submitted, must, be read together. It is, therefore, submitted that s. 177 of the Native Land Act, 1931, applies notwithstanding the Administration Amendment Act, 1944, and, if that section applies, it is applicable here, and cuts out the widow, unless the Native Land Court makes provision for her.

It is also submitted that the maxim, *Generalia specialibus non derogant* applies. The Administration Act, 1908, and the Amendment Act, 1944, are *general* Acts: the Native Land Act, 1931, is a special Act, its preamble stating, "An Act to consolidate and amend the law relating to Native Land." Although it deals with more matters than Native land, it is restricted mainly to the property of "Natives" as defined. The policy of the Legislature is to treat Natives differently from Europeans in many ways, including the canons of descent: where these canons are to be the same the Legislature says so: s. 176 (1) of the Native Land Act, 1931. It could never have been the intention of the Legislature in enacting the Administration Amendment Act, 1944, to remove this difference between the two races. There appears to apply the *ratio decidendi* of *Bishop of Gloucester* v. *Cunnington*, [1943] 1 All E.R. 61, where the Court of Appeal held that the English Rent Restrictions Acts did not apply to ecclesiastical benefices: see also *Brandon* v. *Grundy*, [1943] 2 All E.R. 208. The general rule is that special Acts are not repealed by general Acts unless there be some express reference to the previous legislation, or a necessary inconsistency in the two Acts standing together, which prevents the above maxim from being applied.

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3. Magistrates' Court.—*Change of Parties—Whether Order may be made after Judgment.*

QUESTION: Can an order for change of parties be made after judgment?

ANSWER: Yes. *Taylor* v. *Taylor*, (1941) 2 M.C.D. 274, 275, following *Smytheman* v. *Clark*, [1935] N.Z.L.R. 604.