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THE ADOPTION ACT 1955.

II

NEW PROVISIONS

The following is a brief summary of provisions of the Adoption Act 1955 which are new:

In the definitions in s. 2,

"Child" means a person who is under the age of twenty-one; and includes any person in respect of whom an interim order is in force, notwithstanding that the person has attained that age,

"Court" means—

(a) The Maori Land Court where the term is used in relation to any application for an adoption order which is required by section twenty-one of this Act to be made to that Court, or where the term is used in relation to any application in respect of an adoption order made by that Court:

(b) A Magistrate's Court of civil jurisdiction.

Section 7: No interim adoption order may be made except with the consent of the parents or guardians of the child and the spouse of the applicant if the application is made by a husband or wife alone, unless the Court dispenses with any such consent.

The parents and guardians whose consents are required are:

(a) If the child is legitimate (and there is no adoption order in force) both parents, or the surviving parent, and the surviving guardian or guardians appointed by any deceased parent.

(b) If there is an adoption order in force, the surviving adopted parents or parent, and the surviving guardian or guardians appointed by any deceased adoptive parent.

(c) If the child is illegitimate, the mother, or (if she is dead) any guardian or guardians appointed by her; but the Court may in any case require the consent of the father if in its opinion it is expedient to do so.

(d) The Superintendent of Child Welfare in the case of any child committed to his care.

(e) In the case of a refugee child, as defined in the Child Welfare Amendment Act 1948, instead of either (a) or (b) above, the child's guardian thereunder.

Except where it is given by the Superintendent of Child Welfare, a document signifying consent to an adoption is not admissible unless witnessed in terms of s. 7 (8). The consent may be filed at any time before the time fixed for the hearing and may be withdrawn at any time before an interim order is made (s. 7 (2)) A mother's consent is inadmissible unless the child is ten days old at the time the document is executed.

A formal written consent will not be required from an applicant for an adoption order, as his or her consent is deemed to have been given.

Any parent desirous of having his or her child adopted may in writing name the Superintendent of Child Welfare, subject to his prior consent, as the guardian of the child until the child is legally adopted (with or without conditions as to the religion in which the child is to be brought up); and the Superintendent may then give such consent to the adoption of the child as is required from the person executing the instrument naming him as guardian. In such case, the parent continues to be liable for the maintenance of the child until it is adopted. Such appointment by the mother of the child is void unless the child is at least ten days old at the date of the appointment.

The consent of any parent or guardian may be given (either unconditionally or subject to conditions as to religion) without his or her knowing the identity of the applicant for the order.

A consent to an adoption must be witnessed by a Magistrate, a Registrar of the Supreme Court or of a Magistrates' Court, or a solicitor of the Supreme Court, or a Judge, Commissioner, or Registrar of the Maori Land Court, except where it is given by the Superintendent of Child Welfare. The consent document must contain an explanation of the effect of an adoption order, and an endorsed certificate that the witness has personally explained the effect of an adoption order to the person consenting.

Section 8: The Court, if it thinks fit, may dispense with the consent of any parent or guardian in any of the following circumstances:

(a) if it is satisfied that he or she has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child, or failed to exercise normal duty and care of parenthood, and that, unless such parent or guardian cannot be found, he or she has been given notice of the application;

(b) if it is satisfied:

(i) that he or she is unfit by reason of any physical or mental incapacity to have the care and control of the child;

(ii) that such unfitness is likely to continue indefinitely; and

(iii) that notice of the application has been given to such parent or guardian, or to the committee or administrator, of the estate of such a mentally defective person;

(c) if a licence has been granted in respect of the child under s. 40 of the Adoption Act 1950 (U.K.) or under the corresponding provisions of any former or subsequent Act of that Parliament or under the corresponding provisions of any Act of Parliament of any Commonwealth country.

Where an application for adoption is made by either a husband or a wife alone, the consent of the other spouse must be obtained before an interim order may be made ; but the Court may dispense with the consent if it is satisfied that the spouses are living apart and that the separation is likely to be permanent.

Any person whose consent is dispensed with may, on notice to every applicant for an adoption order, and within one month after the making of the order dispensing with the consent, make application to any Judge of the Supreme Court (or to the Maori Appellate Court) to revoke any consequential interim order; and the Judge, or Court, may in his or its discretion revoke such order.

Section 10 : A report and recommendation from a Child Welfare Officer must be considered by the Court before an interim adoption order may be made and the Child Welfare Officer must be given reasonable notice of the hearing, and he is entitled to appear, cross-examine, call evidence, and address the Court.

Section 11 : Before making an interim order or an adoption order, in respect of any child, the Court must be satisfied :

(i) that the person proposing to adopt the child is a fit and proper person to have the custody of the child and of sufficient ability to bring up, maintain, and educate the child ; and

(ii) that the welfare and interests of the child will be promoted by the adoption, due consideration being for this purpose given to the wishes of the child, having regard to his age and understanding.

Section 12 : On the application of any person, the Court may at any time in its discretion revoke an interim order on such terms as the Court thinks fit. The terms may include an order for the refund of money spent by the proposed adopter on the child's behalf, and any such order shall be enforceable as a judgment of the Court.

Section 13 : When an interim order has continued in force for not less than six months, and provided the child (if under the age of fifteen years) has been continuously in the care and custody of the applicant for at least six months since the approval of a Child Welfare Officer was given or an interim order was made, whichever first occurred, the person in whose favour the order was made in respect of any child may apply to the Court for the issue of an adoption order.

The Registrar of the Magistrate's Court (or the Maori Land Court) shall issue the final adoption order without any further hearing if—

(i) The prescribed period of six months has elapsed, and the application is properly made ;

(ii) A Child Welfare Officer has filed a report recommending that the final order be issued ;

(iii) The interim order did not require the application to be dealt with by the Court ; and

(iv) No proceedings for revocation of the interim order have been commenced.

In all other cases the Registrar is to appoint a time and place for the hearing, and the Court must consider any report furnished by the Child Welfare Officer who must be notified of the hearing, and shall have the same rights as on the hearing at which the interim order was made.

Section 15 : Provisions as to the effect of an interim order :

(i) It may require that the adoption order shall not be issued by the Court without a further hearing.

(ii) It shall not effect any change in the child's names, but may specify how they are to be changed by the adoption order.

(iii) It shall remain in force for one year or until it is sooner revoked or an adoption order is sooner made.

(iv) It shall not be deemed to be an adoption order for any purpose.

(vi) It shall have the effect of giving the custody of the child to the person in whose favour it is made, upon such terms as the Court may think fit to impose in the interim order.

(vii) So long as an interim adoption order remains in force, any Child Welfare Officer may visit and enter the residence in which the child is living.

(viii) During the currency of the interim order, the child must not be taken out of New Zealand without leave of the Court ; and the person or persons in whose favour the order was made must give to the Child Welfare Officer at least seven days' notice before changing his or their residence, except that where an immediate change of residence is necessitated by an emergency it shall be sufficient if notice is given within forty-eight hours after the change of residence.

Section 16 : The making of an adoption order shall have the effect formerly set out in s. 21 of the Infants Act 1908 (as substituted by s. 2 of the Infants Amendment Act 1950), with the following additions :

(i) the child adoption order shall not affect the race, nationality, or citizenship of the adopted child, who shall acquire the domicil of the adoptive parents ; and, where the adoption order was made before the adopted child attained the age of three years, his domicil of origin is deemed to be that of his adoptive parents.

(ii) any affiliation order or maintenance order in respect of the adopted child or any agreement (not being in the nature of a trust) which provides for payments for the maintenance of the child shall cease to have effect, but without prejudice to the recovery of any arrears which are due under the order or agreement at the date on which it ceases to have effect on the making of the adoption order.

(iii) any existing appointment as guardian ceases to have effect on the making of an order.

Section 20 : An order of adoption may be varied, or discharged by the Court in its discretion ; but the application for discharge may not be made without the prior consent of the Attorney-General ; and when it is discharged, the relationship to one another of all persons shall be determined as if the order had not been made (but the discharge will not affect anything lawfully done in the intervening period or the consequence thereof).

Any person, within one month after the date of the Court's decision to vary or discharge an order, has a right of appeal to the Supreme Court against the Magis-

trate's order of variation or discharge, or to the Maori Appellate Court against any decision of the Maori Land Court in respect of an order of discharge.

Section 22 : No application under the Act may be heard or determined in open Court, and no report of proceedings shall be published except by leave of the Court.

Section 24 : On the hearing of any application in respect of an adoption or proposed adoption, the Court is not bound by the ordinary rules of evidence.

(iii) That any condition imposed by a parent or guardian of the child with respect to the religious denomination and practice of the applicant is being complied with.

Section 25 : Except with the consent of the Court it is not lawful for any person to give or receive or agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for any such adoption.

Section 26 : It is not lawful for any person other than the Superintendent of Child Welfare or a Child Welfare Officer to publish in any form any statement indicating that a parent or guardian desires to cause a child to be adopted or that any person wishes to adopt a child, or, that, without the approval of the Superintendent of Child Welfare, any person or body of persons is willing to make arrangements for an adoption.

Section 28 : Any person who fails to comply with any of the requirements of the statute, or who commits any other offence under its provisions, or who makes a false statement for the purpose of obtaining an adoption order, is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £50 or to both ; and, where an offence has been committed, the Court may order the child in respect of whom the offence was committed to be removed to a place of safety until he can be restored to his parents or guardian or until other arrangements can be made for him.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Misfeasance. *220 Law Times*, 311.

CONTRACT.

Position of Sub-Contractors in Building Contracts. *99 Solicitors' Journal*, 827.

CRIMINAL LAW.

Practice—Trial—Judge's Charge to Grand Jury published in Newspapers delivered to Each Member of Common Jury hearing Charge of Murder—Long-standing Practice for Judge's Charge to be reported in Newspapers—Accused Convicted—In View of All Circumstances of Trial, Common Jury not prejudiced in Its Deliberations by Anything read in the Report of Some Days previously—No Miscarriage of Justice—Criminal Appeal Act 1945, s. 4—Criminal Law—Manslaughter—Appellant reckless whether Death occurred or not—No Room for Verdict of Manslaughter, where Defence of Provocation failed—Crimes Act 1908, s. 182 (b). The remarks made by the trial Judge in his charge to the Grand Jury were published in the two newspapers in the city in which a trial for murder was to be held. Subsequently during the trial of the accused for murder, a copy of each newspaper was delivered to the room of each common juror in the hotel in which the jury was lodged during the murder trial. The common jury panel was excluded from the Court during the delivery of the charge to the Grand Jury. The appellant appealed from his conviction of murder on the ground, inter alia, that the statements published in the newspapers which came to the knowledge of the common jury were of such a nature as adversely to influence the jurymen in their consideration of the accused's case. *Held*, by the Court of Appeal, 1. That, although in the form in which the newspaper report of the Judge's charge to the Grand Jury appeared, some of the observations attributed therein to the Judge might have created a prejudice in the mind of the reader, it had always been the practice in New Zealand for the charge to the Grand Jury to be reported in the newspapers, and it had been customary for the Judge, in charging the Grand Jury, to discuss such topics as the state of crime and other matters of public interest, and also to refer to the law and the facts bearing on the more important cases which were to come before the jury for consideration. 2. That the questions of self-defence and provocation were proper subjects for mention by the trial Judge in his charge to the Grand Jury, because the onus lay on the Crown to establish a case of murder and the Grand Jury was required to be satisfied that a prima facie case had been raised on the depositions. 3. That in view of all the circumstances of the trial, there was no justification for concluding that the common jury at the time of its deliberations could still have been influenced adversely to the appellant by anything they might have read some days earlier. (*R. v. Radich*, [1952] N.Z.L.R. 193 ; [1952] G.L.R. 199, applied.) 4. That the appellant, if he had succeeded on the question of prejudice, could not have shown that there was a "miscarriage of justice" within the meaning of s. 4 of the Criminal Appeal Act 1945. (*Mancini* v. *Director of Public Prosecutions*, (1941) 28 Cr. App. R. 65, applied. *R. v. Cohen and Bateman*, (1909) 2 Cr. App. R. 197, referred to.) 5. That the whole of the circumstances, as set out in the judgment, compelled the conclusion that the appellant was reckless whether death ensued or not (Crimes Act 1908, s. 182 (*b*)) ; and there was no room for a verdict of manslaughter if the defence of provocation failed, as, in fact, it did. *The Queen* v. *Black*. (C.A. Wellington. November 18, 1955. Gresson J. Cooke J. North J. Turner J. Henry J.)

DESTITUTE PERSONS.

Offer to Return And Res Judicata. *105 Law Journal*, 692.

DIVORCE AND MATRIMONIAL CAUSES.

Petition—Dismissal for Lack of Proof of Domicil—Such Dismissal No Bar to Subsequent Petition on Same Grounds. The dismissal of a petition because the petitioner did not show that he was domiciled in New Zealand is no bar to a subsequent petition on the same grounds. (*Hall* v. *Hall and Richardson*, (1879) 40 L.T. 525, *Goldblum* v. *Boldblum*, [1939] P. 107 ; [1938] 4 All E.R. 477, and *Gainsford* v. *Gainsford*, (1899) 25 V.L.R. 176, rererred to.) *Hung* v. *Hung*. (S.C. Gisborne. December 14, 1955. Hutchison J.)

INSURANCE.

"All Risks" Insurance Policies. *99 Solicitors' Journal*, 826.

LAND TRANSFER.

Caveat—Caveat by Next-of-kin against Land forming Part of Intestate Estate—Caveator having merely Right to share in Surplus of Intestate Estate after Discharge of Liabilities—No Caveatable Interest in Land—Land Transfer Act 1952, ss. 137, 143. A caveat was lodged against the title of lands of which the registered proprietor died intestate, but no application for letters of administration had been made. The caveator, B., was a son of the deceased who had owned nine separate properties at the time of his decease, all of which were heavily encumbered and eight of them had been sold by the respective mortgagees, in most cases for less than the mortgage debts. C., the eldest son of the deceased, had been in occupation of one of the properties since 1930. He claimed that, about 1934, the deceased had handed over the property to him, subject to a mortgage under which £564 was owing, under an arrangement whereby he was to become responsible for all liabilities in respect of the property. He had paid off the amount owing under the mortgage, took a transfer of the mortgage to himself and his wife, and gave notice of intention to exercise the power of sale thereunder. B. then lodged his caveat, claiming to be beneficially interested in the property as a next-of-kin of the deceased. An action had been commenced by the next-of-kin against C.,

calling on him to account for his administration of the property since the death of the deceased. C. applied under s. 143 of the Land Transfer Act 1952 for an order for the removal of B.'s caveat. *Held*, That the caveator's claim was not to an interest in the land of the deceased intestate, but merely a right to share in any surplus of the intestate estate after all liabilities had been discharged; and, accordingly, the caveator had no interest in the land entitling him to lodge a caveat as required by s. 137 of the Land Transfer Act 1952. (*Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Hall*, [1938] N.Z.L.R. 1020; [1938] G.L.R. 516, and *Dr. Barnardo's Homes National Incorporated Association* v. *Special Income Tax Commissioners*, [1921] 2 A.C. 1, applied. *Corbett* v. *Inland Revenue Commissioners*, (1937) 54 T.L.R. 279, referred to.) *In re Savage's Caveat.* (S.C. (In Chambers.) Wanganui. November 15, 1955. McGregor J.)

NEGLIGENCE.

Surgeons' Liability for Negligence: The Removal of Swabs or Packs. *220 Law Times*, 337.

NUISANCE.

Boundary Trees. *8 Conveyancer and Solicitors Journal*, 106.

Damage caused by Falling Trees. *105 Law Journal*, 628.

PRACTICE.

Discovery—Crown Proceedings—Minister of the Crown—"Officer of the Crown" to make Affidavit of Discovery—Circumstances wherein Officer other than Minister should do so—Code of Civil Procedure, R. 161—Supreme Court (Crown Proceedings) Rules 1952, R. 22 (S.R. 1922/122). A Minister of the Crown is an "officer of the Crown" for the purposes of R. 161 of the Code of Civil Procedure (as amended by R. 22 of the Supreme Court (Crown Procedings) Rules 1952), but it does not necessarily follow that a Minister should always be ordered to make the affidavit whenever the Crown is a party required to make discovery. A Minister of the Crown ought not to be troubled with the fact of making discovery if there is another responsible officer equally capable of making full discovery. The officer selected should be one who will be aware, or has the means of becoming aware, of all documents which are or have been in possession of the Crown, and which are relevant to the matters in issue in the action. Observations as to the circumstances in which a Minister of the Crown should be required to make an affidavit of discovery. *Dick and Sauer* v. *Hodges*. (S.C. Nelson. November 28, 1955. Barrowclough C.J.)

PUBLIC REVENUE—STAMP DUTIES.

Company, Owner of Land, in Voluntary Liquidation—After Discharge of Company's Liabilities, Liquidator called upon by Members to distribute Company's Property in Specie among Them, in Terms of Memorandum of Association—Transfer of Company's Land, by Direction of Liquidator, to Members—Transfer not a "conveyance on sale" but Conveyance by Trustee of Property to which Members, as Beneficiaries, were entitled—Transfer Exempt from Ad Valorem Stamp Duty—Stamp Duties Act 1923, s. 81 (d)*—Companies Act 1933, s. 243.* In 1947, the respondent acquired all the shares in a company, the shares being registered as to 12,497 shares in the company's name, and as to the remaining three shares in the names of three nominees on its behalf. On December 8, 1951, a special resolution for voluntary winding-up and appointment of a liquidator was passed and recorded in the company's minute-book, and duly registered. All the debts of the company having been paid by the liquidator, the respondent requested the liquidator to transfer the land owned by the company to the respondent, and a memorandum of transfer to the respondent, by direction of the liquidator, of that land was duly executed. The value of the land was then £42,000. On presentation of the memorandum of transfer for stamping, the District Commissioner of Stamp Duties ruled that it was assessable with stamp duty of £462, pursuant to s. 79 (*a*) of the Stamp Duties Act 1923. The respondent objected to the assessment, and, on disallowance of its objection, required the Commissioner of Inland Revenue to state a Case under s. 39 of the statute for the decision of the Supreme Court. The case came before F. B. Adams J., who upheld the respondent's objection, and, for the reasons stated in his judgment, held that the memorandum of transfer fell within the exception from conveyance duty imposed by s. 79 given by s. 81 (*d*) of the Stamp Duties Act 1923, namely—"81. The following conveyances shall be exempt from conveyance duty: (*d*) A conveyance by a trustee, executor, or administrator to a beneficiary, devisee, legatee, appointee under a power of appointment, or successor on an intestacy, of property to which such beneficiary, devisee, legatee, appointee, or successor is entitled under the trust, will, or intestacy, to the extent to which he is so entitled;" and was chargeable with duty of 15s. only, pursuant to s. 168 of the statute. On appeal by the Commissioner of Inland Revenue against that determination by the Court of Appeal, *Held*, 1. That the consideration given by the respondent on the acquisition of the shares in the company in December, 1947, was too remote from the winding-up and the circumstances relative thereto to fall within the concept of "valuable consideration" given for the conveyance of the land by the company to the respondent, raised by the words of the definition of "conveyance on sale" in s. 77 of the Stamp Duties Act 1923. (*Archibald Howie Pty., Ltd.* v. *Commissioner of Stamp Duties*, (1948) 77 C.L.R. 143; *Wigan Coal and Iron Co., Ltd.* v. *Inland Revenue Commissioners*, [1945] 1 All E.R. 392; and *Associated British Engineering, Ltd.* v. *Inland Revenue Commissioners*, [1941] 1 K.B. 15; [1940] 4 All E.R. 278, distinguished.) 2. That, upon the liquidation, after payment by the liquidator of the company's debts, its assets, by the operation of s. 243 of the Companies Act 1933, became impressed with the obligation to distribute them among the members; the liquidator was bound, when the members, in terms of the company's memorandum of association, called for distribution of those assets to them in specie, to convey to them the legal estate in the land, which was all that remained in the company; and the memorandum of transfer of the land when executed by the company, was "a conveyance by a trustee . . . of property" to which the respondent transferee, as beneficiary, was entitled. (*In re Oriental Inland Steam Co., Ex parte Scinde Railway Co.*, (1874) L.R. 9 Ch. 557, and *Hardoon* v. *Belilios*, [1901] A.C. 118, followed. *In re Strathblaine Estates, Ltd.*, [1948] Ch. 228; [1948] 1 All E.R. 162, applied. *Drapery and General Importing Co. of New Zealand, Ltd.* v. *Minister of Stamp Duties*, [1925] G.L.R. 58, considered.) 3. That, accordingly, the memorandum of transfer fell within the exemption from conveyance duty contained in s. 81 (*d*) of the Stamp Duties Act 1923. Per Hutchison J. That it was arguable, but not argued, that if full consideration was given by the members of the company for the transfer of the property to them by their payment up of the share capital in satisfaction of the liability for the shares allotted, and by reduction in the amount and value of their shares on the return of capital, duty should have been computed under s. 79, as on a conveyance on sale at the rate of 11s. for each £50 of the original share capital of £12,500, a total of £137 10s. (*Archibald Howie Pty., Ltd.* v. *Commissioner of Stamp Duties*, (1948) 77 C.L.R. 143, considered.) Appeal from the judgment of F. B. Adams J. dismissed. *Shaw Savill & Albion Co., Ltd.* v. *Commissioner of Inland Revenue.* (S.C. Christchurch. November 23, 1954. F. B. Adams J.) (C.A. Wellington. December 16, 1955. Stanton, Hutchison, and Shorland JJ.)

TRANSPORT.

Motor-vehicles Insurance (Third-party Risks)—Mobile Crane—Crane being operated to lift Pipes from Adjacent Truck—Cable of Crane coming into Contact with Overhead Power-line—Electric Shock causing Death of Truck-driver—Accident not "sustained or caused by or through or in connection with the use of the motor-vehicle"—"Use"—Transport Act 1949, s. 70 (1). The words "by or through or in connection with the use of the motor-vehicle in New Zealand", as used in s. 70 (1) of the Transport Act 1949, must be read, per Barrowclough C.J., as if the words "as such" were inserted after the word "motor-vehicle"; and, per Hutchison J., as if the words "in its vehicular function" were so inserted. (*Commercial Union Insurance Co., Ltd.* v. *Colonial Carrying Co., of New Zealand, Ltd.*, [1937] N.Z.L.R. 1041; [1937] G.L.R. 575, applied.) The statement of facts agreed upon by the parties, may be summarized as follows. The Nelson City Corporation was the owner of a vehicle known as a Priestman Mobile Crane, which consisted of a G.M.C. truck chassis with a crane mounted on and fixed to the rear part of the chassis. It was used for no other purpose than as a mobile crane. The motive power for the crane was separate from and independent of the motive power for the truck. It was customary for the driver of the truck also to operate the crane, and, while operating the crane, to be in the crane cab. It was possible though not customary for the crane to be operated when the truck chassis was moving. The Corporation hired a truck and driver to convey iron pipes to the site of some road works being carried out by the Corporation in Brook Street, Nelson. The truck was driven by G., now deceased. At and

near the site of the road works, the Corporation was also using the said mobile crane which was in the charge of T., an employee of the Corporation. The mobile crane was used to unload pipes from G.'s truck on to the side of the road, and, while G. was away for another load, laying the pipes in a trench along the side of the road. On the morning of October 17, 1952, T. was operating the mobile crane laying pipes in the trench, and from there he drove the crane further along the road to where G. had stopped his truck with another load of pipes. On the direction of G., T. moved his mobile crane to the side of the road and stopped. After stopping he switched off the engine of the truck chassis and applied the hand-brake, and engaged the engine in gear for safety and to prevent movement. G.'s truck was also stopped on the same said of the road a short distance away from the mobile crane. Having so stopped the mobile crane, T. moved to the crane cab and there operated the crane to lift pipes from G.'s truck, swing them to the side of the road, and then lower them. G. was standing on the roadway guiding the pipes as they were lowered from time to time by the crane. Another Corporation employee was standing on G.'s truck preparing the tackle round the pipes for the next lift. During one of these operations, the cable of the crane came into contact with an overhead power-line; and G., who at the time was guiding with his hand the pipe being moved by the crane, received an electric shock which caused his death. At and for some minutes before the accident, the truck chassis was stationary while the crane was being operated. A claim by G.'s widow alleging negligence by T. in the manner in which he operated the crane, and alleging that such negligence was the cause of her husband's death, was compromised in the total sum of £5,200. The compromise was approved by the plaintiff, which had since paid that amount. The plaintiff was a member of and contributor to a group of insurance companies and offices known as the Motor Vehicles Third Party Pool (represented by the defendants) and, if the plaintiff's liability to indemnify the Nelson City Corporation were by virtue of the contract of insurance under the Transport Act 1949, £5,200 would be refunded to the plaintiff out of the funds controlled by the Motor Pool. If, however, there was no liability on the plaintiff under the Transport Act 1949, then the indemnity would be met by the plaintiff under its comprehensive motor-insurance policy out of its own funds, subject to limited rights of recourse under re-insurance contracts. The plaintiff and the defendant were unable to agree whether, upon the facts stated, the liability of the plaintiff to indemnify the Corporation arose pursuant to the contract of insurance under the Transport Act 1949; and they asked the Court, upon originating summons (which, by consent, was removed into the Court of Appeal) to decide, on the agreed facts, whether the Motor Pool was liable to indemnify the Corporation in respect of the claim of G.'s widow pursuant to s. 70 (1) of the Transport Act 1949. *Held*, by the Court of Appeal (Barrowclough C.J. and Hutchison J., F. B. Adams J. dissenting), That, on the agreed facts, the defendant was not liable to indemnify the plaintiff in respect of the accident, as the accident was not "sustained or caused by or through or in connection with the use of the motor-vehicle in New Zealand", within the meaning of s. 70 (1) of the Transport Act 1949. For the reasons, Per Barrowclough C.J., 1. That, at the time of the accident, that part of the contrivance which was "equipped with wheels . . . upon which it moves, or is moved," that is, the chassis component, was not in use except as a mere stationary platform, and the crane was being used for the purpose of unloading pipes from a lorry on to the ground: an operation which did not involve any movement whatever of the truck chassis. 2. That the agreed statement of facts did not disclose a negligent positioning of the mobile crane on the road, and it was not contended that there was a negligent "permitting [the mobile crane] to be on any road" as those words are used in s. 2 (1), or that the particular use of the mobile crane, which arose from its having been permitted to be on the road, was a negligent "use" within the meaning of s. 70 (1). Per Hutchison J., 1. That a motor-vehicle does not cease to exercise its "vehicular function" simply because it may for the time being be stationary, its being stationary for the period may be a factor to be taken into account but it will not be conclusive. 2. That, as a matter of substance, the fatal accident was not "sustained or caused by or through or in connection with the use of" the mobile crane in its vehicular function, but was "sustained or caused by or through or in connection with" its use in its function as a crane. 3. That it was not suggested in the agreed statement of facts or in argument that the question of where on the road the mobile crane was positioned was an important factor for consideration. *State Fire Insurance Office* v. *Blackwood and Others*. (C.A. Wellington. September 27, 1955. Barrowclough C.J., Hutchison, F. B. Adams JJ.)

TRUSTS AND TRUSTEES.

Trustees' Remuneration and the Inherent Jurisdiction. *105 Law Journal*, 691.

UNDUE INFLUENCE.

Transfer of Land by Way of Gift from Elderly Mother to Daughter—Donor acting without Legal Advice—Transaction not Free Act and Deed of Mother—Transfer set aside as Void—Order for Transfer to be delivered up for Cancellation. There is a presumption of undue influence where a parent, who continued to repose confidence in a child, and while still under the child's influence, harmful or otherwise, has executed a transfer of property to the child, and such transaction involved a substantial element of gift. Independent legal advice is not the only way in which the presumption can be rebutted. It can be rebutted by proof that the transfer was the result of the exercise of the transferor's own free and independent will. Where legal advice is given to the donor, it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor. (*Inche Noriah* v. *Shaik Allie Bin Omar*, [1929] A.C. 127, followed.) If the presumption be not rebutted, the Court must set aside the transfer. (*Allcard* v. *Skinner*, (1887) 36 Ch.D. 145, referred to.) *In the present case*, the elderly transferor's signature to a transfer to her daughter, by way of gift, of her interest in the property which was her home was witnessed by the transferee's solicitor, and any advice he may have given her was given without a knowledge of all the relevant circumstances, and she had no advice from him or from any other competent and honest adviser that the proposed transaction appeared to be an unwise one. It was held that the execution of the transfer was not the free act and deed of the transferor; and the transfer was accordingly set aside. (*Huguenin* v. *Baseley*, (1807) 14 Ves. 273; 33 E.R. 526, applied.) *Aitken* v. *Williamson*. (S.C. Christchurch. October 12, 1955. Barrowclough C.J.)

WILL.

Attesting a Will. *105 Law Journal*, 693.

Devisees and Legatees—Gift to "Children"—Prima facie Meaning of Legitimate Children—Will not operating as Guide-Book to Inclusion of Illegitimate Children—Extrinsic Evidence inadmissible to show Testator's Contrary Intention. Where there is a testamentary gift to "children" as a class, the word "children", prima facie, means legitimate children. Where the Court is not satisfied that the will operates as a guide-book to the inclusion of illegitimate children in the term "children", extrinsic evidence to show that the testator must have meant the word otherwise than in that meaning cannot be admitted. (*Hill* v. *Crook*, (1873) L.R. 6 H.L. 265, *Dorin* v. *Dorin*, (1875) L.R. 7 H.L. 568, and *Khoo Hooi Leong* v. *Khoo Hean Kwee*, [1926] A.C. 529, followed.) (*In re Stevenson, Public Trustee* v. *X.*, [1944] N.Z.L.R. 301; [1943] G.L.R. 324, applied.) (*Kerr* v. *Kerr*, [1928] G.L.R. 461, considered and distinguished.) *In re H. (Deceased), Smith and Others* v. *Public Trustee*. (S.C. Palmerston North. August 26, 1955. Hutchison, J.)

Direction to Trustee to permit Testator's Sister to "occupy and live in" a named Flat owned by the Testator, Free of All Outgoings—Gift over on Sister's Death—Licence for Personal Occupation of Flat during Her Lifetime—Estate of Life Estate in Flat not given—"Occupy"—"Live in". The will of the testator contained the following clause: "I declare that during the life of my sister Edith Mabel Denton my Trustees shall permit her to occupy and live in the flat at 'Fern Hill' (No. 3) at present occupied by her and myself free from the payment of rent or any expenses in respect of rates insurances repairs or upkeep of any kind whatsoever and after her death the same shall fall into and form part of my residuary estate." At the date of his will and before his death, the testator and his named sister had resided in the flat, which was in a building owned by the testator. On originating summons for interpretation of the clause, *Held*, That, on its true construction, the clause did not confer a life estate in the flat on the testator's sister, the intention of the testator being to ensure that a personal residence was available to her during her life for such periods, intermittent or otherwise, as she should desire. (*May* v. *May*, (1881) 44 L.T. 412, applied. *Fillingham* v. *Bromley*, (1823) Turn. & R. 530; 37 E.R. 1204, and *Holden* v. *Allen*, (1903) 6 G.L.R. 87, referred to.) *In re Denton (Deceased), New Zealand Insurance Co., Ltd.* v. *Denton*. (S.C. Wellington. October 20, 1955. McGregor J.)

Testamentary Gifts not Nowadays Readily Implied, *99 Solicitors' Journal*, 348.

Testamentary Omissions, *99 Solicitors' Journal*, 313.

ESTATE AND GIFT DUTIES ACT 1955.

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

The Estate and Gift Duties Act 1955 effects almost a complete consolidation of pre-existing gift and death duty statute law in New Zealand : it also amends the statute law in certain directions, and some of these amendments are of a far-reaching nature and all of them are to the good. These changes necessitate the writer's bringing out a new edition of his book, *The Law of Death and Gift Duties in New Zealand*, which Messrs Butterworths hope to publish some time in 1956.

RETROSPECTIVE AND STREAMLINING EFFECT OF NEW ACT.

The Estate and Gift Duties Act 1955 has one feature, which is most uncommon in Acts dealing with taxation of this nature : it is, with one or two exceptions, made *retrospective* to the date of the bringing down of the last Budget in Parliament. Thus, although it did not receive the Royal Assent until October 26, 1955, most of its provisions are deemed to have come to come into force on July 21, 1955 : s. 1 (2). Although the Bill itself was not introduced into Parliament until the dying days of last Session, the learned Editor of this JOURNAL was able to give a most interesting and illuminating outline of its main provisions in the issues of July 26, 1955 and August 2, 1955, which he headed respectively, *Death Duties : Streamlining the System of Collection*, and *The New Rates of Gift Duty*.

The system of death duties has indeed been streamlined, for succession duty has been totally abolished (except, of course, as to the estates of persons dying before July 21, 1955) ; and the rather tricky system of " Marginal Balances ", which was introduced in 1939 to prevent certain unfair results from operation of the graduated scales, has been jettisoned in favour of amended scales of estate and gift duty, which are much easier to follow, and which do not revive the unjust anomalies which the system of marginal balances was designed to abolish. These amended scales of estate and gift duty appear to have been thought out most carefully ; and I think that they are as fair in principle as it is possible for them to be.

QUICK SUCCESSIONS : NECESSITY TO STREAMLINE.

In one important matter, however, the Department has not yet been able to streamline the collection of estate duty, and that is in respect of the concessions granted on *Quick Successions*. Reference in this connection may, with advantage, be made to a letter which appeared in this JOURNAL, last year, at p. 281.

As the correspondent points out, the exemption is available only on that part of a succession which the Commissioner is satisfied still forms part of the second dutiable estate. Moreover, for the purposes of s. 19 of the Estate and Gift Duties Act 1955, it is necessary to ascertain what duty was payable in the first estate in respect of the succession comprised in the second estate on which the concession is claimed. It is often necessary in one or both of the estates to apportion debts among the various successors, and to apportion non-dutiable estate with dutiable estate ; it is sometimes necessary to take into consideration the equitable rules as to marshalling of assets, which are liable to give us headaches any time. All these matters involve complicated arithmetical calculations to be worked out in accordance with formulas adopted by the Commissioner. One may well sympathize with estate clerks, say those in the Queen City of the North, deep in the throes of these complicated calculations, on a sleepy, steamy afternoon in February, when the cooler waters of the Waitemata beckon so strongly to more frolicsome exercises.

It is to be hoped that in time some far simpler system will be adopted, achieving substantially the same results with infinitely less trouble, calculation, and irritation.

The principal bugbear at present preventing simplicity of administration appears to be the proviso to s. 19 (2), which ensures that the concession shall take the form of a percentage of the *lower* of two duties.

It is, however, not to be inferred from these remarks that the writer is against the principle of relief from successive estate duties ; on the contrary, the general principle is fair to the tax-payer : without some such succession, great hardship may be caused to the successors in the second estate ; it is the complexity of its administration which requires remedying.

EXTENSION OF GIFT DUTY EXEMPTION TO OVERSEA CHARITIES.

The learned Editor of this JOURNAL, last year, at p. 212, after pointing out that a gift inter vivos to charities outside New Zealand was liable to gift duty, whereas one for the benefit of people or objects in New Zealand was exempt, eloquently and forcibly advocated the abolition of such a distinction, and expressed the hope that the Legislature would exempt from gift duty all charitable gifts inter vivos. For example, he aptly pointed out that, in the then state of the law, the living donor of a gift to a charity, such as the Red Cross or the New Zealand Lepers Trust Board—which operate solely in New Zealand, but benefit objects outside New Zealand—was penalized by having to pay gift duty on such a gift.

Readers of this JOURNAL will be glad to hear that the Government listened to this appeal. Provided that oversea charities satisfy the English legal conception of what is a charity, they will now be exempt from gift duty as from July 21, 1955, just as New Zealand charities have hitherto been : they will be exempt, too, from aggregation under s. 50 (1), and will be excluded from the operation of s. 5 (1) (*b*), straight-out gifts made within three years of death.

But it is important to note that charitable gifts come into the death duty net, if caught by s. 5 (1) (*c*) or s. 5 (1) (*j*)—covering reservations of benefits or life interests to donors or failure of donees to assume possession and enjoyment of gifts : *Bethell* v. *Commissioner of Stamp Duties*, [1947] N.Z.L.R. 49 ; [1946] G.L.R. 482.

It may as well be pointed out, however, that the old distinction between New Zealand and oversea charities still exists with reference to conveyance duty under the Stamp Duties Act 1954. A conveyance of property for charitable purposes is not, because it is charitable, exempt from ad valorem conveyance duty, unless it enures for the benefit of people or objects in New

Zealand : *Adams's Law of Stamp Duties in New Zealand*, 2nd Ed., 102.

Quick Successions Saved from Lapse.

To revert again to the topic of *Quick Successions*, every solicitor has had well-drilled into him the effect of s. 33 of the Wills Act 1837 : examiners love to set questions on this section. It provides in effect that where a child or other issue of a testator dies in the lifetime of the testator leaving issue living at the testator's death, any gift to a named child or other issue in the testator's will is not to lapse, but is to take effect as if the child or other issue had died immediately after the testator. Consequently, a child or other issue of a testator can become a successor in the testator's estate—entailing an immediate liability for estate duty on the property concerned in both the testator's and the child's or other issue's estates. For example, see *Adams's Law of Death and Gift Duties in New Zealand*, 2nd Ed., pp. 149 and 150. Section 21 of the Estate and Gift Duties Act 1955 is designed to ensure that the quick succession relief will apply to such cases : hitherto it has not applied in such circumstances.

When Gift Statements Must Be Filed.

For many years gift statements had to be filed in the Stamp Duties Office when the value of the gift exceeded £300, although no gift duty was payable thereon unless the value of the gift exceeded £500, or if together with the value of all other gifts made within twelve months previously or subsequently the total value exceeded £500. But the new Act alters the law in this respect : now since July 21, 1955, a gift statement need only be filed if the value of the gift exceeds £500 or if its value when aggregated with previous gifts within twelve months exceeds £500.

The Ascertainment of the Present Value of Annuities and Other Interests for Life or Other Periods, or Expectant on Death or Events.

One of the most interesting parts of the new Act is the addition of Tables for the purposes of the above matters. Hitherto life interests and the value of annuities have been based on the *Carlile Tables*, although we all knew that in those *Tables* the expectation of life as at the present day in New Zealand was under-stated. Also, in good times as well as bad, the Department always made its calculations as if the ruling rate of interest was 5 per cent. This long-established practice has now statutory authority.

Subsection (2) of s. 77 provides that, for the purposes of the Act, the present value of any annuity or other interest for the life of any person or for any other period, or the present value of any interest expectant on the death of any person or on any other event, shall be calculated on the basis of compound interest at the rate of 5 per cent. per annum with annual rests ; and, accordingly, Tables A, B, and C in the Third Schedule to the Act are to be used as far as they are applicable.

Tables A and B concern male lives and female lives respectively, and are based on the last population census and have been compiled by the Government Statistician, whom nobody can contradict. Readers of this Journal will be interested to learn that females have longer expectation of life than males. No longer will the ladies be able to say with truth that they always get the wrong end of the stick : we can now confute them with the figures of the Government Statistician. For example, a new-born male child has an expectancy of 68.29 years, whereas a female child has one of 72.43 years.

The proviso to s. 77 (1) reads :

> Provided that the expectation of life of any person who is suffering from a mortal illness shall be ascertained by the Commissioner in such manner as he thinks fit.

It appears to the writer that this proviso (although a new express provision) does not in any way alter the previous law and practice. The onus of proving a mortal illness lies upon him who sets it up, and the Court will take a practical, commonsense view of any proved special circumstances.

Definitions in the Act.

These are to be carefully observed. They are contained in s. 2 of the Act, in two subsections. Subsection (1) contains the usual formula : " unless the context otherwise requires ". But subs. (2), which defines the important words, " Beneficiary ", " Disposition of property ", " Donor ", " Dutiable estate ", " Final balance ", " Gift ", " Succession " and " Successor " does not contain these words, and is therefore subject to no such qualification. The purpose of this difference is to eliminate doubts as to whether certain definitions in one part of the Act apply to the same words to be found in other parts of the Act. For example, there has always been some slight doubt whether the word " beneficiary ", as defined in Part IV of the Act dealing with gift duty, also applied to s. 5 (1) (*f*) which dealt with assignments of life-insurance policies. Sim J. in *Public Trustee* v. *Commissioner of Stamps*, (1912) 31 N.Z.L.R. 1116 ; 15 G.L.R. 61, held that the definition of " beneficiary " did so apply. But the doubt was rather strengthened by the fact that, in the United Kingdom Act, the word " donee " (clearly pointing to a gift) was used, whereas in the New Zealand Act the corresponding word was " beneficiary ", and, in other parts of the Act dealing with death duty where the Legislature intended the gift duty definition of " beneficiary " to apply, the Legislature expressly said so. The doubt has now been removed. In s. 5 (1) (*f*) the word " beneficiary " has the gift duty meaning ; and, therefore, s. 5 (1) (*f*) does not apply unless there is an element of gift in, or inadequate consideration for, the assignment.

One also notes with great interest that there is also included in subs. (2) the phrase, " Disposition of property ", which, with reference to s. 5 (1) (*j*) (the death duty provision dealing with reservation of life-interests) was the subject of much argument in *Ward* v. *Commissioner of Inland Revenue*, [1955] N.Z.L.R. 361 (now under appeal to the Privy Council). In that case, the Court of Appeal held that a contemporaneous transfer and mortgage, securing an annuity to the transferor, was a disposition of property for the purposes of s. 5 (1) (*j*). The Estate and Death Duties Act 1955, by giving the phrase " disposition of property " as used throughout the Act, the wide meaning given to it by Part IV (dealing with gift duty) gives legislative sanction to the construction so preferred by the Court of Appeal ; but it does not settle the point whether the element of gift is necessary for a disposition of property to be caught by s. 5 (1) (*j*). In *Ward's* case the transferee gave fully adequate consideration.

ABOLITION OF MAORI SUCCESSION DUTY.

As from January 1, 1956, Maori Succession Duty will be abolished. In its stead, a fee will be paid to the Maori Affairs Department; this is provided for in s. 3 of the Maori Purposes Act, 1955. The new fee will apply to all vesting orders made on succession on or after January 1, 1956, and the exemption has been increased; where the value of the land is not less than £1,000, a special succession fee equal to 2 per cent. of the value of the interest will be payable before the order issues, provided that the fee shall in no case exceed the amount by which the value of the interest exceeds £1,000.

THE WILLS AMENDMENT ACT 1955.

A Revised Version of Testamentary Law.

By MALCOLM BUIST, LL.M.

III: MINORS, MARRIAGES AND MOVABLES.

Wills of Married Minors: These wills have heretofore been governed by s. 14 of the Infants Act 1908:

> Every male infant not under the age of nineteen years, and every female infant not under the age of eighteen years, after his or her marriage shall be competent to make a valid will disposing of all or any part of his or her real and personal property.

This provision is now replaced by s. 12 (1) of the Wills Amendment Act 1955:

> Notwithstanding anything to the contrary in s. 7 of the [Wills Act 1837] or any other enactment or rule of law, every minor after his or her marriage shall be competent to make a valid will or revoke a will in all respects as if he or she were of full age.

The age of approved marriage is thus now the deciding factor: see Part III, Marriage Act 1955.

Wills in Contemplation of Marriage: The Law Reform Act 1944 provided that these wills should not be revoked by the solemnization of the marriage contemplated. Section 39 of the Property Law Act 1952, which took this provision into the law of property, is now re-enacted, with verbal rearrangements, by s. 13 of the Wills Amendment Act 1955, and thus becomes part of the law of wills.

WILLS AFFECTING MOVABLES.

Under s. 40 of the Administration Act 1952 every will and other testamentary instrument of a *British subject* or citizen of the Republic of Ireland (whatever his domicile at the time of making the same or at the time of his death) should, as regards *personal estate*, be held to be well executed for the purposes of being admitted to probate in New Zealand:

(*a*) If made out of New Zealand, as required by the law:
- (i) of the place where the same was made, or
- (ii) of the place where the person was domiciled when the same was made, or
- (iii) then in force in *that part of the Commonwealth or of the Republic of Ireland* where he had his domicile of origin (s. 40 (1)).

(*b*) If made in New Zealand, as required by the law of New Zealand (s. 40 (2)).

Furthermore, a will of *personal estate* in New Zealand was not revoked, invalidated, or changed in construction by subsequent change of testator's domicile (s. 40 (3)).

Under s. 14 of the Wills Amendment Act 1955, every will and other testamentary instrument of *any person* (whatever his domicile at the time of making the same or at the time of his death) shall, as regards *movable property*, be held to be well executed for the purpose of being admitted to probate in New Zealand:

(*a*) If made out of New Zealand, if made as required by the law
- (i) *of the place where the person was domiciled at the time of his death*, or
- (ii) of the place where the same was made, or
- (iii) of the place where the person was domiciled when the same was made, or
- (iv) in force when the same was made in *the place* where the person had his domicile of origin (s. 14 (1)).

(*b*) If made in New Zealand, if made as required by the law
- (i) *of the place where the person was domiciled at the time of his death*, or
- (ii) of New Zealand, or
- (iii) *of the place where the person was domiciled when the same was made* (s. 14 (2)).

Section 14 (3) provides:

> No will or other testamentary instrument *of any person* shall, so far as relates to *movable property* in New Zealand, be held to have been revoked or to have become invalid, nor shall the construction thereof be altered, by reason *only* of any subsequent change of domicile of the person making the same.

Section 14 (4) defines "land" (to clarify the definition of "movable property" that follows):

> "Land" means land in New Zealand; and includes any estate or interest in land in New Zealand.

This new scheme of definitions is completed as follows:

> "Movable property" includes a mortgage of land, a rent charge or annuity or legacy charged on land, and any interest in the proceeds of sale of land contracted to be sold or held upon trust for sale; but does not include a leasehold estate or interest in land.

and the new law operates in respect of wills made on or after the date of commencement of the Act, namely October 27, 1955.

In the above summary of the previous law and the changes made, the amended portions have been shown in italics, and the two relevant enactments have been set out in parallel manner for ease of comparison.

THE BACKGROUND.

The practical difficulties to be met by this legislation flow from the rule of private international law that *mobilia sequuntur personam*, i.e., that the distribution

of personalty is governed by the law of the State in which the deceased was domiciled at the time of his death. The problems arise if he dies possessed of personalty in more than one country, and are further complicated if the place of his death is not within the State in which he died domiciled. Common practice requires :

(*a*) that the jurisdiction over the personalty (equally with the realty, in this point) of the domestic courts of the State in which they are situate be recognized by the appointment by each such Court of a local " administrator " of the personalty (cf. s. 49 of the Administration Act 1952) ; and

(*b*) that the " administrator " in the State where the deceased was domiciled at the time of his death be the " principal administrator ", to whom the other or " ancillary " administrators should account.

Indeed, Lord Westbury L.C. pointed out in *Enohin* v. *Wylie*, (1862) 10 H.L.C. 1, 15 ; 11 E.R. 924, 930 :

> Now the utmost confusion must arise if, when a testator dies domiciled in one country, the courts of every other country in which he has personal property should assume the right, first of declaring who is the personal representative, and next of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation.

The full force of the legislation is seen when the common law background is shown, and a case arising out of a death before 1861 is now given, to show why such legislation is necessary at all. In *In the Goods of Raffenel*, (1863) 3 Sw. & Tr. 49 ; 164 E.R. 1190, the deceased had her domicile of origin in England, but married a French naval officer, thereby acquiring a marital domicile in France. After her husband's death, she frequently expressed her intention of returning to England to reside there permanently. In 1853 she left Dunkerque for Calais, and, with her children and baggage, boarded a packet bound for England. Before leaving the harbour she was taken so ill as to be obliged to land again at Calais, where she remained for about three months in the hope of getting sufficiently well to undertake the voyage. They returned to Dunkerque where she died. A month before her death she had made a will valid by the law of England but invalid by the law of France. Her property was in England. On a motion for probate of this will it was held that the French domicile had not been abandoned as long as the deceased remained in the territory of France, and the motion was rejected.

Practical Points.

Whilst the legislation of which s. 14 of the Wills Amendment Act 1955 is the successor has always been regarded as having the aim of removing difficulties in the separate location of the possessions of the deceased, certain points should be kept in mind by an executor or administrator seeking a grant under the powers given :

(*a*) The relevant doctrines and statutes apply only to movables ; full jurisdiction over the rules of succession to land is invariably claimed by the Courts within whose jurisdiction the land is situated : *Freke* v. *Lord Carberry*, (1873) L.R. 16 Eq. 461.

In Wills Precedent xviii (" Wills including foreign property ") in *2 Key & Elphinstone's Precedents in Conveyancing*, 14th Ed., 982, it is suggested that in a will dealing with land in a colony not given absolutely, a trust for conversion should generally be inserted, so that the proceeds may be disposed of according to English law, and questions as to application of colonial law may as far as possible be excluded.

There appear to be two difficulties in the way of this approach. First, the new New Zealand legislation departs from Lord Kingsdown's Act (followed in s. 40 of the Administration Act 1952) by referring to " movable property " instead of to " personal estate ", so that every care to keep within the new definitions is necessary, and it may no longer be advisable to lean on decisions such as *In the Goods of Gunn*, (1884), 9 P.D. 242, and *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80, 98, which apply the doctrine of equitable conversion to freeholds, without further thought. Secondly, although the case was one of intestacy, there may be some fundamental material for doubts in the words of Russell J., in *In re Berchtold, Berchtold* v. *Capron*, [1923] 1 Ch. 192—

> The distinction between real estate and personal estate under English law has nothing to do with the question. The alternatives and the only alternatives for consideration are immovable property or movable property,—

and the Court here held that a right to the proceeds of a trust for sale of land was immovable property equally with the freehold land out of which the money was eventually to be paid. In other words, a draftsman would have to keep strictly within the statutory exception given in the definition, *qua* " movable ", not *qua* " personalty ".

(*b*) The Court will not make a grant unless there is property within its jurisdiction : see *In re Thomas Minifie*, [1936] N.Z.L.R. s. 13, and distinguish s. 2 of the Administration of Justice Act 1932 [U.K.].

(*c*) Any doubt whether the benefit of s. 14 (3) is available to foreigners' wills is set at rest by the words " any person " : see *In the Estate of Groos*, [1904] P. 269, criticized by *Cheshire on Private International Law*, 2nd Ed., 523.

(*d*) Restrictions upon dealings with movables may need to be taken into account. These may arise not only under the terms of the will itself (e.g. by requiring beneficiaries to confirm the provisions of a concurrent will dealing with foreign assets and purporting to be so executed as to be valid in the appropriate foreign courts) but also by restrictive legislation or rules of law, e.g. our own Family Protection Act 1908, or the Continental regulation of successions. *Bartlett* v. *Bartlett*, [1925] A.C. 377, suggests that they may sometimes affect the right to a grant.

(*e*) Hence there may be difficulties where the *lex loci rei sitae* differs fundamentally from that of the *lex domicilii*. As migrants enter New Zealand and make wills here but retain their domicile of origin in countries outside of the Common Law, we have the problem where the *lex domicilii decedentis* does not recognize the *lex loci actus*. Here the new s. 14 (2) solves some, but not all, of the problems of the " administrator ". For situations of this type, two suggestions are available :

(i) Concurrent wills, appropriately executed in each instance according to the law applicable to the assets disposed of. This is somewhat precarious : see *In the Estate of White Todd* [1926] P. 173. A requirement that legatees under the New Zealand form of will elect to confirm the foreign will, if ineffective, may or may not be appropriate.

(ii) A holograph will, written in full and signed by the testator himself, and then attested in the usual manner by two witnesses in terms of s. 9 of the Wills Act 1837, is likely to commend itself to most jurisdictions outside of the Common Law. In *In re Priest, Belfield* v. *Duncan*, [1944] Ch. 58, however, one of the witnesses was caught by s. 15 of the Wills Act 1837, the attestation being regarded as deliberate and Scottish law as therefore excluded.

It appears that, apart from devices such as the above, the Wills Amendment Act 1955 does not completely bridge the gap between systems of law, but is unilateral in effect. It is a palliative, not a panacea.

(*f*) Section 14 refers only to the obtaining of "administration" of movables situate in New Zealand, i.e. to the getting in of assets; the law of the domicile still regulates the succession to those assets, so that the grant in New Zealand may or may not be ancillary notwithstanding the powers now available.

(*g*) Where the deceased was a married woman, her matrimonial domicile is that of her husband, and s. 14 must be construed accordingly, subject to s. 41 of the Administration Act 1952.

(*h*) Where there is an intestacy, the movables devolve according to the law of the domicile, in the ordinary manner, unaffected by s. 14. Change of domicile may, in such circumstances, effect a change of substantive succession, as well as of the forum of principal administration, because s. 14 (3) is expressed to operate only in respect of a will or other testamentary instrument.

(*i*) Wills in exercise of powers must comply with the requirements of s. 9 of the Wills Act 1837, notwithstanding the provisions of s. 14 of the new Act: see *Re Kirwan's Trusts*, (1883) 25 Ch. D. 373, and *Hummel* v. *Hummel*, [1898] 1 Ch. 642, but see also *Jarman on Wills*, 8th Ed., 800.

Dual Testation and Representation.

(*j*) It is submitted that, notwithstanding the decision in *In re Rippon* (1863) 3 Sw. & Tr. 177; 164 E.R. 1242, (that where the will has been executed in England according to the law of England, affidavits regarding domicile need not be filed), the domicile at the time of death is still a relevant question, deciding as it does who is the principal administrator, and deciding also the dominant law to be applied. For instance, if the deceased died domiciled abroad, it is convenient to be able to say that in respect of his New Zealand movables a certain will is well executed for the purpose of being admitted in New Zealand to probate, but it may be that the Court of the domicile has by private international law the right to set up some other document.

Examples include *In the Goods of Meatyard*, [1903] P. 125, where Sir Francis Jeune, P., made in favour of Belgian administrators, duly appointed by the Court of domicile, an order for a grant of administration with an English will and codicil (appointing English executors, who opposed the application) and the Belgian will annexed. Apparent exceptions include *In re Coquerel*, [1917] P. 6, where, however, no foreign grant had yet been made, and *In the Estate of Goenega*, [1949] P. 367, where the English will was valid under French law. An interesting instance of the main rule is *In the Goods of Prince Oldenburg*, (1884) 9 P.D. 242, where administration was granted to an appointee under the law of the domicile, disregarding as such a will and two codicils.

It is submitted that s. 14 may now be found to have the effect of weighing the balance unduly against the Courts of a foreign domicile, whereas only cases such as *In the Goods of Raffenel* (*supra*) required attention.

The foundation of the case law on this point is summed up in Appendix II of *Hayes & Jarman's Forms of Wills*, 17th Ed., 378:

> The doctrine that, in regard to personalty, the *lex domicilii* prevails, respects only the devolution and distribution of the property, and not the administration thereof: for the Court of Administration is, by our law, regulated by the *lex loci rei sitae*; and the estate must be administered in the country in which possession is taken of it under lawful authority: *Preston* v. *Lord Melville*, (1841) 8 C. & F. 1; 8 E.R. 1,

but this must be read with the rule of English law that the right to administration is in general to follow the findings of the Court of domicile at death: *Enohin* v. *Wylie* (*supra*).

Furthermore, it is possible to suggest that the new Act operates "beneficially" in circumstances such as pertained in *In the Goods of Raffenel* (*supra*), but otherwise merely enables the testator's nomination of a local executor to prevail against other proposals of a principal administrator elsewhere.

Assuming that the foregoing be correct, we may envisage that when a foreign *principal* administrator applies to the Court in New Zealand for an ancillary grant to his attorney, the Court in New Zealand will appoint as his representative *only* the person ascertained by means of s. 14 of the Wills Amendment Act 1955. This is fully in accordance with the fundamental principle mentioned earlier, that the domestic jurisdiction of the *lex loci rei sitae* remain unimpaired by the doctrines recognizing the superior claims of the *lex domicilii*.

The Act, however, directs our Courts to say merely, "By New Zealand law we fully accept your principal administration, but by the same law your representative to get in the New Zealand movables is to respect s. 14, if relevant." It is submitted that this formula states and exhausts the normal function of the Court of Probate in such circumstances. If the difficulty outlined above be real, a practical solution may then lie in admitting the will to probate, as directed by the statute, but making the grant one of administration with the will or wills annexed, in favour of the principal administrator or his attorney—following the lines of *Meatyard's* case (*supra*). This, it is submitted, pays joint respect to the requirements of the statute and those of the rule of private international law, the only "casualty" being the testator's intention that the person named by him as New Zealand executor be appointed.

Spent Provisions.

Certain sections of the Wills Act 1837 have no longer force:

Section 2: Certain old statutes repealed.

Section 4: Fees and fines payable by devisees of customary and copyhold estates.

Section 5: Enrolment of wills of customary and copyhold estates.

Section 8: Validity of wills of married women.

Section 32: Lapse of devise of estate tail.

They have, therefore, been repealed by s. 15 of the Wills Amendment Act 1955.

RECONSTRUCTION OF THE TEMPLE.

A Note on War Damage Replacement.

By C. O. Herd.

Much headway has been made during the past two years in the reconstruction of the war-damaged part of the Temple. The east side of Middle Temple Lane now presents an unbroken line of buildings from the Wren gateway in Fleet Street to the Embankment entrance. The Cloisters and the south side of Pump Court have been replaced with entirely new buildings. The new Lamb Building is situated south of Pump Court, and is approached through an archway in Middle Temple Lane. Immediately below lies Carpmael Building, just completed. This building is named Carpmael Building in recognition of the signal services rendered to the Middle Temple by Kenneth Carpmael Q.C., a Master of the Bench, in connection with the restoration of the Inn after the war of 1939-45. These chambers have a pleasantly rounder corner leading into Crown Office Row, where another large block of chambers, covering the area between Carpmael Building and Inner Temple Hall, rapidly nears completion.

Together with the Cloisters and south side of Pump Court, the new buildings, designed in the classic style by Sir Edward Maufe R.A., are built of red brick on a Portland stone base, four stories high, with a coping of Portland stone on the top. Those in Middle Temple Lane and in Crown Office Row also have bands of the same stone marking the different storey levels. The windows are of the Georgian type—square topped, wooden framed, painted cream.

All these new chambers harmonize with the old architecture of Middle Temple, particularly the seventeenth century buildings in New Court and the north side of Pump Court.

At Crown Office Row, a splendid archway with chambers built above links the new Carpmael Building in Middle Temple with the new Harcourt Buildings in Inner Temple, thus completing the whole of the east side of Middle Temple Lane. That old favourite, Fig Tree Court, has disappeared; and Elm Court is a court only in name, for none of its former chambers has been replaced.

The new Hall of Inner Temple was completed during the last long vacation. Lord Oaksey, the Treasurer, opened the Hall at an informal ceremony on October 4. The foundation-stone of this stately building was laid by Her Majesty the Queen on November 13, 1952. The new Hall, constructed of red brick on the now familiar base of Portland stone, is of the classic style of architecture. It has, on each of the north and south sides, five large lofty windows which impart a Georgian appearance. The north entrance adjoins the Cloisters and faces the round part of Temple church, whilst, at the south, two more entrances overlook Inner Temple garden.

Inside, the Hall is quite delightful: very light and bright, with walls panelled in light oak up to the level of the window sills. The ceiling is made of white fibrous plaster, ornamented with elegant mouldings edged with gold leaf and decorated with an oak leaf enrichment. The gold leaf decoration is repeated in the architraves around the windows which have an attractive rope-styled embellishment.

At the west end of the Hall is a traditional screen with minstrels' gallery, whilst at the east end, behind the high table, an oak-panelled wall has as its central feature a columned pediment. Here, between the pillars in the centre of the wall, hangs a portrait of His late Majesty King George VI, who was a Bencher and Past Treasurer of Inner Temple. In the middle window, south side, are to be found the late King's armorial bearings worked in stained glass and inscribed "Albert, Duke of York, Master of the Bench 1917", together with the arms of James, Duke of York, who was Master of the Bench in 1661. Other stained glass windows contain the arms of Lord Keepers and Lord Chancellors including Thomas Lord Coventry (1625) and Viscount Simon (1940), whilst around the walls are many fine pictures of distinguished members of the Inn.

Inner Temple library is in course of construction, and is being built on to the east end of the Hall. When complete, the Hall and library will form an imposing block of buildings extending from the Cloisters to Tanfield Court.

An interesting and historically accurate fact about the new Hall is that it occupies the same site as the old refectory of the crusader-ecclesiastics of the twelfth century, the Knights Templars, who gave the Temple its name. Remains of this refectory have been carefully preserved, and are housed in a small building made of irregular stone-work which is joined to, and forms the west end of the Hall.

The architects concerned with the new buildings in Inner Temple are Sir Hubert Worthington, R.A., and Mr T. W. Sutcliffe, A.R.I.B.A.

Middle Temple library, which was situated on the west side of Middle Temple garden at the south end of Garden Court has completely disappeared. At the beginning of last year a firm of demolition contractors carried away the last stones and rubble. A new library is to be built opposite, fronting Middle Temple Lane, and between Plowden Buildings and Temple Gardens. The new library will, therefore, face the new Harcourt Buildings in Middle Temple Lane south of Crown Office Row, and should be much more conveniently placed than the old one, which was rather out of the way except for those barristers whose chambers were in or near Garden Court and Fountain Court. But the old library was certainly in a very delightful place, near the bottom of the garden and overlooking the Thames Embankment, and it was a very pleasant experience to view the river and traffic from the magnificient oriel window which projected some ten feet from the main south wall.

On the site of this old library a new structure is beginning to take shape, for the first stones are now being laid of what promises to be a very handsome building. This is to be a five-storey block of chambers, designed in the classic style by Sir Edward Maufe. These chambers will match the remainder of the new buildings. Measuring about one hundred and twenty feet long and some forty feet wide, of red brick construction on a base of white Portland stone, this building will accommodate ten sets of barristers' chambers, five on either side of the central entrance facing west.

These chambers, which will almost certainly be the most favourably situated in the Temple, are to be known as "Queen Elizabeth Building", and will mark the long association of Queen Elizabeth the Queen Mother with Middle Temple of which Her Majesty is a Bencher and Past Treasurer.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A Meeting of the Council of the New Zealand Law Society was held at Wellington, on November 25, 1955, at 10 a.m.

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

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

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

Obituary.—H. S. T. Weston, New Plymouth: The Council passed the following resolution:

"The Council learns with very great regret of the death of Mr H. S. T. Weston, who was at one time a member of the Council of the New Zealand Law Society.

The Council extends its deepest sympathy to Mrs Weston and her family in their sad loss."

L. W. Willis, Napier: The Council passed the following resolution:

"The Council learns with very great regret of the death of Mr L. W. Willis, who was at one time a member of the Council of the New Zealand Law Society.

The Council extends its deepest sympathy to Mrs Willis and her family in their sad loss."

Contracts Enforcement Bill.—The following letters were received from District Societies:—

(a) *Hamilton*, 18th October, 1955: "The Council of this Society, having considered this Bill, have approved of it with the exception of the Clause Number 2 (6) which makes the Act retrospective."

(b) *Gisborne*, 3rd October, 1955: "My Council has no objection to the Bill in its present form as far as it goes, but the question was raised in discussion as to whether or not it might be a favourable opportunity to deal with certain questions relating to contracts for sale of land; notably the enactment of standard Clauses for adoption, if required, in agreements for sale and purchase of land."

(c) *Auckland*, 14th November, 1955: "This Bill has been considered by my Council. Opinion on this subject was not unanimous. A substantial majority of members was in favour of or not prepared to oppose, the Bill in its relation to Section 4 of the Statute of Frauds. A suggestion was made, however, that the Bill should permit action to be brought on any of the Contracts mentioned in Section 21 (*a*) and (*b*) of the Bill in the further case where a deposit or part payment is made (as at present provided in Section 6 (1) of the Sale of Goods Act 1908). On the subject of repealing Section 6 of the Sale of Goods Act opinion was about equally divided, but a majority of members considered that if it were retained there should be an increase in the figure stated therein from £10 to a sum having more relation to present money values—such suggested increased sum being not less than £50 but probably nearer £100."

(d) *Southland*, 21st October, 1955: "This Bill and your letter of 16th September were considered by the Council of this Society, and I am directed to advise the Council is of opinion that opposition to the Bill should be withdrawn."

(e) *Wellington*, 24th November, 1955: "At its recent Meeting my Council, although approving the Bill, held divided views as to the retrospective effect incorporated in the Contracts Enforcement Bill. The majority, however, resolved that opposition by the Society to the Bill should be withdrawn but that the proposal to make the legislation retrospective should not be supported."

Canterbury and Otago approved the Bill in its present form. Taranaki thought the legislation could well stand over for another year or two, to see if the Act operated satisfactorily in England. The President expressed the view that there appeared to be one or two technicalities which could be dealt with at the April Meeting. In the meantime, the various views would be collated and forwarded to District Societies for their further comments.

Superannuation for Lawyers.—The President reported that Mr Hurley and he had attended a Meeting convened by the New Zealand Society of Accountants which representative members of the Engineers' Institute, Dentists, and other interested parties attended. The proposals agreed upon had been sent to the Minister of Finance for his consideration, and, in due course, he will receive a deputation to discuss the proposals.

International Bar Association.—The President reported that the biennial Conference of the International Bar Association would be held at Oslo, Norway, from July 23-28, 1956. It had been the practice for the Society to appoint from its members who would be abroad at the time, two representatives, although as many members of the Society who desired to register as such could attend as Conferees. As Mr Justice Hutchison and Mr N. R. Bain would be going overseas next year, the President proposed in the following terms that they should be appointed as the delegates of the Society: "The Council of the New Zealand Law Society hereby resolves that pursuant to section 2 (*b*) of Article V of the Constitution of the International Bar Association, the Hon. Mr. Justice Hutchison and Mr Norman Rhind Bain be and are hereby chosen and appointed as deputies of the New Zealand Law Society in the House of Deputies of the International Bar Association."

Mortgagors' Liability to Pay Costs of Transmission.—The Hawkes Bay Society wrote as follows: 4th October, 1955:

"I am enclosing copy of letter received from a firm of solicitors in this district. The Council of this Society asks that the matter be referred to the Costs Committee for a ruling.

Enclosure: W., a contributor to the extent of £700 to a joint mortgage, died intestate on 4th October, 1945. His children entered into a Deed of Family Arrangement with Mrs W., who was her husband's Administratrix, whereby the estate capital was left intact and the income paid to Mrs W. for life. Mrs W. died on 25th December, 1954, and Mr Y., who was granted Letters of Administration *de bonis non* in W.'s estate is now proceeding to get in and distribute the capital assets.

We act for S., the Mortgagor, and several months before administration was granted to Y., he invited the mortgagor to repay his mortgage which had been running on overdue for several years, to enable Y. to complete the administration to W.'s estate.

Messrs ———, solicitors of Palmerston North, act for Y. and insist that their costs of preparation of the transmission £3 3s. and its registration £1 15s. are payable by the mortgagor S. pursuant to the N.Z. Law Society's ruling 153 at page 85 of the 1947 Volume of Decisions, Rulings, and Interpretations.

We agree that, had the mortgagor made the request to repay his mortgage, ruling 153 would apply. But we point out that the mortgagor is not asking to be relieved in equity from the legal consequences of his own act in this particular instance. The administrator of the deceased mortgagee desires to complete his administration, and has invited the mortgagor to repay his debt, which he has done, and now seeks to charge him for the privilege.

We say that until the administrator Y. had registered his transmission he was in no position to deal with the mortgage at all. In other words he could not have joined the other contributory to this particular mortgage in extending the term, increasing the rate, giving notice to call the mortgage up or accepting a repayment in part or in full. The preparation of transmission and its registration is normal practice in estate administration and the scale of conveyancing charges within the Dominion as approved by the N.Z. Law Society provides for a scale guide with transmission where required. If ruling 153 is applied in all cases where the mortgagee is deceased, the situation could well arise where double charges might possibly be made and paid, one by the estate without even a preparation of transmission, and the other by the mortgagor who would be called upon to pay both costs and disbursements involved whenever he chose to repay his mortgage.

We have no information as to the assets of W.'s estate, nor details of the Deed of Family Arrangement, as to whether there was any mixing the title to the mortgaged estate with other property but in any case we are not sure whether the fact that W. had already mixed his title with other of his property by contributing to a joint mortgage would in itself exclude this particular matter from the rule as laid down in *23 Halsbury's Laws of England*, 2nd Ed., p. 511, para. 759.

We shall be glad therefore if your Council will give the matter consideration, and if thought worthy of a decision by the N.Z. Law Society, as we do, we shall be glad if you will refer the matter for a ruling accordingly."

The inquiry was referred to the Costs Committee who reported as follows: 3rd November, 1955:

"This Committee has, as requested, considered your letter with copy of the letter from the Hawkes Bay Law Society attached.

Although this is a matter of law we observe that members of the Conveyancing Committee have in the past stated their views.

Rulings 149, 150, 151/2, 153 and 154 of the New Zealand Law Society deal with aspects of the same question as is now asked. The answer in those rulings agreed that the principle is set out in *23 Halsbury's Laws of England*, 2nd Ed., p. 511, para. 759.

The statement there that the costs to be borne by the mortgagor on repayment of a mortgage include 'not only the ordinary costs where the mortgage title has not been changed by assignment or devolution but also any extraordinary costs rendered necessary by a change in title or other event . . . ' in our opinion covers the circumstances laid before us.

In this we assume that a transmission relating exclusively to the particular mortgage will be produced. As was pointed out in Ruling 153, where a transmission is produced applicable to interests additional to the mortgage, it would be difficult or impossible to apportion the costs of transmission as between the several properties or interests, and it is the invariable practice for the mortgagee's estate in such circumstances to pay for the document of devolution.

The inquirer refers to the fact that the scale of costs laid down as a guide in estate matters includes the cost of a transmission where one is required; but we cannot see that this assists the mortgagor.

Nor do we consider that the fact that the mortgagee or either of the mortgagees requested repayment, made any difference to the mortgagor's liability. If the mortgagor was in a position to bargain with the mortgagee as to the terms on which he would repay, he apparently did not choose to do so. If he did not, the usual principles would apply on a release being called for on repayment."

It was resolved that the report be adopted.

New Legislation.—The Secretary submitted the following report:

During the Session 138 Bills were collected from the House and perused at this office. Of this number, 128 of the Bills were passed, particulars of which have been sent to each Society. Copies of the Assented-to Acts have also been sent to the Societies, as and when received. The Bills, which were further examined by Wellington members of the profession, were—Land Subdivision in Counties Amendment, Estate and Gift Duties Bill, Statutes Amendment Bill, Transport Amendment Bill, Wills Amendment, Shops and Offices and Joint Family Homes Amendment. In these cases no representations were recommended.

Transport Amendment Bill: Mr Rothwell, a member of the Sub-committee of the Society which dealt with the question of Motor Registration Certificates, pointed out that no provision was made in this Bill to deal with the registration of motor-vehicles and suggested that a present member of the Council might go into the matter with Mr Rothwell with a view to making an approach next year to the new Postmaster-General.

Housing Bill: In the case of the Housing Bill representations were made to the Minister of Housing concerning cls. 22 and 23 which provide for the cancellation of agreements for sale where the purchaser has made various types of default. The Conveyancing Committee felt strongly that cancellation should not be effected unless notice of the default was given to all persons having registered interests in the Agreement. To summarize the position, it was thought that the cancellation provisions should follow the general principles relating to power of sale by a mortgagee. Mr Phillips, a member of the Committee, also discussed the matter with the Corporation. Although no statutory amendment was made, the Minister said inter alia that he had instructed the Corporation to see that all care was taken to serve notices of proposed rescission of the Agreement for Sale on registered mortgagees of purchasers. The Minister thanked the Society for its interest in the matter and welcomed the Society's representations on any legislation or departmental administration.

Family Protection: The Minister of Justice forwarded draft copies of this Bill for the views of the Society. The Standing Committee felt that the Bill might require further consideration on a number of points. The Canterbury Society also expressed the view that any proposed alterations should be referred to District Societies for their consideration and comment. The Standing Committee wrote to the Minister, and its letter was placed before the Statutes Revision Committee. The Bill was, however, proceeded with.

Adoption Bill: Mr W. R. Birks submitted a report on this Bill in which he expressed doubts as to the provisions of ss. 7 and 8, where the natural parent or parents cannot be found. Copies of the submission made were forwarded to the Statutes Revision Committee. Suitable amendments were made to the legislation.

Tenancy Bill: The attention of the Minister was drawn to a point raised to the effect that no provision had been made for an aggrieved tenant to lay an information if he wished to do so. Further attention was drawn to cl. 55 (1) (*e*). In view of the decision given in *Kanizaj* v. *Brace*, [1954] N.Z.L.R. 283, it was recommended that the clause should apply not only to the deprivation of any "amenities", but also to the deprivation of any rights of the tenant under his tenancy. The last matter was suitably amended, but no action was taken as to the former point.

Estate and Gift Duties: No representations were made on this Bill, as Mr Virtue, who had been appointed by the Society, had previously discussed the proposals with the Department before the legislation was drafted. In this connection the following letter, dated October 28, was received from the Minister of Finance:

"During the second reading of the Bill which was passed in the House last night, I was delighted to place on record the Government's appreciation of the willing co-operation of your Society in taking part in the discussions preliminary to the drafting of the Bill. It has been a matter of great satisfaction to the Government that the contribution made by your Society has materially assisted in the production of such a well-received piece of legislation which will be of great value not only to the Government and the members of your Society but also to everyone who is affected by the Act.

I also took the opportunity of publicly thanking your representative, Mr D. W. Virtue, for the time and care which he devoted to the discussions. Please convey to him my warm thanks and the appreciation of the Government.

While I know that the part played by your Society and its representative will in itself be sufficient satisfaction, I thought you would like to know that the assistance so freely extended was not overlooked."

Mining Titles Registration Bill: A copy of a report adopted by the Hamilton Law Society was forwarded to the Secretary for Justice.

This Bill has not been proceeded with, but the points covered by the Hamilton Society will be considered when the Bill comes again under review.

It was resolved to adopt the report.

Legal Education.—The following letter was received from the University of New Zealand: 14th October, 1955:

"In reply to your telephoned inquiry for a progress report on the various matters which came up from the Society to the Council of Legal Education and Senate, I would advise as follows:

Reduction in number of Arts Units: The proposed reduction to four units including a compulsory English I has been agreed to by the Senate, and at the moment awaits the consent of the Governor-General.

External Examinations: This matter has been discussed by a University Committee with various representatives of the Society. I believe that the general situation is now better understood on both sides, and that no changes in policy are at present contemplated. External examiners continue to be used for the great majority of the Professional subjects.

Full-time Students: The view of the University is that while no Law student is required to attend the University as a full-time student, there is held to be considerable advantage to any student who undertakes one or two years' full-time study during his law courses.

Council of Legal Education: The proposal to add two further representatives of the Society and two further Deans of Law Faculties, together with the Vice-Chancellor (ex officio), is approved by Senate, and at the moment awaits the consent of the Governor-General.

Communication between Council and Senate : The Senate has asked the Legislature to so amend the University Act as to provide that in future the Council of Legal Education shall report directly to the Senate, but in addition, copies of all recommendations from the Council to the Senate shall be sent by the Council to the Academic Board for its comment to the Senate. That proposal is at the moment in the hands of the drafting authorities, and we hope that an amending Bill will shortly be brought down.

Commonwealth and Empire Law Conference.—The Secretary said that as she had given a full report in the NEW ZEALAND LAW JOURNAL, she desired merely to draw the attention of the Council to one or two matters which might call for some consideration by the New Zealand Society.

1. *Professional Ethics and Etiquette :* Concern was expressed at the Conference that so many commence practice without the benefit of some systematic instruction in professional ethics and etiquette. The Secretary suggested that the Council might give some thought as to whether further steps should be taken in New Zealand in this connection.

2. *Recruitment to the Profession :* Most countries were experiencing a serious shortage of law clerks. In New Zealand, other than in the University centres, it was found to be almost impossible to obtain assistance either qualified or unqualified. In England the employment of unqualified or managing clerks was encouraged by offering superannuation benefits, etc. It might well be that such a class could be encouraged in New Zealand by making employment conditions more attractive and giving such employees some status.

A summary setting out the position as at 1930 and 1955 showed the problem which was being faced by the profession in New Zealand :

	Population	Pract. Certifis. Issued	Number of Principals.
1930.	1,506,809	1,765	1,401
1954.	2,136,193	1,961	1,583
	Remainder Qualified Clerks, Govt. Solrs., etc.	Engaged in Govt. Depts.	Notices of Admission.
1930.	364	(5) 29	152
1954.	378	(21) 110	68

Approximately fifteen overseas practitioners who would be employed in Government Departments had been assisted by the Government and had arrived in New Zealand.

The Secretary said she had not overlooked the fact that in three or four years' time an additional number of students would be graduating although this did not necessarily mean that they would all be entering private practice.

3. *Admission to the Legal Profession :* Some of the representatives of Societies, including The Law Society, said at the Conference that no student was permitted to *commence* the law course in their countries without first satisfying the Society that he or she was a fit and proper person. No similar action was taken in New Zealand, and the Secretary asked whether the Society considered this further precaution should be taken.

4. *Conferences to be Continued :* It was suggested that another Commonwealth Conference should be held in five years in Canada, and later in Australia.

5. *The Judicial Committee. A Commonwealth Supreme Court :* The Secretary asked whether the suggestion made by Mr Justice Gresson and adopted by Sir Hartley Shawcross in his final address called for early consideration by the New Zealand Society.

6. *Hospitality :* Over forty New Zealanders, some with wives and families, attended the Conference, all of whom enjoyed the generous hospitality provided by the profession in England and Scotland.

The question of a suitable gift to The Law Society had been discussed by the New Zealand representatives and it had been subsequently decided to have made by the Disabled Servicemen's League a cigarette casket and ashtray of New Zealand woods and paua shell inscribed " To The Law Society from the New Zealand Law Society." (These were on display at the Meeting of the Council.)

7. *Secretaries' Conference :* A copy of the transcript of notes taken by the Secretary whilst at Cambridge had already been circulated.

The Council resolved that a letter be sent to The Law Society and the Bar Council expressing appreciation of the hospitality extended to New Zealanders who had visited the United Kingdom not only during the Conference period, but on various occasions.

Legal Conference, 1957.—The President of the Canterbury Society drew the attention of the Council to the fact that Anzac Day, April 25, would fall during the Conference period and it had been suggested that a re-arrangement of events be made so that the Thursday could be observed as a free day for the visitors. This would entail the Sports Day being held on Saturday instead of Friday. The suggestion was approved.

LEGAL LITERATURE.

They Stand Apart : A Critial Survey of the Problem of Homosexuality. Edited by His Honour Judge Tudor Rees and Harley V. Usill. Pp. 212 + xii. London : Heinemann (1955).

The problem of homosexuality in males is causing grave concern in Great Britain. A school of thought has grown up that considers the law should be amended to permit homosexual practices between consenting adult males.

The editors have attempted to focus attention on the problem, not to lay down a definite line of action. The evidence is presented by contributors—eminent in varying fields—the reader may form his own opinion.

Judge Tudor Rees himself deals with " Homosexuality and the Law". He draws attention to the diversity of punishments meted out to offenders and stresses the difficulty in awarding an appropriate sentence.

" Homosexuality and Society" is contributed by the Viscount Hailsham Q.C. The learned Viscount sees no occasion to change the law for "in so far as homosexuality is a problem at all, it is a problem of social environment and not of congenital make up" (p. 21). Many will agree with the ultimate conclusion, but join issue with the sweeping generalization.

The religious aspects of the problem are portrayed through Anglican eyes by the Reverend Dr D. S. Bailey. Dr Bailey emphasizes that homosexual practices are the result of the moral outlook of the community, not vice versa. They are a symptom, not a cause.

Dr W. Lindesay Neustatter, a London psychiatrist well known in criminal psychiatry, describes the medical features of the problem. In describing treatment and prevention, he is not guilty of any undue optimism. Neustatter makes a plea for "prison hospitals".

A tabloid account of the law in other countries is set out by Dr H. A. Hammelmann. Three appendices conclude this informative work—namely, a critical, survey of statistics, extracts from debates in the Lords and Commons, and finally extracts from "the Report of the Joint Committee on Psychiatry and the Law appointed by the British Medical Association and the Magistrates Association."

The book presents a wealth of expert evidence, and, as ever with that commodity, there is conflict. Most lawyers will probably alight at the same platform as the Viscount Hailsham, though some may wish to stress that they have arrived by another train.

G. L. McL.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Married Daughter's Claim.—"I do not agree with Mr Wright that a testator is bound always to contemplate the possibility that a married daughter may lose her husband by death or divorce, or that either she or her husband may become an invalid, or that her husband may lose all his money. Neither testators, nor Courts administering this type of legislation, are required to act as insurers of married daughters against all possible vicissitudes. It must again, in every case, be a matter of considering what it was reasonable for the testator to anticipate, and what, having regard to (inter alia) the claims and needs of the married daughter and others, her health, her husband's health, means and prospects, the age of both of them, and the amount the testator had available to satisfy the various claims upon him, a wise and just parent would have done. Superhuman foresight and hyperanxious speculation can be neither expected nor required; wise and just human judgment in all the circumstances (which the Court can never know as well as the testator) is the most that can be set up as a standard. Where a daughter is as yet unmarried, and nothing is known of any husband she may hereafter marry, it may be proper in all the circumstances to have regard to the possibility of her having some day a sick or impecunious husband—cf. *Re Ford*, [1952] A.L.R. 198, at p. 202. It may be quite a different matter where a daughter is already married to a healthy husband, with adequate means and good prospects, and as to whom there is no reason to anticipate ill-fortune; there may be more urgent or important claims which must then be preferred. Least of all can it be suggested that a married daughter is entitled to say that her father should, in making his will, disregard her husband's means and prospects altogether, however satisfactory they may be." Per Sholl J. in the Full Court in *Re Hodgson*, [1955] V.L.R. 481, 495.

Marital Tiffs.—Whether it be due to the humidity of the weather or the proximity of the individual, the fact appears to be that the Christmas-New Year holiday period just passed has produced a large crop of husband-and-wife disagreements leading to the need for professional advice. Here is a field where the older practitioner finds favour with angry and distraught spouses by reason of his reputed worldly wisdom, but where he feels a mounting disinclination to be cast in the role of psychiatrist, psychologist, or spiritual adviser. If he allows his sympathy to gain ascendance, he has, almost before he realizes it, a neurotic on his hands. An urbane tolerance is possibly the best palliative. In writing of The Philosophy of Exploration, Freya Stark tells of an Italian ecclesiastic who invited the Gadhi of Tripoli to dinner and at repeated intervals offered ham to the Muslim dignitary. He refused several times and at last explained that it was forbidden by his religion. "You don't know what a pleasure you miss," said the host. When the guest rose to leave, he thanked the monsignor for his hospitality and begged him to thank his wife also for the excellent meal which she had, no doubt, prepared. The Italian churchman explained that he could have no wife: it was forbidden by his religion. "Alas," said the Gadhi, "you don't know what a pleasure you miss."

Muffin Note.—Someone wants to know whether the Bench has a tea-break in the House of Lords. Scriblex dislikes to plead ignorance of the law, as practised there, and takes refuge in a note by Ivor Brown in his *Chosen Words* (Jonathan Cape, 1955) that the late Lord Asquith of Bishopstone appealed for more muffins to ease the strain of the afternoon "and indeed of life itself". And why, he inquires, should not a Lord of Appeal do a little appealing as well as being appealed to. On being told that Britain lacked butter to make his desired confections and so to fill the tray of the old-time muffineer and set the hand-bell ringing in the street again, Asquith L.J. sought to know why crumpets should be able to defy that shortage. Crumpets, he did not like. To him they were nothing more nor less than "limp, lardaceous, pock-marked parodies of muffins." And speaking elsewhere in his book of the common use of the adverb "comfortably" to mean "easily", Ivor Brown makes reference to a particularly revolting murder trial in which a medical witness was recently giving evidence. The corpse had been sliced up for the purposes of concealment. The doctor laid down the proposition that "a human body could be cut up comfortably in about an hour".

More Light on Dark Corners.—In the course of an article in *Current Legal Problems*, 1955, Vol. 8 (Stevens and Sons, London) on the definition of "crime", Dr Glanville Williams, Quain Professor of Jurisprudence, says

> A crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding is criminal if it has certain characteristics which mark it as criminal.

Scriblex feels that if this definition were better known to the criminal classes, ignorance of law would never be pleaded as an excuse.

From My Notebook.—"Parliament has treated driving when disqualified as a very serious offence. It is one of the offences in the Road Traffic Act 1930, for which a sentence of imprisonment is to be passed unless the Court comes to the conclusion that, having regard to the special circumstances, a fine will be an adequate punishment. For instance, if a man met with a sudden emergency owing to his wife or child being ill and wanted to drive a car to get a doctor, those might be 'special circumstances'." Per Lord Goddard L.C.J. in *R.* v. *Phillips*, [1955] 3 All E.R. 273.

"It is not, in my opinion, in the public interest that workmen should assume that, whoever else may be called on to compensate the victims of their wrongdoing, they themselves will be immune. I say this for two reasons. First, it is not in accord with contemporary thought that any section of the public should be free from any liability to which the people as a whole are subject. Secondly, such freedom would tend still further to diminish that sense of responsibility which all should feel towards one another, but which can scarcely be regarded as an outstanding characteristic of modern life." Per Romer L.J. in *Romford Ice Co.* v. *Lister*, [1955] 3 All E.R. 460, 480.

PRACTICAL POINTS.

1. Company Law.—*Increase of Capital by Private Company—All New Shares may not be taken up by Existing Shareholders pro rata—Renunciation of Rights by Some Existing Shareholders—Procedure.*

QUESTION: I act for a private company with twenty-three shareholders scattered throughout New Zealand. The company has decided to increase its capital by £9,000, offering the new shares in the first instance to present shareholders at par in proportion to their present holdings and then offering any shares not taken up by the shareholders at a premium of 2s. per share. The premium, however, is to be the property not of the company but of the shareholders, who have in effect "renounced" their rights to the issue. A copy of the curiously-drawn resolution carried at the annual general meeting is attached. It is hoped to get the new capital paid to the company before Christmas.

The procedure as with a "one-man company" of having the members simply call and sign an appropriate minute in the minute book, and, simultaneously, a Memorandum of Subscription for Increased Capital is not practicable. Moreover, possible difficulties are raised by s. 299 of the Companies Act 1933. Article 34 of Table A authorizes the company to increase its capital by ordinary resolution, but s. 299 seems to envisage simultaneous completion of the Memorandum of Subscription for Increased Capital, whereas, in the present case, it could be some weeks after the passing of a resolution increasing capital before the Memorandum of Subscription for Increased Capital were completely executed, unless shareholders residing out of Wanganui executed the Memorandum by authorising an agent in Wanganui to sign on their behalf.

1. What do you suggest is the simplest way of giving effect to the increase in capital?

2. What do you suggest is the appropriate way to give effect to the curious premium proposal while guarding against the premium becoming the property of the company?

ANSWER: The simplest way is to treat the resolution which has already been passed as merely exploratory, and not as an actual increase of capital. A form of resolution for increasing capital is set out in *Morison's Company Law*, 2nd Ed., 916. As the question is merely one of procedure, it would be advisable to put the facts before the local Assistant Registrar of Companies, and obtain his approval of, and ruling as to, the correct procedure in the circumstances.

As the renunciation of rights to take up shares is probably liable to ad valorem stamp duty, the matter should also be discussed with the District Commissioner of Stamp Duties.

The procedure as to entry in minute book is permissive but not mandatory.

You appear to have adequately provided against the premium becoming the property of the company.

X.2.

2. Land Transfer.—*Land brought under Land Transfer Act 1952 by Virtue of Land Transfer (Compulsory Registration of Titles) Act 1924, in Name of Original Crown Grantee—Agreement for Sale and Purchase—How Legal Title may be vested in Trustees of Purchaser—Stamp-duty Procedure.*

QUESTION: We act for Trustees of E. A., a deceased client, who desire to obtain a Land Transfer title to a section of land for which a compulsory title has been issued but remains in the Land Transfer Office. We have in our possession the original Crown Grant, dated October 2, 1871, in the name of A.B., of , infant. This deed was found in our deceased client's deed box and attached to the document was the following unstamped letter:

November 29th, 1909

I, the undersigned hereby agree to sell to Mr. E. A. all my rights title and interest in Section Block Sumpter's Gully Township of Oamaru N.Z. for the sum of three pounds.

Maiden Name "A.B"

Married Name "A.S"

Post Office Nanango Queensland

The letter was not signed by E.A., and the only evidence we have of the acceptance and the payment of the consideration is the fact that E.A. had possession of the Crown Grant.

We have made inquiries at Nanango in Queensland and find that A.S. died at Manly (N.S.W.) on June 29, 1948. She had married twice and was survived by a son of her first marriage and by her husband W.S. of the second marriage. W.S. the husband of the second marriage died subsequently on January 6, 1951.

A.S. died intestate and had no assets in Australia, so no administration was taken out. Strangely enough, Australian agents have been unable to find any evidence of the marriage of A.S. with W.S. and it may be that they were never married.

We have prepared an application by the son of the first marriage of A.S. for a grant of Letters of Administration in New Zealand to an attorney, and we enclose copies of the documents for your perusal. It seems that administration would not be granted to the son unless we can prove that the second marriage of A.S. was not valid.

Would you please give us your opinion whether (*a*) The application for letters of administration would succeed? (*b*) What would the position be regarding Stamp Duty on the letter constituting the agreement for sale? (*c*) Would it be preferable to apply for a vesting order of the Supreme Court vesting the property in the trustees by virtue of the agreement for sale under s. 17 of the Trustee Act 1908? Unfortunately, with regard to an action under the latter section, we know that the son of the first marriage is living but we are unable to contact him at the present time.

ANSWER: In its entirety, this question is beyond the scope of Practical Points. One vital fact has been omitted—the fact of *possession* since 1909 to the present time. It is assumed that the Certificate of title is a limited one, and that E.A. and his trustees have been in possession since 1909. Answers to your questions seriatim:

(*a*) Beyond the scope of Practical Points. A question for conveyancing counsel. In any case, letters of administration appear unnecessary.

(*b*) The letter is liable to stamp duty of 1s. plus £5 penalty. In 1909 agreements for sale of land were not liable to ad valorem conveyance duty. But if the District Land Registrar issues a new title, he will probably assess it for conveyance duty under s. 85 of Stamp Duties Act 1954: *Adams: The Law of Stamp Duties in New Zealand*, 2nd Ed., 119.

(*c*) The correct procedure is to apply to the District Land Registrar for a new certificate of title in the names of the trustees of E.A. If the trustees have no power of sale, the District Land Registrar will probably require the consent of the beneficiaries. Application should be made under s. 200 of the Land Transfer Act 1952. If the District Land Registrar declines, there is a right of appeal to the Registrar-General of Land, and thence to the Supreme Court.

Alternatively, application could be made to the Supreme Court for orders under ss. 41 and 43 of the Trustee Act 1908: *In re Park*, (1907) 10 G.L.R. 111. The question would then be: what would constitute sufficient evidence to safisfy His Honour?

X.2.

INLAND REVENUE DEPARTMENT.

Whangarei Office.

Arrangements have been completed for the opening of a Duties Division of the Inland Revenue Department at Whangarei on Monday, February 13, 1956.

The address will be: Kia-Ora Buildings, James Street, Whangarei.

The postal address will be:

District Commissioner of Stamp Duties,

Private Bag,

Whangarei.

The Office will serve the Counties of Whangarei, Hobson, Bay of Islands, Hokianga, Mangonui, Otamatea and Whangaroa.