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INVITEES, LICENSEES, AND TRESPASSERS: SUGGESTED ALTERATIONS IN THE LAW.

IN his judgment in *Napier* v. *Ryan*, [1954] N.Z.L.R. 1234, 1243, ll. 44 *et seq.*, delivered in August, 1954, the learned Chief Justice, in dealing with the liability of an occupier of land towards a trespasser, said that it is a matter of some concern that the standard of care required of an occupier is different from, and perhaps less than, the standard of care required of a person who is not an occupier. His Honour went on to say that these differing standards exist in England, as is pointed out in an interesting series of articles in the *Law Quarterly Review* (69 L.Q.R. 182 and 359; and 70 L.Q.R. 33). He said that the probable reasons for the two standards are pointed out in those articles, and it seems that, in America, an attempt has been made to restate the law on this topic. "It maybe," His Honour added, "that there is a case for the amendment of the law in this country."

In relation to the wider aspect of this branch of law, it will be remembered that Sir John Salmond expressed his misgivings as to the distinction made with regard to the occupier of premises between invitees, licensees, and trespassers. In his *Torts*, he said (and his words are reproduced in the 10th Edition, at p. 571):

> The law on the whole subject is still in a confused state. The delimitation between the different categories is far from settled; nor is it possible to state with certainty the duties owed to persons falling under those categories. Had it been earlier and more generally recognized that the topic is only one branch of the law of negligence it might have been seen that the occupier's duties cannot conveniently be put into a strait-jacket to fit the character in which the plaintiff comes on to the premises, and the law would then have been freed of some needless refinements and profitless distinctions.

"It is no doubt unfortunate that the law as to the obligation of owners of property towards those who come upon it compels distinctions to be drawn which are subtle and apt to be confused," as Atkin, L.J., as he then was, observed in *Coleshill* v. *Manchester Corporation*, [1928] 1 K.B. 776, 791. "On the other hand," His Lordship added, "they correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use."

With the present unsatisfactory state of this branch of the law calling for review, the Lord Chancellor, Lord Simonds, announced on July 15, 1952, that he had set up a Law Reform Committee, with Jenkins, L.J., as chairman,

To consider having regard especially to judicial decisions, what changes are desirable in such legal doctrines as he may from time to time refer to the committee.

The second of two subjects referred to the Committee for consideration was:

1. Whether any, and if so what, improvement, elucidation, or simplification is needed in the law relating to the liability of occupiers of land or other property to invitees, licensees, and trespassers.
2. Whether any amendment should be made in the law relating to a lessor's obligations towards his tenant's invitees and licensees.

The Committee was a distinguished array of legal talent, with Lord Justice Jenkins, as chairman. It comprised Lord Goddard, L.C.J., the late Lord Asquith of Bishopstone (who died on August 24, 1954, but had expressed himself in full agreement with the Committee's Report); Lord Justice Parker; Mr. Justice Devlin; Professors A. L. Goodhart, Sir David Hughes Parry, and E. C. S. Wade; and Messrs. R. J. F. Burrows, W. J. K. Diplock, Q.C., Gerald Gardiner, Q.C., J. N. Gray, Q.C., R. E. Megarry, and R. T. Outer. Lord Goddard was unable, owing to the pressure of work, to give the Report the full consideration he would have wished, but he was in general agreement with its recommendations.

The Committee's Report (Her Majesty's Stationery Office. Cmd. 9305) is an impressive document of forty-four pages. It provides a brilliant and most comprehensive treatment of the present state of the law, under eleven headings, as to an occupier's liability towards persons entering on his premises while another section deals with criticisms of existing law and suggested amendments. Another section of the Report deals in detail with injury to third parties through breach of a landlord's duty to repair.

The Report cites a wealth of case-law on the subjects with which it is concerned. Moreover, it quotes all the recognized text-books. In the result, the Report itself provides a text-book and commentary, which, in its extent, is not to be found elsewhere in one place.

To summarize, very briefly, the Committee's main proposals for amending the unsatisfactory state of this branch of the law:

The existing law recognizes that an occupier of premises owes some duty of care in regard to the safety of those premises to persons lawfully coming upon them, and that, even towards a trespasser the occupier is under a negative duty of refraining from active measures calculated to do him bodily harm. But the matter has not been allowed to rest on this simple primary

distinction between visitors lawful and unlawful; and, in assessing the standard of care required in relation to persons coming within the former class, the Courts have found it necessary to divide them into categories, fixed by reference to the nature of the right to enter the premises, and then to impose upon the occupier a standard of care which varies according to the category to which a particular visitor is held to belong, and the Committee recommends that any measure of reform should aim at preserving real differences while removing useless complications.

The Committee recognizes the force of the argument that, if the existing system, however irrational it may be in theory, works well in practice, it had better be left alone; and it does not underrate the difficulties attending any attempt to codify this branch of the law. Nevertheless, it is of opinion that this attempt should be made. The general principle advocated is that occupiers should be bound "to take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe for use by the visitor for the purpose to which the invitation or permission relates".

The majority of the Committee propose the abolition of the distinction between invitees and licensees and the adoption of the "common duty of care", as defined above, which should be owed by an occupier to every person coming upon his premises at his invitation or by his permission, express or implied; but this common duty of care should be capable of modification by attaching a condition to the invitation or permission of the occupier.

Similarly, a landlord who remains in occupation of the means of access to the demised premises should owe this "common duty of care" to any third party lawfully using the means of access, unless a more onerous duty is imposed on the landlord by the tenancy agreement; and, where a landlord is bound contractually or by statute to keep demised premises in repair, and, owing to a breach of this obligation, a member of the tenant's family or a person residing with him or lawfully visiting him sustains injury, then the person injured should, in the view of the Committee, have the same right of action against the landlord as he would have had if he himself had been the tenant, without prejudice to any other right of action he might have.

The Committee does not favour any change in the law as regards trespassers, whether in relation to adults or children; or in the law relating to master and servant, or in the existing statutory obligations regarding the safety of premises.

The occupier's liability for the negligence of the independent contractor should depend on whether the occupier acted reasonably in entrusting the work to an independent contractor and took reasonable steps to satisfy himself that the work was properly done so as to leave the premises in a safe condition.

The Law Reform Committee's Report appears to use the word "visitors" to describe generally all persons on premises by the occupier's invitation or permission. The Committee proposes rules with regard to special kinds of visitors, which would aim at uniformity in the duty of occupiers. To a visitor for the purpose of maintenance, repair, or construction, the occupier should be under no greater duty than to one entering for the normal use of the premises. Knowledge by a visitor of a danger should not in itself discharge the occupier, but should be taken into account, together with any warnings given, in deciding whether the occupier had discharged his duty with regard to that danger.

The Committee draws a distinction, as regards an occupier's liability towards persons entering on his premises, between contractual and lawful but non-contractual visitors. It recommends that, where a contract between occupier and visitor expressly defines the standard of care to be observed by the former towards the latter, the contractual standard should prevail for better or worse. But it is far more common for a contract to be silent on the matter; and here, too, the Committee favours the application of the uniform standard of care, namely, that "the occupier should take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe for use by the visitor".

The Committee observed that its recommendations in regard to an occupier's liability towards persons entering on his premises are intended to apply not only to land and buildings but also to movable structures such as ships, scaffolding, ladders, and lifts on the footing that the person who is in control of the structure is the "occupier" and that any person who, at the occupier's express or implied invitation or permission, goes into or upon it is a "visitor".

The Committee observed that since the passing of the Crown Proceedings Act, 1947 (U.K.) (which is reproduced in our corresponding statute of 1950), the Crown has in general been in the same position as any other occupier in regard to the safety of persons entering on its premises; and the Committee thinks that any legislation which may be passed to give effect to its recommendations should bind the Crown.

Other proposed rules aim at safeguarding the principles of contributory negligence as applied by the Contributory Negligence legislation, and the principle of *volenti non fit injuria* in relation to dangers on the premises.

The Report is not unanimous, however, for Mr. W. J. K. Diplock, Q.C. (who, incidentally, will shortly be leading in a New Zealand revenue appeal before the Judicial Committee of the Privy Council), in a minority report, expressed disagreement with the view of the majority of the Committee, as he is not satisfied that a case for the general abolition of the distinction between the duty owed to invitees and licensees has been made out.

He does not favour the general abolition of the distinction between the duty owed to invitees and licensees. He considers that, however imperfect it is in theory, the practical compromise which the common law has evolved in dividing persons who enter on land into these two classes, in his opinion, works substantial justice save in certain cases where he would transfer the persons concerned from the class of licensees to that of invitees. An examination of the reported cases does not satisfy Mr. Diplock that any drastic alteration in the law is needed. In his view, an attempt to codify the law can only have the result of causing, for a considerable period of years until the new case-law has been settled, uncertainty over a wide field of legal rights and obligations which affect every member of the public in his daily life. Over much of that field the law is now reasonably certain and not unsatisfactory; and Mr. Diplock would accordingly limit

statutory intervention to specific amendments of the law in those cases where the doctrine of *stare decisis* has prevented the common law from adapting itself to current social and ethical conceptions.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Winding-up—Practice—Enlargement of Time—Affidavit verifying Petition for Winding-up by Court—Such Petition to be verified by Affidavit in Prescribed Form and "sworn after and filed within seven days after the petition is presented"—Affidavit in Ordinary Form, verifying Petition filed with Petition—Court's Power to Enlarge Time for filing Prescribed Affidavit Exercisable in Special Circumstances only—Petition dismissed—Companies (Winding-up) Rules, 1934, (1934 New Zealand Gazette, *3636*) *RR. 17 (1), 186.* The power of enlargement of time, given by R. 186 of the Companies (Winding-up) Rules, 1934, should not be exercised except in special circumstances. (*In re Fortune Copper Mining Co.*, (1870) L.R. 10 Eq. 390, *Re Uniquia, Universal Sports and Recreation Society, Ltd.*, (1896) 40 Sol. Jo. 621, *Re London and Westminster Co-operative Store Co.*, (1868) 17 L.T. (N.S.) 559, and *Re Anglo-Danish Steam Navigation Co.*, (1866) 15 L.T. (N.S.) 407, referred to.) A petition for the winding-up of the company by the Court on the grounds that it was insolvent and unable to pay its debts, was filed on December 3, 1954, and the date for hearing was fixed for February 9, 1955. Attached to the petition, which was undated, was an affidavit in the form prescribed by R. 415 of the Code of Civil Procedure. On March 16, 1955, after several adjournments of the hearing, there was sworn and filed a verifying affidavit in the form prescribed by R. 17 (1) of the Companies (Winding-up) Rules, 1934. On application for an order under R. 186 of those Rules enlarging the time within which the affidavit might be filed, *Held*, That the failure to file the affidavit verifying the petition for the winding-up of the company by the Court, was due to oversight and failure to read the Companies (Winding-up) Rules, 1934, when the petition was being presented, and this was not a special circumstance. The petition was dismissed. *In re Golden Bay Fish Co., Ltd.* (S.C. Nelson. April 18, 1955. Barrowclough, C.J.)

CRIMINAL LAW.

Appeal against Conviction—Accused arraigned in Presence of Whole Jury-Panel, on Count of Escaping from Prison—Later Trial by members of Such Panel on Six Counts of Housebreaking, Theft, and Wrongful Conversion—Accused Convicted on Five Such Counts—Arraignment in Presence of Jury-Panel on Charge of Escaping from Prison, implying Accused a Convicted Person, seriously prejudicing Accused in His Defence—Notwithstanding Such Irregularities, "no substantial miscarriage of justice" in Respect of Three Counts—New Trial on Two Counts—Criminal Appeal Act, 1945, s. 4 (1). The appellant was tried on an indictment containing seven counts, the first being that he had escaped from lawful custody as a convicted prisoner. He was first arraigned on that charge while the whole of the jury-panel were in Court, and a common jury was being impanelled to try that charge. Later in the day, while the first jury was deliberating, the appellant was arraigned upon the remaining counts of housebreaking, theft, and unlawful conversion of a motor-car. He was convicted by the first jury on the charge of escaping from lawful custody, and by the second jury on five counts. He was acquitted on the remaining count. The appellant appealed against his conviction and sentence, principally on the ground that serious irregularities occurred in connection with the second trial. *Held*, by the Court of Appeal, 1. That, in consequence of the course that was adopted in arraigning the appellant on the charge of escaping from lawful custody before he was required to stand his trial on the remaining counts, he was seriously prejudiced in his defence. (*R.* v. *Harris*, (1924) 18 Cr. App. R. 157, followed). 2. That, without the irregularities whereby the jury had information that the appellant was a convicted person, a reasonable jury, on the whole of the evidence given at the trial, would have convicted the appellant on the fourth, fifth, and sixth counts; and consequently, there had been "no substantial miscarriage of justice", within the meaning of the proviso to s. 4 (1) of the Criminal Appeal Act, 1945, in respect of those three convictions. 3. That as the evidence implicating the appellant on the second and third counts very largely depended on the evidence of one witness, and on articles found in the appellant's possession which were not capable of certain identification, it would be unsafe to apply the proviso to s. 4 (1), and the convictions on those counts should be quashed, and a new trial directed on each such count. (*R.* v. *Williams and Woodley*, (1920) 14 Cr. App. R. 135, applied.) *The Queen* v. *Weir.* (C.A. Wellington. April 6, 1955. Cooke, North, Turner, JJ.)

Appeal against Sentence—Application for Leave to Appeal against Sentence of imprisonment—Death of Prisoner before Application heard—Whether Widow allowed to continue application. R. was convicted of obtaining money by false pretences and sentenced to eighteen months' imprisonment. He gave notice of application for leave to appeal against conviction but, before the hearing of the application, he died in prison. His widow applied to be allowed to continue the application. *Held*, the sentence being one of imprisonment and the prisoner having died, neither his widow nor his executors or administrators had any such legal interest as would justify the Court's allowing them to continue the appeal, and accordingly the application would be refused. *Per Curiam*, if the sentence on a prisoner is a sentence to a fine and the prisoner dies, his executors or administrators may be allowed to appeal against his conviction so that, if the appeal should succeed, the fine may be saved or recovered. *R.* v. *Rowe.* [1955] 2 All E.R. 234 (Cr. App.)

Evidence—Accomplice—Corroboration—Necessity for Warning—Rule of Law—Receiver as Accomplice—Issue Question for Judge whether Receiver Accomplice. When, in a criminal trial, a person who is an accomplice gives evidence for the prosecution it is the duty of the Judge to warn the jury, that, although it may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although formerly regarded as a rule of practice, now has the force of a rule of law. A receiver, even if he does nothing to make himself *particeps criminis*, must nevertheless be regarded as an accomplice in an extended sense of that term, and as a person whose evidence, when tendered for the prosecution, must be the subject of an appropriate warning. (*Davies* v. *Director of Public Prosecutions*, [1954] A.C. 378; [1954] 1 All E.R. 507, followed.) (*R.* v. *McAllister*, [1952] N.Z. L.R. 443; [1952] G.L.R. 279, referred to.) *The Queen* v. *McDonald.* (C.A. Wellington. April 6, 1955. Finlay, Cooke, North, Turner, JJ.)

Preventive Detention—Personal Interests of Offender subordinated to Public Interest in Imposition of Sentence—Precedent Warning of Liability to Sentence of Reformative Detention not Necessary Condition of imposing Sentence—Essentials of Committing Magistrate's Certificate—Requirement that Magistrate send Charge Sheet and Information to Registrar of Supreme Court directory—Criminal Justice Act, 1954, s. 24. Section 24 (2) of the Criminal Justice Act, 1954, being a statutory enforcement, of the factor of the protection of the public (which has always been one of the factors in the imposition of a sentence), the personal interests of the offender, and all other considerations ordinarily taken into account, are subordinated to the public interest. The giving of a precedent warning to an offender of liability to be sentenced to preventive detention if again convicted of an offence of the same nature, is not a condition of imposing a sentence of detention. Where any person, who is convicted of an offence and is liable to preventive detention, is committed to the Supreme Court for sentence, the Supreme Court must have before it a certificate by the committing Magistrate, as required by s. 24 (3) of the Criminal Justice Act, 1954, which will inform its mind with precision and comprehensiveness of the offence of which the prisoner has been convicted. A certificate which fails to do that is a defective certificate. If the prisoner was convicted on the charge in the information, and the certificate makes this clear, a repetition in the certificate endorsed on that information is not required. Even in those cases to which s. 78 of the Justices of the Peace Act, 1927, relates, where there may be a conviction in respect of a charge which is recited in a charge sheet and not in an information, the precise charge on which an offender has been convicted must be disclosed either in the Magistrate's certificate or by the

statement of facts supplied by him; in all other cases, charges contained in charge sheets are effectively replaced by charges contained in informations. (*Liverpool Borough Bank* v. *Turner*, (1860) 30 L.J.Ch. 379, and *Howard* v. *Bodington*, (1877) 2 P.D. 203, applied.) The statement of facts which the committing Magistrate is required by s. 24 (3) to send to the Registrar of the Supreme Court, must be a statement of a judicial character. The words in s. 24 (3) " the Magistrate . . . shall cause the information and the charge sheet . . . to be sent to the Registrar of the Supreme Court " are directory, and apply in terms only after the Magistrate, having entered a conviction, has determined to commit, and has committed, the offender for sentence; and the direction is consequential and does not relate to any essential phase of the committal itself; and, accordingly, exact fulfilment of the statutory duty is not essential to the validity of the committal for sentence. (*Middlesex Justices* v. *The Queen*, (1884) 9 App. Cas. 757, applied.) *Semble*, That s. 24 (3) of the Criminal Justice Act, 1954, may impose a duty on the Court of first instance to see that there is an information in every case where an offender may be dealt with under that section; and if there is any alteration under s. 72 (as amended) of the Justices of the Peace Act, 1927, or under s. 79 in the nature of the offence charged in the information, a certificate relating to a conviction on any such amended information should state fully the charge on which the prisoner was convicted. (*Cooper* v. *Hamilton*, (1888) 6 N.Z.L.R. 598, *Brown* v. *Kennedy*, (1888) 7 N.Z.L.R. 255, and *Parr* v. *Surgenor*, [1923] N.Z.L.R. 1229; [1924] G.L.R. 190, referred to.) *The Queen* v. *Freeman*. (C.A. Wellington. April 29, 1955. Finlay, Hutchison, North, JJ.)

DEATHS BY ACCIDENTS COMPENSATION.

Damages—Assessment—Claim by Mother for Death of Son—Possibility of Son's marriage to be taken into Account. In an action under the Fatal Accidents Act, 1846, £3,100 was awarded to the deceased's mother, who was a widow of about fifty-three years of age. At the time of his death the son was living with his mother and was contributing to her support a net weekly amount, after allowing for the cost to her of feeding him, of about £4. He was twenty-nine years old, steady, unmarried and without matrimonial intentions. He was likely to recognize throughout his life his obligations towards his mother. On appeal by the defendant on the ground that the damages were excessive, *Held*, although, if the relationship between the plaintiff and the deceased had been that of husband and wife instead of mother and son, £3,100 would have been a proper sum to award, yet in the circumstances the award would be reduced to £1,500, since there was a strong probability that the son would eventually have married and this and the consequent expectation of reduction in his contribution to his mother's support had not been given sufficient weight. Appeal allowed. *Dolbey* v. *Goodwin*, [1955] 2 All E.R. 166 (C.A.)

GIFT.

Donatio Mortis Causa—*Post Office Savings Bank Pass-book—Pass-book handed to Donee by Deceased on Day before Her Death—Gift made in Contemplation of Death—Delivery of Means of getting at Fund—Gift to take Effect on Donor's Death—Effective* Donatio Mortis Causa. On September 14, 1953, the deceased had told a friend that her aunt was to have her Post Office Savings Bank Pass-book and her sister was to have all the rest. Next day, when the deceased was desperately ill, and she was aware of it, she handed her Post Office Savings Bank Pass-book (showing a credit balance of £1,135) to her aunt. She died on the following day. *Held*, 1. That the proper inference was that, when the deceased handed the Pass-book to her aunt, although she then said nothing about her death, she had the same thought in mind as she had expressed to the friend on the previous day; and, that the gift was accordingly made in contemplation of death. 2. That the handing-over of the Savings Bank Pass-book was a transfer of a part of the means of getting at the fund. (*In re Archer*, *Archer* v. *Archer*, [1914] 33 N.Z.L.R. 1464; 17 G.L.R. 201, and *Zimmermann* v. *Public Trustee*, [1946] N.Z.L.R. 403; [1946] G.L.R. 192, applied.) 3. That, on the evidence, the gift was made in circumstances which showed that it was to take effect only if the death of the donor should follow. (*Lord Advocate* v. *M'Court*, (1893) 20 R. (Ct. of Sess.) 488, and *Re Lillingston*, *Pembery* v. *Pembery*, [1952] 2 All E.R. 184, distinguished.) (*Gardner* v. *Parker*, (1818) 3 Madd. 184; 56 E.R. 478, referred to.) 4. That the deceased had made to the plaintiff a valid *donatio mortis causa* of the Post Office Savings Bank Pass-book and of the moneys to the deceased's order at the date of her death in the account to which the Pass-book related. *Northcott* v. *Public Trustee* (S.C. Wellington. April 20, 1955. Barrowclough, C.J.)

HUSBAND AND WIFE.

Joint Family Home—Jurisdiction—Purpose of Statute—Court's Power to direct Sale where Parties separated by Agreement—Power to Stand over Application for Sale, if Premature—Registration not vesting Family Home in Parties as Joint Tenants—Disposal of Moneys on Sale—Joint Family Homes Act, 1950, ss. 10, 11. Although the Joint Family Homes Act, 1950, confers no jurisdiction on the Court to direct a sale of the property where there is no separation order or divorce decree, s. 10 gives the Court power, in appropriate cases, to direct a sale on the application of either party. The Joint Family Homes Act, 1950, contemplates the assurance of stability and continuity to the home registered under it. Where there is still any reasonable hope that the parties may yet become reconciled, application for an order should not be entertained; and the Court, in terms of s. 10, may direct that it stand over, thus meanwhile maintaining the *status quo* of the family home. Registration under the Joint Family Homes Act, 1950, does not vest the family home in husband and wife as joint tenants *simpliciter*, so that each is thereafter entitled absolutely to half the proceeds of sale. Section 10 gives the Court a wide discretion as to the disposal of moneys received on a sale of the joint family home ordered under that section; and the Court will look broadly at the question of assessment of the parties' respective shares, and will not be duly concerned with fine points of detail. (*Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63; [1952] 2 All E.R. 863, applied). (*Barrow* v. *Barrow*, [1946] N.Z.L.R. 438; [1946] G.L.R. 245, followed). (*Masters* v. *Masters*, [1954] N.Z.L.R. 82, distinguished). *Sutherland* v. *Sutherland*. (S.C. Palmerston North. May 11, 1955. Turner, J.)

LAND TRANSFER.

Mortgage—Joint Tenancy—Mortgagees' Respective Interests not Defined—Joint Tenancy as between Mortgagees and Third Parties—Court entitled to inquire whether Tenancy in Common between Mortgagees—Equitable Presumption in favour of Tenancy in Common where Money advanced on Mortgage—Question whether Evidence sufficient to displace Presumption—Land Transfer Act, 1952, s. 6 1.——Will—Construction—Devises and Bequests—Devise of Share or Interest in Land " owned by me at my decease "—Land sold before Death of Testatrix—Mortgage over Same given by Purchaser to secure Purchase-money—Testatrix at date of Death owning interest in Mortgage Debt secured on Such Land—Words of devise not wide enough to include such Mortgage Debt. Section 61 of the Land Transfer Act, 1952, which makes the Register, in so far as the mortgagees are described in the instrument, paramount, and conclusive as between the mortgagees and any person dealing with the survivor of them, does not preclude the Court from entering upon an inquiry as to whether or not a tenancy in common exists between registered mortgagees where the registered instrument is silent on that point. In equity, there is, in effect, a presumption in favour of a tenancy in common in the case of money advanced on mortgage; and the question in each case is whether or not there is evidence sufficient to displace this presumption. (*Cameron* v. *Smith*, (1910) 13 G.L.R. 193, referred to.) The relevant portion of the will of the testatrix was as follows: " 2. I give devise and bequeath to my sister . . . all that my share estate and interest owned by me at my decease . . . in the shop premises and living rooms and appurtenant land thereto . . . together with the adjoining vacant section of land the said shop premises living rooms and lands being at present owned by my sister and me in equal shares." When the will was made the testatrix and her sister were registered proprietors of the fee simple as tenants in common in equal shares of certain land indicated in the will. By an agreement dated December 15, 1951, the testatrix and her sister agreed to sell the whole of the land, and it was provided that the payment of the purchase price should be satisfied by the purchaser's executing in favour of the vendors a mortgage over the land securing the principal sum of £4,000 and interest. On February 25, 1952, a transfer of the land to the purchaser and a mortgage to the testatrix and her sister as mortgagees were registered in the Land Transfer Office at Wellington. The mortgage stated that the principal sum was lent to the mortgagor by the testatrix and her sister. There were no express words in the mortgage which defined the respective interests of the two mortgagees. The testatrix died on June 23, 1952, and her sister survived her for a period of slightly over two months. On originating summons, the Court was asked to determine: (*a*) whether the testatrix's sister became solely entitled both in law and in equity to the mortgage and to the principal and other moneys thereby secured; and (*b*) whether the testatrix's sister on the death of the testatrix, became entitled, by virtue of cl. 2 of the will of the testatrix, to all the estate, right, title and interest of the testatrix in the mortgage and the principal and other moneys thereby secured.

Held, 1. That the testatrix's sister, the survivor, on the death of the testatrix, became solely entitled in law as mortgagee under the mortgage; but, in equity, she held one half-share thereof in trust for the personal representatives of the testatrix. (*In re Jackson, Smith* v. *Sibthorpe*, (1887) 34 Ch.D. 732, and *Robinson* v. *Preston*, (1858) 27 L.J.Ch. 395; 70 E.R. 211, referred to.) 2. That the devise in the will was a specific devise of the share, estate, or interest "owned" by the testatrix in the property at the date of her death; but at the date of her death, she did not own any such share, estate, or interest: she owned an interest in a mortgage debt secured on the property. 3. That the words of the will were not wide enough to include the mortgage debt, which, therefore, did not pass under cl. 2 of the will. (*In re Galway's Will Trusts, Lowther* v. *Viscount Galway*, [1950] Ch. 1; [1949] 2 All E.R. 419, applied.) (*Mackesy* v. *Mackesy*, [1896] 1 I.R. 511, *Kilkelly* v. *Powell*, [1897] 1 I.R. 457, and *In re Mitchell, New Zealand Insurance Co., Ltd.* v. *James*, [1950] N.Z.L.R. 85; [1950] G.L.R. 466, distinguished.) *In re Foley (deceased), Public Trustee* v. *Foley and Others* (S.C. Wellington. April 19, 1955. Henry, J.)

LANDLORD AND TENANT.

Notice to Quit—Validity—Signature—Agreement providing for Signature by Landlords' Valuer—Signature by Valuer's assistant in Valuer's name—No indication that Signature not Valuers. Signature of Principal's name—Validity of Signature. A clause in a tenancy agreement provided that: "The tenancy may be determined by three months' notice . . . If determined by the [landlords] it shall be by a written notice signed by the valuer to the [landlords] . . . If determined by the tenants it shall be by a notice in writing signed by the tenants and served upon the valuer or one of his assistants . . ." A notice to quit given by the landlords was signed: "J.E.J.T., valuer and agent of the [landlords]", but the valuer's name was written by the valuer's assistant without any indication that he was acting on behalf of the valuer or with his authority. *Held*, provided that the signature was duly authorised by the valuer, the notice to quit was validly signed, since there was nothing in the terms of the agreement to require a personal signature or to displace the common law rule that a document, including a notice to quit, may be signed by an authorised agent in the principal's name without indicating that the signature is appended by an agent. (*R.* v. *Kent JJ.* (1873) (L.R. 8 Q.B. 305), and *France* v. *Dutton*, [1891] 2 Q.B. 208, applied.) (*Goodman* v. *J. Eban, Ltd.*, [1954] 1 All E.R. 763, considered.) Appeals allowed. *London County Council* v. *Vitamins, Ltd. London County Council* v. *Agricultural Food Products, Ltd.* [1955] 2 All E.R. 229 (C.A.)

Underlessee and Relief from Forfeiture. *219 Law Times* 204.

MASTER AND SERVANT.

Duty of Master—Provision of Safe System of Working—Workman employed by Sub-contractors killed by Pipe falling from Platform of Scaffolding—Scaffolding erected by other Sub-contractors—Gaps between Boards of Platform and No Toe-boards to platform. The defendants who were electrical contractors were employed as sub-contractors to instal electrical apparatus in a large workshop which was under construction and which was intended to be used for making jet aircraft or their component parts. The work to be done by the defendants involved the installation of conduit pipes, which were to be fixed to the steelwork, and this required the use of scaffolding, which was supplied and erected by a company specialising in that work. The scaffolding was used not only by the defendant's workmen but also by other workmen who were engaged on the work of construction which was going on, and the scaffolding had to be moved from time to time as the work proceeded along the length of the building. There were three tiers of scaffolding, the lowest, or third tier, being about thirty feet above the floor level. The boards forming the platform of the third tier were not laid uniformly flush against each other and in places there were gaps between them varying from one to three inches. On the outer side of the platform were vertical upright scaffold tubes, but the incline of the platform was inwards rather than outwards. There were no toe-boards. An electrician employed by the defendants placed on the platform a piece of steel piping, some twelve feet long and a little more than an inch in diameter, which was to be used as one of the conduit pipes. About an hour later the pipe fell from the platform on to H., a workman employed by the defendants, who was on the floor of the building, and fatally injured him. The reason for the fall was not known, but there was no negligence on the part of the electrician, who had been placing pipes in a similar position without any accident for a period of over three months. In an action against the defendants, under the Law Reform (Miscellaneous Provisions) Act, 1934, for damages in respect of the death of H., it was contended that the gaps in the platform-boards and the failure to provide toe-boards constituted breaches of the Building (Safety, Health and Welfare) Regulations, 1948, and of the defendants' duty at common law to provide a safe system of work. *Held*, (1.) The work on which the defendants were engaged was an integral part of the construction of a building, within reg. 2 (1) of the regulations of 1948, and the regulations were applicable to that work. (*Elms* v. *Foster Wheeler, Ltd.*, [1954] 2 All E.R. 714 applied.) (2.) The defendants were in breach of reg. 24 (1) in that they had failed to provide toe-boards, and, as that breach could have been, and probably was, the cause of the accident, the defendants, in the absence of evidence to show that the accident was not so caused, were liable in damages for breach of statutory duty to H. (Principle stated by *Scott*, L.J., in *Vyner* v. *Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547, 549, letter C citing a statement of *Lord Goddard*, in *Lee* v. *Nursery Furnishings, Ltd.*, [1945] 1 All E.R., 387 at p. 390 applied.) (3.) The defendants were also in breach of reg. 22, in that the platform was not closely boarded, but, on the facts, the failure to provide close boarding was not the cause of the accident. (4.) As the scaffolding had not been provided by the defendants, but had been used by them and their workmen for some time, the defendants were not liable at common law for failure to provide a safe system of work merely because the platform-boards had spaces between them and there were no toe-boards. *Hughes* v. *McGoff and Vickers, Ltd.*, [1955] 2 All E.R. 291 (Liverpool Ass.)

MONEYLENDER.

Loans by Moneylenders. *105 Law Journal* 230.

PRACTICE.

Supreme Court Amendment Rules (No. 2) 1955. Rules 188 to 188 F of the Code of Civil Procedure (as to the swearing of affidavits outside New Zealand) are revoked, and new RR. 188-190 are substituted. The new rules bring the Code into line with s. 21 of the Statutes Amendment Act, 1939 (under which certain diplomatic and consular representatives may take affidavits outside New Zealand), but they adopt the later definitions of "Commonwealth country" and "Commonwealth representative" contained in s. 6 (3) of the Evidence Amendment Act, 1952.

PROPERTY LAW.

Resulting Trust and Tenancy in Common. *105 Law Journal* 115.

SALE OF GOODS.

Description—Contract containing Clause, "Shipment and destination: Afloat per s.s. Morton Bay due London approximately June 8"—Condition of Contract. By a contract contained in a letter written by the sellers to the buyers on June 1, 1954, and confirmed by the buyers in a memorandum received by the sellers on June 4, 1954, the sellers agreed to sell to the buyers 5,064 cases of cans of Australian quick-frozen peaches. The contract contained a clause, "Shipment and destination: Afloat per s.s. Morton Bay due London approximately June 8," and it was provided that 1,250 cases should be delivered immediately on arrival and the balance in equal quantities at intervals of seven days. The owners of the Morton Bay, in their published itinerary dated March 3, 1954, had said that the ship would arrive in London on June 8, 1954, but in their published itinerary dated May 31, 1954, they stated that the ship was due in London on June 19. The Morton Bay was not reported in London until June 21, and, owing to certain difficulties with the Customs authorities, the goods were not available for delivery until after July 19. The buyers refused to take delivery, and claimed that the words "Afloat per s.s. Morton Bay due London approximately June 8" formed a condition of the contract in the sense that they were part of the description of the goods, and that, accordingly, the sellers were in breach of contract. The sellers claimed that the words merely identified the ship and the voyage on which the goods were being imported and that June 8 was not intended to be a delivery date. *Held*, the whole of the phrase "Afloat per s.s. Morton Bay due London approximately June 8" was part of the description of the goods, and the words "due approximately June 8" made it a condition of the contract that the goods should be shipped on a ship of which it could truly be said, at the date of the contract, that she was due to arrive on, approximately, June 8, 1954; and on the facts, having regard also to the shipowners' itinerary which was published on the day before the date of the contract and stated that the ship was due in London on June 19, it was shown that the sellers were in breach of a condition of the contract and the buyers were entitled to reject the goods. *MacPherson Train & Co., Ltd.* v. *Howard Ross & Co., Ltd.* [1955] 2 All E.R. 445 (Q.B.D.)

WILLS AND POWERS.

The Conflict of Concepts in In re McEwen.

By Malcolm Buist, LL.M.

(*Concluded from p. 154.*)

III. The Relation of Testamentary Delegation to Testamentary Powers in in re McEwen.

With the foregoing material, by way of definition of the subject-matter, it may now be possible to sort out more clearly the relative jurisdiction of the two propositions with which the second part of the present article began.

Now, if the cases set out in the judgment of Gresson, J., be analyzed, it will be seen that generally the property vested in the executors or trustees to be disposed of *in that capacity* :

(*a*) *Morice* v. *Bishop of Durham*, (1805) 10 Ves. Jun. 522 ; 32 E.R. 947. The property was bequeathed to the Bishop of Durham in trust, and the real issue was a search for the beneficiary denoted by the words, " such objects of benevolence and liberality as [the trustee] in his own discretion shall most approve of." It happened that he was also appointed executor, but the property clearly vested in him as trustee for distribution.

(*b*) *Yeap Cheah Neo* v. *Ong Cheng Neo*, (1875) L.R. 6 P.C. 381. The property of testatrix was vested in her executors in trust for various purposes, concluding with a residuary disposition (held to be one of these trust purposes) that the executors " apply and distribute the same [*i.e.*, the residue], all circumstances duly considered, in such manner and to such parties as to them may appear just ". Their Lordships' decision, founded on the whole will, was that a trust was intended to be created, and, as in the preceding case, an appropriate beneficiary could not be located. There was however a vesting in the distributing trustee, as such.

(*c*) *Fenton* v. *Nevin*, (1833) 31 L.R. Ir. 478. Here the provision regarding residue left the property vested in the executors for them as such to apply as they thought fit.

(*d*) *Re Carville, Shone* v. *Walthamstow Borough Council*, [1937] 4 All E.R. 464. A provision, " The residue to be disposed of as the executors shall think fit ", was treated as a failure to make any effective gift of the residue, which therefore remained in the hands of the executors in trust as under a partial intestacy. The testatrix had left it in their hands *qua* executors, for disposal *in that capacity*.

(*e*) *In the Goods of Smith*, (1869) L.R. 1 P. & D. 717. A codicil concluded, " I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." This was a question of probate, and not of trust or executorship, and whilst, on the one hand, Lord Penzance said a testator could not confide to another the right to make a will for him, on the other hand this was treated as a kind of *conditional* will and therefore a valid testamentary act.

(*f*) *Blair* v. *Duncan*, [1902] A.C. 37. The residue of the estate was bequeathed to two brothers of testatrix, but in the event of partial or full intestacy in respect of the residue, the interest undisposed of was " to be applied for such charitable or public purposes as my trustee thinks proper." This was a Scottish appeal, and Lord Robertson pointed out, at p. 49 :

> The proper inference from those cases [*i.e.*, *re* charitable purposes] is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class.

Lord Davey said that the short question was " whether a trust for such charitable or public purposes as the *executor* might select " was valid. The distribution was thus to arise out of the vesting in the executor : it was to be effected by virtue of his title as executor (or trustee).

(The special position of charities is dealt with at the end of this article.)

(*g*) *Grimond* v. *Grimond*, [1905] A.C. 124 ; 92 L.T. 478. The trustees were directed (in the event) to divide one-third of the residue " to and amongst such charitable or religious institutions and societies as they might select." Lord Halsbury, L.C., pointed out that there had not been a gift to a class with power of selection (*i.e.*, a power in the nature of a trust) but that testator had empowered someone else to make his will for him after his death. (It is submitted that the strong objections raised in *69 Law Quarterly Review*, pp. 344-346, to the unrestricted power may apply equally to the class gift with power of selection.) However, the property was left to the trustees and the title to be conferred was to be a transfer by them by virtue of their office as trustees of the title they had received by " transmission ", and this the law would not allow.

(*h*) *Houston* v. *Burns*, [1918] A.C. 337. Trustees were directed to apply residue " for such public, benevolent, or charitable purposes in connection with the parish of L. or the neighbourhood in such sums and under such conditions as they in their discretion shall think proper". The House had no doubt that this was void for uncertainty. But the power of appointment was not in issue : the residue was vested in the trustees for the purposes of the proposed distribution.

(*i*) *Attorney-General* v. *National Provincial Bank*, [1924] A.C. 262. Again, the gift was in trust " for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they think proper". Viscount Haldane crystallized the matter when he said, at p. 268 :

> You have not got that divesting out of the testator of his interest which is essential to constitute a testamentary disposition.

(*j*) *Attorney-General* v. *New Zealand Insurance Co., Ltd.*, [1937] N.Z.L.R. 33. This is the well-known case of the will of Mrs. Catherine Smith, of Auckland, who left her residuary estate to her trustee so that the *trustee* might distribute it " in making other bequests towards institutions societies or objects established in or about Auckland aforesaid for charitable benevolent educational or religious purposes . . . ". The dele-

gation was to the trustees, as in the foregoing cases: *their* title was to be transferred.

(*k*) *Chichester Diocesan Fund and Board of Finance (Inc.)* v. *Simpson*, [1944] A.C. 341; [1944] 2 All E.R. 60. The bequest was in favour of "such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select". This is the latest case referred to, and the following comment by Viscount Simon, L.C., is significant:

> With one single exception [viz., charities] he cannot by his will direct executors or trustees to do the business for him (*ibid.*, 348; 62).

This is just what the foregoing testators have been trying to do, but the "business" has been the disposal of the assets by virtue of the testator's own powers of ownership, exercised by his personal representatives.

The Limit of the Cases.

The question may be asked, "What does it mean, to say (as did Lord Macmillan in the last-mentioned case), that the testator cannot leave the disposal of his estate to others?".

When the cases set out above are weighed, it is notable that the excess authority was vested in the testator's personal representatives *as such*. Gresson, J., observed that there was in them "a discretion given to trustees in the execution of their trust, in short . . . a trust and not a mere power".

It is submitted that this is the limit within which Lord Macmillan's dictum should be read. The personal representatives stand in the shoes of the testator, and Viscount Haldane's comment in *Attorney-General* v. *National Provincial Bank*, (*supra*), recalls to mind the fact that by giving the property to them the testator has not "divested himself" of it and has to that extent not made a will properly so-called.

This reference to "divesting" enables us to make a distinction between (*a*) *powers of management or control* vested in personal representatives, with merely curatorial duties in respect of the assets, *e.g.*, power to invest or lease, and even to sell, retaining the proceeds (*i.e.*, merely converting the assets), and (*b*) *powers of distribution*, which are not a management but a post-testamentary distribution of the assets. Powers of the first-mentioned kind are unobjectionable; the latter require scrutiny.

A similar distinction, from the viewpoint of form, is drawn in *Jarman on Wills*, 8th Ed., 789:

> A power of appointment, as a general rule, requires for its exercise some more or less formal expression of intention, while a power of disposition, although it may be expressed so as to confer a mere power of appointment (as where a power to dispose of property by will is given) may be expressed so widely as to include the exercise of powers incident to ownership, such as a power of using, selling, or otherwise alienating the property, which may obviously be exercised without any formal expression of intention.

In a somewhat loose form, then, it may be correct to say that a man may give his personal representatives all the discretionary powers of ownership except those of giving his property away as they please. This, it is submitted, gives Lord Macmillan's dictum the context of the decisions of the Courts.

The position of the donee of a power is different from that of the executor spoken of in the dictum, and the following propositions are tentatively submitted as summing up the respective positions of these two kinds of "representative" of the testator:

(*a*) The executor has full legal proprietorship, but nebulous discretion;

(*b*) The donee of a power has full discretion (within the limits of the type of power) but nebulous proprietorship;

(*c*) In the exercise of his authority to transfer assets, the executor transfers the legal ownership from himself to the person already enjoying the beneficial ownership;

(*d*) In the exercise of his discretion to appoint assets, the donee divests the executor of legal and the person otherwise entitled of beneficial ownership.

Other Cases on Powers.

The difficulties which are assembled in *In re McEwen*, *McEwen* v. *Day* seem to come into being as soon as attempts are made to force the topic of powers into other legal categories, especially those of ownership, executorship, testation, or trust, to the exclusion of the proper relevant subjects of condition, mandate, the executory interest, and conveyancing practice hardened into law. In the present article it is not convenient to do more than suggest this cause of tension, but the following paragraph may sufficiently illustrate the point being generally aimed at, namely, that the power of appointment is an independent concept in our English body of law, dating from very early times, and entitled to stand on its own feet and exercise its own jurisdiction without being crowded out by other (and later) concepts.

In *69 Law Quarterly Review*, 345, it is said:

> It is more than likely that there will be an increase in wills that make no disposition of property at all, but leave the entire disposition to the executors . . .
>
> Corporations qualified to act as executors . . . show an increasing fondness for granting executors the most extensive powers of disposition, so that in everything but name such executors are making quite elaborate wills for testators after death.

From a practical angle, testators and settlors seem for centuries to have been satisfied with the dispositive authority of the donee of a power of appointment, and apparently have not observed sufficient ill effects of the practice to lead them to abandon it where appropriate. From a legal angle, as shown in the many cases reviewed by Gresson, J., it would not be possible for such powers of disposition to be exercised by the grantees *qua* executors. However, a lawful authority, *qua* power, is not an extension of the executor's authority as such, either by liberty granted to him by the testator or by the execution by someone other than the testator of a direction that the executor transfer the legal ownership otherwise than as set out in a document admitted to probate under the Wills Act.

The last point may be expanded as follows. Supposing it were argued that a normal testamentary gift by A to B should be invalid, on the grounds that it is putting into B's hands the power to pass the ownership on to C, the immediate answer would be that the effect of the Wills Act must become spent at some point, and that once B has acquired full ownership, the concept of testation is replaced by that of proprietorship. It is submitted that, in a parallel manner, if by will A gives to B a power of appointment, then on B's realizing that power by exercising it, the concept of testation has been replaced by that of a power

exercised. These are elements of conveyancing practice, and rules of long standing.

Furthermore, the law is not unprepared for the point at which a donee of powers may, by exercising them in his own favour, destroy the foregoing separation of concepts. In *Beyfus* v. *Lawley*, [1903] A.C. 411, the donee had a general power to appoint £10,000, which in default of appointment was to go as residue under the will creating the power. He covenanted, in consideration of a certain loan, that he would, immediately after executing the mortgage, sign his will appointing a trust in favour of the mortgagee for principal and interest, and did so. On the donee's death, the mortgagee claimed a priority in respect of the sum so appointed. The Earl of Halsbury, L.C., and Lords McNaghten and Lindley, had no doubt that the power itself was valid, and then, in respect of the matter disputed, Lord Lindley said, at p. 413:

> It cannot now be denied that property appointed by will under a general power is assets for payment of the debts of the appointor, and is not regarded as property of the donor distributable by the donee.

It seems that the conveyancing requirements provide a guide here. A donee who proposes to appoint himself in exercise of the power granted to him, will not in the ordinary course acquire the rights of ownership until he has executed the appropriate instrument of appointment. It therefore seems that the doctrine applied in *Beyfus* v. *Lawley*, (*supra*), amounts to a notional execution, comprised in the Court Order, in substitution for the actual execution, of a just and equitable appointment in the donee's own favour, for the benefit of his creditors generally. (This was discussed, in relation to Family Protection claims, by Gresson, J., in *Kensington* v. *Pearson*, [1948] N.Z.L.R. 695, 710.)

This brings to light another link in the chain of successive concepts: first, testation (the creation of the power by the donor), secondly, the power itself (when the donee, by due exercise, transmutes his status into that of appointor), and thirdly, proprietorship (the condition of the appointee). There is a fourth concept as a kind of substratum, namely, the defeasible rights of the person who takes in default of appointment, and this is an alternative proprietorship.

Such a distinction between power and proprietorship is reinforced by the following points of difference:

(*a*) The power may be validly constituted with an express exclusion of the donee. This is noted in the cases referred to by Gresson, J.

(*b*) "The principle which governs the constitution of powers, and their very nature, is this, that whatever is given by the donor of a power in execution of the power, passes to the appointee, or the party in whose favour the power is executed by the donor, not by force of the appointment, or by any act of the donee, but by the act of the donor of the power, by virtue in fact of the power and not of the appointment under it," per Lord Brougham, L.C., in *Tainall* v. *Hankey*, (1838) 2 Moo. P.C. 342, 350; 12 E.R. 1036, 1039. This is the element of mandate within the concept of the power, and brings us back to the realm of the power of attorney, of agency, and of the survivorship of authority earlier spoken of. In the power of appointment there seem to be notions of representation different in kind from the "personal representative" who is invested with proprietary rights by the conveyancing process of "transmission". There is the fundamental difference that, as to title, the personal representative (or the trustee) is, whilst the holder of a power is never, a party in whose representative name assets of the "principal" appointing him are legally vested to enable him to deal with them. This is subject to a rule of convenience where a general power over personalty is exercised by will (*O'Grady* v. *Wilmot*, [1916] 2 A.C. 231, 250).

Final Explanations and Comparisons.

It seems that Gresson, J., was not altogether satisfied with the two principles available as reconciliations or rationalizations of the co-existence of the power of appointment and the restrictions imposed by the Wills Act on post-testamentary dispositions of property. His comment was:

> It is not easy in the obscure light afforded by the decisions and the dicta to which I have referred to determine the question put by the Originating Summons. Since the power was entrusted to two donees, I do not think I am justified in upholding the power as "equivalent to property", nor can I regard the power as one where the selection is limited to a class of persons defined by an exclusive description. . . . If the power is to be upheld, it must be upon some other principle than either of these.

The search for an all-embracing principle to close the category of post-testamentary disposition and restrict it to the Wills Act exclusively, seems to have been at the root of the bringing of the originating summons in *In re McEwen*, *McEwen* v. *Day*, and also of the article in *69 Law Quarterly Review*, quoted (*ante*, p. 151), and in the judgment. Such a search is likely to be coloured by the fundamental concepts taken into account, and the manner in which they are understood and defined. To suggest that the full background of the issue now being discussed may be deeper and more extensive than is generally taken into account, this article is closed with two judicial definitions, at the highest level. The first of these may simplify one aspect, namely, the position of charities, whilst the second, by analyzing the fee simple, may bring to the integrity of the power of appointment an unexpected ally.

First, then, why have trustees or executors *as such* a recognized right to select amongst *charitable* objects, notwithstanding what Gresson, J., described as a "furore of *dicta*" against post-testamentary dispositions by such persons? In *Mayor of Lyons* v. *Advocate-General of Bengal*, (1876) 1 App. Cas. 91, 113, Lord Penzance said:

> . . . the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court the gift notwithstanding the particular disposition may not be capable of execution subsists as a legacy which never fails and cannot lapse.

The second extract, which is from the judgment of Earl Cairns, L.C., in *Swinton* v. *Bailey*, (1878) 4 App. Cas. 70, 79, raises the representative similarity between a general power and the rights of a tenant in fee simple in such a manner as to confirm the suggestion earlier in this part of this article that the proper requirements of the Wills Act may in fact be satisfied as well by the giving of a power of appointment as by the giving of ownership of the *corpus* itself:

> . . . as I understand the rule of law it is, that where you have a devise "to A. B. and to his heirs and assigns for ever," in the eye of the law that is a devise to A. B., and a devise to his heirs and assigns for ever. The law says what the words say,—that you have there a devise to all of those persons. No doubt the law goes on to say that where you have a devise made in that way the ancestor shall have the dispositive

power over the whole fee simple; but that is for the reason that you have got the devise to the heirs *ad infinitum*, and the devise cannot have effect given to it in any other way except by treating the words as words of limitation.

So, therefore, it may be proper to turn to the summary by *Williams on Real Property*, 18th Ed., 115:

> . . . The devices of modern conveyancers had made it possible for a tenant in fee simple, not only to grant his land to another in fee simple, or for any less estate, with the rights of alienation incident to the estate conferred, but also to give to others independent powers of disposition over his land, equivalent to [though not identical with] the disposing power of a tenant in fee simple.

The Wills Act could not ask for more.

THE WATERS POLLUTION ACT, 1953.

Grant of Easement, by a Riparian Owner to a Non-Riparian Owner, to discharge Waste Products into a Stream.

By E. C. ADAMS, I.S.O., LL.M.

The Waters Pollution Act, 1953, which came into force on April 1, 1954, appears so far to have created but little interest among members of the legal profession. Yet this is an Act which may well have far-reaching consequences as to the rights and liabilities of riparian owners, not only *inter se* but also as to the general public.

The purpose of the Act is stated in its Long Title:

> An Act to provide for the constitution of a Pollution Advisory Council, to define its powers and functions, and to make provision with respect to the prevention or mitigation of pollution of waters.

From a practical point of view, therefore, the main purpose of the Act is the *mitigation* of pollution of *waters*.

The Act defines "Waters" very widely indeed:

> "Waters" means any river, stream, lake, natural or artificial watercourse, bay, gulf, harbour, or other waters within the territorial limits of New Zealand; and includes *underground or artesian waters*.

The inclusion of underground or artesian waters in the definition is very interesting in view of the manner in which the common law has differentiated between surface-waters and underground waters, in this branch of the law of torts.

The liability for the pollution of waters has recently been considered by the Courts in England: *Pride of Derby and Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1952] 1 All E.R. 1326, affirmed by the Court of Appeal, [1953] Ch. 149; [1952] 1 All E.R. 179. That case emphasizes, *inter alia*, that a riparian owner can maintain a suit to restrain the *fouling of the water without showing that the fouling* is actually injurious to him; and that the fact that the water is also fouled by others is no defence. The right to pollute a stream (as against a riparian owner) may at common law be acquired by the person causing the pollution by long enjoyment or by grant. In New Zealand, however, if the servient tenement is under the Land Transfer Act, such a right could not be acquired by prescription; it would have to be acquired by registration against the title to the servient tenement of a grant of easement by way of memorandum of transfer.

At common law, pollution of surface-waters is not a mere nuisance but the wrongful disturbance of a servitude. At common law, too, the term "pollution" has a very wide meaning: it includes any alteration of the natural quality of the water, whereby it is rendered less fit for any purpose for which in its natural state it is capable of being used. As Sir John Salmond stated in his classic work on *Torts*:

> Thus, it is actionable to raise the temperature of the stream by discharging into it hot water from a factory, or to make *soft water hard by discharging into the stream water impregnated with lime*, no less than to pollute the stream by pouring into it the sewage of a town or the chemical refuse of a factory.

At common law, pollution of the surface-waters of a stream is actionable without proof of actual damage. (Under our Mining statutes the owner of a mining privilege may have granted by the Warden certain rights which constitute a serious invasion of this common-law right of riparian owners, but that is another aspect which is not of much practical importance these days when the mining industry is almost non-existent, but it is not without interest to observe that s. 30 of the Act absolves from prosecution any person who discharges a pollutant from a mine in accordance with the Mining Act, 1926.)

At common law the pollution of *underground* water is actionable only as a nuisance, and not as the disturbance of a servitude.

As pointed out, pollution at common law has a very wide meaning: under the Waters Pollution Act, 1953, it has a more specific meaning; but, at the same time, it is very comprehensive in its effect:

> "To pollute", in respect of any waters, means to contaminate the waters so as to change the physical or chemical condition thereof in such a manner as to make the waters unclean, noxious, or impure, or as to be detrimental to the health, safety, or welfare of persons using the waters, or as to render the waters undrinkable to farm animals, or as to be poisonous or harmful to animals, birds, or fish around or in the waters; and "pollutant" has a corresponding meaning:

When the Waters Pollution Bill was before Parliament, it was pointed out that, although there were already in existence several Acts dealing with the pollution of waters, those Acts were concerned with specific matters such as the prevention of the discharge of oil in territorial waters, the protection of fisheries, and the ensuring of pure water for domestic purposes: other Acts authorized the making of by-laws or rules, but operated only in the district of the authority by which the by-laws or rules were made. It was further pointed out that there was no general legislation preserving the rights of the *public* to the enjoyment of waters free from pollution, or general legislation providing adequately for the reduction of pollution by encouraging diversion of trade wastes to sewers of local authorities. The Waters Pollution Act, 1953, supplies this general legislation.

The Act makes provision for the establishment of an Advisory Council, to consist of representatives of the

Departments of State and local authorities mainly concerned. Section 3 reads as follows :

3. (1) There is hereby established a Council to be called the Pollution Advisory Council.

(2) The Council shall consist of—

(*a*) The Secretary for Marine ;

(*b*) Ten other members, to be appointed by the Governor-General on the recommendation of the Minister, of whom—

(i) One shall be an officer of the Department of Agriculture :

(ii) One shall be an officer of the Department of Health :

(iii) One shall be an officer of the Ministry of Works :

(iv) One shall be an officer of the Department of Scientific and Industrial Research :

(v) Four shall be appointed to represent local authorities :

(vi) Two shall be appointed to represent industry.

(3) Of the members appointed to represent local authorities, one shall be nominated by the New Zealand Counties Association, one shall be nominated by the Municipal Association of New Zealand Incorporated, one shall be nominated by the Harbours Association of New Zealand, and one shall be nominated by such Drainage Boards as the Minister may from time to time specify in that behalf by notice in the *Gazette*.

(4) Of the members appointed to represent industry, one shall be nominated by the New Zealand Dairy Board and one shall be nominated by the New Zealand Manufacturers' Federation (Incorporated).

The powers and functions of this Advisory Council are set out in s. 14, which reads :

14. (1) The principal functions of the Council shall be to inquire into and make reports and recommendations to the Minister on such ways of preventing or reducing the pollution of waters and of co-ordinating the functions of persons or bodies charged with the duty of preventing or reducing the pollution of waters as from time to time appear practicable, whether suggested by the Council or referred to it by the Minister.

(2) Without limiting the generality of subsection one of this section, the Council may—

(*a*) Carry out surveys and investigations for the purpose of ascertaining the causes, nature, and extent of the pollution of waters :

(*b*) Organize and encourage research into ways and means of preventing or reducing the pollution of waters :

(*c*) Compile and publish information on ways and means of preventing or reducing the pollution of waters :

(*d*) Compile and publish codes setting forth requirements for the treatment of trade wastes or other pollutants before being discharged into waters and encourage voluntary compliance with any such codes :

(*e*) Compile model by-laws for local authorities in respect of the treatment and disposal of trade wastes :

(*f*) Investigate conflicts of interests which have arisen or may arise between different authorities, public bodies, industries, classes of the community, or persons in respect of the pollution of waters and recommend the resolution of any such conflicts :

(*g*) Advise Government Departments, local authorities, and public bodies for the purpose of co-ordinating the policies and activities of any such bodies in respect of the prevention or reduction of the pollution of waters.

(3) The Council shall have all such other powers as are conferred on it by this Act or by regulations under this Act and all powers and authorities necessary, conducive, or incidental to the performance of its powers and functions.

As will be observed from a perusal of that section, the powers and functions of the Advisory Council are largely of an advisory nature, but subs. (3) should be particularly noted :

(3) The Council shall have all such other powers as are conferred on it by this Act or by regulations under this Act and all powers and authorities necessary, conducive, or incidental to the performance of its powers and functions.

This subsection appears sufficiently wide to provide a proper basis on which to frame the regulations and by-laws which the Act contemplates for the purposes of carrying out the main purposes of the Act.

The manner in which it is proposed to prevent the pollution of " waters " is set out in s. 15 (1), which reads :

15. (1) Subject to the provisions of this Act and of any regulations made thereunder, every person commits an offence against this Act who causes or knowingly permits to enter any waters—

(*a*) Any pollutant of a poisonous or noxious nature ; or

(*b*) Any refuse, litter, debris, or other matter, whether solid or liquid, which either directly or in combination with similar acts (whether his own or another's) endangers the lives, safety, health, property, or comfort of the public or which obstructs the public in the exercise or enjoyment of any right common to the members thereof.

The wide definition of " pollutant " has already been pointed out in the course of this article. As regards para. (*a*), however, the Act is not yet operative ; for subs. (4) of the section provides that no prosecution may be commenced under the section in respect of the entry into waters of any matter to which para. (*a*) of subs. (1) of the section relates, unless regulations under the Act are in force prescribing standards for determining when matter is to be treated as poisonous or noxious for the purposes of the Act. Up to the date of this article, no Regulations appear to have been made under the Waters Pollution Act, 1953.

Section 15 (3) mitigates to a limited extent the effect of subs. (1) thereof, and it reads :—

(3) Notwithstanding the provisions of subsection one of this section,—

(*a*) The discharge of any matter from a sewer or a sewage disposal works under the control of a local authority ; or

(*b*) The discharge from any trade premises, during a period of two years from the commencement of this Act or such further period as may be prescribed in that behalf, either generally or in respect of specified classes of trade premises, by notice by the Minister published in the *Gazette*, of any trade wastes of substantially the same nature and volume as trade wastes that are being discharged from those trade premises at the commencement of this Act,—

shall not constitute an offence under the said subsection.

" Sewer," " Trade premises," and " Trade wastes " are defined as follows :

" Sewer " includes a public drain under the control of a local authority :

" Trade premises " means any premises used or intended to be used for carrying on any trade or industry ; and includes any land or premises wholly or mainly used (whether for profit or not) for agricultural or horticultural purposes :

" Trade wastes " means any liquid, with or without matter in suspension or solution therein, which is or may be discharged from trade premises in the course of any trade or industrial process or operation or in the course of any activity or operation of a like nature ; but does not include condensing water, surface water, or domestic sewage.

Section 19 authorizes local authorities to make by-laws dealing with the reception and disposal of trade wastes. Section 26 provides that the discharge of domestic sewage into a sewer in accordance with by-laws of a local authority and the discharge of trade wastes in accordance with trade wastes by-laws shall not constitute a breach of the Act or the regulations made thereunder. Local authorities themselves, however, are not absolved from liability in respect of the discharge of pollutants from their sewers in contravention of regulations.

Common-law rights are expressly preserved by s. 30 (3), which provides that nothing in the Act or in any regulations or by-laws under the Act shall affect any right which any person may have under any rule of law to restrict or prevent or obtain damages in respect of the pollution of waters. And so what we have read in our student days from *Salmond on Torts* still stands.

Following the modern tendency, it is expressly stated that the Act shall bind the Crown.

Very severe penalties are prescribed for offences against the Act, and this is the method adopted by the Legislature to carry out its intention.

The following form of easement is very common in dairy districts of the Dominion. The dairy industry is one of the most, if not the most, important industry in New Zealand, and the satisfactory disposal of waste products from a dairy factory is often a serious and most pressing problem. It remains to be seen, if the practical efficacy of such a precedent will be considerably lessened by operation of the Waters Pollution Act, 1953.

PRECEDENT.

MEMORANDUM OF TRANSFER: GRANT TO DISCHARGE WASTE PRODUCTS INTO A STREAM.

WHEREAS A.B. of is registered of an estate in fee simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed hereon in ALL THAT piece of land situated containing being (hereinafter called "the land firstly hereinbefore described") AND WHEREAS THE DAIRY COMPANY LIMITED (hereinafter called "the Company") is registered as proprietor of an estate in fee simple subject similarly as aforesaid in ALL THAT piece of land situated as aforesaid containing being (hereinafter called "the land secondly hereinbefore described") AND WHEREAS the Company has erected a Dairy Factory on the said piece of land secondly hereinbefore described the waste water skimmed milk whey and other waste products whereof are discharged by the Company into the Stream which flows through the piece of land firstly hereinbefore described NOW THESE PRESENTS WITNESS that in consideration of the sum of NINETY POUNDS paid by the Company to the said A.B. (the receipt whereof is hereby acknowledged) the said A.B. hereby accepts the same in full satisfaction and accord of all damage which he may have suffered by reason of the pollution of the said stream up to the present time AND THESE PRESENTS ALSO WITNESS that for the consideration aforesaid the said A.B. doth (but to the extent only of his power in that behalf) hereby transfer and grant unto the Company and its assigns as and in the nature of an easement appurtenant to the piece of land secondly hereinbefore described FULL AND FREE LIBERTY AND LICENCE so long as the Company its successors or assigns shall maintain and operate a Dairy Factory on the land secondly hereinbefore described at all times hereafter to discharge waste water whey skimmed milk and other waste products from any dairy factory for the time being erected on the said piece of land into the Stream that is to say if and in case the Company shall cease to use the factory for the time being on the land secondly hereinbefore described as a dairy factory and to keep the same open and running during the usual portion or portions of each year then the said right liberty and licence shall determine and the Company shall whenever requested so to do and at its expense re-transfer release and surrender the premises unto the owner or owners for the time being of the said land firstly hereinbefore described AND IT IS HEREBY DECLARED that (subject to the provisions hereof) the burden of the licence hereby granted shall be binding on the said A.B. his heirs executors administrators and assigns the registered proprietor for the time being of the piece of land firstly hereinbefore described and that (subject to the provisions hereof) the benefit of the Licence and easements hereby granted shall pass to the Company and its assigns the registered proprietors for the time being of the piece of land secondly hereinbefore described.

[*Insert here any special covenants.*]

IN WITNESS WHEREOF

WIGS THROUGH THE AGES.

The wig has a wonderful past. Specimens have been recovered from mummies of a very ancient date. Hannibal, when doubtful of his allies in northern Italy, went amongst them disguised with perukes "suited to every age." But those were the ancestors of the wig which appertains to the hairdressing and theatrical professions, and not of the symbol of the law, which has a more recent origin.

The modern judicial and legal wig developed from the peruke and periwig of the reign of Charles II. Gossiping Samuel Pepys relates that he substituted for his own hair a periwig which cost him three pounds, and on going to church found that it "did not prove so strange as he had feared it would." Many have since agreed with his opinion for, despite its apparent thickness, the horsehair wig, if properly fitted and ventilated, is by no means uncomfortable.

WIGS IN GENERAL.

The real initiator of the full-bottomed wig was Louis XIV, but it was also favoured by Queen Anne. Old prints reveal the flowing character of the coverings of the eighteenth century. Addison mentions a man "who held up his head with the most insipid serenity, and stroked the sides of a long wig that reached down to his middle." But that was not the only form of wig worn then. The price-lists of the peruke-makers included "full bottom tyes," "full bobs," "minister's bobs," "airey levants," "qu perukes," and "bagg wigs."

Throughout the reigns of the first two Georges the wig was a common article of dress, and it was not until George III was on the throne that it fell into disfavour. In the middle of the eighteenth century there were over 30 different names for wigs in addition to those mentioned, including:—artichoke, bag, barrister, bishop, brush, bush or buzz, buckle, busby, chain, chancellor, corded wolf's paw, Count Saxe's mode, crutch, cut bob, detached buckle, Dalmahoy (a bog-wig worn by tradesmen), drop, Dutch, full, half-natural, Jansenist bob, judge's ladder, long bob, Louis, pigeon's wing, rhinoceros, rose, scratch, she-dragon, small back, spinach seed, staircase, Welsh, and the wild boar's back.

The "judge's ladder" was a reference to the symmetrical rows of curls on the judge's full-bottomed wig; and the "bag-wig" was so called because the lower part was enclosed in a silken bag which hung upon the shoulders.

On 11th February, 1765, a petition was presented to George III by the master peruke-makers of London, setting forth the distresses of themselves and an incredible number of other persons dependent on them, from the almost universal decline of their trade in consequence of gentlemen so generally beginning to show their own hair. They said that what business remained in their profession was nearly altogether taken from them by French artisans. They had a further ground of complaint that they were obliged to work on Sundays,

By courtesy of the *Law Times* (London).

which they would rather have spent in their religious duties "learning to fear God and honour the king." Under these circumstances the distressed perukemakers prayed his majesty for means of relief. The king returned a gracious answer. But the general public, albeit but little converted from the old views concerning the need of protection to industry, had the sense to see the ludicrous side of the petition, and someone quickly delighted them by publishing a petition from the "Body Carpenters," imploring his majesty to wear a wooden leg, and to enjoin all his servants to appear in the royal presence with the same graceful decoration.

Forensic and Judicial Wigs.

First the common people had abandoned the wig, then the military officers, and finally clergymen, leaving it the sole possession of the legal profession. Archbishop Sumner was the last cleric to wear a wig in public, at the marriage of the Princess Royal, daughter of Queen Victoria, in 1858.

As the use of the wig became more limited, those who retained it appear to have become jealous of claimants to the distinction, for some of the older judges objected to the barristers of their time appearing in a head-dress which they declared, oblivious of their own appearances, to be "coxcombical." In modern times, however, the tendency is in the direction of insisting upon the use of both wig and gown, and he would be a bold advocate who sought to plead in every-day attire without sufficient excuse. Only with a Judge's sanction may a barrister plead bareheaded.

A Judge of the High Court has two wigs in ordinary use—the full-bottomed, or full dress, and the tye, or undress. The former completely hides the head and hangs down in front on the breast. Its material should be white horsehair, laboriously cleaned and curled and woven with silk threads on a gauze foundation. The occasions when this is worn are strictly defined—the rules on this point are so abstruse that some Judges are dependent for the due observance on the vigilance of their clerks. On the first day of Michaelmas term, which follows the Long Vacation, the full-bottomed wig is in evidence, while the tye-wig does duty at the opening of the Hilary, Easter, and Trinity terms.

When the Judges meet at the Old Bailey, when they dine with the Lord Mayor of London, when they attend levées and similar functions, when they attend the House of Lords, or at St. Paul's Cathedral, they wear their flowing wigs. This is also the head-dress worn when opening an Assize Commission and charging a Grand Jury; but, the moment when these two last functions are fulfilled, their Lordships retire and reappear in tye-wigs. At State functions, such as the Home Secretary's dinner, and at certain semi-State functions no wig whatever is worn, possibly because its natural accompaniment, the robe, is not worn.

Besides the Lord Chancellor, the Speaker of the House of Commons and the Judges of the High Court, the only persons entitled to wear a full-bottomed wig are Queen's Counsel. On their first public professional appearance after "taking silk"—namely, when sworn in before the Master of the Rolls they figure in this new possession. They also wear it at the Lord Chancellor's breakfast and reception which precede the opening of Michaelmas sittings; but when pleading their invariable headgear is the frizzed wig, similar in every respect to that worn by the members of the junior bar.

A uniform practice regulates the making of the frizzed wig, in that the curls are ranged horizontally round it and two loops hang in the neck. But different makers have their own ideas as to how many curls there should be, and the number varies from 27 to 32. Most wigs have a perpendicular curl at the root of the loop, but many are without this artistic variation.

Serjeants-at-Law.

Until about ninety years ago a "coif" was worn by the serjeant-at-law. A peculiar, and not very honourable, origin is attached to the coif, which consisted of a small black patch worn on the crown of the wig. Its ancestry dates from the time when the clergy, by ecclesiastical veto, were forbidden to engage in any secular occupation. Deprived by this rule of the emoluments from engagements in courts of law, then quite common, a certain number defied their superiors and continued to act, seeking disguise in a small white cap which hid the tonsure or shaven part of the skull. Later the colour was changed to black; and when the clerical advocate disappeared in favour of his legitimate successor, the serjeant-at-law, who held relative rank professionally and adopted the wig, the black cap gave place to a small black patch, which remained the distinctive mark of the serjeant until he disappeared towards the last quarter of the nineteenth century.

It was never very easy to decide whether the serjeant-at-law or the Queen's Counsel held prior rank in the profession. Until Lord Cockburn, C.J., granted them the unrestrained privilege, the serjeants were always relegated to the back rows of counsel's seats, amongst the junior barristers, unless they held a patent of precedence. Thus the Queen's Counsel and the serjeant holding a patent ranked equally, but the serjeant without a patent ranked as a connecting link between Queen's Counsel and the junior bar. So that a newly-appointed Queen's Counsel came before an unpatented serjeant, however great his experience. Socially the serjeant undoubtedly had the advantage, for he held a distinct rank apart from his profession, which could not be claimed by the Queen's Counsel.

In one other respect the serjeant also claimed a distinction which may or may not be considered of value. Besides the black silk gown which was common to them both, he possessed a scarlet gown for use at Guildhall banquets and the "churching" of the Judges in Trinity term, and a purple gown for saints' days. In and out of term, the Queen's Counsel was confined to black.

The High Cost of Wigs.

During the eighteenth century, wigs, whether legal or otherwise, were expensive articles, often costing as much as fifty guineas. Wigs then were made exclusively of human hair, the great demand for which far exceeded the supply and helped to make the price almost prohibitive.

The high cost was not the only objectionable feature of the eighteenth-century wig. In the first place, the wigs were extremely heavy, and the original weight was increased by the enormous quantity of pomatum that had to be applied constantly in order to give the artistically-made curls and ringlets the proper consistency. In turn, the pomatum was covered by a layer of white powder; consequently cleanliness was out of the question. At least once a week the periwig-maker had to overhaul the wigs of his clients to keep the elaborate structures well shaped and in decent form.

In spite of all these drawbacks the legal wig might have retained its original form if Pitt had not placed a very high duty on hair-powder, which increased its cost. The periwig-makers were alarmed. The Judges and, even more vehemently, the barristers, loudly protested against the new tax, without success. This impost provoked wigmaker Humphry Ravenscroft to develop his invention of a legal wig in which the curls could be fixed by some mechanical means, which would enable the wearer to be independent of the renovating services of the peruke-maker.

In 1822, Ravenscroft took out a patent for "making a forensic wig, the curls whereof are constructed on a principle to supersede the necessity for curling, frizzing or using hard pomatum, and for forming the curls in a way not to be uncurled; and also for the tails of the wig not to require tying in dressing; and, further, the impossibility of any person untying them". This patent contained the principle of the "fixed" wig and caught on immediately. Humphry was the grandson of Thomas Ravenscroft who supplied Hogarth with the wigs portrayed in his "The Five Orders of the Periwigs." A few years later Humphry introduced horsehair instead of human hair as the materials for his wigs, and the old powdered wig received its deathblow.

There are seldom more than three occasions when a lawyer buys a wig—when he is called to the bar, when he takes silk, and when he is raised to the bench. The Judge's wig is extremely light. The full-bottomed wig, in spite of its long flaps and multitudinous ringlets, weighs no more than five ounces, while the average weight of a barrister's wig is only two and a quarter ounces.

When a new Queen's Counsel takes silk he appears first in all the bravery of new silk gown, full-bottomed wig, breeches and stockings with low shoes, and he is seated within the bar, at the invitation of a Judge. "Do you move, Mr. ——— ?" queries the Judge, and the new Q.C. rises, and bows in turn to the bench, to the senior bar and to the junior bar, who return the bow, standing. The new Q.C. then rises and goes to the next Court for the same formalities. For this ceremony he has been wearing the full court dress; but before he is permitted to address the Court he must cast off his long wig, don the short curls of the barrister, and cover his stockinged legs with trousers.

Legal wigs have been described as "grotesque ornaments, fit only for African chiefs," and barristers seem to have the same horror of a smart new wig as the young "blood" at a university has of cap and gown that are unmutilated. In both cases it is probably the fear of being mistaken for newcomers that causes this attitude.

NEW ZEALAND LAW SOCIETY.

Annual Meeting.

The Annual Meeting of the Council of the New Zealand Law Society was held on Friday, April 1, 1955.

The following Societies were represented: Auckland, Messrs. D. L. Bone (proxy), B. C. Haggitt, S. D. E. Weir and H. R. A. Vialoux; Canterbury, Messrs. T. A. Gresson and A. L. Haslam; Gisborne, Mr. R. E. Gambrill; Hamilton, Mr. F. C. Henry; Hawkes Bay, Mr. H. W. Dowling; Marlborough, Mr. A. G. Wicks; Nelson, Mr. J. E. Fitchett; Otago, Messrs. J. R. M. Lemon and F. M. Hanan; Southland, Mr. E. H. J. Preston; Taranaki, Mr. R. O. R. Clarke; Wanganui, Mr. A. A. Barton; Westland, Mr. A. M. Jamieson; and Wellington, Messrs. A. B. Buxton, R. L. A. Cresswell (proxy), E. T. E. Hogg, I. H. Macarthur.

The President (Mr. T. P. Cleary) occupied the Chair.

The Treasurer (Mr. D. Perry) was also present.

The President welcomed members who were attending the Council Meeting for the first time.

Apologies for absence were received from Messrs. H. J. Butler and R. Hardie Boys.

Mr. Justice Henry.—The following resolution was carried:

"That this Council tenders its warmest congratulations to the Hon. Mr. Justice Henry upon his elevation to the Bench of the Supreme Court and wishes him much happiness in the high office to which he has been called.

The Council records its appreciation of the services rendered by Mr. Henry whilst a member of the Council of the New Zealand Law Society."

Sir George Finlay.—The following resolution was carried:

"The Council and members of the New Zealand Law Society desire to express their congratulations to Sir George Finlay on the bestowal upon him of the honour of Knighthood."

Sir William Cunningham.—The following resolution was carried:

"The Council and members of the New Zealand Law Society desire to express their congratulations to Sir William Cunningham (former President of the Society) on the bestowal upon him of the honour of Knighthood."

The Hon. the Attorney-General.—The following resolution was carried:

"The Council of the New Zealand Law Society begs respectfully to tender to the Hon. J. R. Marshall its congratulations and best wishes upon his appointment as Attorney-General."

Mr. Justice Hay.—The Council expressed its deep regret at the retirement of Mr. Justice Hay through ill health and it was resolved that the President and Secretary, who were visiting the Judge the following day, should convey the expression of the Council to the Judge and also the good wishes not only of the Council but of all members of the Society.

Election of Officers.—President: Mr. T. P. Cleary was duly re-elected.

Mr. Cleary thanked the members of the Council, the Standing Committee and the Vice-Presidents for their support during his term of office.

Vice-Presidents: Mr. A. B. Buxton and Dr. A. L. Haslam were duly re-elected.

Hon. Treasurer: Mr. D. Perry, the only nominee, was duly re-elected.

Management Committee of Solicitors' Fidelity Guarantee Fund: Sir Alexander Johnstone, Q.C., Messrs. D. Perry, G. C. Phillips, D. R. Richmond, and A. T. Young were elected as members of the Management Committee. (Mr. Hogg, on behalf of the Wellington Society, asked that in the new Bill the number of members of the Management Committee be increased to "six" instead of "five." The proposal was approved.)

Audit Committee: Messrs. J. R. E. Bennett and F. B. Anyon were duly re-elected.

New Zealand Council of Law Reporting: Mr. G. T. Baylee was reappointed for a further term of four years, expiring the first Monday in March, 1959.

Disciplinary Committee: Messrs. J. B. Johnston and H. R. Biss, Sir William Cunningham, and Messrs. M. R. Grant, A. N. Haggitt, L. P. Leary, Q.C., W. E. Leicester, and A. C. Perry were duly re-appointed.

Library Committee: Messrs. F. C. Spratt and I. H. Macarthur were duly re-elected.

Conveyancing Committee: Messrs. J. R. E. Bennett, S. J. Castle, and G. C. Phillips were duly re-elected. The Council expressed appreciation of the services given by Mr. Buxton on this Committee for many years.

Costs Committee: Messrs. E. T. E. Hogg, D. R. Richmond, and D. W. Virtue were duly re-elected.

Finance Committee: Messrs. D. Perry, G. C. Phillips, D. R. Richmond, and A. T. Young were duly re-elected.

Legal Education: Messrs. G. G. Briggs, H. J. Butler, N. Izard, A. C. Perry, and H. R. C. Wild were elected. The Council expressed appreciation of the services given by Mr. A. M. Cousins on this Committee.

Law Revision Committee: Sir Wilfrid Sim, Q.C., and Mr. H. J. Butler were duly reappointed; but in the absence of Mr. Butler, Mr. C. P. Richmond was appointed in his place, and, in the event of the possible absence of Sir Wilfrid Sim, Mr. F. C. Spratt was appointed to attend the meetings of the Committee.

Post-War Aid Committee: It was decided that as there was apparently no further work, this Committee should now retire.

Separate Court of Appeal.—The following report was received:

"The President and the members of the Standing Committee and the Secretary waited on the Hon. the Attorney-General on Thursday, 17th March, 1954, at noon.

Being the first occasion in which the Committee had met the Attorney-General in his official capacity, the President took the opportunity of expressing the congratulations and best wishes of the Society and the assurance that the relationship between the Minister and the Society would be as harmonious as it had always been with his predecessors in office.

The President informed the Attorney-General that the question of the constitution of a Separate Court of Appeal had been one which had been under the careful consideration of the Society for a number of years.

It was not intended, he said, to refer to the arguments for and against the proposal, these being already formulated by the Society and submitted for the consideration of the Rt. Hon. the Prime Minister, at which discussion Mr. Marshall had attended in his then capacity of Acting Attorney-General.

The former Attorney-General had undertaken to consider the Society's representations, but had shortly afterwards relinquished office.

The President did stress the fact, however, that in the interest of the administration of justice and for the public benefit the matter called for a decision. He submitted that if further information or assistance was required the Society would be most happy to be of service.

The President concluded by informing the Attorney-General that the proposal had the unanimous support of the District Societies and of those who engaged in Court of Appeal work.

The Attorney-General assured the Committee that the proposal would be fully considered and a decision given this year. (He was unable, however, to promise that effecting legislation could be forthcoming this year.)"

Statements of Accused Persons to the Police.—This matter had been left to the Standing Committee to discuss with the Minister in Charge of Police. As the Committee felt that it was not a matter which need wait the return of the Prime Minister, the question was taken up with the Police Commission by Mr. Hardie Boys on behalf of the Committee. Following Mr. Hardie Boys's representations to the Commission, the following letter had been received from the Chairman of the Commission:

"As arranged, Mr. R. Hardie Boys, representing the New Zealand Law Society, met the members of the Police Commission on 15th March, 1955.

There was a discussion on the question of an accused's solicitor being permitted to peruse his client's statements to enable advice to be given regarding plea. The Police Commission now desires to record that it is the police practice to make statements available for the foregoing purpose after inquiries regarding the offence have been completed.

It is the intention of the Police Commission to have this subject brought up for discussion at the next conference of commissioned officers of the Force so that there will be uniformity in all districts when dealing with the matter."

A lengthy discussion took place in the course of which Mr. Dowling suggested that the solicitor acting for accused should have the right to see the statement immediately without waiting for the police to make further enquiries.

It was resolved that in the letter of acknowledgment to the Chairman of the Commission the Society express the hope that he would arrange that the statements be made available to the solicitor at the earliest opportunity.

International Bar Association: Monaco Conference.—Mr. G. C. Phillips, who represented the New Zealand Law Society at the Conference of the Association held at Monaco in July, 1954, was present by invitation and gave a brief outline of the constitution of the Association and referred to the subjects on which Papers had been read, the most interesting of all being that which dealt with Legal Aid, the details of the English scheme being of particular interest.

The most outstanding feature of the Conference, Mr. Phillips said, was the friendship shown and the Conference had proved a delightful experience.

A full report for record purposes was furnished by Mr. Phillips.

Transport Act, 1949.—The Wanganui Society wrote as follows:

1st March, 1955.

"I am directed to request you to place before the Council an aspect of the Transport Act, 1949, which appears to require attention.

It appears that the Transport Licensing Authority has no power to issue subpoenas. Applications coming before an Authority can involve business of a very substantial value, in many cases far in excess of a Magistrate's jurisdiction. Those who practise before the Authorities know that there is often considerable difficulty in securing the attendance of witness and the power of compelling attendances should be available.

The matter is of particular importance where the evidence of Government officials is required, as these persons usually take the attitude that they cannot give evidence voluntarily. This actually happened in a recent case in the Wanganui district.

It may be pointed out that under the Bankruptcy Act the assignee has the power to summon witnesses (Section 92) and under the Commissions of Inquiry Act, 1908, Section 4, and every Commission the power and status of a Magistrate in respect of summoning witnesses.

In view of the extent and importance of issues involved in applications coming before the Authorities we urge the Council to make representations to the Government with a view to having the necessary amendments made to the Transport Act."

It was resolved that representations be made on the lines of the Wanganui letter.

OBITUARY.

Mr. W. D. Campbell (Timaru).

Known throughout Canterbury for more than fifty years, first for his association with journalism and later in the legal profession, ultimately becoming Crown Solicitor in the Timaru district, a position which he relinquished last year, Mr. William David Campbell, O.B.E., M.A., LL.B., has died in his 80th year.

Mr. Campbell was born in Chertsey in 1876, and he attended the Chertsey School until he went on to the Christchurch Boys' High School. He graduated M.A. at Canterbury University College in 1898.

Between 1898 and 1899 he was on the teaching staff of the Brisbane Grammar School. In 1900, he accompanied the Second New Zealand Contingent to the Boer War, and he was the first official New Zealand war correspondent to undertake such an assignment.

Continuing his journalistic career, Mr. Campbell served on the staff of the *Lyttelton Times*, the *Taranaki Herald*, and the *Press*, Christchurch, and was Editor of the *Timaru Post*.

In 1904 he was appointed Editor of the *Timaru Herald*. During his service in journalism he began to study law, and in 1912 took his LL.B. degree at Canterbury University College. In 1909, he retired from journalism to join the legal profession as a member of the firm of Raymond, Raymond, and Campbell; and on his appointment as Crown Solicitor, established his own practice. Later he was joined by Mr. G. J. Kelly, under the title of Campbell and Kelly, which, since then, has been joined by Mr. O. Stevens, of Dunedin, under the title of Campbell, Kelly, and Stevens.

Until recently Mr. Campbell was an active partner, but ill-health caused him to relinquish the office of Crown Solicitor.

Mr. Campbell unsuccessfully contested the Timaru seat as a Reform Party candidate in 1908. For some years Mr. Campbell served on the board of governors of the Timaru High Schools, and he was one of the founders of the South Canterbury branch of the South African War Veterans' Association. He was patron and honorary solicitor.

Mr. Campbell was a charter member of the Timaru Rotary Club when it was formed in 1927. He was the Club's fourth president.

In the 1955 New Year Honours, Mr. Campbell was created an officer of the Most Excellent Order of the British Empire (O.B.E.)

Mr. Campbell is survived by his widow, Mrs. Ethel Campbell, and three daughters.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Portraits and Photos.—On the presentation at the recent Dink Reunion to the Chief Justice (Major-General Sir Harold Barrowclough) of a portrait from his former comrades, it was stated that the General had started his military life with the Rifle Brigade as a lance-corporal and finished four years later as a Lieutenant-Colonel. Amongst the many achievements of the Brigade during its short history in World War I was its record of being the first unit to go into action with tanks in 1916, and of being the last to use scaling ladders to attack a walled town at Flers in 1918. In both these actions the Chief Justice took a prominent part, but was less embarrassed than at the Reunion itself when (if the story be other than apochryphal) a man whose name was not Casey but who claimed to be a friend of Casey approached him, and after explaining that he was one of the original Rangiotu Dinks, said it would be a great honour if his friend could photograph him in company with the General. To this suggestion, the Chief-Justice—a Dink for the day—readily agreed. The photo having been taken, Casey's friend remarked: "I'll treasure this photo all my life, and if on some future occasion we should meet in less happy circumstances I shall be very glad to show it to your Honour".

Time Limitations.—To go from the sublime to the at times slightly ridiculous—viz., from the Chief Justice to our local office-boy—the following conversation is alleged to have resulted from an application by this junior *rara avis* to his indulgent employer for the next afternoon off:

I.E. "What are the grounds for your request?"
O.B. "My grandfather, Sir, is getting married."
I.E. "Good Lord, how old is your grandfather?"
O.B. "Eighty-five, Sir."
I.E. "Good Lord, why does he want to get married?"
O.B. "He doesn't *want* to, Sir, : he *has* to."

Troubles in Smoke.—The iconoclastic statement to the Court the other day of a Wellington motor-miscreant was to the effect that, such was the burden and worry of keeping municipal meters from expiring each hour, he preferred to risk prosecution every now and again from parking too long in designated 60-minute areas. It reminded Scriblex of a recent defendant brought before the Magistrates' Court at Northampton upon a summons charging him with allowing his chimney to catch fire. He did not appear but wrote to the Court as follows:—

> "I was burning a lot of old summonses on the night in question, and I am afraid I put too many on the fire at once. Would you mind putting the fine on the bill, as I will be up on the 30th with four other summonses, and no doubt that will be an expensive day for me. I really think I will try to get a yearly account with you."

Something of the defendant's pathetic plight must have tugged at the Magistrate's heart since he imposed a fine of 7s. 6d. only.

The Tribulations of Edmund Curl.—In *R* v. *Curl*, decided in 1727, the defendant, Edmund Curl, was found guilty of publishing an obscene libel—namely, *Venus in The Cloister or The Nun in Her Smock*. Its author, as a literary man, is chiefly remembered today as a figure in Pope's *Dunciad*, but his case has some interesting and unusual legal features. It is contained in three reports—2 Strange 788; 17 State Trials 153 and 1 Barnardiston (K.B.) 29—and none of them says why he was prosecuted or convicted and in what manner the Court defined "obscene": indeed, almost 150 years were to pass before the classic *obiter dictum* of Chief Justice Cockburn in *R.* v. *Hecklin*, (1868) L.R. 3 Q.B. 360. ("And I think that the test of obscenity is this, whether the tendency of the matter charged as obscenity as to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.") Re-affirmed only last year by the Court of Criminal Appeal in *R.* v. *Reiter*, [1954] 1 All E.R.741. In the first of the *Curl* reports (2 Strange 788) it is observed that "the defendant was afterwards set in the pillory, as he well deserved"—somewhat odd words as the reporter was also Curl's counsel. The second reports (17 State Trials 153) tell us that while Curl was in the pillory at Charing Cross he was not "pelted or used ill", for, being an "awful, cunning though wicked fellow" he managed to convince the mob that "he stood there for vindicating the memory of Queen Anne . . . and when he was taken down out of the pillory, the mob carried him off, as it were in triumph, to a neighbouring tavern" where presumably he did the right thing by all and sundry. Serjeant-at-Law Barnardiston, the reporter of the third-mentioned reports, merely infers that the book is immoral and that "morality is the fundamental part of religion, and therefore whatever strikes against that must for the same reason be an offence against the common law". Publication of a cheap edition of the proceedings in the House of Lords against the Earl of Winton brought Curl before that House on a breach of privilege, and he was reprimanded on his knees by the Lord Chancellor after three months' loss of liberty—a turbulent predecessor of what sections of the Australian Press regard more recently as the Canberra journalistic martyrs.

The Woes of Mrs. Iwi.—Is it a libel to say of a woman Justice of the Peace that she is lacking in judicial sense? Mrs. Esther Iwi of Golders Green, London, thought so and sued one of her fellow Justices, Edward Montesole, in respect of nine alleged libels published to the then Lord Chancellor, Lord Jowitt, to whom she had herself written (according to defence counsel) about a hundred letters concerning her grievances. One of these concerned a defended motoring case in which the presiding Magistrate, without any reference to her, had announced that the Bench found the case proved and the defendant guilty without wasting the time of the Court in hearing defence. Another concerned a quarterly meeting, when, at the tea-break, one of her colleagues had turned to the Clerk and said: "I have fixed the target for the fines which I am going to collect for you to-day at £60." He had a list in his hand; and he said: "So far I have collected £37 10s., and I am going to see what I can do about the rest after tea." Following her letter to the Home Secretary about this economic incident, the Mayor of Hendon had made a speech in which he had said that she was unfit to be a Magistrate and should have the decency to resign. During the case, she raised at least one interesting point. Her husband (Edward P. Iwi), was solicitor on the record for the plaintiff; and she sought a direction from the Court as to whether he was entitled to go home at nights during the hearing as she considered while the trial proceeded a solicitor should not speak to a witness. This point was decided in her favour, but unhappily the case was not, despite her quotation to the jury of a statement by Lord Atkin that "justice is not a cloistered virtue".

THEIR LORDSHIPS CONSIDER.

By Colonus.

Stoppage in transitu : " The test laid down by Lord Ellenborough in the case of *Dixon* v. *Baldwin*, (1804) 5 East 175; 102 E.R. 1036, appears clearly to cover such a case as this. Alluding to the case of *Hunter* v. *Beal* (cited in *Ellis* v. *Hunt*, (1789) 3 Term R., 464, 467 ; 100 E.R. 679) in which it was said that ' the goods must come to the *corporal touch of the vendees*, in order to oust the right of stopping in transitu Lord Ellenborough says that this was ' a *figurative* expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal as contra-distinguished from a delivery to a person virtually acting as a carrier or means of conveyance to or on the account of the principal in a mere course of transit towards him. ' . . . The law appears to their Lordships to be very clearly and accurately laid down by the Master of the Rolls in the case of *Bethell* v. *Clark*, (1880) 20 Q.B.D. 615. He says, ' When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu and may be stopped. ' " Lord Herschell, in *Lyons* v. *Hoffnung*, (1890) 15 App. Cas. 391, 393 (P.C.).

Foreign Corporation, Existence of : " English Courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. Thus, in *Henriques* v. *Dutch West India Co.*, (1728) 2 Ld. Raym. 1532, 1535, the Dutch company were permitted to sue in the King's Bench on evidence being given ' of the proper instruments whereby by the law of Holland they were effectually created a corporation there. ' But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact. " Lord Wright, in *Lazard Brothers and Co.* v. *Midland Bank Ltd.* [1933] A.C. 289, 297.

Foreign Law, Proof of : " The question, therefore, is whether by Soviet law the Industrial Bank was at the date of the issue of the writ in this action . . . an existing juristic person. What the Russian Soviet law is in that respect is a question of fact, of which the English Court cannot take judicial cognizance, even though the foreign law has already been proved before it in another case. The recent enactment, s. 102 of the Supreme Court of Judicature (Consolidation) Act, 1925 [U.K.], which provides that this question of fact must be decided by the Judge alone instead of by the jury, if there be a jury, expressly treats the question as depending on the evidence given with respect to the foreign law. No earlier decision of the Court can relieve the Judge of the duty of deciding the question on the actual evidence given in the particular case. On what evidence of the foreign law the Court can act has been often discussed. The evidence it is clear must be that of qualified experts in the foreign law. If the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication : so in effect it was laid down by Coleridge, J., in *Baron De Bode's Case*, (1844) 8 Q.B. 208, 266 ; 115 E.R. 854, 875 : in the *Sussex Peerage Case*, (1844) 11 Cl. & F. '85, 116; 8 E.R. 1034, 1046, Lord Denman stated his opinion to the same effect as he had done in *Baron De Bode's Case* (*supra*). He said that if there must be a conflict of evidence of the experts ' you (the Judge) must decide as well as you can on the conflicting testimony, but you must take the evidence from the witnesses.' Hence the Court is not entitled to construe a foreign code itself : it has not ' organs to know and to deal with the text of that law ' (as was said by Lord Brougham in the *Sussex Peerage Case* (*supra*, 115 ; 1034)). The text of the foreign law if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony " Lord Wright in *Lazard Brothers & Co.* v. *Midland Bank Ltd.*, [1933] A.C. 289, 297.

" *Underwrite* " : " When the matter was before the Judge below, the parties agreed that for the purpose of construing the letters of April 15, 1929, the word ' underwrite ' should be taken to mean ' to agree to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public'. This is a definition which seems to express accurately the meaning of the word ' underwrite ' in the sense in which it is commonly used." Lord Tomlin, delivering the judgment of the Judicial Committee in *Australian Investment Trust, Ltd.* v. *Strand and Pitt Street Properties, Ltd.*, [1932] A.C. 735, 747.

Address of Attesting Witness : " My Lords, I do not think it necessary to say much about the two remaining points. The first of these points is that the address of the attesting witness is not given. That is a question of fact. Now, that this *may be* the address of the witness upon the face of the instrument is not denied—it is possible. If it were not the address of the witness, I should quite agree that, as a matter of fact, the bill of sale had not complied with the provisions of the statute. But it is not denied that this is the place where the witness carries on his business. It is not denied that at this place during the ordinary hours of business the witness might be found. Therefore I am of opinion that the witness has given his address, although it might well be that, if it could be established that the witnesss was not there, the fact that he had merely put the address of his employer, and not his own private residence, would be insufficient : but if it is the address of his employer where he is personally employed, and where anybody can go and find him, and make any inquiries of him he pleases—if that is established as a fact, and it is not denied—it appears to me that the witness has complied with the provision of the statute which requires him to give his address." Lord Halsbury, L.C., in *Simmons* v. *Woodward*, [1892] A.C. 100, 107.