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DEATH DUTIES: LIFE INSURANCE POLICIES NOT BENEFICIALLY OWNED BY THE DECEASED.

IN its interpretation of the United Kingdom death-duties provision corresponding with s. 5 (1) (*g*) of the Death Duties Act, 1931, the Court of Appeal in England in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, [1951] 1 All E.R. 240, rendered difficult the position of a practitioner called upon to advise on the effect of the local provision. That decision interpreted the corresponding s. 2 (1) (*d*) of the Finance Act, 1894 (U.K.), differently from the interpretation given it by the New Zealand Courts. Some certainty of interpretation seemed to be had from the construction of s. 5 (1) (*g*) by our Court of Appeal in *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, together with the similar construction given to the identical s. 2 (1) (*d*) in *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426. But the Court of Appeal in the *D'Avigdor-Goldsmid* case upset any idea of such certainty or uniformity. Happily, the House of Lords has had the last word in the *D'Avigdor-Goldsmid* litigation, [1953] 1 All E.R. 403. The result is a unanimity of construction by the highest judicial tribunals in England, Scotland, and New Zealand.

Earlier in these pages, our learned contributor, Mr. E. C. Adams, dealt fully with the *D'Avigdor-Goldsmid* litigation in its pre-House of Lords aspects: see (1951) 27 NEW ZEALAND LAW JOURNAL, 221, and (1952) 28 NEW ZEALAND LAW JOURNAL, 60. He pointed out that, in refusing to follow the Scottish case, *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426, the English Court of Appeal had rendered the law in this country uncertain and unsatisfactory, and he preferred the view taken in that case by the Judge of first instance, *Vaisey*, J., as being more in harmony with the *ratio decidendi* of the leading case, *Adamson* v. *Attorney-General*, [1933] A.C. 257. Mr. Adams also pointed out that if the Court of Appeal decision was to stand, then there was no need for the inclusion of s. 5 (1) (*f*) in our legislation or its counterpart, s. 2 (1) (*c*) in the United Kingdom statute.

When the appeal reached the House of Lords, *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, [1953] 1 All E.R. 403, the only matter in dispute was the claim made under s. 2 (1) (*d*) of the Finance Act, 1894 (U.K.), as the Crown did not cross-appeal in respect of the decision of the Court of Appeal under s. 2 (1) (*c*), in which it upheld the Judge of first instance, who held there was no maintainable claim to death duty under that paragraph.

Section 2 (1) (*d*) of the Finance Act, 1894 (U.K.) brings within the charge of estate duty:

> (*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

The corresponding provision in the Death Duties Act, 1921, is s. 5 (1) (*g*), which is now reproduced for purposes of comparison with the corresponding United Kingdom provision, as above:

> (*g*) Any annuity or other interest purchased or provided by the deceased, whether before or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, *to the extent of the beneficial interest accruing or arising* by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased.

Fortunately, now, as the result of the recent House of Lords decision, the New Zealand practitioner may rely on a uniformity of decision in interpreting our s. 5 (1) (*g*) and its counterpart—in England in *D'Avigdor-Goldsmid's* case in its ultimate decision in the House of Lords; in Scotland, in *Lord Advocate* v. *Hamilton's Trustees* (*supra*), which was approved by the House of Lords in *D'Avigdor-Goldsmid's* case; and in New Zealand in our Court of Appeal's judgments in *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, and in *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550, in which *Lord Advocate* v. *Hamilton's Trustees* was applied.

In *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, 540, 541, *Smith*, J., with whom *Blair*, J., concurred, said that it was not disputed that an "interest" in s. 5 (1) (*g*) includes a life-insurance policy. He then considered *Adamson* v. *Attorney-General*, [1933] A.C. 257, *Attorney-General for Ireland* v. *Robinson*, [1901] 2 I.R. 67, *Attorney-General* v. *Murray*, [1904] 1 K.B. 165, *Lethbridge* v. *Attorney-General*, [1907] A.C. 19, and *Richardson* v. *Commissioner of Inland Revenue*, [1909] 2 I.R. 597, all of which rested on the application of s. 2 (1) (*d*) of the Finance Act, 1894, which, as we have already shown, corresponds almost identically with s. 5 (1) (*g*) of the Death Duties Act, 1921. His Honour then considered *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426, and *Lord Advocate* v. *Scott*, [1918] S.C. (Ct. of Sess.) 720. From his review of all these cases, His Honour thought that the following conclusions might be drawn concerning the application of s. 5 (1) (*g*):

1. The principal object of the paragraph is to bring into the dutiable estate of the deceased an interest, on the purchase or provision of which he has expended his means in his lifetime and in respect of which a beneficial interest will arise or accrue upon his death.

2. The paragraph contemplates that the interest which produces the beneficial interest on the death shall be provided by one person only—*viz.*, the deceased—whether he does so alone or in concert or by arrangement with any other person. In my opinion, the paragraph implies, as the Lord Ordinary was disposed to think in *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426, *that the whole interest must be provided by the deceased.* This is an equitable construction, because nothing less than the whole interest arising on the death is to be included in the dutiable estate. This construction is also supported, I think, by the fact that s. 5 (1) (*f*), which deals specifically with an insurance policy on the life of the deceased which is kept up for the benefit of a beneficiary, provides that, if the deceased has paid only a part of the premiums, only a proportionate part of the proceeds of the policy shall be included in the dutiable estate. As s. 5 (1) (*g*) contains no corresponding provision, it should not be assumed that it is intended, as part of a taxing statute, to app'y to anything but the whole interest purchased or provided by one person—*viz.*, the deceased.

3. The deceased may purchase or provide the whole interest, either alone or in concert or by arrangement with any other person. If some other person purchases or provides the whole or a part of the interest, either alone or in concert or by arrangement with the deceased, the interest is outside the subsection.

4. In determining whether the deceased did purchase or provide the policy, the Court, having regard to the legal nature of the transaction in question, ascertains whether the means of the deceased were used for the purpose of acquiring or maintaining the policy.

5. In accordance with the principle established in *Lethbridge* v. *Attorney-General*, [1907] A.C. 19, the interest is not provided by the deceased where, though he has purchased or provided it for some period, he subsequently transfers it during his lifetime for adequate consideration.

The rather complicated facts in *D'Avigdor-Goldsmid's* case, are neatly summarized by Mr. E. C. Adams in (1951) 27 NEW ZEALAND LAW JOURNAL, 221.

Some general facts, however, may be useful when considering the judgments in the three Courts. The question at issue was whether estate duty should be paid on a sum of money amounting to £48,765, which was received on the discharge of a life policy taken out by the plaintiff's father, Sir Osmond D'Avigdor-Goldsmid, Bt., deceased, on May 3, 1904, for £30,000 with profits, under annual premiums of £695. By a subsequent marriage settlement, the policy, with all bonus additions, was assigned by the deceased to trustees on trust to receive the policy moneys at maturity and hold the same on the trusts therein declared, and the deceased covenanted with the trustees to pay the premiums on the said policy, which he did, as long as he had any interest in it. By subsequent dispositions, which it is not necessary to set out, the appellant, who was his eldest son, became absolutely entitled to the policy as from November 10, 1934, more than five years before the death of his father, which occurred on April 14, 1940. The appellant paid out of his own moneys the premiums under the policy from the time he became absolute owner of it.

The Crown claimed estate duty on the £48,765, either under s. 2 (1) (*c*) [our s. 5 (1) (*h*) of the Finance Act, 1894], or under s. 2 (1) (*d*) [our s. 5 (1) (*g*)]. As regards the first claim, *Vaisey*, J., decided that no estate duty arose. The Court of Appeal came to the same conclusion; and this conclusion was not now challenged by the respondents in the House of Lords. But on the alternative claim to duty under s. 2 (1) (*d*) of the Act of 1894, the Court of Appeal reversed the decision of *Vaisey*, J., that no duty was payable and held that the sum in question was property which must be deemed to pass on the death of the deceased within para. (*d*).

We content ourselves here with a brief summary of the judgment of *Vaisey*, J., in the Court of first instance in so far as he considered s. 2 (1) (*d*) [our s. 5 (1) (*g*)]. His Lordship held that the property assigned to the son of the deceased in 1934 was the policy—that is to say, the benefit of the contract of insurance with the insurance company on the life of the deceased. The deceased died on April 14, 1940. But the son had paid thirty-one of thirty-seven premiums paid on the policy. *Vaisey*, J., held that no new benefit accrued or arose in connection with the policy or its proceeds on the death of the deceased. As he said, the son, the appellant, at any time before his father's death, could have surrendered or sold the policy if he had so desired; but he had preferred to keep it up. On the authority of *Lord Advocate* v. *Hamilton's Trustees (supra)*, *Vaisey*, J., rejected the Crown's claim to death duty on the proceeds of the policy, on the ground that, before the deceased's death, the whole beneficial interest in the policy and the moneys payable thereunder had become fully vested in the appellant. The result was that the Crown's claim for duty was rejected; because no beneficial interest had accrued or arose on the deceased's death in favour of the son by survivorship or otherwise; accordingly, the provision corresponding to our s. 5 (1) (*g*) did not apply; and the claim for death duty failed. In short, the whole interest had passed to the son in November, 1934, more than five years before the deceased's death.

The Court of Appeal reversed *Vaisey*, J., on this point. Its decision was largely based on *Attorney-General* v. *Robinson*, [1901] 2 I.R. 67. It will be remembered that in *Russell's* case, [1948] N.Z.L.R. 520, 545, *Kennedy*, J., said:

> I do not think the Crown need invoke any such principle as it was submitted was established in *Attorney-General* v. *Robinson* ([1901] 2 I.R. 67), to the effect that the mere fact that on the death of the deceased policy moneys became payable was sufficient to attract the application of s. 5 (1) (*g*) in that it showed that a beneficial interest accrued on the death of the deceased. No such principle can justly be extracted from *Attorney-General* v. *Robinson* ([1901] 2 I.R. 67, and, if it could, I think it could not be supported.

But, in *D'Avigdor-Goldsmid's* case, the Master of the Rolls, *Sir Raymond Evershed*, in delivering the judgment of the Court, after referring to a number of cases, said ([1951] 2 All E.R. 543, 562):

> In this state of the authorities, and, particularly in view of the express and unqualified approval accorded to *Attorney-General* v. *Robinson* ([1901] 2 I.R. 67) by this Court in *Attorney-General* v. *Murray*, ([1904] 1 K.B. 165), it seems to me that, notwithstanding *Lord Advocate* v. *Hamilton's Trustees*, ([1942] S.C. (Ct. of Sess.) 426), our duty is to apply to the present case the law as laid down in *Attorney-General* v. *Dobree* ([1900] 1 Q.B. 442) and in *Attorney-General* v. *Robinson*.

Their Lordships in the House of Lords were somewhat critical of *Robinson's* case. For example, *Viscount Simon*, [1953] 1 All E.R. 403, 406, said:

> The judgment of *Palles*, C.B., in *Attorney-General* v. *Robinson* has received the close attention which is proper to be given to any pronouncement of that very learned Judge, and the Chief Baron nine years later thought it right in *Richardson* v. *Inland Revenue Commissioners*, ([1909] 2 I.R. 597, 624) to add some observations on his decision in *Robinson's* case on the ground that it had been misapprehended. I confess I do not find it easy to grasp the Chief Baron's argument and in particular I do not appreciate the meaning of his statement ([1901] 2 I.R. 67, 90) as to " an exact descrip-

tion of money secured by a policy of insurance." The liability of the subject under a taxing statute ought not to be arrived at by a course of subtle and sophistical argument; and, even in the case of the most learned judicial pronouncements, it is well to recognize that on rare occasions *bonus dormitat Homerus*.

And *Lord Porter* said that it was plain that the Court of Appeal had reached their conclusion by following the reasoning of *Palles*, C.B., in *Robinson's* case, a case which had influenced a number of decisions in the United Kingdom, but had not been the subject previously of any direct approval by the House of Lords. He showed how *Lord Russell of Killowen* had withheld approval of the judgments in *Dobree's* and *Robinson's* cases, in the course of his speech in *Tennant* v. *Lord Advocate*, [1939] 1 All E.R. 672, 675. *Lord Porter* considered *Lord Russell's* doubts were fully justified. As for himself, he said ([1953] 1 All E.R. 403, 407) that he could not accept the view that some fresh interest accrues or arises in the beneficial holder of a policy on the death of the deceased life. As one of their Lordships had expressed it in the course of the argument, the value of the chose in action is increased, the interest of the beneficiary is not altered.

Having disposed of *Robinson's* case as at the best, distinguishable, and, in general, as a subject for criticism, their Lordships approved the principle and the reasoning of *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426. Thus, *Viscount Simon*, who presided on the Woolsack, ([1953] 1 All E.R. 403, 406) said:

A life policy is a piece of property which confers on the owner of it the right, if certain conditions continue to be satisfied, to claim and be paid the policy moneys on the death of the person whose life is assured. These rights, therefore, belonged to the appellant from 1934 and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realised. There was, therefore, no new or additional beneficial interest in the policy which arose on the death of the appellant's father. For six years past, he had had absolute and unfettered ownership of the policy. As *Vaisey*, J., pointed out ([1951] 1 All E.R. 248), he

> "could have sold it, mortgaged it, given it away, destroyed it, settled it, or (being a policy on his father's life) he could have surrendered it at the moment when his father was in extremis, at the point of death."

If he had done any of these things, the Crown could not have claimed to aggregate the policy moneys with the rest of the estate for the purposes of duty. It follows that no estate duty is payable on the £48,765, for no beneficial interest in the policy accrued or arose on the death of the deceased.

I prefer to base my decision on this simple ground by taking the words of the statute and seeing whether the Crown brings the case within the section. We were referred to a large number of previous decisions which were alleged to throw light on the problem raised. It is enough to say that the Scottish decision of *Lord Advocate* v. *Hamilton's Trustees* is in line with the conclusion at which I have arrived, and the argument in *Lord Wark's* opinion sets out a course of reasoning which I accept and apply in the present case.

Lord Porter agreed with *Viscount Simon*. At pp. 407, 408, he said:

The Crown's claim under s. 2 (1) (*c*) of the Act of 1894 has been dropped and I find myself in agreement with the views of *Vaisey*, J., as respects the claim under s. 2 (1) (*d*). Like him, I prefer the decision and the principle laid down in the Scottish case *Lord Advocate* v. *Hamilton's Trustees* to those enumerated on behalf of the Crown, which I refrain from discussing further since they have been analysed in the opinion about to be delivered by *Lord Morton of Henryton*, and I cannot usefully add to his remarks.

In the course of his speech, *Lord Morton of Henryton*, at pp. 410, 411, said:

There are three conditions which must be satisfied in order to give rise to a claim for duty under s. 2 (1) (*d*), viz., (i) there must be an annuity "or other interest"; (ii) it must have been purchased or provided by the deceased either by himself alone or in concert or by arrangement with some other person; and (iii) a beneficial interest therein must accrue or arise by survivorship or otherwise on the death of the deceased. I have inserted the word "therein" in condition (iii), although it does not appear in the paragraph, because it is manifest from the wording of the section that the duty is payable only if a beneficial interest *in the "annuity or other interest"* accrues or arises on the death of the deceased.

. . .

As to condition (i), I am content to assume, for the purposes of this appeal, that the policy is an "other interest" within the meaning of the paragraph, although I have long felt, and still feel, grave doubt whether the Legislature ever intended this curious phrase to apply to the absolute beneficial ownership of a policy of assurance. There is no decision of this House on the point; and it is to be noted that "money received under a policy of assurance" is singled out from other property and expressly subjected to estate duty in certain circumstances, by s. 2 (1) (*c*) of the Act of 1894, incorporating the Customs and Inland Revenue Act, 1889, s. 11.

Condition (ii) is admittedly satisfied, in accordance with, and subject to, the provisions of the Finance Act, 1939, s. 30, by reason of the inclusion of No. 27 Wood Street in the property appointed to the appellant on November 10, 1934.

Has condition (iii) been satisfied in the present case? In my opinion, it has not. The only "other interest" purchased or provided by the deceased (Sir Osmond) was the policy. That was what he owned in October, 1907, that was what he settled on October 22, 1907, and that was what was appointed to the appellant on November 10, 1934. The question to be decided is whether a beneficial interest *in the policy* accrued or arose on Sir Osmond's death. To that question there can, in my view, be only one answer. The whole beneficial interest in the policy passed to the appellant absolutely in 1934. No interests in expectancy were created, and the beneficial interest of the appellant in the policy immediately after his father's death was exactly the same as his beneficial interest in the policy immediately before his father's death. True it is that the property in which the appellant had a beneficial interest became more valuable by reason of the death, but he had at all material times the same beneficial interest in that property. The Attorney-General, if I understood him correctly, described this as a "metaphysical conception"; but, to my mind, it is a plain statement of fact; and if it is a correct statement of fact it is manifest that condition (iii) is not satisfied in this case. I think that confusion has arisen in certain earlier cases because the Court has regarded the moneys ultimately paid under the policy, instead of the policy itself, as the "other interest purchased or provided".

After an exhaustive examination of a number of English, Irish, and Scottish decisions, His Lordship distinguished some of them and said that others were not in point. He concluded his judgment, at pp. 414, 415, as follows:

Lastly, I come to *Lord Advocate* v. *Hamilton's Trustees*. In that case the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons were to become absolutely entitled on attaining the age of twenty-five and the daughter's share was settled on her for life with remainders over. The trust deed stated that these provisions in favour of the children "shall vest in them respectively at the date hereof." The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under s. 2 (1) (*d*) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary (*Lord Keith*) on the grounds that (i) "in the circumstances the property sought to be charged had not been provided by the deceased", and that

> (ii) "there was no beneficial interest accruing or arising on the death of the deceased, in respect that the whole interest in the policies had passed to the beneficiaries twenty-four years before the truster's death, their interest having fully vested."

It is unnecessary for the present purpose to consider the first of these two grounds, but, in my view, the second ground was correct. *Lord Keith* used language which applies very aptly to the present case. He said ([1942] S.C. (Ct. of Sess.) 426, 434):

> "In the present case, it is undoubted that an interest vested in the beneficiaries under the deed of trust at the date thereof, and the death of the truster made no difference to that interest. If the sons had predeceased their father, their shares of the proceeds of the policies would have been paid over to their executors. I have difficulty in seeing how a beneficial interest accrued or arose to them, by survivorship or otherwise, on the death of the deceased. What accrued to them or to the trustees was a present right to demand payment from the insurance company in respect of a previously existing beneficial interest."

I agree with the reasoning which I have just quoted. I would allow the appeal and restore the order of *Vaisey*, J.

Lord Reid, in his speech, set out to demolish the arguments of the learned Attorney-General. For example, at p. 416, he said in part:

> To say that the policy was "provided" is merely a short way of saying that what was provided was the contractual right against the insurance company which the assured obtained when he entered into a contract with the company or took out the policy. That contractual right was assigned to the appellant, and it was by virtue of that contractual right alone that the appellant ultimately obtained payment of the £48,765. It is true that the company was only bound to pay if the assured, and, in his turn, the appellant, fulfilled their part of the contract by paying premiums, etc., but, this having been done, the contractual right originally acquired by the assured remained in force until the date of payment arrived and the money was paid.
>
> It was then argued that, if what was provided was the policy, a new beneficial interest in respect of it arose at the death, because then for the first time there arose a right to sue for the sum due under the policy: before the death the appellant only had a contingent future right, but after the death he had a new and different right—a right to get the money. This argument is not based on any peculiarity of a contract of insurance, and if it is right it seems to me necessarily to lead to the conclusion that, whenever a creditor is owed money payable at a future date, his right after the date of payment has come is a new right different from the right which he had before that date. That seems to me to be a novel doctrine, and to neglect the fact that the rights of contracting parties flow from the contract: a new right would require a new contract. From the beginning the creditor's right was to be paid on a certain day, and the coming of that day does not create a new right, it merely enables him to enforce his old right, and I do not see why it should make any difference if the date of payment is determined, not by the calendar, but by the occurrence of an event, such as death, whose date cannot be predicted. Nor do I see why it should make any difference that the creditor has had to perform his part of the contract between the date when it was made and the date of payment. I must, therefore, also reject this argument.

Lord Asquith of Bishopstone concurred with the opinions of *Viscount Simon* and *Lord Morton of Henryton*. He added, at p. 417:

> Disengaged from certain clinging and obscuring draperies, the point seems to me a short one. It turns on the meaning, in the Finance Act, 1894, s. 2 (1) (*d*), of two terms: "other interest" and "beneficial interest". "Other interest" in this context seems to me to cover, and on the facts of this case specifically to denote, the benefit of the policy: *viz.*, the contractual rights conferred by it, whether on its original holder or its assignee. These rights included the right to exact payment of the insurance moneys in an agreed and specified event, *viz.*, the death of Sir Osmond. The policy, the vehicle of this right, was assigned out and out, to Sir Osmond's son, the appellant, over five years before his father's death.
>
> The "beneficial interest" referred to in the concluding lines of the material paragraph was a beneficial interest in the "other interest" referred to in its opening lines. It is a clumsy collocation of terms, no doubt, but it must mean a beneficial interest in a contractual right to exact £x if and when Sir Osmond should die. This beneficial interest has never altered in quality from the time of the assignment till the day of Sir Osmond's death, or until the day after it. The death has not generated a new beneficial interest. What it has done is to enhance the value of the "other interest" in which the beneficial interest subsisted. The "other interest" (consisting of the contractual rights under the policy) bore in its womb the "promise and potency" of this enhancement from the start. To say that the "beneficial interest" therein sprang into life "on the death" seems to me wholly false. If I buy an apple tree and it subsequently bears fruit, I was beneficially interested in the fruit from the start.
>
> In these circumstances, I can see no answer to the reasoning which has moved my Lords to allow the appeal and like them I would allow it.

From the foregoing extracts from the speeches in their Lordships' House, and applying them to our own death-duty legislation, so far as relevant, the conclusion reached by their Lordships may, we think, be expressed by saying that the words "the interest purchased or provided" as used in s. 5 (1) (*g*) of the Death Duties Act, 1921, means the benefit of the policy and not the proceeds of the policy. The words "beneficial interest" in that paragraph mean and refer to the beneficial interest in the policy. In *D'Avigdor-Goldsmid's* case, the whole of the interest passed by assignment to the son of the insured in 1934. As the whole of that interest had so passed to him at that date, no beneficial interest in the policy "accrued or arose on the death of the deceased" on April 14, 1940. Consequently, s. 2 (1) (*d*) of the Finance Act, 1894 (U.K.) [or s. 5 (1) (*g*) of our Death Duties Act, 1921] did not apply to render estate duty payable on the amount of the policy moneys.

As the learned author of *Adams's Law of Death and Gift Duties in New Zealand*, in his *Cumulative Supplement No. 2* (written in 1946) at p. 25, so concisely put it: The proceeds of the policy "did not come within s. 5 (1) (*g*) because the assignment was absolute, and because [the insured] did not covenant to pay the premiums after assignment." And that, in effect, is what the House of Lords decided in 1953, thus reviving and vivifying the decisions of our Court of Appeal in 1948 in *Russell's* and *Cravens* cases.

As Augustine Birrell says in one of his *Essays*: "These proceedings found their way, as all decent proceedings do, to the House of Lords—farther than which you cannot go, though ever so minded". And, we can take it that the interpretation of s. 5 (1) (*g*) of the Death Duties Act, 1921, is now sure, and certain.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1953.

No. 1. Imprest Supply.
2. Royal Titles.
3. Emergency Forces Rehabilitation.
4. Property Law Amendment.
5. New Zealand Government Property Corporation.
6. Military Training Amendment.
7. Department of Agriculture.
8. Tenancy Amendment.
9. Finance.
10. Primary Products Marketing.
11. Marketing Amendment.
12. Local Elections and Polls.
13. Licensing Amendment.

ADMINISTRATIVE LAW.

Certiorari—New Zealand Dairy Board—Zoning Order made by Board—Question whether Board under Duty to Act Judicially in arriving at Administrative Decision—Such Question to be decided on True Construction of Authorizing Legislative Provisions and in Relation to Conditions and Circumstances in which Jurisdiction Exercised—Contest before Board between two Dairy Companies, in Nature of Lis *between them—Existence of Such* Lis *material to Question whether Quasi-judicial Duty rested on Board—Cumulative Effect of Existence of* Lis *with Board's Right under Regulations to undertake Inquiries—Board under Quasi-judicial Duty in Hearing Dispute between Companies before making Zoning Order—Inquiry conducted in Such Manner as to Contravene Principles of Natural Justice—Declaration accordingly —Certiorari and Prohibition issued—Agriculture (Emergency Powers) Act, 1934, s. 27—Dairy Factory Supply Regulations, 1936 (Serial Nos. 1936/33, 1948/167), Regs. 5, 6, 16.—Practice—Jurisdiction—Petition to Parliament—Petitioner later seeking Discretionary Remedy from Supreme Court—Petition not Bar to Discretionary Remedy sought for Enforcement of Existing Rights.* As a result of Zoning Order (No. 30) made by the Executive Commission of Agriculture in May, 1937, the respondent dairy company, carrying on business in Gisborne and the surrounding district, and another company (the Kia Ora Co-operative Dairy Co., Ltd.) became entitled to operate exclusively in a defined area in the Gisborne district, and were excluded from operating outside that area. The zoning conditions so established continued to exist until 1950, when the appellant Board issued the zoning orders which were the subject of the present proceedings. This letter was, in substance, an application to the Board to review the whole question of zoning and to require the respondent company to cease the manufacture of butter. Moreover, the letter set out the circumstances in a manner prejudicial to the respondent company. Before 1942, the respondent company was approached by the Health Department with a request that it undertake the treatment and supply of pasteurized milk to the public schools, and it was informed that other dairy companies had declined the proposal. The company complied with the request, after overcoming the difficulties of finance. The scheme was put into operation. In 1942, the treatment-plant was in operation, commencing with the school milk contract, and expanding to the whole milk supply of Gisborne with the exception of one or two small dairies. This expansion resulted in an annual turnover in the company's milk department of approximately £90,000 as against £43,000 in its butter department. In March, 1950, the Kia Ora company, by letter, expressed its desire that the appellant Board (which had been substituted by regulation for the Executive Commission), should examine the question of cream and milk supplies in the Gisborne and surrounding districts. After various meetings and negotiations between the appellant Board, the companies concerned, and interested parties, at none of which were the contents of the Kia Ora company's letter to the Board disclosed to the respondent company, no agreement was reached. The result of these discussions and detailed replies to complaints were reported to the Board by the respondent company, and its letter ended with a statement to the effect that it would appreciate the privilege of appearing before the full Board with the object of stating its case more fully or of answering any questions. The Board ignored this specific request. At a full meeting of the Board held on May 31, 1950, the Board decided that only one butter factory should operate in the Gisborne district. On August 3, the Board, by resolution, decided to give notice of its intention of issuing a zoning order to operate as from October 1, 1950, assigning to the Kia Ora company the cream collection area over which the two companies then operated. On August 29, the respondent company wrote to the Board protesting against its proposal, and asking for rescission of the Board's resolution and for an opportunity of being heard. On September 2, 1950, the appellant Board in exercise of the power conferred upon it by Reg. 16 of the Dairy Factory Supply Regulations, 1936 (Serial No. 1936/33), and in terms of its resolution of August 3, 1950, made Zoning Order No. 120 which was the subject of these proceedings. It was to come into force on October 1, 1950. Its effect was to assign exclusively to the Kia Ora company the area defined in Zoning Order No. 30 of 1937 as that in which the two companies could jointly collect cream produced in supplying dairies situated in that area, and to prohibit the respondent dairy company after October 1, 1950, from collecting or receiving any cream so produced for the purposes of manufacture into creamery butter. The respondent company and others presented a petition to Parliament praying relief and remedy by way of legislation either in the direction of reversing and setting aside the Board's decision in the matter of the zoning order or of setting aside such decision and the rehearing of the matter by an independent tribunal. The petition was heard by a select Committee of the House of Representatives, which decided to make no recommendation on the petition. On August 4, the Board made an amended Zoning Order (No. 120A) postponing until June 1, 1951, the date of the coming into operation of Zoning Order No. 120 already made, but otherwise confirming that Order. The respondent company commenced an action against the Board claiming (*a*) a declaration that zoning Orders Nos. 120 and 120A issued by the Board were invalidly passed and were of no legal effect; (*b*) an order or certiorari to remove into the Supreme Court and quash the zoning orders; and (*c*) an injunction restraining the Board from carrying out its intention of promulgating the zoning orders or from proceeding further or exercising any jurisdiction in connection with the same. The action was heard by Mr. Justice Hay, who found that, in the conduct of the inquiry instituted by the Board following the application made to it by the Kia Ora company, there was, in the various respects mentioned in his judgment, a departure from those principles of natural justice which were incumbent on the Board; and, in particular, the plaintiff company was denied a hearing on the crucial issue as to whether or not a zoning order should be made: — the denial of an opportunity to be heard having resulted from the fact that the plaintiff company's representatives were deceived by the calculated reticence of the Board's representatives as to the real purpose of the only meeting at which any opportunity was afforded them of putting their company's case to the Board. His Honour held that the plaintiff company was entitled to succeed in the action in respect of all the relief it claimed; and he gave judgment accordingly in its favour, with costs against the Board. From that judgment the Board appealed on the ground that it was erroneous in law and fact. *Held*, by the Court of Appeal (*Sir Humphrey O'Leary*, C.J., and *Hutchison*, J., dissenting), that the appeal should be dismissed, for the reasons: Per *Northcroft*, *Finlay*, and *Cooke*, JJ. 1. That the New Zealand Dairy Board in making its Zoning Order of September 1, 1950, was determining a question affecting the rights, as a subject, of the respondent company, as the Order, if valid, involved a direct interference with the common-law right of the plaintiff company to trade with whom it chose, in that its right to carry on its butter-manufacturing undertaking was in question; and the making of that Order involved the determination of a question affecting that right. (*Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66, explained and distinguished.) (*R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171, and *R.* v. *Legislative Committee of the Church Assembly*, [1928] 1 K.B. 411, and *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, applied.) 2. That the decision of the Board to make the Zoning Order was that of a body that was, at least primarily, an administrative body; and the question whether such a body was under a duty to act judicially in the course of arriving at an administrative decision was to be determined on the true construction of the authorizing legislative provisions or constating instrument and the conditions and circumstances under which and in which the jurisdiction fell to be exercised. (*De Verteuil* v. *Knaggs*, [1918] A.C. 557, and *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66, applied.) (*R.* v. *Manchester Legal Aid Committee*, [1952] 1 All E.R. 480, distinguished.) (*Smith* v. *The Queen*, (1878) 3 App. Cas. 614, *Wilson* v. *Esquimalt Railway Co.*, [1922] A.C. 202, *Estate and Trust Agencies (1927), Ltd.* v. *Singapore Improvement Trust*, [1937] A.C. 898, and *Patterson* v. *District Commissioner of Accra*, [1948] A.C. 341, referred to.) Dictum of *Lord Greene*, M.R. in *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851, 859, mentioned. Per *Northcroft* and *Cooke*, JJ. That the Board's functions were administrative functions, and neither in the Dairy Factory Supply Regulations, 1936, and their amendments, nor in any matters therein taken separately or cumulatively, was there anything sufficient to warrant the conclusion that it was a proper inference from their language that the Board was under any duty to act judicially or quasi-judicially in making inquiries for the purposes of the Regulations or before exercising the powers conferred on it by them. 2. That the true approach to the question, whether there was anything in the conditions or circumstances under which, or in which, jurisdiction was to be exercised by the Board that justified the inference that a quasi-judicial duty was imposed on it, was to be found in the fact that there was before the Board a contest or contests between the respondent company on the one hand and the Kia Ora Dairy Co., Ltd., on the other with regard to matters in dispute between them, and that there was in existence something in the nature of a *lis* between the two companies with regard to a matter of great moment to them both. (*R.* v. *Manchester Legal Aid Committee* [1952] 1 All E.R. 480; *Errington* v. *Minister of Health*, [1935], 1 K.B. 249, applied.) 3. That the actual existence of the

form of *lis* that existed was a circumstance that must for the purposes of this case, be regarded as one of the conditions or circumstances under which, or in which, the power in question was exercised by the Board, and that the actual existence of that *lis* was material to the question whether a quasi-judicial duty rested on the Board. 4. That the cumulative effect of the actual existence of the form of *lis*, which was a condition of the jurisdiction and of the express recognition in Reg. 17 of the Dairy Factory Supply Regulations, 1936, of the fact that the Board might undertake inquiries in pursuance of the Regulations was such as to show that the conditions of the jurisdiction and the context together disclosed a sufficient indication that a quasi-judicial duty lay on the Board in the hearing and consideration of the cases of the companies that were concerned. Per *Finlay*, J. 1. That, in the contest between the two dairy companies, a true *lis* affecting their respective rights and interests arose out of the exercise or intended exercise by the Board of the zoning functions delegated to it by the Dairy Factory Supply Regulations, 1936. (*Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66, distinguished.) 2. That, on the true construction of the Regulations, which were designed to deal with circumstances involving conflicting rights, upon such a *lis* arising, it was intended that the Board, though normally an administrative body, should act according to the principles of natural justice. (Dictum of *Lord Lorburn* in *Board of Education* v. *Rice*, [1911] A.C. 179, and *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, applied.) 3. That, furthermore, from the inherent character of the jurisdiction given to the Board by the Regs., and irrespective of the existence of any *lis*, it was intended that the Board should act according to judicial principle, and not autocratically and in defiance of the fundamental principles of fairness. (*Local Government Board* v. *Arlidge*, [1915] A.C. 126, and *R.* v. *Manchester Legal Aid Committee*, [1952] 1 All E.R. 480, and *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66, referred to.) Per *Northcroft*, *Finlay*, and *Cooke*, JJ. That no sufficient ground had been shown for disturbing the finding of fact of the learned trial Judge or his conclusion, in substance, that the inquiry that the Board held was conducted in such a manner as to contravene the basic principles of natural justice. Per *Northcroft*, *Finlay*, and *Cooke*, JJ. That the conduct of the respondent company in petitioning Parliament did not disentitle it to the discretionary remedy it sought, since, among other reasons, the relief sought from a judicial tribunal by an applicant for a writ is for relief of a judicial nature for the enforcement of existing rights whereas the relief sought from Parliament is of a legislative nature involving the grant of fresh rights, and it is relief that may be granted without any formal pronouncement on the very objections by reason of which the writ is sought. Appeal from the judgment of Hay, J., dismissed. *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Company, Ltd.* (S.C. Gisborne. August 6, 1951. Hay, J. C.A. Wellington. October 31, 1952. O'Leary, C.J., Northcroft, Finlay, Hutchison, Cooke, JJ.).

COMPANY.

Meeting—Adjournment—Poll—Poll to be taken immediately at Meeting—Impossibility of continuing Meeting to ascertain result of Poll. The articles of association of a company provided that a poll on any question of adjournment should be taken immediately at the meeting and without adjournment and that proxies should be lodged at least forty-eight hours before the time appointed for holding a meeting or adjourned meeting. At an extraordinary general meeting of the company, held on January 20, 1953, to consider *inter alia* certain resolutions proposed by some of the shareholders, a poll was demanded on a motion for adjournment. The meeting, which had started at noon and had already lasted for over three hours, could not be continued in the room where it was being held as that was then required for another purpose, and no other room was available. As the scrutineers would require over two hours to count the voting on the poll, the chairman said that the poll would be taken immediately and the result announced later. He went on to say that, if the poll was in favour of adjournment, the meeting would stand adjourned for thirty days, and, if against, another meeting would be called as soon as practicable. The poll was taken and the result was made public on January 22, 1953, the motion for adjournment being lost by a substantial majority. *Held*: the requirement in the company's articles that a poll on any question of adjournment should be taken immediately meant that the poll was to be taken as soon as practicable in all the circumstances; as it was impossible, for physical reasons, to go on with the meeting on January 20, any meeting convened to hear the result of the poll and to continue with the business of the meeting of January 20 (the motion for adjournment having been lost) would be a continuation of the meeting of January 20; and, therefore, any proxies deposited after mid-day on January 18 would not be valid. *Shaw* v. *Tati Concessions, Ltd.* ([1913] 1 Ch. 292), applied. *Jackson and Others* v. *Hamlyn and Others*, [1953] 1 All E.R. 887 (Ch D.)

As to Adjournment of Meeting, see *5 Halsbury's Laws of England* (1949 Ed.) p. 382, para. 618; and for Cases, see *9 E. and E. Digest*, pp. 580, 581, Nos. *3878-3882*.

COSTS.

Certification and Taxation. *97 Solicitors' Journal*, 162.

CRIMINAL LAW.

Evidence—Corroboration—Failure of Accused to give Evidence. The appellant was convicted of receiving and of being an accessory before the fact to larceny of some tyres. During the trial evidence was given by accomplices, the persons who had been convicted of the larceny of the tyres, that they had arranged the whole transaction with the appellant. He himself did not go into the witness box and give evidence, and the Judge directed the jury that they could take that fact as amounting to corroboration of the accomplices' evidence. *Held*, the direction was wrong. *R.* v. *Jackson*, [1953] 1 All E.R. 872 (C.C.A.)

As to Corroboration of Evidence of Accomplices, see *9 Halsbury's Laws of England*, 2nd Ed., p. 223, para. 311; and for Cases, see *14 E. and E. Digest*, pp. 460-462, Nos. *4891-4919*.

Wounding with Intent to do Bodily Harm—Firearm with no Cartridge in Barrel though Magazine charged—Such Firearm "loaded"—Crimes Act, 1908, s. 197 (b). A rifle charged with cartridges in the magazine is "loaded" within the meaning of s. 197 (*b*) of the Crimes Act, 1908. (*R.* v. *Carr*, (1819) Russ. & Ry. 377; 168 E.R. 854, distinguished.) *The Queen* v. *Lacey and Another* (S.C. Palmerston North. February 6, 1953. Gresson, J.)

"Wrong" in the M'Naghten Rule, *103 Law Journal*, 148.

DESTITUTE PERSONS.

Separation—Order made Parties later resuming Cohabitation—Reconciliation Unsuccessful and Parties entering into Separation Agreement—Subsequent Complaint and Separation Order made—Order of No Effect—No Power to Order Rehearing—Appeal from Order allowed—Magistrates' Courts Act, 1947, s. 77. The Supreme Court has no power under s. 77 of the Magistrates' Courts Act, 1947, to order the rehearing of a complaint for a separation order under the Destitute Persons Act, 1910. Consequently, the order made for a rehearing in *Revell* v. *Revell*, [1952] N.Z.L.R. 838; [1952] G.L.R. 619, was made *per incuriam*; and the whole of the original appeal, therein reported, was allowed. *Revell* v. *Revell* (S.C. Wellington. March 6, 1953. Sir Humphrey O'Leary, C.J.)

DIVORCE AND MATRIMONIAL CAUSES.

Alimony and Maintenance—Alimony pendente lite—*Application for Alimony* pendente lite *brought before Court after Decree of Judicial Separation granted—Application out of time, as Suit not "pending"—Divorce and Matrimonial Causes Rules, 1943, R. 42.* Rule 42 of the Matrimonial Causes Rules only permits the making of an order for "alimony pending suit" and an application for such an order is out of time if it is made after a decree of judicial separation has been made in the suit. (*M.* v. *M.*, [1928] P. 123) followed.) On November 26, 1952, the petitioner filed her petition for judicial separation upon the ground of adultery. On December 12, 1952, an order was made by consent securing her costs at an agreed amount. On December 16, 1952, a notice of motion for an order for alimony *pendente lite* was filed. On March 10, 1953, the decree for judicial separation was granted. On March 23, 1953, the application for alimony *pendente lite* was brought before the Court. It was opposed by the respondent. *Held*, That the application was out of time, as the suit was not then "pending," within the meaning of R. 42 of the Matrimonial Causes Rules as the making of the decree for judicial separation had terminated the suit.. *Pollett* v. *Pollett* (S.C. Wellington. April 13, 1953, Northcroft, J.).

Practice—Petition—Cook Islands—Service in Rarotonga—Particulars to be included in Petition—Form of Notice to Respondent—Translation to accompany Papers to be served. Where a petitioner is unable to ascertain the name of the co-respondent, and the petition is to be served outside New Zealand, that allegation should be contained in the petition, and a paragraph therein should set out briefly the facts supporting it. *Semble*, That it is desirable that this course should be followed even in petitions to be served in New Zealand, and, in particular, where special circumstances exist. The petition should set

out the petitioner's case in detail, as indicated in the judgment including the circumstances on which the petitioner relies as establishing his divorce in New Zealand; and a translation should be forwarded with the papers to be served on the respondent. (*Burfield* v. *Burfield* [1916] N.Z.L.R. 524; [1916] G.L.R. 359) applied.) *Semble*, That the least time which should be allowed for an answer to be filed should be ninety days. The special considerations for a notice to the respondent in respect of service abroad apply with full force to a person who has spent all her life in Rarotonga and who, at the time when the petition is filed, is living there with her family. (*Burfield* v. *Burfield*, [1916] N.Z.L.R. 524; [1916] G.L.R. 359 and *Liversey* v. *Liversey*, [1926] N.Z.L.R. 117; [1926] G.L.R. 105, applied.) The form of notice is indicated in *Bennett* v. *Bennett* ([1931] N.Z.L.R. 38; [1931] G.L.R. 14); and, as there are no solicitors practising in Rarotonga, the notice should contain a statement that, if the respondent desires to consult a solicitor in New Zealand, the name of one in Auckland qualified to advise her will be given to her by the Official Secretary of the Administration upon being consulted; that if the respondent desire to consult such solicitor, she may communicate with him, and that the petitioner's solicitors will pay him the sum of £5 to cover any work done by him in relation to the respondent's case. *Katia* v. *Katia* (S.C. Auckland. February 24, 1953. Fair, J.)

Substituted Service, *97 Solicitors' Journal*, 182.

The Effect in England of Foreign Decrees of Divorce, *215 Law Times*, 118.

IMPRISONMENT FOR DEBT LIMITATION.

Judgment Summons—Prescribed Form of Affidavit to be made by Judgment Creditor—Clauses requiring Judgment Creditor to testify on Oath as to Debtor's Financial Position Ultra vires—*Imprisonment for Debt Limitation Act, 1908, s. 5 (1)—Imprisonment for Debt (Magistrates' Courts) Rules, 1949 (Serial No. 1949/188) r. 9 (1).* Section 5 (1) of the Imprisonment for Debt Limitation Act, 1908 (which entitles the judgment creditor to obtain a judgment summons whenever there is in his favour an unsatisfied debt) does not require the judgment creditor, as a condition precedent to the issue of a judgment summons to testify on oath as to the financial position of the debtor. Consequently, r. 9 (1) of the Imprisonment for Debt (Magistrates' Courts) Rules, 1949, is *ultra vires* in so far as it prescribes the inclusion in the prescribed form of creditor's affidavit of cls. 5 and 6 thereof; and an affidavit in that form, but excluding those clauses, sworn by a judgment creditor entitles him to the issue of the judgment summons applied for. (*Culling* v. *Bremner*, (1877) 2 N.Z. Jur. (N.S.) S.C. 206; *Andrews* v. *McCulloch*, (1885) N.Z.L.R. 4 S.C. 35; and *Lothian* v. *Bugden*, (1904) 23 N.Z.L.R. 901, applied.) *Thomas* v. *Whitaker* (S.C. Christchurch. February 27, 1953. Northcroft, J.)

JUSTICES.

Election by Offender to go for Trial at Quarter Sessions—Substitution of New Charge—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1). The appellant was charged before justices with making a false declaration under s. 9 (1) of the Vehicles (Excise) Act, 1949, when applying for a licence in respect of a motor vehicle, for which the maximum punishment on summary conviction was six months' imprisonment. He elected to go for trial under s. 17 (1) of the Summary Jurisdiction Act, 1879, and at quarter sessions he was charged with making a false declaration under s. 5 (*b*) of the Perjury Act, 1911, for which the maximum punishment was two years' imprisonment, and was convicted of that offence. *Held*: if a prisoner elects to go for trial before a jury under s. 17 (1) of the Summary Jurisdiction Act, 1879, another charge cannot be substituted at quarter sessions for the charge for which he was originally before the Court of summary jurisdiction and, therefore, the conviction must be quashed. *R.* v. *Phillips*, [1953] 1 All E.R. 968 (C.C.A.).

For the Summary Jurisdiction Act, 1879, s. 17 (1), see *14 Halsbury's Statutes*, 2nd Ed., p. 857.

LAND DRAINAGE.

Obstructions—Local Authority ordering Removal of Obstructions—Scope of Order—Statutory Obligation to comply with Valid Order—Contrast with Application to Adjoining Owner to improve Natural Flow of Water—Land Drainage Act, 1908, ss. 62, 67. Section 62 of the Land Drainage Act, 1908, contemplates an order by a local authority for removal of obstructions and clearing and cleansing, by removal of weeds and growths calculated to impede the full flow of water, as contrasted with an improvement to the natural flow of water, by work such as described in s. 67 (1) as widening, deepening, straightening, or otherwise improving." (*James* v. *Kowai County Council*, (1922) 17 M.C.R. 76, and *Raglan County Council* v. *Covert*, (1928) 23 M.C.R. 35, distinguished.) Section 62 of the Land Drainage Act, 1908, imposes a statutory obligation upon every occupier or owner of land on the banks of any watercourse or drain to remove obstructions (including weeds) which impede the "free flow of the water in such watercourse or drain," if he is required to do so by a proper order made by the local authority; and failure renders the occupier or owner liable for fine and payment of the expenses of having the removal effected by the local authority. His redress is to appeal to a Magistrate to determine that the notice shall have no effect, and he may so appeal, if he considers he can show justification for it, even after a determination of a Magistrate requiring compliance with the order. *Munro* v. *Whangarei County* (Whangarei. March 30, 1953. Herd, S.M.)

LAND SUBDIVISION IN COUNTIES.

Appeal—Minister's refusal of Consent to Scheme Plan of Subdivision—Grounds for Refusal that Town-planning Board alone could deal with Objections to County's Provisionally Approved Extra-urban Plan—Refusal not 'justified on Any Ground set out in Land Subdivision in Counties Act, 1946—Land Subdivision in Counties Act, 1946, s. 3 (5) (7). The appellant's land, containing a little less than 6½ acres, was situated in the Manukau County. It adjoined the boundary-line of Howick Borough, and immediately adjoined another small block, already subdivided, within that borough. The appellant's scheme-plan showed a proposed subdivision into quarter acre lots, without involving any road formation. The scheme plan was submitted to the Minister for approval on November 20, 1951, and approval was formally refused by letter dated November 14, 1952, the ground of such refusal being stated as follows:—"Refusal is made under s. 3 (5) (*a*) of the Land Subdivision in Counties Act, 1946, on the grounds that the Extra-urban Plan of the Manukau County Council was provisionally approved by the Town-planning Board on March 11, 1953, and that as a consequence, objections to the Extra-urban Plan may be dealt with only by the Town-planning Board under the judicial powers vested in it by the Town-planning Act, 1926. Therefore the Minister will not approve any plan that contravenes the zoning in the Extra-urban Plan until such matters have been determined by the Town-planning Board."

The appellant appealed under s. 3 (7) of the Land Subdivision in Counties Act, 1946, against the Minister's refusal *Held*, allowing the appeal, 1. That, when the Minister of Lands has refused his consent to a subdivision, it is the duty of the Board of Appeal set up under s. 3 (7) to review the grounds upon which the Minister relied as justifying his refusal; and, after a *prima facie* case has been made out by the appellant, the Minister, in order to succeed, must satisfy the Board, on the evidence, that his refusal is justified on at least one of the grounds set out in s. 3 (5). (*Ecroyd* v. *Minister of Lands*, (1953) 8 M.C.D. 8 followed.) 2. That the ground upon which the Minister relied was not one of the grounds set out in s. 3 (5). *Semble*, That the rights and remedies given to the various parties by s. 3 of the Land Subdivision in Counties Act, 1946, are additional to those created under the Town-planning Act, 1926, and there is no conflict of jurisdiction between that section and certain sections of the Town-planning Act, 1926. (Dicta thereon in *Patton* v. *Minister of Lands*, (1951) 7 M.C.D. 44, disagreed with.) *Andrew* v. *Minister of Lands* (April 2, 1953. Land Subdivision in Counties Appeal Board. Kealy, S.M., Chairman. at Otahuhu.)

PUBLIC REVENUE.

Death Duties (Estate Duty)—Covenant by Deceased to Provide Annuity payable Monthly—No Allowance for "contingent debts or any other debts"—Amount calculated actuarially as Present Value of Annuity not allowable—Death Duties Act, 1921, s. 9 (2) (d) (3). Section 9 (2) (*d*) of the Death Duties Act, 1921, which provides that, in computing the final balance of an estate for death duty purposes, no allowance is to be made for "contingent debts or any other debts the amount of which is, in the opinion of the Commissioner, incapable of estimation," applies to a liability incurred by a covenantor to pay an annuity until the death of the annuitant. (*Commissioner of Stamp Duties (N.S.W.)* v. *Permanent Trustee Company of N.S.W., Ltd.*, (1933) 49 C.L.R. 293, applied.) In computing the final balance of the estate of the covenantor for the purpose of that statute, allowance cannot, therefore, be made for the full amount calculated actuarially as the present value of the annuity payable; and, accordingly, no allowance in excess of the sum payments to a relative during her lifetime. The payments allowed under s. 9 (3) in respect of payments within three years after the death of the covenantor is justified. The deceased with others entered into a deed whereby he and they bound themselves and their personal representatives to make monthly

were to be made on the first day of each calendar month. The obligation to make the annuity payments was acknowledged by the Commissioner of Stamp Duties to have been incurred for fully adequate consideration in money or money's worth. At the death of the deceased, the proportion of the monthly payment to be made by him was £1 16s. 5d. and the capitalized value of the portion of the annuity payable by him (calculated actuarially and having regard to the expectation of life of the annuitant) was £1,052 9s. This figure was allowed by the Commissioner, when assessing succession duties, in arriving at the value of the shares of the estate receivable by the deceased's successors. In computing the final balance of the estate, the Commissioner, pursuant to s. 9 (1) of the Death Duties Act, 1921, made allowance for the above-mentioned liability. In reliance on s. 9 (2) (*d*) of the Act he declined to make an allowance for the sum of £1,052 9s., but, pursuant to s. 9 (3), he made an allowance of £281 5s. for the monthly sums which would become payable within three years after the deceased's death. In a Case Stated under s. 62 of the Death Duties Act, 1923, the Court was asked to determine whether an amount in excess of £281 5s. should have been allowed in respect of the deceased's liability under the deed, and, if so, what was the amount which should have been allowed. *Held*, That an annuity debt is a contingent debt in that it is dependent upon the contingency of the continued life of the annuitant, and that, inasmuch as the period of the annuitant's life is not capable of determination in advance an estimation of the quantum of the contingent indebtedness (or "pecuniary liability" within the definition of "debt" in s. 2 of the Death Duties Act, 1921) could not be made; and that, accordingly, in computing the final balance of the estate, no allowance was to be made in respect of the said sum of £1,052. (*Commissioner of Stamp Duties* v. *Permanent Trustee Co. of New South Wales, Ltd.* (1933) 49 C.L.R. 293 followed.) *New Zealand Insurance Co., Ltd.* v. *Commissioner of Stamp Duties* (S.C. Timaru. 1952. October 29, December 17. Northcroft, J.)

SALE OF GOODS.

Trade description—Mutual Ignorance as to Deficiency in quality—Goods of contract description supplied—Validity of Contract. By two contracts in writing, the sellers agreed to sell, and the buyers agreed to buy, a quantity of Calcutta Kapok "Sree" brand. After the goods had been delivered, the buyers found that, instead of being pure kapok, they contained an admixture of cotton, which was unsuitable for their machinery. It appeared that both parties thought that Calcutta Kapok "Sree" brand was tree kapok, whereas in the kapok trade it was a brand which was known to contain an admixture of bush cotton. On the question whether the contracts were nullities on the ground of mutual mistake of fact, *Held*: when goods, whether specific or unascertained, are sold under a known trade description, without misrepresentation or breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is irrelevant; if goods answering to the particular description are supplied, the parties are bound by their contract and there is no room for the doctrine that the contract can be treated as a nullity on the ground of mutual mistake, even though the mistake, from the purchaser's point of view, may turn out to be of a fundamental character; and, therefore, the contracts were not nullities and the buyers were bound by them. *Harrison and Jones, Ltd.* v. *Bunten and Lancaster, Ltd.*, [1953] 1 All E.R. 903 (Q.B.D.)

As to Mutual Mistake as to the Quality of the Subject-matter of a Contract, see *23 Halsbury's Laws of England*, p. 136, para. 191; and for Cases, see *35 E. and E. Digest*, pp. 105-107, Nos. *110-122*.

TENANCY.

Alternative Accommodation: The terms. *97 Solicitors' Journal*, 165.

Tenancy Amendment Act, 1953.—This Act prescribes special circumstances to be taken into account in fixing the fair rents of dwellinghouses and business properties under the Tenancy Act, 1948. It is substantially to the same effect as the Tenancy Regulations, 1952 (Serial No. 1952/248), which were made on December 17, 1952, and were held by Mr. A. A. McLachlan, S.M., to be invalid. The regulations are revoked by s. 3 of the new statute. The Act applies in every case where a fair rent is fixed after its passing, even if the proceedings had already been commenced. Every fair rent already fixed is validated. The effect of the Act on the fixing of fair rents is as follows:

Dwellinghouses.—Where the dwellinghouse was built on or before September 1, 1942, any increase in value (up to 15 per cent. in excess of the value on that date) is to be a special circumstance justifying a fair rent in excess of the basic rent. Where the dwellinghouse has been built after September 1, 1942, the capital cost of the dwellinghouse when built, plus the cost of any subsequent improvements, is to be a special circumstance. But if the dwellinghouse (whether built before or after September 1, 1942) has been purchased after February 22, 1950, and let to a new tenant on or after December 10, 1951, then the capital cost to the landlord is to be a "special circumstance." (It is made clear that this only applies where the dwellinghouse has been let to a new tenant after the purchase.) In the case of any dwellinghouse, whenever it was built, any increases in rates, insurance premiums, or other outgoings payable by the landlord are to be "special circumstances."

Business Properties.—In the case of any business property, any increase in value (up to the capital value as defined in s. 2 of the Valuation of Land Act, 1951) and any increases in rates, insurance premiums, or other outgoings payable by the landlord are to be "special circumstances" justifying a fair rent in excess of the basic rent.

Urban Property—Possession—Year's Notice to Tenant—Sufficiency of Notice of Intention to recover Possession without Specifying Court wherein Application will be made—Landlord not required to prove Greater Hardship—Tenancy Act, 1948, ss. 24 (2), 25 (1)—Tenancy Amendment Act, 1940, s. 12. The notice to the tenant required by the second proviso to s. 25 (1) of the Tenancy Act, 1948 (as added by s. 12 of the Tenancy Amendment Act, 1950) is effective so long as it gives twelve months' notice of an intention to proceed for recovery of possession; and it is not necessary to specify therein the actual Court to which the application will be made. Where such a notice has been given to the tenant, it is the duty of the Court to consider the application for possession in accordance with the provisions of s. 24 (2) and not in accordance with those of s. 25 (1); and, in so doing, it is to have regard to the hardship of both parties and other persons affected without requiring the landlord to prove hardship greater than that of the tenant. *Coltman* v. *Sutherland* (S.C. Wellington. March 20, 1953. Northcroft, J.)

TRANSPORT.

Construction of Statute—"Certificate of fitness as hereinafter provided"—No Specific Later Reference in Statute—Legislative Intent—Wide and Comprehensive Language with No Technical Meaning—Reference to Regulation making Power in Later Section—Transport Act, 1949, ss. 118, 160 (m). The words, "a certificate of fitness as hereinafter provided," as used in s. 118 of the Transport Act, 1949, must be given the fullest meaning to effectuate the clear intention of the Legislature, and there is sufficient in s. 100 (*m*) of the statute (to which the Transport Regulations 1950, owe their validity in respect of the issue, duration, conditions, etc., of certificates of fitness) to prevent those words from becoming meaningless. (Dictum of *Lord Greene*, M.R., in *Elderton* v. *United Kingdom Totalisator Co., Ltd.*, [1945] 2 All E.R. 624, 625), applied.) *Wilson* v. *New Zealand Express Co., Ltd.* (Auckland. March 9, 1953. Spence, S.M.)

WILL.

Gift to "charitable institutions referred to by me in this my will"—Unitarian Church. The testatrix bequeathed: ". . . (13) To the Rev. C. W. Townsend of the Unity Church Torquay or if he predeceases me then his successor at such church for the general purposes of such church the sum of £100; (14) To the Rev. H. Barnes of The Divine Unity Ellison Place for Unitarian Work Newcastle or if he predeceases me then his successor at such church for the general purposes of such church the sum of £100; . . . Subject to the payment of the foregoing legacies . . . my trustee shall pay or transfer the residue of the said money in equal shares between the charitable institutions referred to by me in this my will". *Held*: on the true construction of the will, the Unity Church and The Divine Unity were "charitable institutions" within the meaning of that term as used in the will, and they were entitled to participate in "the residue of the said money" notwithstanding that they were not the legatees under gift No. (13) and gift No. (14) respectively. *Re Nesbitt's Will Trusts. Dr. Barnardo's Homes National Incorporated Association* v. *Board of Governors of the United Newcastle-Upon-Tyne Hospitals and Others*, [1953] 1 All E.R. 936 (Ch.D.).

As to the Rule *Falsa Demonstratio Non Nocet*, see *34 Halsbury's Laws of England*, 2nd Ed., p. 228, para. 285; and for Cases, see *44 E. and E. Digest*, pp. 904-908, Nos. *7649-7677*.

THE PROPERTY LAW ACT, 1952.

The New Provisions as to Covenants.

By E. C. Adams, LL.M.

In the new Property Law Act, 1952, there will be found several new covenants, which ought to interest the law student and the conveyancer.

Sections 63 and 64 of the Property Law Act, 1952, relate to the *benefit* of covenants relating to land, and the *burden* of covenants relating to land.

The Benefit of Covenants running with the Land.

Section 63 (1) provides that a covenant, whether express or implied under that or any other Act, relating to any land of the covenantee shall, unless a contrary intention is expressed, be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and subject as aforesaid, shall have effect as if those successors and other persons were expressed. This is in substitution for s. 47 (1) of the Property Law Act, 1908, which was as follows :—

> A covenant relating to land whether expressed or implied, shall be deemed to be made with the covenantee, his executors, administrators and assigns and shall have effect accordingly.

It may be pointed out here that s. 239 of the Land Transfer Act, 1952, provides that in any form under that Act the description of any person as proprietor, transferor, transferee, mortgagor, mortgagee, lessor or lessee, or as trustee, or as seised of, having, or taking any estate or interest in any land, shall be deemed to include the heirs, executors, administrators, and assigns of that person. Presumably this and corresponding sections of earlier Land Transfer Acts, do not alter the common law rules as to what covenants do or do not run with the land, except to this extent that covenants, which at common law run with the land, only if expressed to be made with executors, administrators and assigns, automatically run with the land whether executors, administrators, and assigns or successors in title are expressly mentioned or not : *Official Assignee of Dunbar* v. *Deal and Manning*, (1888) 7 N.Z.L.R. 9.

Apparently, the same principle applies to s. 63 (1) of the Property Law Act, 1952, as set out above.

A new provision is subs. 2 of s. 63 of the Property Law Act, 1952, which provides that for the purposes of that section in connection with covenants *restrictive of the user of land*, the expression " successors in title " shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

The Burden of Covenants Running with the Land.

Section 64 of the Property Law Act, 1952, dealing with the burden of covenants relating to land, appears to be new. Subsection (1) provides that a covenant, whether express or implied under that or any other Act, relating to any land of a covenantor or capable of being bound by him by covenant shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself and his successors in title and the persons deriving title under him or them, and subject as aforesaid, shall have effect as if those successors and other persons were expressed. Presumably this section also would not extend the class of covenants which run with the land except to the same extent as indicated above with reference to s. 63 of the Property Law Act, and s. 239 of the Land Transfer Act, 1952. Section 64 (2) (which the Hon. H. G. R. Mason, Q.C., cited verbatim in ((1952) 28 New Zealand Law Journal, 25), reads as follows :—

> This section extends to a covenant to so some act relating to the land, notwithstanding that the subject matter may not be in existence when the covenant is made.

Subsection 3 of this section is similar in effect to s. 63 (2) cited *supra*, and reads as follows :—

> For the purposes of this section in connection with covenants restrictive of the user of land, the expression " successors in title " shall be deemed to include the owners and occupiers for the time being of the land.

The Hon. Mr. Mason in the course of his valued article in the New Zealand Law Journal expressed the hope that these *new* provisions above referred to will give better remedy for the *enforcement of restrictive covenants*. For the first time, a later section of the new Property Law Act, 1952, makes provision for restrictive covenants, as to the user of land , if intended to be appurtenant to other land, to be noted in the Land Transfer Register; but this far-reaching change in our conveyancing law is worthy of a later and separate article.

It may be pointed out that ss. 63 and 64 of the Property Law Act, 1952, above cited, apply to *implied* as well as to express covenants.

Covenants to be Joint and Several.

Section 67 of the Property Law Act, 1952, reads as follows :—

> 67. Where under a covenant, whether express or implied under this or any other Act, more persons than one are covenantors, the covenant shall, unless a contrary intention is expressed, be deemed to bind the covenantors and any two or greater number of them jointly and each of them severally.

This section is very much wider in its effect than the corresponding section in the Property Law Act, 1908, which was restricted to *implied* covenants in a *mortgage* and read as follows :—

> Every covenant by this Act directed to be implied in a mortgage shall be implied on the part of each of the mortgagors (if more than one).

Section 67 of the Property Law Act, 1952, appears to be based on New South Wales legislation ; and it will be noted that it, too, applies to implied covenants under the Property Law Act, 1952, or any other Act, as well as to express covenants. Unless a contrary intention is expressed in the instrument, all such covenants are deemd to be joint and several.

The effect of a joint and several covenant by two lessees who hold as joint tenants both at law and in equity is shown in *Cunningham-Reid* v. *Public Trustee*, (1944) 60 T.L.R. 393. This was a lease to two lessees, and one covenant therein read as follows :—

> The lessees hereby jointly and severally covenant with the lessor in the manner following that is to say that the lessees will pay the rent hereby reserved.

In delivering the first judgment in the Court of Appeal, *Luxmoore*, L.J., said :—

> The covenant is a joint and several one. If there were nothing else in the lease, and either Captain Cunningham-Reid or Sir Ernest Sanger had been sued on it, the other of them would have been entitled to contribution, because it is plain that under the lease a legal joint tenancy is created (*ibid.*, 394).

Sir Ernest Sanger died on December 26, 1939. After his death his contributions were paid by his executors until Christmas, 1942. From that date the executors refused to pay any further share of the rent. Captain Cunningham-Reid, the other lessee, was required by the landlord to pay the whole of the rent, and, in fact, he paid the whole of it for the two quarters, March and June, 1943, namely : £115, half of which sum he claimed from the executors of Sir Ernest Sanger. The Court of Appeal rejected this claim. Continuing his judgment, *Luxmoore*, L.J., said :—

> On Sir Ernest Sanger's death Captain Cunningham-Reid succeeded not only to the legal interest in the lease *but also to the full beneficial interest.* In those circumstances it could hardly be suggested that, having the full benefit of the lease, he could be equitably entitled to call on the executors of his co-covenantee, whose estate has no beneficial interest in the lease, to pay half the cost. In equity, the claim to contribution in these circumstances must, of necessity, fail.

Covenants Implied by the Property Law Act, 1952.

In the course of this series of articles on the Land Transfer Act, 1952, and the Property Law Act, 1952, I have already delt with a few of the covenants implied by these two very technical statutes.

Section 68 of the Property Law Act, 1952, states that a covenant or power implied under that or any other Act shall have the same force and effect, and may be enforced in the same manner, as if it had been set out in length in the deed wherein it is implied. Instruments in the form authorized by the Land Transfer Act, 1952, when registered have the effect of a deed duly executed by the parties signing the same : s. 38 (3) of the Land Transfer Act, 1952. Therefore s. 68 of the Property Law Act, 1952, applies to implied covenants in instruments registered under the Land Transfer Act. Section 156 of the Land Transfer Act, 1952, provides that in any action for breach of any implied covenant, the covenant alleged to be broken may be set forth in the statement of claim, and it may be alleged that the party against whom the action is brought did so covenant precisely in the same manner as if the covenant had been expressed in words in the instrument, any law or practice to the contrary notwithstanding.

Any implied covenant or power may be negatived, varied or extended in the deed, or by a memorandum in writing endorsed thereon and executed as a deed is required to be executed by the parties to the deed intended to be bound thereby : see the proviso to s. 68 of the Property Law Act, 1952.

There is no doubt that the system of setting out implied covenants in statutes such as the Land Transfer Act and the Property Law Acts are a great convenience : legal documents may thereby be considerably shortened. But they are not unaccompanied with a certain danger in the hands of the inept or the careless. The conveyancer, it appears to me, should always ask himself this question : Is there any implied covenant in this instrument, which if not varied or negatived, will detrimentally affect the interests of my client ?

Covenants implied in mortgages of land.—Covenants, conditions, and powers to be implied in mortgages of land, will now be found only in the Property Law Act, 1952, and not as heretofore also in the Land Transfer Act.

These covenants, conditions, and powers, now set out in the Fourth Schedule to the Property Law Act, 1952, are more complete than were the corresponding ones in the Property Law Act, 1908, and the Land Transfer Act, 1915. Thus, where the mortgage is a puisne mortgage, or a mortgage of a term of years, additional suitable covenants will be found in the Schedule. Also mortgagors now impliedly covenant to pay rates and taxes.

Customary modifications of implied covenants in mortgages of land.—It is observed, however, that in practice solicitors still usually modify certain of the covenants implied in mortgages of land by the Fourth Schedule to the Property Law Act, 1952.

Modification of covenant for insurance.—Covenant No. 2 provides for insurance against fire. The word " approved " in the phrase " to be approved by the mortgagee " is usually not used, the word " nominated " or " directed " being substituted therefor. To the said implied Covenant No. 2 there is also often added in practice additional provisions along the following lines :—

> The covenant by the mortgagor/s for insurance against fire directed to be implied in every mortgage of land by the Property Law Act 1952, section 78 and set out in the Fourth Schedule to that Act, shall as regards this mortgage be modified by adding thereto the following paragraphs :
>
> " And the mortgagee may at any time before the expiration of any current policy notify the mortgagor/s in writing that he requires the mortgagor/s upon the expiration of that policy to insure the said buildings and erections to the full insurable value thereof in an insurance office named by the mortgagee in the said notice, and the mortgagor/s shall upon the expiration of the current policy allow the same to lapse and shall reinsure in accordance with the said notice. No insurance shall be transferred by the mortgagor/s from one insurance office to another without the prior consent in writing of the mortgagee."
>
> " If in the event of fire the moneys received by the mortgagee under any policy of fire insurance and applied by the mortgagee towards repayment of the moneys secured by this mortgage shall be less than the moneys which at the time of such application shall be owing to the mortgagee hereunder, including interest to the date of such application, the balance of the said moneys shall become payable by the mortgagor/s to the mortgagee at the expiration of a three calendar months' notice in writing from the mortgagee to the mortgagor/s demanding payment thereof, and shall bear interest from the date of such application until full payment thereof at the rates hereinbefore provided for."

Covenant applying when mortgagor makes default.—Implied covenant No. 8 in the Fourth Schedule to the Property Law Act, provides that where the mortgagor makes default for the space of *two* months in the payment of the principal sum and interest, or any part thereof, or in the performance or observance of any other covenant expressed or implied in the mortgage, etc. ; in practice this period of two months is often reduced to one month.

Modification of implied Covenant on Repayment.—Implied Covenant No. 10 is the one which requires a mortgagee to give a discharge on repayment of all moneys owing. This implied Covenant No. 10 is usually modified by the following special clause :—

Continued from cover i.

BERTRAM EGLEY, Solicitor, of Wellington, desires to announce that he has re-entered practice, and is carrying out Agency matters for the Legal Profession at the following addresses:

153 FEATHERSTON ST., P.O. BOX 1988, WELLINGTON.
Office Telephone 41-999; (Residence) 53-611

MESSIEURS G. S. GORDON, C. F. TREADWELL and W. G. CLAYTON who have hitherto carried on practice as Barristers and Solicitors at Wanganui under the firm name of Treadwell, Gordon, Treadwell & Clayton, wish to announce that as from the first day of April, 1953, they have been joined in partnership by MR. GORDON SYDNEY SWAN. The practice will be carried on in future under the name of TREADWELL, GORDON, CLAYTON AND SWAN.

LEGAL NOTICE.

The legal practice hitherto carried on by MESSIEURS CROKER, MCCORMICK AND DAWSON, at OPUNAKE, has been dissolved by mutual consent. From the 1st day of April, 1953, Mr. W. G. Dawson will carry on the Opunake practice on his own behalf under the name of "W. G. DAWSON". MESSIEURS CROKER AND MCCORMICK will continue practice as heretofore at NEW PLYMOUTH.

PARTNERSHIP.

NEIL LACHLAN WATSON practising as a Barrister, Solicitor and Notary Public under the firm name of MESSRS. WATSON & WATSON, INVERCARGILL, announces that he has admitted MR. JOHN GEE GRIEVE, LL.B. into Partnership. The partnership will continue to practise under the firm name of MESSRS. WATSON & WATSON at the present address.

SOLICITOR required for sole charge Branch Office of old established and extensive practice Auckland Provincial town. Reply giving details of experience and salary required to— "X",
C/o C.P.O. BOX 472, WELLINGTON.

PARTNERSHIP.

MR. E. M. MACKERSEY has pleasure in announcing that he has admitted into partnership MR. GORDON KEITH ROSS, LL.B., Barrister and Solicitor. The practice of Barristers and Solicitors will be carried on as from the 1st of April, 1953, under the firm name of MACKERSEY & ROSS, at KING STREET, TE KUITI.

REQUIRED IMMEDIATELY for an old established North Island practice in a progressive Country Town, a qualified Solicitor experienced in Conveyancing and Estate work, with view to partnership. Liberal salary and opportunity. Reply:—

"OPPORTUNITY,"
C/o BOX 472, WELLINGTON.

MR. GEORGE J. FOY, Barrister and Solicitor of Te Aroha announces that he has admitted into partnership his Managing Clerk, MR. JAMES TERRY RYAN, LL.B. The practice will henceforth be carried on at the same address, 190 WHITAKER STREET, TE AROHA, under the firm name of FOY & RYAN.

LAW CLERK, qualified or unqualified, preferably with some experience in conveyancing and estates, required for established practice; excellent prospects for suitable applicant; applications in confidence to FOY & RYAN, SOLICITORS, BOX 77, TE AROHA.

ACCOUNTANT, not necessarily qualified, for legal office; knowledge of taxation an asset but not essential. Apply in confidence with copies of testimonials to FOY & RYAN, SOLICITORS, TE AROHA.

MESSRS. HESKETH RICHMOND COCKER & CO. and R. H. MACKAY, Solicitors, Auckland, announce that they have amalgamated their practices and that the amalgamated practice will be carried on after 1st April, 1953 at Messrs. Hesketh Richmond Cocker & Co's. offices, No. 2 WYNDHAM STREET, AUCKLAND, under the name or style of HESKETH RICHMOND COCKER & CO. and R. H. MACKAY.

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That the obligation imposed upon the mortgagee by clause No. 10 of the said implied covenants, conditions and powers shall arise only upon payment by the mortgagor of the moneys mentioned therein and of the costs of preparing and obtaining execution of the memorandum of discharge therein referred to.

Enforcement of Covenants.

Before concluding this short article on the new provisions as to covenants in the Property Law Act, 1952, it is meet that I should refer to s. 66 of the Property Law Act, 1952, which reads as follows :—

> 66. (1) A covenant, whether express or implied under this or any other Act, or an agreement made by a person with himself and another or others, shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been made with the other or others.
>
> (2) This section applies to covenants or agreements made or implied before or after the commencement of this Act.

The defect in the common law, which the above-cited section seeks to remedy, may be exemplified by such a case as *Ridley* v. *Lee*, (1935) 51 T.L.R. 364. In this case a covenant entered into by B with himself and H and S was held to be void and unenforceable. This case also shows that, although s. 66 of the Property Law Act, 1952, is retrospective, it will not validate any covenant or agreement of such a nature which required the element of full mutuality as between the parties thereto—*e.g.*, a building-scheme on the subdivision of land.

The mischief which s. 66 of the Property Law Act, 1952, seeks to cure may also be illustrated by a New Zealand case, *Allan* v. *Dawson*, [1936] G.L.R. 307. In this case pursuant to a deceased person's will, A, B, and C, executed a Memorandum of Encumbrance under the Land Transfer Act, 1915, to secure payment of a rent charge, in favour of the said C. A, B, and C were the executors of D, who by his will had created a rent charge in favour of C. The Memorandum of Encumbrance was duly registered under the Land Transfer Act, and it was not suggested that it should not have been registered. *Smith*, J., after stating that it was not contended that the encumbrance was not effective for the purpose of *charging* the rent and of *obtaining the benefit of registration* under the Land Transfer Act, said :—

> Again, as Mr. Glasgow pointed out, if the incumbrance could be construed to create a personal covenant on the part of the executors to pay the rent charge, then it would be a covenant by the three executors, including Mrs. Dawson, (C), to pay the rent charge to Mrs. Dawson, (C). By virtue of s. 166 (3), of the Land Transfer Act, 1915 (now s. 67 of the Property Law Act, 1952 (*supra*), such covenants, if they existed, would be construed to be both several and joint but the incumbrance could only be effectually executed by the three executors and, therefore, in order to enforce the covenant Mrs. Dawson (C), would have to sue the three executors, including herself. The law will not recognize an action in that form—see *Mainwaring* v. *Newman* ((1800) 2 Bos. & Pul. 120 ; 126 E.R. 1190) and *Boyce* v. *Edbrooke* [1903] 1 Ch. 836, 842, 843.

I think that these two examples alone, will satisfy one that s. 66 of the Property Law Act, 1952, will strengthen the system of jurisprudence in this country, and be of more use in practice than the logical rule of the common law which it supersedes.

SOME ASPECTS OF THE AIR SERVICES LICENSING ACT, 1951.

By J. F. Northey, B.A., LL.M., Dr.Jur. (Toronto).

In moving the second reading of the Air Services Licensing Bill—now the Air Services Licensing Act, 1951—the Minister in charge of Civil Aviation referred to the Bill as being " straightforward ",[1] but administrative lawyers will find that the Act merits close attention. The principal purpose of the Act is to establish an independent Air Services Licensing Authority whose functions are to " hear and determine applications for the granting, renewal, or transfer of licences [to operate internal commercial air services] . . . and for any of those purposes to hold such inquiries and make such investigations as it thinks necessary or expedient."[2] The functions now exercised by the Licensing Authority were formerly performed by the Minister in charge of the Air Department.[3] From the decision of the Licensing Authority there is an appeal to the Air Services Licensing Appeal Authority.[4] The Air Services Licensing Act, 1951, follows the pattern set by the Transport Act, 1949, and other statutes establishing administrative tribunals on whom Parliament has conferred judicial and other functions, but it is desirable that the implications of these statutes should be fully appreciated. In this article, special attention will be drawn to the following provisions of the Air Services Licensing Act [5] :

(i) Section 16 (2), obliging the Air Secretary to place before the Licensing Authority all such information at his disposal (whether obtained from the applicant or not) as will assist the Licensing Authority in dealing with the application.

(ii) Section 17, requiring the Licensing Authority to give notice of the receipt of the application for a licence.

(iii) Section 23 (3), enabling the Licensing Authority to revoke a licence if the air service is abandoned or curtailed in contravention of the licence.

(iv) Sections 32 and 38, protecting the proceedings of the Licensing and Appeal Authorities from review by the ordinary Courts.

[1] (1951) *296 New Zealand Parliamentary Debates*, 1112.

[2] Section 11 of the Air Services Licensing Act, 1951.

[3] Sections 6 and 8 of the New Zealand National Airways Amendment Act, 1948.

[4] Section 36 of the Air Services Licensing Act, 1951.

[5] Comparable sections appear in statutes establishing similar administrative tribunals.

USE OF DEPARTMENTAL INFORMATION.

Section 13 of the Act provides that, subject to an exemption in favour of aero clubs, ([6]) air services shall not be carried on in New Zealand([7]) except in conformity with an air service licence granted under the Act. Air service licences are granted only by the Licensing Authority([8]), which consists of three members appointed by the Governor-General.([9]) Applications for licences must be sent to the Air Secretary, who shall transmit them to the Authority.([10]) In addition, the Air Secretary is required to place before the Authority all such information at his disposal as will assist the Authority.([11]) This section calling on the Air Secretary to furnish what must be departmental information to the Authority is of special interest.([12]) It calls to mind the decision in *Local Government Board* v. *Arlidge*, [1915] A.C. 120, in which Arlidge sought to upset the decision of the Local Government Board on the ground, *inter alia*, that the contents of the report of a public local inquiry conducted by an inspector had not been disclosed to him. He asserted that, because the Board had considered the inspector's report without disclosing its contents to him, the Board had failed to determine his appeal in the manner provided by law. There was a conflict of judicial opinion on the necessity for publication to Arlidge of the inspector's report,([13]) but the House of Lords held that non-disclosure did not invalidate the decision of the Local Government Board. Lord Shaw of Dunfermline and Lord Moulton inclined to the opinion that the disadvantages of disclosure would in many cases exceed the advantages of disclosure ([1915] A.C. 120, 137, 151), and that publication would cripple the usefulness of the public inquiry and might be mischievous.

The Committee on Ministers' Powers considered the problem ([14]) and weighed the arguments for and against publication. They reached a general conclusion in favour of publication where the function of the tribunal is judicial or quasi-judicial.([15]) In cases where an inquiry or investigation precedes the exercise of functions other than judicial or quasi-judicial, the Committee considered that the tribunal should be entirely free to inform itself as it thought fit.([16]) This question has been considered by the Courts on numerous occasions since the *Arlidge* case,([17]) where the Judges have displayed differences of opinion comparable to those in the *Arlidge* case. The main objection to the non-disclosure of Departmental information is that the parties denied access thereto are unable to bring evidence in rebuttal or explanation of opinions expressed in the Departmental report. The principal arguments for non-disclosure are the possibly confidential nature of the contents of the report ([18]) and the effect that disclosure would have on Departmental efficiency.([19])

Will the Licensing Authority, which is clearly to exercise judicial or quasi-judicial functions, disclose to applicants the information furnished by the Air Secretary? In this case, it will be noticed that s. 16 (2) is mandatory—the Air Secretary *shall* furnish all necessary relevant information. The Authority is required to take into account, *inter alia*, evidence or representations received at the public hearing and any representations *otherwise made* by or on behalf of the New Zealand Government Railways Department, local authorities, other public bodies, or any persons carrying on transport services likely to be affected or residents likely to be served.([20]) However, before taking into consideration any adverse representations not made at the public hearing, the Authority is required to give the applicant and other persons likely to be affected a reasonable opportunity of replying to the representations.([21]) It will be noted that this proviso does not expressly extend to information submitted to the Authority by the Air Secretary under s. 16 (2).([22]) The Authority is apparently not bound to disclose this information, and in practice may decline to do so, but it would be wiser, in the interests of securing the full confidence of the parties and the public, if the Authority were to advise the parties of all adverse information available to it, whether received from the Air Secretary or from other sources. When referring to s. 102 (2) (*h*) of the Transport Act, 1949, ([23]) *F. B. Adams*, J., stated in *Short* v. *Auckland Transport Board*, [1951] N.Z.L.R. 808, 811, 812:

> As to the matters required by s. 102 to be considered, the section does not purport to be exhaustive. There is no express prohibition of the consideration of other relevant matters, and, in my opinion, none was intended to be implied. If justification be needed for this view, I think it may be found in subs. 2 (*h*), which requires the Authority to take into account "Any evidence and representations received by it at the public sitting," and any "representations" received from certain sources or contained in any duly signed petition. The subsection cannot apply in its entirety, though it may apply in part, where there is no public sitting; but it is relevant in its entirety on the question of construction, and, in my opinion, it shows that the other subsections are not exhaustive of the matters to be considered. Subsection 2 (*h*) would be otiose as regards "evidence" if it were read as merely requiring the Authority to consider evidence tendered on the matters previously enumerated; and it would seem to be almost equally otiose as regards "representations". This

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[6] Section 14.

[7] As to "international air services", see the International Air Services Licensing Act, 1947, and its Amendments.

[8] Section 15.

[9] Section 3.

[10] Section 16 (1).

[11] Section 16 (2).

[12] Similar provisions appear in s. 9 of the Board of Trade Act, 1950, and s. 100 of the Transport Act, 1949.

[13] The opinions of the Judges of the King's Bench Division and Court of Appeal are summarized in the *Report of the Committee on Minister's Powers*, Cmd. 4060 (1932), 102, 103.

[14] *Ibid.*, 100-107.

[15] *Ibid.*, 105.

[16] *Ibid.*, 106, 107.

[17] *E.g.*, *The King* v. *Housing Appeal Tribunal*, [1920] 3 K.B. 334, 341, 344, *Norwegian Nitrogen Products Co.* v. *United States*, (1933) 288 U.S. 294, *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, 267, 268, 272, 273, *Re Moxon*, [1945] 2 All E.R. 124, *Miller* v. *Minister of Health*, [1946] K.B. 626, *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851, and *Wright's Canadian Ropes, Ltd.* v. *Minister of National Revenue*, [1946] S.C.R. 139; [1947] 1 D.L.R. 721. See also *Douglas* v. *Dyer*, (1908) 27 N.Z.L.R. 690.

[18] Even the Committee on Ministers' Powers saw difficulties if the report covered questions of policy. The Committee thought that a separate report could be made on such questions: Cmd. 4060, (1932), 105, 106.

[19] *Local Government Board* v. *Arlidge*, [1915] A.C. 120, 151 (per Lord Moulton).

[20] Section 18 (2) (*j*); *cf.* s. 102 (2) (*h*) of the Transport Act, 1949.

[21] Section 18 (2) (*j*).

[22] Section 16 (2) refers to "information", while the proviso to s. 18 (2) (*j*) speaks of "adverse representations". The Air Secretary is not mentioned amongst those bodies or persons who may make representations under s. 18 (2) (*j*).

[23] This sub-section is similar in effect to s. 18 (2) (*j*) of the Air Services Licensing Act, 1951.

argument may not be conclusive in itself, but, putting merely verbal considerations aside and considering s. 102 as a whole, I think the intention was to insist on consideration of the specific matters referred to therein, but nevertheless to leave the Licensing Authority free to consider other relevant matters. The section is not to be regarded as a sort of mental straitjacket. Other relevant matters may come before the Authority in the form of "evidence" or "representations," as contemplated by subs. 2 (*h*), and, in my opinion, the tribunal is also entitled to exercise its own mind, and to give effect to relevant considerations which occur to it, even though they be not referred to in s. 102 or in evidence or representations under subs. 2 (*h*). This being so, there is no reason why the tribunal should not, in any proper case, gather for itself such materials or information as may assist it in its deliberations, though presumably, in cases where there is a public sitting, the principles of natural justice may require that the tribunal should give to the applicant and other persons affected the same reasonable opportunity to reply in regard to such matters as it is required to give under the proviso to subs. 2 (*h*). In cases where there is no public sitting and no formal hearing, as under s. 101A, there will probably be no such obligation, the right of the applicant and other persons to be heard being limited to their right to be heard on appeal.

The Authority would be well advised to give the parties the opportunity of replying to all adverse evidence or information received by it.

Notice of Hearing.

On receiving an application for a licence (other than a temporary licence), the Authority must give notice in each locality to be served by the proposed air service of the receipt of the application and of the time and place at which a public hearing will be held by the Licensing Authority to consider the application.[24] This section conforms to the common-law requirements as to notice where the tribunal is exercising judicial or quasi-judicial functions.[25] The common-law principle is that persons likely to be affected by the decision of a judicial or quasi-judicial tribunal shall be given notice of the hearing which shall state "time when and place where."[26] If the function of the tribunal is administrative or ministerial (as contrasted with judicial or quasi-judicial), it would seem that the Courts will not require the same precision and care to be shown in giving the notice and in its contents as they will if the function is judicial or quasi-judicial. Where the rules governing notice have been prescribed by statute, as they have in the Air Services Licensing Act, 1951, the Courts will insist on strict compliance with the statute.[27] At the hearing, the Authority must hear all evidence tendered and representations made which it deems relevant to the subject-matter of the application.[28]

Revocation of Licences.

Section 23 (3) provides that, if any licensee abandons or curtails any air service in contravention of the conditions of the licence, the Licensing Authority may, in its discretion, revoke his licence, and also any other licence held by him under the Act. This section should be compared with s. 26, under which the Authority may, of its own motion or on the application of the licensee, amend, revoke, or add to any of the terms or conditions of the licence. By s. 26 (2), the Authority is required to give seven days' notice of its intention to exercise the powers conferred by s. 26 (1) to the licensee and to every other person who, in its opinion, is likely to be affected. In *Hyland* v. *Phelan* [1941] N.Z.L.R. 1096, the decision turned on the meaning of a similar clause in the Transport (Goods) Order, 1936. In that case, failure to give either personal or public notice to an individual indirectly affected by the determination of the Authority did not invalidate the proceedings. *Fair*, J., stated, at pp. 1105, 1106:

> It [the Authority] has construed the words "every other person who in its opinion is likely to be affected" as though they meant the same as the words, "persons who in the opinion of the Licensing Authority are directly interested" . . . The Licensing Authority would appear to be in the best position to judge who is likely to be specially affected. On this view it would appear that cl. 15 did not contemplate either personal or public notice to members of the public . . . But I should add that to omit to give public notice in such circumstances would be a grave responsibility, and might well result in an amendment or addition being challenged on the ground that the Authority had failed to follow a course called for by reason and justice . . . But that is a matter which I do not need to decide in the present proceedings.

Sections 27, 28, and 29 are also relevant. These sections as to renewal, revocation, suspension, and transfer of licences contemplate a public hearing of which notice shall be given before action is taken by the Authority. Under s. 23, however, it might appear that the Authority can act without giving notice to the licensee or others affected. It appears further that whatever evidence the Authority has of abandonment or curtailment need not be disclosed to the licensee. The Authority would be unwise, however, to assume that notice and a hearing can be dispensed with under s. 23.[29] In *Smith* v. *The Queen*, (1878) 3 App. Cas. 614, 623, the Court held that, as the function exercised by the Commissioner under s. 51 (5) of the Crown Lands Alienation Act, 1868,[30] was judicial, there must be an inquiry into the alleged abandonment of the lease. The inquiry must be conducted according to the requirements of substantial justice. Sir Robert P. Collier, who delivered the judgment of the Judicial Committee, stated, at p. 623:

> If an exercise of judgment is required to determine whether or not a man is entitled to lands by reason of compliance with the provisions of the Act, it is difficult to see why less judgment should be required in determining, what concerns him quite as much, whether or not he has forfeited them by non-compliance. Their Lordships are of opinion that the inquiry to be made by the Commissioners under s. 51 (5) is in the nature of a judicial inquiry.

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[24] Section 17 (1).

[25] The whole tenor of the Act (especially ss. 7, 12, 18, 36, 37, and 41) strongly suggests that the Authority and the Appeal Authority are to exercise judicial or quasi-juridical functions. As to the meaning of judicial and quasi-judicial decisions, see *Report of the Committee on Ministers' Powers*, Cmd. 4060 (1932) 73-79.

[26] *Capel* v. *Child*, (1832) 2 Cr. & J. 558; 149 E.R. 235, *Cooper* v. *Wandsworth Board of Works*, (1863), 14 C.B. (N.S.) 180; 143 E.R. 414, *St. James and St. John, Clerkenwell (Vestry)* v. *Feary*, (1890) 24 Q.B.D. 703; *Hopkins* v. *Smethwick Local Board of Health*, (1890) 24 Q.B.D. 712, *Attorney-General* v. *Hooper*, [1893] 3 Ch. 483, *Dominion Sugar Co.* v. *Northern Pipe Line Co.*, (1930) 47 O.L.R. 119, *Re Imperial Tobacco Co., Ltd.*, and *McGregor*, [1939] O.R. 213, and *The King* v. *Winchester Area Assessment Committee, Ex parte Wright* [1948] 2 All E.R. 552.

[27] For an example of the manner in which the Courts interpret statutory provisions as to notice, see *Burgess* v. *Jarvis*, [1952] 1 All E.R. 592. The notice there was held to be invalid because it did not comply with the statute.

[28] Section 17 (4); *cf.* s. 101 (3) of the Transport Act, 1949.

[29] It may be, of course, that s. 28 applies where a licence is revoked under s. 23, and that a hearing and notice are necessary.

[30] This subsection provided as follows: "The lessee of any agricultural or pastoral land, his agent or bailiff, shall reside on such selection continously and *bona fide* during the term of his lease, provided that if at any time during the currency of a lease it shall be proved to the satisfaction of the Commissioner that the lessee has abandoned his selection and failed in regard to the performance of the conditions of residence during a period of six months, it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated."

They do not desire to be understood as laying it down that the Commissioner, in conducting such an inquiry, is bound by technical rules relating to the admission of evidence, or by any form of procedure, provided the inquiry is conducted according to the requirements of substantial justice.

These requirements are well known to our law, and have been enunciated in many case bearing some resemblance to, though not idential with, the present.

The Authority, in exercising its powers under s. 23 (3) should therefore give notice of its intention to revoke the licence and accord the licensee an opportunity of stating his case.

(To be concluded).

THEIR LORDSHIPS CONSIDER

By COLONUS.

Ejusdem generis.—This rule of construction was very simply illustrated, in an unusual way, by the case of *Thames and Mersey Marine Insurance Co., Ltd.* v. *Hamilton, Fraser, and Co.*, (1887) 12 App. Cas. 484. The steamer *Inchmaree* was at anchor, and the boilers were being filled by a donkey-engine, which worked a pump. By some misadventure, the valve leading into the boiler became blocked. The pumping apparatus developed too much pressure as a result of this, and the engine became damaged. The owners had insured the vessel, and sought to recover the cost of replacement, on the grounds that this loss came within the risks covered by the policy. The relevant clause in the policy reads like a summary of a W. H. G. Kingston or Captain Marryatt sea-adventure :

> And touching the adventures and perils which the capital stock and funds of the said company are made liable unto by this insurance, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters-of-marque and countermarque, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof.

Turning to the damage, in the light of this clause, Lord Halsbury, L.C., said, at pp. 489, 490 :

> If understood in their widest sense the words are wide enough to include it ; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them.
>
> There is perhaps a third consideration which cannot be overlooked, and that is where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense.

The real question was thus whether the accident came within the term " perils . . . of the seas". Lord Bramwell suggested, at p. 492, that this would not include the case of the captain, seized with giddiness, dropping the chronometer into the hold, and pointed out, at pp. 492, 493 :

> The damage to the donkey-engine was not through its being in a ship or at sea. The same thing would have happened had the boilers and engines been on land, if the same mismanagement had taken place.

Accordingly, their Lordships held that the loss was not recoverable under the policy.

Retail Shop.—Certain merchants sold seeds from their warehouse, not only to the trade, but also to other customers, all orders being handled at the one office. The retail sales were effected in various ways, but there was no " shop " in the usual sense physically. For rating purposes, the Crown claimed that the retail sales constituted the premises a retail shop. Their Lordships did not agree. The case was *Toogood and Sons, Ltd.* v. *Green*, [1932] A.C. 663, and *Lord Thankerton* said : " My Lords, a manufacturer must get rid of his production by sale, and the disposal of his goods involves normally a clerical staff to deal with the matter of disposal, which may conveniently be housed in the same hereditament ; that of itself is therefore a normal and integral adjunct of a manufacturing business. On the other hand, a person who stocks only goods manufactured by others, and sells them in premises adapted for the accommodation of any member of the public who chooses to resort there for the purchase of some of these goods for his own consumption, is clearly carrying on a retail business in a retail shop. As already explained, the present case may be taken as one in which the appellants sell only goods manufactured by themselves, and in which they have no accommodation adapted for the purpose of the physical resort of customers. The orders for goods are almost entirely obtained outside the hereditament, but they are dealt with on the hereditament " (*ibid.*, 671). After analysing the relevant cases, His Lordship concluded " that the true element is in the provision of accommodation in the premises for the public who may so resort, even if in fact the business is so unsuccessful that the public do not resort " (*ibid.*, 674). No such accommodation was provided in the present case, so the Crown's contention was not upheld.

Philosophy of Traffic.— *Lord Macnaghten*, in *Great Western Railway Company* v. *Bunch*, (1888) 13 App. Cas. 31, showed he was apparently an observant spectator when travelling by train. His remarks concerning railway traffic still apply : " I apprehend that if all travellers acted precisely alike, if everybody arrived at a station for a particular journey at precisely the same moment, though the time of arrival were the fittest that could be imagined, there would be no little confusion, and perhaps some consternation, among the railway officials. Whatever may be the result of your Lordships' judgment, there is no fear that it will have the effect of making everybody act alike. Some passengers will still give more trouble at the stations than others, but no one will give any more trouble for it. Things will go on just as usual. The fidgety and the nervous will still come too soon ; the unready and the unpunctual will still put off their chance of arrival till the last moment, and the prudent may have their calculations upset by the many accidents and hindrances that may be met with on the way to the station. And it is just because of the irregularity of individuals that the stream of traffic is regular and easily managed " (*ibid., 59,60*).

(Concluded on p. 128.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Aiding the Poles.—In a recent communication, Mr. Commissioner Latey, the well-known author, told Scriblex that he had made an order for the taxation of costs in the Divorce Court where, as the result of the beneficient operation of legal aid, two Polish exiles had litigated their matrimonial differences for twelve days at a total cost to the State of £3,000. To this sum the wife's contribution would amount to £64 and the husband's £93. What many of the profession in England fear about legal aid is that it may create a new class of professional paupers.

Musical Entertainment.—" I have never heard women gossip musically," observed Goddard, L.C.J., in *Barnes* v. *Jarvis*, a Divisional Court appeal, when counsel said that a musical-hall act included a characterization of the manner in which two women would gossip with each other. This was followed by a caricature of a wife nagging her husband to decorate the back bedroom and a sketch of a newly married couple in which the husband insists in going out every night to the local " pub." These were done to the musical accompaniment throughout of a piano played by an accomplished pianist. The question in issue was whether the act amounted to " musical entertainment " ; if not, an offence was committed under the Sunday Entertainment Act, 1932. " Could a trick cyclist's act be called musical entertainment because music was being played and he fell off to the accompaniment of a big bang from the bass ? " was a pertinent question put by the Court which considered that the object of the Act was to enable concerts to be given on Sunday and the patter of a music-hall artist, even with music, was not within it. One point that does not appear to have been canvassed during the hearing is whether, by any stretch of the imagination, a sketch of a nagging wife can be entertainment at all.

The Lucky Motorist.—No one could describe the motorist as a favoured unit of the community. He has to constitute himself a virtual insurer for the most wooden-headed of pedestrians, and his misdemeanours and errors of judgment, however slight, rarely evoke a tear of sympathy from the most tender-hearted of the public. Scriblex has a minor sense of satisfaction in recording the case of Robert Neil who pleaded guilty at Harlesden in November last to exceeding the speed limit, the Magistrate (on being told that he had been driving for twenty years) having fined him £1 and observed that in view of his good record this sum would be sufficient. His licence was ordered to be endorsed ; and, when this was handed in, it was found that the defendant had been convicted on ten previous occasions, nine for speeding and on the last one his fine had been £25. The Magistrate struck out the entry referring to the sentence and adjourned the hearing, the defendant receiving by post a refund of the fine he had paid with commendable promptness and being informed, in addition, that his attendance was desired at the adjourned hearing. On an application for an order prohibiting the Magistrate from dealing further with the case, the Divisional Court granted the order with reluctance, and with the observation that it was no part of their duty to say more. One can only conclude that they did not regard the motorist's luck in this instance as altogether pleasing.

Misuses of Advertisement.—The profession in England received something of a shock to read that the *Sunday Express* proposed to publish a series of four articles, under the headline *Man or Superman* upon Sir Hartley Shawcross, who, following his work as Attorney-General in the Labour Government, has returned to a very lucrative career at the Bar. It seems that, after the announcement, pressure was brought upon the *Sunday Express* by the present Attorney-General, Sir Lionel Heald, and Sir Hartley (who had not previously been advised of the publication) ; and, finally, as a result of the personal intervention of Sir Winston Churchill, K.G., the newspaper agreed to forgo its scoop. At a meeting of the Bar Council shortly afterwards, Sir Hartley addressed the gathering at some length upon the undesirability of personal publicity by barristers in private practice. Now, as if to emphasize the freedom of the Press, the *Sunday Pictorial*, again without reference to its " subject-matter " has commenced its own series ; and the Council has stated that it is quite powerless to take any step whatsoever to prevent publication. " It is simply a question of grinning and bearing it." This ordeal the victim is the better able to endure as the articles are lavishly illustrated, and extremely adulatory of his political and legal career. The *Sunday Pictorial* itself made a cynical reply to criticism : " We have heard of plenty of barristers who were delighted to get a case that would bring them into the limelight Sir Hartley now appears to shun. In any event, no legal luminary, however bright, has any right to dictate to the Press of this country."

Here and There.—That the primary function of the Judges is to maintain the rule of law and that they have succeeded in so doing in the great political, social, and economic changes of the past few years is the theme of this year's Haldane Memorial Lecture delivered by Lord Justice Denning. He gives first place to the Crown Proceedings Bill, 1947, which abolishes ancient immunities of Government departments before the law, and he points out the influence, over twenty-six years, of a series of enlightened Lord Chancellors in securing its passage despite great departmental opposition . . .

" Even the scanty sum which you will receive will, I think, substantially exceed the remuneration paid to certain of the learned counsel in this case—those who are appearing under the provisions of the Poor Persons Rule—If they are juniors, the maximum sum that they can receive is 10 guineas, and, if they are in silk, then the most they will get is an additional 5 guineas "—Glyn-Jones, J., in his address to the jury in the eighth week of a pottery conspiracy trial heard in the Central Criminal Court in London. . . .

At a farewell tea-party tended to Mr. Pritt, Q.C., by the 2,000 members of the Kenya African Union the acting-President of the Union (Mr. F. W. Odele) dressed him in a robe of black and white monkey skins, declaring him elevated to the status of tribal elder, the recipient of these high honours sitting on a native stool with a fly-whisk in his hand during the ceremony . . .

LEGAL LITERATURE.

Control of Delegated Legislation. Being a Study of the Doctrine of Ultra Vires in relation to the Legislative Powers of the Executive Government, with special reference to Great Britain, Australia, New Zealand, and Canada. By D. J. HEWITT, LL.M., A Barrister and Solicitor of the Supreme Court of New Zealand. Lecturer in Constitutional Law, Canterbury University College, Christchurch. With Foreword by SIR CECIL T. CARR, K.C.B., Q.C., LL.D., Counsel to the Speaker, House of Commons. Pp. xx + 195 (including Index). Wellington: Butterworth & Co. (Australia) Ltd. Price 43s., post free.

In New Zealand, as well as in England and other common-law countries, the great expansion in the activities of the modern State has resulted in an immense output of subordinate legislation by various administrative authorities.

While many writers have discussed at great length the political and administrative aspects of this process, very much less attention has been given to the systematic treatment of the detailed problems with which practising lawyers are primarily concerned, namely, those arising out of the control of delegated legislation by the Courts through the application of the doctrine of "ultra vires". The appearance of this book by Mr. D. J. Hewitt, of Christchurch, therefore fills an important gap in the literature of Administrative Law.

After dealing by way of introduction with the nature of delegated legislation and its historical development, the author then proceeds to discuss under various administrative headings the wealth of case law bearing on the subject of "ultra vires" which he has collected from English, New Zealand, Australian, and Canadian sources. The topics under which he has classified his wide range of material include real-estate, education, public health, transport and shipping, taxation and customs, contracts, the marketing of food in Australia, statutory returns, and the control of dairy produce in New Zealand, of industry by licence, and of natural products in Canada. A summary of the case law relating to each topic not only shows clearly the methods by which the Courts tend to deal with issues of "ultra vires" but also provides a convenient digest of the law for those in search of the relevant authorities on any specific point. The book concludes with a chapter in which various suggestions are made for the reform of this particular branch of the law.

In the foreword written by Sir Cecil Carr, the leading authority in England on Administrative Law, it is pointed out that Mr. Hewitt's work "is a book for lawyers, written by one whose approach to the law is both academic and practical," and that "his pages will be found valuable for study and for reference, both by those who teach and by those who practice the law"; but in addition it will also prove invaluable to students of public administration and to those many civil servants who in the course of their official duties are frequently confronted with legal problems arising in respect of the rules and regulations they are called upon to administer.

E. J. H.

Current Legal Problems, 1952. Vol. 5. Edited by George W. Leeton and Georg Schwarzenberger; (vi + 339 pp., incl. Table of Cases and Index to Vols. 1 to 5). Price £2 5s. net. London: Stevens and Sons, Ltd.

Under this rather forbidding title are collected fourteen of the weekly public lectures which were delivered in the Faculty of Laws at University College, London, during the Session 1951-52, and Lord Justice Denning's Presidential Address to the Bentham Club. One might be tempted to think (without making any further inquiry) that such a volume would suffer from what Dr. Johnson described as the worst literary vice—that of tediousness. But this is not so. These lectures have one quality in common: they are all eminently readable. That is to say, they have a sureness of touch, which succeeds in holding the attention of the reader by reason of their intrinsic interest and skill in presentation.

The first is "The Need for a New Equity," by Denning, L.J. It is followed by "The Director as Trustee," by Professor G. W. Keeton, one of the editors, a versatile and prolific writer who has the knack of being able to illuminate the dark corners of equity. It is a problem constantly met in practice; and the new English Companies Act of 1948 has not resolved it entirely. The remaining thirteen lectures cover a wide range of subjects from "The High Court Control of Inferior Tribunals" (by Mr. D. C. Holland) to "Officialdom and Infancy" by Mr. Richard O'Sullivan, Q.C.

Two particularly interesting contributions are Mr. D. G. Payne's on "The 'Direct' Consequences of a Negligent Act," and "The Protection of British Property Abroad," by the second editor, Dr. G. Schwarzenberger. This is the fifth volume of the series, and if (again citing Dr. Johnson) it would be wrong to call the Faculty of Laws of University College, London, a nest of singing birds, from reading this volume one can at least call the Faculty a collection of talented and expressive legal writers.

THEIR LORDSHIPS CONSIDER.

(*Concluded from p. 126.*)

Frustration.—"The essence of 'frustration' is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of *Lord Sumner* in *Bank Line, Ltd.* v. *Arthur Capel and Co.*, [1919] A.C. 435, 452. What he says is, 'One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated.'" *Lord Wright*, in *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] A.C. 524, 530.

Book Reviews.—"There is indeed one obvious difference between the copyright in books and that in dramatic performances. Books are published with an expectation, if not a desire that they will be criticized in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like—and if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, a 'fair use' only be made of the publication, no wrong is done and no action can be brought. It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others or to be used in such a way as a book may be used, but still the principle *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book." *Chatterton* v. *Cave*, (1878) 3 App. Cas. 483, per *Lord Hatherley*, at page 492.

Independent Advice.—"Independent advice to be of any value must be given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction. Advice given after the event when the supposed contracting party is already bound is given under entirely different circumstances, with a different position presented to the minds of both the adviser and his client." *Lord Atkin*, in *MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468, 474, 475.