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THE ADOPTION ACT 1955.

IN the most recent number of the *Canadian Bar Review*, which has just come to hand, the whole issue is devoted to "The Legal Effects of Adoption" by Professor Gilbert D. Kennedy, Professor of Law, University of British Columbia (*33 Canadian Bar Review*, 752-875). In an editorial note, explaining the devoting of a whole issue to a single article, it is said that the subject is of wide interest in Canada.

The learned author of the article says that during the last generation or two, the trend in English-speaking countries has been towards making the adopted child, in all relationships, a member of a new family and no longer a member of the old. But the full implications of the trend have not yet been appreciated in most jurisdictions by draftsmen, Legislatures, and the Courts. After an extensive review of statutory adoption laws in one form or another in most parts of the Commonwealth (England, Scotland, the ten provinces and two territories in Canada, the six States of Australia, New Zealand, and South Africa) and in all States in the United States, he comes to the conclusion that "New Zealand offers an excellent example of legislation dealing with the effect of an adoption order". He refers to s. 21 of the Infants Act 1908, as enacted by s. 2 of the Infants Amendment Act 1950.

Throughout his lengthy article, Professor Kennedy returns again and again to this feature of New Zealand adoption law; and, finally, he provides a model section as a pattern to which exceptions may be added or subtracted. It is our s. 21 of the Infants Act 1908, unchanged as to the effect of an adoption order, but in a slightly expanded form.

This brings us to a consideration of the Adoption Act 1955, which came into force on October 27, 1955.

I.

The Act Generally

The new statute has made considerable changes in the law and practice of adoption. It creates a new code to safeguard the welfare and rights of children, who are, or may become, the subjects of an adoption order. At the same time, it retains what was best in the previous legislation, particularly a great portion of Part III of the Infants Act 1908, which was confined to the adoption of children.

The general purpose of the new legislation is the greater protection of the adopted child, side by side with attention to the rights of the adopting parents.

It is being increasingly recognized overseas that an adoption order should not be made finally until there has been an opportunity for an independent person to observe the child's reactions to its proposed new home and parents, and the reactions of the parents themselves to having the child in their home. In England, it is obligatory for a child to have resided in its new home for at least three months before an adoption order is made. A similar provision exists in other countries.

In the child's best interests, therefore, the new Act provides that there must be an investigation of the home conditions of the adoptive parents by a Child Welfare Officer, whose prior approval must be given before the placement of a child under fifteen years of age in its new home. Such approval remains in force for a month after it has been granted.

An interim adoption order must be made on the first instance. An application for an interim order for adoption must be made within one month, and the Court must have before it a report on the proposed home and parents and a recommendation from a Child Welfare Officer, in addition to any other reports the Court may require.

In making an interim adoption order, the Court gives a tentative approval of the application for adoption, unless special circumstances render it desirable that an adoption order should be made in the first instance.

The adoption order may not, except in special circumstances, be made until after the child has resided in the adoptive parents' home for six months.

The Court is empowered to make adoption orders, whatever may be the domicil of the applicant or the child: see *In re B.* (*An Infant*), (1954) 8 M.C.D. 254.

The new statute makes some changes in respect of eligibility to adopt a child under twenty-one years of age. The former provisions in the Infants Act 1908 required a wide age-difference in the case of an unmarried person adopting a child of the opposite sex, but they were silent on other points, such as a minimum age for an applicant. The new statute specifies the minimum age of an adopting parent, and the minimum difference in age between an adopting parent and the child who is being adopted. An adoption order may be made in favour of a husband and wife, or of one of them with the consent of the other.

Consents To Adoption

Before the Court can make any interim adoption order, it must have before it the consents to the adoption of all persons whose consents must be filed in the Court.

Certain extensions and minor changes in the previously-

existing law are made in the new statute in respect to consents to adoption. If the prior consent of the Superintendent of Child Welfare is given, any parent who desires to have his or her child adopted may in writing appoint the Superintendent as the guardian of the child until the child is legally adopted, and may impose conditions with respect to the religious denomination and practice of the applicants or any applicant to adopt the child or as to the religious denomination in which the applicants or applicant intend to bring up the child. When so appointed, the Superintendent may give such consent to the adoption as is required from the person who appointed him as the guardian of the child. Any such appointment by the mother of a child is void unless the child is at least ten days old at the date of the appointment.

The consent by any parent or guardian of the child to an adoption may be given (either unconditionally or subject to conditions with respect to the religious denomination and practice of the applicant or as to the religious denomination in which the applicants or applicant intend to bring up the child) without the parent or guardian knowing the identity of the applicant for the order. The consent by the mother of a child to an adoption is not admissible unless the child is at least ten days old at the date of her executing the consent document.

The Court may dispense with consent in the following cases: (1) if the parent or guardian has abandoned, or has persistently neglected the child or failed to maintain or exercise the normal care of parenthood in respect of the child, or is unfit by reason of physical or mental incapacity to have the care of the child; and in any such case, reasonable notice of the proposed adoption order has been given to the parent or guardian; and (ii) if a licence has been granted in respect of the child under s. 40 of the Adoption Act 1950 (U.K.) or under any statute of a Commonwealth country for allowing a child to go abroad for adoption.

The Effect of an Adoption Order

The section dealing with the effect of an adoption order is s. 16. This substantially reproduces s. 23 of the Infants Act 1908 (as substituted by s. 2 of the Infants Amendment Act 1950). (This is the section which earned the approval of Professor Kennedy in his study of the legal effects of an adoption order in the *Canadian Bar Review*, to which reference has already been made.) The adoption order shall not affect the race, nationality, or citizenship of the adopted child. The child acquires the domicil of the adopting parent or parents, and such domicil is to be thereafter determined as if the child had been born in lawful wedlock to such parent or parents. The domicil of origin of the child is not affected.

Under specified conditions, overseas adoptions are given the same force as adoption orders made under the provisions of the Act. No restriction is placed on the effect of overseas adoptions to which it does not apply.

Maori Adoptions

A notable feature of the new Act is that its provisions apply in respect of any person, whether a Maori or not, in respect of any child. Where the applicant or one of the applicants for an adoption order is a Maori, and the child is a Maori, the application is to be made to the Maori Land Court. All other applications are to be made to a Magistrates' Court.

In our next issue, we propose to examine the new Act in more detail, with particular reference to the provisions which appear in it for the first time.

SUMMARY OF RECENT LAW.

AIR LAW.

Air Carriers' Liability: The Hague Protocol. *105 Law Journal*, 724.

BY-LAW.

Milk Authority—Hours for Delivery of Milk—Limited Hours of Delivery onerous on Milk Vendors—Small Extension of Time not Detrimental to Consumers—By-law unreasonable—Milk Act 1944, s. 83. A by-law of the defendant Board, made pursuant to the powers conferred on it by s. 83 of the Milk Act 1944, provided as follows: "3. From and including the 15th day of October in any year up to and including the 14th day of April in the next succeeding year, no Milk Vendor or other person engaged in the retail delivery of milk shall deliver milk to or at any dwellinghouse after the hour of seven a.m. on any day. 4. From and including the 15th day of April up to and including the 14th day of October in any year, no Milk Vendor or other person engaged in the retail delivery of milk shall deliver milk to or at any dwellinghouse after the hour of eight a.m. on any day." The applicant, a milk-vendor, moved to quash or amend the by-law, on the grounds that the hours fixed by it for delivery of milk—namely, the prohibition of delivery later than 7 a.m. in summer and 8 a.m. in winter—were unreasonable. *Held*, That cls. 3 and 4 of the by-law were unreasonable, in that the limited hours of delivery were onerous on a substantial proportion of the milk-vendors, and, to that extent, the by-law was unreasonable from their point of view, and if such hours were extended by a further hour, only 20 per cent. of the consumers, at the most, would suffer a delay in delivery, and the embarrassment to them caused by a small extension of time would not be very serious; and that those two clauses of the by-law should be quashed. *Quaere*, Whether s. 83 (2) of the Milk Act 1944, whereby the Governor-General may, by Order in Council at any time, disallow either in whole or in part any by-law made under s. 83 if in his opinion the by-law is unreasonable or undesirable, restricts the jurisdiction of the Court in proceedings in which a by-law is attacked on the ground of unreasonableness. *Craig* v. *Hutt Valley and Bays Metropolitan Milk Board.* (S.C. Wellington. October 21, 1955. McGregor J.)

DIVORCE AND MATRIMONIAL CAUSES.

Consortium and servitium. *29 Australian Law Journal*, 321, 389, 428.

Separation—Three Years' Separation—Husband's Petition—Deed of Separation containing Condonation Clause and Covenant by Wife not to take Proceedings against Husband in Respect of Previous Misconduct—Such Agreement No Bar to Wife's adducing Evidence in Relation to Petitioner's Wrongful Acts or Conduct as leading to Separation—Divorce and Matrimonial Causes Act 1928, ss. 10 (j), 18. A party to a deed of separation is debarred from commencing proceedings based on acts of misconduct which have been withdrawn or forgiven by virtue of a subsequent agreement for separation or based on any cause of complaint in respect of which such party has agreed not to commence or prosecute any proceedings. (*Rose* v. *Rose*, (1882) 7 P.D. 225, on app. (1888) 8 P.D. 98; *Russell* v. *Russell*, [1935] P. 39; and *H.* v. *H.*, [1938] W.N. 273; [1938] 3 All E.R. 415, followed.) The innocent party is, however, not debarred from setting up such earlier acts of misconduct as a defence to proceedings commenced by the party allegedly guilty. No act of the parties, even if such act were binding to the extent that it amounted to a valid contract not to oppose the making of a decree as provided in the latter portion of s. 18 of the Divorce and Matrimonial Causes Act 1928, can affect the

Court in exercising the discretion conferred on it by the earlier part of s. 18 as to whether or not a decree should be made. (*Gooch* v. *Gooch*, [1893] P. 99, applied. *Chapman* v. *Chapman*, [1926] N.Z.L.R. 291; [1926] G.L.R. 171, followed.) The conduct of the parties before the separation as well as their subsequent conduct in relation to the observance or otherwise of their respective obligations under the deed of separation are relevant to the question of the exercise by the Court of its discretion under s. 18 as to whether or not a decree should be made. Consequently, a deed of separation agreement containing a condonation clause and a further provision that the wife (respondent) should not at any future time take any proceedings against the husband in respect of any misconduct or alleged misconduct committed or alleged to have been committed by him before the date of the deed of separation agreement is no bar to the admission of evidence of such acts or conduct at the hearing of the petition on the issue of the cause of the separation. The husband petitioned for divorce on the ground set out in s. 10 (*j*) of the Divorce and Matrimonial Causes Act 1928. The parties were married on November 5, 1929, and the husband left the matrimonial home on October 29, 1947. Shortly afterwards, the wife filed a petition for judicial separation, alleging cruelty on the part of the husband. On September 22, 1949, a deed of separation was entered into between the parties, a term of the settlement being that the wife would make application to have the petition for judicial separation dismissed. Later this petition was dismissed. The deed of separation contained, inter alia, the following covenants on the part of the wife. "2 (*d*) That the wife will not at any future time take any proceedings against the husband in respect of any misconduct or alleged misconduct committed or alleged to have been committed by him before the date hereof and will apply to have the petition for judicial separation filed in the Supreme Court of New Zealand at Wellington on the 12th day of December 1947 dismissed. (*e*) That any misconduct or alleged misconduct committed or alleged to be committed by the husband before the date hereof (which the husband denies) shall be taken by this agreement to have been condoned and shall not be relied upon or pleaded in bar in the event of the husband seeking a divorce founded upon three years separation as from the date hereof." On a preliminary argument as to whether the wife could call evidence as to the wrongful acts or conduct of the petitioner, to which, it was alleged, the separation was due, *Held*, 1. That, whether or not the respondent was bound by her agreement not to plead in bar the wrongful conduct of the petitioner, the condonation of such wrongful conduct was ineffective in so far as the present proceedings were concerned; and such wrongful conduct could be both pleaded and adduced in evidence in support of a submission by the respondent that the Court's discretion should be exercised against the petitioner. 2. That, accordingly, the respondent was entitled to call the evidence she sought to adduce in relation to the petitioner's alleged wrongful acts or conduct to which, it was pleaded, the separation was due. *Saunders* v. *Saunders*. (S.C. Wellington. October 18, 1955. McGregor J.)

Seven Years' Separation—Desertion—Husband Petitioner with Animus Deserendi continuing during Seven Years Period—Wife in Mental Hospital—Intention of Desertion not communicated to Wife—Such Communication not required—Undefended Suit—Decree nisi—Divorce and Matrimonial Causes Act 1928, ss. 10 (jj), 18. A husband petitioned for dissolution of marriage on the ground set out in 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, that the parties were living apart and had been living apart for not less than seven years from January 24, 1947. The suit was not defended. The respondent was committed to a mental hospital on December 1, 1927, and after one month's probation, she was discharged "recovered" on August 21, 1928. On six subsequent occasions, she was a voluntary boarder in that institution for periods of six months, ten months, two years and eight months, one year and five months, and, finally, for over seven years from January 24, 1947, until August 19, 1954, when she was discharged "recovered". At the time when the respondent entered the mental hospital in January, 1947, the petitioner said he had made up his mind that he could not live with her again; and he had not done so. *Held*, 1. That the petitioner's decision in January, 1947, showed an animus deserendi on his part; it was not necessary that such intent should have been communicated to the respondent; and he had retained that intent during the whole period since January 24, 1947. (*McRostie* v. *McRostie*, [1955] N.Z.L.R. 631, applied. *Wilson* v. *Wilson*, [1955] N.Z.L.R. 175, distinguished.) 2. That there was no reason for exercising a discretion against the petitioner under the earlier part of s. 18 of the Divorce and Matrimonial Causes Act 1928; and, as there was no opposition to the decree sought, the second part of s. 18 did not apply. *Marriott* v. *Marriott*. (S.C. Christchurch. October 20, 1955. Hutchison J.)

ESTATE DUTY.

Disclaimers and Estate Duty. 105 *Law Journal*, 755.

EVIDENCE.

Recent Complaints. *99 Solicitors' Journal*, 806.

HUSBAND AND WIFE.

Joint Family Home—Decree for Judicial Separation—Wife and Children living in Family Home—Wife Settlor of Joint Family Home—Application by Her for Cancellation of Joint Family Home Certificate—Considerations moving Court to refuse Such Application—Order in Wife's Favour for Possession of Family Home—Joint Family Homes Act 1950, s. 11. The wife, petitioner in a suit for judicial separation, on receiving a decree in her favour, applied, under s. 11 of the Joint Family Homes Act 1950, for an order giving sole possession to her of the joint family home of the parties and cancelling the registration of the Joint Family Home Certificate relating to the land. The custody of the five children of the marriage, who were at home with the applicant, was given to her. The petitioner was the settlor of the joint family home, and the respondent had an interest in it. *Held*, 1. That the effect of making an order cancelling the Joint Family Home Certificate would be to put the family home back in the name of the petitioner, she having been the settlor, and it would be unfair to vest the house back in the petitioner without some compensation or payment to the respondent who had an interest in the property. 2. That, as the parties were still husband and wife, though separated by a decree for judicial separation, it would be undesirable to cancel the Joint Family Home Certificate, which would destroy, or tend to destroy, the possibility of reconciliation. 3. That the effect of the registration as a joint family home is to afford a good deal of security to the children of the marriage, which would not be improved by cancelling the Joint Family Home Certificate; and, if an order for cancellation were made, it would lend to have a detrimental effect on the relationship between the father and the children. (*Sutherland* v. *Sutherland*, [1955] N.Z.L.R. 689, referred to.) 4. That an order for the possession of the family home should be made in favour of the petitioner; but no order would be made for the cancellation of the registration of the Family Home Certificate, but without prejudice to any subsequent application which the petitioner may be advised to make. *Shotton* v. *Shotton*. (S.C. Gisborne. November 25, 1955. Hutchison J.)

Married Women's Property—Wife materially assisting in Conduct of Service-Station Business—No Contribution by Wife towards Purchase of Land and Erection thereon of Dwelling—Intention of Parties that Business a Joint Venture—Sale of Business and Goodwill—Wife's Beneficial Interest in Business represented by Part of Proceeds of Sale—Wife entitled to Half Proceeds of Sale of Goodwill—"Property"—Married Women's Property Act 1952, ss. 15, 19. In 1939, the husband purchased a vacant section, and, in 1941, he built a service station, garage, and dwelling thereon with his own and borrowed money, to which no contribution was made by the wife. The title was throughout in the name of the husband. Before the erection of the combined dwelling and service station, the wife had carried on a confectionery shop, the profits of which were used for household expenses. She worked during long hours supplying petrol and oil to customers of the service station, and she materially assisted in the conduct of the business. The parties separated in April, 1954. In 1955, the building was sold, and, after repayment of mortgage moneys and the expenses of sale, etc., the net proceeds amounted to £4,257, including £1,500 for goodwill, of which the sum of £2,100 was, by agreement, retained in trust by the husband's solicitors pending determination of an application by the wife, under s. 19 of the Married Women's Property Act 1952, for an order that the wife had a beneficial interest in the property or the proceeds of the sale thereof, and was entitled to share in such proceeds. *Held*, 1. That it was the intention of the parties that the business in which they were both engaged was a joint venture, to provide for them both during their joint lives, and that the wife should have a beneficial interest therein; and, on that understanding, she devoted her not inconsiderable efforts to promote its success, with the result that, up to the time of the sale of the business, the wife had a beneficial interest

therein. (*Masters* v. *Masters*, [1954] N.Z.L.R. 82, and *Peychers* v. *Peychers*, [1955] N.Z.L.R. 564, applied.) 2. That the property, in which the wife had a beneficial interest was represented by a sum of money held in the husband's solicitors' trust account; and s. 19 of the Married Women's Property Act 1952 envisages that a fund may be "property" in the same way as any other class of property; and s. 15 recognizes that money may be a species of "property". (*Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63; [1952] 2 All E.R. 863, and *Barrow* v. *Barrow*, [1946] N.Z.L.R. 438; [1946] G.L.R. 245, followed. *Tunstall* v. *Tunstall*, [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310, referred to.) 3. That, as the contribution of the wife by way of services was for the preservation and advancement of the business and no contribution was made by her in regard to the purchase of the land or the erection of the buildings and plant, the order in favour of the wife should be limited to the proceeds of the sale of the goodwill of which she should receive half (£750). (*Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63; [1952] 2 All E.R. 863, and *Newgrosh* v. *Newgrosh*, (1950) (unreported), applied.) *Dillon* v. *Dillon*. (S.C. Christchurch. October 12, 1955. McGregor J.)

Payments by Wife to Husband while living together—Payments made on Faith of Representations that Husband would cease Association with Another Woman—Such Association retained—Moneys not Unconditional Gifts—Amount thereof repayable to Wife. Moneys paid by a wife to her husband, at his request when they were living together, in consequence, and on the faith of his representations that he had abandoned and would not renew an association which he had formed with another woman, when he was in fact retaining that association, are not unconditional gifts, but are repayable by him when those representations are proved to have been false. (*Turnbull* v. *Duval*, [1902] A.C. 429, and *Mercier* v. *Mercier*, [1903] 2 Ch. 98, applied.) *Paltridge* v. *Paltridge*. (S.C. Auckland. November 9, 1955. Stanton J.)

Summons for an Order as to Title to Dwellinghouse, filed—Question in Dispute resolved before Proceedings taken to bring it before Court—Summons later brought on for Hearing—Summons obsolete—Married Women's Property Act 1952, s. 19. Where, after an application for an order under s. 19 of the Married Women's Property Act 1952 has been filed, the disputed question between the parties is resolved between them before any proceedings are taken to bring the application before the Court, there is no question between the parties for the Court to try and determine; and the application, when brought on for hearing, should be dismissed. *Volpicelli* v. *Volpicelli*. (S.C. (In Chambers.) Wellington. November 17, 1955. Barrowclough C.J.)

INTERNATIONAL LAW.

European Human Rights Convention. *105 Law Journal* 759.

LANDLORD AND TENANT.

Lease—Covenant to repair—Action for Damages for Breach brought during Term—Measure of Damages—Onus on Lessor to prove Amount by which Value of Reversion diminished by Failure to perform Covenant—Assignee of Lease liable only for such Breaches of Covenant occurring while He holds Premises as Assignee. In an action by the lessor claiming damages for breach of a covenant to repair brought during the continuance of the term of the lease, the measure of damages is the diminution of the value of the reversion by reason of the failure of the lessee to perform the covenant. The onus is on the lessor to prove the amount by which the value of the reversion has been diminished by reason of any proved breach of the covenant to repair. (*Conquest* v. *Ebbetts*, [1896] A.C. 490, referred to.) An assignee is liable only for such breaches of covenant as occur while he holds the premises as assignee, and not for breaches which were complete when he took his assignment. He must perform the covenants even in respect of repairs then necessary, but he is not personally liable in damages for an antecedent breach as such. (*In re Green*, [1923] G.L.R. 726; *Churchwardens of St. Saviour's, Southwark* v. *Smith*, (1762) 1 W. Bl. 351; 96 E.R. 195; and *Coward* v. *Gregory*, (1866) L.R. 2 C.P. 153, explained.) A covenant in a lease was in the following terms: "That the lessee will from time to time and at all times during the said term well and substantially repair cleanse maintain and keep all new buildings which may at any time during the said term be erected on and all additions made to the said demised premises and the walls, fences, drains and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever except in case of destruction or damage by fire." This covenant did not impose an obligation to do all that a prudent and far-seeing owner might be prepared to do in his own best interests. It was a covenant to repair and maintain, that is to say, a covenant to do from time to time such repairs and maintenance as were necessary and proper. Observations as to the assessment of damage for non-repair causing diminution of the value of the reversion. (*Anstruther-Gough-Calthorpe* v. *McOscar*, [1924] 1 K.B. 716, applied.) *Sleeman and Others* v. *Colonial Distributors, Ltd.*, (*Electronic Engineers, Ltd., Third Party*). (S.C. Christchurch. September 21, 1955. F. B. Adams J.)

MASTER AND SERVANT.

Liability of Servant—Negligence—Whether liable in Contract or Tort—Joint Tortfeasor's Common-law Rights to Contribution—Exemption—Implied Terms of Contract of Service—Whether Master required to insure Servant against His Own Negligence—Duty to insure Servants using Vehicle on Road—Injury to Fellow Workman—Damages—Remoteness—Servant's Negligence—Master's Liability to Third Party—Recovery from Servant—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5 c. 30), s. 6 (2)—Law Reform Act 1936, s. 17 (2). While backing his lorry in the yard of a slaughter-house to which he had been sent to collect waste, the defendant, a lorry driver employed by the plaintiffs, negligently ran into and injured his father, who was also employed by the plaintiffs on the same work. The father obtained judgment for damages for negligence against the plaintiffs. The plaintiffs' insurers, acting in the plaintiffs' name by virtue of a term (condition 2) in the contract of insurance but without consulting the plaintiffs, brought an action claiming damages for negligence or breach of contract against the defendant, the writ being issued a week before judgment was obtained by the father against the plaintiffs. Preliminary objection that the writ was premature having been taken by the defendant, a second action was allowed to be brought and consolidated with the first action. *Held*, (Denning L.J. dissenting): the plaintiffs were entitled to recover in damages from the defendant the amount for which they had been made liable to his father because: 1. The defendant was in breach of an implied term in his contract of service with the plaintiffs that he would drive with reasonable care and skill (*Harmer* v. *Cornelius*, (1858) 5 C.B.N.S. 236, dictum of Warrington L.J. in *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. at p. 536, and *Jones* v. *Manchester Corpn.*, [1952] 2 All E.R. 125, applied); and the damages were not too remote. 2. Although the plaintiffs and the defendant were joint tortfeasors as against the defendant's father (per Scrutton L.J., in *The Koursk*, [1924] P. at p. 155), the plaintiffs' claims were not defeated by the principle of the common law that there was no contribution between joint tortfeasors, since the plaintiffs gave neither authority nor assent to the defendant's negligence and did not share in its commission (*Adamson* v. *Jarvis* (1827) 4 Bing. 66 applied); moreover, since the negligence was the defendant's own negligence, there was no ground for the Court to grant (in the second action) the defendant immunity from liability to contribution under the Law Reform (Married Women and Tortfeasors) Act 1935. 3. Although in so far as the first action was based on a claim for contribution under the Act of 1935 it was premature (*Littlewood* v. *George Wimpey & Co., Ltd.*, [1953] 2 All E.R. 915, followed), yet the first action was not premature in so far as it was founded on breach of contract, since the cause of action arose on the commission of the breach of contract and the fact that the writ was issued by the insurers before the liability of the plaintiffs to the defendant's father was established did not defeat the action as the insurers were entitled to issue the writ by virtue of condition 2 of the contract of insurance independently of the doctrine of subrogation. 4. Section 35 (1) of the Road Traffic Act 1930 did not prevent the plaintiffs from maintaining their claims against the defendant because, on the footing that the yard in which the accident happened was not a road to which the public had access within s. 121 of that Act, the accident did not arise out of the use of the lorry on a road within s. 35 (1). 5. There was no such implied term in the contract of service with the defendant as would place on the plaintiffs the duty of insuring the defendant against liability for injury such as had occurred to his father in this case; nor was any term to be implied in that contract that that defendant should not be sued by the plaintiffs for damage arising from his negligence if they were insured in respect of such damage, for a servant was as much liable to his master for negligence as was anyone else (dictum of Lord Wright in *Digby* v. *General Accident Fire & Life Insurance Corpn., Ltd.*, [1942] 2 All E.R. at p. 339, applied). Per Birkett L.J.: the submission that the slaughter-house yard where the accident took place was not a road [within the Road Traffic Act 1930, s. 121] is well founded. Appeals dismissed. *Romford Ice & Cold Storage Co., Ltd.* v. *Lister* [1955] 3 All E.R. 460 (C.A.)

LEGAL ANNOUNCEMENTS.

Continued from page i.

LEGAL ANNOUNCEMENT.

An opportunity exists for a young Solicitor to acquire a partnership in an old-established estate and conveyancing practice in a North Island country town. Replies to :—

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NUISANCE.

Nuisance and the Reasonable Milkman. *29 Australian Law Journal*, 435.

PRACTICE.

Misconduct—Disqualification of Juror on Ground of Interest (other than Pecuniary or Proprietary)—Real Likelihood of Bias to bes hown—Juror's Duty to disclose to Court Any Circumstances which may disqualify Him—Right of Challenge giving Litigant Reasonable Protection against Possibility of Bias on Juror's Part—"Misconduct"—Code of Civil Procedure, R. 276. If a juror finds that he has an interest in the case, it is his duty to report to the Court any circumstances known to him which may disqualify him. (*Bailey* v. *Macaulay*, (1849) 13 Q.B. 815; 116 E.R. 1475, followed.) To disqualify a person from acting as a juror upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceedings, a real likelihood of bias on his part must be shown. (Test prescribed by Blackburn J., in *R.* v. *Rand*, (1866) L.R. 1 Q.B. 230, applied.) (*Williams* v. *B.A.L.M. (N.Z.), Ltd. (No. 2)*, [1951] N.Z.L.R. 629, distinguished.) The right to challenge gives a litigant, if he is diligent, reasonable protection against the possibility that some member of the jury, for one reason or another, may be liable to have a conscious or unconscious bias against him. It is not sufficient to show, on a motion for a new trial, or on appeal, that some members of the jury may not have been as disinterested as the litigant would have wished to have been the case. He must go further, and must show very solid grounds for depriving the successful party of the judgment in his favour. (*Williams* v. *Great Western Railway Co.*, (1858) 28 L.J. (N.S.) Exch. 2, *Brown* v. *Dean*, [1910] A.C. 373, and *Howey* v. *Henderson*, (1895) 21 V.L.R. 396, followed.) *So held* by the Court of Appeal, allowing an appeal from the judgment of Hutchison J., [1954] N.Z.L.R. 1062. An insurance company was the indemnifier of the defendant company. In an action against the defendant company, one of its employees claimed damages in respect of injuries sustained by him while he, as a tractor salesman, was demonstrating a tractor with a hydraulic loader attached, and the tractor fell over a bank. It was alleged that the tractor with the loader was deficient in construction, and was inefficient and unsafe in that condition, and that this was the cause of the accident. An order was made for the trial of the action before a special jury. The jury returned a verdict for the defendant company. The plaintiff moved for a new trial upon the grounds that the verdict was obtained by unfair and improper practice on the part of the defendant company and its indemnifier; and that a member or members of the special jury had been guilty of misconduct, in that, among four named members of the special jury having some connection with the indemnifier, were: (*a*) the manager and director of a company which was a sub-agent of the indemnifier, (*b*) a director of a company which had a similar subagency, and (*c*) the accountant of a company which held agencies for three insurance companies, including the indemnifier; and that the defendant company and its indemnifier and the special jurors mentioned knew of the fact that the insurance company was indemnifier of the defendant company. It was not suggested that any of the special jurors had any financial or other interest in the case before the Court. Application was also made that a new trial should take place before a common jury. Hutchison J. set aside the verdict, and ordered a new trial on the ground that members of the jury had been guilty of misconduct: [1954] N.Z.L.R. 1062. The defendant company appealed. *Held*, by the Court of Appeal, That it could not reasonably be inferred that there was a real likelihood of bias on the part of the three jurors concerned, or that there was even a reasonable suspicion thereof; and no injustice had occurred. Appeal from the judgment of Hutchison J., [1954] N.Z.L.R. 1062, allowed, order for a new trial vacated, with judgment to be entered for the defendant company. *Holmes Motors, Ltd.* v. *Prentice* (C.A. Wellington. August 15, 1955. Finlay, North, Turner, JJ.)

PROBATE AND ADMINISTRATION.

Probate—Mutual Wills—Husband and Wife—Husband executing Will intended for Wife—Operative Part of Will leaving Whole Estate "unto my husband absolutely"—Any Striking-out of Those Words rendering Sole Disposing Clause Nugatory—Testator not intending Document to operate as His Will—No Knowledge or Approval of Effective Conditions Therein. The deceased and his wife intended to make and execute mutual wills. In the will prepared for the husband, he gave, devised, bequeathed, and appointed all his estate "unto my wife Edith Emily Foster absolutely". In the will prepared for the wife, she gave, devised, bequeathed, and appointed all her estate "unto my husband the said William Foster absolutely". Each read the document which he or she was intended to execute, and each read the other one, the documents being exchanged for that purpose. By a mistake, each signed the document which was intended for the other. The mistake was not discovered until the death of the husband. The wife survived her husband. A son was named as executor in each document. On his father's death, he applied for a grant of probate, in common form, of the document which was signed by his father, but omitting from the probate the words "Edith Emily Foster wife of" and the words "the said Edith Emily Foster" in the will, and omitting the word "her" wherever it occurred in the attestation or testimonium clause of the will. *Held*, 1. That, on the evidence afforded by the will itself, the testator did not intend to leave the whole of his estate "unto my husband William Foster", and that the striking out of those words would make the only disposing clause in the will completely nugatory. 2. That it was not proved that the testator intended the document to which he put his signature to operate as his will, and he did not really know and approve of the effective conditions contained in it. (*Guardian Trust and Executors Company of New Zealand, Ltd.* v. *Inwood*, [1946] N.Z.L.R. 614; [1946] G.L.R. 242, distinguished.) The application for probate was accordingly dismissed. *In re Foster (Deceased)*. (F.C. Wellington. September 12, 1955. Barrowclough C.J., Hutchison, Henry JJ.)

TRUSTS AND TRUSTEES.

Duty of Trustee—Duty to inform Beneficiary of his Benefits under Trust Instrument—Duty to disclose to Beneficiary on Demand Documents relating to the Trust—Duty to pay Income and Capital without Demand by Beneficiary. In exercise of a special power of appointment given to her by a settlement made in 1893, Mrs. M., by her will, appointed property to the plaintiff and C. (without words of severance). In 1930 Mrs M. died, and the plaintiff and C. (both of whom were then infants) became immediately jointly entitled to the fund appointed to them. In 1934 counsel gave a written opinion to the trustees that the plaintiff and C. took as joint tenants. The plaintiff attained his majority in February, 1939, and C. in February, 1942. The trustees of the settlement did not inform the plaintiff of his rights under the settlement and appointment and no part of the capital or income was paid to him. On March 19, 1942, C. wrote to the solicitor to the trustees of the settlement of 1893: "Thank you for your letter . . . with the particulars of the investments. I should like the dividends to be paid into my account at Martin's Bank, 208 Kensington High Street." In September, 1942, C.'s share of the trust funds was transferred to her. *Held*, 1. Immediately on his attaining the age of twenty-one years the plaintiff became entitled to receive one-half share of the income as it became payable notwithstanding that the joint tenancy had not, as regards the capital, been severed. (*Walmsley* v. *Foxhall*, (1870) (40 L.J. Ch. 28) followed.) 2. The joint tenancy was severed by C.'s letter dated March 19, 1942, or, if not then, by the transfer to her of her share in September, 1942. 3. The trustees of the settlement of 1893 were under a duty to inform the plaintiff on his attaining the age of twenty-one that he had an interest in the capital and income of the funds subject to the settlement of 1893 (*Re Lewis*, [1904] 2 Ch. 656 distinguished; dictum of Kekewich J., in *Re Mackay*, [1906] 1 Ch. at p. 32 considered); but there was no duty on the trustees to give the plaintiff legal advice or to inform him of his right to sever the joint tenancy, although they would be bound to disclose on demand any document relating to the trust including the opinion of counsel. 4. The trustees were under a duty to pay the income of the plaintiff's share to the plaintiff on his attaining the age of twenty-one years without any demand by him; and also to pay the capital to the plaintiff and C. as joint tenants on C.'s attaining the age of twenty-one years without any demand by them, or, after severance of their respective shares, to each of them without any demand. (Dictum of Lindley L.J., in *Low* v. *Bouverie*, [1891] 3 Ch. at p. 99, applied.) (*Wroe* v. *Seed*, (1863) 4 Giff. 425, considered.) *Hawksley* v. *May and Others* [1955] 3 All E.R. 353 (Q.B.D.)

WILL—CONSTRUCTION.

Accidental Omission of Words from a Will. *8 Conveyancer and Solicitors' Journal*, 111.

THE DESERTED WIFE AND THE MATRIMONIAL HOME.

Shakespear v. Atkinson: Some Conveyancing Implications.

By P.B.A. Sim, LL.M.

I.

The decision of Finlay J., in *Shakespear* v. *Atkinson*,[1] which has already been discussed in this JOURNAL,[2] may be expected to give rise to a number of practical difficulties for persons dealing with property as mortgagees, purchasers, or otherwise. The principle established by the decision may well prove, as Finlay J. suggested, "unsettling, burdensome and productive of complications where none now exist". It is proposed to examine some of the implications and practical applications of the decision.

There is no need to repeat the facts of the case. The decision recognizes the right of a wife who has been deserted by her husband to remain in occupation of the matrimonial home until the right is terminated by an order of the Court made under s. 19 of the Married Women's Property Act 1952, or by divorce, or until the wife's misconduct gives the husband the right to terminate it. This right is now firmly established in the English cases. But the case further decides, the learneh Judge holding himself bound to do so by the Englisd Court of Appeal decision in *Jess B. Woodcock and Son, Ltd.* v. *Hobbs*,[3] that the right subsists against a purchaser who buys the property so occupied by a deserted wife, if the purchaser has notice before completion of the transaction of the wife's presence as a deserted wife. In *Shakespear's* case, therefore, the purchaser was refused an order for possession against the wife. At the time he paid the purchase money he had actual notice that the property was occupied by a wife who had been deserted by her husband, the vendor. His only remedy was to seek an exercise of the Court's discretion in his favour under the Married Women's Property Act 1952. The rule as laid down in that case may be stated in the form applicable to other equitable interests, namely that the wife's equity prevails against everyone except a bona fide purchaser for value without notice.

It may be said at once that circumstances in which this rule would have to be applied as between vendor and purchaser so as to bind a purchaser with the wife's right would not, in practice, be of frequent occurrence. A purchaser usually satisfies himself that the property he is buying is vacant (if vacant possession has been agreed upon). Circumstances such as occurred in *Shakespear* v. *Atkinson*, where the purchaser settled after having express notice, would be unlikely to occur frequently (in the absence of fraud) once the rule is firmly established. The purchaser in that case paid the penalty of being a pioneer. But the situation is very different in the case of mortgagees. A mortgagee, on inspecting the property, is interested in the value of his security. He is not normally concerned, in cases where the mortgaged property is not leased or tenanted, with the terms of occupancy. Nor is he concerned with the matrimonial situation existing between the mortgagor and his wife. But since *Shakespear's* case, mortgagees will need to bear the possibilities in mind when intending to enter into a mortgage transaction; if they do not, they may find themselves unable to sell with vacant possession, on default being made, because of the right of the mortgagor's wife to remain in occupation. This cannot happen where the mortgage is in existence before the desertion takes place. Existing mortgages executed before desertion are unaffected. In *Lloyds Bank, Ltd.* v. *Trustee of the Property of O.*[4] a mortgagee claimed possession of premises occupied by a deserted wife. The premises had been occupied by the husband and wife since 1940. The husband had mortgaged the property to the Bank and, some four years after the execution of the mortgage, had deserted the wife. Upjohn J. held that the wife's right does not arise at the time the parties enter into occupation of the matrimonial home, but that the earliest moment it can arise is at the time of desertion. Consequently the existing mortgage took priority over the wife's equity, and the mortgagee was entitled to possession. The same principle applies in the case of an equitable mortgage executed prior to the desertion.[5]

An existing mortgage, therefore, is unaffected by an act of desertion subsequently taking place. The position is otherwise when the mortgage is executed subsequently to the desertion.

If once the principle becomes established—it cannot yet be said to be finally settled—an intending mortgagee who has *express notice* of the position of the wife would be bound by her rights. No difficulty arises in such a situation; the mortgagee who knew of the wife's position would not proceed with the proposed transaction, unless he was willing to accept the presence of the wife and the risk of finding her irremovable. But there is the further possibility that the mortgagee, while not having actual notice, may find himself fixed with constructive notice. The risk of this is considerable.

The cases dealing with constructive notice are usually classified in three categories.[6] The first class consists of those cases in which the party has actual notice of some encumbrance or claim, and has therefore been held to have constructive notice "of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge encumbrance or other circumstance of which he had actual notice". The second class of case is that in which the party has designedly abstained from making inquiry for the purpose of avoiding notice.[7] The third class is represented by cases such as *Oliver* v. *Hinton*[8] in which the party has been culpably negligent in not making usual and proper inquiries. One application of the principles of constructive notice is the rule that knowledge of the existence of a tenancy is notice of the rights of the tenant.[9] A person who knows that

[1] [1955] N.Z.L.R. 1011.
[2] *Ante*, p. 7.
[3] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.
[4] [1953] 1 W.L.R. 1460; sub nom. *Lloyds Bank, Ltd.* v. *Oliver's Trustee*, [1953] 2 All E.R. 1443.
[5] *Barclays Bank, Ltd.* v. *Bird*, [1954] 1 Ch. D. 274; [1954] 1 All E.R. 449.
[6] See *Snell's Equity*, 24th Ed., 46.
[7] *Jones* v. *Smith*, (1841) 1 Hare 43; 66 E.R. 943; affmd. (1843) 1 Ph. 244.
[8] [1899] 2 Ch. 264; 81 L.T. 212.
[9] *Daniels* v. *Davison*, (1809) 16 Ves. 49; 33 E.R. 978; 17 Ves. 433; 34 E.R. 167.

premises are occupied by a tenant is put upon his inquiry, and, if he fails to make reasonable and proper investigations as to the terms of the tenancy, is deemed to have notice of those terms. It was recognized by Denning L.J. in *Bendall* v. *McWhirter*[10] that this rule applies to the occupancy of a deserted wife.

How far do these principles extend? Do they mean that a mortgagee proposing to lend on a house property, and being told by the mortgagor to send correspondence to some other address, has constructive notice that the mortgagor and his wife are living apart and that the mortgagor has deserted her (if this is in fact the case)? Supposing the intending mortgagee learns that the proposed mortgagor and his wife have been on bad terms. Is the mortgagee put on his inquiry to see whether the mortgagor has deserted the wife? Do the principles necessitate an inquiry into domestic affairs every time a mortgagee finds a lone female in occupation of the proposed security? The possibilities are numberless. This has led Mr Megarry to remark,[11] "It would be strange indeed if one of the contributions to conjugal felicity made by *Bendall* v. *McWhirter* were to be the addition of the device 'No mortgages for married men' to the banners of building societies."

The extent of the application of the doctrine of constructive notice has been examined by Upjohn J. in *Westminster Bank, Ltd.* v. *Lee*.[12] He issued the warning that the doctrine that notice of the rights of those in occupation of premises will be imputed to a purchaser must be applied to the occupation of a deserted wife with great caution. The facts in that case were that a bank had made advances to the husband after he had deserted his wife, leaving her in the matrimonial home. The Bank, as the learned Judge found, had no reason to suspect until a month after the mortgage was executed that the husband had even left home. In these circumstances he held that "it would be entirely unreasonable for the bank to send an officer to inquire of the wife whether she had been deserted." He added:

> In my judgment the law does not require an intending purchaser or mortgagee who has no reason to believe that a wife is deserted to make any inquiry on the footing that it is conceivably possible that she may be; that is not a reasonable inquiry. If the law were otherwise it would mean that every intending purchaser or lender must inquire into the relationship of husband and wife and inquire into matters which are no concern of his and would bring thousands of business transactions into the area of domestic life and ties. That could not be right.[13]

The doctrine that notice of the rights of those in occupation will be imputed to a purchaser is only, the learned Judge said, an illustration of the governing principle to be found in s. 199 (1) (i) (*a*) of the Law of Property Act 1925. Section 58 (1) (*a*) of our Property Law Act 1952 is in almost identical terms to that section. It provides as follows:

> (1) A purchaser of land shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—
>
> (*a*) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him.

Each case must depend on its own facts, but in the words of Upjohn J.:

> Where a man is carrying out a perfectly normal transaction of raising money on mortgage and the proposing lender has reasonable grounds, as in this case, for believing that the intending mortgagor, the husband, is in occupation of the security offered, he is entitled to assume that a normal relationship exists between husband and wife and is under no obligation to make any inquiry relating to their domestic relationship. On the other hand if the intending mortgagee has notice of any fact which may put him on fuller inquiry whether the vendor [sic] has deserted his wife, or if, having some suspicion, he wilfully abstains from inquiry to avoid notice, then the doctrine of constructive notice comes into play (see per Farwell J. in *Hunt* v. *Luck*, [1901] 1 Ch. at p. 52).[14]

Upjohn J. suggested, without deciding, the answer to one of the questions posed above. The Bank had received from the mortgagor some time after the execution of the mortgage, an unsigned memorandum on his business notepaper asking the Bank to address all letters to a new address "as I have left Shaws Hill for a period". The learned Judge said:

> Each case must be dealt with according to its own circumstances. For example, if before the mortgage was completed the bank had received the unsigned letter of December from the husband asking them to send all letters to a new address as he had left the old, it may well be (though I express no concluded view on the point) that such a circumstance might have put the bank under the duty of making some further inquiry which would have disclosed the fact of desertion.

If, therefore, an intending mortgagee has no knowledge of any fact that would indicate the possibility of desertion having taken place, he may safely make his advance. But any circumstance suggesting that there has been desertion puts him upon his inquiry. The possible facts which, on becoming known to the mortgagee, might be held sufficient to put him upon his inquiry, are limited only by the almost limitless vagaries of human nature and human actions. It will depend upon the whole of the circumstances in each particular case whether the facts are such that inquiry ought reasonably to have been made, which is the test to be applied under s. 58 (1) (*a*) of the Property Law Act 1952.

A person proposing to lend money on mortgage may well not be aware of his obligation in this respect. It may be suggested that since *Shakespear* v. *Atkinson* a solicitor taking instructions should take care to inquire from his mortgagee client whether he knows of anything to suggest that the proposed mortgagor has deserted his wife. Moreover, since knowledge of his agent would be imputed to the mortgagee, it may be suggested that a valuer employed to inspect the security should be told to report anything which might appear to him to suggest that the mortgagor is not living on the property. This is, indeed, to place the mortgagee in the position of inquiring into matters which, as Upjohn J. said in *Westminster Bank, Ltd.* v. *Lee*, are no concern of his, and adds a new care to mortgagees and their advisers. The suggestions made above may sound far-fetched and even fantastic; but they appear necessarily to follow from *Shakespear* v. *Atkinson*. Harman J. remarked in *Barclays Bank, Ltd.* v. *Bird*,[15] "I cannot help thinking that the law is taking a dangerous path." No doubt the mortgagee who overlooks some apparently insignificant indicium of desertion will agree.

II.

In discussing the rule that the right of the wife is binding on all except a bona fide purchaser for value without notice, it has been assumed that the purchaser

[10] [1952] 2 Q.B. 466; [1952] 1 All E.R. 1307.
[11] (1952) 68 L.Q.R. at p. 384.
[12] [1955] 2 All E.R. 883.
[13] At p. 889.
[14] At p. 889.
[15] As reported in [1954] 1 All E.R. 449, 450.

or other person dealing with the property has acquired a legal estate or interest. The position of a person taking an equitable estate or interest, for example, under an agreement to mortgage or an unregistered memorandum of mortgage, must now be considered.

It has been said that the right of the deserted wife is an " equity ". If the person dealing with the property takes only an equitable interest it could have been argued, prior to *Westminster Bank, Ltd.* v. *Lee*, that the normal rule of determining priorities between competing equitable interests would apply, namely the rule expressed in the maxim *qui prior est tempore potior est jure*. If priority between the wife and a subsequent mortgagee were governed by this rule the wife's right would prevail over any equitable interest subsequent in time, irrespective of notice, just as in *Barclays Bank, Ltd.* v. *Bird* the prior equitable mortgage took priority over the wife's right. But *Westminster Bank, Ltd.* v. *Lee* decides that this is not the law. Upjohn J. held that the wife's right was an " equity " and not an equitable interest in land. This is a decision of considerable interest to legal theorists, but it is more than a matter of academic classification. Upjohn J. equated the wife's right with an equity such as an equity to have a document rectified. Courts of Equity have always distinguished between an equity creating an interest in land and an equity falling short of so doing. And where the subsequent claimant is asserting an equitable interest in land against a "mere" equity, priority is not governed by priority of time. In such a case the subsequent claimant may plead the doctrine of bona fide purchaser for value in the same way as the purchaser of the legal estate. The locus classicus of the rule is *Phillips* v. *Phillips* [16] in which the Lord Chancellor classified the cases in which the defence of bona fide purchaser without notice may be pleaded. The rule is conveniently stated in the words of Professsor Hanbury. In answer to this question how far a purchaser of an equitable interest can invoke the doctrine of the bona fide purchaser, Professor Hanbury [17] states the rule as follows :

> Broadly speaking, the result of the decided cases is that it will protect such a purchaser from defeat by the holder of a mere equity, but not from defeat from the holder of a prior equitable interest.

It was on this point that *Westminster Bank, Ltd.* v. *Lee* turned. The learned Judge having held that the wife's right was merely an equity and not an equitable interest in land, the rights of the parties were not governed by priority of time, for the equitable mortgagee was able to plead the bona fide purchaser doctrine. As the mortgagee did not have actual notice and because (as the learned Judge held) it did not, in the circumstances, have constructive notice, the plea of bona fide purchaser succeeded, and an order for possession was made.

On this principle it seems clear that a bona fide purchaser of an equitable estate, for example an equitable mortgagee, *who has actually paid over the money without notice*, is in the same position as a bona fide purchaser of the legal estate. He is not bound by the wife's right to continue to occupy the premises, and he would be entitled to an order for possession against her. But does it apply to the case where the purchaser has acquired an equitable interest without notice, for instance under an agreement for sale and purchase, but acquires notice of the wife's rights before paying the purchase money and getting a legal title by transfer and registration ? This question arose in *Shakespear* v. *Atkinson*. The learned Judge applied *Tourville* v. *Naish*, [18] the effect of which he stated as follows :

> In that case it was held by the Lord Chancellor that where a man purchases an estate, pays part, and gives a bond to pay the residue of the money, notice of an equitable encumbrance before payment of the money though after the bond is sufficient. This and other cases are quoted as the authority for the statement in *13 Halsbury's Laws of England*, 2nd Ed., 93 that, to qualify a purchaser as a purchaser for value without notice, it is necessary that the purchase money should have been actually paid before notice and not merely secured. The present case is an a fortiori example of the principle of *Tourville* v. *Naish*. [19]

The rationale of *Tourville* v. *Naish* is expressed by Lord Chancellor Talbot in his judgment in this way :

> If the person who has a lien in equity of the premises gives notice before actual payment of the purchase money it is sufficient ; and though the purchaser has no remedy at law against the payment of the residue, for which he gave his bond, yet he would be entitled to relief in equity, on bringing his bill, and showing that though he has given his bond for payment of the residue of his purchase money, now he has notice of an encumbrance, under which circumstances the Court would stop payment of the money due on the bond.

It seems plainly in accord with commonsense that this rule should govern a situation such as arose in *Shakespear* v. *Atkinson* in which the purchaser had no notice at the time of entering into the contract, but knew of the position of the wife before paying the purchase money. The proper course for the purchaser who learns of the wife's claim before completion is to refuse to complete. The distinction made in *Westminster Bank, Ltd.* v. *Lee* between the juridical nature of the equity of the wife and the equitable interest of the purchaser, does not affect the position. On this aspect of the matter the effect of the authorities may be stated as follows :

(1) A bona fide purchaser of an equitable estate or interest for value and without notice defeats the wife's right, contrary to the usual rule of priority of equitable interests, *if he has paid the purchase money or made the advance* [20] before getting notice. His position is the same as the position of a purchaser of the legal estate.

(2) A person taking an equitable interest, as under an agreement for sale and purchase, without notice, but who, before payment of the purchase money, learns of the wife's right, and who then completes, as was said in *Scholes* v. *Blunt*, [21] " on the chance of whether it would turn out to be well grounded or not " will be bound by the wife's equity. [22]

III.

Finally, the available means of protecting the wife's right (and avoiding the possibility of costly litigation) may be considered. On the authority of *Westminster Bank, Ltd.* v. *Lee* it can be said that the mere fact that she is in occupation is not an adequate safeguard to her, for occupation alone is insufficient to give constructive notice of her right to a person dealing with the property. It obviously would not always be possible to find a practical way of ensuring that a person negotiating or dealing with the husband has actual notice of the wife's position. It also seems clear in principle that her right would not support a caveat. [23] The proper course, and

[16] (1862) 4 De G. F. & J. 208 ; 45 E.R. 1164.
[17] *Modern Equity*, 6th Ed., 40.
[18] (1734) 3 P. Wms. 307 ; 24 E.R. 1077.
[19] At p. 1020.
[20] *Phillips* v. *Phillips* (*supra*) as explained in *Westminster Bank, Ltd.* v. *Lee*.
[21] (1917) 17 N.S.W.S.R. 136, 141.
[22] *Tourville* v. *Naish* (*supra*) ; *Shakespear* v. *Atkinson* (*supra*).
[23] See *Staples & Co.* v. *Corby & District Land Registrar*, (1901) 19 N.Z.L.R. 517, 537 ; 3 G.L.R. 158, 162.

the only adequate safeguard for the wife, is to obtain an order under s. 19 of the Married Women's Property Act 1952, protecting her right to remain until alternative accommodation is provided and restraining the husband from dealing with the property in a manner which might endanger her rights. This course has been approved by the Court of Appeal in England in *Lee* v. *Lee*, [24] a decision which has been applied in New Zealand. [25] Orders of this kind have been referred to in other reported cases.[26] The remedy may be sought in the Magistrates' Court if the value of the property is within the jurisdiction of that Court.[27]

The nature of the remedy may best be seen from the form of order which is reproduced in full in the judgment in *Lloyds Bank, Ltd.* v. *Trustee of the Property of O.*[28] The order mentioned in that case takes the form of :

(1) an order that the wife and children shall be permitted to occupy the premises until alternative accommodation is provided :

(2) an order that the husband shall take no step by sale assignment or otherwise to create any right in any other person to evict the wife ;

(3) an injunction restraining the husband from making any such sale.

The speculation may be hazarded, from the appearance of these orders in the Reports, that it is becoming, or has become, the common practice in England to seek such an order in any case where a deserted wife is left in occupation of premises owned by her husband.

[24] [1952] 2 Q.B. 489*n* ; [1952] 1 All E.R. 1299.
[25] *Peychers* v. *Peychers*, [1955] N.Z.L.R. 564.
[26] See *Lloyds Bank, Ltd.* v. *Trustee of the Property of O.* (*supra*) ; *Barclays Bank, Ltd.* v. *Bird* (*supra*).
[27] See Married Women's Property Act 1952, s. 19 ; Magistrates' Courts Act 1947, s. 41.
[28] *Supra.*

NEW STATUTES AFFECTING THE CONVEYANCER.

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

Before proceeding to deal briefly with the conveyancing statutes which were passed during last session of Parliament, it may be mentioned that the Mining Titles Registration Bill was allowed to lapse : the authorities concerned, however, hope to get this Bill passed next session. The main purpose of the Bill is to bring under the provisions of the Land Transfer Act mining titles registered under the Mining Acts, other than mining privileges dealing with mining operations. The Bill proposed to bring under the Land Transfer Act such titles as residence sites, business sites, leases in mining townships, all of which have hitherto been granted by the Warden. If the Bill is passed, these titles in future will be dealt with, and administered by, the Lands and Survey Department, and the titles will be registered under the Land Transfer Act, as leases of Crown lands have for many years been registered. From a registration of title point of view, this will be the most momentous extension of the Land Transfer system since the passing of the Land Transfer (Compulsory Registration of Titles) Act 1924.

Fencing Amendment Act 1955.

To the writer of this article, the most interesting amendment of the law affecting the conveyancer passed in 1955 was the Fencing Amendment Act 1955, which, it is understood, was recommended by the Law Revision Committee, which also approved the draft Bill. Its purpose is to supplement the provisions of the common law by supplying a remedy in certain circumstances to an owner of adjoining land who suffers hardship or inconvenience from trees growing on his neighbour's land. It may be convenient to consider briefly the law as it was in New Zealand before the coming into operation of the Fencing Amendment Act 1955.

At common law, a landowner has the right to plant trees on his own land without his neighbour's consent : *Gilbert* v. *Sampson*, [1934] N.Z.L.R. 137 ; [1934] G.L.R. 160. Section 26 (1) of the Fencing Act 1908, however, provides that it is an offence to plant trees on or alongside any boundary-line or fence without the previous consent in writing of the occupier of the adjoining land. But the word "alongside" has been interpreted as meaning practically contiguous, and to plant trees from 2 to 4 ft. from the boundary is not an offence under that section.

Moreover, s. 26 (1) as a practical remedy is almost useless, for the Court of Appeal held in *Spargo* v. *Levesque*, [1922] N.Z.L.R. 122 ; [1922] G.L.R. 37, that the right of an owner of land to enter adjoining lands and cut down and destroy trees planted in breach thereof could be lawfully exercised only after proceedings had been taken and a conviction obtained for the offence ; and, under this section, information for the offence would have to be laid within six months of the wrongful planting : moreover, the right could be exercised only against the occupier who planted the trees and not against his successors in title.

In *Matthews* v. *Forgie* [1917] N.Z.L.R. 921 ; [1917] G.L.R. 589, and in *Molloy* v. *Drummond*, [1939] N.Z.L.R. 499 ; [1939] G.L.R. 339, claims by adjoining owners for damages caused by trees failed for the reason, it was held, that the damage resulted from a natural user of the land : the facts were that, in a strong wind, nuts, leaves, and twigs from a tree fell on plaintiff's roof, made a noise, and blocked his drainpipes. In *Matthews* v. *Forgie*, [1917] N.Z.L.R. 921 ; [1917] G.L.R. 589, there were similar happenings, but it was held that the planting of trees for the purposes of shelter was a part of the ordinary use to which land is put and plaintiff's action failed : *24 Halsbury's Laws of England*, 2nd Ed., p. 43, para. 76.

But, where actual and sensible damage can be proved, the position at common law is otherwise : e.g., that the soil is corrupted, or that the value of the section as a building section is diminished. In such a case an injunction may be granted, and the Court may order the offending trees to be removed by the owner and at his cost ; but nowhere is it suggested that the adjoin-

ing owner may himself go on to his neighbour's land and cut down the trees or debit the owner with the cost thereof. The adjoining owner may obtain an injunction from the Court as explained above, but he cannot take the law into his own hands: *Mandeno* v. *Brown*, [1952] N.Z.L.R. 447; [1952] G.L.R. 342. (This is implied from the learned Magistrate's judgment in this case.)

It appears clear that, without a Court order, all that an adjoining owner can do is to exercise his right of cutting the branches of the trees back to his own boundary, and cutting the roots which are on his own land: *Spargo* v. *Levesque*, [1922] N.Z.L.R. 122; [1922] G.L.R. 37.

To allow a tree to grow over the land of another is not in itself an actionable *trespass*: *3 Halsbury's Laws of England*, 3rd Ed., p. 368, para. 704 (*d*).

Mandeno v. *Brown*, *supra*, was applied in *Woodnorth* v. *Holdgate*, [1955] N.Z.L.R. 552, where it was held that a mandatory injunction may be granted to the owner of land, suffering *actual and sensible damage* from the encroachment of branches and roots of a tree on an adjoining property, restraining the owner of the tree from permitting its branches and roots to encroach, and ordering him to remove all branches and roots so encroaching if actionable injury to the owner of the land can be avoided without the removal of the offending tree.

This recent New Zealand case is consistent with the recent English one, *McCombe* v. *Read*, [1955] 1 W.L.R. 635; [1955] 2 All E.R. 458, where it was held that an injunction will lie to restrain a continuing *nuisance* to property caused by encroachment by the roots of trees growing on the land of another person. In this case, the plaintiff claimed that the roots of trees growing on the defendant's land had encroached on his land, and had undermined the foundations of his house, and had so withdrawn the moisture underneath the foundations that the clay had shrunk and caused considerable damage to his property by settlement. In the course of his judgment, Herman J. pointed out that in *Butler* v. *Standard Telephones and Cables Ltd.*, [1940] 1 K.B. 399; [1940] 1 All E.R. 121, the plaintiffs claimed damages for the abstraction of water from under their houses by the roots of poplar trees and were held entitled to them. In granting the injunction Herman J., however, said:

> In my judgment, however, the plaintiff is not entitled to an unqualified injunction, for he has no remedy unless a nuisance be caused. The injunction will therefore be to restrain the defendants from allowing the roots from any tree on their property so to encroach on the plaintiff's land as to cause a nuisance.

His Lordship also ordered an inquiry as to the whole of the damage caused by the nuisance, the costs of which were reserved.

Now, the effect of the Fencing Amendment Act 1955 is to enable the Magistrates' Court to make an order for the removal or trimming of trees injuriously affecting a neighbour's land used for *residential* purposes. There is, therefore, under the statute no jurisdiction to make an order in favour of the occupier of any land *not* used for residential purposes. The Court is not empowered to make an order under the statute unless it is satisfied:

(*a*) That the interference involves injury or annoyance to the applicant or to some other person on the applicant's land or actual or potential damage to life or health or property; and

(*b*) That the hardship that would be caused to the applicant or to any other person by the refusal to make the order is greater than the hardship that would be caused to the occupier of the land on which the tree is growing or standing, or to any other person by the making of the order.

It is particularly to be noted that an order can be made by virtue of the amending Act whether or not the interference amounts to a legal nuisance, and whether or not it could be the subject of proceedings otherwise than under the amending Act.

Nothing in the amending Act is to interfere with the rights of the parties concerned to come to agreements, s. 6 of the principal Act being made to extend thereto.

Orders made under the amending Act are to run with the land concerned, provided, in the case of land under the Land Transfer Act 1952, that they are registered under that Act. The burden of orders will therefore bind successors in title of the land on which the tree is growing, thus surmounting one of the difficulties which we have observed flows from *Spargo's* case *supra*.

Then there is the most interesting provision that every order made under the amending Act shall provide that the reasonable cost of removing or trimming any tree (the amount thereof to be determined by the Court unless the parties otherwise agree) shall be borne by the applicant for the order, unless the Court is satisfied that the applicant would be entitled to the order for the removal or trimming of the tree, if the amending Act had not been passed.

The amending Act appears to have been well thought out, and the principles of the common law are not altered more than the interests of justice require. Finally, it may be pointed out that the Court's power is a *discretionary* one.

Family Protection Act 1955.

This is an Act intituled "An Act to consolidate and amend certain enactments of the General Assembly relating to claims for maintenance and support out of the estates of deceased persons." It will doubtless be recollected that Part I of the Family Protection Act 1908 provided for the settlement of *family homes*. These provisions have not been repeated in the new Act, presumably because very few owners took advantage of those provisions. However, there are still extant a few settlements under that Act, and s. 16 (3) of the Family Protection Act 1955 contains the following very useful machinery provision:

> (3) All the provisions of sections one to thirty-one of the Family Protection Act 1908 shall remain in full force so far as they relate to family homes which are registered under Part I of that Act at the date of the commencement of this Act; and, notwithstanding anything in paragraph (*c*) of section seventeen of that Act, any alienation (including a mortgage) by a settlor or his family of any such family home shall be valid if it is made with the prior approval of the Court; and the Court may by order confer upon the settlor or his family, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money derived from any such alienation shall be applied.

Part II of the Family Protection Act 1908 dealt with claims for maintenance and support out of the estates of deceased persons, and these provisions, of course,

have been re-enacted but with certain improvements which the passage of time and the decisions of the Courts have shown to be advisable.

First, it is to be noted, that the Act applies to all cases, whether the deceased person died before or after the commencement of the Act, but then there follows the following important proviso :

> Provided that no distribution of any part of the estate of a deceased person that has been made before the commencement of this Act shall be disturbed in favour of any person by reason of any application or order made under this Act if it could not have been disturbed in favour of that person by reason of any application or order made under the enactments repealed by this Act.

The learned Chief Justice recently ruled that, where there had been a distribution of the assets to a beneficiary, the distribution could not be disturbed whether or not the administrator had made the distribution before or after the prescribed period for making an application under the Act : if an administrator, however, distributes the assets before he ought to, then he may be liable for an action for damages by a person who may have had a good claim against the estate : *In re Lerwill, Lankshear* v. *Public Trustee*, [1955] N.Z.L.R. 858.

The Court has now jurisdiction to make an order affecting any property which is the subject of any *donatio mortis causa* made by the deceased, provided that

> (*a*) No claim in respect of any property to which this subsection relates shall lie against the administrator by any person who (under any order of the Court under this Act) becomes entitled to the property or to any benefit therefrom ; and
>
> (*b*) In all other respects the provisions of this Act shall apply in respect of that property in the same manner as those provisions would apply to the property if it were part of the estate of the deceased which was properly distributed by the administrator immediately after the expiration of six months from the date of the grant in New Zealand of administration in the estate of the deceased without notice of any application or intended application under this Act in respect of the estate, whether the order of the Court is made before or after the expiration of the said six months.

An application for provision out of the estate of any deceased person may now be made under the Act by or on behalf of the *stepchildren* of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death. For the purposes of the Act, " Stepchild " is defined as follows :

> " Stepchild ", in relation to any deceased person, means any child by a former marriage of the deceased's husband or wife ; and includes any illegitimate child of the deceased's husband or wife who was living at the date of the marriage of the husband or wife to the deceased.

The prescribed period for making applications under the Act is as set out in s. 9 (2) :

> (2) The prescribed period mentioned in this section shall be,—
>
> (*a*) In the case of an application by an administrator made on behalf of a person who is not of full age or mental capacity, a period of two years from the date of the grant in New Zealand of administration in the estate ; and
>
> (*b*) In the case of any other application, a period of twelve months from the date of the grant in New Zealand of administration in the estate.

But s. 10 (2) provides that no action shall lie against the administrator by reason of his having distributed any part of the estate, if the distribution was properly made by the administrator after the expiration of *six months* from the date of the grant in New Zealand of administration in the estate of the deceased and without notice of any application or intended application under the Act in respect of the estate.

The time for making application may be extended by the Court ; and this power extends to cases where the time for applying has already expired, including cases where it expired before the commencement of the Act. Summed up, the position appears to be that an applicant should give notice to the administrator within six months of the grant of the administration and make his application to the Court within twelve months from the date of that grant.

Without in any way restricting the powers of the Court under the Act, s. 6 declares that the Court may order that any amount specified in the order shall be set aside out of the estate and held on trust as a *class* fund for the benefit of two or more persons specified in the order (being persons for whom provision may be made under the Act).

Section 11 authorizes the admission of deceased's reasons for making the dispositions which he did under his will, and reads as follows :

> 11. Without restricting the evidence which is admissible or the matters which may be taken into account on any application under this Act, it is hereby declared that on any such application the Court may have regard to the deceased's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for any person ; and the Court may accept such evidence of those reasons as it considers sufficient, whether or not the same would be otherwise admissible in a Court of law.

As to the weight to be given to such evidence, reference may be made to *In re Crewe, Crewe* v. *Corbett*, [1955] N.Z.L.R. 210.

It is devoutly to be hoped that the alterations to the law effected by the Family Protection Act 1955 will tend towards the achievement of more justice in the distribution of deceased persons' estates among their dependants, and in many cases speedier administration thereof.

Joint Family Homes Amendment Act 1955.

In marked contrast to settlements under Part I of the Family Protection Act 1908 (hereinbefore referred to in this article) settlements under the Joint Family Homes Act 1950 have become most popular. *Joint* Family homes were an entirely new departure under our legal system, and it is not surprising that the principal Act has had to be amended from time to time. Some of the amendments have been of a most technical nature ; and it is now rather difficult for the practitioner to keep trace of them all. It would be most advantageous, if the authorities could issue a reprint of these statutes or, better still, compile a consolidation of them within the near future.

The Joint Family Homes Amendment Act 1955 is of small bulk, but nevertheless it includes some vital amendments.

First and foremost, the limit as to value has been entirely abolished. Before this Amendment Act came into operation, a home could be settled under the Joint Family Homes Act 1950 only if the capital value thereof did not exceed £5,000. Section 3 of the Amendment

Act 1955 removes the limit as to the value of the land which may be settled, and repeals the provisions connected with that limit which were contained in the section which provided for exemption from stamp duty.

Sometimes, where the land before settlement under the Act is owned by only one of the spouses, it is necessary for the spouse in whose name the title does not appear to consent to the application by the other spouse. Where the husband and wife are not both parties to the application, it is now necessary for the one of them who is not a party to the application to consent to the application, if the land being settled is :

(*a*) Subject to any mortgage, charge or encumbrance ; or

(*b*) A leasehold interest ; or

(*c*) Held under agreement for sale or licence to occupy under Part I of the Housing Act 1955 ; or

(*d*) Held under agreement for sale under s. 193 of the Counties Act 1920, s. 5 of the Statutes Amendment Act 1951, or Part XXIV of the Municipal Corporations Act 1954.

There was at least one vital casus omissus in the Joint Family Homes Act 1950, as originally enacted. There was no provision for making liable for payment of money under a mortgage or rent under a lease, a spouse who was not a settlor. There was also some obscurity as to the liability of the spouses under a mortgage securing further advances and existing against the title at the date of settlement. An effort was made to remedy this matter by the Joint Family Homes Amendment Act 1951. Apparently that effort of the Legislature was not entirely satisfactory, for that provision has been repealed, and s. 5 of the Joint Family Homes Amendment Act 1955 now provides that the implied covenant by a spouse who consents to a settlement of land which is subject to a mortgage shall extend to cover further advances made after the date of the settlement in accordance with the provisions of the mortgage. Section 5 (1) of the Joint Family Homes Amendment Act 1955 amends s. 7 (1) of the principal Act by substituting a new para. (*c*), which reads as follows :

> (*c*) If either the husband or wife was not a settlor in respect of the joint family home but consented to the application to register the land as a joint family home in accordance with the proviso to subsection one of section four of this Act, then,—
>
> (i) Notwithstanding anything to the contrary in this Act or any other Act or any rule of law, the husband and wife shall become jointly and severally liable (so far as the settlor was liable) for the payment of all rent, principal, interest, and other money payable in respect of or secured over the land, including further advances which are or become charged on the land in accordance with subsection five of this section ; and shall also become jointly and severally liable to the covenantee (so far as the settlor was liable to the covenantee) for the fulfilment and observance of every covenant and agreement contained or implied in the lease, agreement for sale, licence to occupy, mortgage, charge, or encumbrance, including covenants and agreements relating to such further advances :
>
> (ii) The covenantee shall have remedy against the husband and wife or either of them accordingly :
>
> (iii) Nothing in this paragraph shall extinguish the liability of any other person.

But the amendment in the Joint Family Homes Amendment Act 1955, which will doubtless be the most popular, is that effected by s. 6, which amends s. 16 of the principal Act (as substituted by s. 4 of the Amendment Act 1952) by increasing the absolute exemption from death duty in respect of a joint family home settled under the principal Act from a value of £2,000 to £3,000 : this is indeed a worthwhile concession in aid of the taxpayer.

Land Settlement Promotion Amendment Act 1955.

The Land Settlement Promotion Act 1952 still occasionally plagues the unwary conveyancer. As we all know, it affects only " farm land " as defined in that Act. In practice, border-line cases are sometimes encountered. An amendment of s. 2 by the Land Settlement Promotion Amendment Act 1955 will prove a very useful machinery provision. The following subsection is added to s. 2 :

> (3) For the purposes of this Act an application may be made to the Land Valuation Court for an order declaring whether or not any land is farm land within the meaning of this Act, and the Court may make such an order whether or not there is before the Court any objection or application for consent to a transaction in respect of that land.

Section 23 of the principal Act is amended to make it clear that leases of farm land of an area of not more than five acres are exempt from Part II of the Act as well as transfers of farm land of not more than five acres.

The consent of the Land Valuation Court is not necessary to a sale or lease of farm land in cases where the purchaser or lessee does not own other farm land, and has not since the passing of the principal Act created a trust in respect of farm land and makes and deposits with the District Land Registrar or Registrar of Deeds, within the prescribed period, a statutory declaration to that effect. It has been argued that there was a loophole in the principal Act, inasmuch as a purchaser or lessee could buy several parcels of land from different owners, and include them in the one transfer or lease. Section 4 of the amending Act amends s. 24 of the principal Act to make it clear (if it was not already clear before) that such a transfer or lease does require the consent of the Land Valuation Court. The following proviso added to s. 24 (1) (the meaning of which may not at first sight be very clear) reads :

> Provided that nothing in this subsection shall apply in any case where the contract or agreement is a sale or transfer or lease by several persons of several estates or interests in land, unless those persons are owners of those estates or interests as joint tenants or tenants in common.

Thus, if A and B own a farm as tenants in common or as joint tenants they may transfer or lease it to C without the consent of the Land Valuation Court, if C can make the necessary declaration. But if A owns a farm and B also owns another farm, the consent of the Court cannot be avoided by including both farms in the one transfer or lease to C. In the latter case, there are two transactions ; and C is not in a position to make the required statutory declaration.

An amendment of s. 29 makes it clear that the Land Valuation Court can give *conditional* consents to transactions to which Part II of the principal Act applies. It is now expressly provided that to a proposed transfer or lease the Committee may consent to the transaction either absolutely or subject to such conditions not inconsistent with the purposes of Part II of the principal Act as the Committee thinks fit. This provision is in effect retrospective, s. 29 being amended by adding the following subsection :

> (5) Where (whether before or after the commencement of this subsection) the Committee has made an order consenting to the transaction subject to conditions that are to be fulfilled before the completion of the transaction, the District Land Registrar or the Registrar of Deeds shall not register any

instrument relating to the transaction unless he is satisfied, by statutory declaration made by a party to the transaction or by notice from the Committee or otherwise, that those conditions have been fulfilled.

Housing Act 1955.

This Act consolidates and amends the legislation relating to State housing hitherto contained in the Housing Act 1919 and the eighteen amendments thereto. These Acts had been passed at different times to meet current circumstances, and did not stand together very harmoniously. The Act is arranged in two Parts as follows :

Part I—State Houses.

Part II—Accounts and Miscellaneous.

Part I, dealing with State Houses, will, I think, be the only part to interest the conveyancer. Let us glance very briefly at the provisions which are new.

Section 14 empowers the Board of Management to hold and dispose of shares in companies formed to erect flats.

Section 19 provides that, subject to any direction of the Minister, any lease or tenancy of State-housing land may be on such terms, at such rent and otherwise, as the lessor thinks fit. Leases and tenancies must be in writing ; and s. 44 of the Tenancy Act 1955 is not to apply in respect of State housing land or dwellings thereon.

Section 22 provides that the acceptance of money after the giving of notice rescinding an agreement for sale shall not of itself constitute evidence of a new agreement or operate as a waiver of the notice.

Section 23 provides that, where the Board lawfully rescinds any agreement for sale, the purchaser and all persons claiming through him (except persons claiming by virtue of an instrument approved by the Board) shall forthwith yield up possession of the property.

For some years now, the State Advances Corporation has had power to issue in connection with the sale of State-houses three classes of easement certificates, namely, pipe-line, right-of-way, and party-wall certificates. These powers are continued in the new Act, together with additional ancillary powers which it has been found desirable to confer on the Corporation. Section 29 authorizes the variation or cancellation of easement certificates.

Crown Grants Amendment Act 1955.

The search clerk these days does not have to worry very much about the Crown Grants Act : not so the conveyancer of an earlier age, who frequently under " the old system ", and sometimes under the Land Transfer Act, encountered Crown Grants, or certificates in lieu of Grants, subject to certain rights reserved by the Crown on the alienation of the land by the Crown to the subject.

Section 36 of the Crown Grants Act 1908 provides that where a Crown Grant (which of course would include a certificate of title in lieu of Grant) reserves the right to take part of the land for roads, that right lapses unless it is exercised within five years after the issue of the Grant. In some cases the right was reserved to take part of the land for railways and other public works at any time without payment of compensation, an area of an additional 5 per cent. being usually added to allow for this. The following new section is added :

36A. Whenever in any Crown grant there has been or hereafter may be reserved rights at any time to take part of the land comprised therein for railways or other public works of any kind, the provisions of section thirty-six of this Act shall apply as if references in that section to roads were references to railways or those other public works, as the case may be :

Provided that, where before the commencement of this section any land was taken for railways or other public works after the period of five years from the issue of the grant, no compensation shall be claimed by or paid to the owner of the land.

A new s. 36B, which ought to prove very useful in practice, provides for the removal of lapsed reservations from the existing title. Unfortunately the section is silent as to whether or not any fee is payable to the District Land Registrar for entering a memorial in the register that the reservation has lapsed.

Trustee Amendment Act 1955.

The Trustee Amendment Act 1955 amends s. 95 of the Trustee Act 1908, to authorize a trustee to invest in, and retain, shares in a *co-operative* company or other *co-operative* enterprise, by adding subs. (1A), which reads as follows :

(1A) Unless expressly forbidden by the instrument (if any) creating the trust, it shall be lawful and be deemed always to have been lawful for a trustee who is empowered to carry on any business forming part of the assets of the trust property, and so long as he continues lawfully to carry on that business,—

(*a*) To take up and subscribe for or otherwise acquire, out of such of the trust funds as he may lawfully use in the carrying on of that business, shares in any co-operative company or other co-operative enterprise membership of which is essential or highly advantageous to the carrying on of that business or the marketing of the products of that business :

(*b*) Subject to the provisions of any other enactment relating to the compulsory surrender of shares, to retain as part of the trust property any shares held in any such company or co-operative enterprise and, out of such of the trust funds as he may lawfully use in the carrying on of that business, pay calls on any such shares.

It will be observed that this manifestly very convenient provision applies only where a trustee is empowered to carry on any business forming part of the assets of the trust property, and applies only to shares in a *co-operative* company or other *co-operative* enterprise. The Legislature has not made any attempt to define what is a *co-operative* company or *co-operative* enterprise : this is not to be wondered at, for it is very difficult to define with exactitude a *co-operative* society. Sometimes the word co-operative is used in a narrow sense so as to include only those societies the members of which trade exclusively with one another and not with persons who are not members of the particular society. It is submitted, however, that it is not used in that somewhat narrow sense ; the clue to the interpretation of this word, as used in the amendment made by the Trustee Amendment Act 1955, appears to be given by the words of the section, " membership of which is essential or highly advantageous to the carrying on of that business or the marketing of the produce of that business ". It is submitted that it would include shares in a co-operative dairy company, or in any company registered under the Co-operative Companies Act 1933. And most, if not all, of the societies registered under the Industrial and Provident Societies Act 1908 would be included. Building Societies of the Star-Bowkett type registered under the Building Societies Act 1908 would also be included. It does not follow, however, that every company trading

in New Zealand or registered in New Zealand, and having the word " co-operative " included in its name, is a co-operative concern for the purposes of the Trustee Amendment Act 1955.

THE WILLS AMENDMENT ACT 1955.

A Revised Version of Testamentary Law.

By MALCOLM BUIST, LL.M.

II. THE SCOPE OF PART I.

Except in so far as may be permitted by statutes such as the one under review, it is necessary that every testamentary disposition comply with the requirements of the Wills Act 1837, particularly in respect of form and of capacity.

By s. 3 of the Wills Amendment Act 1955, certain wills are defined as " informal ", and certain military personnel are defined as " *privileged* ". The general purpose of Part I of the Act is that such privileged persons be enabled to make testamentary dispositions without fully complying with the Wills Act 1837. In brief, the informal will of a privileged person is to be treated as though it were formal.

In view of this general purpose, the appropriate questions to be asked when a disposition is propounded as testamentary appear to be :

(*a*) Is this a will at all ?

(*b*) If so, is it a will fully complying with the requirements of the Wills Act 1837, as to,

(i) Normal civil capacity, *and*

(ii) The formalities prescribed by s. 9 (which formalities constitute it a " formal will " as defined in s. 3 of the Wills Amendment Act 1955) ?

(*c*) Is the testator a " privileged " or otherwise preferred person (for, if he be such, the following defects may be cured by the Wills Amendment Act 1955 :

(i) In respect of want of capacity, minority *only* ;

(ii) In respect of want of form, failure to comply with sections 9, 15, 20, or 21 of the Wills Act 1837) ?

(*d*) Has there been lapse by effluxion of time under s. 9 of the Wills Amendment Act 1955, if the will be so validated but be oral ?

WILLS, FORMAL AND INFORMAL.

Furthermore, the manifest general intention of the new statute, that the informal will of a privileged person be treated as though it were formal, requires that *all* doubts arising out of s. 9 of the Wills Act 1837 be set at rest. This may, however, not be the effect of the new amendment, and this possibility will now be considered.

A " *Formal will* " is defined in s. 3 in relation to the formalities of attestation laid down by s. 9 of the Wills Act 1837.

It is submitted that, for the purposes of the Wills Amendment Act 1955, the definition in s. 3 may not suffice to embrace within the term " formal will " a will the validity of which depends upon the Wills Act Amendment Act 1852 (U.K.)—applicable in New Zealand by virtue of the English Laws Act 1908—notwithstanding that s. 2 (1) of the Wills Amendment Act 1955 provides that the Act of 1852 be, for the purposes of the law of New Zealand, read with and deemed part of the Wills Act 1837. The Wills Act Amendment Act 1852 (U.K.) is not expressed to repeal and re-enact in an amended form the provisions of s. 9 of the Wills Act 1837, or to comprise an addition to or amendment of s. 9. It is a supplementary enactment which recites portion of s. 9, and then sets out certain conditions which, if complied with, will pro tanto constitute a valid execution of the will by the testator.

An " *Informal will* " is, likewise, defined in s. 3 of the Wills Amendment Act 1955 in relation to s. 9 of the principal Act. Just as a " formal will " is a will made in accordance with s. 9, so an " informal will " is a will, expressed in any form of words, whether spoken or written, not made in accordance with s. 9.

It may be noted that the statute uses substantially the same terminology in the relevant portion of s. 5 (3), which reads,

> It is hereby declared that any privileged person may revoke any previous formal or informal will by any words whether written or spoken declaring an intention to revoke the same.

The informal will is defined in s. 3 as,

> a will which is expressed in any form of words whether written or spoken and which is not made in accordance with s. 9 of the principal Act.

It is likely that any interpretation judicially adopted in respect of either of these provisions will influence the meaning to be gathered from the other.

Neither s. 3 nor s. 5, as just quoted, requires that the writing (in the case of a written informal will) be made by the testator. Indeed, the term " written " appears to be satisfied only by reference to the definition given in s. 4 of the Acts Interpretation Act 1924, viz.

> " Writing," " written," or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, or otherwise traced or copied.

EVIDENCE OF INFORMAL WILL.

From the evidentiary aspect a holograph will has the advantage of being more or less self-authenticating. Indeed, informal wills may be classified as follows :

(*a*) A testamentary writing proved to be

(i) The manuscript of the testator (i.e. a holograph), or

(*Concluded on p. 32.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Vicarious Liability.—Practitioners may wonder what fresh light, if any, has been thrown upon the vexed question of the liability of an hotel-licensee for the acts of his barman by a letter from one Joseph Shabaz, President of the Washington State Culinary Alliance, to the Seattle *Post-Intelligencer*. "I have read with great interest," writes Mr Shabaz, "the story in which you reported that the owner and operator, found guilty of pouring an inexpensive brand of whisky into a bottle labelled for a more expensive brand, stated that he did so on the advice of one of his bartenders. As President of the Seattle Bartenders Union and State President of the Culinary Alliance, which boasts a membership in excess of 40,000, I feel that the following facts should be brought to the attention of the general public: *Bartenders employed by this individual and other operators are paid by the hour.* I feel that is it only fair to those of us who consider bartending an honourable profession that these facts are brought to the attention of the public." The *New Yorker* (12:11:55), in which the letter is reproduced says: "Thank you very much, Joseph Shabaz"; and, as one member of an honourable profession to another, Scriblex says the same.

Constructive Desertion.—"The legislation has enacted that certain sexual offences—rape, sodomy, bestiality—shall of themselves be grounds for seeking a decree of divorce. It has not enacted that the commission of an indecent assault on a third person shall be a ground for divorce. It seems to me that if we are to hold that the commission of such an offence as in the present case (the indecent advances of the husband towards a strange woman sitting next to him in a picture theatre) is to provide a wife with just cause for withdrawing from cohabitation and staying permanently away from her husband, and, furthermore, is to provide grounds whereby she can allege constructive desertion against him, we shall, in effect, be laying down a new ground for the relief of divorce which is not provided by the Legislature."—per Willmer J. in *Lewis* v. *Lewis*, [1955] 3 All E.R. 598, 601.

Where Angels Fear to Tread.—Scriblex is indebted to "A.L.P." in the *Justice of the Peace and Local Government Review* for a reference to the case of Salvatore d'Angelo in which the decision of the Californian Court of Appeal is said to be hailed by American jurists as "the baby-sitters' charter". Salvatore's mother decided (and who can blame her) to have the evening off and hired a "baby-sitter" to look after the delightful little fellow, aged five. For no known reason, apart from the effects of televised football, he put his head down, charged his temporary guardian in the midriff, knocked her flying and broke both her wrists. It was contended that she was an invitee, and Salvatore (who had treated other "baby-sitters" in like manner) was nothing more or less than a trap, of the danger of which the parents knew or ought to have known and of which concealed danger they failed to give notice. So far, the doctrine of *scienter* has prevailed and the plaintiff held her substantial verdict. "A.L.P." aptly quotes the Wordsworthian aphorism, "Heaven lies about us in our infancy". Salvatore, he observes, lays about him in his.

The Highest Courts. The list for the Privy Council in its Michaelmas sittings comprised in all eighteen appeals—amongst them one from Canada, two from New Zealand, one from the Channel Islands and seven from Crown Colonies. For the similar period there are eleven English appeals in the House of Lords list, one of which *Staveley Iron and Chemical Co.* v. *Jones*, [1955] 1 All E.R. 6 involves consideration of the proposition that the standard of care owed by an employer to workmen in his factory is higher than that required between the workmen themselves. Our Court of Appeal discussed the topic in *C. E. Daniell Ltd.* v. *Velekou*, [1955] N.Z.L.R. 645 and reached a similar conclusion. This is not altogether surprising since its decision in *Hibberds Foundry Ltd.* v. *Hardy*, [1953] N.Z.L.R. 14, that the employer's duty extended to the protection of a worker who, having open to him alternative methods of doing the work—one safe, the other dangerous—consciously chooses the latter method as the easier one and suffers injury thereby.

Taxpayer's Triumph.—The "arbitrary" method of assessment adopted with singular success by the Inland Revenue Department has a miss occasionally. In the case of one Hughes, a ship-yard labourer of fifty who had amassed £5,000 on a wage of £15 weekly, the English authorities brushed aside the suggestion that he was other than a part-time bookmaker or bookmaker's agent in the world of horses or dogs. His evidence, an emphatic rebuttal of any such theory, was accepted. It seemed that he had never eaten sweets, even as a child; never smoked, drank or kept company with the so-called weaker sex; restricted holiday expenditure to 5s. for any one vacation; used his brother's discarded razor-blades, had a new suit once in thirteen years, worked a night shift so that he could wear his father's shoes while the father slept, and only once seen a movie. This was "The Road to Morocco", which he testified to be not worth the price of admission; but, in this regard, Bob Hope could justifiably retaliate that his critical faculties were limited.

From My Notebook (Mixed Bag Division).—"The idea that there is a duty on us to do our duty properly seems to be declining. If we can do it quickly, so much the better. I am getting tired of it. Things are getting worse and worse. If we could get a habit of doing our work because it is a duty and take pleasure out of doing it properly, there will be a better era dawning."—Mr Justice Wallington in the Vacation Court, October, 1955. . . .

"Probably because of legal aid—and it may be connected with higher legal fees in the divorce courts—hundreds of couples have been encouraged to seek divorce where in many cases there could have been reconciliation."—Mr C. H. Stanley, Probation Officer for Newbury. . . .

At the annual conference of the English Law Society, held this year, at Llandudno, Wales, the Ladies' programme included an enormously popular lecture and demonstration by a famous "beauty" expert. The view is now expressed that, on the score of utility, it should have formed part of the men's programme as well.

WILLS AMENDMENT ACT 1955.

(*Concluded from p. 30.*)

(ii) Written by an amanuensis but adopted and signed by, or by an agent of, the testator (not being a " formal " will).

Here the Court of Probate has primary written evidence by virtue of the relaxation of s. 9 of the Wills Act 1837 in favour of " informal " wills.

(*b*) Evidence of a spoken form of words, being an oral statement of what the deceased wanted to be done with his property after death: see *Re Spicer*, [1949] P. 441; [1949] 2 All E.R. 659.

A modern illustration of the Court's approach to the evidentiary aspect is *In the Estate of Macgillivray*, [1946] 2 All E.R. 301, in a minority dissent, supported in *11 The Conveyancer*, 114, Scott L.J. drew attention to the general intent of Parliament in relaxing the requirements of form; but it is submitted that this approach should now be ridden sparingly since the decision of the House of Lords in *Magor & St. Mellons Rural District Council* v. *Newport Corporation*, [1952] A.C. 189; [1951] 2 All E.R. 839.

It seems appropriate to set out now s. 5 (6) of the Wills Amendment Act 1955, which reads,

> (6) Notwithstanding anything to the contrary in any other enactment, an informal will may be proved upon such evidence as the Court may consider sufficient.

and to recall that a will is not defined in the Wills Act 1837 or in any of its amendments.

Privileged Minors.

This Part of the Act generally divides persons into the following classes:

(*a*) Privileged persons (fully defined in s. 4);

(*b*) Minors who are privileged persons;

(*c*) Certain minors who may conveniently be described as " under orders " (see s. 6 (*b*) (ii) to (v));

(*d*) Seamen or naval ratings whose cash or chattels come into official hands; and

(*e*) Maoris,

all of whom may usefully be referred to as " preferred persons ".

The definition, in s. 4, of a privileged person would, on the face of the matter, include a minor who came within its terms, so that the enabling words of s. 5 (1), " . . . . any privileged person may make a will ", would validate the will of a privileged minor in point of the age of the maker. The Act itself, however, raises a doubt by dealing separately in several places with the powers of a privileged minor, in such manner as to set up an independent pattern. First, s. 6 (*a*) provides that an *informal* will made by a privileged person who is under the age of twenty-one years shall be as valid as it would have been if the testator had been over that age; and s. 6 (*b*) (i) similarly validates the *formal* will of a privileged minor. These two provisions suggest that s. 5 (1) has not covered the wills of privileged minors. Secondly, under s. 7 (2), the revocation authorized by burning, tearing, or otherwise destroying, not in the testator's presence, the will of a privileged person is to be effective " whether or not he has attained the age of twenty-one years ". If every minor otherwise qualified were ex hypothesi a privileged person, these words would be otiose. Thirdly, s. 7 (3) (*b*) extends to a privileged testator " whether or not he has attained the age of twenty-one years " exemption from the requirements of s. 21 of the principal Act (relating to the due authentication of obliterations, interlineations, or alterations); and the above argument seems to apply here.

If these instances establish for the Wills Amendment Act 1955 a consistent usage sufficient to bind the Courts in their construction of the Act, then, it is submitted, the effect may be as follows:

A. The definition of a " privileged person " contained in ss. 3 and 4 does not per se include minors; or—stating the matter the other way round—it implies words to the effect, " provided such persons shall have attained the age of twenty-one years ".

B. It would follow that a privileged minor might, by informal will, revoke wholly or in part any previous formal or informal will, by virtue of the combined effect of ss. 5 (2) (*c*) and 6 (*a*); but that he might not exercise the power in s. 5 (3) to revoke any previous formal or informal will by any words whether written or spoken declaring an intention to revoke the same.

C. Section 7 (1), validating gifts to a witness of a privileged person's will, does not contain the proviso found so consistently in the Act when privileged persons are intended to include minors, and would not apply to wills of minors.

D. The case of the prisoner of war who was a privileged person immediately before his capture or internment (s. 4 (*b*) (v)) will likewise not include minors.

Revocation and Lapse.

A privileged person may, by informal will, revoke wholly or in part any previous formal or informal will (s. 5 (2) (*c*)), and, under s. 5 (3), may revoke any previous formal or informal will by any words, whether written or spoken, declaring an intention to revoke the same. The latter provision appears to be intended to enable a mere revocation to operate without the context of a positive will. Section 6 (*a*) appears to empower a privileged minor to exercise the former but not the latter power, as already discussed regarding this group of preferred persons.

A privileged person may also, by virtue of s. 7 (2), effectually have his will revoked by directing or authorizing (in writing or orally) any other person to burn or tear or otherwise destroy his will, with intent to revoke, even though the act be not carried out in his presence.

A minor authorized by this Part of the Act may procure a formal revocation under this Act, or under and by virtue of a burning, tearing or other destruction of the will, with intent to revoke, in his presence (s. 6 (*c*)).

An oral will (including a revocation) lapses in the circumstances set out in s. 9. Apart from due revocation, there is a twelve months' validity limit, operating so that the will has no force or effect, unless:

(*a*) In a case where the testator was a prisoner of war when he made the will or became a prisoner of war within twelve months after he made the will, the testator dies while he is a prisoner of war or within twelve months after he ceased to be a prisoner of war; or

(*b*) In any other case, the testator dies within twelve months after he made the will.