New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes"

VOL. XXXI TUESDAY, AUGUST 2, 1955 No. 14

DEATH DUTIES: THE NEW RATES OF GIFT DUTY.

IT will be remembered that the Minister of Finance, the Hon. J. T. Watts, in his Budget speech referred to reductions in the rates of gift duty. He said:

"The rates of gift duty will also be liberally adjusted throughout the entire range of gifts.

"In future, where a gift exceeds £500 in value, but does not exceed £1,000, duty will be payable only on the excess over £500 at the rate of 5 per cent.

"Thereafter, duty will be levied on the full value of the gift at gradually increasing rates so that a rate of 6 per cent. will be reached at £2,000, 9 per cent. at £5,000, 14 per cent. at £10,000, 20 per cent. at £20,000, and a maximum of 25 per cent. at £30,000; but with a reduction in every case of the gift duty at 5 per cent. on the first £500.

"The violent increases in rates of duty and the substantial marginal balances which are objectionable features of the present system will be abolished.

"The new rates which are printed as Appendix 'B' to the Budget * will apply to gifts made on or after July 21, 1955. This concession, estimated to cost £200,000 for a full year, is equivalent to a 20 per cent. reduction in the total gift duties collected."

While the Minister confined his reference to gift duty as relating merely to an alteration of the scale in which that duty is to be assessed on gifts made on and after July 21, 1955, he foreshadowed, for enactment this year, a new *Death Duties Act consolidating* the present legislation, as brought up to date with the abolition of succession duty, the inception of a one-duty system of death-duties taxation, and the change in the rates of estate and gift duty.

History of Gift Duty in New Zealand.

It may be of interest, therefore, to consider the history of gift-duty taxation; and we acknowledge what follows in that regard to Mr. F. R. Macken, Deputy Commissioner of Inland Revenue, and his officers.

Gift duty was first introduced into New Zealand by the Deceased Persons' Estates Duties Act 1881 Amendment Act, 1885, and was imposed on deeds of gift, as defined in the Act. The rates, which were determined by the value of the gift were the equivalent of death duty rates and ranged from 2½ per cent. of the amount of the gift in excess of £100 to 10 per cent. on gifts exceeding £20,000.

The Stamp Acts Amendment Act, 1891, repealed and re-enacted the deed of gift provisions of the 1885 Act, but did not alter the scope or rates of duty.

The Stamp Acts Amendment Act, 1895, extended the definition of "deed of gift," and also made provision that the rates of duty were to be determined, not according to the value of the gift, but according to the value of all the real and personal property owned by the donor. Rates of duty were not altered.

The Death Duties Act, 1909, repealed the previous gift-duty enactments and introduced a gift duty on dispositions of property, as defined, whether such dispositions were made with or without an instrument in writing. The duty was 5 per cent. of the value of the gift; but it was not payable where the value of the gift (together with the value of all other gifts made by the donor within six months previously or subsequently *to the same beneficiary*) did not exceed £500.

The Death Duties Amendment Act, 1911, altered the non-liability limit to where the value of the gift (together with the value of all other gifts made by the donor within 12 months previously or subsequently *to the same or any other beneficiary*) did not exceed £1,000.

The Death Duties Amendment Act, 1920, left the non-liability limit at £1,000 and, in place of the flat rate of 5 per cent., imposed a graduated scale. The rates were:—

Not exceeding	£1,000			Nil
Exceeding	£1,000	but not exceeding	£5,000	5%
,,	£5,000	,, ,,	£10,000	7½%
,,	£10,000			10%

The Death Duties Act, 1921, consolidated the various gift-duty enactments, but did not alter the scale of duties.

Part II of the Finance Act, 1930, reduced the non-liability limit for gifts from £1,000 to £500. The rate for gifts exceeding £500 but not exceeding £1,000 was 2½ per cent.

The Finance Act, 1939, which introduced marginal balance provisions, increased the rates of duty as follows:

Not exceeding	£500			Nil
Exceeding	£500	but not exceeding	£1,000	3%
,,	£1,000	,, ,,	£5,000	6%
,,	£5,000	,, ,,	£10,000	9%
,,	£10,000			12%

The rates imposed by the Finance Act, 1939, were increased by one-third by the War Expenses Act, 1939.

* Reproduced on p. 208, *ante*.

The rates imposed by the 1939 Acts were further increased by the Finance Act, 1940. The scale was :—

Not exceeding £500	..	..	..	Nil
Exceeding £500	but not exceeding		£1,000	5%
„ £1,000	„	„	£5,000	9%
„ £5,000	„	„	£10,000	15%
„ £10,000	„	„	£20,000	20%
„ £20,000	..	..	..	25%

The Finance Act (No. 2), 1942, provided for a rebate on gifts which are liable to a gift duty in another country, if a reciprocal provision is made by that country. (This reciprocal arrangement is in operation with the Commonwealth of Australia but not the separate State.) The rebate is one half of the duty paid in New Zealand, or the other country, whichever is the lesser.

The following table compares the rates of gift duty payable under the various enactments (omitting the Deceased Persons Estates Duties Act 1881 Amendment Act, 1885, as the rates under that Act were on a different basis from the others) :—

Rates of Gift Duty from 1910.

Act	Percentage of Value or Aggregated Value				
	£500 to £1,000	£1,000 to £5,000	£5,000 to £10,000	£10,000 to £20,000	Over £20,000
Death Duties Act, 1909	5	5	5	5	5
Death Duties Amendment Act, 1911	-	5	5	5	5
Death Duties Amendment Act, 1920	-	5	7½	10	10
Finance Act, 1930 ..	2½	5	7½	10	10
Finance Act, 1939 ..	3	6	9	12	12
War Expenses Act, 1939	4	8	12	16	16
Finance Act, 1940 ..	5	9	15	20	25

Gift Duty in Australia.

Australia.—In Australia, as with death duty, there are two taxing authorities, the Commonwealth authority and the State authorities. All the authorities impose a gift duty in one form or another. In some cases, it is under the name, gift duty ; but, in other instances, it is styled a stamp duty. However, in all cases, they are in fact gift duties as they are taxes on voluntary transactions.

The Commonwealth imposes a gift duty. This duty was first imposed by the Commonwealth Gift Duty Act, 1941, and the statute bears a striking semblance to the gift-duty provisions applicable in New Zealand.

The rates of gift duty vary from 3 per cent. where the gift exceeds £2,000, to 27.9 per cent. where the gift exceeds £500,000.

Victoria imposes a duty on settlements and deeds of gifts under its Stamp Duties Act.

The rates vary from 1 per cent., where the value of the gift does not exceed £1,000, to 5 per cent. where the value exceeds £100,000.

New South Wales.—In this State, a duty is imposed by the Stamp Duties Act on conveyances made without consideration in money or money's worth. The rates are the same as the death-duty rates applicable in that State. The rate varies from 3 per cent., where the value of the gift does not exceed £1,000, to 27 per cent. where the value exceeds £100,000.

Queensland.—A gift duty is imposed by the Gift Duty Act, 1926. The rate varies from 3 per cent., where the value of the gift exceeds £1,000 to 20 per cent. where the value exceeds £63,000.

Northern Territory.—This State imposes a gift duty the rates of which are the same as those for the succession duty applying in that State. The rate is thus dependent on the value of the gift, and the degree of relationship.

South Australia, *Western Australia*, and *Tasmania* all have duties on voluntary transactions ; but, in each case, the duty is little more than a conveyance duty. However, it must not be overlooked that in these States, and in all other States in the Commonwealth, the Commonwealth gift duty applies, as well as the duty imposed by the State.

Position in the United Kingdom.

The United Kingdom does not have a gift duty, or any duty corresponding to a gift duty. However, provision is made in the Death Duties Act of that country that all gifts made within five years of the date of death form part of the dutiable estate of a deceased person.

Rebate where Gift Duty is Paid in New Zealand and in any Country outside New Zealand.

It is provided in the Finance Act (No. 2), 1942 (N.Z.), that, if a gift is subject to gift duty in New Zealand and in any country outside New Zealand, a rebate is allowed of one-half of the amount paid in New Zealand or one-half of the amount paid in that country, whichever is the lesser amount, provided that country makes a similar provision.

The Commonwealth of Australia is the only country that comes within the provisions of the rebate. The duties paid to the State Authorities do not qualify.

Anomalies in the Present System.

The present scale of gift duty as fixed by s. 28 of the Finance Act, 1940, is as follows :—

Value of Gift Exceeding	Up to	Rate %	Marginal Balance.
£	£		£ s. d.
—	500	Nil	Nil
500	1,000	5	526 6 4
1,000	5,000	9	1,043 19 1
5,000	10,000	15	5,352 18 10
10,000	20,000	20	10,625 0 0
20,000	—	25	21,333 6 8

This scale results in a donor of £1,100 paying duty at 9 per cent., while a donor of £1,000 pays at the rate of 5 per cent. only. Likewise a donor of £5,500 pays at the rate of 15 per cent., while a donor of £5,000 pays at the rate of 9 per cent. Then, again, a donor of £10,000 pays a duty of £1,500 while, in contrast, a donor of £10,500 pays £2,000 duty. Similarly, a donor who has made a gift of £20,000, involving duty of £4,000, would have to pay a further £1,000 in duty if he made an additional gift of £1,000 within the year.

These illustrations of the result of violent changes in the scale, and the problem of marginal balances which accompanies those changes, are a powerful argument in favour of review and improvement of the rates.

The New Scale of Duties.

The new scale generally embodies the ideas in the scale recommended for estate-duty purposes. It disposes of the problem of margins altogether, and does

away with the steep jump in the rate at any point. It will enable a donor to make a gift without undue manipulation, in order to keep the value within any particular duty bracket. It will thus encourage donors to make gifts without undue thought to the resulting duty liability.

On the other hand, it is necessary for the scale to bear a reasonable relationship to the prospective liability of the donor for death duty. Experience indicates clearly that gifts are not actuated so much by the desire of the parent to provide for his family, as by the desire and intention of avoiding the later payment of a higher rate of duty.

The scale adopted by the Minister of Finance, and now in operation, preserves this balance as far as it is possible to do so.

As was said in *Inland Revenue Commissioners* v. *Duke of Westminster*, [1936] A.C. 1, 19, "the taxpayer may select a form of gift that does not attract duty". Under the new scale of gift duties, to make it worthwhile for a donor to make a gift, he would need to be prospectively liable for a greater amount of duty. The following table shows, in the first column, the amount of the gift, and in the second, the level of wealth at which it becomes well worthwhile.

Gift	Donor's Estate
£600	£1,500
£2,000	£10,000
£5,000	£15,000
£10,000	£24,000
£20,000	£40,000

Gifts to Charities.

Section 2 (1) (*a*) of the Death Duties Amendment Act, 1923, provides that no gift duty is payable in respect of the creation of any charitable trust in New Zealand, or the gift of any property in aid of any such charitable trust. The words "any charitable trust in New Zealand," when they appeared in s. 43 of the Death Duties Act, 1909, which was repealed and re-enacted as s. 2 (1) (*a*) of the now current statute, were interpreted as applying to trusts for the benefit of persons in New Zealand: *Garland* v. *Minister of Stamp Duties*, [1919] N.Z.L.R. 792, 798, where Hosking, J., applied the principle involved in the decision of the Court of Appeal in *In re Adams*, (1905) 25 N.Z.L.R. 302; 8 G.L.R. 46 (where the relevant words in the statute were "property voluntarily conveyed, devised, bequeathed, or transferred to trustees for the benefit of the public"). The principle was that the exemption from gift duty applied only where the ultimate objects of the charity were wholly or substantially within New Zealand, as the property so given would benefit the people of New Zealand by serving to lighten their taxation for such charitable purposes as were supported by the public revenues. In other words, the Court of Appeal held that the rationale of the exemption was the *quid pro quo* which New Zealand thus obtained.

In *Garland's* case, the gift was made by a donor resident in New Zealand in favour of trustees resident in New Zealand for what was described as the foreign-mission work of the Methodist Church of New Zealand. In that case, the Court did not have to deal with an exempting enactment which did not mention New Zealand, or which left the territorial limit of the exemption quite open, as in *In re Adams*, for the expression under consideration was "any charitable trust in New Zealand", as used in s. 43 of the Death Duties Act, 1909; and the question was reduced to this—namely, whether that meant a charitable trust which is managed or controlled in New Zealand, or a charitable trust which is for the benefit of persons within New Zealand.

Notwithstanding the difference between *Garland's* case and *In re Adams*, (1905) 25 N.Z.L.R. 302; 8 G.L.R. 46, it was held that the rationale of the decision in the latter case served to determine the question, and that the latter of the two alternative meanings must be adopted. The rationale of the decision in *In re Adams* was stated by Hosking, J., to be as follows:

> ". . . charitable gifts are exempted from duty because of the reciprocal public benefit accruing from them, and that, if the *quid pro quo* is not to be found in New Zealand, the exemption *prima facie* does not apply. In other words, the exemption applies only if the *quid pro quo* enures for the benefit of persons or objects in New Zealand. If the gift possesses no such reciprocity, then a doubtful enactment exempting gifts from duty should *prima facie* be construed as having no application to such a gift.

In *In re Adams*, the Court of Appeal considered that a *quid pro quo*, materially speaking, would exist if the benefit of the gift were to accrue in New Zealand, because the objects of the gifts which the then legislation exempted were of such a nature that the gifts would lighten the financial burdens of the then Colony. Mr. Justice Hosking did not think the rationale of the exemption was to be confined to gifts the objects of which would relieve taxation. As the legislation then stood, and having regard to the purpose of the gift in *In re Adams*, there was no occasion to consider any other *quid pro quo* in that case. In *In re Wilson*, (1908) 28 N.Z.L.R. 50; 11 G.L.R. 122, aff. on app. *sub nom. Commissioner of Stamps* v. *McDoual*, (*ibid.*, 373; 504), where the gift was in aid of the social work of the Salvation Army in New Zealand, the Court of Appeal held the gift to be exempt, although it was not very evident to what extent that social work served to lighten the financial burdens of New Zealand; but, as the Court considered the funds comprised in the gift had substantially to be spent in the Dominion, it may be said that, materially speaking, a *quid pro quo* was rendered by the gift.

The view taken by Hosking, J., as to the meaning of the words "in New Zealand" was, he said, confirmed by the pointed insertion of the words "in New Zealand" in s. 43 of the Death Duties Act, 1909, passed after *In re Adams*, (1905) 25 N.Z.L.R. 302; 8 G.L.R. 46, was decided. The words "in New Zealand" were retained in s. 43 of the Death Duties Act, 1921, passed after *Garland's* case had been decided, and also retained when that section was repealed and replaced by s. 2 (1) (*a*) of the Death Duties Amendment Act, 1923, now currently in force.

Where, therefore, there is a gift to a charitable trust, the question must always arise under the existing law as to whether it is "a charitable trust in New Zealand". As Sir Michael Myers, C.J., said in *Weston and Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 192, 197, l. 1; [1945] G.L.R. 72, 73, "the crucial test is whether the trust property must be applied to objects in New Zealand"; and this test was approved by the Court of Appeal on appeal from the judgment of the learned Chief Justice, *ibid.*, 316, 317, l. 35; 242, 244.

As the law stood when *In re Adams*, (1905) 25 N.Z.L.R. 302; 8 G.L.R. 46, was decided, the burden of duty on gifts *inter vivos* ultimately fell on the persons taking the property, unless the donor otherwise provided. Estate

duty in respect of the whole estate was primarily payable out of the deceased's estate, but was ultimately to be apportioned amongst and borne by the beneficiaries according to their several interests: see s. 12 of the Deceased Persons' Estate Duties Act, 1881. In the case of instruments of gift, liability for payment of the duty was primarily cast on the donor with the right to recover from the donee, the property also being charged with the duty: see s. 6 (2) of the Stamp Acts Amendment Act, 1895. The exemptions under consideration by the Court in *In re Adams* were, therefore, exemptions operating in favour of those benefiting from the gift, and the *quid pro quo* principle was directly in point as applied to them. This, however, is not the position in respect of gift duty under the present gift-duty legislation, for, under s. 50 of the Death Duties Act, 1921, gift duty constitutes a debt due and payable to the Crown by the donor. The liability for its payment is thus cast on him, and he is bound to indemnify the donee against any charge for it on the property: see s. 51 (2). Consequently, under the existing law, the exemption in favour of gifts *inter vivos* to charitable objects "in New Zealand" operates in favour of the donor, though he does not give, materially, any *quid pro quo* for the exemption in any shape or form.

The net result of the present legislation is to curb the generous impulses of a prospective donor of gifts to worthy—though technically not "in New Zealand"—charities, which immediately render the donor liable for gift duty on them.

The imposition of gift duty on gifts to charities outside New Zealand has been relaxed by the Legislature on a number of occasions, for example, in respect of private donations to the Food Relief Funds of Great Britain (Finance Act, 1951, s. 17), to the United Nations appeal for the relief of distressed children (*cf.* Finance Act (No. 2), 1952, s. 5), and to flood relief funds in the United Kingdom and the Netherlands (Finance Act, 1953, s. 6). But, as we observed in our last issue in another connection, it would be a bold statement to say that those charitable objects were more worthy of support than, say, the Red Cross or the New Zealand Lepers' Trust Board, which, by the "crucial test" set out in *Weston's* case, have charitable objects not "in New Zealand," so that gifts *inter vivos* to either of them attract gift duty for which the donors are liable.

Some Suggestions.

The Minister of Finance, in his Budget, did not foreshadow any change in the statutory provisions relating to gift duty, and confined himself to the adjustment of the rates of such duty; but, as a consolidation of the Death Duties legislation is in prospect for enactment in the present Session, the time is opportune for the removal of anomalies in the present system of collecting such duty.

We shall welcome any suggestions from the practising profession as to improvements which they consider should be made in the present gift-duty legislation. In the meantime, we put forward some suggestions which the Minister of Finance, with his practical experience of estate and gift-duty matters, will, we think, appreciate.

With the new abolition of succession duty on the value of a devise or bequest of property to a charitable trust which, wholly or partially, benefits charitable objects outside New Zealand, a testator's estate will not any longer be liable for payment of what amounted to a *post-mortem* gift duty on the value of such a devise or bequest. The basis of the rationale of the Court of Appeal's judgment in *In re Adams*, as extended in *Garland's* case, has gone, with the abolition of succession duty in respect to duty on gifts to charities having objects outside of New Zealand; as such rationale is abrogated by the disappearance of the differentiation between the two classes of charities in respect of succession duty. If, therefore, the present s. 2 (1) (*a*) of the Death Duties Amendment Act, 1923, were left unrepealed (or were re-enacted in the proposed Death Duties Act this year), the living donor of a gift to a charity such as the Red Cross or the New Zealand Lepers' Trust Board—which operate solely in New Zealand, but benefit objects outside New Zealand—is penalized and his estate is *pro tanto* reduced, to an extent to which his estate, after his death, in respect of a bequest of the same nature, will not be subject to succession duty under the new legislation.

It is suggested, therefore, that the distinction between a gift to "a charitable trust in New Zealand" and a gift to a charity which is not restricted to objects in New Zealand should be abolished, so that the effect of the removal of succession duty in respect of devises or bequests to the latter class of charities will be reflected in the case of gifts *inter vivos*, with the result that, as regards both succession duty and gift duty, all charities will be on the same footing.

Section 53 of the Death Duties Act, 1921, requires, as a matter of administration, that a return must be made to the Commissioner of Inland Revenue in respect of every gift where the amount involved is £300 or upwards. Gifts up to £500 were exempt, but that exemption disappeared if a gift exceeded £500.

As, in terms of the Minister of Finance's proposals, the flat exemption of £500 is to be retained, irrespective of the value of the gift, it would simplify administration of the gift-duty provisions if s. 53 were amended to provide that a gift return would be required only where the gift (alone or combined with any other dutiable gift in the preceding twelve months) exceeds £500.

The Commissioner may take the view that the return, even in the case of a £300 gift, is useful to enable him to check easily and speedily a subsequent gift for the purposes of aggregation; but, if that be so, gifts of (say) £250 or any gifts under £300, which are exempt initially, could still be used for that purpose, but they are not, of course, disclosed to the Commissioner at the time they are made—that is, under the existing law which requires disclosure only at £300 or more.

Administratively, it seems, therefore, that if the gift-duty declaration were recast in sufficiently wide terms to make the donor disclose *all* gifts made within the previous twelve months, there is no sound reason for retaining this provision in respect of a gift statement where the gift it evidences can never alone attract any duty.

An ancillary matter is the case of the new valuation required where a gift of realty is made. It sometimes happens that a gift is made of a share (say, one-fifth or one-twelfth interest) in a particular real property. At present, a valuation of the whole of the property must be obtained, and the higher valuation fee is charged for it. It would encourage donors of such undivided shares of realty, if the valuation fee were assessed on the share which is the subject of the gift, and not on the total value of the property.

SUMMARY OF RECENT LAW.

ALIEN.

Naturalization—Certificate granted to Applicant's Father under Local Act in Burma—Whether Father became a British Subject by Naturalization—Burma Independence Act, 1947 (11 Geo. 6 c. 3), Sch. 1, para. 2 (2). In 1878, the plaintiff's father was granted in Rangoon a certificate of naturalization under an Act passed by the Governor-General of India in Council (No. xxx of 1852) intituled "An Act for the naturalization of aliens". By virtue of s. 8 of the Act the plaintiff's father was deemed within the territories therein referred to (*i.e.*, the territories which were under the government of the East India Company, including Burma), to be a natural-born subject of the British Crown, as if he had been born within the said territories. The plaintiff was born in Burma in 1883, and held a British passport from 1900 to 1951. On the question whether the plaintiff had ceased by virtue of the Burma Independence Act, 1947, to be a British subject on January 4, 1948 (the appointed day for the purposes of the Act), on the ground that his father's naturalization was local and the term "British subject by naturalization" in para. 2 (2) of Sch. 1 to that Act was confined to imperial naturalization, *Held*, On the true construction of the Burma Independence Act, 1947, Sch. 1, para 2 (2), the plaintiff did not cease on January 4, 1948, to be a British subject, because the local naturalization obtained by the plaintiff's father was naturalization within the meaning of that word in the enactment; accordingly, the plaintiff was a British subject. (*Markwald* v. *Attorney-General*, [1920] 1 Ch. 348, explained.) *Bulmer* v. *Attorney-General*. [1955] 2 All E.R. 718 [Ch.D.]

COMPANY—WINDING-UP.

Misfeasance—Liability for Misfeasance—Receiver and Manager appointed by Debenture-holder—Liquidator—Whether Receiver a Manager of Company—Whether alleged Default within Section—Interest of Plaintiff in Subject-matter of Misfeasance Summons—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 333 (1), s. 455 (1). In 1940, B. J., Ltd., issued to a bank a debenture in ordinary banker's form, containing a floating charge on all the assets of the company, to secure an overdraft. In August, 1947, the bank appointed A. as receiver and manager. A. immediately terminated the active operations of the company and in January, 1948, the unsecured creditors of the company presented a petition for the compulsory winding-up of B. J., Ltd. A winding-up order was made on January 27, 1948, and later, B. and another (who died in 1952) were appointed joint liquidators. A contributory of the company, who held seven hundred of the total issued share capital of one thousand shares of £1 each, issued a summons in the winding-up under the Companies Act, 1948, s. 333, to have examined the conduct of A. while acting as receiver and manager from August, 1947, until the winding-up order was made, and of B. while acting as liquidator since the date of that order, on the footing that A. and B. had been guilty of misfeasance. The principal grounds of the application in relation to A. were (*a*) that on his appointment he stopped all building work notwithstanding that he was told that that would entail great loss to the company; (*b*) that he made to the Central Land Board an incorrect application for loss of development value in respect of land at Huyton; and (*c*) that he failed to make application under the Town and Country Planning Act, 1947, s. 80, for a certificate of exemption in respect of other land and to make a claim for loss of development value in respect of that land. In relation to B. the principal ground alleged was that the claim in respect of the land at Huyton was taken over by the liquidators, who, although the incorrectness of the claim was pointed out, failed to put in a proper application, so that the compensation received was £4,500 instead of £8,600. The claims of unsecured creditors amounted to about £10,000 and only £83 was available after satisfaction of the debts having priority. *Held*, 1. A. was not a manager of the company within the words "director, manager or liquidator . . . of the company" in s. 333 (1) of the Companies Act, 1948, because he was not concerned to manage for the benefit of the company but, as receiver and manager of the property of the company appointed out of court by the debenture-holder, was concerned to realise the debenture-holder's security; accordingly, s. 333 of the Act did not extend to A. 2. The grounds of complaint alleged against A. were not within s. 333 because, as regards allegation (*a*), a receiver and manager appointed by a debenture-holder was under no duty to the company or its contributories to preserve the goodwill and business of the company, and allegations (*b*) and (*c*) were in substance charges of negligence, not of any misapplication or misfeasance for which a charge could be sustained under the section. (*Dicta* of Maugham, J., in *Re Etic, Ltd.*, [*1928*] Ch. 873, and of Lindley and Lopes, L.JJ., in *Re Kingston Cotton Mill Co.* (*No. 2*), [1896] 2 Ch. 283, 288, applied.) 3. The ground of complaint alleged against B. was also not of misapplication or misfeasance within s. 333; moreover even if £8,600 had been received as compensation in respect of the land at Huyton, there would still have been nothing available for contributories, and, therefore, the contributory had not sufficient interest in the subject-matter of his claim to entitle him to proceed under s. 333. Appeals allowed. *Re B. Johnson & Co. (Builders), Ltd.* [1955] 2 All E.R. 775 [C.A.]

CONTRACT.

Work—Fitness of Materials for particular Purpose—Hair Dye producing Dermatitis—Preliminary Test negative—Customer failing to disclose Ill Effects suffered on Previous Occasion. In 1954, the plaintiff, who wished to have her hair dyed at the establishment of the defendant who was a ladies' hairdresser, agreed to undergo a test of Inecto, a hair dye which was known to be dangerous in certain cases. The plaintiff read the instructions on the Inecto package which included a warning that the use of Inecto Rapid without a test might be dangerous and prescribed a simple test for discovering whether a person had a predisposition to skin trouble as a result of using the dye. The test was duly applied to the plaintiff and proved negative, but, when subsequently used to dye the plaintiff's hair, the Inecto produced acute dermatitis. In 1947, Inecto had been used on the plaintiff's hair by another hairdresser and had had a bad effect on the plaintiff. She did not tell the defendant at the time when the use of Inecto was being considered that Inecto had previously been used and had had a bad effect. The plaintiff was one of a rare class of persons who reacted normally to the small test of Inecto but for whom a full application of the dye might still be harmful. In an action for damages for breach of warranty that the Inecto was suitable for use for the purpose for which it was required, *viz.*, for dyeing the plaintiff's hair, *Held*, The defendant was not liable since, although a warranty by the defendant was to be implied that Inecto was suitable for dyeing the hair of a person whose reaction to Inecto was normal, yet the plaintiff by failing to warn the defendant at the time of the test and treatment about the plaintiff's previous experience of the use of the dye, and thus, in effect, of the fact that the plaintiff was abnormally sensitive to Inecto, was disabled from relying on the warranty. *Griffiths* v. *Peter Conway, Ltd.*, [1939] 1 All E.R. 685, applied.) Appeal allowed. *Ingham and Another* v. *Emes*. [1955] 2 All E.R. 740. [C.A.]

CRIMINAL LAW—BIGAMY.

Quarter-caste Maori going through Form of Marriage with Woman of Not Less than half Maori Blood, in Presence of Officiating Minister, without Notice to Registrar or Certificate from Him—Marriage, though defective, purporting to be Marriage of Two Maoris before Officiating Minister—Bigamy committed—Crimes Act, 1908, s. 224 (2)—Maori Land Act, 1931, s. 232. The accused, a quarter-caste Maori, was married, and, on January 11, 1949, he went through a form of marriage with a woman of not less than half Maori blood. He was charged with bigamy in going through this form of marriage. The form of marriage which he went through on January 11, 1949, was in the presence of an officiating Minister; but without prior notice to the Registrar of Marriages, and without a certificate from the Registrar. At that date, s. 232 of the Maori Land Act, 1931, was in force, and, had the accused been a half-caste Maori, or of greater admixture of Maori blood than half-caste, and had been unmarried, the form of marriage gone through would have resulted in a regular valid marriage, sanctioned by s. 232 as an optional form of marriage between two Maoris. On appeal against a sentence by a Magistrate of six months' imprisonment on the charge of bigamy, *Held*, That the marriage was not merely a marriage according to Maori custom in terms of s. 79 of the Maori Affairs Act, 1953, but it purported to be a marriage of two Maoris before an officiating Minister, in accordance with the provisions contained in s. 232 (1) (*b*) of the Maori Land Act, 1931, then in force, and that, accordingly, the crime of bigamy had been committed. (*Renata Te Ni* v. *Tuihata Te Awhi*, [1921] N.Z.L.R. 729; [1921] G.L.R. 331, followed.) (*R.* v. *Brawn*, (1843) 1 Car. & K. 144; 174 E.R. 751, and *R.* v. *Robinson*, (1938) 26 Cr. App. R. 129, applied.) *McDonald* v. *Police*. (S.C. Hamilton. June 13, 1955. Shorland, J.)

CRIMINAL LAW—FALSE PRETENCES.

Statement of Intention about Future Conduct does not constitute a False Pretence. A statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal

law. The appellant and his father carried on a business as pest destructors. The appellant had entered into contracts with farmers to destroy the vermin on their land over the period of a year and had asked for and obtained payment in advance of half the annual charge. In some cases he did no work at all in fulfilment of the contract. He was convicted at quarter sessions for obtaining cheques by false pretences. The indictments, which were all in similar form, alleged that he obtained the cheques " by falsely pretending that he . . . was then *bona fide* entering into a contract for the destruction of moles . . . for a period of twelve months, and that he . . . then *bona fide* intended to carry out [his] obligations under the said contract, and that he . . . then *bona fide* believed that [he] would be able and willing to carry out [his] said obligations." The jury were directed that the prosecution had to prove that the appellant entered into the contracts without any genuine intention of carrying them out and that he falsely pretended that he had such an intention. *Held*, The direction was wrong in law and the conviction must be quashed. (Dictum of Bowen, L.J., in *Edgington* v. *Fitzmaurice*, (1885) 29 Ch.D. 483, distinguished; dictum of Lord Alverstone, C.J., in *R.* v. *Bancroft*, (1909) 3 Cr. App. Rep. 21, explained.) (*R.* v. *Jones*, (1853) 6 Cox C.C. 467, disapproved.) Appeal allowed. *R.* v. *Dent*. [1955] 2 All E.R. 806. [C.C.A.]

CRIMINAL LAW—INDICTMENT.

Motion to Quash—Time for making the Application. The defendant and his brother were the executors and trustees of their mother's will and her residuary estate was to be divided between them. At the time of the mother's death in 1949, the brother was abroad and the defendant, who was a solicitor, obtained probate of the will and made himself responsible for administering the estate. In December, 1953, on an originating summons taken out by the brother, an order was made for the administration of the estate by the Court, and by an order dated January 19, 1954, the defendant was required to lodge at a district registry on or before February 12, certain accounts and a statement, all of which were to be verified by affidavit. The defendant having failed to comply with the order of January 19, by an order, dated March 4, the brother was given leave to issue a writ of attachment against the defendant for his contempt of Court, and on March 8 the defendant was arrested and put in prison. On March 23 he was released, after having apologized to the Court and undertaken to comply with the order of January 19 within a month of his release. He again failed to comply with the order and also with a renewal order, in the same terms, made on April 23, and on June 8 he was again arrested and put in prison for contempt of Court. On September 22, 1954, while still in prison, the defendant swore an affidavit in which, after apologizing to the Court for his failure to prepare in proper form the accounts which he had been ordered to produce, he explained that he had no money to do so and disclosed, for the first time, that he had converted to his own use most of the assets from his mother's estate. He then went on to ask for his release. Subsequently, the defendant was prosecuted for fraudulent conversion, under the Larceny Act, 1916, s. 21. The defence moved to quash the indictment on the ground that under s. 43 (2) of the Act, the defendant was not liable to be convicted. *Held*, The conversion constituting the offence charged had been first disclosed on oath by the defendant " in consequence of . . . compulsory process of [a] Court of law or equity in [a] proceeding " within the meaning of those words in s. 43 (2) of the Larceny Act, 1916, and accordingly the defendant was protected by the subsection from being convicted and the indictment should be quashed. (*R.* v. *Noel*, [1914] 3 K.B. 848, and *R.* v. *Tuttle*, (1929) 140 L.T. 701, distinguished.) *R.* v. *Maywhort*. [1955] 2 All E.R. 752. [Chester Ass.]

DIVORCE AND MATRIMONIAL CAUSES — DECREE ABSOLUTE.

Amendment—Marriage as Pleaded and Proved dissolved by Decree—Decree made Absolute—Two Ceremonies of Marriage—Petition referred only to Second Ceremony—Application to amend Petition and Decrees by substituting References to First Ceremony—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (1)—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 4 (1) (a), r. 6 (1), r. 80. By the Matrimonial Causes Rules, 1950, r. 4 (1) (a), a petition for divorce must state the " names of the parties to the marriage, the place and date of the marriage and the name and status of the wife before the marriage " and, by r. 6 (1), must be supported by an affidavit by the petitioner verifying the facts. On October 8, 1926, the parties went through a ceremony of marriage in secret at the church of St. P. The husband transposed his Christian names and omitted one of the wife's Christian names for the entry in the marriage register. On October 27, 1927, the parties went through a second ceremony of marriage at the church of St. M., which was attended by their friends and relations. Their names were on this occassion correctly entered in the register. On January 20, 1953, the wife presented a petition for divorce on the ground of the husband's adultery, and set out the details relating to the second ceremony. On May 15, 1953, a divorce commissioner granted to the wife a decree *nisi*, pronouncing that " the marriage had and solemnised on October 27, 1927, at St. M. Parish church " between the parties be dissolved. On June 27, 1953, the decree was made absolute. Subsequently each party re-married. On July 7, 1954, an order was made in respect of the wife's prayer for maintenance, and on October 6, 1954, an order was made varying the marriage settlement. On a summons by the wife calling on the husband to show cause why she should not be at liberty to amend the petition and the decrees by substituting the date and place of the first ceremony for those of the second ceremony, and by inserting the descriptions in the marriage register relating to the first ceremony, *Held*, Precision in pleading the marriage ceremony which, by a petition for divorce, a petitioner prays that the Court should dissolve is a matter of substance, not of form (*Reder* v. *Reder*, [1948] W.N. 238, applied); when the decrees for dissolution were made in the present case it was intended only to dissolve the marriage which had been pleaded and proved, *viz.*, that of October 27, 1927; and as there had been no slip or omission in recording that decision, the Court had no power either under R.S.C., Ord. 28, r. 11, or its inherent jurisdiction to make the amendments sought (*MacCarthy* v. *Agard*, [1933] 2 K.B. 417, considered and applied) and the summons would be dismissed. (*Hampson* v. *Hampson*, [1908] P. 355, not followed; dictum of Lord Merriman, P., in *Everitt* v. *Everitt*, [1948] 2 All E.R. 545, 549, considered.) *Per Curiam*, a matter of this importance should have been brought before the Court by motion, and not by summons. *Thynne* (*Marchioness of Bath*) v. *Thynne* (*Marquess of Bath*). [1955] 2 All E.R. 377. [P.D.A.]

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance Agreements on Separation and Divorce, *219 Law Times* 310.

EXECUTORS AND ADMINISTRATORS.

Advertisements for Claims against a deceased's Estate, *219 Law Times* 301.

Undisposed-of Property as a Fund for the Payment of Legacies *99 Solicitors' Journal* 410.

GAMING.

Lottery—Pamphlets bearing a Number distributed indiscriminately to Persons attending Bands Concert—Each Pamphlet having Number corresponding with Prize in Unnamed City Shop Window—Result fixed and unalterable on Distribution of Pamphlets—Subsequent Industry, Care, and Diligence in Locating Prizes not Affecting Result—Scheme a "lottery"—Gaming Act, 1908, s. 41 (a). The fact that a competitor must employ some industry, care, and diligence in order to obtain possession of his prize under a scheme in which the distribution of his prize is by chance, will not save the scheme from being a distribution of property " by chance " and therefore a " lottery " within the meaning of s. 41 (*a*) of the Gaming Act, 1908, unless the industry, care, and diligence affects the result. (*Moore* v. *Elphick*, [1945] 2 All E.R. 155, applied.) Thus, where officials of an Association distributed pamphlets indiscriminately to persons approaching the gates of a Park where the Association was holding a bands concert, each pamphlet bearing a number which corresponded with a numbered gift in a shop window in a city area, the distribution of the particular prize relating to the particular pamphlet was fixed and unaltered, and was controlled by chance alone; and it constituted a scheme by which prizes were distributed by " mode of chance " within s. 41 (*a*) of the Gaming Act, 1908, when the recipient of a pamphlet received a prize-winning number. Any subsequent employment of industry, care, or diligence on the part of the holder of a pamphlet in locating his prize could not affect the result. *Hamilton* v. *Auckland Bands Assn. (Inc.)*. (S.C. Auckland. June 2, 1955. Shorland, J.)

HOSPITALS.

Account for Hospital Treatment of Patient since Deceased—Death resulting from Injuries caused by Negligence—Personal Representatives of Deceased liable to Hospital Board for Amount of Such Account, to Extent of Deceased's Estate—Hospital Board entitled to recover Such Amount from Wrongdoer—Claim not for

"*damages . . . for any bodily . . . harm suffered by*" *Deceased—Statutes Amendment Act, 1937, s. 17 (1)—Hospitals Amendment Act, 1932, s. 15 (2).* Section 17 (1) of the Statutes Amendment Act, 1937 (whereunder "the damages recoverable for the benefit of the estate of a deceased person shall not include any damages. . . for any bodily or mental harm suffered by him") is not a bar to a claim by the personal representative to recover hospital expenses for treatment of the deceased, which is a claim for loss sustained as a result of the negligence of the wrongdoer, and is not a claim for damages "for" the bodily injury. (*Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85, applied.) Consequently, by virtue of s. 15 (2) of the Hospitals Amendment Act, 1932, a hospital board can recover from the wrongdoer the amount which the personal representative of the deceased was, to the extent of the deceased's estate, liable to the hospital board for the cost of the relief granted as a consequence of the bodily injuries suffered by the deceased. *Hole* v. *North Canterbury Hospital Board.* (S.C. Christchurch. June 17, 1955. McGregor, J.)

Actions Against Hospital Authorities, *219 Law Times*, 256.

HUSBAND AND WIFE.

Discharge of Maintenance Order for Adultery, *99 Solicitors' Journal*, 345.

Married Women's Property—Title to Property—Matrimonial Home—Both Parties contributing to Purchase—Husband alone making Mortgage Repayments—Court Order for Sale with vacant Possession—Sale inappropriate when Matrimonial Proceedings pending—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17. In 1950, a married couple bought a house for their matrimonial home, the husband contributing £170 and £60 legal costs and the wife, a school teacher, £230, towards the total cost of £1,760 of which £1,300 was borrowed. The house was conveyed to the husband and wife as joint tenants and by a mortgage of the same date they both assumed responsibility for repayment of the £1,300, but the mortgage repayments of £3 weekly were by arrangement between them to be made by the husband out of his wages. The husband made no housekeeping allowance to the wife but paid some of the household bills, and the wife paid other household expenses and bought furniture and replaced linen, crockery, etc. It was found as a fact that the intention of the parties at the time of the purchase was that they should own the house in equal shares and that the husband should pay off the mortgage by deduction from his wages. On June 22, 1954, the wife presented a petition for divorce, which was subsequently amended so as to claim only judicial separation. In September, 1954, the husband made an application to the County Court Judge for an order under s. 17 of the Married Women's Property Act, 1882, that the house belonged to him and that the wife should do everything necessary to vest it in his name. At the time of the hearing £651 had been paid off the mortgage, leaving £649 outstanding, and both parties were still living in the house. The Judge decided that the house should be sold with vacant possession, and that the proceeds of sale subject to paying off the mortgage and paying a sum of £300 (*viz.*, the sum of £230 +£70 in respect of subsequent contributions to the home) to the wife belonged to the husband. On appeal, *Held*, 1. In accordance with the original intention of the parties at the time of the purchase of the house they were entitled beneficially to the proceeds of sale in equal shares (*Rimmer* v. *Rimmer*, [1952] 2 All E.R. 863, applied); and as from the date when the marriage broke down, which was taken as June 22, 1954, both parties were liable as between themselves in equal shares for sums payable under the mortgage. 2. As the wife was a co-owner, and might be the innocent party, in which case the husband would be under a duty to provide her with a roof over her head, an order for sale of the house with vacant possession ought not to be made at the present time but the question could well be considered by the matrimonial Court when dealing with alimony or maintenance. *Cobb* v. *Cobb.* [1955] 2 All E.R. 696 [C.A.]

INTERNATIONAL LAW.

The Preposed International Criminal Court, *105 Law Journal*, 361.

PRACTICE—APPEALS TO PRIVY COUNCIL.

Value of "matter in dispute"—Tenants' Appeal—Value to Appellants of Retention of Right of Occupancy of Premises—All Relevant Circumstances relating to Premises and to Business conducted therein to be taken into Account—Value of Retention of Right of Occupancy shown to amount to more than £500 Sterling—Conditional Leave given—Stay of Execution of Order for Possession pending Disposal of Appeal—Terms imposed as to Speedy Prosecution of Appeal—Privy Council Appeals Rules, 1910, RR. 2 (a), 6. The correct course in determining the question of the value of "the matter in dispute", on the appeal, within the meaning of R. 2 (*a*) of the Privy Council Appeals Rules, 1910, is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal to Her Majesty in Council. (*Macfarlane* v. *Leclaire*, (1862) 15 Moo. P.C. 181; 15 E.R. 462, and *Allan* v. *Pratt*, (1888) 13 App. Cas. 780, followed.) *So held* by the Court of Appeal, in granting conditional leave to appeal from the judgment reported. A judgment of the Court of Appeal ordered the appellants to give to the respondent possession of certain premises occupied by them as tenants by virtue of the special provisions of the Tenancy Act, 1948. The appellants sought conditional leave to appeal from that judgment to Her Majesty in Council. *Held*, by the Court of Appeal, 1. That the proper approach was to determine whether the appellants had established that it was worth £500 sterling to them that the provisions of the Tenancy Act, 1948, should be held to give them protection against an order to vacate the land; and that meant that all relevant circumstances relating both to the premises themselves and to the business conducted on the premises by the appellants were considerations which required to be taken into account. (*Lipshitz* v. *Valero*, [1948] A.C. 1, followed.) (*Popatlal Padamshi* v. *Shah Meghji Hirji* and *Chogley* v. *Bains*, both unreported, but referred to in *Meghji Lakhamshi & Brothers* v. *Furniture Workshop*, [1954] A.C. 80, 88; [1954] 1 All E.R. 273, 275, applied.) 2. That such considerations included the value of the land occupied by the appellants and the rent paid by them; the fact that an order for possession meant the extinction of the appellants' boardinghouse business; and the expenditure incurred in 1945 by the appellants in the repair of the building following a fire, and the considerable sum spent by them since 1945 in complying with requisitions by the City Council. 3. That, taking all those factors into consideration and giving them their proper weight, the right of occupancy of the premises which the appellants sought to maintain was worth more than £500 sterling to them; and that conditional leave to appeal should be granted. 4. That there should be a stay of execution of the order for possession pending the determination of the appeal, subject to terms imposed for the prosecution of the appeal with the least possible delay. *McKenna and Another* v. *Porter Motors, Ltd.* (*No. 2*). (C.A. Wellington. June 3, 1955. Finlay, North, Turner, JJ.)

PROBATE AND ADMINISTRATION.

Probate—Appointment of New Executor—Administration Bond—Will appointing Executor, and, if such Executor unable to act, appointing Manager of Named Company as Substitute for Executor—Grant of Probate to Executor who discharged Duties until Incapacity due to Ill-health—Appointment of Substitute Executor—Such Appointment not "a grant of administration", but Substitution, virtute officii, of One Executor for Another to whom Probate granted—Administration Bond or Sureties dispensed with—Form of Order—Administration Act, 1952, ss. 6, 11. The testator, by his will, appointed H. as his executor and trustee, or "if he should be unable to act", then "the Manager at Wanganui" of a named company. H. applied for and was granted probate and he had discharged his duties as executor, though some of those duties remained unfulfilled. He then applied, under s. 11 of the Administration Act, 1952, to be discharged from his office as executor, on the ground of incapacity to continue acting as such. He asked the Court to appoint as executor and trustee, in his place, the Wanganui manager of the named company. He further applied to the Court to dispense with sureties to the administration bond to be executed pursuant to s. 6 of the Administration Act, 1952. *Held*, 1. That the order under s. 11 of the Administration Act, 1952, should be made. 2. That, as this was not a "grant of administration" such as is referred to in s. 6 of the statute, but a substitution, *virtute officii*, of an executor for one to whom probate had already been granted, the chief reason which generally influences the Court to require security (namely, that it is the Court, and not the testator, who is nominating the administrator), was therefore absent. (*In re Cotterill*, (1913) 32 N.Z.L.R. 784; 15 G.L.R. 439, and *Re Topliss*, (1914) 17 G.L.R. 285, applied.) 3. That, taking the foregoing factor into account, and as all the debts were paid and the share of the infant beneficiary was small, no order would be made directing an administration bond or sureties. (*Re Curtis*, [1916] G.L.R. 29, referred to.) *In re Mc Lean (deceased).* (S.C. Wanganui. May 5, 1955. Turner, J.)

SALE OF GOODS.

Exclusion of Sellers' Liability in the Motor Trade, *99 Solicitors' Journal* 298.

INSANITY AS A DEFENCE TO CRIME.

The McNaghten Rules: A Plea for Their Retention.

By P. P. LYNCH, M.D., LL.D., F.R.A.C.P.

My attention has been called to an article in this JOURNAL, *ante*, p. 140, in which a plea has been made for a revision of the McNaghten Rules, presumably to bring them into line with modern developments and advances in psychiatry and criminology. The writer expressed the view that psychiatrists have always been dissatisfied with the Rules, which, they maintain, are unscientific and built upon a misapprehension as to the true nature of mental disease, and which, for these reasons, are to-day hopelessly out of date. The author continued his criticism by saying that, in 1843, psychology hardly existed, psycho-analysis was not born, and psychiatry was in a crude state. Since that day, he said, these sciences have made a development that is little short of amazing and have revealed a great deal that was previously unsuspected in the undercurrents that condition human behaviour.

This may be all perfectly true; but it is also true that, just as in 1843, the complexities of the human mind and the uncertainties of human behaviour still remain matters for wonderment. Notwithstanding the advances that have been made in techniques in regard to the diagnosis and treatment of mental disorder, it is still true that no general agreed definition of insanity has been arrived at. Consequently, when attempts are made to formulate criteria upon which a scientific assessment of the mental state of any person can be determined, the old difficulty arises again—a difficulty increased rather than diminished by the very complexity of life at the present time.

I think, at this stage, I may make a criticism of the author for an error into which he has fallen for failing to follow references to their sources. McNaghten was not the victim, but was the perpetrator, of the crime over which such a furore arose in 1843.

The Straffen case, by reason of its bizarre and extraordinary ingredients, excited a great deal of public interest; and the author of the article referred to the correspondence in *The Times* which followed the trial and the appeal. He referred also to the letter written to that newspaper by the President of the Royal College of Physicians, which I have before me as I write.

In the Straffen case, the remarks that were made by Mr. Justice Oliver over "trying a babe in arms" were made at the first trial, when Straffen, on the testimony of experts in psychiatry, was found unfit to plead by reason of mental defect and was committed to Broadmoor Hospital. There he remained as a patient until his escape about a year later. I think this fact is sufficiently important to have been given more stress than the author of the article gave it.

The expert evidence which was given in the first trial was by those who were in a position to profit by the very advances in psychology and psychiatry which the author has made so much of. The author of the article has selected this case for a purpose, viz., to show that the Straffen case strikingly illustrates the inadequacy of the McNaghten Rules. In my view it does nothing of the kind.

I have no doubt that the President of the Royal College of Physicians, Sir Russell Brain, would contend that no more competent body could be found to determine the mental state of a person than a medical panel or properly-trained medical officers. At the same time, it must not be lost sight of—and cannot be too strongly emphasized—that a jury is the only tribunal in this country which can find as a fact whether a person is insane or not. In coming to that conclusion it has, as in other cases, all the advantages of such professional evidence as is submitted to it. In this way the jury will, from the special knowledge of the medical experts who give testimony before it, be able, as it were, to take advantage of the remarkable advances in psychiatry and psychology and knowledge of behaviour to which the author of the article has referred.

I am bound to say that, in this connection, the public and legal profession rate these advances a good deal higher than do my own colleagues. When the Straffen case is judged on this basis it will be seen that the inadequacy lies not so much in the Rules themselves, but in the wide diversity of opinion as expressed by different medical officers, and, indeed, as expressed by the same medical officer on virtually the same facts at different times.

This point is such an important one that I think it is worthwhile in brief outline indicating the main features of the two trials of Straffen.

When Straffen was first arrested and charged with the murder of the two children, Cicely Batstone and Brenda Goddard, he was tried at the Taunton Assizes. Evidence was called from medical men and submitted to a jury. On the strength of Straffen's previous medical history, and on the evidence as to the mental state of the prisoner at the time of the trial, the Judge told the jury that if they believed the evidence of the doctors they would find that putting Straffen on his trial was like trying a child. Straffen was found unfit to plead and was committed to a mental institution. The institution to which he was committed had formerly been a prison for the criminal insane, but it is now a hospital and is no longer regarded as a prison. Straffen was, in fact, for over a year a patient in that institution and made himself useful as a porter in the infirmary. During the months that he had this job, he was able to make reconnaissance of the various means of escape which the institution offered him. It may very well be that, as it was regarded as a hospital, the means of preventing escapes would be no more exacting than, say, in a mental hospital. I think it was this aspect of the matter that created the greatest public uneasiness in England, and which led to a good deal of agitated comment in the newspapers about the ease with which the escape was effected, and the terrible consequences which followed. Nevertheless, he did escape, and, within an hour, he had strangled a third child in much the same circumstances as the two previous crimes. On the crime being detected, he was interviewed at the hospital to which he had been returned by Police officers. He rather skilfully

evaded their questions and said that by reason of his former delinquency, the Police were "ganging up on him," but he finally admitted the crime. He was then charged with the murder; and, on medical advice being sought from the doctors who had care of him, they felt that they were in a position now to say that not only was Straffen fit to plead, but, when he was put on his trial, there was no evidence that they could find which could be taken to mean that at the time he committed the third murder that he was insane within the terms of the McNaghten Rules.

It may be that onlookers at the trial and members of the public generally felt that there was surely a grave anomaly in that, at one particular time, a young man of little more than twenty should be found so seriously affected by mental disease as to be unfit to plead at his trial, and that, in another year, the same or virtually the same body of medical opinion now held an entirely contrary view. The circumstances here surely suggest that if there was any obscurity it was not on the part of those who stated the law or those who administered it. It was rather on the part of those who had all the advantages of recent advances in psychiatric medicine and in disorders of behaviour.

The truth of the matter is that the ingredients of mental disorder are not capable of any precise and scientific definition of a sort which the public tend to believe that modern psychiatric practice offers. It seems to me that the Straffen case did not so much reveal the inadequacy of the McNaghten Rules, as it did the incomplete state of medical knowledge and the inherent difficulties of the subject.

The leading article in *The Times* rather criticized the trial Judge for the terms in which he defined the three points needed to establish a defence to insanity. *The Times* commented that the clarity of his explanation did not content those laymen who asked why, if Straffen was fit only for Broadmoor last year, this year he could be condemned to hang. The answer is that, while medical knowledge and art is uncertain, the law requires that certain Rules be complied with—Rules which—I would again emphasize—are there for the guidance of juries. If there is a certain rigid precision in the actual terms of the McNaghten Rules, the experience of those who have seen them in operation is unanimous that any loosening of their requirements would be fraught with great danger.

There has been a suggestion made in recent months and emanating from the United States that a different view of insanity may be taken and that the following issues should be put to the jury :—

(i) Whether the accused was suffering from a diseased or defective mental condition when he committed the crime; and

(ii) Whether the crime was the product of such abnormality.

If the answer to both questions is in the affirmative, a defence of insanity is made out.

In view of the difficulty of defining such terms as "disease", "defect", and "product", this test would be clearly very difficult to apply. Indeed, it may be held on reflection that these two rules may be more difficult to satisfy than the much-discussed and much-criticized McNaghten Rules.

In (1952) *214 Law Times*, 150, a contributed article deals with great skill with the problem under discussion. Two points in this article, in my view, stand out as going to the heart of the matter. One is that it cannot be too strongly emphasized that a jury is the only tribunal which can find as a fact whether a person is sane or insane. Secondly, that the issue of a prisoner's sanity is best left in the hands of the jury, guided on law by the trial Judge.

The introduction of controversial elements such as partial responsibility and uncontrollable impulse would greatly complicate the operation of the Rules. In the long run, it would do more harm than good.

The Function of Legal Philosophy.—Though there are no doubt many permissible ways of defining the function of legal philosophy, I think the most useful is that which conceives of it as attempting to give a profitable and satisying direction to the application of human energies in the law. Viewed in this light, the task of the legal philosopher is to decide how he and his fellow lawyers may best spend their professional lives. In keeping with this pragmatic conception, we may test the reality of any particular controversy of legal philosophy by asking: Would the adoption of the one view or the other affect the way in which the Judge, the lawyer, the law teacher, or the law student, spends his working day? Tested by this criterion, some of the issues about which jurists have violently disputed reveal themselves as lacking in any real significance for human affairs. On the other hand, tested by the same standard, questions which at first glance seem sterile and verbal may gain a new reality. This is perhaps the case with the most abstruse-seeming of all jurisprudential disputes—those which relate to the proper definition of law. Consider, for example, the choice presented by two such conflicting conceptions of law as that which defines it as the behaviour patterns of Judges and that which defines it as reason applied to human relations. This choice may seem at first to present only an issue of linguistic properties, about which no one should become unduly excited. Yet if in these definitions the word "law" means the life-work of the lawyer, it is apparent that something more vital than a verbal dispute hinges on the choice between them. Surely the man who conceives his task as that of reducing the relations of men to a reasoned harmony will be a different kind of lawyer from one who regards his task as that of charting the behaviour sequences of certain elderly State officials. And if the lawyer shapes hinself by his conception of the law, so also, to the extent of his influence, does he in turn shape the society in which he lives. When this much may be at stake we cannot dismiss a dispute concerning the proper definition of law as a mere logomachy. To do so would be to commit almost as stupid an error as that of denying the reality of a war because the slogans under which it was fought were logically meaningless, or did not present a clear-cut issue between the contending forces. If definitions of law are mere words, they are words which may significantly direct the application of human energies, and to the extent that they do this they cannot be ignored in a legal philosophy which is concerned with realities. (Lon. L. Fuller, The Law in Quest of Itself (1940) pp. 4-5.)

A DISTINGUISHED AMERICAN LAWYER.

Visit of Dr. R. G. Storey, former Bar Association President.

One of the leading lawyers of the United States, Dr. Robert G. Storey, of Dallas, Texas, and his wife recently paid a short visit to the Dominion on his way to Pakistan to assist in setting up a new legal and judicial system there.

Dr. Storey was an American counsel at the Nuremburg trials, and, more recently, a member of the 12-man Hoover Committee set up to investigate the composition of the American Federal Government.

Dr. Storey is making a tour of the "friendly free nations of the world" who have requested assistance in remodelling their legal and judicial systems. So far, on his present tour, he has visited Korea, Japan, Formosa, and the Philippines for this work. It is his third similar trip.

In Australia, Dr. Storey was the guest of the Law Council of Australia at its biennial meeting at Brisbane on July 18. He was to spend four days in Melbourne for discussions with lawyers and Judges there.

His present tour is being made with the assistance of the State Department but Dr. Storey does not receive a salary from the American Government.

From Pakistan, he and his wife will travel to Beirut, Istanbul, Rome, and Paris, before returning to New York by the end of August. He said he would spend some days in Lebanon, where he would examine the results of work he did there on a previous tour.

Dr. Storey's Career.

Dr. R. G. Storey was educated at the University of Texas and the Southern Methodist University, where he took his Arts degree. He received Doctorates in Law from the Texas Christian University, 1947; Laval University, 1953; and Drake University, 1954. He is a senior partner in the firm of Storey, Armstrong, and Steger, of Dallas, Texas, in which the two sons are attorneys and partners. He is the Dean of Southern Methodist University Law School, and the President of the Southwestern Legal Foundation.

Dr. Storey has had a distinguished career in public affairs, he was Assistant Attorney-General of Texas for Criminal Appeals, 1921-1923; Member of the National Executive Committee of the American Legion, 1921 to 1922; Regent of the University of Texas, 1924-1930; Governor of the Kiwanis Clubs, Texas-Oklahoma District, 1931; President of the Park Board, City of Dallas, 1938-1941; Executive Trial Counsel for the United States at the Nuremberg Trial of the Major Axis War Criminals, 1945-1946; and since 1953, he has been a member of the Commission to Reorganize the Executive Branch of the United States Government (Hoover Commission).

His Bar Association Activities include the following: President of the Dallas Bar Association, 1934; President of the State Bar of Texas, 1948-1949; and President of the American Bar Association, 1952-1953; Since 1954, he has been President of the Inter-American Bar Asso-

President of the Dallas Bar Association, 1934; President of the State Bar of Texas, 1948-1949; and President of the American Bar Association, 1952-1953. Since 1954, he has been President of the Inter-American Bar Asso-

ciation; since 1949, a Member of the Council of the Survey of the Legal Profession; and, since 1952, a Member of the Council of the International Bar Association. He is an Honorary Member of the Canadian, Peruvian, Mexican, Cuban, Korean, and various State Bar Associations.

He was a 2nd Lieutenant in the Heavy Artillery in World War I, and Colonel of the Air Corps in World War II. His decorations include the Bronze Star for Work in War Crimes in Bulgaria; Legion of Merit for Combat Intelligence Service in the Mediterranean Theatre of Operations; U.S. Medal of Freedom, and French Legion of Honour for Services in Trial of Major Axis War Criminals, Nuremberg.

In New Zealand.

In Auckland and in Christchurch, Dr. Storey was the guest of the local Law Society. While in Wellington, he was entertained at luncheon by the New Zealand Law Society, and at an afternoon gathering by the Wellington and New Zealand Law Societies. He also visited the Law School of Victoria University College, where his genial and friendly approach soon made him very popular with the students.

Rebuilding Backward Judicial Systems.

In an interview with a representative of this Journal, Dr. Storey said that the American Bar had realized that, although the United States was spending billions of dollars in rehabilitation of backward areas and giving technical advice in agricultural industry and public health, nothing effective had been done to encourage friendly free nations to develop the Anglo-American attitude towards an independent judiciary and legal profession. He pointed out that, when the Communists overran a country, they first captured the prominent lawyers. It was important, if democracy is to survive in these areas, that they understand the need for a Bench and Bar which can function independently of the Government of the day. With this end in view, Dr. Storey had visited West Germany, Korea, Japan, Formosa, and Pakistan. The theories which he had explained to these countries were foreign to their history.

Last year, he said, he spent six weeks in Korea on his work.

"I think the work there has been fruitful", Dr. Storey added. "The Korean Legal Centre has been set up to train the judicial leaders of the country in the British and American type of common law system, and a scheme for exchange of legal leaders between Korea and America has been organised. We think it will help the country, and it will also serve as a pilot study." President Rhee of Korea told Dr. Storey that his first visit was only a beginning.

The Chief Justice in Japan explained that this concept was something new in the history of his country, and would be difficult to develop. Nevertheless, it has been arranged that the legal profession from the countries referred to will send representatives to the United States to study the constitutional problems. Already fifteen German lawyers had visited the legal centre in Dallas, Texas.

When asked whether he thought that New Zealand could do anything to help, Dr. Storey stated that in Indonesia, particularly, Australia and New Zealand could give valuable assistance in instructing this area in the principles referred to above. He pointed out that, politically, Indonesia faced a very uncertain future; and assistance of this type was urgently needed.

In the United States, Judges, practitioners and teachers of law have all been co-opted to further this scheme. The difficulty is to persuade lawyers of standing to stay long enough in the various countries requiring help.

Recollections of The Nuremburg Trials.

Dr. Storey was Executive Trial Counsel for the United States at Nuremburg, in 1945 and 1946. As such, he was responsible for allotting the various aspects of the case to be handled by the American prosecutors. He spoke with great affection and respect of Mr. Justice Jackson, whose death last year robbed America of one of her greatest legal figures.

Sir David Maxwell Fyfe (now the Lord Chancellor, Lord Kilmuir) and Sir Hartley Shawcross, who led the British team, became friends of his.

When asked for some recollections of the trial, Dr. Storey said that Hess attracted attention early in the trial by his queer behaviour. His British captors were satisfied that he was insane. His defence counsel maintained that he could not be convicted because of his mental instability. He was thin and gaunt, eating very little, and bore an expression indicating abnormality of an advanced kind. The Americans were not convinced of his genuineness and an International Board of psychiatrists examined Hess. He staged an attack of illness during the hearing, and, at other times, he sat between Goering and Ribbentrop, reading a book and taking no interest in the proceedings.

To the consternation of his defence counsel, the psychiatrists unanimously found that Hess was sane. While the argument was proceeding the President, Lord Justice Lawrence (now Lord Oaksey) looked up over his glasses and said "Would the prisoner Hess like to make a statement?" Hess produced a brief written document from his pocket, and stated that he had been simulating insanity ever since he surrendered to the British after his dramatic flight; and that he wished to proceed on the basis that he was a sane and normal person. Thereafter, he put on weight and behaved in every respect as a sane, balanced individual.

Dr. Storey recounted this incident to show the profound wisdom of Lord Justice Lawrence, whose sense of fairness had cleared up what might have remained a matter of doubt and difficulty. He stated that, until the question was asked, none of the Court had any reason to think that Hess would give so devastating an answer.

On the personal side, Dr. Storey has two sons in partnership in his legal firm. He spoke with pleasure of having appeared with each of them in a case right through from the initial preparation in his office to the hearing in the Supreme Court of the United States.

The Objection to Codification.—The objection most frequently made to codification—that it would if successful deprive the present system of its "elasticity"—has, we have reason to believe, exercised considerable influence; but when it is carefully examined, it will we think turn out to be entitled to but little, if any, weight. The manner in which the law is at present adapted to circumstances is, first by legislation, and secondly by judicial decisions. Future legislation could of course be in no degree hampered by codification. It would on the other hand be much facilitated by it. The objection under consideration applies, therefore, exclusively to the effects of codification on the course of judicial decision. Those who consider that codification will deprive the common law of its "elasticity" appear to think that it will hamper the Judges in the exercise of a discretion which they are at present supposed to possess, in the decision of new cases as they arise. There is some apparent force in this objection, but its importance has to say the least been largely exaggerated, and it is in our opinion certainly not sufficient to constitute (as some people regard it) a fatal objection to codification. In order to appreciate the objection, it is necessary to consider the nature of this so-called discretion which is attributed to the Judges. It seems to be assumed that when a Judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas on the contrary he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to be found in previous judicial decisions or in books of recognized authority. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a Code represents the effect of decided cases and established principles, it takes from the Judges nothing which they possess at present. (Report of the Royal Commission appointed to Consider the Law relating to Indictable Offences: With an Appendix containing a Draft Code embodying the Suggestions of the Commissioners (London, 1879) pp. 7-8.)

INLAND REVENUE: DUTIES DIVISION.

New Masterton Office.

An office of the Duties Division of the Inland Revenue Department was opened at Masterton, on August 1, 1955. The address is: 1st Floor, Academy Buildings, Cnr. Church and Queen Streets, Masterton.

The postal address of the new office is:

District Commissioner of Stamp Duties,
Private Bag,
Masterton.

The office will serve the counties of Castlepoint, Featherston, Masterton, Mauriceville, and Wairarapa South.

EASEMENTS AND RESTRICTIVE COVENANTS.

Applications to the Supreme Court for Modification or Extinguishment.

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

Of great interest to the conveyancer is the recent case of *Richardson* v. *Manawatu Tire Rebuilders, Ltd.*, [1955] N.Z.L.R. 541. It is interesting and important not only for what it actually decides but also for certain *dicta* expressed by Turner, J., on s. 127 of the Property Law Act, 1952—a novel provision on which there is no other reported New Zealand case. This section for the first time authorized the Supreme Court to modify or extinguish easements and restrictive stipulations affecting land. The section applies to easements and restrictions existing at the commencement of the Act, as well as to those coming into operation after its commencement. Any order made under the section may be registered under the Land Transfer Act, 1952, and, when so registered, it is binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the easement, or interested in enforcing the restriction, and whether those persons are parties to the proceedings or have been served with notice or not. Subsection 1, which is the substantive part of the section, reads as follows :—

> 127. (1) Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement or restriction upon being satisfied—
>
> (*a*) That by reason of any change in the user of any land to which the easement or the benefit of the restriction is annexed, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement or restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement or restriction without securing practical benefit to the persons entitled to the easement or to the benefit of the restriction, or would, unless modified, so impede any such user; or
>
> (*b*) That the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part; or
>
> (*c*) That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the restriction.

Now, s. 127 of the Property Law Act, 1952, first appeared in the Property Law Amendment Act, 1951, which never came into force but the provisions of which are embodied in the present consolidating Property Law Act, 1952. As is well known to all solicitors, the Property Law Amendment Act, 1951, was sponsored by the Hon. H. G. R. Mason, Q.C., M.P., who outlined and explained the provisions of that Act in (1952) 28 New Zealand Law Journal 24. Explaining the predecessor of this section under the heading of "Important Changes in the Substance of the Law", Mr. Mason wrote :—

> . . . and the same section gives power to the Court to remove easements or restrictive covenants which lapse of time and changed circumstances have made obsolete.

Section 127, of course, goes further than that : it empowers the Court to *modify* easements and restrictive covenants, but Turner, J.'s, restricted application of the word "modify", as hereinafter explained, appears to conform to the intention of the learned draftsman of the Property Law Amendment Act, 1951, who, in his explanation of the Act, omits all reference to the *enlargement* of an easement or restrictive covenant.

The relevant words of the Memorandum of Transfer in *Richardson* v. *Manawatu Tire Rebuilders, Ltd.*, (*supra*), were as follows. The italics have been inserted by the writer of this article for the sake of clarity.

> . . . Do Hereby Transfer and Grant to the transferees as appurtenant to the lands comprised in Certificates of Title Volume 437 Folio 270 and Volume 482 Folio 246 being parts of Sections Numbered 274 and 275 City of Palmerston North full *and exclusive* right and liberty for the Transferees and their successors in title registered proprietors for the time being of the said lands described and their tenants and servants and all persons authorized by them from time to time and at all times hereafter at his or their will and pleasure to pass and repass with or without horses animals carts waggons carriages motor cars and other vehicles of any description laden or unladen for all purposes whatsoever connected with the use and enjoyment of the lands hereinbefore lastly described being the lands comprised in Certificates of Title Volume 437 Folio 270 and Volume 482 Folio 246 (Wellington Registry) over and along that portion of the land comprised in Certificate of Title Volume 5 Folio 57 delineated on the plan drawn hereon and in outline coloured red Provided Always that the Transferor and his successors in title shall be entitled *whilst the building now erected on the said land shall be used as a dwellinghouse* to similar rights of ingress and egress over the said right-of-way And the Transferees covenant with the Transferor that the Transferees and their successors in title will at all times maintain and repair the said right-of-way . . .

His Honour described this as "a rather remarkable document", inasmuch as it purports to grant an *exclusive* right of way. He added, at p. 542, l. 15 :

> I do not need to decide in these proceedings whether or not I would be disposed, if the wording stopped there, to conclude that by the word "exclusive" the grant effectively excluded the registered proprietor of Lot 5; it is clear by the words which follow that such was actually the intention of the parties, and that they intended that the grantor and his successors should thereafter be excluded from user except so long as the building at that time erected on Lot 5 should be used as a dwellinghouse.

The writer of this article must confess that, although he has always understood that an *exclusive* grant of way is permissible, this is the first time, despite his rather long experience in dealing with easements, that he has encountered an *exclusive* grant of a right of way. If A grants B a right of way, not expressed to be exclusive, over his land that does not prevent him from granting a similar right of way in favour of C and so on, provided he makes each subsequent grant of right of way subject to the preceding ones. If, of course, at the time he grants the first right of way, he contemplates granting similar rights in the future, it is good conveyancing practice to insert a provision making it clear that the grantee's enjoyment of the right of way is to be common with other persons having a similar right : see, for example, the precedent given in *Goodall's Conveyancing in New Zealand*, 2nd Ed., 227, where the relevant law

is stated in footnote (*d*) thereto. It may be safely stated that in New Zealand the *exclusive* grant of a right of way is extremely rare. It is most unlikely that the Supreme Court will ever have to deal with facts similar to those in *Richardson* v. *Manawatu Tire Rebuilders, Ltd.*

It must be borne in mind, also, that an easement is a mere *jus in re aliena*. After the grant of a right of way, the fee simple still remains vested in the grantor, subject to the rights of the grantee to enjoy what has been granted to him: the estate in fee simple is diminished to that extent but to that extent alone. An easement does not involve the right to possession as does a lease, nor does it give the grantee the exclusive right to use the land: his right of user is confined to the terms of his grant. It is submitted that any instrument which purported to grant the exclusive right to possession and user of a parcel of land would operate as a conveyance of the estate in fee simple from the grantor to the grantee; and, if the land were under the Land Transfer Act, the District Land Registrar would refuse to register it, as the transfer would not contain the operative words as required by the Land Transfer Act.

The application before the Court in *Richardson* v. *Manawatu Tire Rebuilders, Ltd.*, was made by the successor in title of the transferor to omit from the proviso at the end of the grant the words put above in italics, "whilst the building now erected on the said land shall be used as a dwellinghouse". The grounds urged were a change in the user of the servient tenement and in the character of the neighbourhood, by virtue of which the easement would, unless modified, impede the reasonable user of the land by the registered proprietor of the servient tenement. Counsel for the proprietor of the servient tenement put his submissions before the Court in this way: as his client's predecessor in title had reserved for himself a right of way over his own land, but only so long as an existing dwellinghouse on the land continued to be used, he asked that this right of way be *modified* by way of *enlargement* so as to continue it after the house had ceased to be used as a dwellinghouse. His Honour expressed strong doubt as to whether s. 127 of the Property Law Act, 1952, enables the Court to *modify* an easement so as to *enlarge* it. His Honour, after stating that he did not decide that point, expressly continued:—

> It is true that this word [*i.e.*, the word "modify"] may in appropriate contexts bear an extensive as well as a restrictive meaning: see the dictum of *Cooper*, J., in *Souter* v. *Souter*, ([1921] N.Z.L.R. 716, 725; [1919] G.L.R. 368, 373); but I am very doubtful whether it is so used in this section, for the words of subs. (1) (*a*), (*b*), and (*c*) do not seem to me to be applicable to enlargements of easements, and subs. (5) by directing that the Court's order shall be binding on persons "entitled to the easement or interested in enforcing the restriction" appears to contemplate that the order shall operate to restrict, not to enlarge, easements.

It is submitted that this is the correct view of the section. Not only is it impliedly consistent with subs. (5), but it also harmonizes with the principle of the common law that the burden upon the servient tenement must not be unduly increased. Thus, if A grants B a right of way to his dwellinghouse, and B subsequently demolishes the dwellinghouse and erects a theatre in lieu thereof, the patrons of the theatre have not by the grant any right to use the right of way: *Allan* v. *Gomme*, (1840) 11 Ad. & E. 759; 113 E.R. 602. Thus it would appear that, under s. 127 of the Property Law Act, 1952, the Court has no jurisdiction to enlarge or increase the *locus in quo* of a right of way. If A grants B a right of way from point X to point Y, the Court, presumably, cannot increase that right of way from point Y to point Z. But it may be pointed out that, except as to land subject to the Land Transfer Act, there is no objection to the acquisition by prescription of a right in enlargement of or complementary to an express and existing grant: *Carpet Importing Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37; [1926] G.L.R. 425.

However, as s. 127 of the Property Law Act, 1952, applies to restrictions arising under covenant or otherwise as to the user thereof as well as to easements, His Honour was able to deal with the argument from another point of view—namely, by treating the rights of the party under the proviso as a restrictive covenant by the applicant's predecessor in title, thereby, having granted an "exclusive" right-of-way, he bound himself expressly or impliedly, not to use the land as a passage-way after the existing dwelling had ceased to be used as a dwellinghouse.

The applicant based the grounds of his application on paras (*a*) and (*c*) of subs. (1):

> (*a*) That by reason of any change in the user of any land to which . . . the benefit of the restriction is annexed or in the character of the neighbourhood . . . the . . . restriction ought to be deemed obsolete *or* that the continued existence thereof would impede the reasonable user of the land subject to the . . . restriction without securing practical benefit to the persons entitled to the benefit of the restriction,
>
> Or, alternatively, (*c*) that the proposed modification . . . will not substantially injure the persons entitled to the benefit of the restriction.

His Honour was not able to find that any change had been made in the user of the dominant tenement. Any change in the use of the servient tenement, except in so far as it might be considered a part of its own neighbourhood, seemed to His Honour to be irrelevant. His Honour, at p. 543, l. 35, continued:—

> There is some proof of a change in the character of the neighbourhood which is shown to be in a state of transition from a residential to a business quarter. I do not think, however, that such a degree of change as is proved would justify me in concluding that by reason of it the restriction should be deemed obsolete. Indeed, the parties to the original grant seem to me to have envisaged, more or less clearly, that the day might come when the character of the neighbourhood might change exactly as has been the case, and that the premises might cease to be used as a dwellinghouse; and in that case they have expressly provided that the reserved user is to cease.

As to the other grounds relied on by the applicants, His Honour found it impossible to hold either that the continued unmodified existence of the restriction would secure no practical benefit to the owner of the dominant tenement, or that it would not be substantially injured by the modification sought. His Honour thought it was clear that the more one group of persons uses a right-of-way, the less free another group is to use it,

> . . . and where an exclusive right is granted (as it is argued is the case here) the re-inclusion of a person, or group of persons, excluded by the terms of the grant must operate to the detriment of those exclusively entitled by its terms. (*ibid.*, p. 544, l. 12).

The application to modify the grant under s. 127 of the Property Law Act, 1952, was, therefore, dismissed with costs.

It may reasonably be inferred from the reasoning in this case that, in applications under s. 127 of the Property Law Act, 1952, the vested rights of proprietors of land will not be lightly disturbed, interfered with, or altered by the Court. Also, that the Court will not make

a new contract for the parties: that it will not alter the express terms of the grant, but will assume jurisdiction to fill in gaps so as to effectuate the implied intention of the parties as gathered from an examination of the grant itself and consideration of the surrounding circumstances.

Finally, the writer of this article desires to point out that, in his opinion, it is rather a pity that no demand has yet arisen to make provision for registration under the Land Transfer Act, 1952, of a consensual variation by the parties to a registered easement or to the noting on the Land Transfer Register of a consensual variation of a provision duly noted on the Land Transfer Register, restrictive as to user. At present the procedure is adopted of releasing the existing easement or provision restrictive as to user, and registering new grants or noting new restrictive provisions—a procedure which is cumbersome and expensive. Already the covenants of a Land Transfer mortgage or lease may be varied by a short form; and, logically, there appears no reason why registered easements and duly-noted stipulations as to user should not be similarly modified.

THE CHOSEN OF THE GODS.

By Advocatus Ruralis.

When the Land Settlement Promotion (Farmers Protection) Act was passed, Advocatus told his farmer friends that this statute, by restricting farm buyers to members of a pressure group, had reduced the mortgage value of farms by, at least, 15 per cent. Moreover, by restricting the purchasers (and would-be farmers) to farmers' sons, new methods of farming were shut out. In Advocatus's district thirty years ago (before the days of farmers' income-tax), farms sold at 10 to 15 per cent. above production value, because farmers generally were of the opinion that the place next door would be handy for their sons.

The imposition of income-tax certainly helped the farmer to take a more intelligent interest in the economic side of farming, but, when business men entered this neglected commercial field and made two and three blades of grass grow where one had grown before, then the farmer really felt hurt. Previously it had been fairly easy to keep up with the Joneses because the Joneses were also farmers; but, when these shocking business men took up farming and made it pay, then the farmers were faced with their own younger generation demanding that they do likewise.

Obviously, the only thing to do (as in the Wool Retention period in 1951, when their incomes became fantastically high) was to have another Farmers Protection Act passed.

Trustees are sometimes faced with the necessity of selling farms; and, prices being what they are, they are compelled to sell by auction. If a neighbouring farmer wants to purchase part of the land to be sold, he explains to the Court how this extra land is required for water, or for a dormitory for sheep or something, and all is well. But if a mere business man wants to buy, then all is changed.

In a recent sale of first-class land, the Crown Representative said: "From a special report, I am advised that the property has not been farmed to its full capacity:" But he still objected to the highest bidder (a business man) being allowed to complete a purchase. It is, of course, possible that, with the very high prices obtaining, neighbouring farms may have merited a similar report. In the same month, Advocatus had a third-class farm for sale. At auction, it did not get a bid. It had been poorly farmed for twenty years. It was hawked, and finally sold to a fool of a business man for about 60 per cent. of its Government value. The business man had previously bought and brought into production (250 per cent. increase in stock) other badly-farmed third class land which he still owned, but no neighbouring farmer objected to this accumulation of land.

It should be the policy of any Government to bring our land into a higher state of production. If, in doing this, one particular section of the community must work harder or suffer, this should not affect the policy.

Aerial top-dressing has probably been the greatest help to increased production in New Zealand. The Land Settlement Promotion Act might yet be ranked with rabbits as the greatest deterrent, especially when there is a two or three months' delay between the auction and the Court hearing.

Advocatus has yet to meet a farmer who could name three other farmers within a distance of fifty miles to whom he would willingly send his son to learn farming.

OBITUARY.

Mr. R. F. Smith (Whakatane).

The death took place recently at Whakatane, in his 83rd year, of Mr. Robert Francis Smith, who had practised in that town for the past thirty-four years, and he had been in practice for fifty-five years.

The late Mr. Smith was born at Greytown on May 21, 1873, and was a son of Dr. John Smith, a pioneer surgeon of that town. Mr. R. F. Smith received his early education at Greytown and won a scholarship, under which he went to Wellington College. On completing his secondary education, he entered the civil service as a member of the Post Office staff at Wellington, and later studied law at Victoria University College.

He was admitted as a solicitor in 1898, and practised at Wellington as a member of the staff of Messrs. Izard & Weston, and also privately at Petone, where he resided. He remained in Wellington until the time of the first Great War, when he left to manage a practice at Otaki.

In 1919, Mr. Smith left Otaki and went to Whakatane, where he commenced practice on his own account. He continued to practice at Whakatane until March, 1953. He was tendered a complimentary function by the members of the Whakatane Bar to mark the occasion of the fiftieth anniversary of his admission to the bar.

Mr. Smith was a very keen bowler, and won many trophies during his long career in that sport. He was a Past President of both the Petone and the Whakatane Bowling Clubs. He was a keen gardener, and specialized in roses. He was a member of the Rose Society of England, and also of that of America. He was also well known in the district for his interest in poultry, and was a member of the Bay of Plenty Poultry, Pigeon, and Cage Bird Club. He exhibited birds successfully in the Bay of Plenty, and as far afield as Auckland. In his younger days he was a keen oarsman, and at one time was captain of the Wellington Rowing Club.

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

The Hatless Witness.—The question of women's hats has again reared its ugly head—this time in the Supreme Court at Napier, when the Chief Justice observed to counsel: "I hope I can have your assurance that the appellant intends no disrespect to the Court by appearing here, attired as she is. I do not set myself up as an arbiter of women's fashions, but usually on ceremonial occasions, such as the sittings of a Court of Law, women attend wearing a hat." On receiving counsel's assurance that no disrespect was intended, both the appellant and her witness being unadorned on top, His Honour intimated that he would accept that assurance on that occasion, but added that the Court was the Supreme Court of the Dominion and that as such it should be treated with respect: that litigants who resorted to it should, so far as their means would allow, appear in the garb which was customarily worn on such occasions. Joseph Addison, the essayist, once observed that there is not so variable a thing in Nature as a lady's headdress, so the average practitioner is sometimes in difficulty in knowing whether what his client dons for her appearance in Court actually falls within the defined limits or not. Maybe the New Zealand Law Society, accepting as a basic model Edward Lear's "runcible hat," could devise some standard female headgear that could be clamped hurriedly upon the head of the lady litigant when time did not permit of her dalliance with fashion at the local millinery store.

The Lucky Motorist.—It's an ill wind that doesn't blow somebody some good, and this must have been the feeling of the negligent motorist in the recent case of *The Queen* v. *Shoreham-by-the-Sea Justices* that came before a Divisional Court (Lord Goddard C.J., Hilbery, and Pearce, JJ.). The motorist who had been found guilty of careless driving contrary to s. 12 of the Road Traffic Act, 1930, encountered an unsympathetic bench of justices who disqualified him for 18 months, which was six times the maximum period which the statute permitted. The C.J. considered that it would be most desirable if the law could be amended so that, where an order was made by justices which was in excess of that which the law allowed, a Divisional Court were empowered to amend the conviction by imposing the sentence which the law did allow. Mistakes of this kind by justices had happened from time to time; but it had always been held that the Divisional Court must quash the order imposing the fine. It would be a very desirable thing, he thought, if the Court were given power to amend, but the practice had been so uniform for so many years that this would have to be done by legislation. For an offender to provoke justices into error would appear to be more profitable tactics than to throw himself upon their tender mercy.

Le Mot Juste.—According to the *Dominion*, funereally-inclined enthusiasts of Masterton met the other day to consider the erection there of a crematorium. After discussion, it was resolved that the matter be referred to the local bodies concerned.

Witnesses of the Crown.—In an article in (1955) *72 South African Law Journal* 44-45, Lord Justice Denning, writing on the traditions of the Bar, stresses that the responsibilities of prosecuting counsel are not confined to a fair presentation of the case. If he knows of a credible witness who can speak of facts which go to show the prisoner's innocence, he must himself call that witness. Moreover, if he knows of a witness who can speak to material matters, then although he need not call him himself, he must tell the prisoner's counsel about him so that he can call him. This was illustrated in a case a few years ago. The London County Council used to have their ambulances repaired by some garage proprietors. When repairs were needed, a note was sent to the garage with the vehicle, specifying the necessary repairs. Now it so happened that a clerk of the garage altered this note so as to make it appear that many more repairs were done than had in fact been done. In consequence the London County Council paid much more to the garage proprietors than they ought to have done. The garage proprietors were prosecuted for fraud, and the question arose as to who should call the clerk who altered the note. Neither the prosecution nor the defence called him. Lord Goddard, the Lord Chief Justice, said that it was understandable that the prosecution should not themselves call him, but it was, he said, "the duty of the prosecution to make available to the defence a witness whom the prosecution know can, if he is called, give material evidence". The prosecution had done that, and the defence had not chosen to call him. So the garage proprietors were convicted.

New Uses for Old Words.—The observation of the poet, Walter de la Mare, that many essentially beautiful and evocative words have missed their vocation (linoleum, for example, he says ought to be a charming old Mediterranean seaport) was made the subject of a *New Statesman* competition and produced, *inter alia*, the following entry:—

> From *The Iberians*: an Arthurian Legend
>
> . . . . Forth rode Sir Virus, nor looked back to see
> His castle's frowning poulticed walls, inset
> With lichened torts and quaint malfeasances;
> Nor heard the glood with streptococcal roar
> Plunge down the grape-hung terraces to meet
> Swift-flowing Vinegar; nor felt his horse
> Ratchet and pestle on the northern hills.
> For Lanoline, in her Welsh bower, o'erhung
> With yellow umbilicus buds and velvet
> Hernia blossom, span the thread that drew him . . .

There are many mellifluous legal words or phrases that appear wasted upon so arid a desert as the law—for instance, seisin, trover, detinue, sine die, jus tertii, replevin, and certiorari.

From My Notebook:

"During my first two years I think I tumbled into nearly all the pitfalls, but each was a valuable experience, because it taught me the best way to clamber out, and there is no other way of learning. Advocacy cannot be learned by reading law books any more than a boxer can learn to fight by merely punching at a ball. He has got to be knocked down many times before he is fit to earn his living in the ring."—From an autobiography by Sir Patrick Hastings.

"Sensible young men do not marry as early as they used to do"—Goddard, C.J. in *Dolbey* v. *Goodman*, [1955] 1 W.L.R. 553, 554.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Banker and Customer.—"Their Lordships are of opinion that whether or not an indebitatus count is used to recover money lent, where the creditor is a customer and the debtor a bank on current account, the "peculiar incidents" of that relationship govern the legal position and determine what the plaintiff must prove. This is admitted as regards the necessity of demand, a requirement which, in the absence of special agreement, does not attach where an ordinary creditor-debtor relationship exists, and the debtor must "seek out" his creditor. But a further "peculiar incident" is that the bank is only indebted to the customer for the amount (which may be called "a balance" when it is arrived at by deducting authorized withdrawals from sums paid in) standing to his credit as at the time of demand. Of course, if the customer can prove that at this time the "balance" suffices to pay his demand, he succeeds. If the "balance" falls short of doing so, even by a penny, he fails altogether, another distinction which rails off the creditor-debtor relationship in the case of a customer and banker from that relationship in other cases." Lord Asquith, delivering the judgment of the Privy Council in *Bank of New South Wales* v. *Laing*, [1954] A.C. 135, 154; [1954] 1 All E.R. 213, 221.

Marine Insurance; Goods.—"If that is correct, I am quite unable to see why the respondents in the present case should not be able to claim indemnity simply on the basis of loss of goods, and as if the doctrine of loss of adventure had never been accepted as part of our maritime law. The contract is an insurance against loss of two different kinds in relation to the goods. The first involves loss or damage to the goods themselves. The second involves merely that they have not reached their destination, though they may be perfectly safe. The frustration clause, in my opinion, is free from ambiguity. It relieves the underwriters in the cases we are dealing with from liability under the second head, but it leaves their liability unaffected as regards cases under the first head, provided, of course, that the risk has not come to an end. The trial Judge, misled, I think, by a somewhat incautious statement by that very experienced Judge, Bailhache, J., in *Sanday and Co.* v. *British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781, 784, repeated without comment in the Court of Appeal by Swinfen Eady, L.J., at p. 819, took the view that what was insured by a marine policy was merely the adventure. This, with all respect, was a mistake. Both as a matter of history and of commercial good sense, the main and primary subject of the insurance on goods under such a policy is the goods as tangible chattels. The liability for loss of adventure is one of a somewhat artificial character, and it appears to have been added to the indemnity in respect of loss of, or damage to, goods by perils insured against. I can find no trace, in any of the old works, of authority for the view that a claim for loss of goods has in the past been regarded as a special kind of claim for loss of adventure, and such a view (as was forcibly pointed out in the Court of Appeal) would lead, if logically pursued, to very strange results. Nor can I find anything in *Phillips on Law of Insurance* or in *Arnould on Marine Insurance* which supports that view. Historically, it is reasonably clear that the goods were first the subject-matter of the insurance and that then the loss of the voyage came to be regarded as involving a (constructive) total loss of the goods, provided there was an abandonment in due time: see *Barker* v. *Blakes*, (1808) 9 East. 283, 294; 103 E.R. 581, 585, where Ellenborough, C.J., explains his view of loss of voyage." Viscount Maugham in *Rickards* v. *Forestal Land, Timber, and Railways Co., Ltd.*, [1942] A.C. 50, 71; [1941] 3 All E.R. 62, 70.

Marriage as Contract.—"We clearly do not . . . intend a contract in the more ordinary sense, the more general acceptation of that word; we do not mean a contracting, an engaging or bargaining to marry; such a contract is a mere article and condition of a marriage to be afterwards had; it is to this subsequent actual marriage that the term 'contract' is applied in the present argument, and not to any mere mutual promise or engagement to marry; such promise or engagement is a promise or engagement to contract a marriage. Now, all admit, and the opinions of the learned Judges pronounce the marriage contract, thus designated, to be one of a very peculiar kind; for whether it is to be regarded as *ipsum matrimonium* or not, they describe it as perfectly indissoluble." Lord Brougham in *R.* v. *Millis*, (1844) 10 Cl. & F. 534, 703; 8 E.R. 844, 907. (The case contains much interesting historical material regarding the essentials of a valid marriage at the time.)

Provocation.—"It is not all provocation which will reduce the crime of murder to manslaughter. Provocation to have that result must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death. As it is said in *Stephen's Digest of the Criminal Law*, art. 317:

> In deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind.

The test to be applied is that of the effect of the provocation upon a reasonable man, as was laid down by the Court of Criminal Appeal in *R.* v. *Lesbini*, [1914] 3 K.B. 1116; 11 Cr. App. 7, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (i) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (ii) to take into account the instrument with which the homicide was effected, for to retort in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter." Viscount Simon, L.C., in *Mancini* v. *Director of Public Prosecutions*, [1942] A.C. 1, 9; [1941] 3 All E.R. 272, 277.