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FAMILY PROTECTION: SOME RECENT CASES.

IN our last issue, we considered some widows' claims under the Family Protection Act 1955 decided this year.

II.—CHILDREN'S CLAIMS.

In *In re Coutts (deceased)* (Auckland: March 29, 1956), the testator, who was eighty-seven at his death, left a widow (who was his second wife), a daughter, and two grandchildren (whose father was a son of the testator, who predeceased him). The testator's estate was valued at £23,633, approximately. By his will he bequeathed to his widow (who was 77 years of age) an immediate legacy of £250, his shares (valued at £157), a life interest in his furniture (valued at £450), and an annuity of £520 per annum charged upon his farm and stock which he bequeathed to his grandson, the son of his daughter. The widow, on his death, became owner of the dwellinghouse by the operation of the Joint Family Homes legislation. He gave his sole surviving daughter a legacy of £500, and he gave his grandson, her son, his farm and stock charged with the annuity payable to the widow; and he gave £500 to his granddaughter and £500 to his grandson. The residue of his estate (£1,600 approximately) he left to four charities equally. The daughter, the only surviving child of the testator, applied for further provision, and, by the same proceedings, the widow applied for further provisions.

The evidence showed that the daughter, by her assistance and work, had contributed in some material measure in the making of the testator's estate; but he had conferred on her no gifts in money or educational or other advantages, which would operate to reduce, let alone discharge, the claims of the plaintiff. The legacy and shares bequeathed by the testator to his widow, with her own moneys, amounted to over £1,100, and she had a free house (rates and insurance, £19 7s., maintenance £75 per annum), free use of furniture, and £10 a week, and universal superannuation. No order was made in her favour.

The plaintiff daughter was fifty-nine years of age, married, and possessed of no property in her own right other than her personal effects and jewellery. Her husband, a retired farmer in indifferent health and under constant medical attention, had assets worth £21,450, with an average annual income over recent years of £800. The learned Judge said that she had a legal right against her husband to be maintained in the station of life appropriate to the wife of a man worth £20,000 with an income of not less than £800 per annum. He added that what is "proper" maintenance had regard to all the relevant circumstances. His Honour went on to say:

> I am satisfied that the plaintiff by her assistance and work contributed in some material measure in the making of the testator's estate, and that the testator conferred upon her no gifts in money, or advantages—educational or otherwise—which would operate to reduce, let alone to discharge, the claims of the plaintiff.

After referring to *Mudford* v. *Mudford*, [1947] N.Z.L.R. 837, 845, 846, His Honour continued:

> Bearing in mind the fact that the estate left by the testator here is larger than was the estate in *Mudford's* case, and taking into consideration the fact that the plaintiff contributed in some measure to the building of the estate; and the further fact that here there is markedly less in the way of gifts, educational and other advantages conferred, I am of the opinion, first, that the plaintiff—notwithstanding the fact that she is married to a man in a good financial position, and is therefore not in any present need of maintenance—none the less in all the circumstances has a moral claim upon the testator for some moderate sum of money which she can use and spend as her own money; and, secondly, that her contribution to the building of the testator's estate, coupled with the denial of many advantages which were and are the common lot of a daughter of a man of comparatively poor means, enhances such claim to the point that I am forced to the conclusion that a wise and just father possessed of the estate which the testator possessed, and faced with the other claims upon his bounty which existed in this case, would have given his daughter a legacy of £1,000.
>
> I do not overlook the fact that the testator, in addition to giving the plaintiff £500, also gave her adult son a legacy of £500. This is no doubt a relevant fact, but a legacy to a grandson who has no claim under the Act is not a gift to a daughter who has.

In all the circumstances, the learned Judge held that the plaintiff had made out a claim to further provision to the extent of a further £500, in addition to the legacy of £500 given by the will, and an order in these terms was accordingly made.

The incidence of the payment of the additional £500 was made to fall as to £250 upon the bequest to the grandson, and as to £250 upon the residue given to the charities. The incidence of the order made as to costs fell on the residue given to the charities.

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In *In re Dennis (deceased)* (Auckland: May 2, 1956), the claimants were a daughter, Victoria, and a son, Claude, of the testator in respect of an estate of only £1,145. From the earliest material time, the testator farmed an area of poor quality and capable of producing only an insufficient income. As each of his children became capable of work, they assisted during adolescent years in contributing physical assistance and outside earnings to the maintenance of the home, each making approxi-

mately an equal contribution in effort and money. Little result was achieved in a financial sense. In 1944, a area of 168 acres was transferred to a son, Arthur. The remainder was sold for a net sum of £178 13s. 7d. Arthur sold his area for £119 12s. 6d.; and, less £35, he gave the proceeds to his father to help him in building a home. Arthur had worked on the farm without remuneration between the ages of twelve and seventeen ; and, thereafter, until he was twenty, he sent all his wages to his parents, save the cost of his clothes. In 1950, he left a position to go and live with his father, who was then 73 years of age, and to look after him. Another son, William, maintained contact with his father and gave help personally, and through members of the family, when help was required. The son Claude, a claimant for further relief, appeared to have had no association with his father and to have given no help from adolescence onward. The daughter, the other claimant, did not claim to have done anything more than to have frequently looked after her father when he visited Auckland. The bequest of a section to Arthur had been adeemed by the transfer of the section to him before the testator's death, and could not be made the subject of any order on the proceedings. The learned Judge said it was a meagre enough return for his years of devotion and the support he gave his father.

The testator left a section with a house upon it to his son, William (this was estimated to be worth £1,500), a motor-car to his daughter, Maude, and the residue of his estate to his son, Arthur. There was no residue. As regards William's devise, Mr Justice Finlay said :

> That leaves for consideration only the property, estimated to be worth £1,500, left to the elder son, William ; and the question arises what was the moral duty of the testator to the latter, having regard to the claims of the present two applicants. That a testator is entitled by his testamentary dispositions to give proper and reasonable recognition to the claims of a dutiful son who has stood by him through life and cared for him in his years of decrepitude as against children who have done nothing for him from adolescence seems to me unchallengeable, although some question of degree can, of course, arise.

As to the claimants: the son was able-bodied and was earning £850 a year, and the daughter Victoria's husband had net assets of £1,650 but was unlikely to work again, her only responsibility being a girl of twelve, and she could reasonably expect help from her adult children. No order was made in respect of either claimant.

* * *

In *In re Strong (deceased)* (Auckland: June 15, 1956), a daughter of the testator claimed further provision. The testator was twice married, and, by his first wife, he had two sons and two daughters. One son predeceased the testator, but left no children. The surviving son was forty-five years of age. He made no claim, and the plaintiff did not seek to impeach the bequests made to this son under the testator's will. The plaintiff was forty-four years of age, married, with one child, aged sixteen years. Her husband earned an income of approximately £800 per annum, owned the house in which he lived with his wife and daughter, owned a motor-car, and, jointly, with the plaintiff, owned a section of land and cottage at Rotorua. The plaintiff, in her own right, owned and operated a hiring business comprising £200 worth of stock, from which she derived £200 per annum net profit.

In early childhood, the plaintiff lived with her grandmother (the mother of the testator). She attended school until she was sixteen years of age, and married from her grandmother's home. The plaintiff, who was in poor health and required constant medical supervision, received nothing under the will of the testator, the net value of whose estate approximated £4,128.

By his will, the testator bequeathed certain assets to his son. The principal asset, however, was his dwellinghouse, and furniture, and contents, which was subject to a mortgage. The testator directed his trustees to hold his dwellinghouse and contents upon trust to permit his widow to occupy and use the same during her lifetime or until remarriage, she being responsible for the payment of outgoings and for necessary repairs and maintenance ; and, from and after her death or remarriage, to permit his other daughter to occupy and use the house, or to receive the rents from it, during her lifetime, she being responsible for the like outgoings, repairs, and maintenance ; and, after her death, in trust for her children in equal shares and proportions as and when they attain the age of twenty-one years. The residue of his estate the testator bequeathed to his widow.

It was conceded that the provision made for the widow could not be impeached, but it was claimed that the plaintiff had a claim under the Family Protection Act 1955, and that the provision made by the testator in favour of his other daughter should bear the incidence of any order that should be made in favour of the plaintiff. That daughter was married with three children. Her husband's position was comparable with the plaintiff's husband. She left school at the age of thirteen years in order to assist her brother and mother in carrying on the work of the testator's farm, which was ultimately abandoned.

Mr Justice Shorland said that the plaintiff had been disinherited in favour of her sister and her sister's children, and whilst the plaintiff was clearly not in need, and, indeed, possessed some income and means in her own right, she, nevertheless, was in precarious health, and had not, at any time, received anything from her father.

The evidence showed that the testator gave, as his reason for excluding the plaintiff from his will, the fact that she had received some money under her grandmother's will. The benefits received appear to have been a small amount of furniture and forgiveness of a mortgage for £300. This, no doubt, His Honour said, was a circumstance to be considered, and one which may well have justified the making of some discrimination between the sisters. He went on to hold that the plaintiff had established a breach of moral duty on the part of the testator, and that, in competition with her sister, she had some claim.

The property of which the widow was to have the use until death or remarriage (subject to payment of outgoings and repairs), and of which the plaintiff's sister was to have the use or the rents, subject to the same terms, for her life, after the death or remarriage of the widow, comprised three flats.

The learned Judge did not think that the circumstances required equality of provisions in favour of each daughter. He thought that, subject to making some provision for each daughter, the testator was, thereafter, free to please himself, and was entitled to leave the residue to his grandchildren, being the children of the plaintiff's sister, to the exclusion, if he was so minded, of his granddaughter, being the daughter of the plaintiff. His Honour considered that the provision which the plaintiff was entitled to receive was (from, and after the death or remarriage of the widow,

and during and limited to her lifetime) the right to occupy and use one of the flats, or to receive the rents from it, she being responsible for one-third of the rates, insurance premiums, interest payments, and repairs and maintenance, in respect of the whole building. An order in these terms was made, with liberty to apply reserved to the parties to enable them to have the Court determine which particular flat is to be appropriated to the order in favour of the plaintiff, in case the parties are unable to agree.

* * *

In *In re Meiklejohn (deceased)* (Wellington : June 19, 1956), the claim was by a daughter of the testatrix for an order in her favour under the Family Protection Act 1955.

In an oral judgment, Gresson J. said :

> In this case, as in all such cases, what has to be considered is the need of the applicant, and the moral claim. Sometimes, they co-exist. Here, they do not. In my opinion, there is really no need. She [the daughter] has capital assets of £6,500 ; she has an income of about £275 ; she has no one to support but the son, and the measure of support necessary in his case is, having regard to his age, slight ; so that, judged from the point of view of need, there is little, if any, need. Now for the moral claim. The estimation of the moral claim is more difficult. Where a daughter stays at home and looks after elderly parents, she has strong claim. In this case, for some years, the plaintiff did the equivalent of that—first in regard to work in her mother's flats, then in the managing of her mother's business affairs. That she elected, later, to pursue an independent life, does not negative some claim on her mother's consideration, and, in this case, that she is an only child reinforces that claim. What order should be made in her favour ? The testatrix's measure of her obligations seems to have been £1,250. She conjured up a non-existent debt of that amount and forgave it, and, in fact, conferred no benefit at all. It is difficult (these cases always are) to determine what order ought to be made. I think an award of £1,500 is one that I can properly make and that, in all circumstances of this case, I should make.

As to the incidence of that order, His Honour held that, as to £500, it is to be charged in reduction of the bequest to the testatrix's niece ; and, as to the balance of £1,000 upon the residue taken by the charities.

* * *

In *In re Pickens (deceased)* (Auckland : July 2, 1956), the net value of the estate left wholly by the testator to his wife was a little in excess of £6,000. The wife was his second wife, and by her he had five children, there being two children by his prior marriage. Shortly before the date of death the wife left the testator, contrary to his wishes, to take a position, said to be that of housekeeper to another man. In taking this position she left the children, and the question of the custody of the children was the subject-matter of litigation, in the course of which Mr and Mrs Miller, who were related to these children, were, on their application, given custody of the children in preference to their mother. The testator sought to revoke the will before his death, but his revocation, or purported revocation, had been held to be ineffective. The result was that the widow is the sole beneficiary under the testator's will.

The five children of the second marriage applied for further relief.

Shorland J., in an oral judgment, said that the widow in all the circumstances did not stand in the position that a widow normally does. The claims of the children were proper claims, and they had a proper right to take substantially from the widow. One boy was in an institution and his future was obscure. For him the sum of £1,000 was paid to the Public Trustee to be held by him as a trustee in a fund for his benefit to be applied in respect of income for his benefit so long as he is in the Institution, with power to the Public Trustee, if he thinks it proper so to do, to resort to capital ; and, if and when he is discharged from the Institution in which he is at present, with full powers to the Public Trustee to apply both income and capital as he thinks proper for his advancement and benefit until he attains the age of twenty-five years. Any surplus of the fund remaining at the time he attains twenty-five years is to be the subject-matter of a further Court order, leave being reserved in that connection to the parties to apply.

An order was made for £3,000 to be paid to the Public Trustee as a class fund for the maintenance, education, and benefit of the other four children. There was also an order, under s. 6 (4) of the Family Protection Act 1955, directing the sale of the whole of the assets of the estate as soon as might prove to be practicable.

* * *

In *In re Bodger (deceased)* (Christchurch: July 3, 1956), F. B. Adams J. had to consider the application of the only child of the testator, who was his daughter by his first marriage. The defendant was his fourth wife to whom he had been married for fourteen months. Three months before his death, he made a will under which she was the sole beneficiary. The net value of the testator's estate was about £8,500. The widow's independent assets probably equalled or exceeded £14,000. Her normal income was much in excess of £186, which was her income in a year in which special circumstances affected it. She was fifty-nine years of age. Even if she were to receive nothing from the testator's estate, it would not be long before she received the superannuation benefit under the Social Security Act 1938, and it seemed probable that she might expect to live the rest of her life in reasonable comfort and without resort to capital.

The daughter was not in good health, and her husband was a war-amputee since 1944. He was unfit for work and his only source of livelihood comprised his weekly war-pensions which represented little more than a bare subsistence for the family. The daughter had two children, aged respectively eight and six, the latter suffering from cerebral palsy and requiring constant attention and medical care. She had no assets.

The plaintiff was born after the separation of her parents. Her mother remarried when she was three and a half years old, and she grew up as a member of her stepfather's family and was known by his name until her own marriage. She did not hear of her father until she was sixteen, and did not meet him until December, 1950, shortly after her thirtieth birthday when he sought her out. This was their first meeting, and the daughter was then married with two children of her own. Afterwards, and until the testator's death, she and her husband were on friendly terms with him. Neither she nor her husband ever asked the testator for money, but he had made her two gifts, £10 and £5 respectively. The friendly association with the testator continued, such as it was, down to the testator's death.

The learned Judge reviewed the details of the unusual relationship existing between the daughter and her father to the end of his life, and continued :

> I find nothing in the circumstances so far discussed that should be regarded as depriving the daughter of any right she

might have under the statute, or even, so long as her claim does not come into competition with any better claim, as justifying the Court in treating her otherwise than would have been done if her relationship with her father had always been a normal one. She has not been guilty of unfilial conduct, and I think she responded to her father's friendly approach in the manner and to the extent that he desired. If one takes the view, which is more than reasonably open, that the father did not perform a father's duties to her in her infancy, or at time of her marriage (an occasion when a normal father might well have envisaged a duty to assist), or in the closing years when he was in contact with her and her family, such failure on his part cannot be regarded as relieving him of his testamentary duty or as reducing in any degree the provision which he ought to have made for her maintenance and support. The primary fact is that she was his daughter and his only child ; and, even if there had been no friendly intercourse in his closing years, it would still have been incumbent on him to consider her needs when making his will, and she would still have been entitled to advance a claim under the Act if he had failed to perform that duty. Her present claim does not rest on her association with the testator from 1950 onwards. It is in no sense a claim for a *quid pro quo* in respect of her acceptance of the testator as her father when he invited her to do so, and there is no question of merely rewarding her for a few visits, and no ground for measuring her right solely by what occurred in and after 1950. It is enough that she was his daughter ; and, if she needed help and he had the means to supply such help without infringing other testamentary duties, then she has a valid claim to the full extent of the provision he ought to have made. Had her relations with the testator been normal throughout her life, his duty would have been merely to provide for her needs to the extent that was appropriate in view of his means and of other claims on his bounty ; and this was exactly the duty that was incumbent on him in the circumstances of the case, and would have been so even if she had remained a stranger to him. I repeat, however, the qualification expressed in the opening sentence of this paragraph, to the effect that these remarks apply only on the supposition that the daughter's claim does not come into competition with any better claim. It may be that, as between competing claimants, the Court would have regard to such matter as I have been discussing. If, for instance, this testator had had other daughters who had been brought up normally as members of his family, it might well be that his testamentary duty owed to them would have exceeded his duty to an outcast daughter. But I am not dealing with such a case, and need express no opinion about it. Here the competition is between a daughter who knew the testator as her father only for a few short years at the close of his life, and a widow who was his wife only for 14 months at the end of his life.

I believe that, in what I have said above, I am only applying to this case of a daughter, unknown to the testator for the greater part of her life, the same principle as was applied to grandchildren by the Court of Appeal in *In re Wright, Willis* v. *Drinkwater*, [1954] N.Z.L.R. 630, 638, 639, (and adopted by the same Court in *In re Maxwell, Maxwell* v. *Maxwell*, [1954] N.Z.L.R. 720, 735, and in *In re Donghi, Petrowski* v. *Kingston*, [1954] N.Z.L.R. 1183, 1190) in declining to regard her claim as being in a different category from other claims, and applying the words of the Act with the same force in her case as in any other case, and in holding that, once the due measure of her claim has been ascertained by reference to all the relevant circumstances, it must be allowed without hesitation and on the scale that is appropriate in the circumstances. The relevant circumstances include, of course, the competing claim of the widow, and I am not suggesting that she has any sort of priority over the widow. But, so long as sufficient provision is made for the widow, the daughter is entitled, under the Act to adequate provision for her maintenance and support. In considering the scale on which provision should be made, I shall again guide myself by what was said in *In re Wright.*

Mr Justice F. B. Adams said that, reviewing all the circumstances, he saw no reason why the daughter's claim should be dealt with on a parsimonious basis or otherwise than as the claim of a daughter to whom her father owed a normal testamentary duty if other circumstances did not negative or qualify that duty. The learned Judge considered that the daughter's husband's physical state was at all times such that the risk of more or less permanent incapacitation which in fact ensued and was known to the testator before his death was one that the testator ought to have taken into account as affecting his testamentary duty to his daughter.

His Honour awarded the daughter one half of the net proceeds of the estate, on the same footing in all respects as if the will had given the whole estate to her and the widow in equal shares. (The widow's share would represent about £12 a day for the term of her brief marriage to the testator.)

The learned Judge concluded by saying that the award of one half of the estate to the daughter went no further than was necessary to discharge the duty owed by the testator under all the circumstances to make adequate provision for her proper maintenance and support. The purpose of the order, he added, was not merely to relieve the daughter from a life of penury, but to enable her to live in comfort and happiness to the degree that ought to have been envisaged by the testator as coming within his moral duty in providing for her.

* * *

In *In re K. (deceased)* (Wellington : July 27, 1956), the testator left a widow and two children, one the child of the marriage, a daughter aged eleven, and an illegitimate child, a boy aged three. The estate was under the value of £2,500. In an agreement for separation, the testator had covenanted to pay £78 a year maintenance in respect of his daughter until she should reach the age of eighteen (being a liability of the estate amounting to £717) and premiums on a policy of life insurance on the daughter's life, assigned to the widow and maturing in ten year's time (the liability of the estate in this respect being £141 5s.). The testator gave outright one third to his daughter, one third to the mother of his illegitimate son, and one third to a woman who later disclaimed any beneficial interest in the estate.

The widow and the illegitimate infant son claimed for relief.

The widow was not in any great necessity, having assets of £570 and an income of £555 as a school-teacher in England, and being entitled to a pension after another five years. The mother of the illegitimate child was necessitous, living with her parents, with total assets amounting to £107 in cash. She and her infant son were being kept by her parents.

Gresson J. treated the future maintenance of the daughter (£717) and the amount of the insurance policy payable to the widow on its maturity (£350) as part performance of the testator's obligations to his wife and daughter, and ordered the payment of the daughter's maintenance and of the insurance premiums to be paid out of the estate. Of the £1,500 left, he ordered a lump sum of £500 to be paid to the widow, and that the residue be held in trust as to one-third for the daughter and as to two-thirds for the son, with resort in each case to the powers conferred by ss. 4 and 5 of the Trustee Amendment Act 1946.

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To make the record complete, it should be mentioned that the following Family Protection cases have been reported this year : (Widow), *In re Wilson (deceased)*, [1956] N.Z.L.R. 373 ; (Widow and Children), *In re Crewe (deceased)*, [1956] N.Z.L.R. 315, C.A. ; (Children), *In re Harding (deceased)*, [1956] N.Z.L.R. 506, C.A. ; (Adopted Child), *In re Yarrell (deceased)*, [1956] N.Z.L.R. 739 ; (Grandchildren), *In re Partridge (deceased)*, [1956] N.Z.L.R. 265.

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Covenant to make Maintenance Payments to Divorced Wife—Wife adjudicated Bankrupt—Suspended Discharge—Whether Payments to be made to Bankrupt or Trustee in Bankruptcy—Bankruptcy Act 1914 (4 & 5 Geo. 5 c. 59), s. 51 (2). By a deed dated May 21, 1940, the applicant covenanted to pay to his divorced wife, the debtor, a monthly sum of £50 by way of maintenance during her life. In 1952, the debtor was adjudicated bankrupt and on April 29, 1955, she obtained her discharge subject to a suspension of two years. By an interpleader summons the applicant sought the direction of the Court how, as between the debtor and her trustee in bankruptcy, he should dispose of the monthly sum payable under the deed. *Held*, the monthly sum was payable to the debtor unless and until the Court, on the application of the trustee in bankruptcy, should make an order under s. 51 (2) of the Bankruptcy Act 1914 for the sum, or part of it, to be paid to the trustee, because the monthly sum payable under the deed was "income" within the meaning of s. 51 (2), and the subsection applied to such income whether the right to receive it had or had not become vested in the trustee under s. 18 (1) and s. 38 of the Act. (*Re Landau, Ex. parte Trustee*, [1934] Ch. 549, and *Ex parte Huggins, Re Huggins*, (1882) 21 Ch.D. 85, applied. Decision of Upjohn J., [1956] 1 All E.R. 425, affirmed.) *Re Tennant's Application*, [1956] 2 All E.R. 753 (C.A.)

Fraudulent Preference—Debtors Overdraft at his Bank repaid within Three Months of Bankruptcy—Dominant Motive of Debtor to retain Bank's Goodwill for carrying on His Business—Not Fraudulent Preference—Bank Manager without Knowledge of Debtor's Insolvency or Knowledge thereof Sufficient to put Him on Inquiry—Such Manager entitled to make Lodgments to Debtor's Account to secure Repayment of Overdraft—No Intention to prefer Bank—Bankruptcy Act 1908, s. 79 (1). A payment made to a bank in the hope that, if the debtor's overdraft was cleared, the bank would extend further overdraft accommodation, or if it was made because the debtor thought that it was necessary in order to retain the bank's goodwill so as not to imperil the continuation of the debtor's business, is not a fraudulent preference under s. 79 (1) of the Bankruptcy Act 1908. (*Re G. Stanley & Co., Ltd.*, [1925] Ch. 148, applied.) Within three months of the debtor's bankruptcy, certain lodgments made to his account with a bank had the effect of extinguishing an overdraft. Most of these lodgments were made by the debtor himself. Two of the amounts were lodged by the manager of the bank, who, with the debtor's authority, had personally collected them, and he also paid to the debtor's account an amount owing by himself for purchases from the debtor. A trading account and balance-sheet prepared by a Public Accountant was submitted to the manager of the bank about fifteen weeks before the bankruptcy. From these, the debtor appeared to be quite solvent, even if somewhat short of cash; and the manager believed the defendant "to be solvent with a substantial balance of assets over liabilities". Subsequently, the payments to the debtor's account in reduction of the overdraft were made. On a motion by the Official Assignee for an order that all such payments be deemed fraudulent and void as against him, in that they constituted a fraudulent preference under s. 79 (1) of the Bankruptcy Act 1908, *Held*, 1. That the governing motive of the debtor in lodging amounts to pay off his overdraft, in so far as there was a governing motive, appeared to have been to retain the goodwill of the bank in order to permit of his business being carried on; and that a payment made for that reason was not a fraudulent preference. 2. That, without knowledge on the part of the bank manager that the debtor was insolvent, or knowledge sufficient to put him on inquiry, the bank manager was entitled to do all that he did to secure the repayment of the overdraft; and, accordingly, the lodgments made by the manager to the debtor's account had not been proved to have been made with the intention of preferring the bank, and were, accordingly, not a fraudulent preference. (*In re Drabble Brothers*, [1930] 2 Ch. 211, distinguished.) *Re Aston (A Bankrupt), Ex parte Official Assignee.* (S.C. Wellington. June 27, 1956. Gresson J.)

CHARITY.

Cy-près Doctrine—Impossibility of determining Which of Two Claimants entitled—Gift to "Disabled Soldiers Sailors and Airmen's Association"—Association of that Name not in Existence—Claim by Two Charities caring for Disabled Ex-servicemen. By her will made in 1943, the testatrix, who died in 1947, gave the residue of her estate "upon trust for the Disabled Soldiers Sailors and Airmen's Association absolutely". There never was an association of that name. Two well known societies whose purpose was the care of disabled ex-servicemen contended that the testatrix meant one of them to the exclusion of the other. There was no relevant evidence to help in the determination which of the two the testatrix had intended. *Held*, it would be directed by way of scheme that, subject to the approval of the Attorney-General, the residue should be equally divided between the two institutions because it was clearly established that the testatrix's intention was to benefit disabled ex-servicemen, but it was impossible to determine which of the two claimants (who were the only possible claimants) she meant to benefit. (*Re Alchin's Trusts*, (1872) L.R. 14 Eq. 230, approved.) Appeal allowed. *Re Songest (deceased), Mayger* v. *Forces Help Society and Lord Roberts Workshops*, [1956] 2 All E.R. 765. (C.A.)

CONTRACT.

Performance of Existing Duty as Consideration. *100 Solicitors' Journal*, 410.

Quasi-contract—Right of County Council to recover from Third Party Wages and Allowances paid, under Statutory Obligation, to Police Officer during Illness caused by Third Party's Negligence—Sums not recoverable by Officer from Third Party. On November 17, 1952, N., a police constable serving in a county constabulary, was seriously injured owing to the negligence of the defendant. On December 21, 1952, he was certified as unfit for duty by the police surgeon and was away on sick leave until February 21, 1953, when he returned to work but was able to undertake only light duties. On July 3, 1954, he became totally unfit again, and as from December 31, 1954, he was compulsorily retired. N. received his full salary and allowances (including a house allowance in respect of the rent of his house) from December 21, 1952, until December 31, 1954, and after that date received a pension, to all of which he was entitled by virtue of statute. By virtue of the Local Government Act 1888, s. 30 (3) and the Police Act 1890, s. 33 and Sch. 3, the plaintiffs were legally bound to make and did make these payments. On February 16, 1956, N. recovered damages from the defendant for negligence. The damages did not include any sum in respect of loss of wages, as he had lost none, and in assessing the damages his right to a pension was taken into account. The plaintiffs sued the defendant for £751 18s., made up as follows: (i) the full pay and allowances (other than house allowance) paid to N. from December 21, 1952, to February 20, 1953, and from July 3, 1954, to December 31, 1954; (ii) half of the full pay received by N. between February 21, 1953, and July 3, 1954, when he was on light duties; (iii) house allowance for the periods when N. was on sick leave; (iv) half of the house allowance for the period when N. was on light duties; (v) the pension paid to N. from January 1, 1955, to February 16, 1956, the date on which N. obtained judgment against the defendant; and (vi) fees paid to the police surgeon in connection with N.'s disability. *Held*, The plaintiffs were not entitled to recover the £751 18s. from the defendant because (*a*) (as regards items (i) and (iii)) although there was a principle of law that where liability to pay the same sum rested on two persons one of whom was ultimately liable and the other of whom was legally compelled to pay the latter could recover the sum so paid from the person ultimately liable, yet in the present case the defendant had never been liable to pay N. these sums by way of damages for negligence so that the principle had no application. (*Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 3 All E.R. 696, considered, and dicta of Lord Wright M.R. (*ibid.*, 706) applied. *Metropolitan Police District Receiver* v. *Tatum*, [1948] 1 All E.R. 612, and *Metropolitan Police District Receiver* v. *Croydon Corporation*, [1956] 2 All E.R. 785, not followed.) (*b*) (as regards items (ii) (iv) and (v)) even if the principle had applied these items could not have been recoverable since the plaintiffs were not suing and were not entitled to sue in respect of loss of N.'s services and the defendant could not have been liable to N. for these amounts by way of damages for negligence; and (as regards item (vi)) the defendant had never been liable for these fees. *Monmouthshire County Council* v. *Smith*, [1956] 2 All E.R. 800. Monmouthshire Assizes.

CONVEYANCING.

Obstructive Covenants. *100 Solicitors' Journal*, 392.

CRIMINAL LAW.

Obtaining Credit by Fraud—Advance Payments for Services to be rendered—Whether obtaining Credit. The appellant was an

electrician. He obtained contracts from shopkeepers to erect or renovate electric signs at an agreed price and obtained payment of part of that price in advance. Apart from insignificant matters none of the work was carried out. None of the advance payments was returned. He was convicted on charges under s. 13 (1) of the Debtors Act 1869 that in incurring a debt or liability he had obtained credit by fraud. By virtue of s. 3 of the Act of 1869 and s. 150 (2) and s. 30 (8) of the Bankruptcy Act 1914, "liability" in s. 13 (1) of the Act of 1869 includes an obligation to pay money or money's worth. The appellant contended that he had not obtained credit, since his obligation, in return for the part payment, was not to pay money in the future but to do work. *Held*, Since by obtaining money in advance in return for a promise to give money's worth, viz., to render services, the appellant had obtained credit within s. 13 (1) of the Debtors Act 1869, viz., credit for the rendering of the services, and since he had obtained that credit by fraud, he was rightly convicted. *Per Curiam*, the present case was a clear case of fraud, but mere delay in paying a debt or doing work is not fraud. Appeal dismissed. *R.* v. *Ingram*, [1956] 2 All E.R. 639 (C.C.A.)

Practice—Bail—Accused on Remand before Depositions taken—Supreme Court's Inherent Jurisdiction to admit to Bail—Accused charged with Breaking and Entering Warehouse and Theft therefrom—Evidence on Affidavit before Court giving Details of Alleged Offence and Possession of Stolen Goods by Accused—Such Information comprising Evidence offered on the Charge—Bail refused. An accused person was charged with breaking and entering a warehouse and with theft therefrom. Upon remand, and before the taking of depositions, bail was refused by a Magistrate. On an application to the Supreme Court to set aside the Magistrate's decision, and, by virtue of its inherent jurisdiction, to admit the accused to bail, there was before the Court an affidavit stating the details of the breaking and entering a warehouse and listing goods stolen therefrom found in the accused's possession, and other stolen goods. *Held*, refusing bail, That the information contained in the affidavit regarding the goods stolen from the warehouse was evidence offered on the charge of breaking and entry, and the information regarding the other stolen goods was evidence relevant to the application for bail. *In re R.*, [1944] N.Z.L.R. 19, distinguished. *In re D.* (S.C. (In Chambers). Wellington. July 11, 1956. Barrowclough C.J.)

Wilful Damage. *100 Solicitors' Journal*, 407.

DAMAGES.

Measure of Damages—Loss of Earnings—Incidence of Income Tax—Wrongful Dismissal—Managing Director of Company—Relevance of Certain Factors in assessing Damages—Income Tax—Directors' Fees—Prospective Benefit under Retirement Pension Scheme. The plaintiff's service agreement as managing director and general manager of the defendants was terminated in circumstances which amounted to his wrongful dismissal and he sued the defendants for damages. The defendants admitted liability but contested the amount of the damages. The plaintiff was fifty-four years old and in good health. His service agreement had been for fifteen years from December 21, 1950, at a salary of £5,000 per annum, and in the event of his being prevented by ill health from performing his duties as managing director and general manager he was entitled under the agreement to serve the defendants as technical adviser at two-thirds of his salary as managing director. The plaintiff had been receiving director's fees of £578 per annum, but his service agreement gave him no contractual right to these. He was also a member of the defendants' retirement scheme, and, on his dismissal, had elected to have a life annuity thereunder. Although he conceded that the provision of this scheme regarding termination of employment applied in the circumstances, yet he contended that he had lost the amount which he would have to pay to insure such further benefits as he would have had if his service had continued, since all contributions to the insurers under the scheme were paid by the defendants. The plaintiff possessed investments having a value of £500,000 or more and had a gross income from investments of over £20,000 per annum. For many years he had been in the habit of covenanting to pay substantial portions of his gross income to relatives, thereby legitimately diminishing his taxable income. At the date of the hearing these covenants were for an aggregate of £4,900 per annum, but he intended to increase their amounts. The plaintiff also intended in the future to hand over substantial sums of capital to his children and it was possible that by investing in non-income-producing property he could dispose of further parts of his investments in such manner that liability to income tax would not be attracted. The plaintiff had also a prospective earned income of £1,000 per annum derived from two businesses in which, since his dismissal, he had invested money. The plaintiff's gross loss from April 5, 1956, after giving credit for £1,000 per annum earned income, amounted to £48,000 or, if director's fees from the defendants were excluded, £43,000, in which estimate no deduction was made for the possibility of ill health compelling the plaintiff to act only as technical adviser at the lower salary. If income tax (including surtax) were deducted, and assuming that the incidence of tax due to unearned income were not taken into account and that covenanted annual payments were discharged out of unearned income, this loss would be, it was estimated, £22,000. If the plaintiff's unearned income were taken into account, the plaintiff's loss, as computed by the defendants and having regard to liability to income tax and surtax on the whole of his income and prospective reduction of covenanted payments (thus increasing his liability to tax), would be about £4,650. *Held*, (i) In determining by what amount the gross damages should be reduced in view of the incidence of income tax (including surtax) at a rate appropriate not merely to the plaintiff's earned income but to the aggregate of his earned and investment income, regard would be had to the fact that the plaintiff was able and intended to dispose of his capital and income therefrom in such manner that his liability to income tax would be diminished. (Observations of Lord Goddard in *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796, 806, applied.) (ii) As the defendants were under no contractual obligation to the plaintiff by virtue of his service agreement to pay to him director's fees, the amount of prospective director's fees from April 6, 1956, onwards would not be taken into account in assessing the damages. (iii) No sum would be included in relation to any alleged loss of prospective benefit under the retirement scheme. (iv) In all the circumstances, the amount of the general damages should be £18,000. *Beach* v. *Reed Corrugated Cases, Ltd.*, [1956] 2 All E.R. 652 (Q.B.D.).

DIVORCE AND MATRIMONIAL CAUSES—ADULTERY.

Standard of Proof of Adultery—Divorce and Matrimonial Causes Act 1928, ss. 10 (a), *17 (1)* (c). It is not necessary to prove the direct fact of adultery, or an act of adultery in time and place. While adultery must be proved beyond reasonable doubt, the standard of proof is satisfied if the circumstances are such as would lead the guarded discretion of a reasonable and just man to the conclusion that adultery has been proved. The Court must be satisfied to the point of feeling sure that adultery has been committed. A very great probability may suffice, notwithstanding a remote possibility that adultery was not committed. What is required is a reasonable conclusion based on fair inferences which satisfy the mind of the Court that adultery has been committed. (*Loveden* v. *Loveden*, (1810) 2 Hag. Con. 1; 161 E.R. 648; *Preston-Jones* v. *Preston-Jones*, [1951] A.C. 391; [1951] 1 All E.R. 124, followed. *R.* v. *Summers*, [1952] 1 All E.R. 1059, applied. *McDonald* v. *McDonald*, [1952] N.Z.L.R. 924, referred to.) The judgment is reported on this point only. *Watkins* v. *Watkins*. (S.C. Christchurch. July 12, 1956. F. B. Adams J.)

FAMILY PROTECTION—ADOPTED CHILDREN.

Right of Adopted Child to apply under Family Protection Act 1955 preserved, though Adopted Children, as Such, not mentioned therein—Application filed before Passing of that Statute and heard afterwards—Application of Such Statute—Family Protection Act 1955, ss. 2 (2), 3 (b)*—Adoption Act 1955, ss. 16 (2)* (a), *(3)* (b)*—Statute—Saving Clause—Issue of Originating Summons before Repeal of Family Protection Act 1908 not "any thing . . . done" affecting rights under that Repealed Statute—Mere Right to apply for Relief existing at Date of Repealing Statute not Such a "right" as preserved by That Enactment—Acts Interpretation Act 1924, s. 20* (e)*—Family Protection Act 1955, s. 16 (2).* The provisions of s. 16 (2) (*a*) of the Adoption Act 1955 have the effect of making the adopted child and the adoptive parent child and parent for the purpose of the Family Protection Act 1955; and, consequently, it was not necessary, in order that the latter statute should relate to adoptive parents and adopted children, that they should be specifically mentioned therein. (Dictum of Lord Atkin in *Coventry Corporation* v. *Surrey County Council*, [1955] A.C. 199, 205, applied.) An originating summons seeking further provision from the estate of a deceased person under s. 33 of the Family Protection Act 1908 was filed on October 11, 1954. On October 26, 1955, that statute with its amendments was replaced by the Family Protection Act 1955. The summons came on for hearing on June 13, 1956. On the question as to the law then applicable, *Held*, 1. That the express terms of s. 2 (2) of the Family Protection Act 1955,

that it "shall apply in all cases whether the deceased person died before or after the commencement of this Act" require that it is to govern all cases whether commenced after the coming into operation of the Act or pending at the time the Act came into force; and that the present case was within that subsection. 2. That, by virtue of s. 16 (3) (*b*) of the Adoption Act 1955, the law determining the status of the plaintiff as an adopted child of the testator was "the law existing at the date on which the will [of the testator] took effect"—namely, s. 2 of the Statutes Amendment Act 1950 which was in force at the date of the testator's death. 3. That, accordingly, the plaintiff as the adopted child of the deceased was qualified to apply for further provision out of his estate as one of "the children of the deceased" by virtue of s. 3 (*b*) of the Family Protection Act 1955. 4. That the plaintiff's right to apply under the Family Protection Act 1908 was not a "right" within the meaning of that word in s. 20 (*e*) of the Acts Interpretation Act 1924, as the mere right existing at the date of a repealing statute to take advantage of provisions of the repealed statute was not such a right as was preserved. (*Abbott* v. *Minister for Lands*, [1895] A.C. 425, applied.) 5. That the express provision of s. 2 (2) of the Family Protection Act 1955 that it should "apply in all cases whether the deceased person died before or after the commencement of [that] Act" prevented the issue of an originating summons before the Act was passed being treated as "any thing whatsoever done" within the meaning of those words as used in s. 16 (2) of the Act; and, accordingly, the express inclusion of adopted children enacted by s. 15 of the Statutes Amendment Act 1947, which had been repealed at the date of the hearing of the originating summons, no longer operated. (*Hutchinson* v. *Jauncey*, [1950] 1 K.B. 574; [1950] 1 All E.R. 165, and *Jonas* v. *Rosenberg*, [1950] 2 K.B. 52; [1950] 1 All E.R. 296, applied. Dictum of Ostler J. in *Mathieson* v. *Hall*, [1929] N.Z.L.R. 333; [1928] G.L.R. 504, not applied.) *In re Yarrell (deceased), Dickinson* v. *Yarrell*. (S.C. Wellington. July 9, 1956. Gresson J.)

MASTER AND SERVANT—NEGLIGENCE.

Superior Servant with Authority to control and direct Inferior Servant in His Work—Former using Aeroplane (which He flew) on Company's Business with Latter accompanying Him—Travel by Aeroplane not authorized by or known to Company—Inferior Servant killed during Aeroplane Flight as result of Superior Servant's Negligence—Such Flight not Abstraction from General Scope of Superior Servant's Authority to Direct Inferior Servant's Work—Choice of Wrongful Mode of Transport in the Exercise of Such Authority not absolving Company from Liability in respect of Inferior Servant's Death. S. and W. were respectively the sales manager and a salesman employed by the defendant company. S., who was the immediate superior of W. and had authority to control and direct him in his work, instructed W. to accompany him to Oamaru. S. (who had a pilot's licence authorizing him to fly an aeroplane with one passenger) chartered an aeroplane for part of the journey, and flew the aeroplane himself. Such a means of transport had never before been used on behalf of the company, and it was plain, according to the evidence, that the company would not have authorized it. At Oamaru, W. transacted business for the company. On the return flight the aircraft crashed, and S. and W. were both killed. In the action against the company under the Deaths by Accident Compensation Act 1952 by W.'s widow on behalf of herself and her two infant children, the jury found: (i) S. was negligent in the management of the aircraft, and such negligence caused the death of W.; (ii) in undertaking the trip by aeroplane, S. was not acting within the scope of his employment; and (iii) W. undertook the journey on instructions from S. for the purpose of taking part in the transaction of business on behalf of the company. On motion by the plaintiff for judgment and motion by the company for judgment or nonsuit, *Held*, 1. That the act of S. in undertaking the flight, although unauthorized by the company, was so connected with the authorized acts—namely, the direction and control of W. in carrying out his duties, as to be a mode, although an improper mode, of carrying out the authority given. (*Century Insurance Co., Ltd.* v. *Northern Ireland Road and Transport Board*, [1942] A.C. 509; [1942] 1 All E.R. 491; and *Canadian Pacific Railway Co.* v. *Lockhart*, [1942] A.C. 591; [1942] 2 All E.R. 464, followed.) 2. That, on the flight, S.'s duty was to conduct himself so as not negligently to cause damage to an employee (or a third person), and, as such duty was not observed, the company was liable. (*Black* v. *Christchurch Finance Co., Ltd.*, (1893) N.Z.P.C.C., followed. *Century Insurance Co., Ltd.* v. *Northern Ireland Road and Transport Board*, [1942] A.C. 509; [1942] 1 All E.R. 491, and *Lloyd* v. *Grace, Smith & Co., Ltd.*, [1912] A.C. 716, applied.) *Wright* v. *John H. Stevenson, Ltd.* (S.C. Dunedin. May 23, 1956. Henry J.)

MENTAL DEFECTIVES.

Creditors—Jurisdiction—Time when Mental Defective's Property comes within Lunacy Jurisdiction of Supreme Court—Effect of Social Security Legislation on Availability of Mental Defective's Assets for Payment of Claims against His Property—Judicature Act 1908, s. 17—Mental Health Act 1911, ss. 7, 87, 88. The Supreme Court, in its lunacy jurisdiction, cannot interfere with the common-law or statutory rights of a judgment creditor over funds of a mental defective which have not been brought into possession of a committee. In each case, therefore, the inquiry must be whether or not the property concerned has on the relevant date come within the lunacy jurisdiction of the Supreme Court. The patient's property becomes subject to that jurisdiction on the making of a reception order followed by the lawful detention of the subject of the order and the giving of the prescribed notice to the Public Trustee under s. 87 of the Mental Health Act 1911. (*In re Brown, Llewellin* v. *Brown*, [1900] 1 Ch. 489, applied.) *Quaere*, Whether the Public Trustee's custodianship of the property of a mental patient begins immediately on the making of a reception order. It is not in every case that full and proper maintenance of a mental patient is assured by the Social Security legislation and that creditors are entitled as of right to enforce their debts satisfied out of his estate. Each case must be regarded on its own merits. (*In re A.*, [1954] N.Z.L.R. 1138, referred to.) *P.* v. *P.* (S.C. Wellington. July 6, 1956. Barrowclough C.J.)

NEGLIGENCE.

Licensee—Negligence—Licensor's Duty of Care—Whether any Distinction between duty to Licensee and Duty to Invitee—Defence—Volenti non fit injuria—Knowledge of Danger—Licensee walking on Railway Track—Injury owing to Train-driver's Negligence. The defendants owned and operated a narrow gauge railway some 2½ miles long which passed through a tunnel sixty-six yards in length. For many years local residents had habitually used the railway track as a pathway providing a short cut to a village, and the practice had been acquiesced in by the defendants. While walking through the tunnel the plaintiff was struck by a train and injured and she claimed damages. The Court found that the plaintiff was a licensee on the track and that the driver employed by the defendants was negligent, but that the plaintiff was guilty of contributory negligence. On appeal, *Held*, The plaintiff was entitled to damages because—(i) the defendants (whether they were invitors or licensors) were under a duty, in carrying out their operations, to take reasonable care not to injure anybody lawfully walking on the railway, and they had failed in that duty, and (ii) the defence of *volenti non fit injuria* was not available since, although the plaintiff in walking through the tunnel voluntarily took the risk of danger from the running of the railway in the usual way, she did not take the risk of negligence by the driver; but her knowledge of the danger was a factor in considering the plaintiff's contributory negligence. (*Hawkins* v. *Coulsdon & Purley Urban District Council*, [1954] 1 All E.R. 97, and *Dunster* v. *Abbott*, [1953] 2 All E.R. 1572, applied. *Dann* v. *Hamilton*, [1939] 1 All E.R. 59, approved.) Appeal dismissed. *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625 (C.A.)

PRICE CONTROL.

Specially Approved Price—Order purporting to operate retroactively—Price Tribunal not empowered by Statute or at Common Law to approve Selling-price to take Effect retrospectively—Control of Prices Act 1947, ss. 15 (6), 16. The Price Tribunal has no power under the Control of Prices Act 1947 to make a retroactive order in respect of specially approved selling prices to take effect before the date of approval. Furthermore, the Price Tribunal has no power at common law to make its order retroactive to the date on which the application for a specially approved price was first made, and thus by its order retrospectively create rights in favour of a party when those rights did not exist at the commencement of the proceedings. (*In re Keystone Knitting Mills' Trade Mark*, [1929] 1 Ch. 92, and *Co-operative Transport Association, Tauranga, Ltd.* v. *Tauranga Co-operative Dairy Association, Ltd.*, [1948] N.Z.L.R. 724; [1948] G.L.R. 263, distinguished.) Consequently, any such order as purports to make the authorized selling price retroactive is *ultra vires* the Price Tribunal, and is ineffective. *Taranaki Electric Power Board* v. *Stratford Borough*. (S.C. New Plymouth. July 11, 1956. Barrowclough C.J.)

SHIPPING AND SEAMEN.

Charterparty—War-risks Clause—Deviation and Discharge of Cargo by Order of a "Government"—Order of Authorities not recognized as a Government by United Kingdom Government

—Meaning of "Government" in War-risks Clause in Charterparty—Whether Non-recognition by United Kingdom Government conclusive that Administering Authority was not a Government. A vessel, of Italian registry and owned by an Italian subject, was chartered by a Czech company for a voyage from ports in North China to European ports. The proper law of the charterparty was English. The vessel sailed under the Italian flag. Under a war risks clause in the charterparty the vessel had liberty to comply with directions given "by the government of the nation under whose flag the vessel sails . . . or any other government . . . ", and delivery in accordance with such directions was a fulfilment of the contract voyage and freight was payable accordingly. At the time of the voyage in 1953 hostilities between the Republic of China and Nationalist China were taking place spasmodically. While on her voyage the vessel was intercepted by a warship of the Chinese nationalist forces and under direction of those authorities the vessel's cargo was discharged at a port in Formosa. The shipowner claimed freight calculated at the lowest of several different rates provided by the charterparty for discharge at different European ports. At all material times the Chinese nationalist forces were in control of Formosa. They were recognized by the Italian Government as the Government of China. At the material time, however, Her Majesty's Government (*a*) had ceased (as was stated by the Foreign Office in answer to inquiries made for the purposes of this case) to recognize the former Nationalist Government of China as being either the *de jure* or the *de facto* government of the Republic of China, and (*b*) did not recognize that any government was located in Formosa. The claim having been referred to arbitration the umpire found that those carrying on the administration of and in fact governing Formosa were a government and that the vessel had complied with the directions of a government within the war risks clause. The charterers contended that it was not permissible to go behind the statement of the Foreign Office, and that accordingly the directions given were not the directions of a government. *Held*, In determining the meaning of the words "any other government" in the war risks clause of the charterparty, which was a commercial document, the statement of the Foreign Office was not conclusive as the words were to be interpreted in the sense in which an ordinary commercial man would use them; the words referred to a national government, not a subservient authority (such as a municipal or provincial government), but were not limited to a government recognized to be such by Her Majesty's government, and in the circumstances, the shipowner was entitled to the freight which he claimed. (Dictum of Goddard J., in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co., Ltd.*, [1938] 3 All E.R. 80, 83, applied.) *Luigi Monta of Genoa* v. *Cechofracht Co., Ltd.*, [1956] 2 All E.R. 769 (Q.B.D.)

TRADE AND COMMERCE.

Licensing Restrictions and International Trade. *106 Law Journal*, 339.

TRUSTS AND TRUSTEES.

Discretionary Trusts, *100 Solicitors' Journal*, 411.

Variation of Trusts. *100 Solicitors' Journal*, 393.

VALUATION OF LAND.

Coal-mine—Unimproved Value—No Direct Evidence of Market Value—Use of "Hoskold" Formula of Valuation—Fixation of Fair and Reasonable Royalty—Principles to be applied—Coal-mines Act 1925, s. 16. On an objection by the Buller County, the Nelson Land Valuation Committee increased the unimproved values fixed upon a general revision of the District Valuation Roll for the Buller County, as at March 31, 1954, on the mineral portions of the assessments made by the Valuer-General relating to the lands mined by the State in the Buller District, and upon which the Crown had agreed to pay rates as if they had remained in private hands. The lands concerned were in the vicinity of Denniston, Stockton and Millerton and could be regarded, for the purpose of this appeal, as one mineral field. The County rated on unimproved value. On appeal by the Crown, *Held*, 1. That, as a means of assessing unimproved value, the use of a formula, in lieu of direct evidence of market value, is justified where there is no recognized "market", or where evidence of sales is non-existent or unreliable; and the value of a formula is to be judged by reference to the extent to which it may be relied on to give a result approximating to the market value of the property to be valued. 2. That the "Hoskold" formula of valuation of a coal mine has the authority of long usage, both in New Zealand and elsewhere, and is a reliable method if applied with proper judgment and discretion for assessing the value of a mine or coal-bearing land; and that, where the property is mined by the owner of the land and it is necessary to assess a notional royalty, and that formula is applied to assess unimproved value, profit-earning capacity is a relevant factor. 3. That evidence concerning royalties paid in the particular coal-mining district is admissible with a view to establishing a ruling rate of royalty, or of establishing limits within which a notional rate of royalty should be found. 4. That the notional royalty to be fixed for the purposes of the valuation should be a fair and reasonable royalty, having regard to all relevant circumstances; but it is not to be fixed by reference to s. 16 of the Coal Mines Act 1925, or by any other arbitrary method. 5. That the notional royalty should not be increased on account of a fall in the value of money or a rise in the price of coal, which have no necessary relationship to the royalty notionally payable in respect of the coal in any particular area; or because a welfare levy is imposed by the Coal Mines Amendment Act 1953. 6. That the evidence fell short of establishing in this case that there was a ruling rate of royalty. 7. That the evidence was not such as to warrant that the notional royalty should be more than 1s. per ton; and that, as this was the basis of valuation adopted by the Valuer-General in assessing the value of the coal in the State's Buller mines, and it was acceptable to the Crown, the appeal should be allowed and the original valuation restored. *The Queen* v. *Buller County and Valuer-General.* (Land Valuation Court. Nelson. June 25, 1956. Archer J.)

VENDOR AND PURCHASER.

Land Settlement Promotion—Purchaser, paying Moneys under Sale-and-Purchase Agreement, refusing to join in Application for Consent and repudiating Agreement on Ground of Its Illegality—Moneys so paid not recoverable by Him—"Application"—Land Settlement Promotion Act 1952, s. 25 (1) (a). The "application" for the Land Valuation Court's consent to a transaction required by s. 25 (1) (*a*) of the Land Settlement Promotion Act 1952, to be lodged within one month from the making of the contract, means an effective application concurred in by both parties on which the Court can either give or refuse its consent. An intending purchaser of land, who has executed an agreement for sale and purchase and paid moneys thereunder, and who has refused to join in and complete an application for the consent of the Land Valuation Court to the sale and has then repudiated the contract on account of its illegality, cannot recover the moneys paid under the prohibited and unlawful contract. (*George* v. *Greater Adelaide Land Development Co., Ltd.*, (1929) 43 C.L.R. 91, followed.) *Leys* v. *Money.* (S.C. Auckland. July 10, 1956. Stanton J.)

WILL.

Devises and Bequests—Direction to Trustees to pay Income of Residuary Estate to Son for Life or "until sooner termination of his present marriage"—Capital to be paid to Son if Marriage terminated during Son's Life—If Marriage subsisting at Son's Death, Residuary Estate to be given to Named Persons—Such Condition and Limitation valid. The testator, by his will, directed his trustees to stand possessed of and to invest the residuary trust funds and, subject to a life interest to his wife during her widowhood, he directed his trustees "to pay the income arising therefrom to my said son . . . during his life or until the sooner termination of his present marriage and if my said son's present marriage shall terminate during my son's life then upon trust thereafter as to both capital and income for my said son absolutely and if on the other hand my said son's present marriage shall continue up to the date of his death then upon his death the residuary trust funds shall go and be paid both as to capital and income to [named persons]". On originating summons to determine whether the provisions relating to the duration of the son's marriage were valid, *Held*, 1. That a valid condition was created by the words "and if my son's present marriage shall terminate during my son's life". 2. That a valid limitation was created by the words "or until the sooner termination of his present marriage". (*Ramsay* v. *Trustees, Executors and Agency Co., Ltd.*, (1948) 77 C.L.R. 321, followed. *In re Caborne, Hodge* v. *Smith*, [1943] Ch. 224; [[1943] 2 All E.R. 7, not followed. *Wacker* v. *Bullock*, [1935] N.Z.L.R. 838; [1935] G.L.R. 706, discussed.) *Griffiths* v. *Gifford and Others.* (S.C. Napier. June 20, 1956. Turner J.)

THE SUPREME TRIBUNAL OF THE BRITISH COMMONWEALTH?

The words set out above have been used to designate the House of Lords by the New Zealand Court of Appeal in *Smith* v. *Wellington Woollen Co.* (1956), [1] a judgment open to the construction that a single Division has held that the Court is absolutely bound to decline to follow a previous decision of its own which is in conflict with a subsequent decision of the House, even although in reaching the subsequent decision their Lordships erroneously assumed that there was no decision in the appellate courts of the other Commonwealth countries on the matter. The designation cannot have been intended to be understood in a literal sense, for the House of Lords has no jurisdiction over courts not within the United Kingdom. Its accuracy in another sense has been loyally defended, in advance of attack, by the Editor of this JOURNAL, on the ground [2] that Professor Davis has shown that the House of Lords is the highest tribunal having authority to lay down a principle of English law.[3]

The last proposition may be correct; but it is hardly decisive. The crucial question is whether, except when there are material differences in statute law, the common law of New Zealand is always to adopt every development that occurs from time to time in the common law of England, as laid down by the House of Lords, provided only that it can be applied to the circumstances of this country. Undoubtedly the New Zealand courts are entitled to hold that, as a matter of judicial practice, such is to be the rule at any given period. But a decision on the point is ultimately one of policy and should surely not be reached until the opposing considerations have been carefully weighed.

INCONCLUSIVE PRECEDENTS

That course is not taken in the judgment in *Smith's* case. Instead the judgment is based on four earlier cases. The first of these is *Robins* v. *National Trust Co.* (1927),[4] an appeal from the Supreme Court of a Canadian Province, in which Lord Dunedin, delivering the judgment of the Judicial Committee, said that a Colonial Court which is bound by English law is bound to follow the House of Lords. The Court of Appeal describes this observation as "direct and compelling authority". In fact, as is pointed out by Lord Wright in (1943) 8 Camb. L.J. 135, the observation was obiter, since the question did not arise in that case. (Lord Wright adds: "I feel great difficulty in accepting the view that the Privy Council is bound by a decision of the House of Lords on English law.") Moreover, even assuming that Lord Dunedin meant his observation to apply to the highest court in a self-governing Dominion, there has been a great evolution in Commonwealth constitutional relations since 1927, including such landmarks as the Statute of Westminster 1931 and the Declaration of London 1949. The latter Declaration, made on the occasion of India's determination to become a republic but to remain within the Commonwealth, describes the Commonwealth countries as "free and equal members of the Commonwealth of Nations". At the present day it seems doubtful whether the Judicial Committee would force the highest court in one member state to follow the highest court in another member state at all costs, notwithstanding that the court appealed from preferred to adopt a less coercive rule. Cf. *Attorney-General for Ontario* v. *Attorney-General for Canada* (1947).[5]

The second case relied upon by the Court of Appeal is *R.* v. *Seaton* (1933),[6] where, however, Myers C.J. expressly stated:

> It is not disputed that the law on the subject, unless there is some statutory enactment in New Zealand altering the position, is necessarily the same in New Zealand as it is in England . . . . [7]

In any event, almost a quarter of a century has elapsed since *Seaton's* case.

The third case is *Piro* v. *Foster* (1943) [8] which, as a decision of the High Court on Australian practice, must carry weight in settling New Zealand practice, although it cannot be conclusive. Latham C.J., to whose judgment the Court of Appeal specifically refers, there said that, although the High Court is not technically bound by the House of Lords,

> In my opinion it should now be formally decided that it will be a wise general rule of practice that in cases of clear conflict between a decision of the House of Lords and of the High Court, this Court and other courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle.[9]

Both in this passage and earlier in his judgment Latham C.J. uses the expression "general rule". He does not say that the rule is to be without any exception.

Finally the Court of Appeal professes to follow *In re Rayner* (1947), [10] where a majority of both Divisions of the Court sitting together held, as is stated in the headnote:

> The Court of Appeal is free to overrule a judgment of that Court which is contrary to the current of New Zealand authority theretofore existing, or which, though not expressly overruled, is, in principle, in conflict with a decision of the House of Lords . . . or inconsistent with a judgment of the High Court of Australia.

It will be noticed that the decision was that the Court was free to overrule a previous judgment in the circumstances mentioned, not that it was bound to do so.

The authorities cited by the Court of Appeal thus fall short of establishing an inflexible rule that the New Zealand courts of the present day should submit unreservedly to the authority of the House of Lords on all matters of principle. Unfortunately the attention of the Court was not drawn to *Kerr* v. *Kerr* (1952).[11] In that case a majority of the Manitoba Court of Appeal held that they were not bound by English decisions, and declined to follow, not only certain decisions of English courts other than the House of Lords, but also observations made by members of the House in *Preston-Jones* v. *Preston-Jones* (1950).[12] Since the

[1] [1956] N.Z.L.R. 491, 500.
[2] *Ante*, p. 115.
[3] (1955) 31 N.Z.L.J. 42.
[4] [1927] A.C. 515, 519.
[5] [1947] A.C. 127, 153, 154; [1947] 1 All E.R. 137, 145.
[6] [1933] N.Z.L.R. 548; [1933] G.L.R. 451.
[7] *Ibid.*, 557; 453.
[8] (1943) 68 C.L.R. 313.
[9] *Ibid.*, 320.
[10] [1948] N.Z.L.R. 455.
[11] [1952] 4 D.L.R. 578.
[12] [1951] A.C. 391; [1951] 1 All E.R. 124.

majority described these observations as obiter, however, the precise scope of the Manitoba decision may be uncertain.

Unsatisfactory House of Lords Decisions

A rule of absolute submission to the House of Lords is not necessary to justify the actual decision of the Court of Appeal in *Smith's* case. The issue upon which conflict had arisen between an earlier decision of the Court and a decision of the House of Lords—whether, in assessing damages for loss of earnings in an action for personal injuries, an allowance should be made for the plaintiff's tax liability—is not of major importance. Lord Keith's dissenting speech in the House shows that each of the alternative solutions of the issue open to the courts gives rise to anomalies; and, as has already been indicated in this JOURNAL,[13] perhaps only legislation could produce a completely logical solution. Even if the Court of Appeal remained unconvinced that the solution previously adopted in New Zealand was wrong, the issue might well be thought not to be of such moment as to call for an election to differ from the House of Lords. It can hardly be necessary to say that the House of Lords naturally commands the greatest respect in New Zealand, and that, if the Court of Appeal were to reserve a liberty to differ from decisions of the House, the occasions when that liberty would be exercised might be expected to be rare indeed. As Sir Owen Dixon has said of Australian practice, in an address at Yale University: [13a]

> We are guided now, although not governed, by the authority of the decisions given by the courts in London. If our conceptions of the principles of the common law or of the doctrines of equity constrain us to depart from a modern English precedent of authority, it is done with reluctance and regret. For we set a certain value on consistency of decision in the British Commonwealth and upon preserving the unity and uniformity of the common law.

Moreover, Lord Wright discloses in the article already cited that, "The instinct of inertia is as potent in judges as in other people."[13b]

But occasionally the House has arrived at decisions, upon matters of much greater importance than the taxation question involved in *Smith's* case, which are regarded by the weight of professional and academic opinion in England itself as manifestly unsatisfactory or inconsistent with highly valued principles of the common law. Three recent instances may be mentioned.

In *London Graving Dock Co.* v. *Horton* (1951) [14] a bare majority of their Lordships, reversing a unanimous decision of the English Court of Appeal, held that knowledge of an unusual danger on the part of an invitee who had been injured thereby was an absolute bar to an action against his invitor, even although the plaintiff had not freely and voluntarily accepted the risk. The strong and representative Law Reform Committee appointed by the Lord Chancellor share the general view that this decision worked injustice [15] and it is interesting to note that it has not been followed by the Supreme Court of the Irish Republic, where House of Lords decisions are of merely persuasive authority: see 72 L.Q.R. 34.

Again, in *Duncan* v. *Cammell Laird and Co.* (1942) [16] it was held that an objection in a civil case by a Minister of the Crown to the production of a document, on the ground that it would be injurious to the public interest, is conclusive, and the court should not require to see the document, even (semble) although national security is admittedly not involved. The latter point was not directly before the House and the true interpretation of the decision may be uncertain in some respects; but, if applicable to every such objection in all circumstances, it is widely regarded as discreditable to English administrative law. The House of Lords itself has now decided that the relevant principles of Scottish law are less favourable to the Executive: *Glasgow Corporation* v. *Central Land Board* (1956);[16a] and the same appears to be true of the principles applied in the United States and France.[16b]

The latest example of the lack of firmness which has characterized some House of Lords decisions in administrative law is *Smith* v. *East Elloe Rural District Council* (1956),[17] a case turning on a statutory provision excluding the right to question in legal proceedings compulsory purchase orders obtained by local authorities. Against the dissent of a Scottish colleague and a common-law colleague, three Chancery Law Lords have held this provision to apply even to an order procured by bad faith, fraud or corruption. Comment upon the case in legal journals is not yet available in New Zealand; but in *The Spectator* of April 20, 1956—an English review which can scarcely be described as either irresponsible or radical—the decision is described as "deplorable" and as one of "the more extraordinary decisions of the House of Lords acting in its judicial capacity". A majority of the New Zealand Court of Appeal recently reaffirmed the canon of construction that general words in an Act need not be read so as to abrogate fundamental principles: *Commissioner of Inland Revenue* v. *West-Walker* (1953).[18] A majority of the House of Lords has now adopted quite a different approach.

The *East Elloe* case differs from the two examples given earlier inasmuch as it involved statutory interpretation. In *Cooray* v. *The Queen* (1953) [19] the Judicial Committee held that, if the legislature of another Commonwealth country copies an English statute, both the courts of that country and the English courts should follow any construction of the statutory language that has been adopted in a long-established decision, or a series of decisions, in England. The wisdom of this precept (which does not depend on any conception of the status of the House of Lords) is plain when, as appears to have been the position in *Cooray's* case, the relevant English decisions have preceded the enactment of the legislation in the other Commonwealth country. Whether the rule should be inexorable when the chronological sequence is reversed is a less easy question.

Each of the three decisions mentioned as examples can, of course, be defended. But it is to be hoped that the Court of Appeal in *Smith's* case did not intend

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[13] *Ante*, p. 52.

[13a] (1956) 29 Aus. L.J. 468. At p. 473 he remarks that "so far" Australian courts have acknowledged decisions of the House of Lords as final and imperative authority.

[13b] 8 Camb. L.J. 144.

[14] [1951] A.C. 737; [1951] 2 All E.R. 1.

[15] Third Report (Cmd. 9305), para. 77.

[16] [1942] A.C. 624; [1942] 1 All E.R. 587.

[16a] [1956] S.L.T. 41. See further 106 L.Jo. 369-370, 221 L.T.Jo. 308.

[16b] See Professor Street's article, State Secrets—A Comparative Study, in (1951) 14 Mod. L.R. 121; cf. 71 L.Q.R. 335.

[17] [1956] 1 All E.R. 855; [1956] 2 W.L.R. 888.

[18] [1954] N.Z.L.R. 191.

[19] [1953] A.C. 407, 419.

to lay down that the correctness of decisions of this kind is not even open to debate in the New Zealand courts. Perhaps it is unlikely that *Smith's* case was meant to go so far ; since, if it was, the criticism would be open that, in a case evidently not of any special urgency, a Court consisting of only three of the twelve members of the Court of Appeal had sought, in a short passage in its judgment, to dispose of a question calling for a joint sitting of both Divisions.

Certainty and Uniformity

The purpose of this note is not to embark upon a full discussion of the question of the authority which should be accorded to House of Lords decisions in New Zealand, still less to advocate a concluded view as to the desirable solution. It is simply designed to indicate that the question exists, and to refer to some of the considerations that must be taken into account when a solution is attempted.

Without doubt the main arguments in favour of treating House of Lords decisions as absolutely binding precedents are the advantages of certainty and uniformity in the law. It is a commonplace, however, that the quest for certainty, whether or not it be regarded as a chimera, is more important in some branches of law than in others : the number of occupiers and invitees who regulate their conduct with careful regard to the speeches of the majority in *Horton's* case, and who bear in mind at the same time the explanation of that case given by Denning L.J. in *Greene* v. *Chelsea Borough Council* (1954),[20] may not be large. Moreover, it is arguable that a rule that the New Zealand Court of Appeal is absolutely bound by the House of Lords would not be appreciably more conducive to certainty than any feasible alternative rule. If the relevant decision of the House seems to be unsatisfactory or in conflict with other decisions, litigation is apt to be necessary in order to settle whether the case in hand is not distinguishable. The nature of the difficulties that may arise is well illustrated by the differences of opinion between various Australian State courts upon whether decisions of the House of Lords and the High Court of Australia are in conflict as to the standard of proof of adultery in divorce suits : see *Hobson* v. *Hobson* (1952) [21] and the cases there collected. In this connection it is to be noted that the Court of Appeal in *Smith's* case does not discuss the duty of a Judge at first instance when faced with the contention that a House of Lords decision conflicts with a decision of the New Zealand Court of Appeal. Hutchison J., the trial Judge in *Smith's* case, held himself bound to follow the New Zealand decision until the Court of Appeal should decide to abandon it. With respect, there is much to be said for this ruling ; but, since it is not altogether in accord with Australian practice as laid down in *Piro* v. *Foster* (*supra*), which the Court of Appeal invoked in support of its decision, whether the Court of Appeal regarded the ruling as correct is not clear.

The more realistic and weighty argument is perhaps that based on the desirability of uniformity in the laws of those Commonwealth countries whose common law was originally derived from the common law of England. But, if advanced as a completely decisive consideration, this argument would lose some weight by reason of the tendency of the English legal profession to overlook case law in other parts of the Commonwealth. Probably the fault should be laid at the door of counsel rather than the courts ; for the English courts adhere in the main to the conception that it is their function to adjudicate on the opposing contentions of the parties (see, for instance, a note by Lord Asquith in 69 L.Q.R. 317) ; [22] whereas the New Zealand courts apparently do not hesitate to decide cases on authorities or arguments not cited by or put to counsel.

An Alternative to Unquestioning Compliance

The alternative to a rule of practice that House of Lords decisions are to be deemed absolutely binding might be a rule that great weight should be attached to such decisions and to the importance of uniformity, but that in exceptional cases these considerations may be subordinated to the overriding desirability of achieving a more just result. A strong argument in favour of such a rule is that the New Zealand courts could thereby obtain the maximum advantage from overseas experience. If a decision of the House is thought to be wrong by the English lawyers most familiar with the subject, should the New Zealand Court of Appeal reject the opportunity of profiting from their criticism ? Similarly, if the opinion of a great Commonwealth or American judge—an Atkin, a Dixon, a Salmond, or a Cardozo—happened to differ from the opinion of a chance majority of the House of Lords, it might not be easy to justify a rule entirely precluding the New Zealand courts from any attempt to determine which was the better view.

The doctrine of the absolutely binding single precedent is one of the most curious and controversial features of the English common law. Many lawyers think that the tendency should be to restrict rather than to extend it. Further, the conclusion usually reached by commentators who try to form a comprehensive view of the New Zealand legal system is that (to adopt the words of Dr Robson in his preface to the New Zealand volume in Messrs Stevens and Sons' series on Commonwealth Laws and Constitutions) it is in legislation rather than judicial creativeness that this country has contributed to legal development. It may be that the New Zealand courts are satisfied that, in general, conservatism remains their wisest course. To state, however, that the House of Lords is followed because it is the supreme tribunal of the British Commonwealth is to suggest that this course is dictated by logical deduction from a principle that is beyond dispute ; whereas, in truth, the House is supreme beyond the United Kingdom only if other Commonwealth[23] courts elect as a matter of policy to comply with its decisions. And, however prudent a policy of general compliance may be, what justification is there for utter submission ?

Against these arguments it may be said that the hard-worked New Zealand Judges, who are expected to be proficient in all branches of the law, have not time for the deliberation and reading necessary in the anxious task of forming an opinion on the merits of a decision of the House of Lords. Certainly the New Zealand judicial system is at present defective in this

[20] [1954] 2 Q.B. 127 ; [1954] 2 All E.R. 318.
[21] [1953] V.L.R. 186.
[22] Cf. *Esso Petroleum Co.* v. *Southport Corporation*, [1956] A.C. 218, 242 ; [1955] 3 All E.R. 864, 872 ; *Bolton* v. *Stone*, [1951] A.C. 850, 860, 868 ; [1951] 1 All E.R. 1078, 1082, 1086-7.
[23] This discussion is not concerned with Colonial courts. Their position is considered by Dr T. O. Elias in an article in (1955) 18 Mod. L.R. 356.

respect. But it may not always remain so. Indeed, the very possibility of some alteration in the system would suggest that the present may not be an appropriate time for the Court of Appeal to attempt definitely to resolve the issue touched on in this note. No decision upon an issue so bound up with constitutional growth can be permanent. Nevertheless, any decision upon it must be an important event in New Zealand legal development; and, when a decision is made, let us hope that the fundamental considerations will be fully and candidly examined.

R. B. COOKE.

THE NEW COMPANIES ACT 1955.

Introductory.

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

As I was a member of the Company Law Revision Committee which was set up by the Government in 1950, the learned Editor has asked me to write a series of articles on the new Companies Act 1955 which will come into force on the first day of January, 1957.

COMPANY LAW REVISION COMMITTEE (N.Z.).

This committee was a most representative one, and consisted of the following persons:

Mr H. D. C. Adams, C.M.G., Law Draftsman (Chairman);

Messrs H. E. Anderson and F. C. Spratt, representing the New Zealand Law Socicty;

Mr Andrew Hamilton, representing the Stock Exchange Association of New Zealand;

Mr D. A. F. Crombie, representing the New Zealand Society of Accountants;

Mr W. G. Rodger, representing the New Zealand Institute of Secretaries and the New Zealand Branch of the Chartered Institute of Secretaries;

Mr J. T. Martin, representing the Associated Chambers of Commerce; and Mr E. C. Adams, (then) Registrar of Companies, the writer of this series of articles.

This Company Law Revision Committee sat for two years, and held over fifty meetings, and finally recommended the Bill which was introduced into the House of Representatives in 1952 and sponsored by the Hon. Mr Bowden, then Associate Minister of Finance.

During the course of its sittings, the Company Law Revision Committee, in addition to a careful consideration of the Cohen Report, received and considered many written submissions, and carefully compared the existing Companies Act 1933 (N.Z.) and its amendments, with the provisions of the Companies Act 1948 (U.K.), which was a consolidation of the previously-existing provisions and the Companies Amendment Act 1947 (U.K.), the later amending Act consisting mainly of provisions designed to carry out most of the reforms in company law recommended by the Cohen Committee.

THE COHEN REPORT.

As is only to be expected the recommendations of the Cohen Committee loomed large: this committee sat in England from 1943 to 1945. It may be of interest to New Zealand practitioners to learn that a very able committee after the publication of the Cohen Report was set up in Ceylon, and this committee recommended the introduction into the enacted law of Ceylon of most of the reforms recommended by the Cohen Committee.

Now what did the Cohen Report recommend? As the Report of that committee points out, in the last hundred years or so there has been a great re-distribution of wealth; and, whereas in the early days of joint-stock companies, investors were usually people of wealth, to-day many small investors have holdings in companies, and there is a likelihood of a further diminution in the size of the average shareholding. Small shareholders seldom take a close interest in the company, and

> the growth of investment companies and of unit trusts has tended to divorce the investor still further from the management of his investments.

Although the directors usually use their powers to the advantage of the shareholders, there have been exceptional cases in which directors have abused their position. It should be made difficult for directors to secure the hurried passage of controversial measures.

RECOMMENDATIONS OF COHEN REPORT.

The Cohen Committee, after stating its opinion that the great majority of limited companies are honestly and conscientiously managed, that they have been beneficial to the trade and industry of the country and essential to the prosperity of the nation as a whole, enumerates the general lines of policy for the future in order to prevent abuses:

(1) The fullest practicable disclosure of information concerning the activities of companies will lessen opportunities for abuse and accord with awakening social cconsciousness.

(2) Accordingly, as much information as is reasonably required should be made available both to the shareholders and the creditors of the company concerned and the general public.

(3) Shareholders should be enabled to exercise a more effective control than hitherto over the management of their companies.

(4) Observance of the requirements of the Companies Act should be vigorously enforced.

(5) Where companies are improperly or dishonestly conducted, their affairs should be investigated and the offenders prosecuted.

(6) In order to give minority shareholders a greater protection than that afforded by a compulsory winding-up, the Court should have power to impose upon the parties to a dispute whatever settlement the Court thinks just and equitable.

(7) More particulars should be supplied in a prospectus or in a statement in lieu of a prospectus, in particular as to disclosure in previous transactions in property of the company, the dis-

closure of material contracts and the reports of experts.

(8) More information should be supplied as to the relationship between holding and subsidiary companies.

(9) The powers of auditors should be increased.

(10) Accounts and balance-sheets and profit-and-loss accounts should be more detailed—e.g. valuation of fixed assets and disclosure of hidden profits and secret reserves.

But it is interesting to note that the Cohen Committee thought that undisclosed reserves were necessary for banking companies, discount companies, and assurance companies.

Recommendations of Company Law Revision Committee.

That was the background which the New Zealand Company Law Revision Committee had to consider when it started its deliberations in 1950. As previously stated in this article, that Committee also considered many written submissions; and some who sent in these submissions had obviously studied very carefully the Cohen Report. The Committee was faced with this problem: although in the main our statutory company law had always followed the United Kingdom, there were several important differences between the two systems. And therefore, although it can be truly said that the general aim of the Company Law Revision Committee was to adhere as closely as possible to the form and arrangement of the Companies Act 1948 (U.K.), in order to secure the maximum amount of uniformity in company law as enacted and administered in the two jurisdictions, special New Zealand requirements and conditions demanded certain divergences. The explanatory note which accompanied the Companies Bill 1952 aptly and sufficiently summed the position up as follows:

> New Zealand company law has always been based on United Kingdom legislation; and, as in the case of the Companies Act 1933, the general aim in drafting this Bill has been to adhere as closely as practicable to the form and arrangement of the latest United Kingdom Act. As a result of following this policy in the past, the principles of company law have developed on similar lines not only in the United Kingdom and New Zealand, but also in other Commonwealth countries.
>
> This general policy must, of course, be carried out in a way that takes into account the special conditions and requirements of New Zealand. Consequently, the Bill retains the existing provisions as to private companies and mining companies and other special features of the 1933 Act, and also contains some entirely new provisions; while some of the new provisions of the United Kingdom Act of 1948 have been modified and others (such as those imposing a retiring age for directors) have been omitted.

Divergences between British and New Zealand Company Law.

This similarity, however, in the two systems of law can easily prove a trap to the unwary: it is not safe for the New Zealand practitioner to rely exclusively on the English text-books and precedents; the differences which exist between the two systems must be borne in mind. For example, if English precedents are slavishly followed, one may some day wake up to the fact that the company which has been formed is in reality a mining company within Part XV of the Companies Act 1933 (Part XIV of the Companies Act 1955), for, to constitute a company a mining company for the purposes of the New Zealand statute, it is not necessary that the company should actually carry on "mining operations" as defined in the New Zealand Act: if it has power in its memorandum to carry on "mining operations", it is a "mining company" and subject to the special statutory provisions applying to "mining-companies": *King Gold Mining Company* v. *Cock*, (1912) 31 N.Z.L.R. 1166, 1173; *In re Southern Mines, etc.* v. *Hulme*, [1930] G.L.R. 89.

A factor, which the Company Law Revision Committee had to take into the most careful consideration, was the absence in New Zealand of any one body exercising the important judicial, quasi-judicial, and administrative functions exercised by the Board of Trade in England. Accordingly the 1952 Bill substituted for the English Board of Trade a Minister of the Crown (e.g., the Minister of Justice or Attorney-General, and, in several cases, the Registrar of Companies) and by cl. 466 of the 1952 Bill (now s. 470 of the Companies Act 1955) the Governor-General by Order-in-Council is authorized to alter or add to the requirements as to matters to be stated in a company's balance-sheet and profit-and-loss accounts, provided he does not render such new requirements more onerous, and provided that such Orders in Council are laid before Parliament for ratification within twenty-eight days of their being gazetted, if Parliament is then in session, or if Parliament is not then in session within twenty-eight days after the date of the commencement of the next ensuing Session. Therefore when the Companies Act 1955 comes into operation on January 1 next, one consequence thereof will be a considerable extension of the powers and functions of the Minister of Justice, the Attorney-General, and the Registrar of Companies; and the Supreme Court will have a wider jurisdiction than heretofore in certain matters, e.g., applications by minority shareholders.

Fate of the Companies Bill 1952.

When the Companies Bill was first introduced in the New Zealand Parliament it met with a very favourable reception; soon, however, a strong opposition arose as to the *accounting* provisions, as to which the writer of this article has derived great assistance from an article written by Mr H. E. Strickett, F.P.A.N.Z., in the October 1952 number of the *Accountants' Journal*. The 1952 Bill had its second reading, but was then referred to a very strong special Companies Bill Parliamentary Committee which had many sittings and did not report the Bill back to the House until 11th November, 1953.

Recommendations of the Parliamentary Committee.

Except in respect of the accounting provisions, the special Parliamentary Committee did not make many important alterations in the 1952 Bill as originally introduced. It recommended that private companies, with the consent of all the shareholders, could dispense with an auditor; that it should not be unlawful for a private company to give financial assistance to its directors, by means of a loan, guarantee or provision of security, provided that they were in the employ of the company, with a view of enabling them to purchase or subscribe for fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership. It recommended an improvement on the original new provisions designed to protect the minority shareholders. It tidied up several sections, especially

those prescribing time-limits for applications under the Act and notices of meetings.

The conclusion that we must come to is this that, in the main, the 1952 Bill as recommended by the special Company Law Revision Committee, passed a very searching, painstaking and thorough investigation by a very strong Parliamentary Committee

This Parliamentary Committee did, however, recommend some far-sweeping changes in the accounting provisions of the 1952 Bill. As Mr Strickett pointed out, in his invaluable article above referred to, the 1952 Bill added principally to the particulars to be included in the balance-sheet, and prescribed the minimum information to be disclosed in the profit-and-loss account; these requirements were contained not in the clauses of the Bill, but in a Schedule (the Eighth). Certain important provisions of the Eighth Schedule were excised from the Bill, e.g., those providing for particulars to be shown of amounts written off for depreciation or of amounts retained for providing for any known liability, the taxation liability of the company, the aggregate amount of dividends paid and proposed, the amount set aside or proposed to be set aside to, or withdrawn from, *reserves*. These provisions are restored in the 1955 Act, subject, however, to modifications which the writer of this article has noticed: it will not be necessary to state the amount of the dividends proposed to be paid, and certain *retrospective* effects of the 1952 Bill as to provisions for depreciation, etc., have been taken away. It would appear as if the *accounting* provisions of the Companies Act 1955 have been adopted by way of compromise between two schools of thought which have developed in the accountancy world.

Extended Marginal Notes.

One of the most useful innovations adopted as a result of the reference of the 1952 Bill to the special Parliamentary Committee, is the extended marginal notes: this has been done by the Law Draftsman as the result of suggestions made by two lay members of the special Parliamentary Committee. Although marginal notes are not a part of an Act itself (s. 5 (*g*) of the Acts Interpretation Act 1924), I venture the opinion that the busy practitioner and the officials who have to administer the Act, will live to bless these extended marginal notes: in practice they will amount to great time-savers. We all know that the great majority of companies in New Zealand are private companies, and that many provisions of the Companies Act do not apply to private companies: other provisions apply subject to modification. In the Companies Act 1933, there was a Schedule setting out the sections which did not apply to private companies: but that itself was not sufficient for the busy practitioner or the busy official. I myself have always made my own extended marginal notes in my private copy of both the 1908 Act and the 1933 one. Thus, if we turn to s. 60 of the Companies Act 1955 (dealing with returns as to allotments) we shall find the following extended marginal note: "Para. (*a*) not applicable to private companies; see 9th Sched. See also 13th Sched." Opposite s. 72, dealing with notice of increase of capital, we find this note: "As to private companies see s. 361." If we turn to s. 361, we find that it imposes on private companies certain additional requirements—the necessity for a memorandum of subscription and the forwarding of it to the Registrar together with notice of the increase of the capital required by s. 72. Opposite s. 217, which sets out the circumstances in which a company may be wound up by the Court, we find this note: "As to private companies, see s. 354 (2) (*a*) (ii)", and this note is opposite to para. (*d*) of s. 217, which provides that a company may be wound up if the number of members is reduced below seven. Turning to s. 354 we find that this section is contained in Part VIII of the Act which deals with private companies. Section 354 sets out certain *modifications* of the provisions of the Act as to private companies and para. 2 (*a*) (ii) thereof will show us that a private company may be wound up by the Court, if the number of its members is reduced below its legal minimum, which, s. 353 discloses, is two members. These three examples of the marginal notes will, I think, satisfy one that, as extended in the Companies Act 1955, they will prove a boon to the practitioner, the official, and will perhaps tend to make the path of the student a little easier.

Conclusion.

In the following articles of this series I shall endeavour to show the material changes which will be effected in company law, when the Companies Act 1955 comes into force on January 1, 1957; also, so far as I am able, the reason for such changes. I shall also endeavour to point out company cases of note, which have been reported either in the United Kingdom or New Zealand since the date of the coming into operation of the Companies Amendment Act 1947 (U.K.).

Objectives of Legal Research.—For the professor of law, the problem [of electing between competing ways of applying his energies in the law] is not only how and what he shall teach, but how he shall spend his working day outside the classroom. Shall he find his chief satisfaction in the intellectual stimulation which comes from solving what is known as "the neat case"? Or shall he undertake a pervasive inquiry into the ethical foundations of legal rules, knowing that the price of this inquiry will be the disappearance of "the neat case"—for when rules are no longer treated in abstraction from their purposes, they cease to produce those neat antinomies which the lawyer delights to discuss with his colleagues, and the problem which seemed an intriguing test of juristic ingenuity dissolves into a prosaic question of choosing between competing ethical desiderata. What is the legal scholar's duty toward reform? Does he sufficiently prove his progressiveness by a willingness to construct tenable legal theories to support the reforms effected by Judges too busy to explain adequately what they are doing, or is his role a more active one? Is it his duty to anticipate the future by giving legal form to emergent ethical values, or is he only a kind of intellectual scavenger whose function it is to clean up the conceptual debris left behind in the advance of the law? (Lon. L. Fuller, *The Law in Quest of Itself*, (1940) pp. 13, 14.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

An Early Hitch-hiker.—Amongst the stories that Sir Frederick Chapman delighted in telling of his experiences in the early days of colonization was one of the time when he and his brother (later, Martin Chapman K.C.) went to Auckland with their father (H. S. Chapman J.) to spend some months while Martin C.J. and his father were drafting the constitution of the Church of the Province of New Zealand (the Anglican Church). The boys were at a loose end, so Martin C.J. lent them his "associate"—a tall and ferocious-looking Maori named Mohi who used to row the Chief Justice from Judge's Bay to the bottom of Constitution Hill, and attend him in his walk to the Court where he attended to the Judge's robing (then in public), and sat in Court to do any messages and to keep order. Mohi took the Chapman boys to Rotorua, getting canoe-lifts and food from the hapus on the Waikato River. According to Sir Frederick, his father, knowing that the journey had to be done mostly on foot, gave Mohi a new pair of boots. The party set out for the Waikato River, to join it somewhere between Mercer and the mouth. Mohi wore his new boots through the populated part of what is now Auckland city, but when they reached the vicinity of what is now Newmarket, and the volcanic scoria began, Mohi took them off and strung them around his neck, wearing them only when approaching a Maori settlement. It was the decorative, rather than the utilitarian, that made its appeal to his simple mind.

A Distressing Mistake.—"Colonus", a contributor to this Journal has drawn the attention of Scriblex to Magistrate's Court Form 75, issued under r. 255 (3) and relating to the "diligent search for the goods and chattels" of the judgment debtor made by the bailiff on a distress warrant. This is headed, "Return of Nulla Bonna On A Distress Warrant". The "bonna" is clearly a boner, since little that is good seems to emerge from this form of procedure.

Court Decorum.—The recent strictures of the Chief Justice and some of the lesser hierarchy upon the slovenly apparel of witnesses in the Courts recall to Scriblex a story of the profession in America that appeared in the *New Yorker*. It seems that a junior member of an enormous New York firm "called something like Wickerwallader, Meshach, and Abednego" received a hurried call early one morning from one of his superiors asking him to get certain important documents from the office, jump on a plane and bring them to him at the Supreme Court where he would be making a plea before the assembled Justices. On the young man entering the courtroom, a well-dressed guard enquired whether he was an accredited member of the Supreme Court Bar. He replied that he wasn't—that he was simply a junior member of a New York firm delivering some documents to his superior who needed them for the plea he was about to make. "Well, all right, sir," said the guard, after a pause, "but as you're not wearing a vest, it would be advisable for you to button up your coat."

Judge Jeffreys.—The eleventh of a series of drawings by Geoffrey Fletcher for the *Law Times* (London) (June 8, 1956) shows the building, where the notorious Judge Jeffreys lodged at Dorchester during the autumn of 1685, when he tried the cases that followed the Duke of Monmouth's abortive rebellion and earned for them the name of the Bloody Assizes. After these were over, Jeffreys who had written to Lord Sutherland soliciting the Great Seal was handed this "pestiferous lump of metal" by James II, and became, at 40, the youngest Chancellor on record. Latterly, writers have been at pains to whitewash his character, but Roger North, his contemporary, held no high opinion of him. "No one," he writes, "that had any expectations from him, was safe from his publick contempt and derision, which some of his Minions, at the Bar, bitterly felt. Those above, or that could hurt, or benefit, him, and none else, might depend on fair quarter at his hands."

From My Notebook (Barristerial Department).

"But I think it is of the utmost importance that the Court should not assist barristers to recover their fees. If they do, the whole relation between a barrister and his professional client will be altered, and a door will be opened which will lead to very important consequences as regards counsel. The inevitable result will be to do away with that which is the great protection of counsel against an action for negligence by his client."—Per Lindley L.J. in *Re Le Brasseur and Oakley*, [1896] 2 Ch. 487.

"In a criminal prosecution, instituted for the interests of the public, in the name of the King, and not to gratify the objects of an individual, a prosecutor has no right to address the jury. Counsel indeed (who are in some measure under the control of the Court) have this privilege allowed to them; because, from their professional education and habits of business, it is to be expected that they will not state to the jury anything but what is fit for them to hear." And his duty in summing up the evidence in a criminal case is that he "will not cease to remember that counsel for the prosecution . . . are to regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at Nisi Prius—nor be betrayed by feelings of professional superiority, and a contest for skill and pre-eminence."—Per Crompton J. in *Reg.* v. *Puddick*, (1865) 4 F. & F. 497.

"The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of the human soul. The law also trusts him with a power of insisting upon answers to most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth."—Per Erle C.J. in *Kennedy* v. *Brown*, (1863) 7 L.T. 626.

CAVEAT ADVOCATUS.

By ADVOCATUS RURALIS.

Advocatus from time to time acts for landlords in reference to tenancies, and his opinion of the various rent-restrictions could not be printed in a respectable paper such as this. Recently in a discussion concerning rents, the appropriate Government Department acting for a tenant (who incidentally was in arrears with his rent) headed its letter, Landlord XY Tenant Mr YZ. In reply to a somewhat caustic letter from ourselves, the Department ingenuously explained that MR was inserted in case we thought Mrs YZ was the tenant.

Difficult as the position is in New Zealand, it appears to be worse in England—especially for the solicitor. The junior partner has shown us the case of *Goody* v. *Baring*, [1956] 2 All E.R. 11. In that case, A sold to B certain premises subject to two tenancies. The same solicitor acted for vendor and purchaser. The agreement recited that the tenancies were each let for 25s. per week. Before the sale, the solicitor ascertained that this had been the rent for the last five years, and so informed the purchaser. In discussion with the purchaser, he suggested that, as the rates had gone up in that time, it would be well to apply for an appropriate increase in rents. After the sale, the purchaser applied for an increase in rents. The tenants objected, and in the subsequent proceedings it was discovered that according to the 1938 rentals the recoverable rent was 17s. 6d. per week, and the purchaser was invited to disgorge the rents overpaid. Having done this, the purchaser then unkindly sued his solicitor for negligence. In the course of his judgment, which was against the solicitor, Danckwents J. quoted the words of Scrutton L.J. in *Moody* v. *Cox and Hatt*, [1917] 2 Ch. 71, on the unwisdom of a solicitor acting for vendor and purchaser. "If he as solicitor for the vendor knows of a flaw in the title and discloses it to the purchaser, he may be liable to an action by the vendor; whereas, if he does not disclose it, he may be liable to an action by the purchaser."

The complexities of modern legislation as they affect titles to land can well be a trial to the conveyancer. Advocatus was recently visited by an irate client for whom he had acted in the purchase of town land. It appears that the purchaser had been informed by the local engineer that, according to the town plan, a service-lane was going through his land. Advocatus had always thought of the local town plan in the words of Nesfield (or was it Shakespeare) * "A thing full of sound and fury . . . signifying nothing".

In this particular case, Advocatus wrote to the Local Authority pointing out that there was no Town Plan, but that, if the plan the Authority had made was to become a Town Plan, then the only four-wheeled vehicle which would be able to use their proposed service-lane would be a pram. The plan, or should we say the preliminary plan, was thereupon amended. As this was the third time it had been necessary for Advocatus to move for an amendment of the plan, he believes that a search of the local plan that may perhaps sometime be a Town Plan is a necessary preliminary in a conveyancing transaction. After reading *Goody* v. *Baring*, the junior partner concurs.

As a postscript to local body worries, Advocatus acting for a vendor recently asked the local body had the current rates been paid. They said "Yes". Subsequently, the receipt was produced to Advocatus. Some months later, the purchaser found that, though the current rates had been paid, parts of the previous two years were in arrears. Advocatus still does not know the law covering this point. He paid the rates, and set off in blasphemous pursuit of his erring vendor.

* If you know your Shakespeare, the point of this quotation is n the hiatus.

PRACTICAL POINTS.

Land Subdivision in Counties—Land bordered by Lake—Loss of Riparian Rights if Owner subdivides—Proposed Alternative Procedure Sale of Land as a Whole to a Company—Validity.

QUESTION: I hold a piece of land in a county bordering a lake. If I subdivide (and am allowed to subdivide, as the only legal access is the lake), I lose all riparian rights and must dedicate the foreshore to the State as a reserve. Can this property be sold to a company that notionally subdivides the land (but puts through no *legal* subdivision), and attaches to each parcel of shares the right to use one of the subdivisions? The ownership thus remains undivided, but the user is divided.

ANSWER: The facts are not set out with sufficient elaboration for a satisfactory answer: anyway, the question is a most important one, and, as it is rather beyond the scope of Practical Points, senior counsel's opinion should be sought.

The question is, do the rights proposed to be attached to each parcel of shares, amount to a "subdivision" of land as artificially defined in the Land Subdivision in Counties Act 1946? The wide definition of "sale" in s. 2 apparently does not extend to a monthly, quarterly, half-yearly or yearly tenancy, usually called "periodic" leases. The term "sale" catches a mere easement or licence. On the other hand, the right to exclusive *use* of land does constitute a lease of that land.

X2.

Stamp Duties—Declaration-of-trust Duty paid on Declaration of Trust—Trust Instrument destroyed or lost—Re-execution of Declaration of Trust by Trustees—Liability of Second Instrument to Stamp Duty.

QUESTION: We have recently come to act for the trustees under a deed of settlement upon which duty was paid when it was entered into in 1937. We find that, somewhere in the course of administration of the trust since 1937, the original deed has been lost. The assets comprised in the trust are now substantial, and we were requested by the trustees and their accountants to prepare a declaration of trust by the present trustees acknowledging that they hold the assets upon the terms of the original trust. When we came to prepare an appropriate document, however, we felt that we came up against s. 90 of the Stamp Duties Act 1954. We discussed the matter with the District Commissioner of Stamp Duties and with an official from Head Office. Their view is that if we submit a document which is in fact a declaration by the present trustees of the terms upon which they hold the assets, it would be liable for duty under s. 90, even though it clearly showed on face of it that it was in fact simply to replace the lost document upon which the appropriate duty was duly assessed and paid. The representative from Head Office states that they have met similar questions, and, in each case, duty has had to be paid; but in no case has the amount been substantial as it would be in this case. We do not feel that it is the intention of the Legislature that double duty should be incurred in such cases and yet there appears to be no way of avoiding it.

ANSWER: The Departmental assessment appears to be correct: see definition of "declaration of trust" in s. 90 (2) of Stamp Duties Act 1954. Sections 54 (2) and 153 do not appear to apply. There appears to be a *casus omissus* in the legislation. It is suggested that the enquirer should write to the Minister of Finance pointing out the great injustice caused, and apply for redress. He should recommend the amendment of s. 90.

X2.