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RECENT LEGISLATION OF INTEREST TO PRACTITIONERS.

ALTHOUGH the Legislature, in its last Session, passed 122 new statutes, the Acts which are of everyday interest to the profession in their daily work come within a fairly limited compass.

A number of the new statutes require special and detailed treatment, and they will receive attention in these pages in due course. An example is the Death Duties Amendment Act, 1953, which is the subject of an article in this issue by our learned contributor, Mr. E. C. Adams. Another is the Divorce and Matrimonial Causes Amendment Act, 1953.

Conveyancing.

In our next issue, Mr. Adams, who is the editor of *Real Property in New Zealand* (of which the fourth edition will shortly appear), will deal with new statutes of particular interest to conveyancers.

Courts-Martial Appeals.

The Courts-Martial Appeals Act, 1953, follows the general pattern of the corresponding statute of the United Kingdom, the Courts-Martial (Appeals) Act, 1951, which will be found fully annotated in *30 Halsbury's Statutes of England*, 2nd Ed., 462. It is sufficient to say that the statute sets up a new Court, the Courts-Martial Appeal Court, of which the Judges will be (*a*) the Judges of the Supreme Court ; and (*b*) such other persons, being barristers of the Supreme Court of not less than seven years' practice or former Judges of the Supreme Court, as the Governor-General in Council may appoint.

For the purpose of hearing and determining any appeal, or any matter preliminary or incidental thereto, the Court is to be summoned by the Chief Justice ; and he is to direct where the Court will sit, within or outside New Zealand.

Any decision of the Court will be final, subject to a further right of appeal to the Court of Appeal on a point of law of exceptional public importance when it is desirable in the public interest that a further appeal should be brought.

For any sitting, the Court is to consist of an uneven number of Judges (not less than three), at least one being a Judge of the Supreme Court and at least one being an appointed Judge, unless, in the case of a sitting outside New Zealand, the Chief Justice directs that the Court is to consist exclusively of appointed Judges. The Court may sit in two or more divisions and is to be a superior Court of record. Decisions are to be given by the majority of the Judges present.

The Court is empowered to assign a solicitor and counsel or counsel only to an appellant who has not sufficient means to enable him to obtain legal aid for himself. The Registrar is to report to the Court any case in which it appears that legal aid should be granted.

No costs are to be allowed on appeals under the statute, and the expenses of solicitors and counsel assigned to an appellant and the expenses of witnesses are to be fixed by regulations and are to be defrayed in the same manner as in ordinary criminal cases. Section 16 follows s. 13 of the Criminal Appeal Act, 1945 (as amended by s. 9 of the Statutes Amendment Act, 1948) instead of the United Kingdom statute, which enables the Court to award costs.

Destitute Persons.

An improvement is made in s. 2 of the Destitute Persons Amendment Act, 1953, by providing that, where a Magistrate makes a maintenance order or an order of guardianship in favour of the wife or husband, he may also make an order for the maintenance of any child of the marriage until it reaches the age of sixteen years, and, if the defendant is able to pay past maintenance, an order, up to the amount of £50, may be made for the past maintenance of the child.

Thus is cured an omission in the statute regarding the making of maintenance orders for children. Previously there was no power to order a husband or wife to pay for the maintenance of a child unless there has been a failure to maintain the child ; whereas a separation order, maintenance order, or order of guardianship (giving the custody of the children of the marriage) could be made in favour of a husband or wife on other grounds—namely, failure to maintain the applicant, cruelty, habitual drunkenness, or conviction of assault on the applicant or the children. Also, where a Magistrate makes a maintenance order or an order of guardianship, s. 7 of the Destitute Persons Amendment Act, 1951, will apply, so that an order under the new section (s. 18A) may later be extended by the Court where the child is still receiving education or training between the ages of sixteen and eighteen.

In *Sefton* v. *Sefton*, [1952] N.Z.L.R. 824, Mr. Justice Stanton held that, in view of the provisions of s. 21 of the Destitute Persons Act, 1910, a return to cohabitation did not discharge or nullify a separation order, as the cancellation had to be made by the Magistrates' Court, on application made in that behalf. Consequently, a spouse could not, while a separation order was undis-

charged, be guilty of a fresh desertion in the event of his or her resuming cohabitation and then deserting.

In the course of his judgment, at p. 825, the learned Judge said in relation to s. 21 :

> These provisions have apparently been copied from the Summary Jurisdiction (Married Women) Act, 1895 (Eng.), and the corresponding sections of the English Act were considered by a Divisional Court in England in *Jones* v. *Jones*, [1924] P. 203, where it was held that a separation order is not *ipso facto* discharged by a return to cohabitation, and, consequently, a spouse cannot, while a separation order is undischarged, be guilty of a fresh desertion in the event of his or her resuming cohabitation and then again deserting.
>
> It may be assumed that this result was not intended by the Legislature, because, in the following year, by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the English Parliament provided that, where a wife who has obtained a separation order resumes cohabitation with her husband, the order ceases to have effect on the resumption of such cohabitation : see *10 Halsbury's Laws of England*, 2nd Ed. 842.
>
> However, similar legislation has not been enacted in New Zealand, and I am therefore bound to follow the English decision and to hold that in New Zealand a return to cohabitation does not discharge or nullify a separation order ; cancellation must be by the Court.

By s. 4(1) of the Amendment Act, 1953, s. 21 has been repealed, and a new substituting section has been enacted on the lines of the English amending provision, to which His Honour referred.

The new s. 21(1) provides that a separation order will cease to be in force if the husband and wife resume cohabitation as man and wife ; and, without limiting the general effect of that provision, application may be made to a Magistrate for the formal discharge of the order on proof that cohabitation has been resumed. In other words, while under the repealed section a separation order remained in force until it was discharged by an order of a Magistrate, under the new section it will be discharged automatically by the resumption of cohabitation. Section 21(2) preserves the existing right of any party to apply to a Magistrate for the cancellation of an order made before January 1, 1954, in any case to which the new section does not apply.

Law Reform (Testamentary Promises).

A useful amendment of the Law Reform (Testamentary Promises) Act, 1949, is made by the addition of a proviso to s. 6 of that statute to bring the limitation provisions into line with those in s. 33 of the Family Protection Act, 1908. The former proviso to s. 6, which allowed any action to be brought within three months after the passing of the statute, October 20, 1949, is spent, and has been repealed.

Section 6, as amended by the addition of the new proviso, now reads as follows :

> 6. No action to enforce a claim under this Act shall be maintainable unless the action is commenced within twelve months after the personal representative of the deceased took out representation.
>
> Provided that the time for commencing an action may be extended for a further period by the Court or a Judge, after hearing such of the parties affected as the Court or Judge thinks necessary, and this power shall extend to cases where the time for commencing an action has already expired, including cases where it expired before the commencement of this proviso ; but in all such cases the application for extension shall be made before the final distribution of the estate of the deceased, and no distribution of any part of the estate made before the date of the application shall be disturbed by reason of the application or of an order made thereon.

Law Practitioners.

Several amendments to the Law Practitioners Act, 1931, are made by the Law Practitioners Amendment Act, 1953.

Admission Fees and Practising Fees.—Section 2, which is in substitution for ss. 44 and 45 of the principal Act, provides for the admission fees payable by barristers and solicitors, and the annual practising fees, to be fixed by regulations made by the Governor-General in Council on the recommendation of the Council of the New Zealand Law Society. It also provides for the apportionment of practising fees among the District Law Society, the New Zealand Law Society, and the New Zealand Council of Law Reporting to be prescribed by similar regulations. All these matters were prescribed by statute, which means that an amending Act was necessary whenever a change was desired in the amount of a fee or in its allocation. A Court fee may be prescribed to be paid to the Registrar for the issue of an annual practising certificate, in addition to the practising fee that is apportioned among the bodies mentioned above. The prescribed admission fee must be paid before the name of a barrister or solicitor is entered on the roll.

(This provision has been implemented in the Law Practitioners Fees Regulations, 1953 (Serial No. 1953/163), which increase admission fees, and annual practising fees, and impose a Court fee of 5s. for the issue of every annual certificate.)

Section 3 re-enacts the existing provisions enabling a District Law Society to refund or abate part of its share of an annual practising fee where the barrister or solicitor has practised for only part of a year.

Law Societies.—Section 4 re-enacts the provisions as to the President and two Vice-Presidents of the New Zealand Law Society so as to enable the Council of that Society, if it thinks fit, to elect from among the members of the Society a President who is not already a member of the Council. Every President so elected will automatically become a member of the Council. The existing power to elect one of the members of the Council to be President may still be exercised if preferred. (This is an amendment of s. 65 of the principal Act, as amended in 1952.)

Section 52 of the principal Act is amended so that the consent of the New Zealand Law Society has to be obtained before a new District Law Society is established, in addition to the consent now required of every District Law Society whose district will be affected.

Section 59(1) of the principal Act is amended, and new subsections are substituted. They re-enact the provisions as to the officers and Councils of District Law Societies so as to increase the maximum number of members of the Council (in addition to the President and Vice-President) from eleven to twelve, and to make it clear that officers other than the President and Vice-President may be chosen either from members of the Council or otherwise.

Disciplinary Committee.—There are some amendments to the Law Practitioners Act, 1935, to provide that, when making an order for the interim suspension of a barrister or solicitor from practice, pending the hearing of an application to strike his name off the roll, the Disciplinary Committee of the New Zealand Law Society may act with its ordinary quorum of three, instead of the special quorum of five required when striking a name off the roll or making a final order of suspension. The Disciplinary Committee may make an order for the interim suspension of a barrister or solicitor from practice (pending the hearing of an application to strike his name off the roll) without giving him an opportunity to be heard. The Disciplinary Committee is enabled to make an order for the payment of costs by a barrister

or solicitor whose conduct has been inquired into, without finding him guilty of professional misconduct. Orders of the Disciplinary Committee may be signed by some other member instead of the Chairman if the Chairman is not available. The section also makes it unnecessary to state the findings of the Committee in an order for the interim suspension of a barrister or solicitor pending the hearing of an application to strike his name off the roll. An order of the Disciplinary Committee may be proved by simply producing the order, without having to prove that it was duly made and signed.

Stamp Duties.

Some amendments of a practical nature are made by the Stamp Duties Amendment Act, 1953; and these affect the everyday work of the conveyancing side of the profession. They came into force on December 1, 1953.

Section 93 of the Stamp Duties Act, 1923, has been repealed, and a new s. 23 has been substituted. The former s. 93 authorized the Commissioner of Inland Revenue to make refunds of conveyance duty and mortgage duty paid on an agreement of sale which "was unenforceable by reason of fraud, misrepresentation, or defect of title and has been rescinded accordingly". The new section makes the following changes: (*a*) It applies to duty paid on conveyances as well as on agreements of sale: (*b*) It applies whenever the agreement or conveyance has been rescinded, whether or not there has been fraud or misrepresentation or a defect in title exists; (*c*) It applies only where the duty exceeds 10s., as in s. 53, relating to refunds on any inoperative instrument; (*d*) It enables refunds to be made by a District Commissioner of Stamp Duties as well as by the Commissioner of Inland Revenue.

Section 31 of the principal Act is repealed. The new s. 31 abolishes the penalty of one-quarter of the duty which was incurred if an instrument were presented for stamping more than one month after the date of its execution, but within three months. If an instrument is presented later than three months after the date of its execution, the existing penalty equal to the amount of the duty (with a minimum of £5) will be incurred. Subsection 2 is new. It provides that a penalty equal to the duty unpaid (with a minimum of £5) will be incurred if the duty assessed on an instrument is not paid in full within three months after the date of the giving by the Commissioner or a District Commissioner of a notice of assessment in writing.

Section 105 of the principal Act, which imposes conveyance duty on any "instrument of nomination" by which a person entitled to paid-up shares in a New Zealand company directs the company to allot the shares to another person, is extended so that it will apply to any instrument by which a person entitled to receive money from a company directs the company to apply the money towards the consideration for shares allotted to another person.

The stamp duty of 3s. on statutory declarations and affidavits is abolished. All statutory provisions referring to that duty are consequentially repealed.

The duty of 15s. for deeds not otherwise charged imposed by s. 168 of the principal Act is not to apply to (*a*) variations, discharges, and partial discharges of mortgages of property other than land; and(*b*) variations, discharges, and partial discharges of mortgages of policies or contracts of assurance. The mortgages concerned are themselves already exempt from duty. The duty on variations and discharges of mortgages which are subject to mortgage duty is 5s.

SUMMARY OF RECENT LAW.

ARBITRATION.

Claim within Time fixed by Agreement—Claim to be made Within Fourteen Days from Final Discharge of Goods—Breach by Beneficiary of Fundamental Term of Contract—Goods Delivered of Kind Specified in Contract, but Short in Measure and substantially Undergrade. By a clause in a contract dated May 22, 1951, for the sale of about thirty-five tons of round mahogany logs f.o.b. Lagos for shipment to Liverpool: "Should any dispute arise with respect to any matter connected with this contract, the buyers shall nevertheless accept the goods as shipped and make due payment . . . such payment, however, shall not affect their right, if any, to claim compensation for breach of this contract by the sellers. Such difference shall be referred to arbitration . . . Any claim must be made within fourteen days from the final discharge of the goods and before they are removed." Final discharge of the ship carrying the logs was completed on June 6, 1951, and on July 12 or 13, 1951, the buyers complained to the sellers' agents of the quality of the logs, there being a shortage in measure as well as a serious percentage undergrade, which complaint they confirmed by letter on July 16, 1951, when they also claimed to reject the consignment. *Held*, It was a principle of construction that exceptions in a contract were to be construed as not being applicable for the protection of those for whose benefit they were inserted if the beneficiary had committed a breach of a fundamental term of the contract, and a clause requiring a claim to be brought within a specified period was an exception for this purpose, but in the present case the goods delivered were round mahogany logs, and the fact that there was a shortage in measure as well as a substantial percentage undergrade did not render the performance totally different from what the contract contemplated and so was not sufficient to bring that principle into operation; and, therefore, the sellers were entitled to rely on the time clause. Per *Devlin*, J.: There is no reason why a clause should not be worded so as to provide that a limitation point should not deprive the arbitrator of jurisdiction, and that it should be for him and not for the Court to determine the point finally, so far as it is a question of fact. I think that the authorities accept a third category of this sort. At any rate, on the authorities, if the point is dealt with in the arbitration, whether as a limitation point or as one going to the jurisdiction of the arbitrator which the parties leave him to determine for himself, his finding—subject, of course, to a Case Stated—is conclusive. Furthermore, if I have to choose between construing a clause which provides that any claim must be made within fourteen days either as a clause that bars the claim altogether or as a clause that goes to the jurisdiction of the arbitrator, I should choose the former, for I can see no reason for holding that a clause which is, in form, a limitation clause, should be construed so as to affect the authority of an arbitrator or the validity of his appointment. *Smeaton Hanscomb and Co., Ltd.* v. *Sassoon I. Setty Son and Co.*, [1953] 2 All E.R. 1471 (Q.B.D.). As to Limitation Clauses in Arbitration Agreements, see *2 Halsbury's Laws of England*, 3rd Ed. p. 19, para. 47; and for Cases, see *2 E. & E. Digest*, p. 337, No. *165*.

CHARITY.

Benefit to Community—Public and Charitable Purpose—Appeal for Funds for Erection and Maintenance of Voluntary Hospital in Certain Area—Failure of Object of Appeal—General Charitable Intention—Trusts Affecting Funds. In 1938, a council known as the S. Bucks. and E. Berks. Voluntary Hospital Council was formed, its immediate purpose being to raise funds for (1) the extension of the accommodation of the existing King Edward VII hospital at Windsor and (2) the erection and maintenance of a new voluntary hospital at Slough. In the same year the Slough Hospital Committee was formed with the special object of furthering the purpose of erecting this new hospital, and under a trust deed dated October 28, 1938, three trustees known as the Slough hospital trustees were appointed to be trustees of the committee's property. In 1939 the council published an appeal

in the form of a brochure containing articles advocating the voluntary hospital movement, emphasizing the need for the extension of hospital services in the area, explaining the work of the council, and stressing the need for financial assistance. It further referred to the need for and intention to build a voluntary hospital at Slough and the way in which the council hoped to improve existing services at King Edward VII hospital. Prospective donors were told that they could give either to the extension fund of King Edward VII hospital or toward the erection of the Slough hospital, and that they could earmark their subscriptions for either purpose. A pocket to the brochure contained printed forms to be used by intending donors. The first (document 1) read as follows: " I have pleasure in enclosing remittance value (blank) in respect of contribution as below ". Then followed three columns, one marked " Capital donation ", the second marked " Maintenance donation ", and the third marked " Annual subscription ", each column setting out the same three alternatives, *viz.*, " Council's discretion; Windsor hospital; or Slough hospital ". The second form (document 2) read as follows: " South Bucks. and East Berks. Voluntary Hospitals Council Deed of Covenant. I (blank) of (blank) do hereby covenant to pay to the secretary for the time being of the . . . council . . . yearly during the period of seven years . . . [certain] sums . . . ." Then the following alternatives were set out, *viz.*, " (a) such hospital . . . in South Bucks. and/or East Berks. as the council may from time to time nominate on my . . . behalf. (b) King Edward VII hospital at Windsor. (c) The Slough hospital at Slough. (d) The (blank) hospital at (blank) ", and a note requested the intending covenantor to delete those alternatives which he did not desire to benefit. The appeal met with general support. Under document 2, £14,000 expressly allocated to the Slough hospital was received, and some £1,500 was received but not expressly allocated. £14,000 expressly allocated to the Slough hospital and £4,000 not expressly allocated was subscribed under document 1. Further funds were raised by means of whist drives, dances, collecting boxes and the like. The Court accepted that, as a result of the passing of the National Health Service Act, 1946, it had become impracticable to carry out the charitable purpose of building a voluntary hospital at Slough. On the question on what trusts the investments representing the subscriptions were held by the Slough hospital trustees, *Held*, (i) On the true construction of documents 1 and 2 read in the light of the appeal, of which the whole object was to raise funds for a voluntary hospital, it was the clear intention of the donors that their subscriptions should be applied toward the erection and maintenance of what was essentially a voluntary hospital and not a hospital to be maintained by the State, and, since that purpose had become impossible, the object for which the subscriptions had been raised had become wholly impracticable and had failed. (ii) Where a donor, in exercising the option given him by documents 1 and 2, had indicated a desire to benefit the Slough hospital, it was impossible to infer any general charitable intention, and, therefore, in respect of the sums subscribed specifically to the Slough hospital, there was a resulting trust to the donors. (*Re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 655, and *Re North Devon and West Somerset Relief Fund Trusts*, [1953] 2 All E.R. 1032, distinguished.) (iii) The failure of one among a number of charitable objects did not bring a charitable gift to an end, and, therefore, although the building of the Slough hospital could not be carried out, the gifts in respect of the application of which a discretion had been given by the donor to the council continued to be held on various charitable trusts and could be applied at the discretion of the council among the existing hospitals in the South Buckinghamshire and East Berkshire area. *Held*, further, that moneys collected by means of whist drives, dances, collecting boxes and the like could not have been intended by the donors to be returned when the immediate object of the collection had failed (*Re Welsh Hospital (Netley) Fund* ([1921] 1 Ch. 655), followed), but, *quaere*, whether the funds could be applied cy-pres on the footing that there was a general charitable intention, or whether they became *bona vacantia*. *Re Hillier, Hillier and Another* v. *Attorney-General and Another*, [1953] 2 All E.R. 1547 (Ch. D.).

CONFLICT OF LAWS.

Succession to Estate of Intestate—Foreign Domicil of Intestate—Personal Property in England—Claim by Foreign State as Sole and Universal Heir. On October 11, 1924, the deceased, a Spanish citizen domiciled in Spain, died there a widow and intestate, leaving movable property in England. On June 4, 1930, the State of Spain obtained in Spain a declaration of heirship on failure of heirs on intestacy, and now claimed a grant of letters of administration of the English property. On the evidence, the State of Spain was " a true heir just as any individual heir according to Spanish law ", but it was contended by the Crown that the maxim " *mobilia sequuntur personam* " stopped short of recognition of a State as successor. *Held*, Assuming that there was a valid distinction between the case where a foreign State claimed property in England of a person dying intestate and domiciled in the territory of the foreign State on the footing that it was ownerless and *bona vacantia* and the case where the foreign State claimed to be the successor by virtue of its own laws, in the latter case there was no rule of English law which confined such succession to individuals having a particular quality or characteristic or had the effect of excluding a State from entertaining the capacity of an heir, and, therefore, the State of Spain, as true heir was entitled to a grant. (Decision of *Barnard*, J., [1953] 2 All E.R. 300, affirmed.) *Re Maldonado (deceased). State of Spain* v. *Treasury Solicitor*, [1953] 2 All E.R. 1579 (C.A.). As to Intestate Succession to Movables, see *6 Halsbury's Laws of England*, 2nd Ed. p. 245, para. 299; and for Cases, see *11 E. & E. Digest*, pp. 397, 398, Nos. *525-550*.

CONTRACT.

Arbitrating on Frustrated Contracts, *97 Solicitors' Journal*, 789.

Nature of Repudiation, *97 Solicitors' Journal*, 753.

Pre-War Commercial Transactions with Germany and Japan, *27 Australian Law Journal*, 504.

Threatened Breach of Contract and its Results, *27 Australian Law Journal*, 511.

CONVEYANCING.

Conditions Precedent and Conditions Subsequent, *216 Law Times*, 551.

Equities on the Legal Title, *216 Law Times*, 577.

Length of Notice to Complete, *97 Solicitors' Journal*, 531.

On Proving a Squatter's Title (Theodore B. F. Ruoff), *103 Law Journal*, 743.

The Enforceability of Voluntary Covenants, *97 Solicitors' Journal*, 706.

CRIMINAL LAW.

Conspiracy to Effect a Public Mischief, *216 Law Times*, 552.

Evidence—Wife—Criminal Offence Committed during Marriage—Admissibility of Wife's Evidence after Decree of Nullity for Impotence. A husband was prosecuted for forging his wife's name to a number of cheques, thereby defrauding her bank. Before the prosecution took place, the wife had obtained a decree of nullity on the ground of the husband's impotence. She was called as a witness for the prosecution, and the husband was convicted of forgery. *Held*, A voidable marriage was regarded as valid and subsisting until it had been avoided at the suit of the aggrieved party; accordingly, a spouse who had been lawfully married, but who had subsequently obtained a decree of nullity on the ground of the other spouse's impotence, was not a competent witness against that other spouse on his or her trial for a criminal offence committed during the coverture; and, therefore, the wife's evidence was inadmissible, and the husband's conviction must be quashed. *R.* v. *Algar*, [1953] 2 All E.R. 1381 (C.C.A.).

Falsification of Accounts—Intent to Defraud—Accounts Falsified with Intent only to avoid Dismissal—Falsification of Accounts Act, 1875 (c. 24), *s. 1.* The appellant was convicted of larceny of wireless sets and falsifying accounts. He admitted making false entries with regard to the wireless sets in the accounts of the co-operative society for which he worked, but contended that he had done this, not to conceal the theft of the wireless sets as contended by the prosecution, but to make the gross profit of his department appear higher than it was so that he would not lose his employment. The recorder directed the jury that, whichever of these versions was true, it amounted to an intent to defraud. *Held*, Since the appellant intended by the falsification to induce his employers to keep him in their employment and to pay him wages, he was inducing a course of action by his deceit, and intending to defraud his employers, and, therefore, the recorder's direction to the jury was correct. (Dicta of *Buckley*, J., in *Re London and Globe Finance Corpn., Ltd.*, [1903] 1 Ch. 732, applied.) *R.* v. *Wines*, [1953] 2 All E.R. 1497 (C.C.A.).

DEATH DUTIES.

Incidence of Death Duties on Foreign Personal Estate, *97 Solicitors' Journal*, 703.

LEGAL ANNOUNCEMENTS.

Continued from cover i.

WANTED.

WANTED, YOUNG SOLICITOR for country practice in NORTH ISLAND where experience will be gained in all branches of law. Replies to "COUNTRY PRACTICE," c/o P.O. Box 472, WELLINGTON.

LEGAL NOTICE.

MESSRS. R. H. QUILLIAM, J. P. QUILLIAM and W. T. HUME, have admitted into partnership with them in their practice of Barristers and Solicitors as from January 1st, 1954, MR. I. J. MITCHELL, LL.B., who has been for some time a member of their staff. The practice will be carried on under the firm name of GOVETT, QUILLIAM & HUTCHEN at the present address KING'S BUILDING, DEVON STREET, NEW PLYMOUTH.

PARTNERSHIP NOTICE.

Mr. K. Gillanders Scott, LL.B., Barrister and Solicitor has pleasure in announcing that he has been joined in partnership as from 1st January, 1954, by Mr. Robert Alfred Wilson, LL.B., Barrister and Solicitor (formerly partner of Mr. W. C. Kohn of the legal firm of Messrs. Wauchop Kohn & Wilson, Gisborne). The partnership business will be carried on under the name of GILLANDERS SCOTT & WILSON, at 14 Lowe Street (near Read's Quay), GISBORNE. Tel. No. 2570.

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DIVORCE AND MATRIMONIAL CAUSES.

Separation as a Ground for Divorce—Separation Order—Order not cancelled in Magistrates' Court—Supreme Court's Power, in Divorce Suit, during Currency of Such Order, to hold Order to have ceased to be in Full Force—Petitioner's Temporary Resumption, during Three Years' Period, of Status of Husband—Decree Refused—Divorce and Matrimonial Causes Act, 1928, s. 10(j). The fact that a separation order has not been cancelled under s. 21 of the Destitute Persons Act, 1910, does not prevent the Supreme Court from holding in appropriate circumstances that the order has ceased to be in full force within the meaning of s. 10(*j*) of the Divorce and Matrimonial Causes Act, 1928. (*Millett* v. *Millett*, [1924] N.Z.L.R. 381; [1923] G.L.R. 632, referred to.) The petitioner sought the dissolution of his marriage on the ground that a separation order had been in force for three years. He admitted that in May, 1952, his wife went to Palmerston North to visit him at his flat in Main Street and they slept in the same bed on that night; that on June 13 and 14, 1952, they occupied the same bed; that some time in July, 1952, they spent almost a week together and occupied the same bed; and that on one week-end afterwards they spent two nights together, and then slept in the same room. He, however, denied that sexual intercourse took place on any of those occasions. *Held*, That, as on the occasions in question the petitioner was not a guest or a boarder, he must be regarded as having temporarily resumed the status of a husband; and the occupation of the same bed on so many occasions did constitute an interruption in the separation under the order; and, consequently, the separation order had not been in full force for three years immediately preceding the filing of the petition. (*Buhck* v. *Buhck*, [1947] N.Z.L.R. 709; [1947] G.L.R. 313, and *Paterson* v. *Paterson*, [1 928] N.Z.L.R. 401, applied.) (*Daniels* v. *Daniels*, [1949] N.Z.L.R. 70, referred to.) *Hope* v. *Hope* (S.C. Wellington. October 5, 1953. Cooke, J.).

EVIDENCE.

Admissibility of Document in Evidence—Copy—Need to show Undue Delay or Expense caused by Production of Original—Copy of Statement made to Police after Road Accident—Original Statement lost—"Person interested"—Author of Statement Party to Action for Negligence—Evidence Act, 1938 (c. 28), s. 1(2), (3). After an accident in which a car collided with a motor cycle and then struck and damaged the rear of a stationary motor lorry, the driver of the car made a statement to a Police inspector and signed it. The next day a copy of that statement was made by a Police sergeant, and subsequently the original was lost. The driver of the car began an action for damages for negligence against the personal representatives of the motor cyclist (who had been killed in the accident). Before trial of the action, the plaintiff died in circumstances unconnected with the accident. *Held*, (i) Under the Evidence Act, 1938, s. (12), a copy of an original document was admissible as evidence only if the Court was satisfied " that undue delay or expense would otherwise be caused "; that subsection was not a provision designed as a substitute for the common-law rule as to secondary evidence of lost documents, and it implicitly required that the original document should be in existence; the only question which arose was whether it would cause unnecessary delay or expense to have the original produced; and so, in the circumstances of the present case the copy of the driver's statement was not admissible (ii) The document was also inadmissible under s. 1(3) of the Act as being a statement made by a " person interested " when legal proceedings could be anticipated. *Bowskill* v. *Dawson and Another*, [1953] 2 All E.R. 1393 (Q.B.D.).

FAMILY PROTECTION.

Widow's Claim—Desertion by Widow Seven Years before Testator's Death—Magistrate refusing Her Separation and Maintenance Orders—Effect on Application for Provision out of Testator's Estate—Whether Magistrate's Decision operates as Estoppel in Family Protection Proceedings—Claim to Provision not necessarily forfeited—Widow awarded Capital Sum—Family Protection Act, 1908, s. 33(2). The testator, by his will, bequeathed all his personal effects to his only son and then gave the whole of his residuary estate valued at about £2,600 to his trustee upon trust for his son on his attainment of the age of thirty years. The widow of the deceased was aged 57 years when the testator died on April 4, 1951. She had been married to him over thirty-five years. She took no benefit under his will. By virtue of her status as the widow of the testator, she was entitled to an allowance of £200 9s. per annum from the Teachers' Superannuation Fund, to which the testator had subscribed. In 1945, the plaintiff had left the testator and her ten-year-old son, and did not return. Her application for maintenance and separation orders were dismissed. For the following seven years until the testator's death, she remained separate and apart. *Held*, 1. That the onus of proof of the plaintiff's alleged misconduct was on the defendant. (*Re Greene, Zukerman* v. *Public Trustee*, [1951] N.Z.L.R. 135; [1951] G.L.R. 50, followed.) 2. That, assuming that a decision of a Magistrate on an application under the Destitute Persons Act, 1910, may estop the plaintiff in proceedings under the Family Protection Act, 1908, from contesting against the defendant as a privy of her husband, the correctness of the Magistrate's decision, the matter would be dealt with in this case as though such an estoppel operated; and this involved the conclusion that the plaintiff had left her husband in the year 1944 in such circumstances as to disentitle her to provision from her husband in his lifetime by way of periodical maintenance. (*Lunn* v. *Lunn*, [1924] G.L.R. 157, followed.) 3. That, for the reasons given in the judgment, even in cases (such as the present) where it is proved that the wife has left the husband and had remained apart from him without just cause or excuse, and had, therefore, deserted him in law, she does not thereby necessarily forfeit all claim to provision under the Family Protection Act, 1908; and the circumstances must be examined in every case to see (*a*) whether they absolutely disentitled the plaintiff; and (*b*) if not, to what extent they would lessen the relief to be awarded. 4. That, although the plaintiff's conduct did not completely disentitle her to relief, it furnished good ground for diminishing the amount of any award. (*Re Paulin*, [1950] V.L.R. 462, referred to.) 5. That the plaintiff should receive £500 as a capital provision out of the liquid capital moneys actually available in the estate. *In re Jackson (Deceased), Jackson* v. *Public Trustee and Another*. (S.C. Wellington. November 10, 1953. Turner, J.)

HUSBAND AND WIFE.

Deserted Wife in Occupation of Husband's Dwelling-house—Mortgage of Matrimonial Home by Husband before Desertion—Claim for Possession by Mortgagees—Wife's Right to remain in Matrimonial Home. On October 22, 1945, the husband mortgaged the matrimonial home to the plaintiff bank by way of legal charge and thereby became a tenant at will to the bank of the property. In 1948 he executed a second legal charge in favour of the bank to secure a further advance. On or about October 13, 1952, he deserted his wife who obtained an order from *Barry*, J., that she be permitted to reside in the matrimonial home and that the husband should not create any right in any other person to evict her or interfere with her residence therein. On December 18, 1952, the husband was adjudicated bankrupt. On a summons for possession by the Bank, the wife claimed that she had a right to remain in the matrimonial home notwithstanding that as against her husband and his trustee in bankruptcy the bank had an undisputed claim. *Held*, A wife had no right in the nature of an irrevocable licence to remain in the matrimonial home which arose on entry; the earliest moment at which her right to continue to reside in the husband's house against his will arose when he deserted her; the desertion in the present case had taken place after the creation of the mortgages; and, therefore, the wife's right was subject to the rights of the mortgagees, who were entitled to possession. *Lloyds Bank, Ltd.* v. *Oliver's Trustee and Another*, [1953] 2 All E.R. 1443 (Ch. D.).

Vicarious Liability and the Doctrine of Marital Unity—A Study in Public Policy, *27 Australian Law Journal*, 498.

INFANTS AND CHILDREN.

Adoption and Rights of Succession to Property, *97 Solicitors' Journal*, 744.

Negligence—Allurement—Children—Slow-moving Trucks—Child Riding on Buffers—Licensee—Child—Trap—Tramway Track used by Public and Children — Slow-moving Trucks — Child Riding on Buffers. The defendants used a tramway track which they owned to haul trucks up a slope at about six miles an hour. The track was unfenced and without warning signs except one at the foot of the slope, and no one accompanied the trucks and no one was on duty on the track during the upward or downward journey. The track ran near to houses and the public crossed it *inter alia* to go to allotments and to swimming baths, and children played on the land and the track, to the knowledge of, and without objection by, the defendants. With the knowledge of the defendants but without their permission, children made a practice of riding on the buffers of the trucks. The plaintiff, a boy of six and a half years, who had been forbidden by his father to ride on the trucks, but who, though warned by his father of it, was found to have been not of sufficient age to have appreciated the danger, slipped while jumping off a truck on which he was riding and was injured. *Held*, (i) The plaintiff was a licensee on the land under a general licence not limited to crossing the line for specific purposes and he did not become a trespasser by riding on the truck. (*Lynch*

v. *Nurdin*, (1841) 1 Q.B. 29, and dictum of *du Parcq*, L.J., in *Holdman* v. *Hamlyn*, [1943] 2 All E.R. 141, applied.) (*Addie (R.) and Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358, and *Hardy* v. *Central London Ry. Co.*, [1920] 3 K.B. 459, distinguished.) (ii) The slow-moving trucks were to the knowledge of the defendants an allurement to children and they were a trap for the plaintiff, notwithstanding that he had been warned of the danger and forbidden to ride on the trucks, since he did not appreciate the real danger involved; and riding on the trucks was something children might have been expected to do. (iii) The defendants were, therefore, under a duty to take reasonable care to prevent injury to the children and, having failed in that duty, were liable to the plaintiff for negligence. *Gough* v. *National Coal Board*, [1953] 2 All E.R. 1283 (C.A.).

JUDICIARY.

Lord Normand has resigned from the Office of Lord of Appeal in Ordinary and Lord Keith has been appointed to fill the vacancy.

LAW PRACTITIONERS.

Solicitor—Negligence—Solicitor consulted by Injured Workman in Respect of Accident—Advice as to Workmen's Compensation—Failure to advise in Respect of Common-law Rights—Workman not informed of Common-law Remedy—Right to recover damages at Common Law. On February 3, 1947, a workman, in the course of his employment, suffered injuries to his foot and leg caused by the breaking of the wire rope of a lift. Thereafter, his employers made him weekly payments of compensation under the Workmen's Compensation Acts, 1925 to 1943. In or about March or April, 1947, the workman consulted a solicitor professionally to advise him in respect of the accident. The solicitor took the view that he was being asked only to advise as to the amount of the compensation under the Workmen's Compensation Acts, 1925 to 1943, and he subsequently claimed compensation on the basis of the partial incapacity of the workman and entered into negotiations for a lump sum payment in settlement. The workman was dissatisfied with the result of the negotiations, and consulted other solicitors. The workman now claimed that the solicitor was negligent in not advising him as to his rights at common law. *Held* (*Denning*, L.J., *dissentiente*), It could not be said that the solicitor, being asked to advise specifically on compensation under the statutes, was negligent in not advising as to common-law rights. Per *Denning*, L.J.: a claim to compensation under the Workmen's Compensation Acts, 1925 to 1943, made by a solicitor on behalf of a workman constitutes an election by the workman under s. 29(1) of the Act of 1925 so as to preclude a claim at common law, even though the solicitor has not informed the workman of his possible alternative remedy at common law. (*Medcalf* v. *Samuel Jones and Co., Ltd.*, [1951] 1 T.L.R. 832, approved.) *Griffiths* v. *Evans*, [1953] 2 All E.R. 1364 (C.A.). As to Liability of Solicitors for Negligence, see *31 Halsbury's Laws of England*, 2nd Ed. pp. 131-139, paras. 178-183; and for Cases, see *42 E. and E. Digest*, pp. 107, 178, Nos. *1013-1028*.

VALUATION OF LAND.

Capital Value—Valuation for District Valuation Roll—Estimating Various Interests in Land—Mortgages or Charges disregarded—Apportionment of Value between Owners of Different Interests where Owner of Fee Simple divested of Lesser Interests—No Deduction from Capital Value for Charge not Constituting Interest in Land or for Interest of no Value or Impossible to Value—Valuation of Land Act, 1951, ss. 2, 8, 9, 11, 13, 15, 45. The owner of any estate or interest in land is entitled to have that estate or interest valued under the Valuation of Land Act, 1951, and entered upon the District Valuation Roll. In valuing that estate or interest, any mortgage or other charge thereon is to be disregarded. Where, in respect of any land, there are more interests and more owners than one, the united capital values of the interests of all the owners must not be less than the capital value of the land if held in fee simple by a single owner free from encumbrances. Consequently, no deduction may be made from the capital value of land by reason of a charge thereon which does not constitute an estate or interest in land, or which, though it may constitute an interest in land, has no value or cannot be valued. (*Valuer-General* v. *Public Trustee*, [1942] N.Z.L.R. 6; [1941] G.L.R. 625, applied.) An objection by the owner of a property, which is apparently held in fee simple, and which has been valued as such upon the revision of a District Valuation Roll, can succeed only if the objector can show that he has divested himself of an interest in the land, the value of which can be separately assessed. The appellant, who was the owner of a house property divided into two flats, appealed against a decision of the Auckland No. 2 Land Valuation Committee which confirmed, subject to minor adjustments, the Valuer-General's valuation of the property upon a revision of the District Valuation Roll. The appellant conceded that the tenancies on which she based her objection were not interests in land, and made no attempt to show that they had an assessable value. She contended, however, that the capital value of the property should be limited to market value as if sold as a tenanted property. *Held*, 1. That, as this was not a case in which there were more interests in the land and more owners than one, s. 45 of the Valuation of Land Act, 1951, did not apply. 2. That, in terms of s. 8, the estate or interest of the owner in the land had to be valued as if unencumbered by any mortgage or other charge thereon. 3. That, as the appellant had not shown she had divested herself of a leasehold or other interest which was capable of separate valuation, she was properly assessed with the full value of the unencumbered fee simple of her property. *Semble*. That if the appellant's tenancies were upon a monthly or weekly basis the tenants might be possessed of interests in land, though it was difficult to give such limited interests a monetary value; but if the tenancies (so-called) were no more than "statutory tenancies" under the Tenancy Act, 1948, the tenants had no estate or interest in land, and no more than a statutory right to remain in possession. (*Cameron* v. *The King*, [1948] N.Z.L.R. 813; [1948] G.L.R. 332, followed.) *Findlay* v. *Valuer-General*. (L.V. Ct. Auckland. November 3, 1953. Archer, J.)

WILL.

Construction—Devises and Bequests—Devise to Son subject to Life Interest, with Devise to Other Children in the Event of Son "dying without leaving any children"—Son surviving Life-tenant but dying subsequently without Issue—Literal Construction—Death of Son "at any time"—Devised Property taken, at Son's Death, by Testator's Other Children. Words introducing a gift over in case of the death unmarried or without children of a previous taker indicate according to their natural and proper meaning death unmarried or without children occurring at any time, and this ordinary and literal meaning is not to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper or unless there are circumstances and directions in the will which are inconsistent with the supposition that the period referred to is the death of the first taker. (*O'Mahoney* v. *Burdett*, (1874) L.R. 7 H.L. 388, followed.) The testator, by his will, dated April 22, 1910, after appointing executors, devised his property in Wanganui to his wife for her life. Subject to her life interest, one portion was then devised to testator's son John for life and after his death to his daughter Nola and his son James or the survivor of them in equal shares absolutely. He then devised another portion of that land to his son Michael subject to the wife's life estate therein, "and in the event of my said son Michael Farrell dying without leaving any children I devise my said freehold land to such of my other children as shall be living at the date of the said Michael Farrell's death in equal shares absolutely." The residue of testator's real property was (subject to the wife's life interest) devised to the trustees upon trust to sell and divide the net proceeds in six equal parts and to pay such parts to certain named persons. The testator's wife died on May 8, 1919, and the testator himself died on July 13, 1920. His son Michael died on October 15, 1951, leaving a will under which the defendant was executrix and sole beneficiary. He had been married, his wife predeceased him, and he died without leaving any children. The plaintiffs, the surviving children of the testator, sought a determination as to whether they were entitled to the realty the subject of the devise to the testator's son Michael. *Held*, 1. That, since there was no context to limit the natural meaning of the phrase "dying without leaving any children" in the testator's will, it must be construed as meaning dying at any time and not merely dying within the life of the widow or at any time less than the whole life of the devisee. (*O'Mahoney* v. *Burdett*, (1874) L.R. 7 H.L. 388; *Re Schnadhorst*, [1902] 2 Ch. 234, 241, followed.) (*Re Williams' Will Trusts, Rees* v. *Williams*, [1949] 2 All E.R. 11, applied.) (*Lewin* v. *Killey*, (1888) 13 App. Cas. 783; *McCormick* v. *Simpson*, [1907] A.C. 494; *In re Brailsford*, [1916] 2 Ch. 536; and *Isbister* v. *Isbister*, (1914) 33 N.Z.L.R. 1057, 1061; 16 G.L.R. 708, referred to.) 2. That, consequently, by virtue of the death of the son Michael without leaving any children, the property which was the subject of the devise to him was taken by such of the other children of thel testator as were living at the date of Michael's death in equal shares absolutely. *In re Farrell (Dec.), Clapham and Others* v. *Hugh*. (S.C. Wellington. 1953. October 14. Gresson, J.)

JUDICIAL CONTROL OF TRADE UNION DISCIPLINE.

By J. F. Northey, B.A., LL.M. (N.Z.), Dr. Jur. (Toronto), and B. Coote, LL.B.

The question of the extent to which the Courts have jurisdiction over disciplinary committees of trade unions has been the subject of recent decisions. *White* v. *Kuzych* [1951] A.C. 585; [1951] 2 All E.R. 435; *Abbott* v. *Sullivan* [1952] 1 K.B. 189; [1952] 1 All E.R. 226 and *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 All E.R. 1175. These have been discussed in a number of articles and notes in overseas periodicals; Lloyd, *The Disciplinary Powers of Professional Bodies*, (1950) 13 M.L.R. 281, and *Judicial Review of Expulsion by a Domestic Tribunal*, (1952) 15 M.L.R. 413, a note on *Lee's* case in (1952) 68 L.Q.R. 438; E. F. Whitmore, *Judicial Control of Union Discipline*, (1952) 30 C.B.R. 1, 525, and 617; and J. McL. Hendry, *Wrongful Expulsion from Membership of Trade Unions*, (1952) 30 C.B.R. 844.

It is necessary first to distinguish domestic tribunals of the type considered in these cases from those domestic tribunals which owe their existence to statute. Domestic tribunals fall into two main categories—those that are created by statute, *e.g.*, the disciplinary committees of the legal and medical professions which are created by the Law Practitioners Act, 1931, and its amendments and the Medical Practitioners Act, 1950, and those of "voluntary associations" which derive from agreement of the members. Into this second group fall committees controlling clubs and friendly societies and committees created by the members of trade unions. A recent case illustrating the importance of the distinction between statutory bodies and tribunals of voluntary associations is *R.* v. *Disputes Committee of the National Joint Council for the Craft of Dental Technicians*, [1953] 1 All E.R. 327. *Lord Goddard* stated at p. 327:

> Unless this were a body set up by statute and having duties conferred on it by statute, so that parties are bound to resort to it, it would be a very novel proceeding if we were to issue these prerogative writs [certiorari and prohibition] addressed to it.

As will be shown later, authorities dealing with the powers of the Courts in relation to statutory bodies, *e.g.*, *Barnard* v. *National Dock Labour Board*, [1952] 2 All E.R. 424, and even perhaps in relation to committees of clubs, are of little direct assistance in determining the jurisdiction of the Courts to review decisions of committees of trade unions. It is highly desirable to regard committees of trade unions as constituting a special category of their own. Failure to appreciate the importance of the distinctions already made has, we believe, already led to judicial confusion.

It is proposed to deal with the powers of the Courts in relation to the decisions of disciplinary committees of trade unions under four heads:

(1) the basis of the jurisdiction of the Courts;
(2) the standards of conduct which such committees must observe;
(3) the extent to which the parties can contract out of the protection ordinarily available from the Courts; and
(4) the remedies available to a trade union member in respect of whom disciplinary action has been taken in circumstances warranting intervention by the Courts.

I. The Basis of the Jurisdiction of the Courts.

Three theories are advanced as the basis for the jurisdiction of the Courts. The first theory, which has, we believe, now been at least partially abandoned although it continues to influence the attitude of the Courts towards the standard of conduct expected of disciplinary committees, based the jurisdiction of the Court on the *property rights* enjoyed by members. *Robson on Justice and Administrative Law*, 3rd Ed., 324 states:

> The first thing to be noted is that the courts of law decline to interfere in any way with the authority of a domestic tribunal unless some kind of property right is involved. The foundation of the overriding jurisdiction of the courts in regard to voluntary associations is the right of property vested in the members, of which they may be deprived by unlawful or unjust expulsion.

Robson cites in support of this statement the judgment of *Jessel*, M.R., in *Rigby* v. *Connol*, (1880) 14 Ch.D. 482, 487. The "property rights" doctrine was further elaborated on in *Russell* v. *Russell*, (1880) 14 Ch.D. 471, 478 where the key-phrase used was "matters involving civil consequences to individuals", *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, 562 and *Cookson* v. *Harewood*, [1932] 2 K.B. 478, 481. In that case *Scrutton*, L.J., spoke of the jurisdiction of the Court proceeding "generally" on the right of property; this suggested that property rights are not the only basis for the Court's jurisdiction.

The recent opinion of the Judicial Committee in *White* v. *Kuzych*, [1951] A.C. 585; [1951] 2 All E.R. 435 and the judgments of the Court of Appeal in *Abbott* v. *Sullivan*, [1952] 1 K.B. 189; [1952] 1 All E.R. 226 and *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 must be read as the abandonment of "property rights" as the sole basis for intervention in favour of the "contractual" basis at least in the case of trade unions. The Courts in these cases have regarded the powers of the committees as contractual in origin and the Courts as guardians of that contract. Although there is no express acceptance of the "contractual" basis for jurisdiction in the *Kuzych's* case, it is implied in the decision. The Judicial Committee were of the opinion that the respondent was bound to exhaust his remedies under the rules of the union, *i.e.*, appeal to the Executive of the Shipyard General Workers' Federation, before he could claim a declaration from the Courts as to his rights. The decision fits neatly into the contractual theory and there is this significant passage from the judgment at p. 601 [442]:

> "At any rate, this is the appeal which the respondent was bound *by his contract* [italics inserted] to pursue before he could issue his writ."

There is a definite acceptance of the contractual theory by *Evershed*, M.R., and *Denning*, L.J., in *Abbott* v. *Sullivan*. *Evershed*, M.R., stated at p. 194 [229]:

> In the circumstances it is, in my judgment, plain that its [the committee of the union] jurisdiction must be founded on a contract express or implied mutually entered into and binding on all those who enjoy the privileges of being accepted into the ranks of the corn porters.

Denning, L.J., stated at p. 201 [232]:

> In the case of domestic tribunals which depend for their jurisdiction on a contract, express or implied, it is an actionable breach of contract for them to usurp more than the contract gives them.

Morris, L.J., at pp. 216-7 [238-9] said that it was not necessary for him to consider the basis for intervention by the Courts. The learned Lord Justice referred to *Rigby* v. *Connol*, (1880) 14 Ch.D. 482 and *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, and to the article by Dennis Lloyd in (1950) 13 M.L.R. 281. He concluded with these words :

> No need arises to explore whether the jurisdiction of the Court could alternatively be founded upon some contractual basis.

In *Lee* v. *Showmen's Guild of Great Britain (supra)*, *Denning*, L.J., stated at p. 1180 :

> It was once said by Sir G. Jessel, M.R., that the courts only intervened in these cases to protect rights of property : see *Rigby* v. *Connol* ((1880) 14 Ch. 487) ; and other judges have often said the same thing : see, for instance, *Cookson* v. *Harewood* ([1932] 2 K.B. 481 and 488). But Fletcher Moulton, L.J., denied that there was any such limitation on the power of the courts : see *Osborne* v. *Amalgamated Society of Railway Servants* ([1911] 1 Ch. 562) ; and it has now become quite clear that he was right : see *Abbott* v. *Sullivan* ([1952] 1 All E.R. 226). *Abbott's* case shows that the power of this court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is ultra vires. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his, or to protect him in his right to earn his livelihood : see *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* ([1922] A.C. 440), but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced : see *Baird* v. *Wells* ((1890) 44 Ch.D. 675, 676). That is, I think, the only relevance of rights of property in this connection. It goes to the form of remedy, not to the right.

Romer, L.J., at p. 1184 stated :

> In the case of trade unions such as the defendant guild the rules constitute a contract which are binding on the members and are enforceable against them.

A third theory which has not so far received judicial recognition, except obliquely, suggests that, although the basis for intervention is the protection of contractual rights, some of the obligations of members are determined by the law independently of the wishes of the parties. See *Gould* v. *Wellington Watersiders*, [1924] N.Z.L.R. 1025, 1042, per *Hosking*, J. In short, it is a matter of *status* rather than *contract*. It is conceded that the relationship of master and servant and husband and wife are not contractual in origin but are determined by the law independently of the wishes of the parties. It is submitted that the relationship between members of a trade union is not markedly different from these relationships. In New Zealand, the existence of the Trade-unions Act, 1908, the Industrial Conciliation and Arbitration Act, 1925, and similar legislation dealing with trade union affairs, the settlement of industrial disputes and other questions, places trade unions in a special category. *Denning*, L.J., in the *Lee* case had no difficulty in combining an assertion that the basis for intervention by the Courts was the protection of contract rights with the opinion that there were limits to the parties' freedom of contract. In effect, he stated that there are some terms which the law imports into the contract which cannot be excluded by the parties themselves.

Many Judges have recognized the unique position of a trade union and have emphasized the difference between membership of a social club and a trade union. *Denning*, L.J., in the *Lee* case stated at p. 1181 :

> The question in the present case is : To what extent will the courts examine the decisions of domestic tribunals on points of law ? This is a new question which is not to be solved by turning to the club cases. In the case of social clubs the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club, and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules, but will not otherwise interfere : see *Labouchere* v. *Earl of Wharncliffe*, (1879) 13 Ch.D. 346, *Dawkins* v. *Antrobus*, (1881) 17 Ch.D. 615. It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great, if not greater, than any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club ? I say : " No." A man's right to work is just as important, if not more important, to him than his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work. (*ibid.*, 1181).

Statements to similar effect will be found in *Russell* v. *Duke of Norfolk*, [1949] 1 All E.R. 109, 119 per *Denning*, L.J., *Abbott* v. *Sullivan*, [1952] 1 K.B. 189 ; [1952] 1 All E.R. 226 at pp. 204-5 [234] per *Denning*, L.J., and at p. 219 [240] per *Morris*, L.J., and *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 at p. 1180 per *Somervell*, L.J., and at p. 1184 per *Romer*, L.J.

The fact that individual members of trade unions have little effective control over the union rules does not, of itself, convert what is essentially a contractual relationship into one of status. In *Alexander* v. *Tredegar Iron and Coal Co., Ltd.*, [1944] 1 All E.R. 451 (C.A.) ; [1945] 2 All E.R. 275 (H.L.) the appellant argued that the effect of the Essential Work Order under which labour was directed during the war was to end freedom of control between master and servant and therefore that the doctrine of common employment had no application. The Court rejected this argument and held that the doctrine applied even where labour was directed to employment. It would seem, therefore, that any argument that the relationship between members of a union has some of the characteristics of status gains no support from the fact that a person joining a union does not enjoy complete freedom of contract.

However, learned writers have suggested that membership of a trade union gives rise to rights and liabilities which are not contractual. Professor Whitmore, in (1952), 30 C.B.R. 1, 24 states :

> The constitution [of the union] is important, and frequently decisive, not because it is a contract in the true sense, but because it represents the expressed desires of the membership. The constitution, representing the expressed intention of the members, determines many incidents of the relation, but not all of them. Some of the incidents arise from the nature of the relationship and from its function—from the fact that the members have, by mutual assent, formed themselves into an association or organization of employees for the purpose of regulating the relations between employees and employers or of advancing the interests of employees in respect of the terms and conditions of their employment. Rough analogies may be found in the relationships of master and servant, principal and agent and husband and wife, each of which gives rise to rights and liabilities which are not contractual.

Professor Hendry, in the same *Review* at p. 849 states:

Professor Chafee has advanced a possible theory for the recovery of damages from a voluntary association. He says that "the member's relation to the association is the true subject matter of protection in most cases where relief is given against wrongful expulsions." Although such relations usually grow out of contract, they are not entirely governed by the contract with or the by-laws of the association. There are other incidents than those contained in the contract, such as the judicial requirements for a legal expulsion, the purposes of the club, the benefits the member is to receive, and so on. By this theory, the wrong is the destruction of the member's relation to the association and judicial interference will take into consideration the worth of the membership to the member, the seriousness of the injury, and public policy on the rights and duties of the association. Professor Chafee is thus advancing a new basis of action for interference with a relationship or status that, it is submitted, has particular appeal in its application to trade unions. This is amply illustrated in a passage from a judgment of Mr. Justice O'Halloran:

> '. . . expulsion from a powerful trade union cannot be compared with expulsion from a club, social, fraternal or other organization. This expulsion denied the respondent the right to obtain work from any employer who has a closed-shop agreement. It made it difficult for him to obtain work from any employer having relations with organized labour. An employer does not lightly engage a workman who has drawn upon himself the active and publicly announced dislike of a large and powerful union. Moreover, it denied him the right to describe himself as a union man, a privilege which his convictions led him to prize highly.'

However, if we ignore the implications of this third theory, we may conclude that in the case of trade unions intervention by the Courts is based on the jurisdiction of the Courts to protect rights of contract. If the action of the committee is a breach of contract the member will get a declaration that its action is *ultra vires*. If property rights are also involved the plaintiff will be entitled to an injunction in addition to a declaration. An injunction can be secured only if there is "a legal right asserted or a legal liability to be enforced": *Ecroyd* v. *Manukau County*, [1953] N.Z.L.R. 288, 291 per *Stanton*, J.

II. The Standard of Conduct which Must be Observed by Disciplinary Committees.

It is at this point that we encounter difficulties. If the true basis for intervention is the protection of contractual rights, the principles of natural justice would have no application except to the extent that they were expressly or impliedly incorporated in the contract between the members. If, however, the basis for intervention is the protection of property rights, the Courts are free to treat the authorities dealing with statutory bodies as relevant, though not decisive especially on the question of remedies, and it becomes relatively easy to assert that the principles of natural justice are as applicable to a disciplinary committee of a trade union as they are to a statutory tribunal exercising judicial or quasi-judicial powers. As the cases which follow demonstrate, there is a difference of judicial opinion as to the application of the principles of natural justice to committees of trade unions. This may be caused by the controversy between "property rights" and "contract" as the basis for judicial intervention.

Maugham, J., in *Maclean* v. *Workers' Union*, [1929] 1 Ch. 602, was asked to consider whether the principles of natural justice were binding on the committee of the union. The learned Judge was satisfied that the committee is "bound to act strictly according to its rule and is under an obligation to act honestly and in good faith" (*ibid.* 623). This standard of conduct is consistent with the contract theory. He continued:

> In such a case as the present, where the tribunal is the result of rules adopted by persons who have formed the association known as a trade union, it seems to me reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract, and that the material terms of the contract must be found in the rules.

At p. 625 the learned Judge stated:

> . . . I think it is prudent to remember that these more or less artificial principles [of natural justice] have no application except so far as they can be derived from a fair construction of the rules, and that the implication can only be made if it is clear that the parties, who are laymen and not lawyers, must have intended it.

Maugham, J., considered that the Courts could review the decision of a committee if it had been reached otherwise than honestly and in good faith, but not on the ground that the decision was contrary to natural justice unless those principles had been incorporated in the rules.

In *Russell* v. *Duke of Norfolk*, [1949] 1 All E.R. 109, the Jockey Club had withdrawn the plaintiff's trainer's licence. The plaintiff contended that the decision of the stewards was void because it was contray to natural justice. *Lord Goddard*, stated at p. 491:

> I can find no contract here under which the stewards were under any duty to the plaintiff to hold an inquiry. It is said that they did hold an inquiry, and, therefore, that they must hold it honestly, fairly, and in accordance with natural justice. That seems to me to be a fallacy. If there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence, however the inquiry was conducted? It is admitted that the licence might have been withdrawn without any inquiry. I can see no ground for implying any condition, nor any evidence of a breach of contract. Consequently, there was no case to go to the jury on the cause of action so far as it is laid in contract. I may say that I have had an opportunity of considering all the cases referred to by counsel, and I can find nothing in them which leads to another conclusion. If it is part of a contract that expulsion from a society or the withdrawal of a licence can only follow on an inquiry, or if a statute obliges a professional or other domestic tribunal to make due inquiry, as in the case of the General Medical Council, different considerations at once arise, but I desire to express my respectful agreement with what Maugham, J., said in *McLean* v. *Workers' Union* ([1929] 1 Ch. 623):
>
> > If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the courts would interfere with such a rule on the ground of public policy.

This case can, we believe, be regarded as a relevant authority because the consequences of the withdrawal of the plaintiff's licence were as serious as expulsion from a trade union. The plaintiff's livelihood was endangered by the stewards' action. In the view of the Court, one of the principles of natural justice—the need for a hearing—need not be observed by a domestic tribunal. On appeal the Court of Appeal (*Denning*, L.J., dissenting) held that as the stewards had an unfettered discretion to withdraw the appellant's licence without holding an inquiry, it was impossible to imply a term that they must conduct their inquiry in accordance with the principles of natural justice. *Denning*, L.J., considered that as withdrawal of a trainer's licence disqualified him and deprived him of his livelihood the appellant should be given an opportunity of being heard (p. 119).

In *White* v. *Kuzych* [1951] A.C. 585; [1951] 2 All E.R. 435, the Judicial Committee claimed the right to control the contractual relations of the parties. It decided that "conclusion" of a general meeting of the union was a "decision" within the meaning of the rules and that even if that conclusion was arrived at

in a way which amounted to a denial of natural justice (because of bias and intimidation), the appellant was contractually bound to exhaust his remedies under the rules before he could seek the intervention of the Courts.

In *Abbott* v. *Sullivan*, [1952] 1 K.B. 189; [1952] 1 All E.R. 226 *Croom-Johnston*, J., was of the opinion that the Committee

> while purporting to exercise a judicial or quasi-judicial function, had disregarded one of the so-called principles of natural justice in that they failed to give to the plaintiff any proper notice of the case which he was being called on to meet. (p. 229)

On appeal, the majority, relying principally on authorities dealing with statutory tribunals or clubs, not only failed to recognize an *ultra vires* act as a breach of contract but refused to imply a term that the tribunal would not act *ultra vires*. Although *Morris*, L.J., insisted that, in the absence of malice, *ultra vires* acts are not actionable; he asserted, however, that the Courts will enforce the principles of natural justice not because they are implied in the contract but because the Courts will protect property rights. It is submitted with respect that *Morris*, L.J., has confused the contract theory and the property rights theory and in the result has not done justice to either theory. *Denning*, L.J., admittedly without considerable authority to support him, was prepared to imply a term that the committee should not act without jurisdiction. He stated at p. 203 [233]:

> There is no reason why the same principle [applicable to proprietary clubs] should not apply to voluntary associations. If the committee of a voluntary association only gain jurisdiction by reason of a contract, express or implied, to give it to them, there surely must be implied a contract that they shall not take away a member's property or deprive him of his livelihood when they know, or have the means of knowing, that they have no jurisdiction in that behalf. (*ibid.*, 233).

It is in *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 that we find the most interesting contributions to the controversy. *Sommervell*, L.J., who cited authorities dealing with clubs, statutory tribunals and trade unions and apparently regarded them as entitled to equal weight, said that no question of the breach of the principles of natural justice, still less of malice or bad faith, arose (p. 1180). Both he and *Romer*, L.J., concluded that the Courts could intervene to give a correct legal construction of the rules and further that where the committee had misconstrued the rules and had in consequence acted *ultra vires*, its determination was void. Where there is no evidence to support the decision the committee will have acted *ultra vires*.

Denning, L.J., was of opinion that although the jurisdiction of the tribunal was based on contract the tribunal must observe the principles of natural justice. Any stipulation that these principles need not be observed is invalid as contrary to public policy (pp. 1180-1). In this case as no facts had been adduced before the committee which were reasonably capable of supporting the finding, the determination of the committee was invalid.

(To be concluded.)

THE QUEEN'S VISIT.

The Auckland Profession's Special Acclaim.

It was a happy thought of the President and Members of the Council of the Auckland District Law Society, with the permission of Her Majesty's Judges, to invite the members of the profession and their wives and families to the Supreme Court precincts on December 24. On that afternoon, Her Majesty and His Royal Highness the Duke of Edinburgh were to visit the Naval Dockyard at Devonport. Their route took them past the Anzac Avenue side of the Supreme Court building, both going and on their return.

It was a very warm and sunny afternoon. The grassed slopes of the Court grounds facing Anzac Avenue were crowded with members of the profession and their families. Every local practitioner must have been there. It was a very happy gathering, and the summer frocking of the ladies and the multicoloured raiment of the children, who were of all ages, made it a colourful one.

When Her Majesty drove past, the profession showed that their eloquence is not confined to the Courts, and everyone let himself or herself go in unbounded and enthusiastic loyalty.

Her Majesty and the Duke very graciously acknowledged the profession's wonderful welcome.

In the interval pending Her Majesty's return by the same route, the assembled practitioners were invited to take their families through the Court buildings and the Library, of which the Auckland members of the profession are justly proud. Many, of course, had heard much of the old and dignified Court buildings; and soon groups were being shown all the points of interest there and in the Library.

Soft drinks and ice-creams were available. And so the time passed very pleasantly until Her Majesty, on her return, was again given most enthusiastic acclaim.

The profession in Auckland is to be congratulated on this most happy interlude in the Royal visit to Auckland. It will be a treasured memory for all of us who were privileged to take part in it. And the President and members of the Council were deservedly congratulated on the success which was the fruition of their thoughtfulness.

THE EDITOR.

LEGAL ANNOUNCEMENTS.

continued from page iv.

ANNOUNCEMENT.

NOTICE IS HEREBY GIVEN that the firm of BUDDLE & OTLEY, Barristers and Solicitors at Whakatane has been dissolved as at the 31st December, 1953. Mr. GEORGE OTLEY has retired from the practice which, as from the 1st January, 1954, will be carried on at the same premises, No. 77 The Strand, Whakatane, by MESSRS. LEONARD BUDDLE, JOSEPH DIXON BUDDLE and ROGER CAMPBELL STEELE (until recently in practice at Reefton) under the firm name "BUDDLE, OTLEY & STEELE".

LEGAL NOTICE.

The legal practice formerly conducted at Oxford Street, Levin, by MR. NOEL McNAIR THOMSON, deceased, under the name of HARPER, ATMORE & THOMSON has been taken over as from the 23rd day of November, 1953, by MR. FRANCIS HAMILTON JONES, and the practice will be continued under the name of HARPER, THOMSON & HAMILTON JONES at the same offices in Oxford Street, LEVIN.

Dated this 23rd day of November, 1953.

SIGNED for and on behalf of the estate of Noel McNair Thomson, Deceased, by his Executors, The New Zealand Insurance Company Limited. } by V. E. FROST District Trust Manager, Palmerston North.

SIGNED: F. Hamilton Jones.

THE DEATH DUTIES AMENDMENT ACT, 1953.

By E. C. Adams, LL.M.

Practitioners will find much interesting material in the recently enacted Death Duties Amendment Act, 1953, which came into force on the first day of January, 1954, *i.e.*, it will apply to the estates of persons who die or who have died on or after that date, and to *inter vivos* gifts made on or after that date. A few gaps in the revenue net have been closed up, but, on the other hand, there are several examples of alleviation of apparently rather harsh taxation, which all will welcome.

Amendments to Para. (*g*) of s. 5(1) of the Death Duties Act, 1921.

Readers of this Journal will recollect that last year the House of Lords gave a most important and authoritative ruling (overruling the English Court of Appeal) on the provision in the United Kingdom Act corresponding to para. (*g*) of s. 5(1) of our Death Duties Act, 1921. This ruling was explained at length by the learned Editor of this Journal in (1953) 29 New Zealand Law Journal pp. 113-116. That case, *D' Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, [1953] 1 All E.R. 403, disposed once and for all of the Crown's contentions that life insurance policies by their very nature were interests which accrue or arise by survivorship on the death of the deceased assured. Paragraph (*g*) reads as follows :

> In computing for the purposes of this Act, the final balance of the estate of a deceased person his estate shall be deemed to include :
>
> (*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.

That provision had previously come up for review by the New Zealand Court of Appeal in two now rather well-known cases :

(*a*) *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520 ; [1948] G.L.R. 127.

(*b*) *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550 ; [1948] G.L.R. 357.

In both these cases, there was one necessary element present before liability under para. (*g*) can be incurred : that is to say, until the deceased died, the interests of the beneficiaries were not indefeasibly vested : death of the life assured had the effect of making their interests absolutely indefeasible. That is the main lesson to be learnt from *D' Avigdor's* case (*supra.*). As Kennedy, J., neatly put it in *Russell's* case, [1948] N.Z.L.R. 520; [1948] G.L.R. 127 : " The interest of any beneficiary in the policy moneys was until the death of the deceased, always expectant and defeasible, and, by an appointment which might have been made at any time before the death of the deceased, any child might have been excluded. The interest of each child became absolute and indefeasible *on the death of the deceased*, and its interest did accordingly accrue or arise by survivorship or otherwise on the death of the deceased " (*ibid.*, 545 ; 137).

The relevant facts in *Russell's* case, [1948] N.Z.L.R. 520 ; [1948] G.L.R. 127, were that deceased brought in, as part of the property of her marirage settlement, a policy of insurance on her life, which had been taken out by her father, who had paid the premiums up to that time, and who also continued to do so in accordance with a covenent made by him in the marriage settlement up to the time of his death when the administrator of his estate paid a lump sum in lieu of all future premiums. The policy moneys amounting to £3,749 9s. 10d., were, on the death of the deceased in 1943, paid to the trustees in trust for the children pursuant to the terms of the marriage settlement. As Cornish, J., pointed out in the Supreme Court, there was no doubt that the deceased " provided " the policy. Though her father had taken it out and paid all premiums on it, it was her property at the time of the settlement, and, at that time, she was free to do what she liked with it. She chose to assign it to the trustees of her marriage settlement on terms that the beneficial interest in the terms of it should pass to her children after her death. Accordingly it was held in the Supreme Court that the only " interest " " provided " by deceased for the marriage settlement pursuant to s. 5(1)(*g*) of the Death Duties Act, 1921, was the policy assigned with premiums paid up to 11/23rds of the total premiums finally paid, that the deceased did *not* provide the means of keeping the policy on foot as the father had covenented so to do and, consequently, that 11/23rds only of the total moneys under the policy—namely, £1,793, could be treated as part of the deceased's dutiable estate. In other words, Cornish, J., applied the principle of apportionment, which, in the circumstances, seemed eminently fair both to the taxpayer and the Crown. But this principle of apportionment was rejected by the Court of Appeal in *Russell's* case (*supra*). The Court of Appeal unanimously held that para. (*g*) did not apply unless the deceased had provided the *whole* of the interest. As deceased in *Russell's* case had only partially provided the interest which had accrued on deceased's death, the proceeds of the policy were not, even to the limited extent held by Cornish, J., liable under para. (*g*).

Now s. 2 of the Death Duties Amendment Act, 1953, reads as follows :

> 2. (1) For the purposes of paragraph (*g*) of subsection one of section five of the principal Act the following provisions of this section shall apply.
>
> (2) Where an annuity or other interest was purchased or provided partly by the deceased and partly by any other person, so much of that annuity or other interest as was purchased or provided by the deceased shall be deemed to be an annuity or other interest to which paragraph (*g*) applies.
>
> (3) The deceased shall be deemed to have purchased or provided the proportion of any annuity or other interest that is equivalent to the proportion contributed by the deceased of the total amount in money or money's worth contributed towards purchasing or providing the annuity or other interest.

It appears, therefore, that such a case as *Russell's* would now be decided as Cornish, J., decided it in the Supreme Court. That is to say, para. (*g*) now applies proportionately where the annuity or other interest is provided by the deceased and partly by another person.

There is usually cited in conjunction with *Russell's* case *Craven's* case (*supra*). But from *Craven's* case there emerges a further principle that para. (*g*) does not apply, if during his lifetime the deceased has assigned

his interest for full adequate consideration. On that ground, as well as the one relied on by the Court of Appeal in *Russell's* case, as explained above, it was held that a certain insurance policy on deceased's life was not caught by para. (*g*). Therefore, it would appear that s. 2 of the Death Duties Amendment Act, 1953, would still not catch such a case as *Craven's*. To such a case the principle of the leading case *Lethbridge* v. *Attorney-General*, [1907] A.C. 19, applies: see particularly the judgment of Blair, J., in *Craven's* case.

There is still another amendment to para. (*g*) of s. 5(1) designed to close up another gap in the collection of the revenue. This amendment is to meet the rule laid down in England in *In re Miller's Agreement*, [1947] 2 All E.R. 78, to the effect that the paragraph does not catch any benefit, which the beneficiary himself could not legally enforce, although it may be enforceable by the legal personal representatives of the deceased. Section 3 of the Death Duties Amendment Act, 1953, reads as follows:

> 3. (1) Where the deceased has entered into a contract for a benefit to a person who is not a party to the contract, and the contract is enforceable by the administrator of the estate of the deceased, then, notwithstanding that the contract is not enforceable by the person for whose benefit the contract was made—
>
> (*a*) The benefit shall be deemed to be a beneficial interest for the purposes of paragraph (*g*) of subsection one of section five of the principal Act:
>
> (*b*) The person for whose benefit the contract was made shall, for the purposes of paragraph (*f*) of subsection one of section sixteen of the principal Act be deemed to become beneficially entitled to the benefit.
>
> (2) This section shall apply to the estates of all persons dying after the commencement of this Act.

The relevant facts in *In re Miller's Agreement (supra)*, were that, on the sale of his interest in a partnership, the deceased had contracted with the purchasers that on his death they would pay certain annuities to his three daughters *as from the date of his death*. It was held that these annuities were not liable to death duty in his estate, because under English law the daughters had no rights under the contract either at common law or in equity, except the right to retain any sums paid to them. An examination of this case will show one, I think, that s. 3 of the Death Duties Amendment Act, 1953, has been well drawn. In view of s. 7 of the Property Law Act, 1952 (formerly s. 44 of the Property Law Act, 1908), which enacts that any person may take an immediate benefit under a deed, although not named as a party thereto, and of the Supreme Court decisions, *Re Bastings, Lowry* v. *Bastings*, (1909) 29 N.Z.L.R. 409, and *Armstrong* v. *Public Trustee*, [1953] N.Z.L.R. 1042, it is quite probable that *In re Miller's Agreement*, if heard in New Zealand, would have been decided in favour of the revenue. Nevertheless, s. 3 puts the matter now beyond all doubt and in any case applies to contracts whether couched in the form of deeds or not.

Relief from Successive Death Duties in Quick Successions.

The learned Editor of this Journal has already drawn attention to this hardship in our death duty law under the heading, "Deaths in the Same Calamity." Reference may usefully be made to (1941) 17 New Zealand Law Journal pp. 121 and 133. At p. 133, one will find the following passages:

> "As the death duty rates in New Zealand have been substantially increased twice since 1939, the difficulties of the situation have been accentuated, and the possibility of property of *commorientes* passing more than once by a quick succession of deaths, should be seriously considered by every person of any degree of wealth and by his legal advisers . . ."
>
> "So far as can be ascertained, there has as yet been little effort made in drafting New Zealand wills to meet the contingency of *commorientes*. In one or two instances, however, there has been a testamentary gift *conditional* on the beneficiary surviving the testator by one month. This will have the desired effect except in such cases where the younger ones linger for a month or so and then die. Provision should be made for a gift over, in the event of the condition not being satisfied; for, if there is no gift over, the only result would be an intestacy with all the unfortunate results above stated."
>
> "It would seem a fair amendment of the present law that payment of death duty should be postponed in respect of the second and subsequent deaths, to the respective periods of the normal expectation of life of persons of equal age living at the death of first deceased's death; and that, meantime, it should bear no interest."

After that article was written in the New Zealand Law Journal, s. 19 of the Finance Act, 1944 (No. 3), gave a little relief from successive death duties but it applied only to the estates of deceased *servicemen*: now that we are no longer at war the practical benefit of this section must be just about spent.

The hardship in the law until it was somewhat alleviated by s. 4 of the Death Duties Amendment Act, 1953, was in most vigorous language recently pointed out by a columnist in the *Auckland Weekly News*:

> A responsible delegate, in fact, told a story of taxation. Incredible though it appeared, I have no doubt at all that he was certain of his facts. A family, said the speaker, was farming a property in his neighbourhood some years ago when tragedy befell it. A man ran amok and the farmer, his wife and son died of wounds within a few hours of each other. The dying woman appears to have inherited her husband's property, and to have owned it for a few hours. She was therefore liable for death duties. The dying son inherited his dead mother's property, for battling with his wounds he survived her. Death duties were extorted on his inheritance, for he had possessed his parents' property for a few brief hours. He died and, of course, death duties were again demanded. It appears to have been of small concern to the predatory department concerned that the estate could not meet three simultaneous demands. According to the teller of this shocking story, the land grows fern and a farm is lost.

Although readers of this Journal, being engaged in the administration or practice of the law, will at once realize that it is unfair to put the blame on the Department, which is bound to administer the statute as it stands, the above passage is interesting as showing how this difficult problem appears to the layman and the man in the street. Section 4 of the Death Duties Amendment Act, 1953, which obviously has been carefully thought out and carefully drafted gives a substantial amount of relief from *successive* death duties. This section reads as follows:

> 4. (1) For the purposes of this section—
>
> "Deceased successor" means a person dying after the commencement of this Act who has become entitled to any property as a successor to a predecessor:
>
> "Predecessor", in relation to a deceased successor, means a person who has died (whether before or after the commencement of this Act) within five years before the death of the deceased successor:
>
> "Successor" means a successor within the meaning of the principal Act.
>
> (2) Where the Commissioner is satisfied that the dutiable estate of a deceased successor includes any property identified as being or representing property to which the deceased successor has become entitled as a successor to a predecessor, the Commissioner shall reduce the net amount of the death duties payable in the estate of the deceased successor in respect of that property as follows:
>
> (*a*) If the deceased successor has died within one year after the death of the predecessor, by fifty per cent.:
>
> (*b*) If the deceased successor has died within two years after the death of the predecessor, by forty per cent.:

(*c*) If the deceased successor has died with three years after the death of the predecessor, by thirty per cent. :

(*d*) If the deceased successor has died within four years after the death of the predecessor, by twenty per cent. :

(*e*) If the deceased successor has died within five years after the death of the predecessor, by ten per cent. :

Provided that where the net amount of the death duties payable in the estate of the deceased successor in respect of that property (before making any reduction under this section) exceeds the net amount of the death duties payable in the estate of the predecessor in respect of that property or the property that it represents (after making any reduction under this section if applicable), the reduction to be made under this section shall be the appropriate percentage of the last mentioned amount.

It will be at once observed that the measure of relief is in accordance with the interval between the dates of the first death and the second death—the shorter the interval, the greater the reduction in the amount of the death duties payable in respect of the second estate. If the interval between the two deaths is more than five years, no reduction is made.

Note particularly the words of subs. 2 : " Where the Commissioner is satisfied " etc. These words fall to be interpreted in accordance with the principles recently laid down in *Commissioner of Stamp Duties* v. *International Packers*, [1954] N.Z.L.R. 25, but it is not to be feared that any difficulty in practice will arise of satisfying the Commissioner when the facts fit the section, and there is not likely to be any dispute as to the facts.

Reduction of Period Before Death for Which a Reservation must be Surrendered Before Death Duty on a Settlement may be Escaped.

A perusal of such cases as *Riddiford* v. *Commissioner of Stamp Duties*, (1913) 32 N.Z.L.R. 929, *Commissioner of Stamp Duties* v. *Russell* [1948] N.Z.L.R. 520 ; [1948] G.L.R. 127, and *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550 ; [1948] G.L.R. 357, shows how wide is the net cast by s. 5(1)(*j*) of the Death Duties Act, 1921 : this is the provision which catches *inter vivos* settlements, trusts or other dispositions, in which there are reserved to the settlor life interests or quasi-life interests. If these life interests were surrendered or released *inter vivos*, the settlement trust or other disposition was still caught for death duty, unless deceased lived for more than *ten* years after the date of the surrender or the release. Ten years was, indeed, a long period and the reduction of this period to three years by s. 5 of the Death Duties Amendment Act, 1953, is a substantial concession to the taxpayer : this makes the period the same as that mentioned in s. 5(1)(*b*), under which straight-out gifts, *i.e.*, those gifts which are not caught by s. 5(1)(*c*)) form part of the dutiable estate, only if they are made within three years before the date of death.

Indirect Gifts made by Resolution Passed by a Company.

Every solicitor will be greatly interested in s. 10 of the Death Duties Amendment Act, 1953, which reads as follows :

10. (1) Without restricting the generality of paragraph (*f*) of section thirty-nine of the principal Act, it is hereby declared that for the purposes of that paragraph the passing by a company of a resolution which, by the extinguishment or alteration of the rights attaching to any shares or debentures of the company, results directly or indirectly in the estate of any shareholder or debenture holder of the company being increased in value at the expense of the estate of any other shareholder or debenture holder shall be deemed to be a transaction entered into by that other shareholder or debenture holder if he could have prevented the passing of the resolution by voting against it or otherwise.

(2) This section shall apply to all gifts made after the commencement of this Act.

Obviously this is intended to close up a gap. From a revenue point of view, para. (*f*) of s. 39 of the Death Duties Act, 1921, is not always satisfactory. It defines as a disposition of property for the purposes of gift duty " Any transaction entered into by any person *with intent thereby* to diminish, directly or indirectly, the value of his own estate and to increase the value of the estate of any other person ". To get a transaction under this para., the Revenue must prove *intent* on the part of the taxpayer. The leading case is *Finch* v. *Commissioner of Stamp Duties*, N.Z.P.C.C. 600, 602, where Lord Hailsham, L.C., in delivering the judgment of the Privy Council said :

In their Lordships' view when the statute brings in as a gift a transaction entered into with intent to diminish the value of one estate and to increase the value of another, what is hit at by the statute is a transaction which the person entering into it *intends* to have the effect stated in the subsection.

However, the new s. 10 does not do away with the necessity to prove intent, but it probably is designed to get over the difficulty that a gift by a company is not a gift by a shareholder of that company, and, of course, a company on its dissolution (if it happens to become dissolved) is not liable to death duty. Section 5(1)(*b*) of the Death Duties Act, 1921, making gifts made within three years of death liable to death duty is linked up with s. 39 of the principal Act.

Extension of Exemption of Small Gifts.

Section 44 of the principal Act is brought up to date, having regard to the inflation of money since the Death Duties Act, 1909, came into operation. Until it was amended by s. 11 of the Death Duties Amendment Act, 1953, para. (*a*) of s. 44 of the principal Act provided that a gift should not be taken into account as such, either for the purposes of gift duty or for the purposes of death duty, if the Commissioner was satisfied that the gift together with all other gifts made by the same donor to the same beneficiary in the same calendar year did not exceed in the aggregate *twenty* pounds in value and was made in good faith as part of the normal expenditure of the donor. The amount of twenty pounds has now been increased to *fifty* pounds—a concession long overdue.

Penalty for Late Payment of Gift Duty.

From the revenue point of view, the penalty provisions with regard to the non-payment of gift duty have hitherto been most unsatisfactory : there has been no inducement for prompt payment of gift duty. The Commissioner could not impose any penalty for non-payment of gift duty, unless he could prove that the non-payment was *with intent* to evade or delay the payment of gift duty. The taxpayer had to have a guilty mind : s. 58 of the principal Act, and see *Commissioner of Stamp Duties* v. *Wallace*, [1942] N.Z.L.R. 241. Now by s. 12 of the Death Duties Amendment Act, 1953, a penalty of ten per cent. of the amount of gift duty remaining unpaid automatically accrues if the full amount of gift duty is not paid within one year after the making of the gift or within one year after the first day of January, 1954, whichever period is the later to expire. It should be particularly noted that a penalty so incurred is not deductible for the purpose of death duty, if the subject matter of the gift should subsequently become liable to death duty.

EXTENSION OF TIME FOR CLAIMING REFUNDS OF DUTY PAID IN EXCESS OR PAID IN OTHER COUNTRIES.

Section 15 of the Death Duties Amendment Act, 1953, extends from three years to six years the period within which the Commissioner may make refunds of death or gift duty paid in excess and the period within which actions for refunds can be commenced against the Commissioner. It also enables the Commissioner to make refunds under s. 75 of the principal Act without any application in writing. The reforms effected by this section are steps in the right direction: so far as claims by the Crown for non-payment of duty, they are never barred by lapse of time, the appropriate maxim being *Nullum tempus occuritt regi*. Subsection (2) of the section also extends from three years to six years the period within which the Commissioner may make refunds on account of duty paid in other countries.

CONCLUSION.

In addition, the Death Duties Amendment Act, 1953, contains certain minor administrative changes (all to the good) none of which, however, will concern very much those outside the Department.

The conclusion which one gathers after a careful reading of the amending statute is that the Legislature has striven to secure a state of greater fairness as between the Crown on the one hand and the taxpayer on the other. No reasonably minded taxpayer will resent the removal of anomalies which have allowed a few to escape paying their fair share of death or gift duty, and all the concessions which have been granted to the taxpayer will have the effect of removing seeming injustices, which at times have caused the taxpayer to smart under a sense of hardship suffered.

THEIR LORDSHIPS CONSIDER.

BY COLONUS.

Quasi Contract.—" I do not think that the analogy between an actual contract and a quasi contract is complete; but I think it is so thus far, that neither side can by its laches or misconduct take away from the other its right to enforce the performance of the contract or quasi contract, or claim compensation for its non-fulfilment; but either side may by its laches or misconduct deprive itself of all right to enforce the contract or quasi contract against the other. And I do not see anything unjust or contrary to principle in holding that if a company delays completing a compulsory quasi contract for purchase, till it can no longer exercise the powers for the sake of which it was entrusted with the power of compulsory purchase, that quasi contract, should at least at the option of the landowner be at an end." *Lord Blackburn* in *Tiverton and North Devon Railway Co.* v. *Loosemore*, (1884) 9 App. Cas. 480, 496.

" *Freedom of the City* ": Some years ago the B.B.C. Brains Trust was at a loss to inform its listeners what is meant by this phrase. We have some help from a leading case in the law of trusts, *Henry Goodman and John Blake the Younger* v. *The Mayor and Free Burgesses of the Borough of Saltash in the County of Cornwall*, (1882) 7 App. Cas. 633. A prescriptive right to a certain oyster-bed was vested in the Corporation of the Borough. Unfortunately for the oysters, the " free inhabitants " of the Borough had the right to an unlimited catch of the oysters from February 2 to Easter Eve in each year, from time immemorial, and there was a danger that the beds would be exhausted. Their Lordships held, dismissing an attempt by the Borough to prove that the right of the freemen was not lawful, that, by presumption, the original grant in favour of the Corporation was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the Borough in accordance with the usage. *Lord Fitzgerald*, on p. 668, made some remarks from which we may gather some idea of the meaning of receiving the " freedom of a place:

" One of the objects of creating such a corporation was to confer privileges on the members of the corporate body under one general description, and remove the necessity of a grant to each individual member, and hence it may not be unreasonable to infer that the original grant, whatever it may be, to the corporation of Essa," the original name of saltash, " was on condition that some privileges should be allowed to those who, as a class, were either members of the corporate body, or lived within the territorial ambit of the Borough, and, as such, subject to the corporate authority, and liable to perform corporate duties. Whatever the terms of the original gift may have been, or whatever the character of the privilege bestowed on the free inhabitants of ancient tenements in the borough, the fact seems necessarily to imply that the parties so described were then in some way or other capable of taking and enjoying the privilege.

" The special case affords no interpretation of free inhabitants, and I understand from Mr. Mackenzie that he did not contend that it meant " freemen "; but I presume that he intended " freemen " in the modern and perverted application of the term. Probably " free " was used to distinguish the individual from one who was not free and was classed as a villein, and to whom no privileges were usually conceded. Free inhabitant householders constituted a class well recognized in the early period, when the incorporation of towns first commenced, and they usually constituted the burgesses, or the body from whom the burgesses came. They usually contributed to the public charges, whatever they were, and took their part in bearing the public duties. They participated usually in the benefits conferred on the town and became subject to its duties. The free inhabitants of ancient tenements were probably either originally members of the corporation itself, or a recognized class within the borough, on whom privileges were conferred in respect of their having erected houses within its limits, and being inhabitants or residents therein ".

" *Reasonable Time* ": " There is of course no such thing as a reasonable time in the abstract." *Lord Herschell* (L.C.) in *Hick* v. *Raymond and Reid*, [1893] A.C. 22, 29.

Golden Rule? — " No complaint is made of the conduct of the tribunal, who seem to have impartially fined witnesses on either side whom they considered to have given false evidence ": Lord Atkin, delivering the judgment of their Lordships in *Abakah Nthah* v. *Anguah Bennieh*, [1931] A.C. 72, 74.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Sweets Macabre.—It is seldom that the first Sessions of a puisne Judge are embellished by an anecdote worthy of being placed in legal archives to be used as "shop" by future generations. On his initial visit to the West Coast, Mr. Justice McGregor had a charge of murder on the calendar of cases to be tried. The Greymouth jury returned at about 5 p.m. with a verdict of guilty; the Judge donned the black cap; and the prisoner was duly sentenced to death by hanging. When the Judge sat down at his hotel for dinner that night, he found that the list of sweets on the menu included "Steamed Black Cap Pudding"—a distinct shock to one who had almost forgotten the dourer habits of the mainlanders. His associate sent a message to the kitchen to inquire why so timely but inappropriate a title had been selected, and was assured that this particular pudding quite often reared its ugly head on local menus. The message, however, caused more consternation in the office than in the kitchen of the hotel, a ready assurance being forthcoming that the menu had been typed before the verdict was delivered. No one has, as yet, used the incident as ground for a new trial.

A Queen's Legacies.—The Royal Visit may recall to students of Victorian history that a century ago the Royal family had occasion to think kindly of the barrister's profession. In 1852, there lived in Chelsea a barrister named John Camden Neild. He was no great credit to his Inn or to Cambridge University. He slept on the floor, declined to brush his clothes in case the clothes-brush damaged the nap of the material, and claimed that he was unable to afford an overcoat, using instead as a protection against all weathers a large green umbrella. His principal diet consisted of eggs purchased at cut-rates from his tenants. He owned, however, considerable property in Kent and Buckinghamshire; and, on his death, it was found that he had left no less than half a million pounds. By his will, he bequeathed the whole of this vast fortune to the Queen, "begging Her Majesty's most gracious acceptance of it for her sole use and benefit". With a great deal of hesitation, the Queen decided to accept it, after substantial legacies were given to those who had looked after the testator and to his executors. She also caused to be put up to his memory a reredos and stained glass window in the Buckinghamshire church where he lies buried. Unhappily, barristers who approach so closely to sainthood are few.

Advice for the Layman.—"Have your attorney search the title for you. This is money well spent, as the average layman, who is not familiar with the law of real estate, will become lost in a maze of legal terms. . . . Many persons buying an inexpensive piece of land do not bother with either a title search or a survey because of the cost. This is a poor idea. Title to a piece of land means title to anything firmly attached to it, such as a building. If you go ahead and build a house on a piece of land that turns out later on to be owned by someone else, the house you built as well as the land may pass into the hands of the legal owner. This can be very discouraging."—Hubbard Cole in *Your Dream House*.

Business Accommodation.—Pressure on business space appears to trouble the East as well as the West. In *Hardial Singh* v. *Malayan Theatres Ltd.* (1953) 97 Solicitors' Journal, 555, 602, the appellants who imported films to India had purchased a theatre in Singapore and gave the respondents who were "protected tenants" the month's notice that was required before proceedings could be commenced. They remained in possession under the Rent Ordinance when the notice expired although in fact they themselves owned some eight or nine theatres. The appellants contended that one of these constituted suitable alternative accommodation—an argument that prevailed with the trial Judge. His decision was, however, revised by the High Court of Appeal which in turn was upheld by the Judicial Committee of the Privy Council, the Board including the Chief Justice of Canada. Lord Porter considered that, where a multiple business is carried on at a number of business premises, it must be shown, before an order for possession of one set of premises can be made, that the business carried on in those premises can be adequately carried on elswhere. "There must be shown," he says, "to be alternative accommodation for the business carried on in the premises comprised in the tenancy, not simply accommodation for carrying on the business of the statutory tenant in some different and diminished way by some kind or re-arrangement in the mode of its conduct." The difficulties in this class of case of balancing the merits of one litigant against another are well illustrated by the decision in *John Fuller and Co., Ltd.* v. *Auckland Meat Co., Ltd.*, involving an issue as to whether it is as important to provide more pies for the people as it is to maintain the succulent flow of second-grade joints. The red meat of the mart triumphs; the light refreshment of the theatre goes to the wall.

The Age of Retirement.—The delicate problem of inducing the aged to vacate non-profit offices is one that creeps up in all walks of life, from professional councils to school boards. It is illustrated by a story told by one of the Chief Justices (Fuller) of the United States, whose cares were increased by the presence on his Court of several Justices who were too senile to accept their share of the work, and who had evinced no intention of retiring. Finally, he arranged for one of his younger Justices to approach the then venerable Mr. Justice Field and remind him that some years before he had served upon a committee that requested the then venerable Mr. Justice Grier to retire upon the score of age. Mr. Justice Field, it is said, roused himself from his dozing long enough to mutter, "Yes, and a dirtier day's work I never did in my life."

Justice Between the Parties.—Cartoon in the *New Yorker* of an agitated counsel addressing a mixed jury: "Ladies and Gentlemen, if after due consideration you find the balance of the evidence against my client, I still beg of you to look into your hearts and find compassion and mercy, because a verdict of guilty would make this the tenth straight case I've lost in a row."

PRACTICAL POINTS.

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

1. Death Duty.—*Death Duty Stock—Such Stock not used for Payment of Death Duty—Basis of Value for Death Duty Purposes.*

QUESTION: The assets of a deceased person's estate include £1,000 New Zealand Government Death Duty Stock. Ordinary Government Stock of the same issue had a Stock Exchange market value of £98 at the date of death. Death Duties assessed amounted to £800 and were paid in cash. At what price should the Death Duty Stock have been valued for assessment of death duties?

ANSWER: Death duty stock should have been valued at the market price, if any, for same as at date of death. It is stated that *ordinary* Government stock had a Stock Exchange market value of £98, but it is not stated what Stock Exchange value death duty stock had at that date. If death duty stock was not quoted on the Stock Exchange at or about the date of death, then presumably the Inland Revenue Department could insist on a par value, because the estate could have used it for payment of death duty at par.

X.2.

QUESTION: So far as we are aware, Death Duty Stock cannot be sold by a living holder who, however, can always exchange it for ordinary stock which is readily transferable. The benefit of availability for Death Duties is, of course, lost on an exchange for Ordinary Stock. The deceased could theoretically therefore have obtained £98 for the Stock at the moment before his death.

Assuming that your answer is correct, would you care to elaborate thereon with the authority for the proposition and, in particular, as to whether your answer applies to the whole parcel of stock (of which £200 could not possibly have been used in payment of Death Duties).

ANSWER: This is seemingly a simple question which, however, it is very difficult to answer.

Does the chaffer of the market principle apply (*e.g., In re Louisson*, [1924] N.Z.L.R. 338; G.L.R. 260), or has the deceased, as a probable buyer, got to be taken into consideration in arriving at the *hypothetical* sale value (*e.g., Brook* v. *Mayor, etc., of Wellington*, [1933] G.L.R. 637)?

If deceased could have exchanged this death stock for ordinary stock valued at date of death at £98, then this is a decidely relevant factor.

As to the £200, which could not have been used for payment of death duty, it should not have been valued for death duty purposes at more than £98 per £100. It is probable also in the circumstances that, if the question at issue were referred to the Commissioner of Inland Revenue through the District Commissioner of Stamp Duties at Christchurch, he would hold that the *full* holding of death duty stock held by deceased should be valued on the same basis.

X.2.

2. Partnership.—*Three Brothers—Partnerships created in* 1896 *—Death of B. in* 1911, *and of C. in* 1922*—Continuation of Partnership by A.—Whether the Trustees of, or the Beneficiaries in B.'s and C.'s Estates are Partners—Sale by X. a Beneficiary in B.'s Estate to His Infant Children—Whether Consent of Land Valuation Court Necessary.*

QUESTION: In 1896 A, B and C, three brothers, entered into partnership as sheepfarmers in equal shares as to assets and income. The partnership could be dissolved by any partner on giving six months' notice. In 1911, B died and his executors and trustees were given power to postpone realization of the estate. They did so and entered into a supplemental Deed confirming an arrangement to carry on in the place of deceased and on the same terms and have so carried on until the present day. All the benficiaries are absolutely entitled and have been *sui juris* for many years and confirmed this arrangement. In 1922, C. died and his executors and trustees were given power to carry on the business and this they have done to the present time. The partnership lands are in the names of A. and the trustees of the estates of B. and C., and leaseholds have been renewed from time to time up until recently in the same names.

It is clear that the beneficiaries of B estate could call for a distribution at any time but it has been more convenient to leave the assets in the hands of the trustees. Regular meetings are held and the trustees are no doubt subject to the directions of the beneficiaries as to the carrying on of the partnership business.

As far as C estate is concerned, the trustees hold the assets in trust for the children of deceased—son's shares are three times the daughters' shares and two thirds of each daughter's share is to be retained by the trustees and the income thereof paid to the daughter for life and after her death the corpus of such two-thirds share is held in trust for her children on attaining full age or marrying.

(*a*) Who are the partners in the firm? A., of course, is a partner. In B and C estates, are the partners the trustees or the beneficiaries? Apart from any other consideration, if the beneficiaries are the partners, the number is approaching 20, *vide* s. 372 of the Companies Act, 1933.

(*b*) X., one of the beneficiaries in the B estate, now wishes to sell his share in the partnership to trustees for his infant children so as to reduce his estate for income tax and death duty purposes. It is proposed to sell at full value, take a mortgage for the full amount without interest and write the principal off from time to time. It appears that no Land Valuation Court consent will be required. Section 23(3)(*d*) of the Land Settlement Promotion Act, 1952.

If X. is a partner then his children's trustees will, no doubt, take his place in this position if the co-partners agree. Otherwise it appears that X. will remain the nominal partner and the children's trustees will be assignees under s. 34 of the Partnership Act, 1908.

ANSWER: The above questions are rather beyond the scope of "Practical Points". It is strongly advised that opinion of counsel be obtained, as to whether or not it would be advisable to form the partnership into a private company.

It would appear as if the partnership now consists of A., B.'s trustees and C.'s trustees. The trustees in B.'s estate and in C.'s estate hold their share in the partnership in trust for the beneficiaries in their respective estates. If this is so, then all which X. can sell to his infant children is his beneficial and equitable interest in the partnership, although for revenue purposes it does not appear to matter whether X.'s interest is legal or merely equitable.

The sale of X.'s share, in the circumstances indicated, will not require the consent of the Land Valuation Court: s. 23(3)(*d*) of the Land Settlement Promotion Act, 1952.

It is stated: "It is proposed to sell at full value, take a mortgage for the full amount without interest and *write the principal off from time to time*". It would be safer to charge the current rate of interest. If it later transpired that there was an arrangement or understanding at the date of the sale as to *this writing off*, then the whole transaction would be liable to gift duty: see judgment of Johnston, J., in *Card's* case, [1940] N.Z.L.R. 637, 644. To be effective the principal sum would have to be more than merely written off: it would have to be released by deed: *Chambers* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504; [1943] G.L.R. 300.

X.2.