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DIVORCE: SEVEN YEARS' SEPARATION.

SEVERAL of our readers have written to us drawing attention to what they consider a divergence of judicial opinion on the interpretation of s. 10 (*jj*) of the Divorce and Matrimonial Causes Act, 1928 (added by s. 7 (1) of the Divorce and Matrimonial Causes Amendment Act, 1953), and the application of s. 18 to suits founded on it. They have suggested that some definitive decision by the Court of Appeal would be welcome to practitioners and to those desiring to seek relief under s. 10 (*jj*). We shall try and state the effect of the suggested equally-divided views expressed by their Honours in the four cases reported during the present year; and we shall endeavour to find if our correspondents are justified in making such observations thereon.

Section 10 (*jj*) is as follows:

> That the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years.

We shall have occasion to refer to s. 18. That section, as amended by s. 7 (2) of the Divorce and Matrimonial Causes Act, 1953, is as follows:—

> In every case where the ground on which relief is sought is one of those specified in paragraphs (*h*), (*i*), (*j*), and (*jj*) of section ten of this Act, and the petitioner has proved his or her case, the Court shall have a discretion as to whether or not a decree shall be made; but if upon the hearing of a petition praying for relief on the ground specified in paragraph (*i*) or paragraph (*j*) or paragraph (*jj*) aforesaid the respondent opposes the making of a decree, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition.

I.

Before considering the four judgments delivered during the present year, we must refer to *Crewes* v. *Crewes* [1954] N.Z.L.R. 1116, wherein Mr. Justice Gresson had to consider the effect of the petitioner's disobedience to an order for restitution of conjugal rights. This was the first case reported on the construction and application of section 10 (*jj*). His Honour, at page 1118, said:—

> The Legislature, in enacting that the mere separation of spouses for a period of seven years and an absence of any likelihood of reconciliation should constitute a ground for dissolution of the marriage, must be deemed to have recognized that in that category there would be widely varying cases, some where the separation had been occasioned by no more than incompatibility of temperaments, some where one of the parties had offended. It must have been recognized, too, that where there had been misconduct by one spouse causing or contributing to cause the separation there would be variations in character and degree. The Divorce and Matrimonial Causes Act, 1928, provides that the separation is to be regarded as sufficient justification for dissolution of the marriage with no other qualification than that the discretion conferred upon the Court by s. 18 is to be exercised in regard thereto. The respondent elected not to seek either a judicial separation or a divorce; but she did seek a maintenance order. It was sought, it is true, in the Magistrates' Court and not in the Supreme Court, but that difference is, in my opinion, unimportant. She adopted one of the courses which the legislation provides for cases of non-compliance. In my opinion, it is competent for the petitioner to proceed as he has done, and the fact that there was made in favour of the respondent some years ago an order for restitution which he has not complied with, is not an automatic bar but one of the matters to be considered in relation to the exercise by the Court of the discretion given to it under s. 18.

His Honour found, therefore, that it is competent for a petitioner, against whom an order for restitution of conjugal rights has been made, to petition for a dissolution of his marriage under s. 10 (*jj*). His Honour then considered the principles to be applied under s. 18. As the petitioner had proved the ground set out in s. 10 (*jj*) and the Court had found that the separation was not due to any wrongful act or conduct on his part, the automatic bar imposed by the second part of s. 18 did not apply. His Honour then enunciated the two principles to which the Court must have regard when exercising its discretion under the first part of s. 18; and, in so exercising his discretion thereunder, he granted the petitioner his decree.

In *McRostie* v. *McRostie*, [1955] N.Z.L.R. 631, an undefended suit, a wife petitioned, on the grounds set forth in s. 10 (*jj*) of the Divorce and Matrimonial Causes Act, 1928. Mr. Justice F. B. Adams, in a judgment delivered on March 15, found that a physical separation had been brought about by the husband's committal to a mental hospital, but there was a continuing *animus deserendi* thereafter on the part of the wife. Since October, 1939, the petitioner's desertion of her husband had taken the form, as His Honour put it, of living as the pretended wife of another man, with the Tasman Sea between her and the respondent.

His Honour concluded that the petitioning wife had established that she and the respondent had been "living apart" since January, 1938, and that the parties were "unlikely to be reconciled". He said that there would accordingly be a decree *nisi* for divorce. His Honour concluded his judgment by saying:

> The petitioner succeeds by proving desertion on her own part. This, however, is not anomalous but characteristic of this new ground of divorce, the purpose of which, is, I think, that even guilty spouses may get relief where their marriages have ceased to be real unions. Unless it be so understood, s. 10 (*jj*) seems almost, if not quite, supererogatory. I have not overlooked the discretions given to the Court by ss. 16 and 18 of the Divorce and Matrimonial Causes Act, 1928; but I see no reason for refusing a decree in this case. In the public interest, as well as in the interests of the petitioner and her second son and pretended husband, it is prefer-

able that the petitioner should be allowed to regularize her position.

After the delivery of the judgment in *McRostie's* case, a husband petitioned for divorce on the grounds set out in s. 10 (*jj*) of the Divorce and Matrimonial Causes Act, 1928, and the wife raised, as one of her defences to the petition, that the separation, if, in fact, one took place, was due to the husband's wrongful conduct: *Adams* v. *Adams* [1955] N.Z.L.R. 1245. This defence was based on the argument that the separation was against the wish of the wife, and was unjustified; and that the husband thereby became, and still remained, guilty of desertion. On May 16, in the course of his judgment, Mr. Justice McGregor said:—

> The question, therefore, arises as to whether a husband, guilty of desertion, which I will assume for the purpose of this judgment, can successfully petition for a divorce under s. 10 (*jj*) of the Divorce and Matrimonial Causes Act, 1928 (as added by s. 7 (1) of the Divorce and Matrimonial Causes Amendment Act, 1953). It seems to me that, in this regard, the whole policy of the section must be considered. This matter was very fully considered by *Gresson*, J., in *Crewes* v. *Crewes* ([1954] N.Z.L.R. 1116).

His Honour adopted, and entirely agreed with, the views expressed by Mr. Justice Gresson in that case as to the policy of the Legislature in enacting the new section. He agreed with that learned Judge that, as the parties had been living apart for a period of seven years and were unlikely to be reconciled, the marriage had in reality come to an end, and it was not in the interests of public policy that a husband and wife should be required to retain the marriage status. He concluded his judgment as follows:—

> I agree with *Gresson*, J., that there is no automatic bar; but the desertion by the petitioner is merely one of the matters to be considered in relation to the exercise by the Court of its discretion under s. 18. Taking the view I do of the policy of the Legislature in the present circumstances, I do not consider that this discretion should be exercised in the present circumstances against the petitioner.

In *Freeman* v. *Freeman*, [1955] N.Z.L.R. 924, the husband's petition was based on the ground set out in s. 10 (*jj*). The petitioner proved his allegation that the parties were living apart and were not likely to be reconciled, and had been living apart for not less than seven years. The answer filed by the wife denied the basic allegation of the petition, and alleged that the petitioner had been guilty of desertion, and prayed that the prayer of the petition "being opposed by me be rejected". (The answer did not specifically plead that the separation was due to the wrongful act or conduct of the petitioner.) This, Mr. Justice Shorland, in his judgment delivered on April 21, held was a sufficient plea to enable the respondent to set up that the separation was due to the wrongful act or conduct of the petitioner in wilfully and without just cause deserting the respondent, and to invoke s. 18 of the Divorce and Matrimonial Causes Act, 1928, accordingly. His Honour said:

> The petitioner's evidence acknowledges unequivocally that he was the party who withdrew from cohabitation. It is clear that he did so with the intention of permanently terminating the state of cohabitation. The sole reason he advances for adopting this course is that he could see that the parties were not going to be happy. He offers no reason emanating from any suggested fault or conduct on the part of the respondent. After leaving the respondent, he signs a document regarding an admission by him that he left against the wishes of the respondent, and that he refuses to return to her although she desires him so to do.
>
> I have endeavoured to look behind the actual parting for the purpose of taking a realistic view, and of endeavouring to ascertain the real causes of the parting, with the result that it appears to be all too clear that the parting sprang from a decision made by the petitioner to end the state of cohabitation against the wishes of the respondent. In execution of such intention he, to quote the words which he adopted in his cross-examination, "walked out on the respondent". There is no suggestion by him of any acts or conduct on the part of the respondent which would justify his going.
>
> Upon this evidence, a finding that the living apart was brought about by the petitioner wilfully and without just cause deserting the respondent is, in my view, inescapable; and I so find.

The learned Judge said that, in his view, the Court was bound to consider the plea of the respondent that the separation had been brought about by the wrongful act or conduct of the petitioner; and, if satisfied that the plea was made out, the Court was bound to dismiss the petition. He concluded by saying:

> As I am satisfied that the separation was brought about by the wrongful act or conduct of the petitioner in deserting the respondent, I am bound to dismiss the petition.

In *Wadsworth* v. *Wadsworth*, [1955] N.Z.L.R. 993, Mr. Justice Turner, on August 5, had no hesitation in finding on the facts that the petitioner had deserted his wife without just cause in February, 1942; and that, from that date onward down to the time of the hearing of the petition, he had continued to desert her. Not only did he find that the facts proved desertion without just cause, but he found that the wife had not been guilty of wrongful conduct bringing about the parting or contributing to it. His Honour continued:—

> So finding, I am of opinion that the petitioner cannot have any remedy, for the provisions of s. 18 appear to be mandatory. I leave open the question whether a finding of desertion must necessarily have this result in all cases, confining myself to deciding, in this case, that since the parting and its continuance were exclusively, or substantially exclusively, due to the wrongful conduct of the petitioner, s. 18 must, in this case, necessarily bar his petition.

His Honour distinguished *Keast* v. *Keast*, [1934] N.Z.L.R. 316; [1934] G.L.R. 292, in which Kennedy, J., said:—

> I am authorized to state that what I am about to say has the concurrence of my brothers who were parties to the decision in *Ansley* v. *Ansley* ([1931] N.Z.L.R. 1010) and also of the other members of this Court. "The separation", as explained in that case, does not include wilful desertion which is a termination by the unilateral act of one party. On the contrary, the words "the separation", in the context in which they occur in s. 18 of the Divorce and Matrimonial Causes Act, 1928, refer to a cessation of conjugal cohabitation by mutual consent of the parties (*ibid.*, 346; 304).

His Honour declined to accept a construction of s. 18 which would limit its application to cases of mutual separation, as, he stated, at the time when *Keast* v. *Keast* was decided, those were the only cases in which living apart could form a ground for divorce. He declined to read the dictum of Kennedy, J., out of its context, and to impose upon the operation of s. 18 a limitation which was never contemplated by that learned Judge, and which would now have the effect of allowing a respondent a defence against a petitioner mutually separated from her (or him), but would refuse her such a defence against a respondent guilty of desertion. His Honour continued:

> I therefore distinguish *Keast* v. *Keast*, and hold without hesitation that the word "separation" in s. 18 will, when applied to petitions founded on s. 10 (*jj*) (but possibly in such cases only), has the wider meaning formerly denied by Kennedy, J., and will apply to the "living apart" which is defined by para. (*jj*) as a ground for divorce.
>
> I do not need to decide, and I do not decide in this case, whether, in cases under s. 10 (*jj*), the word "separation", where used in s. 18, means the actual parting or the continued living apart of the parties: in the present case both seem to be due to the conduct of the petitioner, and the question need not therefore be decided.

It was contended for the petitioner that, if His Honour found desertion again him, he would still have the discretion to grant a decree, and *Crewes* v. *Crewes* [1954] N.Z.L.R. 1116, was cited in support of this contention; but His Honour distinguished that case as, where desertion was proved, as in the case before him, this must necessarily involve a finding that the withdrawal of the petitioner from cohabitation was unjustified and therefore wrongful; and, if in such a case, His Honour found (as he did here) that there was no counterbalancing substantial wrongful conduct of the respondent to cast into the scale on the other side, he was of the opinion that s. 18 must operate as a bar.

II.

A consideration of the judgments in the last four cases to which we have referred does not, it seems to us, reveal such a divergence of judicial opinion in interpreting and applying ss. 10 (*jj*) and 18 as our correspondents suggest.

Mr. Justice Turner in *Wadsworth* v. *Wadsworth* and Mr. Justice Shorland in *Freeman* v. *Freeman*, both defended cases, give the same application of s. 18. While the former left open the question whether a finding of desertion on the petitioner's part must necessarily be a bar to a petition under s. 10 (*jj*), he held, on the facts of the case before him, that, since the parting and its continuance were exclusively, or substantially exclusively, due to the wrongful conduct of the petitioner, s. 18 was necessarily a bar to a decree. Mr. Justice Shorland, in the latter of those cases, held that, as the living apart was brought about by the petitioner's wrongful act or conduct in deserting the respondent, the Court was bound, under s. 18, to dismiss the petition.

Against the background of those two judgments, *McRostie* v. *McRostie* would, at first sight, appear to show a completely divergent view. But, when it is remembered that it was an undefended suit, Mr. Justice F. B. Adams had no option but to grant a decree, subject to the exercise of his discretion under s. 18, notwithstanding the admitted wrongful conduct of the petitioner. The reason is, of course, that His Honour had to apply the first part of s. 18, since the petitioner had proved her ground of seven years' living apart and the unlikelihood of the parties' being reconciled; and he exercised his untrammelled discretion, given by that part of s. 18, in the petitioner's favour, on the grounds of public policy and the rectification of the petitioner's domestic circumstances. There was no opposition to the decree, as there was in each of the other cases we have mentioned; so the Court was in no way bound by the second part of s. 18 to dismiss the petition on proof of the wrongful act or conduct of the petitioner in deserting her husband, as that matter had not arisen, and could not have arisen, in the circumstances of the case.

Crewes v. *Crewes*, as we have shown, is distinguishable from the other cases we have mentioned, except in so far as Mr. Justice Gresson there said:

> If I were satisfied that the separation was caused by the wrongful act or conduct of the petitioner, I should be obliged to dismiss the suit.

So far, his view of the application of s. 18 was identical with that of Mr. Justice Turner, and Mr. Justice Shorland; and that matter was not in issue in *McRostie* v. *McRostie*. In *Crewes* v. *Crewes* the learned Judge was not satisfied that the separation was due to any wrongful act or conduct on the petitioner's part; and the remainder of his judgment is largely a discussion of the principles involved, in relation to a proved petition under s. 10 (*jj*), in exercising the discretion conferred on the Court by the first part of s. 18 with a view to deciding whether it should be exercised in favour of the petitioner when he had in some degree misconducted himself, though the breakdown of the marriage could not, in His Honour's opinion, be attributed wholly to that circumstance. It seems to us, with respect, that the value of the judgment lies in its expression of the principles on which discretion should be exercised when there is no statutory bar such as is provided in the second part of s. 18.

In *Adams* v. *Adams*, Mr. Justice McGregor did not find that the separation was brought about by the petitioner's wrongful conduct. He assumed, for the purposes of his judgment, that the petitioner was guilty of desertion. He assumed it in order to pose the question whether a petitioner guilty of desertion can successfully petition for a decree on the ground set out in s. 10 (*jj*). Then, in adopting the judgment of Gresson, J., in *Crewes* v. *Crewes* as to the general policy of the Legislature in enacting s. 10 (*jj*), His Honour, we think, with respect, took out of its context the expression "an automatic bar" as used in that judgment.

In *Crewes* v. *Crewes*, as we have seeen, Mr. Justice Gresson was considering a petition in which the petitioner had failed, some years earlier, to comply with a decree for restitution of conjugal rights. After explaining the nature of that procedure, His Honour found that the separation had *not* been brought about by any "wrongful act or conduct of the petitioner", within the meaning of [the second part of] s. 18; and he then said:

> The fact that there was in favour of the respondent an order for restitution which he had not complied with, *is not an automatic bar*, but one of the matters to be considered in relation to the exercise by the Court of the discretion given to it under s. 18.

His Honour was, it is clear, referring to the discretion given to the Court under the first part of s. 18; he could not be referring to the second part of s. 18, as there was no proof of any "wrongful act or conduct of the petitioner" to bring into operation the duty of the Court to dismiss the petition.

It would appear, therefore, that the judgment in *Adams* v. *Adams*, on the footing of His Honour's assumption of desertion on the petitioner's part, was founded on a misapplication of the first part of s. 18. The petitioner had, it is true, proved his case; but, if it had been proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court would have been bound to dismiss the petition. Mr. Justice McGregor did not find that the desertion of the petitioner had been proved. He merely assumed that it had, for the purposes of the judgment: on that basis, and on that basis alone, the second part of s. 18 applied. If His Honour considered that the desertion of the petitioner had not been proved, then his judgment is on all fours, and for the same reasons, as that of Mr. Justice Gresson, in *Crewes* v. *Crewes*, in so far as that judgment enunciates the principles on which discretion should be exercised in relation to a petition under s. 10 (*jj*), where the first part of s. 18 alone is applicable.

It appears, therefore, that *Crewes* v. *Crewes* and *McRostie* v. *McRostie* are authorities on the interpretation of s. 10 (*jj*) and on the application of the first part of s. 18; and that *Wadsworth* v. *Wadsworth* and *Freeman* v. *Freeman* demonstrate the application of the second part of s. 18 when the respondent opposes the making of a decree and proves to the satisfaction of the Court that the seven years' separation required by s. 10 (*jj*) has been brought about by the wrongful act or conduct of the petitioner.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1955.

Adoption.
Agricultural Emergency Regulations Confirmation.
Air Services Licensing Amendment.
Amusement Tax.
Appropriation.
Auckland Grammar School Amendment.
Auckland Transport Board Amendment.
Bankruptcy Amendment.
Births and Deaths Registration Amendment.
Building Emergency Regulations Amendment.
Building Societies Amendment.
Chiropractors' Association.
Civil Aviation Amendment.
Civil List Amendment.
Companies.
Co-operative Fertilizer Manufacturing Companies.
Counties Amendment.
Crimes Amendment (No. 2).
Criminal Justice Amendment.
Crown Grants Amendment.
Dairy Board Amendment.
Dairy Industry Amendment.
Destitute Persons Amendment.
Dietitians Amendment.
Dogs Registration.
Education Amendment.
Electric Power Boards Amendment.
Electrical Supply Authorities Association Amendment.
Electricity Amendment.
Electricity and Gas Co-ordination Committee.
Emergency Regulations Amendment.
Estate and Gift Duties.
Family Protection.
Fencing Amendment.
Finance.
Finance (No. 2).
Forest and Rural Fires.
Gaming Amendment.
Government Railways Amendment.
Government Service Tribunal Amendment.
Housing.
Housing Improvement Amendment.
Impounding.
Imprest Supply.
Imprest Supply (No. 2).
Imprest Supply (No. 3).
Imprest Supply (No. 4).
Imprest Supply (No. 5).
Joint Family Homes Amendment.
Judicature Amendment.
Judicature Amendment (No. 2).
Justices of the Peace Amendment.
Justices of the Peace Amendment (No. 2).
Land Agents Amendment.
Land and Income Tax Amendment.
Land and Income Tax (Annual).
Land Settlement Promotion Amendment.
Land Subdivision in Counties Amendment.
Law Practitioners.
Law Reform Amendment.
Licensing Amendment.
Licensing Trusts Amendment.
Local Bodies' Loans Amendment.
Local Legislation.
Magistrates' Courts Amendment.
Maori Purposes.
Maori Reserved Land.
Maori Trust Boards.
Marriage.
Meat Export Prices.
Milk Amendment.
Music Teachers Registration Amendment.
Mutual Insurance.
National Parks Amendment.
National Provident Fund Amendment.
National Roads Amendment.
National Roads Amendment (No. 2).
Newspapers and Printers.
New Zealand Foundation for the Blind.
Opticians Amendment.
Penal Institutions Amendment.
Petroleum Amendment.
Plumbers Registration Amendment.
Police Force Amendment.
Police Offences Amendment.
Potato Growing Industry Amendment.
Primary Products Marketing Regulations Confirmation.
Public Holidays.
Public Works Amendment.
Rabbits.
Rehabilitation Amendment.
Reserves and Domains Amendment.
Reserves and Other Lands Disposal.
Shops and Offices.
Social Security Amendment.
Social Security Amendment (No. 2).
Stamp Duties Amendment.
Statistics.
Stock Amendment.
Summary Jurisdiction Amendment.
Superannuation Amendment.
Tenancy.
Tourist Hotel Corporation.
Transport Amendment.
Trustee Amendment.
Urban Farm Land Rating Amendment.
Veterinary Services Amendment.
War Pensions Amendment.
War Pensions Amendment (No. 2).
Water Supply Amendment.
Wills Amendment.

LOCAL ACTS.
Ashburton Borough Cemetery.
Auckland Harbour Board Loan and Empowering.
Auckland Metropolitan Drainage Amendment.
Hamilton City Special Rates Consolidation.
Hikurangi Town Council Empowering.
Lyttelton Harbour Board Loan and Empowering.
Otago Museum Trust Board.
Palmerston North Insurance Funds.
Rawene Town Council Empowering.
Taranaki Harbour Board Empowering.
Tauranga County Council Empowering Amendment.
Timaru Harbour Board Loan.
Wellington Harbour Reclamation.

PRIVATE ACTS.
Church of England (Missionary Dioceses).
Eden Park Trust.
Mary Bryant Trust Board Enabling.
Mina Tait Horton Estate Amendment.

PUBLIC BILLS LAPSED.
Contracts Enforcement.
Crimes Amendment.
Decimal Coinage.
Expiring Laws Continuance.
Harbours Amendment.
Mining Titles Registration.
State Supply of Electrical Energy Amendment.
Statutes Amendment.

ADOPTION OF CHILDREN.

Recognition and Effects of Foreign Adoption Orders, (D. P. O'Connell) *33 Canadian Bar Review*, 635.

COMPANY LAW.

Forfeiture and Surrender of Shares, (E. A. Shaker) *33 Canadian Bar Review*, 654.

CRIMINAL LAW.

Obtaining Credit by Fraud—Hire-purchase—Motor-cycle under Hire-purchase given in part exchange on Hire-purchase of Another Motor-cycle—No Credit obtained since No Debt created—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (1). The appellant obtained a motor-cycle on hire-purchase terms from suppliers, giving in part exchange another motor-cycle which he represented to be his own, but of which he had possession on hire-purchase terms under which payments still remained to be made. The suppliers allowed him £65 in respect of the motor-cycle which he gave in part exchange against the price of the motor-cycle which they supplied. The appellant pleaded guilty to a charge of larceny and a charge of obtaining credit to the amount of £65 under false pretences or by means of other fraud contrary to s. 13 (1) of the Debtors Act, 1869. *Held*, The appellant had not obtained

Messrs. H. R. Biss and A. R. Cooper, practising as Barristers and Solicitors at 86 Lambton Quay, Wellington, under the firm name of Biss & Cooper, announce that they have admitted to partnership with them Mr. W. S. Shires, B.A., LL.M. (N.Z.), Ph.D. (Cantab.), Barrister and Solicitor, as from the 1st day of October, 1955, and that from that date their practice will be carried on at the above address under the firm name of Biss, Cooper & Shires.

LEGAL ANNOUNCEMENTS.

Continued from page i.

A young qualified solicitor is required by country practitioner. A partnership available to suitable applicant after twelve months. Replies to :—

"OPPORTUNITY,"
C/o P.O. Box 472, Wellington.

ACCOMMODATION.

Lower Hutt S.M. would appreciate word of flat or small house in Wellington from March 1956 to end of year—*e.g.*, of client going overseas (though would prefer unfurnished flat for indefinite period). Considerate tenants (wife and self only) prepared to contract out of Act.

Particulars to Registrar, Magistrates' Court, Lower Hutt.

LAWYER, aged 25, returning to New Zealand in November, desires position. Supreme Court centre preferred. Four years' office experience, including one year as a qualified clerk. Apply to :—

"OVERSEAS,"
C/o C.P.O. Box 472, Wellington.

credit, because in "crediting" him with £65 in respect of the motor-cycle taken in part exchange no debt was created; and, therefore, the plea of guilty to the charge of obtaining credit by fraud should not have been accepted and the conviction on that charge would be quashed. *R.* v. *Mitchell.* [1955] 3 All E.R. 263 (C. C. A.)

NEGLIGENCE.

Landlord and Tenant—Injury of Tenant—Two Tenements in Building—Common Access by Stairway—Tenant injured through Defective State thereof—Implied Undertaking by Landlord in Contract of Letting to Keep Common Means of Access in Reasonably Safe Condition—Retention by Landlord of Sufficient Measure of Control and Possession of Means of Access to render Him liable for Injury to Tenant if Defect therein—Tenant's Injury resulting from Landlord's Failure to Keep them Reasonably Safe. Any liability of a landlord for repair arises out of the contractual relationship expressly or impliedly entered into between the parties. (*Cavalier* v. *Pope*, [1906] A.C. 428, followed.) Where a building is divided into several tenements separately let to a fluctuating body of tenants, each of them has an easement over the common stairway or other common means of access, or at least a licence to make use of such means, conterminous with his tenancy; and since the landlord necessarily retains, over such means of access, a degree of possession and control sufficient to enable him to grant such easements or licences to all such incoming tenants as he admits, it is implicit in his contract with every tenant that he shall take reasonable care to keep reasonably safe the common means of access. (*Baker* v. *Turner*, [1950] A.C. 401; [1950] 1 All E.R. 834, followed.) (*Miller* v. *Hancock*, [1893] 2 Q.B. 177, applied.) (*Dunster* v. *Hollis*, [1918] 2 K.B. 795, referred to.) *So held*, by the Court of Appeal (Hutchison and McGregor, JJ., Barrowclough, C.J., dissenting), allowing an appeal from the judgment of Cooke, J. *Nicholls* v. *Lyons.* (S.C. & C.A. Wellington. July 8, 1955. Barrowclough, C.J., Hutchison, McGregor, JJ.)

PUBLIC REVENUE—INCOME TAX.

Case Stated—Findings of Fact by Commissioners—Power of Appellate Court to Review. The respondents were assessed to income tax under Case 1 of Sch. D to the Income Tax Act, 1918, for the years of assessment 1946-47 and 1947-48 in respect of a transaction engaged in by them in purchasing and later selling certain spinning plant, on which transaction they made a substantial profit. Neither of the respondents had had any transactions in machinery or any other commodity before. On appeal, the Commissioners for the General Purposes of the Income Tax determined that the "transaction" in question was not an adventure in the nature of trade and discharged the assessments. On appeal by the Crown, the High Court and the Court of Appeal held that the determination was purely a question of fact, and that it was not open to either Court to interfere with it. *Held*, 1. Although an appellate Court may allow an appeal from the commissioners' determination only if it is erroneous in law, yet, where a Case Stated shows on the face of it no misconception of law, if it should appear to the appellate Court that no person, if properly instructed in the law and acting judicially, could have reached that particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination. 2. The finding that the transaction was not an adventure in the nature of trade must be set aside because the commissioners had acted either without evidence or on a view of the facts that could not reasonably be entertained, and the assessments must be confirmed. (*Cooper* v. *Stubbs*, [1925] 2 K.B.753, *Leeming* v. *Jones*, [1930] 1 K.B. 279, *Jones* v. *Leeming*, [1930] A.C. 415, and *Inland Revenue Commissioners* v. *Lysaght*, [1928] A.C. 234, considered.) Per Viscount Simonds: (*a*) If and so far as there is any divergence between the English and Scottish approach [to the question to which (i) above relates] it is the English approach which is supported by the previous authority of this House. (*b*) What are the characteristics of an adventure in the nature of trade is a question of law, but, assuming that the tribunal is correctly directed on the law, its inference from the facts whether a particular transaction is, or is not, an adventure in the nature of trade, is an inference of fact. Appeal allowed. *Edwards* (*Inspector of Taxes*) v. *Bairstow and Another.* [1955] 2 All E.R. 48 (H.L.)

TRANSPORT.

Dangerous Driving—Riding Motor-cycle through Children's Play Area carefully and at Moderate Pace—Children playing Ten Yards away—Offence committed—Transport Act, 1949, s. 40. To drive a motor-cycle within a recreation area, where children are playing at a distance of not more than 10 yards, is to drive dangerously within the meaning of s. 40 of the Transport Act, 1949, even though the motor-cycle is ridden carefully and at a moderate speed. *Lower Hutt City Corporation* v. *Schnell.* (Lower Hutt. February 1, 1955. Drummond, S.M.)

WILL.

Class—Gift—Time of Ascertainment of Class—Gift of Share of Residue to "my grandchildren (the children of my son [E.J.M.])"—Distribution postponed until the Youngest is Twenty-one years of age—Whether Grandchildren born after Testator's Death included in Class. By his will the testator directed that his residuary estate should be divided into four equal parts and gave "one part to my grandchildren (the children of my son [E.J.M.]) to be administered towards their maintenance and education until the youngest is twenty-one years of age and then distributed equally among them." At the date of the testator's death E.J.M. had two children. Subsequently a third child was born. Neither of the elder children had attained the age of twenty-one years. On the question whether the one-fourth share of residue was held on trust for all the children of E.J.M., whenever born, *Held*, The gift to the grandchildren being immediate and vested, the rule of construction was that the class of grandchildren who took under the gift was confined to those in esse at the date of the testator's death unless the testator had clearly indicated a contrary intention; the direction to distribute the share when the youngest was twenty-one years of age was not a sufficient indication that the testator intended a larger class to take, and, therefore, the share was held on trust for the two children of E.J.M. who were living at the date of the testator's death. (*Smith* v. *Jackson*, (1823) 1 L.J.O.S.Ch. 231, followed; *Mainwaring* v. *Beevor*, (1849) 8 Hare, 44; *Armitage* v. *Williams*, (1859) 7 W.R. 650, and *Re Pilkington*, (1892) 29 L.R. Ir. 370, distinguished.) *Re Manners (deceased). Public Trustee* v. *Manners and Others.* [1955] 3 All E.R. 83. (Ch.D.)

Condition—Forfeiture—Restraint of Marriage—Partial Restraint—Gift of Personalty to Widow provided She remain a Widow—No Gift over on Re-marriage. By his will, the testator provided that, at a certain date, his residuary estate, which was given on the usual trusts for sale and conversion, was to be divided equally between, among others, his sons and a nephew, with a proviso that, if any of the sons should die before the date of distribution leaving male issue, such male issue should stand in his place, but that if such deceased son should not leave male issue but "shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son . . . and lead a chaste life". There was no gift over on the re-marriage of a widow or her failure to lead a chaste life. After the testator's death and before the date of distribution one of his sons died leaving a widow and a daughter and the widow re-married. *Held*, The widow's re-marriage did not cause a forfeiture of the interests given to her and her daughter because, although the will showed an intention that widows who re-married should not benefit, yet mere weight of intention was not enough in the absence of a gift over or something equivalent to it, and, as the will contained no gift over, the proviso was ineffective to destroy the interests given. (Reasoning of Lord Hardwicke, L.C., in *Wheeler* v. *Bingham*, (1746) 3 Atk. 364, applied.) Appeal allowed. *Leong and Another* v. *Lim Beng Chye.* [1955] 2 All E.R. 903. (P.C.)

WORKERS' COMPENSATION—TOTAL DEPENDENCY.

Substantial Position as to Dependency between Parties at Time of Death if Death had not occurred—Circumstances of a Temporary Nature to be discounted—"Total Dependency"—Workers' Compensation Act, 1922, s. 2—Workers' Compensation Amendment Act, 1947, s. 49 (2). In determining whether a relative of a deceased worker is a "total dependant" within the meaning of the definition in s. 2 of the Workers' Compensation Act, 1922 (*as* enacted by s. 49 (2) of the Workers' Compensation Amendment Act, 1947), it is necessary to consider what was the position as to dependency between the parties at the time of death, or, rather, what would have been the position at the time if the death had not occurred. The substantial position should be looked at, and, in ascertaining it, circumstances of a temporary nature existing at the date of the death should be discounted. (*O'Connor* v. *Archibald Russell, Ltd.*, [1940] S.L.T. 26; 33 B.W.C.C. Supp. 1, *Harris* v. *Powell Duffryn Steam Coal Co., Ltd.*, (1915) 9 B.W.C.C. 93, and *De Bique* v. *McGowan and Magee, Ltd.*, [1940] N.Z.L.R. 783; [1940] G.L.R. 431, applied.) *In re McEnirney* (*deceased*), *Public Trustee* v. *Attorney-General.* (Comp. Ct. Wellington. June 9, 1955. Dalglish, J.)

THE LAW OF DEFAMATION: LIABILITY OF NEWSPAPERS.

By A. G. Davis.

There can be little doubt that the Defamation Act, 1954, has removed some of the terrors which formerly beset the publishers of newspapers and, indeed, any printed matter. In particular, s. 6 goes a long way to relieving from liability those guilty of what the English Committee on the Law of Defamation (Lord Porter's Committee) called "unintentional defamation". No longer can some one in the position of Artemus Jones, the plaintiff in the celebrated case of *Hulton* v. *Jones*, [1910] A.C. 20, hope to claim the substantial damages awarded in that action when his name is used by a writer as that of a fictitious person. Provided the author, to use the words of the section, "has exercised all reasonable care in relation to the matter", and provided further that the author has made a satisfactory tender of amends, the plaintiff will fail in his action.

This aspect of the Act was fully dealt with in a leading article in (1954) 30 New Zealand Law Journal (see, particularly, at p. 330 *et seq.*), and there is no need to discuss it further here.

There is one matter, however, about which newspaper publishers may feel less happy. This concerns the publication of certain reports and the degree of privilege accorded to them. The relevant provisions are contained in s. 17. Subsection (1) of that section gives qualified privilege to fair and accurate reports of proceedings of the House of Representatives and of proceedings of Courts of Justice in New Zealand and of various other reports mentioned in Part II of the First Schedule.

Subsection (2), which is of particular concern to publishers of newspapers and to broadcasting stations, provides that in a civil action in respect of any matter mentioned in Part II of the First Schedule, the defence of qualified privilege will not be available if it is proved that the defendant has been requested by the plaintiff to publish in the same manner as the defamatory matter a reasonable letter or statement by way of explanation or contradiction and has refused or neglected to do so or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

Subsection (3) provides that nothing in the section shall be construed as protecting the publication:

> (*b*) Of any such report or other matter as is mentioned in Part II of the First Schedule unless it is of public concern and the publication of it is for the public benefit.

It is with the qualification mentioned in this subsection that this article is particularly concerned.

Part II of the First Schedule lists eleven reports or matters which are given qualified privilege. They range from reports of the proceedings of the Legislature of any territory outside New Zealand to reports of any public meeting held in New Zealand. In general, they are of a nature which one expects to find reported in newspapers.

To get the protection of the section, a newspaper, made defendant in an action for defamation, would have to prove: (*a*) that the report was fair and accurate; (*b*) that, in appropriate cases, an explanation or contradiction was published; and (*c*) that the report or other matter was of public concern and that the publication of it was for the public benefit.

Taken as they stand, the words

> "that the report . . . is of public concern and the publication of it is for the public benefit"

would seem to leave little doubt that a defendant would have to prove both public concern *and* public benefit. On this matter, however, there is no room for doubt.

One does not need to seek far to discover cases in which the word "and" in a statute has been read as if it were "or". For example, in *Murdoch* v. *British Israel World Federation, (New Zealand) Inc.* [1942] N.Z.L.R. 600; [1942] G.L.R. 390, the Court of Appeal held that in s. 43 (2) of the Crimes Act, 1908, the word "and" in the phrase "incapable of understanding the nature and quality of the act or omission *and* of knowing that such act or omission was wrong" should be read as "or", so as to express the effect of the rule in *McNaghten's Case*, (1843) 10 Cl. & Fin. 200).

Again, in *Golden Horseshoe Estates Co.* v. *The Crown*, [1911] A.C. 480, the Privy Council held that the words "deducted and paid" in the Dividend Duties Act, 1902 (Western Australia), were to be read as "deducted or paid". So read, the section would then mean "what it is reasonable and just that it should mean".

Should the words in s. 17 (3) (*b*) of the Defamation Act, 1954, be read disjunctively so as to allow the defence to succeed if it could be proved that the report was a matter of public concern *or* that publication was for the public benefit?

To attempt to answer that question, it is necessary to trace the history of the legislation. This qualified privilege was first conferred by s. 4 of the Law of Libel Amendment Act, 1888 (U.K.). This is a lengthy section which, for present purposes, may be quoted as follows:

> A fair and accurate report published in any newspaper of the proceedings of a public meeting . . . shall be privileged, unless it shall be proved that such a report or publication was published or made maliciously: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter: . . . provided further, that nothing in this section shall be deemed or construed . . . to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

The learned author and subsequent editors of *Fraser's Law of Libel and Slander* strongly contends that the last "and" in the section should be read as "or". At p. 141 of the 7th edition it is said:

> There has been a great deal of discussion as to whether it will be necessary in order to establish privilege for the publication in a newspaper of any of the proceedings specified in s. 4 of the Act of 1888, to prove (1) that the matter is of public concern, *and* (2) that the publication thereof is for the public benefit; or whether it will be sufficient to prove either (1) or (2). At first sight the former construction appears to be the correct one, but it is submitted that a careful consideration of the words of the section will prove that this is not so. For the privilege is only taken away where the matter is *not* of public concern and the publication is *not* for the public benefit; and if so, it follows that where either the matter is of public concern *or* the publication of it is for the public benefit the privilege exists.

The learned author goes on to support his argument by reference to the earlier words in the same section, which deal with blasphemous or indecent matter. That clause, he says, contains two provisos—the first that no blasphemous matter shall be protected; the second that no indecent matter shall be protected: consequently the privilege will be taken away if it be proved that the matter is blasphemous *or* if it be proved that the matter is indecent. He continues:

> On the other hand, the clause dealing with the question under discussion is really only one proviso consisting of two terms, both of which must co-exist in order that the proviso may apply and the privilege be taken away; and should only one of them exist, the proviso fails to apply and the privilege remains.

Logically, this is an attractive argument; but in the few cases reported under the section—the reports of all of which are inadequate—the learned author's argument does not appear to have received much judicial support.

In *Kelly* v. *O'Malley*, (1889), 6 T.L.R. 62, the facts were that a meeting of dock labourers was held to discuss the sugar bounties. The plaintiff had attempted to speak to the meeting, but he was unable to do so because of the noisy and derisive observations of certain persons who had previously known the plaintiff at Bristol, and who were present at the meeting with the express object of preventing him from being heard. An accurate report of the proceedings appeared in the *Star* newspaper, containing, *inter alia*, the substance of these noisy and abusive observations, which had no connection with the sugar bounties, but referred to events which had occurred some years previously at Bristol.

In course of argument, Huddleston, B., (at p. 64), said the publication must be for the public benefit besides being of public interest. In reply, counsel for the defendant said: "Quite so, my Lord, that is what I have contended all along; and I say if of public interest, then it follows it must also be for the public benefit".

In his direction to the jury, the learned Judge was not very explicit on this particular issue. He said: "Could any one say that these miserable personalities had anything whatever to do with public interest or benefit?" Apparently the jury thought not, because it returned a verdict for the plaintiff.

In *Chaloner* v. *Lansdown*, (1894) 10 T.L.R. 290, the defendants had published a report of a sermon preached by a Congregational minister in which the plaintiff (a Conservative candidate for Parliament) was, by implication, condemned and attacked at great length for having attended a smoking concert. Wills, J., ruled that the chapel service was not a "public meeting" within the meaning of the section. Quite apart from that point, the jury found that it was not for the public benefit that the report was published, but apparently they were not called upon to decide whether the matter was one of public interest. Judgment was given for the plaintiff.

In *Ponsford* v. *The Financial Times*, (1900) 16 T.L.R. 248, the alleged libel was contained in a report of a company meeting in the course of which the chairman had made serious allegations against the plaintiff's honesty. From the report of the case it would appear that the defendants pleaded that the report was not only a matter public concern, but also that its publication was for the public benefit. Mathew, J., in a reserved judgment, said that the chairman, in his reference to the plaintiff, was not discussing matters in which the public were interested nor was it a matter the publication of which was for the public benefit.

It is far from clear, however, whether the learned Judge was of the opinion that the defendants had to prove both public concern and public benefit or whether it would have sufficed if they proved either one or the other. In fact, they could prove neither; and judgment was given for the plaintiff.

Sharman v. *Merritt and Hatcher, Ltd.*, (1916), 32 T.L.R. 360, was an action in which the plaintiff had been employed by a borough corporation as superintendent of a public cemetery. A committee of the corporation reported to the corporation that they were not satisfied with the way in which the plaintiff had carried out his duties and that he should be dismissed. The report appeared on the agenda paper of a meeting of the corporation which was open to the public. It was adopted by the corporation without being read. The defendants published a report of the meeting. This contained the statements in the agenda paper concerning the plaintiff. In argument, counsel for the defendants submitted that it was sufficient for the purposes of the section to prove either that the publication was of a matter of public concern or was for the public benefit. Counsel for the plaintiff submitted that the publication must be both of a matter of public concern and for the public benefit.

In his judgment, Shearman, J., said that he had no doubt that a matter relating to the manager of a public cemetery was a matter of public concern. Sitting as a jury, he came to the conclusion that the publication was for the public benefit. He concluded that, if he were to hold that such a publication as the present one was not for the public benefit, it seemed to him that it would be placing an intolerable burden upon reporters at public meetings, and would help to fritter away the privilege which he was sure the statute intended to give. Judgment was given for the defendants.

The learned Judge did not say specifically that it was necessary for the defendant to prove both a matter of public concern and publication for the public benefit. But he implied this. For if the defendant could succeed by proving either matter, then, having held that a question relating to the manager of a public cemetery was a matter of public concern, there would have been no necessity for him to deal with the question, which he said had given him some difficulty, whether publication was for the public benefit.

Such judicial authority as there is lends little support in favour of the interpretation of the section given in "Fraser".

Gatley on Libel and Slander is of the opposite opinion to "Fraser". At p. 329 (4th Ed.) it says:

> The question has been raised whether it is sufficient for the defendant to prove *either* that the subject matter of the report is of public concern *or* that its publication is for the public benefit, or whether he must prove *both* of these facts in order to establish a plea of privilege under this section of the Act. In *Kelly* v. *O'Malley*, Huddleston, B., said that "the publication must be for the public benefit besides being of public interest" and in *Sharman* v. *Merritt and Hatcher, Ltd.*, Shearman, J., held the same view. It is submitted that this is the correct construction of the proviso. It does not necessarily follow from the fact that the public are interested in the subject matter of the report that it is for their benefit that such report should be published.

The Law of Libel Amendment Act, 1910 (N.Z.), used words similar to those in the United Kingdom Act of 1888, in s. 2 (1) (*a*) relating to reports of meetings of local authorities; viz.,

> so far as the report relates to matters of public concern and the publication thereof is for the public benefit.

These words do not appear to have been the subject of judicial interpretation in this country. They are now substantially re-enacted in s. 17 (3) of the Defamation Act, 1954. And the proviso to s. 4 of the 1888 Act is re-enacted in s. 7 (3) of the Defamation Act, 1952 (U.K.).

While, therefore, in view of "Fraser's" submissions, and in view of the paucity of judicial decisions, it cannot be said that the question is free from doubt, it is submitted that a newspaper or broadcasting station claiming privilege for such reports as are mentioned in Part II of the First Schedule must not only not be guilty of malice but must also prove that the report is of public concern *and* that the publication of it is for the public benefit.

At first sight, this may seem to impose a heavy burden on newspapers and broadcasting stations. But as "Fraser" says:

"In its practical aspect, the discussion is perhaps somewhat academic, for it is difficult to imagine any libellous matter of public concern the publication of which would not be for the public benefit, or any libellous matter of private concern which it would be for the public benefit to publish."

LICENSEE OR LIFE TENANT.

Provision for Occupation of Premises by Beneficiary: In re Denton.

By Juristor.

A tenant for life obtains certain advantages, notably the right to receive the profits of the land, not enjoyed by a mere occupant. There was therefore some material benefit at stake in the case of *In re Denton, New Zealand Insurance Co., Ltd.* v. *Denton* (to be reported), in which the defendant claimed that a tenancy for life in her favour was constituted by the following clause in the will of the deceased:

> 7. I declare that during the life of my sister E.M.D. my trustees shall permit her to occupy and live in the flat at "Fern Hill" (No. 3) at present occupied by her and myself free from the payment of rent or any expenses in respect to rates insurances repairs or upkeep of any kind whatsoever and after her death the same shall fall into and form part of my residuary estate.

At the date of the will, and before his death the deceased had resided with the defendant, his sister, in the flat referred to in the clause, being part of a property owned by the deceased. In this originating summons under the Declaratory Judgments Act, 1908, it was argued on behalf of the sister that the clause conferred a life interest on her. For the residuary beneficiaries, it was contended that a mere licence or right of personal residence was given.

McGregor, J., noted that the effective words "to occupy and live in the flat" tied together two conflicting lines of decision, with the result that he had to decide which was the dominant word. He concluded that the wide meaning of "occupy", which alone would constitute a tenancy for life, must be narrowed down by the term "live in", which cut down the right to that of mere personal occupation, and that, therefore, the question propounded must be answered to the effect that the clause did not confer on the defendant a tenancy for life. His Honour said,

> In my view, I must endeavour to construe the words "occupy and live in" as used conjointly in endeavouring to ascertain the meaning the testator intended to convey, and I should not regard the two contrasting expressions separately. Used in conjunction the two expressions seem to me at least to suggest the notion of personal residence. "Live in" can have only this implication, *May* v. *May*, (1881) 44 L.T. N.S. 412, and the same implication is consistent with one meaning which may be given to "occupy" as used in the sense of personal occupancy.

Living in a property was, he considered, inconsistent with letting it to some other person. He thought this view was confirmed by the use of the phrase "at present occupied by her and myself", in the line of the will immediately following. It was agreed that, at the date of the will, the testator and his sister were occupying the flat in the sense that they were residing in the flat. Here the testator had used the word "occupy" in this particular sense, and the will itself might be taken as the dictionary from which the meaning of this word was ascertained.

Fee Simple or Life Estate?

A general question capable of arising in cases of this nature has been discussed by the House of Lords in *Coward* v. *Larkman*, (1888) 60 L.T. 1. The relevant provision of the will, which Lord Halsbury described as "an extraordinary document", caused some difference of opinion among their Lordships, and was as follows:

> . . . and I also desire that my said wife shall have the free use and occupation of my said house called Elmsleigh aforesaid.

Kay, J., had held that, by the general tenor of the will, the whole of the property of the testator had passed absolutely to the appellant (the widow of the testator), on the grounds that there was, in fact, an unlimited bequest of income and of use and occupation; and that the appellant was therefore absolutely entitled, in the context of this will, to the whole of the real and personal estate of the testator. The Court of Appeal allowed the widow a life interest only in the Elmsleigh house, and this decision was sustained by a majority in the House of Lords, Lord Halsbury, L.C., dissenting and preferring to support the view of Kay, J.

It was the opinion of Lord Halsbury that the words "free use and occupation" were sufficient to convey an estate, and that s. 28 of the Wills Act, 1837, which reads,

> And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will

made the construction that it should pass the fee simple obligatory. On this portion of the judgment there is a comment in *Jarman on Wills*, 8th Ed., 1282, that the section speaks of a devise of real estate, not a

devise of the use and occupation of real estate, and that moreover s. 28 does not apply to interests created *de novo*.

Lord Watson, in *Coward* v. *Larkman* (*supra*) at p. 4, whilst agreeing that a gift of use and occupation passed an estate in the subject of it, added that whilst questions had frequently arisen whether the grantee must use and occupy by himself, or might do so by others, it had never been decided that the words imported an unlimited gift—that was to say, a gift in perpetuity. (His Lordship seems here to refer to a comment by the Lord Chancellor that the words concerned were now the subject of a judicial construction.) He had come to the conclusion that in the present instance the bequest of use and occupation was not intended by the testator to be unlimited but was meant to be strictly personal to the legatee. He was accordingly of the opinion that the interest of the appellant in this house had rightly been declared to be limited to an estate for life.

Lord Fitzgerald appears to have agreed with Lord Watson both as to principle and in interpreting the will before the House, for he says, at p. 4:

> There seems to be no disagreement about the rule referred to by Kay, J., or as stated in terms by Cotton, L.J., in the first paragraph of his judgment. Sir Edward Sugden, speaking forty-six years ago, gives the reason for treating a gift of the produce of a particular fund, whether it be interest or dividends, as a gift of the principal in perpetuity, because it represents the capital; and he adds, "If I give the produce of my residuary estate to A.B., this gift of the produce represents the capital from which it is to flow," *Heron* v. *Stokes*, (1842) 4 Ir. Eq. 284. This passage was not necessary for Sir Edward Sugden's judgment, and I refer to it only as the opinion of a great and accurate Judge. It is always however subject to this, "unless a contrary intention shall appear by the will".

The possibility that the beneficiary in *In re Denton, New Zealand Insurance Co., Ltd.* v. *Denton*, (*supra*), might have taken a fee simple is, however, negatived by the words, "during the life of my sister". Accordingly, it was not raised, and the question at issue was whether the beneficiary stood in the next rank, that of tenant for life, with right to profits, or was a mere licensee.

Life Interest or Licence?

In *Parker* v. *Parker*, (1863) 1 New Rep. 508, the question was raised in the form of a trust to permit the testator's three sons, or the survivors or survivor of them, to reside in his freehold premises at A., rent free, they or he keeping the said premises in repair and insured, and on the death of the survivor then upon further trusts, or ultimately to residue. The testator further directed his trustees to pay the rents and profits of property B. to his eldest daughter for life, or to permit her to reside in and occupy the said premises. Kindersley, V.-C., said that if the testator had intended the sons to take a life interest, it would have been easy for him to have said so. But the clause relating to the sons was different from that by which he afterwards gave a life estate to a daughter in another house. What the testator meant was very clear, and, therefore, the sons had a right to reside in the house without paying rent, but, if they did not reside there, they would have no right to rents and profits arising from the house, which would fall into residue.

Similarly, in *In re Stewart, Stewart* v. *Hislop* (1904) 23 N.Z.L.R., 797, Williams, J., discussed the relationship between tenant for life and licensee in the case of a clause in a codicil which directed that the dwelling-house and land concerned be not sold without the consent of the testator's wife if she remained unmarried, and of such of his daughters as might be of age and unmarried, and might be occupied till sold by his said wife if unmarried, and by all or any of his unmarried daughters, free of rent. From some time after the death of the testator, the trustees let the house and land, with the appropriate consents, and treated the rent as income of the trust moneys, and accounted from it as such (less outgoings) to the children of the testator. On an originating summons to determine the rights of the beneficiaries *inter se*, it was argued for the plaintiffs, the widow and an unmarried daughter, that the use of the word "occupy" showed that the testator intended to give a life estate to the plaintiffs. In *Holden* v. *Allen* (1903) 6 G.L.R. 87 (a case referred to by McGregor, J., in *In re Denton* (*supra*)), Cooper, J., had held that the use of the word "occupy" was equivalent to the grant of an estate for life unless there were words in the will clearly cutting down to a right of personal occupation only the right conferred. Here there were no such limiting words, and the plaintiffs therefore claimed the rents to the property. For the two sons of the testator, who were also beneficiaries under the general trusts under the will, it was contended *contra* that the testator had intended merely personal use on the part of the widow and unmarried daughters concerned, and not an estate for life determinable on remarriage. This aspect was particularly noted by Williams, J., who said at p. 800:

> Suppose that the widow and unmarried daughters had an equitable estate or interest in the property, and not the mere personal right to reside there, what would be the nature and extent of such interest? Clearly they would be in equity joint tenants for their lives, marriage being treated as equivalent to death.

Then his Honour examined the practical implications of that interest. No doubt the tenancy would be determined by the sale of the property, but that could be only with the consent of the tenants. They could therefore jointly let or assign their interest. But if they had a joint interest of which they could dispose, each of them was in the position of a joint tenant. A joint tenant in equity, as well as a joint tenant at law, could assign his interest to a stranger and sever the joint tenancy. The widow, therefore, or any one of the unmarried daughters, could have assigned her interest to a stranger, who would thereupon have become tenant in common with the others. If there were no assignment, but any of them became bankrupt, her interest would pass to the assignee in bankruptcy.

But, his Honour continued, each tenant in common had an equal right to the occupation of the common property. Any stranger, therefore, into whose hands an assigned interest might come, however undesirable a person he or she might happen to be, would have an equal right with the widow or the other unmarried daughters to the occupation of the house. The object of the testator had manifestly been to provide a home for his widow and unmarried daughters, in which they, or such of them as liked, could live together. It was certainly not the intention of the testator to give his widow, or any of his unmarried daughters, the power by herself at any time to defeat that object, and to prevent the others making the house their home unless they shared it with strangers. Therefore, he said,

> If an estate passes, the power to each one of them to assign her interest accompanies it, and the existence of such power is inconsistent with the object of the testator.

Thus, Williams, J., concluded, the context showed that, whatever the effect of the word " occupy " might be in general, the construction of the word in this codicil was limited to personal occupation. The trustees of the will, and not the unmarried widow and daughters, therefore, were entitled to the rent of the property as income arising from the residuary estate of the testator.

The " Live in " Test.

In *In re Denton* (*supra*) McGregor, J., applied substantially the same test as was adopted by Williams, J., in *In re Stewart* (*supra*), namely, the position that would arise if the beneficiary did not personally occupy and reside in the premises. He pointed out that " living in " a property is inconsistent with letting it to some other person. It is, therefore, of interest to consider what his further comments might have been if there had been more than one beneficiary concerned. It is submitted that the case against a tenancy for life would then have been strengthened by the *ratio decidendi* of *In re Stewart* (*supra*) set out above, namely, that the introduction of strangers into the home would be inconsistent with the general intention of the gift. There was not, in *In re Denton* (*supra*), a family home in the sense of the living together of several people. There was, however, a clear reference to " living in ", and it might reasonably be submitted that the introduction of a stranger into the flat could be equally inconsistent with the general intention of the gift. This point, nevertheless, is capable of unreasonable extension and should apparently be limited by the circumstances of the particular case. Presumably no objection would be sustained to the voluntary taking of a companion, boarder, or lodger, in *In re Denton* (*supra*), by the sole occupant, whereas in *In re Stewart* (*supra*) this would require common consent. The point, however, may not be free from doubt in view of the very personal nature of the grounds on which both decisions rest.

The last aspect referred to by McGregor, J., was the absence of a gift over until after the death of the sister. It seemed to him that the sister was given the right of personal residence for life. She might desire to give up personal residence for intermediary periods, and later resume such personal residence. A gift over in respect of such temporary periods of absence would be impracticable, and it seemed to him that the intention of the testator was to ensure a personal residence being available for the sister during her life for such period or periods, intermittent or otherwise, as she should desire.

Finally his Honour referred to *Holden* v. *Allen* (1904) 6 G.L.R. 87, mentioned above, in which Cooper, J., after concluding that a right to occupy for life was equivalent to a grant of an estate for life in the property referred to, qualified the general rule by the expression, " unless there are words in the will which clearly cut down the right to that of personal occupation only." McGregor, J., thought that in the bequest before him there was such an indication of intention, and he therefore held that the sister took only a right of personal occupation or residence, as licensee, and not a right to profits as a tenant for life.

THE COMMONWEALTH AND EMPIRE LAW CONFERENCE.

An English View*.

Exchanges of views between members of the legal profession practising in different parts of the Commonwealth are now more necessary than ever. The development of self-government and the curtailment of the appellate jurisdiction of the Judicial Committee of the Privy Council require the forging of new links between the lawyers of the Commonwealth so as to enable them to follow more closely the emergence of new ideas in the administration of justice in their respective territories.

It may not be possible, for economic reasons, to hold conferences of this kind at frequent intervals, but it is desirable that the personal contacts made at the recent Conference in London be strengthened by permanent Committees which will keep in touch with one another until such time as it becomes possible to hold another conference in one of the Commonwealth countries. It is hoped that the next conference will be held in Canada in 1960 and further conferences at intervals of five years in other parts of the Commonwealth.

The range of subjects of mutual interest to lawyers, as the programme of the London Conference has shown, is very considerable indeed, and although conditions must necessarily vary in the different countries, there is much that can be learnt from the varied experience of lawyers practising in practically all parts of the globe.

The subjects discussed at the recent conference were the following: Professional ethics and etiquette, fusion or separation of the two branches of the profession, retirement benefits for practising lawyers, juries in civil and criminal proceedings, systems of land tenure, the causes of and remedies for congestion of business in the Courts, legal aid, the lawyer's part in law reform, tenure of office and qualifications of colonial judges, recruitment of candidates to the legal profession, reciprocity of admission to practice in the Commonwealth, and institutional advertising—the latter term being understood as referring to an orderly system of public relations. It is not possible, within the ambit of a short survey of the work accomplished by the Conference, to deal with all the subjects here referred to, and only a few will be selected for more detailed consideration.

Professional Ethics.

The problem of professional ethics in the widest sense is one which the legal profession has always regarded as being of paramount importance. The

* By F.H. in the *Law Journal* (London).

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reputation of the profession in the eyes of the public depends on the observance of the highest standards of professional etiquette, and delegates expressed some concern that entrants into the profession in many parts of the Commonwealth frequently set up in practice without the benefit of prior systematic instruction in the subject of professional ethics at universities and law schools, and many lawyers practising to-day may agree that a course of instruction in professional etiquette would have saved them anxiety and embarrassment in the early days of their carreer.

While the standards of general ethics to be observed by lawyers as well as other professional men are well understood by lawyers, the same does not necessarily apply to standards of etiquette to be observed by lawyers as a special class. On the other hand, even questions of the latter kind can usually be solved with the help of professional bodies and more experienced colleagues who are always glad to help those who feel that they need the guidance of others on matters of this nature.

The discussion in committee revealed that standards of etiquette are by no means uniform throughout the Commonwealth, and many delegates expressed surprise at the rule obtaining in this country, which precludes counsel from interviewing witnesses other than experts and the parties for whom counsel happens to be acting. Similarly, with regard to such modern developments as broadcasting and television appearances by members of the legal profession, there was a certain divergence of views.

The Bar Council in this country is at present engaged in a review of these problems which have become more acute as a result of the introduction of commercial television, and there is no doubt that much can be learnt from the experience of lawyers in Canada where this question has been under consideration for some considerable time. It remains to be seen whether the compromise solution of allowing lawyers to take part in such activities either anonymously or by revealing their names, but not their profession, will ultimately prove to be satisfactory.

One cannot help but feel that the growing practice of lawyers engaging in these pursuits may well lead to a situation where undesirable advertisement becomes inevitable. On the other hand, there is no denying the fact that public relations are closely linked with broadcasting and television, and it is not easy to devise a system which, while performing the desirable function of acquainting the public with the law and lawyers in the abstract, will at the same time avoid personal advertisement by and for individual lawyers.

Fusion.

Another subject which caused a great deal of heart-searching was that of fusion as against separation of the two branches of the profession. Most delegates appeared to be satisfied with the system obtaining in their respective countries. It would appear that, in addition to this country, the Union of South Africa and New South Wales have found it desirable to retain separation, while in other parts of the Commonwealth there is fusion in law, though not always in fact.

The question before the Conference was not whether fusion rather than separation is in the best interests of the profession, but whether one or the other is likely to provide the best service for the public. Many arguments can be adduced in favour of either system, but much will depend on local conditions, and most lawyers would agree that in widely scattered communities a separation of the two branches of the profession may well militate against an efficient administration of justice, while in prosperous city communities, and especially in those with important commercial interests, fusion may not necessarily provide an adequate service.

It was interesting to learn from our Australian and Canadian colleagues that, notwithstanding that fusion is the rule (except in New South Wales), there has been a tendency in recent years voluntarily to establish a separate Bar.

Those in favour of separation, whether it be compulsory or voluntary, adduced the argument that advocacy is a specialized activity which should be left to specialists in that field, while those favouring fusion felt that specialization *quoad* subject-matter was more important than specialization *quoad* mode of presentation. This latter argument has much to commend itself in a complex society where substantive law tends to become more and more complicated and where no man can hope to achieve more than a nodding acquaintance with many branches of the law, and where specialization *quoad* subject-matter is an imperative necessity. It may well be that the problem is no longer so much one of fusion *versus* separation as one of the large firm of practitioners *versus* the one-man firm. In any event, whichever view one may take of the desirability or otherwise of fusion, there are two anomalies which no longer serve any useful purpose. One is the need for a young lawyer to make up his mind at an early stage in his career whether he feels more suited to enter one or the other branch of the profession, and the other is the immunity of counsel from actions for professional negligence and the resulting immunity of solicitors from such actions where they have taken counsel's opinion.

There is no longer any need for lawyers to select one or other branch of the profession at a time when they are not yet sufficiently mature and experienced to make that choice, and lawyers should be enabled, without the requirement of further examinations, to change from one branch to the other when they feel that they can safely make that choice. In this context it is interesting to observe that lawyers in New South Wales regard it as a hardship that they cannot change from one branch to the other until five years after admission. In so far as concerns the second anomaly—and the writer is fully conscious that many a legal eyebrow will be raised at his suggestion—members of both branches of the profession should be liable for negligence, the corollary being, of course, that counsel's fees should no longer be *honoraria*, but claims enforceable in law. It is to be hoped that the revenue authorities would not automatically withdraw such small benefits as members of the Bar still enjoy if the suggestion here made were to be adopted.

Meanwhile, the legal profession has good cause to feel aggrieved at the treatment it receives at the hands of the revenue authorities not only here, but in other parts of the Commonwealth. Some delegates felt that the present system of taxation is such as to make the future of the independent practitioner highly problematical. There is no system of retirement benefits

which enables a professional man—the problem concerns the professions generally, and not only the legal profession—to make adequate provision for the future.

Moreover, even in the case of solicitors, as distinct from members of the Bar, although a solicitor has a saleable asset in the shape of his practice, he must still look to other solicitors to purchase that practice from him, and the prospective purchaser, under the present system of taxation, will often be unable to do so, with the result that solicitors may have to remain in practice long beyond retiring age. On the other hand, it must not be forgotten that solicitors are still relatively better placed than counsel who have no saleable asset at all and therefore more cause to feel aggrieved. It must be left to the reader to judge whether here perhaps there is another argument in favour of fusion, albeit less from the point of view of the public than from the point of view of the legal profession itself.

Land Tenure.

Two other matters which formed the subject of discussion may be mentioned here. One was a comparison between different systems of land tenure and the other the jury system. With regard to the former, it was generally felt by delegates that compulsory registration of title is preferable to the system of so-called private conveyancing, although some were of opinion that the publicity attendant upon registration of title had led to undesirable practices among land agents in some parts of Australia. Yet, on the premise that the transfer of land should be reliable, quick and cheap—a premise generally accepted by those with experience of this branch of the law—there can be little doubt that such disadvantages as may result from publicity are outweighed by the greater reliability and speed attendant upon the compulsory registration of title.

The Jury System.

With regard to the part to be assigned to juries in the administration of justice, there was a wide divergence of views. In this country, as well as in other parts of the Commonwealth, recourse to trial by jury in civil cases is less frequent than it was before the last war, and the virtual disappearance of juries, except in special cases, is deplored by many. It is probably true to say that while it is desirable for the ordinary citizen to be associated with the administration of justice, trial by Judge alone is more certain and more expeditious. This also seemed to be the view of many delegates who could see little advantage in retaining juries in civil cases.

Almost without exception, however, even those otherwise not in favour of trial by jury felt that juries should be retained in actions which are concerned with the liberty of the subject. It is not quite clear what exactly delegates had in mind, and in particular whether the term "liberty of the subject" was understood as extending to the protection of individuals against encroachments by the State upon rights of property, or whether it was confined to proceedings for *habeas corpus* which, in any event, are not within the competence of juries. In any event, nobody would seriously suggest that Judges have ever failed to uphold the rights of the individual against the executive. The Union of South Africa is alone in having entirely abolished trial by jury in civil cases, and even in criminal proceedings trial by jury is the exception rather than the rule.

The experience of the Union of South Africa, however, has no bearing on the question of the desirability of trial by jury in other parts of the Commonwealth where racial problems do not play a significant part in the administration of justice, and most of the delegates were agreed that trial by jury in criminal cases was desirable and should be retained. Notwithstanding such almost universal agreement, however, the question may be asked whether some reform is not desirable in those countries in which the verdict of juries has to be unanimous.

A Commonwealth Supreme Court.

The different views expressed by delegates on the few topics which it has been possible to select for consideration here show that in many ways the legal systems of the countries of the Commonwealth have travelled in different directions during the last two centuries. It is doubtful, therefore, whether the tentative suggestion of the establishment of a new Supreme Court of the Commonwealth will commend itself to member countries. Even if conceived as a Court composed of Judges of several countries rather than one consisting largely of Judges from the United Kingdom, some of the countries of the Commonwealth may feel that they would prefer, while paying due regard to the case law of this country and other parts of the Commonwealth, to develop along independent lines. If that were to be the wish of the majority of member countries, they would probably still agree that close association between their professional bodies is highly desirable and that the establishment of a permanent Commonwealth Legal Association would be in the best interests of all Commonwealth lawyers.

The Fusion of the Legal Profession.—England, like South Africa, is one of the few countries where the legal profession is divided into two branches: barristers to present the case to the Court; solicitors to do the work of preparing it beforehand. It is often suggested that these two branches should be merged into one single profession as in the United States and many of the countries of the Commonwealth. There may be some advantages in fusion, but I cannot help thinking that one of the reasons why justice is, as we think, so well administered in England is because there is a comparatively small number of barristers who maintain the very high standards, and traditions of which I have told you. High standards can be maintained among a small number of men—because each one of them is jealous to notice divergence from principle and no one of them would willingly forfeit the good opinion of his fellows. But it could not be done among a large number. (Rt. Hon. Lord Justice Denning, *The Traditions of the Bar* (1955), 72 South Afr. L.J. 43, at p. 57.)

CONSENT OF THE MORTGAGEE TO LEASE OF MORTGAGED LAND.

Under the Land Transfer Act, 1952.

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

At page 284, *ante*, the learned editor was good enough to publish an article by me under the name or heading of "Land Transfer: Lease". In that article, I pointed out, *inter alia*, that s. 119 of the Land Transfer Act, 1952, provides that no lease of mortgaged land or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto. Although the consent of the mortgagee may be effectual, if obtained after the registration of the lease, and may even be implied, the careful conveyancer will endeavour to get the mortgagee's consent indorsed on the lease before it is registered. If this is not done, there is a real risk that, if the mortgagee exercises his power of sale, the registration of the lease will be extinguished.

In the course of that article I proceed to point out that s. 119 of the Land Transfer Act, 1952, appears to be little more than declaratory of the common law. The position under the general law was that where a mortgagor granted a lease without the consent of the mortgagee, the only right which the lessee had against the mortgagee who had not consented to the lease was to redeem the mortgage, if the mortgagee took steps to evict him. I further pointed out in that article that a prudent lessee would not rely on such a right, which lack of money at the crucial moment might render impossible to exercise, but instead would endeavour to get the mortgagee's consent.

I have now received relative to the above opinion, the following interesting letter from Mr. P. M. MacCallum, solicitor, of Hastings.

> I have read with interest your article in Volume XXXI of the Journal at Page 284 relating to the obtaining of mortgagees' consents to Leases. I notice that it includes no reference to what is now Section 46 of the new Tenancy Bill which provides that tenancies shall be binding upon mortgagees.
>
> It would seem at first glance that that provision (which is of course a repetition of the provision in the earlier Act) could in some cases have application to Memoranda of Lease under the Land Transfer Act. May I suggest (with some temerity) that practitioners might be interested in your comments upon the relationship of this section to the provisions of that Act.

I am much indebted to my learned correspondent for drawing my attention to this point, which I had omitted to discuss in my article. I agree with Mr. MacCallum that s. 46 of the Tenancy Act, 1955, would in some cases have application to memoranda of lease under the Land Transfer Act, although I am not acquainted with any reported case where the point has been raised by counsel or even mentioned by the Court. I think that s. 46 of the Tenancy Act, 1955, being a particular provision dealing with certain classes of leases, would prevail over the more general provisions of the Land Transfer Act referred to by me in my article.

As its Long Title expresses it, the Tenancy Act, 1955, is "An Act to consolidate and amend certain enactments relating to Tenancies of dwellinghouses and other Properties". I think it was the learned President of the Court of Review (which Court is now happily defunct) who once remarked that the Mortgagors and Lessees Rehabilitation Act, 1936, was an Act in relief of mortgagors and lessees, and not one in relief of mortgagees and landlords. The same line of reasoning may be applied to the Tenancy Act, 1955, and its statutory predecessors. They are and were in relief of tenants and not of landlords or their (*i.e.*, landlords') mortgagees.

Moreover, the Tenancy Acts and their statutory predecessors are of much more recent date than the Land Transfer Acts. The first Land Transfer Act, so far as New Zealand is concerned, was passed in 1870: whereas the first Rent Restriction Act in New Zealand, from which the present Tenancy Act springs, was passed during the 1914-1918 War. The main intention of the Tenancy Act—security of tenure and protection from excessive rentals—would be frustrated, if the mortgagee could evict the tenant.

This interpretation is consistent with the reasoning of the High Court of Australia in the leading case of *South-eastern Drainage Board* v. *Savings Bank of Australia*, (1940) 62 C.L.R. 603. The South-eastern Drainage Amendment Act, 1900, of South Australia, provided that the amount of drainage construction costs apportioned to a land-owner under that Act should be a first charge on the land of the land-owner, and that such charge could be enforced by the Commissioner of Crown Lands, as if he were the mortgagee under the Real Property Act, 1886 (which Act is the South Australian statute corresponding to our Land Transfer Act). In 1912, the registered proprietor executed a mortgage in favour of the Savings Bank of South Australia, and the mortgage was duly registered under the Torrens system. But, in *1908*, a charge for drainage construction had attached to the land. In 1912, when the mortgage was registered there was no notice on the Register-book of the statutory charge. The Court held that, first, as the statutory charge was constituted by an Act later in date than the registration statute, the provisions of indefeasibility of title had to be read subject to the provisions of such later Act. Secondly, as the charge for drain construction costs did not depend for its efficacy on registration, being in fact incapable of registration, it was not possible to apply the principle of such cases as *Assets Co. Ltd.* v. *Mere Roihi*, [1905] A.C. 205; N.Z.P.C.C. 275, and so regard the statutory charge as being something intended to be brought into conformity with the general registration scheme. If the land is subject to the Land Transfer Act, a lease for a term of years may be registered under that Act; but the Tenancy Act applies to many tenancies which could not be registered under the Land Transfer Act, *e.g.*, weekly and monthly tenancies. And there is nothing expressed or implied in the Tenancy Act that tenancies protected thereby are to be subject to any special principles of the Land Transfer Act. In truth a literal reading of, and a more minute examination of, the Tenancy Act shows the contrary.

Section 46 of the Tenancy Act, 1955 provides that

> *Notwithstanding anything to the contrary in any Act* [which, it is submitted, would include the Land Transfer Act] or rule of law, every *tenancy* of a *dwellinghouse* or *property* shall, subject to the provisions of this Act, be binding on every mortgagee

of the *dwellinghouse* or *property* (whether alone or together with any other premises) and on every person claiming under or through any such mortgagee, whether the *tenancy* has commenced or is deemed to have commenced before or after the commencement of this Act or before *or after the creation of the mortgage*, and whether or not the mortgagee has consented to the tenancy.

The words "tenancy", "dwellinghouse", and "property" are defined in s. 2 of the Tenancy Act, 1955, to which careful reference should be made. The word "mortgagee" is not defined in that Act; but, it is submitted, in s. 46 of the Tenancy Act, 1955, it includes the registered proprietor of an encumbrance as well as the registered proprietor of a mortgagee: to give it a narrower meaning would appear to be contrary to the intention of the Act.

The words in s. 46, "notwithstanding anything to the contrary in any Act" appear most signiifcant. I see no reason why the Land Transfer Act should not be included in the phrase "in any Act".

The words in s. 46 "subject to the provisions of this Act" (i.e., the Tenancy Act, 1955) are, at first reading, somewhat puzzling perhaps; but I think that an examination of the Act shows what they mean.

As previously pointed out, the words "dwellinghouse" and "property" are defined. The Tenancy Act, 1955 does not comprise every class of property, whereas a Land Transfer lease may be a lease of any land subject to the Land Transfer Act, and, as we all know, most privately owned land in New Zealand is now subject to the Land Transfer Act.

Part II of the Tenancy Act, 1955 is headed, "Application of Act". Sections 6-9 of the Act are under the heading, "*Total Exemptions*"; and ss. 10 to 17 are under the heading, "*Partial Exemptions*".

Section 6 provides that where a building is erected after the date of the commencement of the Act (October 21, 1955), the Act shall not apply to the building or to any *dwellinghouse* or *property* comprised in it in respect of any tenancy for which an agreement is entered into after that date. Section 7 of the Act exempts from the provisions of the Act *new* tenancies of *dwellinghouses* not let during the period of three months before October 21, 1955.

Section 8 exempts from the provisions of the Act tenancies of *dwellinghouses* or *camp sites* (as defined) let for a period of six weeks or less. (A mortgagee would as a rule not be very much interested with tenancies of such short duration.)

Bearing in mind that the term "property" in the Tenancy Act, 1955, has a limited application, we at once perceive the importance to Land Transfer leases of s. 9 which reads:—

> 9. Where an agreement has been entered into at any time after the commencement of this Act for the letting of any *property* for a term of not less than four years, this Act shall not apply to the premises or to any part thereof in respect of that tenancy.

Most leases registered under the Land Transfer Act are for terms of more than four years: indeed under the "old system" a lease for less than *seven* years was not registrable at all. However, it remains to be pointed out that dwellinghouses are *not* within the ambit of s. 9 (*supra*); but, again, leases of *dwellinghouses* are not often registered under the Land Transfer Act: usually dwellinghouses are let on a weekly or monthly tenancy, although, I understand, that in England leases of dwellinghouses for as long as ninety-years are quite common: perhaps the reason for this apparent divergence of practice is that in England houses are usually built of far more durable materials than wood subject to the ravages of the borer.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Mutual Wills: "The most recent judgment on the effect of mutual wills made by husband and wife, without independent evidence of any contract, is that of Astbury, J., in *In re Oldham*, [1925] Ch. 75. That learned Judge subjected the authorities to a careful examination, and came to the conclusion that the mere fact that two wills were made in identical terms does not of necessity imply any agreement beyond that so to make them. In the case before him he found that there was not sufficient evidence of further agreement, and that there was nothing in the authorities referred to in the argument that constrained him to decide otherwise.

"Their Lordships agree with the view taken by Astbury, J. The case before them is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made. As they have already said, the fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in equity than a right to damages at law." *Gray* v. *Perpetual Trustee Company, Ltd.*, [1928] A.C. 391, 401, per Viscount Haldane, giving the opinion of the Privy Council.

Ratification of Agent's Acts: "The first essential to the doctrine of ratification, with its necessary consequence of relating back, is that the agent shall not be acting for himself, but shall be intending to bind a named or ascertainable principal (*1 Halsbury's Laws of England*, Hailsham Ed., page 231; *Heath* v. *Chilton*, (1844), 12 M. & W. 632, 638; *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd. and Schmidt*, [1914] A.C. 197, 213). If the suggestion of ratification in this case is analysed it comes to this, that the agent having put some of the principal's money in his pocket, the latter 'ratifies' the act. For the reason given this is not possible as a legal conception, since the agent did not take, and could not be deemed to have taken, the money for himself as agent for the principal. If the act had been authorized, the contract between the principal and the agent would have been the ordinary contract of loan. That indeed seems to have been what McElroy suggested to Chambers, if he suggested anything honest at all. There can be no room here for the application of the doctrine of ratification." Lord Maugham in *Imperial Bank of Canada* v. *Begley*, [1936] 2 All E.R. 367, 374.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Justice in Action.—In this column last year, Scriblex referred to the familiar controversy as to whether what Hewart, L.C.J., said in 1924 in *R.* v. *Sussex Justices*, [1924] 1 K.B. 256, 259, was that it was of fundamental importance that justice should not only be done but should manifestly and undoubtedly "*be seen* to be done" or whether the expression "be seen to be done" should be "*seem* to be done." A correspondent in the *Sunday Times*, writing from Ambleside (where there is little to do but direct visitors to the Lakes and read books on angling) has again caused the controversy to raise its unattractive head. However, in this instance, Lord Horder, from his chair at the Athenaeum, comes out strongly in favour of "seen"; while Sir William Crocker, former President of the English Law Society, claims that he was the solicitor in the case in which the visual and not the imaginative verb was used. Giving the latter what is hoped to be its final blow are several other correspondents who rightly contend that what matters is not the appearance of justice but the real and tangible doing of it.

Baron Cooper of Culross.—Lord Cooper, who resigned last year his offices of Lord President of the Court of Session and Lord Justice-General of Scotland, died in July at the early age of 62. A great lawyer, a versatile legal historian, and a fine classical scholar, he had in addition a wide knowledge of electrical engineering, no doubt acquired from his father who was Burgh Engineer in Edinburgh. The harnassing over the past ten years of the water-power of the Highlands was greatly assisted by the report of the committee on hydro-electric development in Scotland over which he presided. It is said of him that "his clarity, his lucidity, the order reigning in his mind, his capacity to grasp the essential fact in a mass of detail made him an ideal Judge . . . he had the faculty of reducing law to simple terms and his addresses to juries never left them in any doubt of the problems which they must resolve." In his pamphlet on *The Scottish Legal Tradition*—one of his many contributions to legal history—he wrote: "Law is the reflection of the spirit of the people and so long as the Scots are conscious that they are a people they must preserve their law."

Jury Confusion.—A writer in the *Law Times*, in dealing with the difficulties experienced by seventeenth century juries in making up their minds, attributes the blame to counsel who prevented by their speeches the clear facts of the case from being understood; and, in support, he quotes an anecdote from *A Guide to Jurymen*, a manual of advice published in 1560: "At a certain trial, after the state of the cause was set forth in the declaration, the counsel beginning to speak, the foreman of the jury calls to the judge, and tells him he had an humble suit to his lordship. 'Well,' says the judge, 'what is it?' 'My lord,' says he, 'it is that now the state of the cause hath been set forth we may proceed immediately to the examination of witnesses and so give our verdict whilst we remember what is material, and that we may spare the labour of these gentlemen, the counsel on both sides, who, I see, are prepared to speak largely; for truly, my lord, if they fall to work as they use to do, our understandings will be so confounded by their long discourse and many niceties as we shall not be able so rightly to judge thereof as now we shall.' This was his humble motion; but the judge, having formerly been a pleader, laughed at the honest man, and so did all the court, except some plain people that had so little understanding as to think there was some reason in it."

Sturgeons and Whales.—The recent present to the Queen of an outsize sturgeon calls attention to the fact that at one time these fish when captured in the Thames above London Bridge might be claimed by the Lord Mayor: captured elsewhere, they were the property of the King as royal fish. The custom appears to have arisen from the high esteem in which the flesh was held by former sovereigns. Henry I is said to have prohibited consumption of sturgeon flesh at any table other than his own. What the split-up was as between sovereign and consort does not appear to be recorded, but Blackstone notices a curious distinction made by the old legal authorities in respect of the whale. This had to be divided between the King and the Queen, the King taking the head and the Queen the tail, the reason assigned being that the Queen might have the whalebone for her wardrobe. Not a very convincing reason either, since the whalebone is found in the head and not in the tail.

Our Bulging Statutes.—According to Members' Circular (No. 10) supplied to members of the Wellington District Law Society by its energetic secretary, there were passed during the last Session of the House no less than 128 Acts. Some of the more important ones were the subject of consideration and revision by the Statutes Revision Committee, but it is safe to assume that not a single member of the Assembly will have read and grasped even a fifth of this legislative deluge, and possibly the Law Draftman is the only person who has read them all. "Equity is a roguish thing." Selden, in his *Table Talk* says that ignorance of the law excuses no man. "Not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him." All that Scriblex can say is that he would hesitate to back any practitioner to win a large prize in any quiz based upon the statutory crop of last Session, ranging as it does from adoption to wills, with dieticians, dogs, potatoes, rabbits, music teachers, opticians, and land agents thrown in for good measure. The good lawyer of the past was the one who assimilated legal principles; but the smart one of the future, well equipped with some legislative geiger counter, will be the one who can find where things are.

From My Notebook.— "There was once a professor of law who said to his students: 'When you're fighting a case, if you have the facts on your side hammer them into the jury, and if you have the law on your side hammer it into the judge'. 'But if you have neither the facts nor the law?' asked one of his listeners. 'Then hammer hell into the table', answered the professor."—W. Somerset Maugham in *A Writer's Notebook*.

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A Meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on Friday, August 5, 1955.

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

The President (Mr. T. P. Cleary) occupied the Chair. The Treasurer (Mr. D. Porry) was also present.

The late Sir John Reed: The following resolution was carried:—

"That this Council records its acknowledgment of the very great service which was rendered by Sir John Reed as a Judge and the service to the Profession which before his appointment he rendered on our own Council."

The President reported that messages of sympathy had already been sent to the members of Sir John Reed's family.

Sir Alexander Johnstone: The following resolution was carried:—

"That the Council and members of the New Zealand Law Society desire to express to Sir Alexander Johnstone their great appreciation of his invaluable and long service to the profession, and the Council tenders its best wishes to him on his attainment of fifty years at the Bar and its hope that he will have a long and pleasant period of ease in front of him."

Dr. R. G. Storey: The President reported to the meeting that Dr. R. G. Storey, Past President of the American Bar Association and President of the Inter-American Bar Association, had recently been visiting New Zealand. The President said he wished to record the appreciation of the New Zealand Law Society to Mr. Weir and his Council for entertaining Dr. Storey during his stay in Auckland, and also to Mr. Gresson and Dr. Haslam for entertaining him while in Christchurch, and for their kindness in extending their hospitality to Dr. Storey during his stay in their cities.

International Bar Association: The following letter was received from the Association:—

April 5, 1955.

The Executive Council, at its meeting in New York, on March 13, 1955, elected Loyd Wright, Esq., of Los Angeles, California, currently President of the American Bar Association, as Speaker of the House of Deputies and Chairman of the Executive Council, to fill the vacancy created by the death of George Maurice Morris.

The Council also accepted the invitation of Den Norske Sakfrerforening to hold the Sixth International Conference of the Legal Profession in Oslo, Norway, from July 23 to 28, 1956.

We are informed by our Norwegian Member Organization that hotel space in Oslo in July, during the height of the tourist season, is scarce. Accordingly, members of the legal profession planning to attend the Conference are urged to make their hotel and travel arrangements well in advance—six months before, if possible. Information concerning travel and hotel facilities will be sent to you in due course.

Conference Topics for 1956.—The following topics were tentatively selected for discussion at the Sixth Conference in Plenary Sessions and Symposia:—

1. International Ship-building Contracts — Particularly Legal Problems in connection with Finance and Security.

2. Foreign Divorces—Problems arising and Possible Solutions.

3. The Legal Profession—The Work of the Organized Bar in Furthering the Legal Profession and its Public Services.

4. Administration of Foreign Estates—Problems of Executors and Possible Solutions.

5. Suggestions for Alleviating Hardships arising from Sovereign Immunity in Tort and Contract.

6. Suggestions for Improvement of International Treaties to Avoid Double Taxation.

At the direction of the House of Deputies, the following topics discussed at previous conferences will be considered in Committee meetings:—

1. Ways and Means of Improving Facilities for Legal Aid for Foreign Nationals, whether Resident or Non-resident.

2. Immigration and Naturalization.

3. Difficulties arising in connection with Taking Evidence Abroad.

4. Human Rights.

5. Proposals for an International Code Regulating the Handling of Property of Enemy Nationals and Residents in Enemy-occupied Territory.

Closer Liaison with Member Organizations.—It was the unanimous sentiment of the Councillors present at the meeting that every effort should be made to enlist the full support and co-operation of our National Member Organizations. The I.B.A. was formed in the firm belief that the organized Bar of the countries of the world could exert a force and achieve results which could not be accomplished by associations limited to individual members of the legal profession. To the maximum extent possible, the Acting-Secretary-General was directed by the Executive Council to work with and through the National Member Organizations, or representatives or committees designated by them. It was realized that for effective and efficient action, a Member Organization may wish to establish a liaison representative or a top-level committee to co-operate with the I.B.A. This procedure is in use by several Member Organizations, and has been found to be quite effective. If your Association does not now have such a representative or committee, may we suggest that you give it consideration.

Plans for the Oslo Conference.—For the 1956 Conference, it is particularly desired to have papers written by outstanding members of our Member Organizations on the various subjects on the Agenda which are of interest to them. Accordingly we shall much appreciate your reviewing the subjects on the Agenda as promptly as possible, so that your Organizations may make a prompt decision as to which of the topics it wishes to be represented on in 1956. When a decision has been reached, we shall appreciate being advised as soon as possible, giving us the topics which you have selected and the names of your members who will write the various papers or paper. This will permit the early designation of the Rapporteur and the two commentators. We should like to have an outline of the paper submitted not later than October 1, 1955, with the paper in final form to be filed with our Norwegian Member Organization not later than March 1, 1956. It will greatly simplify matters if our Member Organizations will arrange to duplicate or print their papers, and to file sufficient copies so that full distribution may be made to prospective Conferees well in advance of the Conference. Only in this way can we achieve an intelligent and effective participation in the work of the Conference. The mechanics and procedure for the submission of papers will be developed more fully by consultation with the Norwegian Bar Association, and Members Organizations will be informed at a later date concerning format, length of paper, preparation of summary, etc.

Publicity.—Member Organizations are particularly requested to give full publicity concerning the NORWAY CONFERENCE to their members.

Service of Notices by Telegraph: The following letter was received from the Director-General of the Post and Telegraph Department:—

Just over two years ago, the question of deleting from the Post and Telegraph Act, 1928, Sections 179-184, inclusive, which provide for the serving of notices by telegraph, was represented to your Society. In your reply dated 5th October, 1953, it was suggested that as members of the profession were probably not aware of the existence of the provisions, the matter be held over for a period.

The Act is now in the course of revision. It is proposed to take the opportunity to delete the sections referred to, unless your Society has any strong objections. As mentioned in my letter of the 15th May, 1953, no Notices had been transmitted by telegraph during the preceding fifteen years; nor has the service been used since the matter was raised with you two years ago.

It was resolved to inform the Director-General that the Society had no objection to ss. 179-184 inclusive being doleted from the Post and Telegraph Act.