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THE VISIT OF THE QUEEN MOTHER.

MEMBERS of the profession of the Law throughout the Dominion will join with the community as a whole in extending a welcome to Her Majesty Queen Elizabeth the Queen Mother during her brief but none the less warmly-acclaimed sojourn in the Dominion. Practitioners everywhere have a special reason for pausing a moment to bid her welcome. Her Majesty is, in effect, one of them, not merely by reason of a Royal patronage of the Law, but more intimately by virtue of a close association with it, and an abiding personal interest in its aspirations, achievements, and traditions.

Since 1944, the Queen Mother has been a Bencher of the Middle Temple; and in 1949, as Consort of the late King George VI, she honoured the Inn by accepting the Treasurership. Then, as now, her association with the Temple transcended the too often pro forma character of official or traditional recognition. The Queen Mother has always had the well-being of the Middle Temple at heart, and her name will forever be commemorated in the elegant and historic premises of "her Inn" in one of the most pleasant open spaces of Thameside London. Notable reaffirmations of her interest in the law have been her presence, on November 5 last, and earlier in 1949, at the opening of major reconstructions of part of the war-damaged Inn.

In July, 1949, Her Majesty, as the Treasurer then in office, rejoiced with her fellow Benchers at the re-emergence of the Middle Temple Hall after its war-time ordeal, and those who witnessed that historic event must have been as deeply moved as the later company of Judges and eminent lawyers who assembled in November of last year to see her preside at the inaugural ceremonies of the Queen Elizabeth Building.

High up on the new wall of the Middle Temple Hall overlooking the Lane, the emblem of the society—the Lamb and Flag—fashioned in durable stone, surmounts a Crown, with the letters "E." and "R." on either side—"Elizabeth Regina"—and beneath the Crown is the letter "T." for Treasurer. Below is the inscription: "Denuo surrexit domus vivat, crescat, floreat." Thus it is recorded for future generations of the Law that the reconstruction of what Her Majesty has so often called "our lovely Hall" was carried out during the period of her Treasurership.

And the Queen Elizabeth Building, too, bears evidence of the loyal appreciation of Benchers of the interest of Royalty in the Law. On the east side of the handsome structure a magnificent carved device includes bold roof-high pediments which are distinguished by the armorial bearings of Queen Elizabeth the Queen Mother and the first Queen Elizabeth. On the west side also, looking down on Temple Place, the centre facade bears a fine carving of the Middle Temple's ancient emblem, beneath which, just above the lintel of the entrance, there is another carving of the Queen Mother's achievement.

Her Majesty's long preoccupation with her Inn and the Law, no less than the architectural distinction and beauty of the restored buildings, with which she has been so intimately identified, is a sign of the eternal strength of the foundations of that Law on which our national life is built; and those who administer and practise the Law may well at this time present a special obeisance to one who has been so closely associated with it.

FAMILY PROTECTION: SOME RECENT JUDGMENTS.

TO continue our practice of giving our readers a summary of recent applications under the Family Protection Act 1955, we now deal with some of them which have been the subject of judgments delivered during the last few months.

WIDOWS.

In *In re Parker* (Auckland, September 30, 1957. M. No. 399/56) heard by T. A. Gresson J., was an application by the widow of W. C. Parker, late of Anawhata, near Auckland, retired manufacturer, who died on September 11, 1955, aged 88 years. He was survived by his widow, Sarah Parker, aged 73 years, two daughters by a former marriage—namely, Margaret Sowden Proctor and Florence Eileen Wright, both of whom were married and in their late fifties, and a stepson, Jack Irwin Keddle, aged 46 years. The testator and his wife had been happily married for thirty years and it was admitted that his wife had given him every attention and comfort over his declining years. There was no evidence before the Court as to the financial position of the two daughters, and His Honour said it must be assumed, therefore, that both were adequately provided for.

The testator's first wife had died in 1917, and left him her whole estate of £5,000. There was medical evidence indicating that the widow had suffered from myocarditis, due to hypertension, for the past three years or more, and that at some future date she might require a companion, and possibly medical care.

By his will, made eighteen months before his death, testator, after making certain personal bequests, bequeathed his widow a 1954 Rover Saloon motor car, valued at £1,000. In fact, the deceased transferred this car to his wife during his lifetime by way of gift. He also devised his home at Anawhata (Government valuation £2,250) and his personal chattels (valued at £461) to his widow and gave her an immediate legacy of £500. He also made certain other pecuniary bequests, subject to the direction that they were to be free of interest and payable " only when my trustees are satisfied that payment shall not affect payment of the moneys payable to my wife." Testator then bequeathed his widow a life interest in three-quarters of the income of the residue of his estate, the remaining quarter being divisible equally between Mrs Proctor and Mrs Wright, who, on the widow's death, receive the residue. The trustees were also empowered at their discretion to apply a total of not more than £500 out of the capital of the estate for the wife's maintenance or benefit.

The gross value of the estate was £24,000, the net value, after meeting duty and bequests, etc., being £17,224.

The net annual income from the residue of the estate was £850; and, at the hearing, it was conceded that the widow would receive £525 per year from the estate, plus a universal superannuation benefit of £100, giving her an income of £625 per annum.

Largely because of the isolated situation of the property at Anawhata, and the resulting increase in the cost of living, the widow asserted that her present income was insufficient to maintain her at the standard to which she was accustomed during her husband's lifetime, and she was anxious to repair and improve the property. She accordingly sought the quarter share of income—namely £175, payable under the will to Mrs Proctor and Mrs Wright. In addition, she asked for a further capital sum of £1,500. His Honour said:

> When proper allowance is made for non-recurring items and capital improvements, they fail to convince me that the widow's present income of £625 per year is " inadequate for her proper maintenance and support." It is settled law that the Family Protection Act 1955 does not permit the Court to " do the fair thing " or correct oversights as such. The Act can be invoked only where the Court is satisfied that the will in question fails to make adequate provision for the proper maintenance and support of a claimant. I recognize that " adequacy " alone is not the test and that propriety must also be taken into account, *In re Shanahan, McCarthy* v. *Shanahan* [1957] N.Z.L.R. 602, 606, but the Court has no jurisdiction to intervene unless first satisfied that there is need for maintenance. As North J. pointed uto recently in *In re Blakey, Blakey* v. *Public Trustee* [1957] N.Z.L.R. 875, 876:
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> > " It is true that over the last few years there has been a tendency to take a benevolent view, shall we say, of the provisions of the Family Protection Act, and on occasions it might be said that there was a tendency to make new wills. That is not my view of the way the Act should be administered and I do not think it is the view of many of the Judges to-day . . . The first inquiry in every case must be what is the need of maintenance and support."
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> It is possibly significant that the £175 income which testator bequeathed his daughters is very approximately equivalent to the income from £5,000, which the evidence established the testator inherited from his first wife. I also take into account the fact that the will was a late will, made in 1954, and the testator himself was no doubt in the best position to judge his wife's reasonable income requirements. Allowance must also be made for the fact that no part of the deceased's income is now required for his own maintenance and support.
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> As was stated by Gresson J. in delivering the judgment of the Court of Appeal in *In re Williamson, Glentworth* v. *Williamson* [1954] N.Z.L.R. 288, 299:
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> > " There has always been on the part of the Court in the case of a widow's application a disposition against awarding a lump sum . . . A less rigid attitude may have been adopted in later years, but there has been no departure from the principle earlier formulated and consistently applied down the years. The testator's duty, as recognized by the statute, was merely to provide an adequate maintenance for his wife during her lifetime and widowhood, and it did not extend to providing her with a fund which she could give to others on her death. In those cases in which a lump sum has been given to a widow applicant, there have been special reasons justifying that course."
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> Again, in delivering the judgment of the Court of Appeal in *In re Crewe* [1956] N.Z.L.R. 315, 326, North J. stated:
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> > " In the case of the widow it was early recognized that the moral duty generally owed by a testator was merely to provide for her maintenance and did not usually extend to providing her with a fund which she could give to others at her death."
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> I have already expressed my view that the widow's income is adequate. In my opinion, it is also arguable whether there has been any breach of moral duty established in regard to the capital provided for her. Nevertheless, counsel for Mrs Proctor and Mrs Wright indicated that his clients would not oppose immediate payment of the additional £500 to the widow, pursuant to cl. 10 of the will, and a further sum of £750 to meet her special needs, thus permitting her to complete the improvements to her home, and also providing something of a " nest egg " against the risk of possible deterioration in her health.

In all the circumstances, His Honour was prepared to make an order in those terms, the additional provision for the widow to be made from residue to the exoneration of the pecuniary legacies. The costs of all parties would be paid out of the estate.

In *In re Sykes* (Napier: October 11, 1957), Haslam J. had before him an application by the widow of the deceased, who died at Napier on October 3, 1955. Probate of his last will dated July 18, 1947, was granted on November 15, 1955. The application was technically out of time. At the hearing, all counsel for the defendants agreed that, in the circumstances disclosed in the plaintiff's affidavit, an extension should be granted to her; and leave to proceed was given accordingly.

The deceased was 59 years of age when he died. He was survived by his wife, now aged 51 years, and by three children: John, born on April 5, 1930; Mrs Margaret Stuart, born May 30, 1934; and David, born November 23, 1941. For death-duty purposes, the net value of the estate was returned at £29,656 3s. 10d. The chief assets consisted of a freehold orchard at Pakowhai, valued for death-duty purposes at £17,760; a house owned by him at 3 Milton Terrace, Napier, valued at £3,850; and a debt to deceased by his son John of £2,055 12s. Although statute-barred, this debt may be set off against John's expectancies under the will, as and when these interests become vested. Death duties totalling, with interest, £6,201 16s. 7d., and debts owing by deceased at death had been paid. Lack of funds had prevented the executor from paying any pecuniary legacies, and, unless the realty was mortgaged, there was no early prospect of so doing.

Under the will the widow was given a legacy of £500, the furniture and household articles (other than the

motor-car), and the right personally to reside in the dwellinghouse and curtilage thereto on the property at Pakowhai until her death or remarriage or her ceasing personally to reside therein. Outgoings were charged on the income of residue. In addition, she was given, until death or remarriage, an annuity of £600 per annum charged on income and capital (subject to her maintaining any dependent infant children) with power for the trustee at his discretion to supplement the annuity with payments of up to £150 in any one year.

The balance of income was applicable at the discretion of the trustee to the education of children of deceased. An immediate legacy of £1,000 was left to each of the three children on attaining the age of twenty-five years, with substitution of the children of that child in the event of failure. The residue was bequeathed to the trustee to pay, after the period of distribution, a further £1,500 to the deceased's daughter on her attaining the age of twenty-five years, and the balance to such of the sons as should attain that age and, if more than one, equally. There was again a substitution of the children of deceased children.

John was married with four children, and, from 1948 until the date his father died, was in partnership with the deceased in the orchard business. He lived in the homestead and had virtually concluded an arrangement with the trustee whereby he would lease the orchard as from June 3, 1957, at a rental of £1,316 per annum as fixed by valuation.

In 1952, the deceased purchased the house in Milton Terrace where he lived until his death, and where the widow and the son David still resided. No rent had been charged for this property. The deceased repeatedly told his wife of his intention to substitute in his will the Milton Terrace house for the homestead at Pakowhai, and to give her the same rights thereto. David was in Form V at Napier Boys' High School, and his counsel stated that he had shown reasonable promise scholastically.

His Honour said :

It is agreed that the orchard will suffer if John does not reside on the site. It is impracticable for the widow to occupy the homestead in terms of the will and she desires to remain in Milton Terrace. Her counsel asks that an order be made in favour of his client in accordance with the expressed but unfulfilled wishes of the testator, and that she be given the right to occupy the Milton Terrace house on terms identical with those contained in the will affecting the Pakowhai dwelling. It is also submitted that, in lieu of the discretionary power to supplement her income, her annuity should be increased to £750 until death or remarriage. She is liable for taxation herself and has the expense of maintaining David until he is self-supporting. All counsel agreed that the testator, in failing to revise his will made some ten years before his death had fallen short of his moral duty to provide adequately for his wife, particularly having regard to the changed circumstances of his estate, and the increased cost of living in the interim. Her application was unopposed. The substantial income now received by the estate from the letting of the orchard (estimated by the executor at £1,000 per annum net) suggests that the testator did not leave his wife sufficient means if measured by the earning power of his orchard at the date of death. Counsel for the executor expects no administrative difficulties if such an order be made.

I am of the opinion on the material before me that the widow is entitled to the relief asked for and an order will be made accordingly. All benefits conferred by this order upon the widow are to date from the death of the deceased. Counsel are asked to submit a draft order in which adjustment of rents, power to purchase a substitute dwelling, and incidental aspects may receive attention. Liberty to apply should be reserved as the estate income may fluctuate in future years.

The father of the deceased was still alive and was now aged about ninety-three years. He was blind but alert mentally and able to give instructions to his counsel not only to refrain from making any application for relief on his behalf, but to abide by the decision of the Court. He had an age benefit under the Social Security Act and was a patient living permanently in the Napier Public Hospital. He had received no maintenance from his son the deceased at any time during his life. He was a " near relative " of the deceased within the meaning of s. 4 of the Destitute Persons Act 1910. The size of the deceased's estate and the financial position of Mr Sykes senior may put him within the class of claimant appearing in s. 3 (*e*) (i) of the Family Protection Act 1955. In view of s. 18 of the Social Security Amendment Act 1950, His Honour directed that the Commission be notified of these proceedings and that counsel inform him by memorandum whether or not the Commission wished to exercise its rights and powers under the last-mentioned section.

For David, Mr McLeod made no claim ; and, in all the circumstances disclosed, there appeared to be no ground for increasing his benefit under the will.

Mr Woodhouse contended that John and Margaret were entitled to relief in the present proceedings. Margaret was 23 and was married just before the death of the deceased. She and her husband were in indifferent financial circumstances. Although her affidavit did not supply much information, the Court was informed that her husband's income had been affected by his lack of success as a jobbing carpenter. She stated that her assets were nil and that her husband's assets consisted of household furniture, an old motor-car and a motor-cycle, tools of trade and £350 in cash. She asked that her two contingent legacies of £1,000 and £1,500 be vested and increased to £3,500. Counsel suggested that such a sum could be used for her to purchase a home and undertook that machinery could be devised to ensure that such an asset was not alienated. As Margaret worked for a considerable period on the orchard, it was possible that she made her contribution to building up the estate assets. Fortunately all the family were on friendly terms with each other, as they were with the deceased.

His Honour continued :

Although Margaret appears to have been a dutiful daughter, the priority of her mother's rights must not be imperilled, nor any relief given to Margaret which may jeopardize the annuity to the widow. Margaret has no children, but if she should later have a family and die before her legacies are vested, her children will take in terms of the will. The nature of the estate assets precludes the immediate payment of cash legacies from corpus. I do not see any justification for re-writing the will to the extent of depriving grandchildren of their expectancies in remainder. On the other hand, Margaret and her husband are without any cash reserves and her brother John is already well established in life. The testator has, in dividing the ultimate capital of his estate, shown a marked preference in favour of his two sons, perhaps because of the appreciation in value of his realty between the date of the will and his death. It is reasonable that Margaret should be able to purchase a home relatively early in her married life. On the other hand there is insufficient in the estate to enable her to do so unless the realty is mortgaged. While such a course is undesirable, it is still possible to increase her expectancy in respect of her first legacy without causing undue embarrassment to other beneficiaries or to the executor in the course of administration.

The Court has power under s. 5 of the Family Protection Act 1955 to attach conditions to an order. On prior occasions relief has been granted which did not entitle the party benefited to an immediate provision vesting forthwith in posses-

sion: *E.* v. *E.* [1915] 34 N.Z.L.R. 785, 803; *Welsh* v. *Mulcock* [1924] N.Z.L.R. 673; [1924] G.L.R. 169.

I accordingly order that her legacy under para. 3 (*b*) of the will be increased to £2,000 but upon the same terms and conditions as provided in that subclause of the will.

I should like counsel to make suggestions on the administrative aspect of such an order. I wish to ensure that the trustee is enabled to postpone payment of the legacy, both at its original figure and as now augmented, if the widow's annuity is likely to be imperilled. For that reason, liberty to apply will be reserved as in the case of the order in favour of the widow.

His Honour said:

I think that John is clearly in the category of the able-bodied son. Furthermore, he has not shown any need for assistance as his net assets, after providing for the £2,055-12-0, which will be offset against his legacies as they vest, aqe upwards of £6,000.

His affidavit does not give any details of how he arrives at the value of his assets in the partnership which he places at "approximately £8,000." In the absence of further information, neither hardship nor need for relief can be inferred. He is young, in good health, and has the advantage of the occupancy of the orchard and house.

His Honour did not see any reason for depriving John's children of their expectancies under the will.

> "The interests of grandchildren are entitled to respect. . . . The will would be unjustifiably remade if those interests were destroyed by vesting absolutely the shares of the children as at the testator's death": *In re White* [1944] G.L.R. 118.

The testator presumably had good reason for leaving a will which contained a succession of trusts, elaborately drawn and with every contingency provided for. If John dies before the period of distribution, his children will take his share in residue. His widow will presumably be entitled to his other assets or at least such provision therefrom as may be adequate for her. I am unable to see any reason for giving relief to John.

Costs of all parties would be taxed and paid out of the residuary estate.

In an oral judgment in *In re Sommer* (Christchurch, October 14, 1957. A. 26/57), it appeared that the estate included some assets of very small value, namely, three shares in a company valued at £1 17s. 6d., and a watch and furniture valued at £6 12s. 6d. Mr Alpers agreed that it would be fair to give the widow those articles, and there would accordingly be an order vesting them in her for her own use and benefit absolutely.

The estate included realty, the Government valuation of which (in 1954) was £975. Apart from that, and the trifling assets already dealt with, all that remained was a sum of money, which was suggested by Mr Bowron to amount to about £136 and by Mr Alpers to be more probably about £160.

In the course of his judgment, F. B. Adams J. said:

It seems quite clear that certain improvements and repairs ought to be done to the house situated on the realty. Perhaps it is valuing it unduly to speak of it as a house—I am referring, of course, to the cottage in which the deceased and the plaintiff lived—it requires hot and cold water and a bath and proper drainage, and the provision of electricity would certainly be in itself a considerable improvement. If these things are done, it is probable that the value of the property will be increased, and it will become much more readily rentable. Mr. Alpers agrees that it would be to the advantage of his own clients that the available moneys should be capable of being used for the purpose of these necessary improvements to the property. His clients will, in due course, get the benefit of that when the property ultimately reverts to them on the death of the plaintiff. In the meantime, the plaintiff will get the benefit in the rental value of the improved lettability of the property.

There will, therefore, be an order that cl. 3 of the will which gives the widow a life interest in the realty and furniture is to apply not only to the realty, but also to all other parts of the estate except those which have been vested by this order in the widow absolutely. It will also be provided that the trustees shall have power to apply the assets other than the realty in the improvement and repair of the realty. The effect of that order is that, if the money is not so expended, the income of it will go to the widow. If it is so expended, she will have the benefit of it while she lives and the residuary beneficiaries will have the benefit of it when she dies. In case there should be any difficulty in regard to the application of these moneys towards the purpose indicated herein, liberty will be reserved to the plaintiff, and also to either or both of the defendants, to apply to this Court from time to time for any appropriate order providing for the use of moneys forming part of the capital of the estate in and towards repair or improvement of the realty.

For the rest, His Honour was not prepared to make any order. He said:

The estate is a very small one. The widow herself already possesses assets worth more than three times the value of the estate, including the home in which she is now living. It is often said that the claim of the widow is paramount, and so in many circumstances it is. But there are limitations even upon the rights of a widow under the Act. In the first place, and this is a rule which is generally acted upon by the Courts and has been laid down on more than one occasion, the Court does not generally make capital provision for widows or widowers. I do not say that is a universal rule, but in general it is a thing that ought not to be done, the reason being that a widow or widower is entitled only to provision during his or her life, and that it is not one of the purposes of the statute to enable a spouse to get into his or her hands the assets of the other spouse, and to be free to dispose of them as he or she thinks fit by will or otherwise. There is another principle which I think is also important. Where a plaintiff, being a widow or widower, has his or her own assets which are available for maintenance the burden of maintenance ought not to be cast upon the other spouse's estate without regard to the assets so held. Once again, that is not an absolute or universal rule. Speaking generally, however, where a widow has assets such as are possessed in this case, and desires to have capital moneys used in order to give her an enlarged income, the burden ought to fall primarily upon her own assets rather than upon those of the testator's estate. Otherwise, the result is to leave her with her assets in her hands available to be disposed of as she thinks fit by will, while at the same time she is allowed to absorb and spend the testator's assets, and so deprive the beneficiaries under his will of the benefits that he intended them to have. I would not say that a widow should be required to spend all her moneys in that way before becoming entitled to an order for maintenance; but in the present case the widow's assets are, as I have said, much greater than the testator's estate.

When Mr Bowron suggested that the plaintiff ought to have a weekly payment of £5 during her life charged upon this estate, in addition to the superannuation benefit of £105 and her own income estimated at about £50 a year, giving to her thus a total income of about £8 per week, I put to him the question whether his client would be prepared to hand over her assets to the estate so that they might become the first source from which the income should be paid. That could quite well be done, if it were thought fit to do so, in such a way as not to deprive this lady of the right to reside in her own house, but subjecting it to a charge that would reimburse the husband's estate if capital moneys were used. Mr Bowron did not respond with any suggestion that he would wish any such thing to be done here, and I myself do not think it would be appropriate in the circumstances.

I do not think this is a case in which capital moneys of the estate should be allowed to be reduced in order to provide this widow with an increased income. If she needs more than her income will provide, then she has assets of her own which, so far as one can tell, are likely to be more than enough to provide for her amply for the rest of her life. I realize, of course, that she could quite well do with a larger income, but I feel convinced that in this case the testator did his duty by his widow in his will, especially when it is viewed in the light of the modest amendments which have now been made to it with the consent of the defendants.

The order of the Court would, therefore, be limited to the matters already mentioned. Costs were awarded to the parties.

In re Bashford (Wanganui: November 11, 1957), heard by McCarthy J., is an application by the widow of the testator, who died at Marton on June 9, 1956, at the age of seventy-one. He left a will dated June 22, 1953, whereby he appointed the Public Trustee his executor and trustee, and after making a pecuniary legacy of £150 to Mr R. H. P. Bending, of Marton, devised and bequeathed to his widow, during her lifetime or until remarriage, the free use, occupation, and enjoyment of his estate, subject to the payment by her of rates, insurance premiums, repairs and other outgoings on the household property to which reference will be made later. Subject to the gift of this interest to his widow, he devised and bequeathed his estate to his trustee to be divided into four equal shares, one of which he left to his brother George Bashford, of London, and the other three he left between nieces and nephews, all of whom are resident in England.

The Public Trustee was administering the estate pursuant to probate granted on July 19, 1956, and after payment of debts, duties, funeral expenses and the like, held assets of a total value of £8,244 15s. 10d. The only anticipated liabilities were administration expenses estimated at £300. The legacy of £150 to Mr. Bending had yet to be paid.

The testator came to New Zealand some fifty years ago, and did not return to England. There was no evidence that he maintained any close contact with his relatives in England. His brother, George Bashford, was eighty-two years of age, and, having regard to the fact that the plaintiff is only 52 years of age, the probabilities are rhat George Bashford will not himself enjoy the benefit of the gift made to him by the testator. There was no reason to believe that there was any particular bond between the testator and the other residuary beneficiaries, nieces and nephews.

The plaintiff was fifty-two years of age and not in robust health. Her only personal assets were the sum of £7 in the Post Office Savings Bank and £60 in National Savings. She said that she was unfit to undertake employment; but that allegation was not supported by medical evidence. However, His Honour considered it would, in the circumstances, be unreasonable to expect her to supplement her income by taking employment.

His Honour said:

> From the figures supplied by the Public Trustee there should be, after paying rates and insurance, commission and social security charges, the sum of £199 per annum available for the plaintiff's support. It may, however, be possible to increase the income position by a change of the investments. Out of this income the plaintiff will have to pay for repairs to the house. True, she will then have free occupation of a comparatively modern and comfortable home but none the less I hold that the testator, having regard to the needs of the plaintiff, failed in his duty towards her.
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> This is not a case where the claims of the widow are in competition with those of children or even of parents of the testator. As already stated the residual beneficiaries are a brother (unlikely to enjoy the benefit of the gift) and nieces and nephews. Although the estate is not a large one, the case, in principle, falls within the second class of cases referred to by Salmond J. in *Allen* v. *Manchester* [1922] N.Z.L.R. 218; [1921] G.L.R. 615. In these circumstances, Mr Easther asks that, in addition to some improvement in the income position of the widow, a lump sum payment should be allowed to cover emergencies arising in the future. That such an order can be made in appropriate cases is well established: *In re Crewe* [1956] N.Z.L.R. 315, 324.
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> I think that, in this case, it is fitting that some lump-sum payment should be ordered, as the widow is not young, and is practically without reserves; but I am not prepared to go to the extent asked by Mr Easther, who seeks the sum of £1,000. I feel that the widow should have a free house without liabilities for repairs and the sum of £5 a week for her maintenance and that, in addition, she should have a lump sum payment of £350. This, at the least, the testator owed to his widow.
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> The order which I make is as follows:
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> 1. The widow shall be entitled to the free use and occupation of the house and furniture until her death or remarriage, whichever is the earlier.
> 2. Rates, insurance, repairs, and other outgoings, on the house property shall be paid by the trustee of the estate of the deceased, if necessary out of capital.
> 3. The widow shall have the sum of £5 per week by way of an annuity until death or remarriage, whichever is the earlier. The widow shall have in addition the lump sum payment of £350.
> 4. The order shall operate as from this date.
> 5. The legacy of £150 to Mr Bending is unaffected by this order.
> 6. The provision made by this order will be in substitution for that given by the will.
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> As to costs, counsel have asked that I fix a sum to cover both counsel's fee and solicitors costs and I am agreeable to this. I fix a sum of forty guineas in favour of the plaintiff the sum of fifty guineas in respect of the numerous defendants represented by Mr Stanford, and the sum of twenty guineas for those parties represented by Mr Tizard. In addition to these amounts there will be the usual disbursements to be fixed by the Registrar. I reserve liberty to all parties of apply.

In our next issue we shall summarize a further selection of recent applications under the Family Protection Act 1955.

COMMENCEMENT DATES OF CERTAIN STATUTES.

The following statutory changes will come into force on April 1, 1958, unless otherwise stated:

Aliens Amendment Act 1957: All amendments made by the Aliens Amendment Act 1957.

Dangerous Goods Act 1957.

Explosives Act 1957.

Hospital Act 1957.

Income Tax Assessment Act 1957.

Justices of the Peace Act 1957.

Land and Income Tax Act 1954: All amendments made by the Land and Income Tax Amendment Act (No. 2) 1957 apply with respect to the tax for the year of assessment commenced on April 1, 1957, and for every subsequent year.

Oaths and Declarations Act 1957.

Public Trust Office Act 1957.

Social Security Amendment Act 1957: September 1, 1957.

Stamp Duties Amendment Act 1957: November 1, 1957.

State Supply of Electrical Energy Amendment Act 1957.

Summary Proceedings Act 1957.

Town and Country Planning Amendment Act 1957: November 1, 1957.

SUMMARY OF RECENT LAW.

DESTITUTE PERSONS.

Maintenance—Offence—Attempting to leave New Zealand while Payments under Maintenance Order in Arrear—Interim Order not a "maintenance order"—Destitute Persons Act 1910, s. 52—Domestic Proceedings Act 1939, s. 6. An interim-maintenance order made under s. 6 of the Domestic Proceedings Act 1939 for maintenance of a wife and child is not a "maintenance order" for the purposes of the Destitute Persons Act 1910. Consequently, no offence was committed under s. 52 of the Destitute Persons Act 1910 by a husband charged with "attempting to leave New Zealand without the permission of a Magistrate while moneys payable by him under a maintenance order were in arrear and unpaid, as the order under which the moneys were alleged to be due and unpaid was an interim maintenance order made under s. 6 of the Domestic Proceedings Act 1939". *Semble*, Where the proceedings for maintenance had been commenced but not completed at the time of a husband's alleged attempt to leave New Zealand, he could have been charged with an offence under s. 54 of the Destitute Persons Act 1910. *Burns* v. *Morrell.* (1957. October 30; November 26, before L. G. H. Sinclair S.M., at Auckland.)

DIVORCE AND MATRIMONIAL CAUSES.

Seven Years' Separation—Wrongful Conduct—Onus Cast on Respondent to prove Petitioner's Wrongful Act or Conduct—Such Onus requiring Proof that Petitioner, if not wholly to blame, was chiefly or substantially Offending Party—Actual Parting to be considered against Background of Matrimonial History—Divorce and Matrimonial Causes Act 1920, ss. 10 (j), 10. Since wrongful act or conduct on the part of a petitioner has been made available to the respondent to bar a dissolution of marriage in the case of seven years' living apart, in precisely the same terms as in the case of a separation by agreement or by order, the principles applicable to the latter are affirmed and made applicable to the former. (*Tursi* v. *Tursi* [1957] 2 All E.R. 828, applied.) A respondent who opposes a dissolution on the ground that the wrongful act or conduct of the petitioner had been the cause of the separation should, to satisfy the Court, be strictly required to establish in fact that that is the case. It does not suffice merely to prove that some wrongful conduct on the part of the petitioner had been a contributing cause to the breakdown of the marriage. To discharge the onus cast on a respondent by s. 18, it must be shown that the petitioner was, if not solely to blame, at least chiefly or substantially the offending party. A decision whether or not the separation was due to the wrongful act or conduct of the petitioner should be made not merely on the bare fact that the petitioner has, strictly speaking, been guilty of desertion, but upon an assessment of the position, having regard to the behaviour of both parties and to the matrimonial history generally. (*Freeman* v. *Freeman* [1955] N.Z.L.R. 924 and *Arnst* v. *Arnst* [1957] N.Z.L.R. 722, followed.) *Raymond* v. *Raymond.* (Supreme Court. Wellington. 1957. September 26; November 11. Gresson J.)

EDUCATION.

Teacher—Gross Misbehaviour—Failure to undergo Military Training Obligations—Such Conduct constituting "gross misbehaviour"—Education Amendment Act 1932-1933, s. 4. Since all teachers must subscribe to the Oath of Allegiance under s. 11 of the Education Amendment Act 1921-1922, the refusal by a teacher to perform his obligations under his oath or affirmation of allegiance (by failing to undergo his military training obligations as required by the Military Training Act 1949) places him outside the statutory conditions of his service, and such conduct is "gross misbehaviour" within the meaning of those words as used in s. 4 of the Education Amendment Act 1932 to 1933. *In re S.* (Teachers' Court of Appeal. Auckland. 1957. July 12, 19. Wily S.M., Chairman.)

HIRE-PURCHASE AGREEMENTS.

Re-possession—Motor-car Dealer acquiring Motor-car, the Property of Defendant Company, from Conditional Purchaser under Hire-purchase Agreement and reselling it—Conditional Purchaser making Default under Agreement—Defendant Company repossessing Car from Possessor—Motor-car Dealer paying Amount due to secure Ownership to Possessor and Costs of Re-possession—Such Costs not limited to £10, as Motor-car Dealer not a "purchaser", being Stranger to Hire-purchase Agreement—Hire-purchase Agreements Act 1939, s. 6 (3) (c). The plaintiff company, hereafter referred to as the plaintiff, is a motor-car dealer. In the course of its business it acquired a Mercury motor-car from B. and in the course of its business resold it to C. The car, however, was the property of the defendant company and B.'s only interest in it had been that of a conditional purchaser under a hire-purchase agreement made between H. (a predecessor in title of the defendant company) and B. B. having made defaults under the hire-purchase agreement, the defendant company traced the car and found it in the possession of C. The defendant company instructed an agent to re-possess the car under the powers in that behalf included in the hire-purchase agreement. This was done, and, in consequence, the plaintiff company was obliged to pay the defendant company £314 to clear the car, and so secure it and the ownership in it to C. Included in the sum of £314, was an item of £34 14s. representing the costs of re-possessing the car. The plaintiff company claimed from the defendant company the sum of £24 14s. which, it claimed, was the amount by which the sum of £34 14s. was in excess of the limit of £10 allowed for recovery of possession and delivery charges by s. 6 (3) (c) of the Hire-purchase Agreements Act 1939. *Held*, That the plaintiff company was not "the purchaser", and, consequently, it could not claim the benefit of s. 6 (3) (c) of the Hire-purchase Agreements Act 1939, and it was accordingly a stranger to the hire-purchase agreement without legal rights against the defendant company. *E. & S. Motors Ltd.* v. *Car Loans Ltd.* (1957. November 26; December 3, before Ferner S.M., at Christchurch.)

LANDLORD AND TENANT.

Lease—Court of Review reducing Minimum Rental in Adjustable Lease—Exercise of Right of Renewal—Effect on Rental in for Renewed Term—Mortgagors and Lessees Rehabilitation Act 1936, ss. 2, 45, 71. By Memorandum of Lease No. 5908, dated December 20, 1935, the Tairawhiti District Maori Land Board granted to W. a lease of certain Native freehold land for a term of twenty-one years from July 1, 1934, at a yearly rental of £345 16s. Clause 13 of the lease provided for renewal in the following terms: "13. On the request of the Lessee by notice in writing to the Lessors or to the Board made not less than six months nor more than nine months before the expiration of the term hereby created, and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Lessee herein contained but not otherwise the Lessors will at the expense of the Lessee grant to him a Lease of the demised premises for a further term of twenty-one years from the expiration of the said term at the yearly rental of five per centum per annum on the then unimproved value of the said lands plus the sum of £770 being the value of the owner's improvements on Lots 5 and 6, provided however that the rental for the renewal term shall be not less than the rental reserved under this present lease . . ." In 1938, W. applied for adjustment of his liabilities under the Mortgagors and Lessees Rehabilitation Act 1936. The Gisborne Adjustment Commission made an order in, inter alia, the following terms: "3. That as from the 1st day of July 1938 and until expiry thereof the rental payable under Memorandum of Lease No. 5908 shall be and the same hereby is fixed at £209 per annum. 4. That Memorandum of Lease No. 5908 more particularly mentioned in the schedule hereto shall be and the same is hereby varied by deleting from cl. 13 thereof the last seven words of the first paragraph thereof being as follows "the rental reserved under this present lease" and substituting therefor the words "the sum of £209 per annum." The order was sealed in the office of the Court of Review and became an order of that Court. In October, 1954, W. gave notice to the Maori Trustee that he desired to take the renewal, and application was made to the Maori Land Court for an order under s. 237 of the Maori Affairs Act 1953 directing the Maori Trustee to execute it. The Court directed the Maori Trustee to execute a renewal in accordance with the terms and conditions of the lease, and settled the amount of the rental for the renewed term at £345 16s. On originating summons seeking an order determining the rental which could properly be demanded for the renewed term of the lease, *Held*, 1. That the Court of Review was empowered by s. 45 of the Mortgagors and Lessees Rehabilitation Act 1936, as amplified by s. 71 thereof, having regard to the general purposes of that statute, to make the order for the variation of the "provision"—the right of

renewal—contained in cl. 13 of the lease existing at the date of the Court's order, the effect of which on the terms of the renewed lease was consequential and arose upon the exercise of the option. (*Henderson Town Board* v. *Johnston* [1940] N.Z.L.R. 202; [1940] G.L.R. 69, applied.) 2. That the rental for the renewed term pursuant to cl. 13 of the lease was to be "not less than the sum of £209 per annum", as provided in the order of the Court of Review. *In re a Lease, Watkins* v. *The Maori Trustee.* (S.C. Wellington. 1957. December 19. McCarthy J.)

Option to Purchase—Provision for Payment of Purchase-money on Expiration of Notice of Intention to exercise Option—Lessee giving Notice and adding "settlement will be effected on or before" a Certain Date—Lessee thus fixing His Own Time for Completion—Imposition of New Term without Lessor's Consent—Notice of Intention to exercise Option ineffective to bring about Concluded Contract of Sale and Purchase. Property Law—Relief from Forfeiture—Option to Purchase—Refusal to transfer Land in Terms of Option to purchase—Application for Relief made after Three Months from Refusal of Transfer—Application out of Time—Property Law Act 1952, ss. 120, 121. The defendant was the lessor and the plaintiff company the lessee of a shop and dwelling under a lease for three years from September 21, 1951, which contained an option to purchase in the following terms: "That if the lessee shall at any time prior to the 29th day of September 1953 give to the lessor three calendar months' notice in writing of its desire to purchase the fee simple of the premises hereby demised then the lessor shall on the expiration of such notice and upon payment to him by the lessee of the sum of one thousand eight hundred and fifty-five pounds (£1,855) and of all the rent then due or accruing due convey the said premises to the lessee for an estate in fee simple free from encumbrances." On May 6, 1953, the plaintiff's solicitor wrote to the defendant as follows: "I am instructed by the abovenamed firm to notify you that it intends to exercise its right to purchase pursuant to Clause 2, subclause 1 of the lease given by you, dated the 20th November 1951. Settlement will accordingly be effected on or before the 29th September 1954." On July 9, the defendant replied: "With regard to your letter of 3rd instant, your letter of 6th May last was received by me on 7th May last." The plaintiff asked for an order declaring that it had validly exercised its option to purchase, and for a decree that, on payment of the agreed purchase money, the defendant be required to execute a transfer of the property to the plaintiff. In the alternative, the plaintiff asked for relief under the Property Law Act 1952 against the loss of its right to purchase. The defendant counterclaimed for an order for possession, the plaintiff's lease having expired. Stanton J. held that there was no concluded contract between the parties, and the plaintiff was not entitled to relief against the forfeiture of the right of option to purchase; and gave judgment in favour of the defendant: [1956] N.Z.L.R. 359. On appeal from that judgment, *Held*, by the Court of Appeal (Gresson J., McGregor J., and T. A. Gresson J.; Barrowclough C.J. and F. B. Adams J. dissenting) That, on its true construction, the letter of May 6, 1953, was not an effective exercise of the option, as it was not such an unqualified acceptance as to bring about a concluded contract of sale and purchase between the parties. ((*In re Imperial Land Company of Marseilles* (*Harris's* case) (1872) L.R. 7 Ch. 587, and *English and Foreign Credit Co.* v. *Arduin* (1871) L.R. 5 H.L. 64, distinguished.) *Held further*, by the Court of Appeal, *per totem curium*, That the lessee was not entitled to relief against forfeiture under s. 118 of the Property Law Act 1952, as the lessee was merely bringing an action for possession of premises subject to a lease which had expired by effluxion of time, and any relief which otherwise might have been available to the lessee pursuant to s. 120 of that statute was statute-barred in terms of s. 121 (1), as an application to the Court to decree specific performance had not been made within three months after the refusal of the lessor to sell the land to the lessee. Observations by Gresson J. on the true function of the Court of Appeal to decide whether the judgment of the trial Judge on the case as presented was right, and as to its duty to disallow an appeal upon a ground not set forth in the pleadings as it is not free to remould appellant's case, when any depart re from the cause of action or the relief claimed in the pleadings has not, in fact, been preceded by the relevant amendments. (*Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C 218; [1955] 3 All E.R. 864 and *London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332; [1942] 1 All E.R. 97, followed.) *Reporoa Stores Ltd.* v. *Treloar.* (C.A. Wellington. 1956. September 20. 1957. June 20, 21, 24, 25; December 6. Barrowclough C.J. Gresson J. F. B. Adams J. McGregor J. T. A. Gresson J.)

MARRIAGE.

Marriage Formalities, *107 Law Journal*, 761.

MARITIME LAW.

Brussels Convention, 1957, *107 Law Journal*, 759.

NEGLIGENCE.

Assumption of Risk and Negligence, *35 Canadian Bar Review*, 887.

TENANCY.

Fixation of Fair Rent—Tenant renting House on Section and Vacant Section—House Property Sold—Subject to Tenancy—Tenant remaining in Occupation of Both Sections—Owner of Vacant Section applying for Fixation of Fair Rent thereof—No Jurisdiction to fix Rent of Portion only of Tenanted Property—Tenancy Act 1955, ss. 20 (1), 26 (1). P. owned two adjacent sections, on one of which a house had been erected, and both sections were let to L. P. sold the house and the section on which it stood, subject to the existing tenancy, but retained the vacant section. On an application by P. to have the fair rent fixed in respect of the vacant section, *Held*, That the Court had no jurisdiction under the Tenancy Act 1955 to fix a rent on the application of one only of two lands to have a rent fixed in respect of a portion only of the tenanted property. *Semble*, If steps were taken to have a fair rent fixed in respect of a tenanted property as a whole, it would be open to P. to have an apportionment made and to recover such proportion of the total rent as P. might be held to be entitled to receive. *Palmer* v. *Laurie.* (1957. June 10; 28, before Kealy S.M., at Auckland.)

Fixation of Fair Rent—Land Tax not an "outgoing in respect of the premises"—Tenancy Act 1955, ss. 2 (1), 21 (1). Land tax is not a tax in respect of property: it is a personal tax levied on a person but based on his ownership or interest in land. Consequently, land tax is not an "outgoing in respect of the premises" within the definition of "outgoings" in s. 2 (1) of the Tenancy Act 1955, and no allowance for land tax can be made in determining the fair rent under s. 21 (1) of the statute. Dicta of Hosking J., in delivering the judgment of the Court in *Charles* v. *Lysons* [1922] N.Z.L.R. 902, 909, applied. *Hallenstein Bros. Ltd.* v. *R. Alston & Sons Ltd.* (S.C. Christchurch. 1957. October 15; December 9. McGregor J.)

Possession—Suitable Alternative Accommodation—Inadequacy and Unsuitability to be Judged in Relation to Needs and Circumstances of Individual Tenant concerned—Tenancy Act 1955, s. 38 (4). Under s. 38 (4) of the Tenancy Act 1955, any alleged inadequacy for the needs of the tenant in the alternative accommodation offered has to be judged in relation to the needs of the individual tenant concerned, and any alleged unsuitability should also be judged in relation to the circumstances of that individual tenant. (*Poore* v. *Folbigg* (1943) 3 M.C.D. 302 and *Buckley* v. *Wellesly* (1951) 7 M.C.D. 3, distinguished.) *Potter and Another* v. *Davey.* (S.C. Wellington. 1957. December 16. T. A. Gresson J.)

— — Shop Premises owned by Applicant for Possession—Possession required to Carry on Therein Business of Company of which Applicant Principal Shareholder and One of the Directors—Applicant not "alter ego" of Company—Applicant not requiring premises "for his own occupation"—Tenancy Act 1955, s. 36 (e). F., the registered proprietor of shop premises, claimed possession thereof as being reasonably required for his own occupation. He required the premises for carrying on therein the business of watchmaker and jeweller. That business was owned and carried on by a limited liability company in which F. was the principal shareholder, holding 6,500 out of 7,000 shares, the other shares being held by one H. in his own right. F. and H. were directors of the company. *Held*, 1 That there was not such a complete identity of interest and control that it could be said that F. owned the business which the company carried on; and, when F. formed his company, he dissociated its operation in law from his own, and the difference which he then created still subsisted and was effective to bar his claim for possession of the premises for his own occupation. (*Salomon* v. *Salomon* [1897] A.C. 22, followed.) 2. That, further, it was probable that the relationship of the company to F. would be that of tenant and landlord and this would be fatal to the proposition that one was the "alter ego" of the other. (*J. R. McKenzie Ltd.* v. *Gianoutsos and Booleris* [1957] N.Z.L.R. 309, distinguished.) *Fisher* v. *Wong Gee.* (S.C. Auckland. 1957. December 13. Turner J.)

THE LAW OF TRUSTS AND ADMINISTRATION.

Statutory Changes in 1957.

By J. G. HAMILTON, LL.M.

The revision of the main statutes relating to the law of trusts was completed with the enactment of the Trustee Amendment Act 1957, the Charitable Trusts Act 1957, and the Public Trust Office Act 1957. Important changes in the law governing the administration of the estates of deceased persons were made by the Administration Amendment Act 1957; and useful provisions affecting the estates of mentally defective persons and protected persons appear in the Mental Health Amendment Act 1957 and the Aged and Infirm Persons Protection Amendment Act 1957.

The Trustee Amendment Act 1957.

This Act provides for further extensions of the statutory powers of trustees; it transfers to the general legislation certain provisions that have previously appeared in the Public Trust Office legislation; and it rewrites s. 83 of the Trustee Act 1956 so as to make minor clarifications of the rules laid down by that section in respect of the apportionment of accrued income on the sale, purchase, or transfer of income-bearing assets.

POWERS.

The most important of the provisions relating to powers is that in s. 5 which adds the following subsection to s. 14 of the Trustee Act 1956:

> (7) Where there is a power (statutory or otherwise) to postpone the sale of any land or authorized investment that a trustee has a duty to sell by reason only of a trust or direction for sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust) the trustee shall not be liable in any way merely for postponing the sale, in the exercise of his discretion, for an indefinite and unlimited period, whether or not that period exceeds the period during which the trust or direction for sale remains valid; nor shall a purchaser of the land or authorized investment be concerned in any case with any directions respecting the postponement of a sale:
>
> Provided that this subsection shall not apply to any property of a wasting or speculative nature.

There has previously been doubt as to how long a trustee can retain assets in exercise of a power to postpone. A statutory power to postpone is conferred by para. (*c*) of s. 14 (1) of the Trustee Act 1956. The new provision extends this statutory power and any express power to postpone by permitting the power to be exercised for an indefinite and unlimited period in cases where the trustee's duty to sell arises only by reason of a trust or direction for sale. The provision has no application in cases where the trustee's duty to sell arises under any rule of law, e.g. the duty to sell unauthorized investments that form part of a residuary estate settled by will for the benefit of persons in succession.

Another useful provision is that in s. 4 which authorizes a trustee to erect a dwellinghouse on land that is subject to the same trusts as the money being expended in respect of the erection, or to purchase land in New Zealand and erect a dwellinghouse thereon, if the dwellinghouse and land are required exclusively or principally as a home for the person entitled to the money being expended, and if the whole of the money is derived from the sale of another dwellinghouse and land which the trustee had power to retain. Power to purchase a dwellinghouse and land in like circumstances was given by para. (*b*) of subs. (2) of s. 14 of the Trustee Act 1956.

By s. 6, the power to sell on terms under s. 17 of the Trustee Act 1956 was extended to all property. The extension was designed to enable a farm and the stock and implements to be sold as a going concern. Section 3 makes it clear that a trustee who has power to purchase certain redeemable stock may (under s. 5 of the Trustee Act 1956) purchase them at a premium or discount, whether his power to purchase springs from the Trustee Act 1956 or any other Act or from the trust instrument. The new wording reverts in this respect to the wording set out in s. 3 of the Trustee Amendment Act 1935. The new s. 2 adds Fire Board securities to the list of authorized investments.

PROVISIONS TRANSFERRED FROM PUBLIC TRUST OFFICE LEGISLATION.

Section 7 enacts, as s. 39A of the Trustee Act 1956, the following provision:

> 39A. (1) Where any chattels are, under the provisions of any will, bequeathed to any person for life or for any limited interest, the trustee may cause an inventory to be made of the chattels, which inventory shall be signed by that person and retained by the trustee, and a copy of the inventory shall be delivered to that person.
>
> (2) The trustee may thereupon deliver the chattels to that person on such terms and conditions as the trustee thinks fit, and shall not thereafter be bound to see to the repair or insurance of the chattels, and shall not be subject to any liability whatsoever by reason of the loss or destruction of the chattels or the neglect of that person to effect any such repairs or insurance.
>
> (3) A copy of any such inventory, signed by that person and by the trustee, shall be deemed to be an instrument within the meaning of the Chattels Transfer Act 1924, and may be registered accordingly.

The Public Trustee has had the advantage of this provision since 1922. It affords useful protection in cases where the whole estate is settled on persons in succession, and the circumstances are such that chattels should be left in the hands of the life tenant. The provision is one to be operated with common sense and with regard to the trustee's duty to hold the scales evenly between the life tenant and the remainderman. In the case of a depreciating asset, such as a motor-car, it may be that the trustee should make the delivery to the life tenant conditional (among other things) on the life tenant making payments to a depreciation fund.

Section 10 enacts as s. 83A of the Trustee Act 1956 a provision that, in the case of any trust estate administered by a trustee corporation, a solicitor or accountant authorized in writing by a beneficiary shall be entitled as of right to examine at any reasonable time the accounts of that estate, and for that purpose shall have access to the trustee corporation's books and vouchers (but not the file) relating to that estate, and to the securities and documents of title held by the trustee corporation on account of that estate.

This is little more than a codification of the general law under which a trustee is bound to allow a beneficiary or his solicitor to inspect the accounts and vouchers and other documents relating to a trust. The important point is perhaps that the file of the trustee corporation cannot be called for.

Section 10 also enacts as s. 83B of the Trustee Act 1956 a provision that has been in the Public Trust Office legislation since 1913 under which any trustee or beneficiary of an estate that is not administered by a trustee corporation may require the condition and accounts of the estate to be investigated or audited by a solicitor or member of the New Zealand Society of Accountants. It appears that little use has ever been made of this provision.

The Charitable Trusts Act 1957.

This Act consolidates and amends the Religious, Charitable, and Educational Trusts Act 1908 and its amendments. The consolidation was undertaken primarily to give effect to certain recommendations of the Law Revision Committee relating to Trust Boards incorporated under Part II; but the whole of the legislation has been reviewed, and much of it has been rewritten.

It must be remembered in connection with the Act that the term "charitable purpose" is defined with different meanings for the purposes of different Parts. In Parts III and V the term has its ordinary legal meaning. Obviously the rules which determine whether a trust is charitable for the purpose of preserving it against failure for uncertainty or under the perpetuities rule must be the same as those which determine whether it is charitable in connection with a change of purpose under Part III. In Parts I and II the meaning of the term "charitable purpose" is extended so as to include every purpose that is religious or educational. The previous Parts I and II applied to all trusts for religious or educational purposes. Part IV, which relates to funds raised by voluntary contributions, follows the previous legislation in giving the term "charitable purpose" a considerably extended meaning. It is desirable that there should be provision for altering trusts created for all purposes for which funds are commonly raised by public subscription, whether or not the purposes are charitable in the strict legal sense.

The Act is divided into five Parts as follows:

Part I —Vesting of property:
Part II —Incorporation of Trust Boards:
Part III—Schemes in respect of certain charitable trusts:
Part IV —Schemes in respect of charitable funds raised by voluntary contribution:
Part V —Miscellaneous provisions.

The first four of the Parts relate to the same subjects as the corresponding Parts in the Religious, Charitable, and Educational Trusts Act 1908. Part V enacts, for the purposes of both Part III and Part IV, a number of provisions which previously were set out separately in each of the Parts. Part V also contains new provisions designed to provide machinery under which steps can be taken to secure the supervision and control of charities in individual cases where it may appear to be necessary.

Part I—Vesting of Property.

The new Part I follows fairly closely the corresponding previous legislation. It provides for the automatic vesting, in the trustees for the time being, of any property acquired by or on behalf of a religious denomination or congregation or society or body of persons associated for any charitable purposes. It also provides machinery for evidencing by a simple memorandum any appointment of trustees of any such property. Such a memorandum has no operative effect as regards Land Transfer land in any land registration district until either the memorandum or a duly certified copy thereof has been filed in the Land Registry Office for the district.

Previously the legislation applied only to freehold or leasehold property or mortgages thereof, but the new provisions extend to all real and personal property. The new provision usefully relaxes the requirement that the document evidencing the appointment of trustees must be executed in the presence of the meeting at which the trustees are appointed. Now it may be executed either at the meeting or at any time thereafter.

Part II—Incorporation of Trust Boards.

The new Part II provides a considerably fuller code than that in the previous legislation for the incorporation of Trust Boards and makes provision for the winding up or dissolution of such Boards. As shown by the footnotes to the sections, many of the provisions of Part II are new, and follow substantially corresponding sections in the Incorporated Societies Act 1908 and the Companies Act 1955. Part II permits incorporation of either the trustees of any trust which is exclusively or principally for charitable purposes, or of any society which exists exclusively or principally for charitable purposes.

Part II of the Charitable Trusts Act 1957 provides only one of several ways in which incorporation can be effected in cases that could come within the provisions of the new Act. In some cases the Incorporated Societies Act 1908 is used; in some cases the incorporation is effected under the Companies Act 1955, s. 33 of which gives power to dispense with the inclusion of the word "Limited" in the name of a company formed for promoting charity; and there are a number of cases where incorporation has been effected by a private Act or other special legislation. The new s. 22 makes it clear that the existing practice in this connection is not affected. In view of this practice, and to allow the one Registrar to control all registrations of bodies being incorporated for charitable purposes, the Registrar with whom all documents must be filed in future will be the Registrar of Incorporated Societies instead of the Registrar of the Supreme Court.

The new s. 23 requires Trust Boards to lodge with the Registrar certified copies of documents and certain particulars relating to new trusts which the Boards may undertake, and alterations of rules, and registered offices. A small penalty is imposed on the trustees and officers of the Board personally in cases where the Board fails to comply with this obligation. No obligation is being imposed on existing Trust Boards to lodge copies of documents or particulars relating to their present constitution and trusts, though they are authorized to do so. Court Registrars are authorized to hand over their existing documents relating to Trust Boards to Registrars of Incorporated Societies;

but in the meantime it is contemplated that this authority will be used only in individual cases where it will be of advantage to have all the documents relating to a particular Board filed together in the one office.

Part III—Schemes in Respect of Certain Charitable Trusts.

Under its general jurisdiction the Supreme Court has power:

(a) To alter the purpose of a charitable trust in cases where the *cy-pres* doctrine so permits, and to approve a scheme to define the objects or prescribe the mode of administering the trust as so altered:

(b) To define the objects or prescribe the mode of administering a charitable trust in cases where no alteration of the objects of the trust is sought: see *In re Amelia Bullock-Webster* [1936] N.Z.L.R. 814.

These powers are extended by Parts III and IV of the new Act. Part IV relates to the alteration of charitable trusts in respect of funds raised by public contributions. Part III relates to the alteration of charitable trusts involving other property.

Subsections (1) and (3) of s. 32 are key provisions, and provide:

> (1) Subject to the provisions of subsection three of this section, in any case where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and it is impossible or impracticable or inexpedient to carry out that purpose, or the amount available is inadequate to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or useless or uncertain, then (whether or not there is any general charitable intention) the property and income or any part or residue thereof or the proceeds of sale thereof shall be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereafter contained in this Part of this Act.
>
> (3) This section shall not operate to cause any property or income to be disposed of as provided in subsection one or subsection two of this section:
>
> (a) If in accordance with any rule of law, the intended gift thereof would otherwise lapse or fail and the property or income would not be applicable for any other charitable purpose:
>
> (b) In so far as the property or income can be disposed of under Part IV of this Act.

Section 33 is new, and enables the powers of trustees for a charitable purpose to be extended or varied and the mode of administering any such trust to be prescribed or varied by a scheme prepared and approved under Part III. Sections 34 and 35 prescribe machinery for preparing schemes and laying them before the Attorney-General. The Attorney-General may submit proposed amendments to the trustees for consideration, and must deliver to the trustees a report on the scheme as finally submitted. The trustees may at any time thereafter apply to the Court for approval of the scheme. The report of the Court must be placed before the Court on any such application.

Part IV—Schemes in Respect of Charitable Funds Raised by Voluntary Contribution.

Part IV provides for the change of the purposes of a trust, and the extension of the trustee's powers, and the alteration of the mode of administering a trust, in the special class of cases where (as provided in s. 39) the trust relates to money raised for any charitable purpose (as defined in s. 38) by way of voluntary contribution, or by the sale of goods voluntarily contributed, or as the price of admission to any entertainment, or in any other manner of voluntary contribution. The machinery under Part IV differs from that under Part III in that under Part IV the proposals to be incorporated in the scheme must normally be advertised; a meeting of contributors must normally be held; and a scheme committee to draw up a scheme for submission to the Attorney-General must normally be appointed.

The provisions relating to the meeting of contributors, and the appointment of a claim committee of three contributors show that Part IV can be invoked only in cases where the trust relates to money contributed by a number of persons. In cases where proposals for a change of purpose are advertised, s. 49 enables any contributor to get his money back before the date fixed for the first meeting of contributors, but not afterwards. Section 50 contains new provisions under which the Attorney-General or the Court can in some cases dispense with advertising or the holding of a meeting of contributors.

Under the previous legislation the approval of a scheme had to be given by the Court in cases coming within Part III, and by the Attorney-General in cases coming within Part IV. This division of authority caused difficulty in cases where part of a fund consisted of legacies to which Part III applied, and part consisted of money raised by public contributions and coming within Part IV. Under the new ss. 35 and 48 one scheme affecting both parts of the fund can now be submitted to the Attorney-General; the Attorney-General can report on the whole scheme; and the scheme can be approved in its application to both parts of the fund on the one application to the Court.

Part V—Miscellaneous Provisions.

Most of this Part relates to machinery provisions designed to supplement Parts III and IV. Important new provisions are however made by ss. 58 and 60.

There is in New Zealand no general system for the supervision and control of charities such as that administered by the Charity Commissioners of the United Kingdom. Such a system is probably not called for in this country at present; but s. 58 (based on s. 9 of the Charitable Trusts Act 1853 of the United Kingdom) empowers the Attorney-General to make inquiries into the condition and management of charities in New Zealand, or to appoint an officer of the Government service or any other person to make any such inquiry. Subsection (1) of s. 60 enables effective action to be taken in any such case. It provides:

> (1) Application may be made to the Court by the Attorney-General or any officer of the Government service or person in respect of any property or income subject to a trust for a charitable purpose within the meaning of either Part III or Part IV of this Act, whether or not a scheme in respect of the property or income or money has been approved by the Court under Part III or Part IV of this Act or otherwise or by the Attorney-General under Part IV of this Act, for an order:
>
> (a) Requiring the trustees to carry out the trusts on which the property or income or money is held, and to comply with the provisions of the scheme (if any):
>
> (b) Requiring any trustee to meet his liability for any breach of trust affecting the property or income or money as the Court may direct:
>
> (c) Excluding any purpose from the purposes for which the property or income or money may be used, applied, or disposed of:

(d) Giving directions in respect of the administration of the trust; or in respect of any examination or inquiry under section fifty-eight of this Act; or of any question to be answered or assistance to be given by any person in connection with any such examination or inquiry:

(e) Directing that on and after the date of the order, or on and after any subsequent date specified in the order, the property or income or money subject to the trust shall not be used or applied or disposed of otherwise than in accordance with a scheme which, after the date of the order, is approved by the Court under Part III or Part IV of this Act or otherwise, or by the Attorney-General under Part IV of this Act.

(To be concluded.)

REVOCABLE LICENCE OVER LAND TRANSFER LAND.

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

A licence (within the meaning of the general law) is not registrable under the Land Transfer Act. It is true that so-called licences are registrable under the Land Transfer Act by virtue of other statutes, such as the Land Act 1948 (Crown Leases and purchases of Crown land under the Deferred Payment System) and the Housing Act 1955 (purchases of State Houses) but these are something more than licences under the general law.

A "licence" (as that term is understood under the general law) is a right to enter upon the land of the licensor for some purpose agreed on or to be agreed on or to do some act in relation to the licensor's land which would otherwise be unlawful, the right not amounting to a lease or to an easement or *profit a prendre*, as those terms are used in the law of real property. In determining into what category an instrument comes, the substance of the transaction must be looked at. Thus a "licence" so-called in the instrument itself may in fact be a lease.

There may be a licence subject to a condition, e.g., a person may give his neighbour permission to walk over his freehold provided he does not go with a dog. Although this is not a contract but a revocable licence, the condition is binding on the licensee: *Wilkie* v. *London Transport Board* [1947] 1 All E.R. 258.

The recent judgment of Sir Harold Barrowclough C.J. bearing on this topic, *McBean* v. *Howey* [1958] N.Z.L.R. 25, is of considerable interest to the conveyancer and the real property lawyer; and a careful perusal of it would be of some assistance to one studying the law of contract or the principle of equitable estoppel. This case clearly brings out the difference in legal effect between an agreement for valuable consideration to grant a perpetual easement over land subject to the Land Transfer Act, and an agreement without consideration to grant a revocable licence thereover. From the use by the learned Chief Justice of the phrase "respective registered proprietors" (*ibid.*, 26), it is reasonable to assume that in *McBean* v. *Howey* both sections of land were under the Land Transfer Act. Section 90 of that Act requires a legal easement to be created by a registered memorandum of transfer. In *Mackechnie* v. *Bell*, (1909) 28 N.Z.L.R. 348, 352, Williams J. said:

> "The case of *Mackenzie* v. *Waimunu Queen Gold-dredging Co.* (1901) 21 N.Z.L.R. 231, has already decided that in order to create an easement under the Land Transfer Act a transfer of the easement must be executed and registered."

I think that these words have often been given a wider application than was intended. The Land Transfer Act does not alter the law of contract further than is necessary to conserve the cardinal principle of that Act: that he who acquires a registered title without actual fraud holds an indefeasible title as against all the world. The penultimate paragraph of the judgment in *Mackechnie* v. *Bell, supra,* which is not so often cited as the passage cited above, recognizes that there may be enforceable contractual obligations on the part of the registered proprietor of the servient tenement to grant an easement. And that was one of the main points involved in *McBean* v. *Howey*: Was the defendant under a contractual obligation to grant an easement in favour of the plaintiffs, Mr and Mrs McBean? The facts were not complicated.

Mrs. McB. and H. were owners of adjoining sections of land, with a frontage to a public road. McB., desiring to erect a garage on his wife's section, required a short driveway to give access to it from the road.

At the time there was a dwellinghouse on Mrs. McB's. section, but none on Mr. H's. section.

Portion of the driveway would have to be constructed across a corner of H.'s section, and this would involve some excavation on H.'s land. In 1948, H. agreed to allow McB. to form the driveway and do the necessary excavation, and he also agreed that McB. should have some right to pass over the driveway to the proposed garage. McB. built the garage on his wife's land on a site approved by H., who constantly saw the construction of the driveway, assisted in it, and encouraged it. *During the next nine years*, McB. regularly used the driveway as access to and from his garage. In March 1957, H. gave McB. two months' notice of intention to revoke McB.'s right of access.

H. intimated that he would have to dig out portion of the driveway in order to give access to his own property on which he was then proposing to build a home.

Mr and Mrs McB. thereupon brought an action against H. for an injunction "from interfering with the said driveway and the plaintiffs' present use thereof."

It is pertinent to observe here that no formal grant of any right of way was ever executed, nor does it appear that either party ever contemplated the execution of any document which would record the terms of whatever agreement had been reached. All that was alleged by the plaintiffs was that H. had promised to give certain rights of access.

In holding that there was no valuable consideration moving from Mr and Mrs McB. His Honour, at p. 27, said:

> There was no stipulation for any act, forbearance or promise on the part of McBean and without that there is no consideration such as is necessary to support what would otherwise

be a bare promise by Howey: see *Salmond and Williams on Contracts*, 2nd ed., 101 et seq. I hold, therefore, that, whatever promise was given by Howey, it was a promise unsupported by valuable consideration. There is no contract which the plaintiffs can ask the Court to enforce.

Relying on the well-known case of *Wood* v. *Leadbitter* (1845) 13 M. & W. 838; 153 E.R. 331, he held that on the evidence, the right which H. promised McB. was a licence not coupled with an interest: it was a bare promise unsupported by valuable consideration and was revocable at will, unless equity would restrain him from revoking it.

Dealing with the doctrine of equitable estoppel (which has figured largely in modern English jurisprudence), His Honour held that although H. acquiesced in McB.'s expenditure on the driveway and the garage and encouraged it, there was no evidence to show that he acted fraudulently or unconscionably in setting up his legal rights to revoke the licence he promised to McB, and it could not be inferred that McB. had incurred expenditure on the driveway and garage on the faith of a mistaken belief that he had been promised a permanent right of way, and that H. must have known that McB. was mistaken as to his legal rights.

In the course of his judgment, His Honour made some very interesting observations, illustrated by apt examples. Explaining, at p. 28, what would have been the legal effect, if a legal grant of a right of way had been created, he said:

> The easement would enure for the benefit of Mr McBean as an easement in gross (s. 122 of the Property Law Act 1952) and also for Mrs McBean as the owner of what would be the dominant tenement if an easement were created. It would enure for the benefit of Mrs McBean's successors in title and would bind purchasers from Howey whether the respective owners of the two properties were good neighbours or not. It is unfortunate that the arrangement between the parties was not put into writing. On the rather uncertain evidence that there is before me, I think that that arrangement cannot properly be regarded as the promise of an easement, but rather as the promise of a licence—something that was essentially personal to both the grantor and grantee. I hold, therefore, that what was promised was a licence, and it was a licence not coupled with an interest. Moreover the promise was a bare promise not supported by any valuable consideration.

I do not think that there can be any doubt but that a legal easement in gross may now be created over land subject to the Land Transfer Act: In respect of the Property Law Act 1952, s. 3 (2) His Honour appears to lay down this interesting proposition:

A, the registered proprietor of land under the Land Transfer Act, may grant a legal easement to B appurtenant to B.'s land, and in the same instrument may also grant an easement in gross over the same land in favour of C.

I have never seen an instrument of such a two-fold nature, but apparently there is no reason why such a memorandum of transfer should not be drawn up and duly registered against the title to the servient tenement. I have knowledge of ineffective attempts by a dominant owner to transform an appurtenant easement into an easement in gross without any fresh consent or grant by the registered proprietor of the servient tenement, but that is an entirely different matter.

With reference to the equitable doctrine of standing by, His Honour said:

> If a man erects an expensive building on land which is not his own and which he has no right whatever to enter I think it would be a fair inference that he mistook his boundary and that if he had known his true boundary he would most certainly not have spent his money in erecting his building in that place. But here there is no mistake as to the boundary. McBean had a licence to use a part of Howey's land. He and Howey were on very friendly terms. He had no reason to expect his licence would be terminated in the near future. It was not in fact revoked for nine years and might have lasted even longer. It is not proved that if McBean had appreciated that his licence was revocable he would certainly not have been prepared to spend £10 on bulldozer hire, £30 on materials for the garage and his weekend labour. Having regard to his then friendly relations with Howey, I think he might well have spent his money and his labour on the faith of his neighbour's goodwill towards him. I do not think it is proved that he incurred his expenditure on the faith of a mistaken belief as to his legal rights, even if I accept that he had such a mistaken view of those rights.

Further on in his judgment, the learned Chief Justice gives the following illustration:

> If I give a man a licence to cross a corner of my land I am not to assume that because he lays a few slabs of concrete to ensure a dry passage in wet weather that he mistakenly believes that he has a permanent right of way. The present case is not so simple as that, but on its facts I am not satisfied that Howey must have known, because of the expenditure of work and labour, that McBean was mistaken as to his legal rights.

To sum the matter up, His Honour could on the evidence find no equity vested in the plaintiffs which justified the Court in restraining Howey from exercising his legal rights in respect of the land of which he was registered proprietor. Mr Howey gave two months' notice of termination of the licence. His Honour thought that that was a reasonable notice, if notice was necessary in the case, and accordingly held that the licence had been lawfully revoked.

The moral is that, if you want a permanent easement over your neighbour's land, get a registrable grant and register it.

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* But His Honour pointed out that the Court was bound to consider the case on equitable principles, which were not applicable in the Court in which *Wood* v. *Leadbitter* was decided.

Murder Statistics.—In answer to a recent question in the House of Lords asking for comparative figures for murder before and after the coming into force of the Homicide Act on March 21, 1957, Lord Chesham gave figures which related to the number of victims of offences recorded by the police as murder, or which would have been so recorded but for the passing of the Homicide Act, excluding those which to date (November 12) had been found to be some other offence. In the six months from September 21, 1956, to March 20, 1957. 25 children between the ages of one and 14 and 53 persons over 14 had been the victims of offences which appeared to have been murder. The corresponding figures for the period March 21 to September 20, 1957, were 31 and 68. If the Homicide Act had not been passed, all the persons over 18 found guilty of murder would have been liable to the death penalty. These figures related to England and Wales only.

SAMOAN WITNESS.

Procedure in the High Court of Western Samoa is modelled on that of the New Zealand Courts with due and proper allowance—no inconsiderable matter—for local conditions and Samoan temperament. Very often the Judge or Commissioner has to act like the sergeant in the song, and be father and mother, too, to the litigants. Even now, when the legal profession is becoming better known in the Territory, many Samoans are not aware of the inestimable benefits conferred upon persons having dealings with the Law, arising from the engagement of counsel. Others are possibly aware of the advantages, but find it reasonably satisfactory and far less expensive to look up pathetically at the " Old Man " on the Bench and silently beg for a helping hand.

The Samoan who comes to give evidence in Court is beset by many difficulties. The first—and one, no doubt, not entirely unknown in Court circles in New Zealand—is that of conflicting interests. On the one hand, there is the impulse to tell the truth, engendered by the theoretical fear of the wrath of God and the practical fear of a gaol sentence for perjury if lies are told on oath and the liar is found out. On the other hand, is the fervent desire to help in every possible way the cause of him on whose behalf the evidence is being tendered. This latter feeling is strong everywhere; but in Samoa it has particular force on account of the operation of what is called the *aiga* system.

The word *aiga* is usually translated " family," but it has a wider connotation than that. It comprises all the persons who owe allegiance to a particular *matai*, or other person who occupies the position of head of the family, and includes not only his relations, but the relations of his in-laws and adopted children, and all others who live under his protection and pay him allegiance and render him service. Although with the onward march of civilization most Samoan loyalties are wearing a little thin, the one loyalty which will stand the test for many years to come is that which subsists within the *aiga*. Any member of the *aiga* may call on any other member for help with the practical certainty that that help will be forthcoming. This loyalty within the *aiga* is so rooted in Samoan custom and tradition that it is almost impossible to convince any Samoan that it does not operate to excuse him from giving false evidence on oath. His first duty, he feels, is to help the *aiga* along; only after that is done is he entitled to give consideration to the moral precepts instilled by his Church, and to the possibility of a gaol term if he is false to his oath.

There is nothing furtive about the Samoan attitude. Recently the Judge was able to confront a witness with evidence the latter had given in a previous case, directly contrary to that he was giving in the case now before the Court. The witness acknowledged that he had previously told a different story.

" Then which is the truth—what you told me then, or what you are saying now ? "

" With great respect, I am telling the truth now."

" Then why did you tell lies in the other case ? "

" Because it would not have helped my family's case for me to tell the truth last time."

Then, as he caught a stern expression on the Judge's face, he went on quickly :

" But, with great humbleness before the dignity of the Court, no harm was done, Your Honour. We lost our case anyway.'

When I speak of the " theoretical fear of the wrath of God " with regard to the question of perjury, I am referring only to these modern times in which the advance of democracy and civilization has pushed into the background many of the forces which once were operative in the Territory. The older Samoans still speak with awe of a case which was heard before the Courts between fifty and sixty years ago. One side was led by a native pastor named Timoteo and a *matai* named Tafua. At the commencement of the hearing the senior Samoan Judge, Suatele, administered a solemn oath which incorporated a pledge to the Almighty that anyone telling a lie in his evidence should be destroyed. The following day both Timoteo and Tafua were dead. Another of that side became seriously ill, whereupon his family begged the other side to join in prayers to God to forgive the great sin which had been committed. They did so ; the sick man recovered and no other deaths followed. The facts are on record. The inference to be drawn from those facts is a matter for the individual reader.

There are illustrations of the effect of the *aiga* system in the case of prospective witnesses as well as those who actually step into the box and take the oaths On a recent occasion the driver of a motor-vehicle wa. arrested and taken to the hospital by the Police to be examined for drunkenness. A Samoan medical practitioner was called, but as soon as he saw the driver he refused to conduct any examination. He said to the Police : " That man belongs to my *aiga*. In fact he is the husband of my sister. If I examine him and certify that he is drunk, I will be severely critizised by own family, and life will be made very unpleasant for me. If I certify him sober, everyone will say that I have done that merely to favour a member of my *aiga*. So please get another doctor or S.M.P. to carry out the examination."

There are many things to be learned before one can acquire any skill in handling Samoan witnesses. The first arises from the reluctance of many New Zealand-trained lawyers to ask questions affirmatively if it is possible to couch them in a negative form.

For example : " Didn't you tell my learned friend just now . . . ? " or " Is it not a fact that you went to defendant's store yesterday ? "

In answering these questions the Samoan witness acts on the " yes-we-have-no-bananas principle." If in fact the witness did not go to defendant's store yesterday, he will answer " yes " to the latter example. His " yes " means " that is so ; when you say it is not a fact you are right." Unless a lawyer wishes to follow a tortuous routine of continual restatement of his questions to ensure complete understanding, he must learn to put them affirmatively in the first instance. It should not be difficult, though many find it so. After all, surely the direct approach in the example given is also the simplest : " Did you go to defendant's store yesterday ? " Couched in that form, the query

admits of no misunderstanding to the Samoan mind—nor does his reply, to the European.

Practising in Western Samoa shows up another habit of New Zealand lawyers in the examination of witnesses: that of the double-barrelled question. "Do you know if petitioner is separated from his wife?" "Can you say if Siaosi is a schoolboy?" Counsel in these instances requires to know if petitioner is living with his wife, or if Siaosi is still at school. The questions however are framed not in that way, but in the way of asking the witness if he has knowledge of the subject; and it is in the latter sense that the Samoan witness answers the question, literally as put. If he knows the facts as to the cohabitation, or whether Siaosi is attending school, he will reply "yes" in each case. But it may well be that, to the witness's knowledge, the parties are living happily together, or that Siaosi has long since left school to go and work for the Government. So counsel is faced with the necessity of asking further questions to elicit the truth. Here is an actual example from a recent case before the High Court:

"Do you know if Paulo is related to the defendant?"—"Yes."

"Do you mean that Paulo is related to him?"—No."

"Then Paulo is not related to him?"—"Yes."

Counsel, in desperation, at last asks the question he should have asked in the first place.

"Is Paulo related to the defendant?"—"No."

The first answer means yes, I know. The second means no, I do not mean he is related. The third, on the "yes-we-have-no-bananas" principle, it is true that Paulo is not related to him. The fourth indicates the truth that could have been ascertained by means of the first question if it had been properly put.

Another actual example:

"Can you say if the work was finished?"—"Yes."

"You mean, you know whether the work was finished or not?"—"Yes."

"Was the work finished?"—"No."

There is a further trait of the Samoan witness which at times is disconcerting to the earnest seeker after truth, if I may so describe both Judge and counsel. That is his desire, in all matters in which neither he nor his *aiga* is personally concerned, to bring pleasure to his interrogator; to give him the answer which the witness thinks he would really like. That is strictly in accordance with Samoan custom; it is a traditional method of showing courtesy and respect. It leads at times to curious results, particularly when the witness has interpreted counsel's wishes in the matter. In this latter case, if counsel can be patient and persuasive, he can bring the witness back to realities; but woe betide him if he allows his exasperation to take charge. A manifestation of annoyance only induces a fit of obstinacy in the witness; and when a Samoan has decided to be obstinate, the disease is incurable.

Except in the case of a man permanently employed—and sometimes even then—a Samoan has a great deal of leisure. He looks round for a congenial method of passing the time during the day. On weekdays, that is; the Church takes care of Sunday. In the evening he can see an elderly Wild West film at the cinema, if he has the price of admission. During the day there is always the High Court or the Land and Titles Court; and in all form of Court proceedings the Samoan takes a profound interest. He comes along to Court in his hundreds, even—though rarely—in his thousands. If he is fortunate enough to find room inside the Court building he sits there like a statute, immobile for hours at a time, keenly attentive to every phase and every aspect of the trial. He misses nothing, and as he has the memory of the traditional elephant, what he sees and hears is written on the tablets of his mind for life. It is strange that the bilingual local weekly paper does not report the proceedings of the Court, except perhaps to give a short summary and the verdict in a murder trial; but it is really of little moment, as each spectator when he returns to his village gathers his *aiga* and his friends round him and gives an accurate verbatim account of the cases he has heard, examination and cross-examination, the remarks of the Judge when giving his decision. For that reason a Samoan witness, even if in the box for the first time, can but seldom be classed as a tyro. He knows the drill; he has a fair idea of what awaits him on examination-in-chief and on cross-examination; and counsel is wise to treat him with circumspection if not with respect.

There are many lessons to be learned from a trial in a Samoan Court, and it is not only the onlookers who may learn them.

—C.C.M.

Interception of Communications.—The publication of the Report of the Committee of Privy Councillors on the purpose, use and extent of the power of interception (Cmd. 283) does much to allay public concern at a practice which Sir James Graham, the Home Secretary, described in 1845 as "odious, invidious, and obnoxious." There is no doubt that the opening of letters or telegrams, or the recording of telephone conversations, constitutes an invasion of privacy and an interference with the liberty of the subject. It follows that if the use of the power of interception is to be justified at all, and in a manner that will command support, it must be shown to rest on considerations which clearly outweigh the dangers to freedom, and it is reassuring to read the Committee's finding that "interception is highly selective and is used only where there is good reason to believe that a serious offence or security interest is involved.

The problem itself is by no means a novel one; the power to intercept letters under a warrant of the Secretary of State has been exercised from the earliest times, and has been recognized by a succession of statutes covering the last 200 years or more. The Committee is satisfied that interception has proved effective in the detection of major crimes, customs frauds and dangers to the security of the State, and that the power has been used "with the greatest care and circumspection, under the strictest rules and safeguards, and never without the personal considered approval of the Secretary of State." On the question of the continuation of the power the Committee is equally specific: "The criminal and the wrongdoer should not be allowed to use services provided by the State for wrongful purposes quite unimpeded, and the Police, Customs, and the Securty Service ought not to be deprived of an effective weapon in their efforts to preserve and maintain order for the benefit of the community."—*107 Law Journal*, 705.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Quotation in Court.—The local Press has recently published a paragraph stating that an American lawyer, Walter Divonato, when addressing a New York Court on behalf of a man charged with offering a bribe to a policeman, recited the entire speech on mercy by Portia in *The Merchant of Venice*. "Your faultless performance," the Judge said, "has saved your client from gaol: he is fined 10 dollars." But how useful a precedent will this afford us, torn with doubt as we are whether even the reasoned report of the Probation Officer will keep the client from durance vile, however richly deserved? We are not so much concerned with the straining of the quality of mercy as with the non-straining of the attribute of patience that, as the week draws to its close, shows at times a marked fraying round its edges. Scriblex recalls many years ago a criminal case heard before Sir Charles Skerrett C.J., whose brilliance as a lawyer greatly outran his artistic sensibilities. Counsel was endeavouring to convince the jury that the accused's commercial activities might well have been different had life treated him differently. In support he was quoting Rudyard Kipling's *If*, and had reached the third verse:

If you can make one heap of all your winnings
And risk it on one turn of pitch-and-toss,
And lose, and start again at your beginnings
And never breathe a word about your loss;
If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you
Except the Will which says to them: "Hold on!"

This was too much for the Chief Justice. "Hold on!" he exclaimed indignantly. "Not hold on, get on! Get on with the case and cut out the irrelevancies!"

N.B.G.—On an information against a taxi-driver who told his passenger, an actor, to "shut the bloody door", a New South Wales Magistrate has found that in the use of the adjective there was a "very, very faint" case of the use of insulting words but considering it "trivial, very trivial," he dismissed the charge. In the objection by an actor to the employment of this typically Australian word, there is a double irony. In Shakespeare's day it was regarded as harmless and it so remained until nearly a hundred years after the latter half of the Seventeenth Century. The Restoration writers used it frequently, and Dean Swift writes to Stella in 1714: "It was bloody hot walking today." Nevertheless, G. B. Shaw startled London when, in 1914, Liza Dolittle in his *Pygmalion* answering a question as to whether she is walking across the Park replies: "Walk! Not bloody likely. I am going in a taxi." John Masefield, a few years later, acquired an undeserved reputation for sensationally bad language when he used it in his dramatic poem *The Everlasting Mercy* ("I'll bloody burn his bloody ricks.") From then on, the British workman has shown a distinct preference for the word: indeed the Very Rev. Dean Inge remarked around 1930 that in the speech of the British workman, "bloody" merely served to indicate that a noun or an adjective might be expected to follow immediately. But, for the Australian, it has always been a colourful adjunct to colloquial speech. Satirizing the adjectival barrenness of the Australian Forces in World War I, the "Australian Poem" is recalled by Charles Graves in *Lars Porsena, or The Future of Swearing*. Its first verse runs:

A sunburnt bloody stockman stood,
And in a dismal, bloody mood
Apostrophised his bloody cuddy:
"This bloody moke's no bloody good,
He doesn't earn his bloody food,
Bloody! Bloody! Bloody!"

The American writer, H. L. Mencken, once asserted that "so familiar has it become . . . that it is a mere counterword, without intelligible significance," and has illustrated his point with the story of the two Yorkshiremen, in front of an election poster. "What do they mean," asks one, "by one man, one vote?" "Why!" said the other, "it means 'one bloody man, one bloody vote'" to which the inquirer replied, "Then why the hell don't they bloody well say so?"

From My Notebook ("*This England*": *Municipal Department*).

Mr John Murray, a motor repair man, of Lord Street, Saford, Lancs., yesterday received permission from the Ministry of Civil Aviation to take his home-made helicopter 10 ft. into the air—providing it is tethered to the ground . . . "Their new decision is a step in the right direction," said Mr Murray, "but it does not satisfy me completely."—*The Times*.

A motor horse-box carrying a live horse can travel at 30 m.p.h. If the horse dies in transit the vehicle immediately becomes a carrier of horseflesh and by law must reduce speed to 20 m.p.h.—*Daily Mail*.

The Mayor of Stratford, Alderman Horace Coghlan, agrees. "I firmly believe people from other planets are watching us," he said. "I am a friendly man, and I'm sure I would have no difficulty in making them understand that we have no hostile feelings towards them. We in Stafford would help them in any way possible to get accommodation and settle here. If necessary, I would put up a couple in my own home."—*People*.

The Housing Committee at Accrington (Lancs.) is asking the Council to agree to send the bailiffs when Council tenants fall more than three weeks behind with the rent. If the scheme is approved a bailiff will call and make a list of the furniture. It will all be done politely and discreetly. The bailiff will wear a neat, quiet, lounge suit.—*Daily Mirror*.

An appeal against Esher Council's refusal to allow an illuminated sign at Hurst Service Station, East Molesey, has been allowed by the Minister of Housing and Local Government subject to certain conditions. One is that the sign shall not be illuminated.—*Esher News*.

Newcastle-upon-Tyne Corporation had to send a member of its maintenance staff to replace a screw in the woodwork of a council house, at a cost of about 15s. 6d., because the tenant, a joiner, would not do it. The tenant's wife said to an official, "Why should he? He's not paid for it."—*Sunday Times*.

TOWN AND COUNTRY PLANNING APPEALS.

Minister of Works *v.* Upper Hutt Borough.

Town and Country Planning Appeal Board. Wellington. 1957. April 8.

Proposed District Scheme—Disallowance of Minister's Objections to Proposed District Scheme—Proposed Widening and Extension of Street—Proposed Alignment Practical and Preferable to Minister's Alternative One—Zoning of Part of Military Camp Area as "Residential"—Rezoned as "Reserve for Government Purposes"—Town and Country Planning Act 1953, s. 26.

Appeal by the Minister of Works under s. 26 of the Town and Country Planning Act 1953 against the disallowance by the council of objections made by the Minister to certain provisions in the council's proposed district scheme. The appeal concerned the proposed widening and extension of Blewman Street and the zoning of part of the Trentham Camp area.

The grounds for the Minister's appeal were based on the proposed extension and widening of Blewman Street, which was not in accord with the intentions of the Army Department in respect of this land. With regard to the zoning of part of the Trentham Camp area, it was stated that the land, which was owned by the Crown, was required for Government purposes and should therefore be shown as "Reserve for Government Purposes" on the district planning map.

The Council contended that the alignment proposed by the Borough Council was a practical one. The alternative proposal made for unnecessary and dangerous angles in the road. Indecision on the part of the Government seemed to be the main reason for the objection and appeal. At the same time the Government seemed to have produced no definite plan for this area, and it was thought better to zone the area "residential" rather than to give it the vague zoning "Reserve for Government Purposes". The zoning provisions relating to the camp area in the Council's district scheme were supported by the Regional Planning Council.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds as follows:

(1) Blewman Street Extension: The district planning map makes provision for the widening and extension of Blewman Street. The proposed extension runs through part of Section 96 Hutt District vested in the Crown and controlled by the Army Department. That department has prepared a plan for the proposed subdivision of this land as a residential area for housing personnel at some future date.

The appellant's ground of objection is that the proposed widening and extension of Blewman Street is not in accord with, and would conflict with, the intentions of the Army Department in respect of this land.

The respondent Borough's view is that the proposed alignment is a practical one and the Wellington Regional Planning Council has expressed the view that the proposed alignment is preferable to the alternative one suggested by the appellant. The Board takes the same view, and the appeal under this heading is disallowed.

(2) Zoning of Part of Trentham Camp Area: This objection relates to an area of approximately twenty-four acres owned by the Crown and administered by the Army Department. Under the proposed district scheme, this area has been zoned as "residential". It is bounded by the Borough boundary on one side and the Wellington-Napier railway reserve on the other. Adjoining land owned by the Crown in the Hutt County has been zoned under the Hutt County Council's proposed district scheme as "Government reserve".

The appellant's case is that this land is Crown land required for Government purposes, and should be so designated in the plan.

The Board is of the opinion that the appellant's proposal is reasonable. To designate this land as a "Reserve for Government Purposes" gives a clear indication that the area in question is not available for private residential purposes.

Under this heading the appeal is allowed.

(3) Areas zoned "Selected Light Industry". This was an appeal against a decision of the respondent Council disallowing an objection by the Minister to the zoning of certain areas as set aside for "selected light industry":

The point at issue no longer calls for decision as, following on the board's decision in *Gabites and Upper Hutt Borough Council*, there are now no areas zoned as "selected light industry".

Appeal allowed in part.

Burns *v.* Upper Hutt Borough.

Town and Country Planning Appeal Board. Wellington. 1957. April 8.

District Scheme—Part of Land shown as "Proposed Street" and Part zoned as "Service Industry"—Possibility of Traffic Problem—Proposed Zoning in Accord with Town-and-Country-planning Principles—Town and Country Planning Act 1953, s. 26.

Appeal, under s. 26 of the Town and Country Planning Act 1953, against the Council's disallowance of objections to the Upper Hutt Town Planning Scheme No. 2. The appellant was the owner of land in Station Street, part of which was shown as "proposed street", and the remainder zoned for "service industry".

The grounds for the appeal were based on the traffic problem which it was considered would arise from the proposed street alterations. It was also stated that the area should be zoned "commercial", to combat ribbon development. The appellant considered that the zoning of the area as "service industry" was inappropriate, as the area was already predominantly residential.

The Council's reply stated that no traffic problem would arise and the purpose of the road was to assist the intended development of the commercial and light industrial area of Upper Hutt. Also, there was a need for a certain amount of industry in close proximity to the commercial area, and the area chosen was the most suitable for service industry.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds:

(1) Objection to proposed road between Station Street and Russell Street.—The respondent Council's proposed district scheme provides for a new road linking Station Street and Russell Street parallel to the main road. The purpose of this proposed road is to promote the development of the centre of the town for commercial purposes and to consolidate that centre as a commercial area. The board is of the opinion that the proposal is in accordance with town-and-country-planning principles, and should not be altered.

Appeal on this ground disallowed.

(2) Objection to the zoning of an area adjacent to the appellant's property. This is predominantly an area of old houses adjacent to the railway and some service-type industries are already operating there in converted houses. It is the appellant's contention that this area should be zoned as "commercial'".

The respondent council's proposed district scheme appears to make adequate provision for commercial uses. There are substantial areas zoned as "commercial" near the centre of the town and not yet developed. The zoning objected to appears to be appropriate. No order as to costs.

Appeal dismissed.

Cotterill *v.* Hawke's Bay County.

Town and Country Planning Appeal Board. Napier. 1957. July 19.

Subdivision—Subdivision of Sixteen Acres to provide Two-acre Section for building of Residence for Applicant Widow—Area zoned as "rural"—Widow finding Whole Area too much for Her Use—Consent given to Subdivision—Town and Country Planning Act 1953, s. 33.

Application to subdivide approximately sixteen acres of land to form a section of two ac. on which the applicant wished to build a house.

The proposed subdivision adjoined the northern boundary of Havelock North borough and was situated in the "rural" zone of the Hawke's Bay County district scheme—Heretaunga Plains section, which was an operative scheme.

In the application it was stated that owing to the death of her husband and her own bad health, the land was now too large for her use, although she still wished to reside there. The Council gave unconditional support to the application.

The Board, therefore, consented to the subdivision of the land into the two lots; one of approximately two ac. and the other of fourteen ac.

Order accordingly.