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FAMILY PROTECTION: SOME RECENT JUDGMENTS.

WE conclude the present series of reviews of recent applications under the Family Protection Act 1955 with cases dealing mainly with applications by children of the testator.

WIDOWER.

In *In re Meakin (deceased)* (Christchurch, October 9, 1957, A. 16/57), in which F. B. Adams J. delivered an oral judgment, there were two applications before the Court: first, one by the widower of the deceased under s. 19 of the Married Women's Property Act 1952, and, secondly, one by him under the Family Protection Act 1955.

On the first application, the learned Judge said that the proper order in a case such as this was to declare that the husband was entitled to an interest in the house and furniture as a tenant-in-common of one undivided moiety. To put the matter in another way, he said that one might regard the wife's will as being in effect a severance of any joint tenancy that may have existed; and he would not be prepared to make an order under the Married Women's Property Act that would deprive her of the right to dispose, by her will, of the interest that she possessed in the house and furniture. His Honour continued:

> There will accordingly be an order in the form just indicated and applying both to the house and to the furniture. By "furniture" I mean all articles of household or domestic use or adornment, excluding the wearing apparel of the wife, and her articles of personal adornment. I hope that those words are sufficient to define with accuracy the chattels to which the order will apply. If, however, they are not sufficient for the purpose, the matter can be dealt with under the liberty to apply which I propose to incorporate in the order.
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> There will also be an order of the kind warranted by *Lee* v. *Lee* [1952] Q.B. 489; [1952] 1 All E.R. 1299, to the effect that neither the plaintiff nor the trustees of the wife's will shall by transfer or otherwise create any right, title or interest in any other person such as would entitle such other person to dispose of or enter into possession of the whole or any part of the property or any interest therein.
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> I come now to the question of possession. The order already made gives the husband a proprietary interest, but says nothing as to possession. There will be an order entitling him to enter into and to retain possession of the house and furniture until the further order of the Court. That order will not come into force until the expiration of six weeks from the date of this judgment. I do not make the order asked for in the motion giving the plaintiff the right to retain possession for life, as it has always seemed to me that, under this particular provision of the Married Women's Property Act, it may not be competent for the Court to carve out interests or estates in futuro, and, in effect, an order for possession during the plaintiff's life would amount to giving him a life estate in the land. My view is that orders dealing with possession should be operative only while the order is allowed to stand, and not limited so as to endure for particular periods in the future.
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> Notwithstanding Mr Alpers's argument that the husband should be allowed to occupy without impeachment of waste, I think it is proper that, if he takes possession, he should be liable, not only to meet current outgoings, such as rates and insurance, but also to keep the property in repair. The order will impose those obligations upon him, the obligation in regard to repair being "fair wear and tear, and damage by fire, earthquake or inevitable accident excepted".
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> There will be liberty reserved to the plaintiff and to the trustee or trustees for the time being of the will of the deceased to apply generally from time to time, and in particular with regard to the working out of the order in so far as it affects the title to the property, and also in regard to the possession and use of the property.

The learned Judge dealt with the claim under the Family Protection Act 1952 independently of the order already made, and as if that order had not been made. His reason for doing so was that these were in fact two separate cases, and he did not know what might happen upon appeal in regard to one or the other. Accordingly, he dealt with them as separate matters. He continued:

> I am quite satisfied that the deceased did owe a testamentary duty to the plaintiff. I do not think he was guilty of unhusbandly conduct such as would destroy or reduce his rights under the statute.
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> I do not feel able to deal with the claim under this Act by providing for payment of a lump sum, or making any other capital provision. In regard to widows, the rule generally followed is not to give them capital. Very commonly they are elderly people with only a few years to live, and all that is reasonably called for is to provide for their few remaining years. It seems to me that that is equally applicable to a widower, and that, here, all the Court can properly do under this statute is to make such provision a the deceased ought to have made for the husband in respect of the few years that may yet remain to him, he being now seventy-three (? seventy-five) years of age.
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> I think, the proper order is, in the first place, to provide that the furniture, defining that term in the same way as I have defined it in the earlier order, shall belong to him absolutely. I have already held that he has a proprietary interest to the extent of a moiety. It seems to me that he ought to have the entirety, and that the Court should thus avoid any questions that might arise as to the ownership or destruction or damage of particular articles. For the rest, I think the proper order is to provide that the whole of the residue of the estate shall be held in trust for him during his life or until he shall remarry. There will be a further provision that he shall be entitled, if he thinks fit, to occupy and reside in the dwellinghouse so long as his life interest continues, and that the dwellinghouse shall not be sold without his consent or an order of the Court.

On the question of costs, His Honour was of the view that the costs of both parties ought to be met out of the estate. It was true that the plaintiff had suc-

ceeded in both his claims, but it had been the act of the deceased that had rendered each claim necessary, and His Honour thought, therefore, it would be wrong to impose any personal liability upon the son or upon the trustees in regard to costs. He continued:

> The question of costs has given me some difficulty, but I am happy to say that the order I now propose to make is one which has the approval of counsel on both sides. I think that the case is one in which solicitor and client costs may be allowed, and in which the costs on both sides of the proceedings may properly come out of so much of the estate as consists of ready moneys, or, to put it perhaps more accurately, out of the estate other than the house and the furniture as defined above. The order will be that the costs of each party as between solicitor and client, including all necessary disbursements, shall be taxed by the Registrar and paid out of the assets other than the house and furniture, and that, if the fund available be deficient for the purpose, it shall be divided equally between the two sets of costs, leaving each party to pay so much of his own costs as cannot be met out of the fund. If either set of costs is equal to or less than one-half of the fund, that set is to be paid in full, and the whole balance applied, so far as may be necessary, towards payment of the other set.

Married Daughters.

In *In re Fraser (deceased)* (Christchurch, October 18, 1957.) McGregor J. said that the family circumstances were somewhat unusual and there was a recent exposition of the proper approach to a matter such as this in the judgment of North J. in *In re Blakey, Blakey* v. *Public Trustee* [1957] N.Z.L.R. 875, 876, 877, and he adopted that enunciation of the principles, and, with respect, agreed entirely with the statement that the two first considerations were the need of maintenance and support, and, secondly, what property did the testatrix leave?

The plaintiff, a married daughter, was 53 years of age at the date of death of the testatrix, May 21, 1955. She was not supported by her husband. She was earning her living as a housekeeper receiving a wage of £4 10s. a week and her keep, and her assets were under £100 in value. Primarily, in view of the fact that one could not expect her to be able to continue work indefinitely or for a very long period of years, His Honour said that she had shown need for consideration, but that was only one circumstance, and a circumstance that was not by any means conclusive, and the question of need had to be regarded in the light of all the other circumstances.

The estate of the testatrix was over £14,000 after payment of duties and administration expenses. She had five children of her own. The plaintiff, a daughter by her first husband, and four adult children of her second family. Under the will, the plaintiff received a legacy of £1,000 free of duty, and the other three children of the second marriage received £13,000 between them. The testatrix has given consideration to all who had moral claims, but the question really at issue was: "Is the provision made for the plaintiff adequate in all the circumstances of the case?"

The plaintiff's father died in 1908 when she was about five or six years of age, and her mother remarried two years later. The plaintiff was at home with her mother and stepfather from the time of the mother's second marriage until about the year 1921 or 1922, except for two years she had at a boarding school, an advantage which her brothers and sisters did not receive. From the time she returned after two years at school and a year learning dressmaking, she was at home for approximately two and a half years until her marriage, and rendered assistance to her mother and stepfather. His Honour did not think that, in the circumstances, any special credit could be attributed to the plaintiff for doing those things, which, in his view, were no more than her filial duty. In any case she married at the age of nineteen, and at twenty-one she received £2,000 from her own father's estate. On marriage she also received £200 from her mother by way of gift, or perhaps some remuneration for her earlier services. She had an unfortunate marriage. She subsequently separated from her husband and a decree nisi was granted in divorce; but the plaintiff had taken no steps to have that decree made absolute. There was no information as to her children, their circumstances or prospects, but it does seem that they are all adult and away from her now.

His Honour said:

> Since her marriage in 1922, the plaintiff has had little contact with her mother. For a long period of years there was no contact at all but it does not seem to me that there was a total estrangement. But the loosening of the bonds between daughter and mother is a circumstance which must be taken into account, particularly in so far as it affected the quantum of the provision which one would naturally expect from a wise and just mother, and which might otherwise have been made if there had been no lessening of contact or loosening of the bonds. The position of the testatrix, when making her will, seems to me to be this—that she had to consider this daughter with whom she had had little recent contact, but who was still her daughter and was without assets, and was unsupported except by her own exertions, and in those circumstances and in the light of the daughter's needs, the testatrix was required to consider what would be adequate provision.
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> In the light of the size of the estate of the testatrix, and the position and claims of the other members of the family, is the legacy of £1,000 bequeathed to the plaintiff adequate provision? The position of the three other beneficiaries has to be considered.

The circumstances of the second daughter, who was married, apart from what she received under her mother's will, were that she had assets in the vicinity of £9,000 and her husband had between £9,000 and £10,000 and an income of £2,700.

The brother was forty-three. As a linesman, he earned £12 a week and he had assets of something over £9,000. He had a wife and was expecting a child.

The third daughter was forty-four. She had a husband who earned some £13 a week and had a small war pension. Her husband's assets were in the vicinity of £3,000; and she had assets of her own of some £10,000, which included a substantial gift from her mother during the mother's lifetime.

His Honour continued:

> I should say that the assets of these three children have been built up to a considerable extent by the fact that they each received from their father's estate when he died, or when the mother died, some £5,500. . . . No doubt the close bonds of affection between the testatrix and these three children actuated her in making her will, and also the fact that it is clear that the testatrix had acquired the greater part of her estate from her second husband, the father of the defendants, and his bounty and the thrift that she herself had exercised, and these matters did necessitate, in my opinion, that the greater part of her estate should go to the three children of her second marriage. At the same time, it seems to me that she should have had regard to the misfortunes and need of the daughter by her first husband, and it also seems to me that the testatrix did receive some benefit from her first husband's estate. It is almost impossible to estimate how much she did receive. The estate was some £2,800, or sworn under that amount in 1908. The plaintiff received a legacy of £500 and the accumulated income from the date of her mother's second marriage until she herself attained the age

of twenty-one. The mother received the residue of the estate, but it is probable that out of that residue she did pay for the education of the plaintiff when the plaintiff was sent to boarding school, but even taking those factors into account, I do think the testatrix must have received some money from the estate of her first husband.

The position seems to be that here is a daughter with no home, no furniture, advancing years and no future; and that is the position that the testatrix and this Court have to consider. I must not attempt to make a new will, but considering the means and position of the daughter, and the means and positions of the other children, I think the testatrix should have made some larger provision, although not so very much larger provision, for this daughter than she made under her will. It is emphasized that the position of the plaintiff and the quantum of an award should not be measured merely by need, but by what is proper and adequate in the circumstances.

His Honour then referred to the judgment of the Court of Appeal in *In re Green, Zukerman* v. *Public Trustee* [1951] N.Z.L.R. 135, 141 l. 40 to 142, l. 3; he continued:

Applying that as well as I can to what is proper and adequate in all the circumstances of the case, it seems to me that in lieu of the legacy of £1,000 bequeathed to the plaintiff under the will there should be a legacy of £1,600 free of duty and the order of the Court will be accordingly.

In *In re Kreegher* (Palmerston North, December 20, 1957), heard by Sir Harold Barrowclough C.J., a married daughter applied for further provision out of her deceased father's estate. The father left him surviving a widow aged seventy, two married daughters—one aged fifty years, and the other (the applicant) aged forty-nine years, and two sons, Valentine aged 44 years, and Phillip aged 36 years. There were no other persons entitled to claim under the Family Protection Act. The father left a will in which he appointed his youngest son Phillip as his executor and trustee. By that will, the testator bequeathed outright to his widow the dwellinghouse in which he was living at the time of his death and a legacy of £300, all free of death duties. (There was also a conditional gift to Valentine which did not become operative.) Subject thereto the whole estate was given upon trust, after payment of death duties and debts, etc., to pay the income to the widow during her widowhood and, on her death or remarriage, to pay legacies of £250 to each of the two daughters. The remainder of the estate then went to Phillip. That which ultimately went to Phillip in terms of the will was valued at £16,721. In his lifetime the testator had made to Valentine gifts of £3,050 and to Phillip gifts of £471.

None of the children desired to disturb the provision made by the testator for the widow. None of them, other than the applicant, applied for further provision than had been made for her or him. The applicant asked for some further provision by way of an annuity to take effect after her mother's death or remarriage.

The applicant was at the date of her father's death forty-nine years of age. She was not in good health. Her hip joint had had to be stiffened surgically on account of arthritis in the joint and she suffered also from a chronically swollen leg. These disabilities called for more rest than her household duties had hitherto permitted her to enjoy. Her husband was fifty-three years of age and was a carpenter. His income averaged from £1,000 to £1,200 a year and he had assets, including a small farm, valued at £10,785. The applicant did not disclose whether she had any assets of her own, and if so what they were worth, but as counsel did not advert to that omission from her affidavit His Honour assumed that she had nothing. She and her husband had one son who was only twenty-three years of age; but who appeared already to be well established on a farm of his own. The applicant would receive her legacy of £250 on her mother's death or remarriage.

The learned Chief Justice said that there appeared to have been some estrangement between the applicant and her parents when the former was in her teens. It was difficult, on affidavit evidence, to assess the extent of that estrangement and to apportion the blame for it. He felt compelled to hold, however, that after leaving home the applicant did give her parents cause for anxiety and that her conduct at that time was to some extent unfilial. He was satisfied that, as she grew older, the applicant's conduct ceased to be a good reason for anxiety; but the evidence showed that there continued to be a lack of that affection which usually existed between a daughter and her parents. His Honour could not acquit the daughter of responsibility for that unhappy state of affairs, but he did not wish to over-estimate these incidents. He thought it proper to say that the testator in making his will was entitled to regard his duty to this daughter as something less than it would have been had she, throughout her life, treated her parents with more respect and affection, and been a greater help and comfort to them in their old age.

The learned Chief Justice continued:

In determining the extent of this testator's duty to this daughter I am to remember that he has made proper and adequate provision for his widow and for all his other children. None of the latter asks for any further provision. On the death or remarriage of the widow the value of the estate must be taken to be about £17,221. Under the will, this will go as follows: to Phillip £16,721, to the applicant £250, and to the other daughter £250. To benefit the applicant at the expense of her sister would be ridiculous. The only competing claims on the testator's bounty are those of Phillip and the applicant. What then is Phillip's position?

Apart from what he is to receive under the will, he has assets of his own worth £6,780. He is married. His and his wife's assets are therefore almost exactly £4,000 less than those of the applicant and her husband. Phillip left school at the age of fourteen and thereafter, until his father's death, that is for a period of twenty-two years, he worked continuously on his father's farm except for occasional periods when work was slack on that farm and he employed himself elsewhere. For nine years he worked for no wages at all, receiving only his keep and occasional pocket money. For the next five years he received a wage of £5 per month plus, I assume, his keep. That brought him down to the year 1948 and during the eight preceding years he was given a bonus which varied from £50 to £100. In 1948 his wages were increased to £8 a month. In the year 1949/50 his wages, with bonus, amounted to £596: for the next two years £600, and from 1953 onwards he got £1,100 per annum. I am not told what would have been the wages which he would have received over these years had he been employed at the then current wage rates, but it is obvious that his father must have effected very considerable savings by employing his son, and that his estate was thereby considerably increased. It is only bare justice that he should benefit under his father's will to a much greater extent than the applicant who left home at the age of seventeen and thereafter rendered no assistance at all to her parents.

It is, of course, no part of my duty to attempt to assess, as on a quantum meruit basis, the value of Phillip's services, as far as they can be regarded as gratuitous, and then to award to him out of the estate an amount equal to that value and divide what is left equally between him and the applicant. But I must make such assessment as on the evidence is possible, and I must take that into account. In making that assessment I do not feel at liberty to say more than this: that the £16,721 which Phillip would receive under the will is substantially more than the amount which would be necessary, as a matter of bare justice, to reward so much of his services as could be called gratuitous. I take it into account in

this way: I am of opinion that, if adequate provision for the applicant has not been made in the will then, having regard to Phillip's financial position independently of the will, and assuming that he received from his father's estate enough to make up the value of what I have called his gratuitous services, there would still be left a sufficient sum to enable the Court to cure the inadequacy of the provision made for the applicant. It is not a case where there are insufficient funds to meet the conflicting claim of the applicant if she has a good claim.

I confess I have felt some difficulty, and have experienced some vacillation of opinion, in deciding whether the testator really owed a duty to the applicant to make more provision for her than he did, and whether, in fact, she has any claim under the Act. Her husband's income varies between £1,000 and £1,200 a year. It could be increased by £350 a year if he required his son to pay interest on the mortgage which he has from his son and there is nothing to suggest that the son could not pay that interest. On the other hand, I must remember that the applicant suffers from a considerable physical disability and is doing household work which her medical adviser considers to be injurious to her health. It is fairly evident that she needs assistance in her home. I think that some of the cost of that could be provided and should be provided by her husband; but having regard to the size of the estate I think that some contribution towards the cost of domestic assistance ought to have been made by the testator. The need for such assistance will probably be more acute as time goes on, and when retirement from regular work will have reduced the husband's earnings. I note that the applicant's sister is married to a man whose estate is worth £25,000 or thereabouts. The two sisters each receive £250 under the will.

Taking all the circumstances into account, and not forgetting that the applicant has been guilty of some neglect of her filial duty, I have come to the conclusion that I ought to order that, in addition to the legacy to which she is entitled under the will, there be paid to her, as from the date of the widow's death or remarriage (whichever event shall first happen) and for the remainder of her life, an annuity of £78 per annum.

There will be an order accordingly and the annuity will be charged on Phillip's share of the residuary estate. If desired, the order may make provision for the purchase of an annuity or alternatively the usual provision for setting aside and settling on appropriate trusts a sufficient sum to keep down the annuity to the end that the balance of Phillip's share may be exonerated from the charge. The applicant is entitled to an order that her costs, taxed on a solicitor and client basis, be paid out of Phillip's share in the estate. Phillip's own costs, whether in his capacity as trustee or as beneficiary, must necessarily come out of his share and no order of the Court appears to be necessary.

Illegitimate Children.

In re G. (Christchurch, November 5, 1957. A.82:56. McGregor J.) was an application under s. 3 (*b*) of the Family Protection Act 1955 on behalf of three illegitimate children of the deceased. The deceased died on April 3, 1956, intestate, and administration of his estate was granted on April 19, 1956, to the first defendants. The net estate available for distribution was approximately £4,200.

The deceased was previously married, but the marriage was dissolved on April 5, 1955, on the wife's petition on the ground of the adultery of the deceased. At the date of his death, he was survived by two legitimate children, a daughter, L. then aged 17, and a son R. then aged nine. The deceased was also survived by three illegitimate children aged seven, four, and two. The paternity of these illegitimate children was acknowledged by the deceased in his lifetime and affiliation and maintenance orders in respect of each of the children at the rate of 30s. per week were made by a Stipendiary Magistrate at Christchurch on June 20, 1955. It appeared that the deceased had earlier been in a much better financial position but during the last few years of his life his estate had diminished owing to his reckless and extravagant expenditure. The persons who succeeded to the estate on intestacy were the two legitimate children in equal shares.

McGregor J. said:

> The estate of the deceased is small and comes within the first of the two classes mentioned by Salmond J. in *In re Allen, Allen* v. *Manchester* [1922] N.Z.L.R. 218; [1921] G.L.R. 613—namely, where any provision ordered must be made at the expense of other persons to whom the deceased had a moral duty. The Court's duty is therefore to see that "the available means of the deceased are justly divided between the persons who have moral claims upon him, in due proportion to the relative urgency of those claims."

F. B. Adams J. recently considered the duty of a testator in regard to provision for illegitimate children in *In re B.* (to be reported). There the learned Judge said:

> While the nature of the relationship between illegitimate children and the testator is one of the circumstances which must be duly taken into account in determining whether the testator has made adequate provision for such claimants, their claims are not to be minimized merely on the grounds of the illegitimacy of the relationship, and when properly ascertained must be allowed without hesitation and on the scale that is appropriate in the circumstances

and later:

> I am not suggesting that the illegitimacy of the relationship is irrelevant. In my opinion, it is a matter requiring to be considered in determining the extent of the duty owed by the testator to the claimant just as the remoter relationship of the grandchildren in *In re Wright, Willis* v. *Drinkwater* [1954] N.Z.L.R. 630 was relevant in the same connection. It must be taken into account along with every other circumstance which enables one to determine what moral duty was owed by the testator to the claimant. In some cases it may weigh heavily and in others where there are different circumstances it may have little or no bearing.

In the present case the deceased had a moral duty to provide for the proper maintenance and support of his legitimate children in so far as his means permitted and in the light of the duty which also devolved on him in respect of his illegitimate children. The legitimate daughter was at the date of the death of the deceased seventeen years of age and she is now in employment at a wage of £6 a week. She lives at home with her mother who has since remarried. Her stepfather's wage is £12 a week, but both her mother and stepfather are practically without assets. It does seem that she is capable of supporting herself but is entirely without funds to meet any emergency or any necessary capital expenditure. It seems to me that if the means of the deceased did permit, he did have a moral obligation in respect of this adolescent daughter. The legitimate son at the date of death was only nine years of age, and would require support until he was capable of supporting himself. The deceased owed a duty to this son, and I do not think this duty is lessened by the fact that the mother has since remarried and the stepfather may have some obligations in respect of this stepchild. At the date of the deceased's death the mother had not remarried, and her small earnings were insufficient for the support of her infant son.

The deceased also had an obligation in regard to his illegitimate children. At the date of his death, their mother was a single woman earning wages at the rate of £7 10s. per week or sometimes less. Her means were insufficient to support the three illegitimate children and, as I have said, she was forced to obtain maintenance orders in respect of each child at the rate of 30s. per week. The deceased had broken his association with the mother of the children in 1955 when he formed an association with a third woman. While I consider that the deceased had an obligation as far as his means would permit for the proper maintenance and support of these illegitimate children, I take the view that the obligation was not as great as the obligation he would owe to legitimate children. If the deceased had lived, one would not have anticipated that the same consideration would have been given to the illegitimate children as to the legitimate children, and the deceased would have performed probably little more than the obligations which were imposed on him in respect of the illegitimate children by the Destitute Persons Act.

In view of the small estate of the deceased this is a circumstance to be taken into account.

But the obligation of the deceased for maintenance and support of the illegitimate children would enure over a much longer period of time, owing to their tender years, than would be the case in regard to his legitimate children, one of whom at the date of his death had reached an age when she could be expected to be almost self-supporting.

Taking these varying and conflicting factors into account and with the limited amount available for distribution one cannot calculate need with precision and it seems to me that the appropriate order to make is that the sum of £2,000 should be set aside out of the estate and paid to the Public Trustee as a class fund for the benefit of the three illegitimate children. The Public Trustee will have the powers given to him by s. 6 (2) of the Family Protection Act 1955 to apply the income and capital of this fund, or so much thereof as the trustee from time to time thinks fit, for or towards the maintenance, education or the advancement or benefit of the illegitimate children or of any one or more of them to the exclusion of the other or others of them, in such shares and proportions and generally in such manner as the Public Trustee from time to time thinks fit, and may so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.

It seems to me that the much younger age of the legitimate son, as compared with that of the legitimate daughter, necessitates a greater provision for him than the provision required for the daughter. I therefore direct that, of the sum set aside for the benefit of the illegitimate children, two-thirds shall be borne by the share of the daughter under the intestacy and one-third by the share of the son under the intestacy.

The plaintiffs were given costs out of the estate in the sum of thirty-five guineas and disbursements, and the second defendants in the sum of thirty guineas and disbursements. The first defendants were entitled to their costs without the necessity of any order.

CHILDREN.

In *In re Moody (deceased)* (Auckland. November 7, 1957, M.102:57), Turner J. said, in an oral judgment, that, although some questions of law had been raised on the application, the matter was essentially one of fact.

The deceased died intestate on December 18, 1955. He left an estate consisting of two farms. All the property had been sold, and the net residue available for distribution consisted of something like £11,500 in cash. The deceased was three times married, and three times divorced. By his third marriage there were no children, but by his first two marriages there were seven, five of the first marriage and two of the second all these children survived the deceased. The estate, if divided in equal shares, would give about £1,650 to each of the seven children.

The two children of the second marriage were a boy and a girl, aged nineteen and twenty respectively. They, by their guardian ad litem, were the plaintiffs in this application, and they asked for further provision over and above the sum of approximately £1,650 which they would in any case each receive under the intestacy.

The application was opposed by the children of the first marriage. Three of these appeared either by counsel or in person, to submit that no order should be made, or, alternatively, that if one were made, that they themselves should be exempted from its incidence. The other two, John James, born on August 24, 1922, and Joan Audrey, born on February 26, 1925, could not be found. The Public Trustee appeared on their behalf (directed so to do by the Court), and Mr Beattie made such submissions as were open to him in opposition to the claim presented by Mr Davison for the plaintiffs.

The learned Judge said :

I address myself at once to the inquiry : what is the need for maintenance, and I observe immediately also the size of the estate. When the surrounding circumstances are contemplated, the two infant plaintiffs are shown to have lived all their lives with their father, and it is abundantly clear that he had every intention, if he had lived, of establishing one of them on each of his properties and of making his property over to them by way of gift inter vivos. He did not live to do this, but they had been brought up in the light of this intention, which he had clearly placed before them in the latter part of his life. They were the only two children who over the last twenty years or so had rendered to the father any filial service. It has been fairly said by all counsel for the children of the first marriage that the children of the first marriage did not have the opportunity of doing anything for their father, and that their failure to render recent filial service to him should not disqualify them from participation in his estate. This is true ; but when I am considering the claim of the plaintiffs in competition with the claims of the children of the first marriage, I do find myself inescapably influenced by the circumstances that during the last twenty years of his life, it may be through no fault whatever of their own in fact, nevertheless the children of the first marriage had no association at all with their father, while the children of the second marriage constituted his effective family in these latter days.

The fact that the children of the first marriage did nothing for their father does not disqualify them, therefore, from all claim to participation in the distribution of the estate, but as an inescapable fact it is a circumstance which must enter into my consideration of the competing claims of the parties, bearing in mind, too, that the moment at which the moral duty of the testator, or in this case the intestate, is examinable, must really be the moment of his death.

In the plaintiffs' favour there is also to be borne in mind that, as far as the evidence goes, it leads to a conclusion in some degree that the plaintiffs have assisted their father in the building up of his estate. I did not have pointed out to me any positive evidence that any other child had done so. I therefore come to the view that, taking all these circumstances into account, this father owed the two children of his second marriage a duty in excess of that owed to his other children. I think that the boy should be put in a position where he can contemplate taking the first steps in establishing himself in life on the land. To the girl, too, at 20 years of age, the father seems to me to have owed some duty of establishing her in life, something more I think as at the date of his death than he can be said to have owed to his other children, so long parted from him.

The order I propose to make is that each of the two plaintiffs, in lieu of the share to which he or she would succeed on the intestacy, should have the sum of £3,000.

The question of incidence assumes some importance in this case. Two of the children cannot be found. It was suggested to me by Mr Beattie that they should not be penalized simply because they were not discoverable. I think that the true rule is rather that, if they have not come before the Court, no reason is shown why their shares should be exempted from the incidence of the order. As regards the other three, they have all shown some reason for an application for exemption. Mrs O'Brien is almost penniless with six children ; Mrs Beaumont has a husband who earns only £14 a week, and there are four children to keep. Mrs Sutcliffe, who filed no affidavit, appeared in person assisted by the good offices of Mr Beattie. She gave evidence in the witness box that she had a husband in poor circumstances, and one child. She did domestic work three days a week to help the family funds. All these three indeed make out a positive case for consideration.

The order of the Court will be that, as to £1,250 in each case, the share of each of these is exempted from contribution. The effect of this appears to be—from an estate of £11,500 the plaintiffs will receive £6,000. That leaves £5,500. When the three children who have appeared before me have received £1,250 each, there will be £1,750 left for distribution, from which the costs of these proceedings must be paid. The balance will be distributable between the two absentees equally if both turn up. But if one or both cannot be found, their shares will be distributable among the children of the first marriage, since the children of the second marriage now have their provision fixed absolutely in satisfaction of their claim.

I think I should reserve leave to apply to either of the absentees if either of them is discovered. It does not seem to me to be useful to reserve leave to anyone else. In this way, I will keep the way open for anything to be said by either of the absentees which can still usefully be said at any time, having regard to the then state of distribution of the estate.

His Honour said that this was a case where the costs should be paid from the residuary fund, that was, the absentees' fund. Counsel for the Public Trustee did not need an order. The plaintiffs' costs were fixed at an inclusive amount of £125 and disvursements. From that amount, £75 would be paid by residue, the plaintiffs being left to provide the balance equally. The costs of Mrs Beaumont and Mrs O'Brien were fixed in each case at £50 and disbursements. No order was made as regards the costs of Mrs Sutcliffe, who appeared in person.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Crown Witness recalled after Close of Crown's Case—Right and Power of Judge so to recall Witness—Exercise of His Discretion not appealable unless Real Injustice has resulted. The trial Judge has the right and power to recall a witness even after the Crown has closed its case. This is a discretionary power with which a Court of Appeal cannot interfere unless it should appear that a real injustice has resulted. (*R.* v. *Hone Maaka Mokomoko* (1904) 23 N.Z.L.R. 829; 6 G.L.R. 570. *R.* v. *Sullivan* [1923] 1 K.B. 47, 16 Cr. App. R. 121, and *R.* v. *McKenna* (1956) 40 Cr. App. R. 65, followed. *R.* v. *Day* [1940] 1 All E.R. 402, distinguished.) The appellant was convicted on four counts of an indictment which charged him with breaking and entering two separate premises and committing the crime of theft therein and two other counts of theft. After the case for the Crown had been concluded and the defence had elected to call no evidence, the learned trial Judge on the application of the Crown recalled a witness, a detective, to give a further piece of evidence, —namely, that a brick bolster had been found by him at the site of the crime. The circumstances leading to the recalling of this witness were these: It was part of the Crown case that the appellant was the owner of this bolster and two witnesses were called who identified the appellant as the person who had been in possession of this bolster some months before the crime was committee. Owing to an oversight on the part of counsel for the Crown, he did not note that the detective, in listing the many articles found at the scene, had omitted to mention the bolster. No one was misled, for the detective had so identified the bolster in the Court below and it had been produced to each of the two witnesses in the course of the trial. The evidence then having been completed, the learned Judge inquired from counsel for the defence whether it was proposed to call evidence for the defence and was informed that no evidence would be called. The further hearing of the case was then adjourned to the following morning to sum up. Overnight, counsel for the Crown, on reading the notes of evidence, discovered the omission, and, in the morning, counsel saw the Judge in Chambers when he decided to recall the detective to enumerate the articles found by him at the site of the crime. On this occasion, the detective included the bolster among the items so found. Thereupon, the Judge again invited counsel for the appellant to say whether they now desired to call evidence, and he was informed that it was not proposed to call evidence for the defence. On an appeal against conviction it was submitted that the trial Judge in recalling the witness had exercised his discretion on a wrong principle: *Held*, by the Court of Appeal, That the trial Judge had acted correctly in remedying a mere slip or accident, when he recalled the Crown witness after the Crown had closed its case. *The Queen* v. *Nash.* (C.A. Wellington. 1957. December 19. Hutchison, North, Henry, McCarthy JJ.)

Evidence—Accused not seeking to set up Good Character or to impugn Veracity of Crown Witnesses—Cross-examination as to Credit or Previous Conviction not permissible—Evidence Act 1908, s. 5 (Evidence Amendment Act 1952, s. 2). Where the evidence given in chief by the accused did not seek to set up his own good character or to impugn the veractity of Crown witnesses, cross-examination as to credit or previous conviction, in the view of the terms of s. 5 of the Evidence Act 1908 (as enacted by s. 2 of the Evidence Amendment Act 1952), should not be permitted; and, if the trial Judge allows it, he exercises his discretion wrongly. (*R.* v. *Clark* [1953] N.Z.L.R. 823, applied. *R.* v. *Woods* (1956) 56 S.R. (N.S.W.) 142, referred to.) Observation of the difference between English and New Zealand legislation as to permissible cross-examination of accused persons. The appellant was convicted after a trial on charges of attempted breaking and entering a warehouse and of assault on the night of September 20-21. At the conclusion of that trial he was charged before another jury on an indictment containing a count of breaking and entering the same hotel premises on an earlier day (August 4, 1957) and committing theft. The order of the two trials was fixed at the request of appellant's counsel. An application by appellant's counsel for an adjournment to enable a fresh panel to try the indictment at a later date during the Sittings was refused on the ground that steps had been taken to ensure that no prejudice might result from the hearing of both indictments during the same week. During the first trial all waiting jurors had been excluded from the Court, and the new jury was empanelled while the first was deliberating its verdict. It was common ground that the only means of knowledge of the prior trial available to the second jury would be from reading reports in the daily newspapers. The appellant was convicted on both counts and sentenced to eighteen months' imprisonment to take effect at the expiry of the sentence imposed in respect of the earlier conviction. The appellant appealed against sentence and conviction. The appeal against conviction was based, first, upon bias, which it was claimed might have resulted from a trial by a jury drawn from the same panel which had previously tried its appellant; and, secondly, that the verdict was unreasonable and could not be supported by the evidence. *Held*, That the learned trial Judge and counsel for the Crown had warned the members of the jury to disregard all matters which might have come to their knowledge other than those given in evidence at the trial, and there was no ground for holding that the jury might have been biased; and there was ample evidence on which the jury could convict. (*R.* v. *Black* [1956] N.Z.L.R. 204, applied. *R.* v. *Parry* [1948] N.Z.L.R. 191, and *R.* v. *Greening* [1957] N.Z.L.R. 906, distinguished.) *The Queen* v. *Leadbitter.* (C.A. Wellington). 1957. December 11, 12, 19. Finlay J. Henry J. McCarthy J.)

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance—Order for Maintenance during Joint Lives made by Consent—Death of Respondent—Application for Order that Former Husband's Personal Representatives "do pay to the petitioner for her permanent maintenance during her lifetime or until she shall remarry such amount . . . as the Court may consider just"—Original Order silent as to Respondent's Personal Representatives or Estate—Application in Reality though not in Form, for Variation of Original Order—Original Order made by Consent when Petitioner could have applied for Order against Husband's Personal Representatives in Event of His Death and did not so apply—Application dismissed—Divorce and Matrimonial Causes Act 1928, ss. 33 (1) (2), 41 (2) (Divorce and Matrimonial Causes Amendment Act 1953, ss. 12, 13). On the basis of a separation agreement, a decree nisi was made absolute on July 4, 1955. By consent, the respondent was ordered to pay the petitioner permanent maintenance at the rate of £5 per week "during the joint lives of the petitioner and the respondent or until the petitioner shall sooner marry." On September 3, 1955, the respondent was killed. By his will, probate of which was granted, he had bequeathed one-eighth of his estate to his brother and sister respectively and the remaining three-fourths to M., whom he was about to marry. The value of his net estate was estimated at £4,161. In October, 1955, the petitioner filed a motion that the respondent's personal representatives "do pay to the petitioner for the permanent maintenance of the petitioner during her lifetime or until she shall remarry, such amount as the Court under the circumstances may consider just." *Held*, 1. That, as the duration of the order for maintenance was expressly limited to the joint lives of the parties and contained no reference to the respondent's personal representatives or estate, the application did not come within s. 33 (1) (2) of the Divorce and Matrimonial Causes Act 1928 (as amended by s. 12 of the Divorce and Matrimonial Causes Amendment Act 1953). 2. That the motion did not seek a variation of the existing order pursuant to s. 41 (2) of the Divorce and Matrimonial Causes Act 1928 (as added by s. 13 of the Divorce and Matrimonial Causes Amendment Act 1953) but sought an order for maintenance against the respondent's personal representatives

and it was in reality, though not in form, an application for the extension of the maintenance order beyond the former husband's lifetime. 3. That, if this application could be dealt with as an application for the extension of the original order beyond the former husband's lifetime, the Court should not make an order in the circumstances of this case, as the original order was made by consent at a time when the petitioner could have applied for an order against the husband's personal representative in the event of his death and decided not to do so; and in any event, the circumstances of the case did not warrant the order sought. *Semble*. The Court should not lightly go behind the terms of an agreement freely entered into between the parties, even though, in appropriate cases, it has power to do so. *Kerr* v. *Kerr*. (S.C. Auckland. 1957. October 8; December 19. T. A. Gresson J.)

ELECTRIC POWER BOARD.

Estoppel—Action claiming Electricity Charges in Excess of Monthly Accounts rendered to Consumer—Nothing in Electric Power Boards Act 1925 or Regulations thereunder to prevent Plea of Estoppel being raised by Consumer—Incorrectness of Monthly Accounts for Electricity supplied—Defendant successfully pleading Estoppel by Representation and Estoppel by Negligence—Electric Power Boards Act 1925, s. 82 (o). An Electric Power Board, duly constituted under the Electric Power Boards Act 1925, sought to recover adequate charges in excess of the monthly accounts rendered to a consumer. In 1950, the defendant, which operated a timber mill and a joinery business, installed new electrical equipment in its premises. This work involved the installation of three current transformers, and, in due course, the defendant obtained the approval of the Board's engineer to their use. The responsibility for the connecting of the current transformers to the meter (which was already in operation on the premises) rested with the Board and not with the contractor; and the Board's Chief Inspector performed the necessary work. Shortly after the installation of the new equipment, the defendant's mill manager noticed that the accounts rendered by the Board for electricity were a great deal less than had been the case in the past. The mill manager drew the attention of the Board's inspector to that circumstance, and the inspector re-checked the wiring but detected no fault. In 1953, the Board's officers put in a check meter, and discovered that the ordinary meter had become defective and it was replaced. On April 24, 1953, the Board wrote to the defendant asking for payment of £39 8s., which, it claimed, represented a fair and reasonable adjustment on the assumption that the defect in the meter had existed during the whole of the previous year. The defendant paid that sum to the Board. The defendant's mill manager drew the attention of the Board's inspector to the recordings on the internal meter (supplied by the Board) which seemed to be out of proportion to the total electricity supplied as recorded on the main meter. He reported this to the Board's chief inspector, who made a further inspection but did not detect anything wrong with the metering equipment. The defendant's accountant then decided to ignore the reading showing on the internal meter and to revert to the previous practice of apportioning the electricity charges between the firm's mill and the joinery department on a percentage basis. Further, the defendant rendered its income-tax returns on the basis that the Board's accounts for electricity were correct. In September, 1955, the Board's inspector decided to make another inspection of the defendant's metering equipment, and he installed three check meters so that each meter recorded separately the electricity passing through each transformer. He found that a cable from one of the transformers to the meter was wrongly connected, although the manufacturer's tag indicated that it was correctly placed. When this error was reported to the Board, it decided to conduct a series of tests extending over a period of months in an endeavour to determine how much electricity had, in fact, been consumed by the defendant. It satisfied itself that over the period from August 3, 1950 to October 30, 1955, it had been short-paid by the sum of £1,181 7s. 5d. The Board accordingly demanded this amount from the defendant; and, upon liability being denied, an action for recovery for electricity charges in excess of the monthly accounts rendered to the defendant was commenced. *Held*, 1. That there were no obligations imposed by the provisions of the Electric Power Boards Act 1925 and the Regulations made thereunder, either on the Board or on the defendant, which prevented the plea of estoppel being raised. (*Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* [1937] 1 A.C. 610; [1937] 1 All E.R. 748, applied. *In re Toora and Foster Electric Light Co. Ltd.* [1938] V.L.R. 333, distinguished.) 2. That the defendant had established the necessary essentials of a successful plea of estoppel by representation. (*Carr* v. *London and North Western Railway Co.* (1875) L.R. 10 C.P. 307, followed. *Seton, Laing, and Co.* v. *Lafone* (1887) 19 Q.B.D. 68, referred to.) (*a*) The rendering of the monthly accounts and the action of the Board, when it wrote to the defendant on April 24, 1953, asking for payment of the sum of £39 8s. which it said it regarded as "a fair and reasonable adjustment of the undercharge", amounted to a representation of the existence of a certain state of facts: if, indeed, it did not effect a compromise of all past claims. (*b*) That, after April 24, 1953, the statements supplied by the Board on the monthly accounts, after it had claimed that the defect had been cured, were, in the circumstances in which they were made, representations of the existence of a certain state of facts. (*Holding* v. *Elliott* (1860) 5 H. & N. 117; 157 E.R. 1123, distinguished.) (*c*) That those representations were made in circumstances which would justify a reasonable person concluding that he was being invited to act on the representation in the normal or usual way in which a person would act in the particular circumstances and that the representations were true; and the Board must be deemed to have intended that the defendant, as a manufacturing concern, should act on the figures contained in the monthly accounts by using the figures as an item of cost in determining the selling prices of its products, and as an item of expenditure in the preparation of its annual income-tax returns. (*Maclaine* v. *Gatty* [1921] 1 A.C. 376, and *Sidney Bolsom Investment Trust Ltd.* v. *E. Karmios and Co. (London) Ltd.* [1956] 1 Q.B. 529; [1956] 1 All E.R. 536, followed.) *Pierson* v. *Altrincham Urban Council* (1917) 86 L.J.K.B. 969, applied.) (*d*) That not only was the knowledge solely in the possession of the Power Board, but the defendant in the nature of things had no possible means of verifying the accuracy or otherwise of the Board's accounts, and, the defendant had throughout displayed the utmost frankness. (*e*) That the loss must fall on the Power Board for the defendant had made out all the elements of a true estoppel, as the defendant acted on the representation in the ordinary course of its business in the belief that the monthly accounts were correct, and did so to its own damage. 3. That the plea of estoppel on the ground of estoppel by negligence succeeded, because: (*a*) the Board was guilty of culpable negligence at least when, shortly after the current transformers had been installed, it was pointed out to the Board that the monthly accounts seemed to be inordinately low; and, if the testing officer of the Board was not negligent in failing initially to check the accuracy of the manufacturer's tag, he must be held to have been guilty of negligence in failing to take proper and reasonable steps to check the metering equipment once the possibility of a fault had been pointed out to him; and he was again guilty of negligence in 1953 when he made a further casual inspection and found no fault. (*b*) These acts of negligence resulted in representations being made in the transaction itself which were calculated to, and did, lead the defendant to believe that the monthly accounts were correct; and that in acting on them the defendant did so to its damage. (*Seton, Laing, and Co.* v. *Lafone* (1887) 19 Q.B.D. 68, followed.) *Taranaki Electric-Power Board* v. *Proprietors of Puketapu 3A Block Incorporation*. (S.C. Taranaki. 1957. November 14, 15; December 11. North J.)

FAMILY PROTECTION.

Illegitimate Children—Onus of Proof—Onus as to Paternity of Testator being "Admitted by or established against the testator in his lifetime—Admissions by Words or Conduct—Principles to be applied in dealing with Claims by Illegitimate Children—Extent of Duty owed by Testator to them—Family Protection Act 1955, ss. 2 (3), 3 (b). On applications by illegitimate children and grandchildren of a testator, the requirement of s. 2 (3) of the Family Protection Act 1955 that the Court is to be satisfied that "the paternity . . . of the parent has been admitted by or established against the parent while both the parent and the child were living" raises two issues in respect of which an onus of proof rests on an applicant: (*a*) He must prove the natural relationship, i.e., that he is in fact a child of the testator; and (*b*) he must prove the admission or establishment of the relationship while both parent and child were living. Although the evidence which proves the one issue may possibly in some cases be sufficient to prove the other, proof of either alone will not suffice. An admission, for the purposes of s. 2 (3) must be one which in fact acknowledges the paternity, and the mere admission of circumstances pointing to paternity will not suffice. A verbal admission sufficiently proved though made to the mother only is within s. 2 (3), as is conduct amounting to tacit admission. Whether it be a matter of spoken words or of conduct, it is enough if the only inference that can reasonably be drawn from the words or conduct is that paternity is definitely acknowledged. While corroboration is not strictly

necessary, the general rule applicable to claims against the estates of deceased persons is applicable; and the Court will be cautious in the acceptance of uncorroborated testimony, and will act upon such testimony only if it finds the evidence sufficiently convincing to justify such a course. While the nature of the relationship between an illegitimate child and a testator is one of the circumstances which must be duly taken into account in determining whether the testator has made adequate provision for such a claimant, the claim is not to be minimized merely on the ground of the illegitimacy of the relationship, and, when properly ascertained, must be allowed without hesitation or undue discrimination and on the scale that is appropriate in the circumstances. The illegitimacy of the relationship is a matter requiring to be considered in determining the extent of the duty owed by the testator to the claimant, as the remoter. It must be taken into account along with every other circumstance which enables the Court to determine what moral duty was owed by the testator to the claimant. In some cases it may weigh heavily, and in others, where there are different circumstances, it may have little or no bearing. (*In re Wright, Willis* v. *Drinkwater* [1954] N.Z.L.R. 640, applied.) *In re Donghi, Petrowski* v. *Kingston* [1954] N.Z.L.R. 1183, referred to.) Proper allowance may be made for the establishment in life of an illegitimate child of the testator, as well as for its maintenance during minority. (*In re Partridge, Partridge* v. *Perpetual Trustees Estate and Agency Co. of New Zealand Ltd.* [1956] N.Z.L.R. 265, referred to.) *In re B.* (S.C. Christchurch. 1957. October 18. F. B. Adams J.)

Jurisdiction—Re-statement of General Principles on which Statute Administered—Family Protection Act 1955, s. 4. In every case in which an application is made for further provision out of the estate of a testator, the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father. (*Bosch* v. *Perpetual Trustee Co. Ltd.* [1938] A.C. 465, [1938] 2 All E.R. 14, followed.) The Family Protection Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances. (Judgment of Salmond J. in *In re Allen, Allen* v. *Manchester* [1922] N.Z.L.R. 218, approved in *Bosch* v. *Perpetual Trustee Co. Ltd.* [1938] A.C. 463, 479; [1938] 2 All E.R. 14, 21-22, followed.) The wisdom and justice of the father whose function the Court is to exercise are confined within certain limits by the statute itself. These limits were specified by the Court of Appeal in *In re Allardice, Allardice* v. *Allardice,* (1910) 29 N.Z.L.R. 959; 12 G.L.R. 753, aff. on app. (1911) N.Z.P.C.C. 156, and approved by the Privy Council in Bosch's case. Those principles to be followed by the Court in administering the Family Protection Act are as follows:—1. That the Act is something more than a statute to extend the provisions in the Destitute Persons Act. 2. That the Act is not a statute to empower the Court to make a new will for a testator. 3. That the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of wife, husband, or children where adequate provision has not been made for this purpose. 4. That, in the case of a widow, the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves. The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be: what is the need of maintenance and support; and the second, what property has the testator left? (*Mudford* v. *Mudford* [1947] N.Z.L.R. 837, followed.) The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration. So, too, in the case of children, a material consideration is their age. If a son is of mature, or nearly mature age, his needs both for the present and the future can be estimated without much difficulty. (*Bosch* v. *Perpetual Trustee Co. Ltd.*, followed.)

Judgment of Turner J. affirmed, but varied. *In re Goodwin Deceased, Goodwin and Another* v. *Wilding and Others.* (S.C. Napier. 1956. February 22, 23; April 11. Turner J. C.A. Wellington. 1957. April 15; July 1. North J. Henry J. McCarthy J.)

Widow—Husband's Will Empowering Trustee at his Discretion to supplement Widow's Income from Residuary Estate to Amount sufficient for Her Proper Maintenance—Court bound to take some Account of Such Discretionary Trust—Trustee authorized to sell Dwellinghouse and apply Proceeds in purchasing, in the Trustee's Name, Suitable home for Widow—Family Protection Act 1955, s. 4 (1). The Court is bound, in considering the adequacy of the provision made for his widow by a testator out of his estate, to take some account of the discretionary trust which he created in the following clause of his will: I EMPOWER my Trustee in its sole discretion if my Trustee at any time considers that the income of my residuary estate is insufficient for the proper maintenance of my wife to have recourse to the capital of my residuary estate to make the income up to such a sum as shall in the opinion of my Trustee be sufficient for such purpose PROVIDED THAT my Trustee shall not deduct from any future income any sum with a view to making a refund to the estate capital in respect of any such advance or advances made from capital without the written consent of my wife. The Court is not justified in assuming that the discretion so conferred by the testator on his trustee will not be wisely exercised by the trustee when, and if, the occasion for exercising it should arise. (*In re Thomas (Deceased), Public Trustee* v. *Thomas* [1954] N.Z.L.R. 302, distinguished.) In the present case, it was held that the provision made for the widow by the testator was inadequate only in that there was given to the trustee no power to sell the matrimonial home and purchase another suitable home for the widow and the daughter. The Court empowered the trustee to sell the dwellinghouse of which the widow was the life tenant and to apply the proceeds of the sale or any other part of the capital in purchasing in its name a more suitable home and to permit the widow to have the free use and enjoyment of it. It was also ordered that the widow during her widowhood should pay the rates and insurance on such new home and make good any damage thereto other than damage due to fair wear and tear; and, during her widowhood, the cost of painting and the making good of ordinary wear and tear should be paid out of capital. *Mills* v. *New Zealand Insurance Co. Ltd. and Another.* (S.C. Wellington. 1957. September 17; December 19. Barrowclough C.J.)

HUSBAND AND WIFE.

Married Women's Property—Wife Contributing All Cash, above Mortgage, required to purchase Section and erect House—Title in Husband's Name—Declaration that Wife entitled to Half Interest and also to Charge on Property for Amount of Excess of Her Contributions over Those of Her Husband—Married Women's Property Act 1952, s. 19 (1). The wife provided the whole of the purchase price of a section (£170) and the whole of the money (£300) required, over and above the amount obtained or mortgage, for the building of the house thereon. The title was taken in the name of the husband. On a motion asking for an order under s. 19 of the Married Women's Property Act 1952 determining the interests of the parties by way of title to the property, and, as agreed at the hearing, the question of possession. *Held,* 1. That, on the facts, the wife did not provide the moneys merely by way of loan to the husband, and it could be inferred from the whole of the evidence that *ab initio,* it was the intention of the parties that the wife should have an interest in the property with her husband. 2. That, on that finding, the Court had jurisdiction to hold that the wife possessed a proprietary interest in the property. (*Watson* v. *Watson* [1952] N.Z.L.R. 892; [1952] G.L.R. 486, distinguished.) 3. That, in the circumstances of this case, there should be a declaration that the wife was entitled to a one-half interest in the property, and also (as the wife had contributed far more than the husband did, even taking into account his payments in reduction of mortgage capital) to a charge upon the property for a sum of money estimated as representing the amount which could be fairly regarded as the excess of her contributions over and above those of her husband. 4. That, for the reasons given in the judgment, the wife should have possession of the property until the further order of the Court. *Reeves* v. *Reeves.* (S.C. Christchurch. 1957. October 4, 7; December 16. F. B. Adams J.)

THE ADVOCATE.

By Sir Norman Birkett.

I have spoken on one or two occasions now on advocates and about advocacy. I have also written one or two papers about it. Therefore I had better follow the example of a friend of mine who always began by saying: "I have delivered this address twice before, once to a fashionable audience in the City of London and once to convicts in the prison on Dartmoor. I therefore take the advantage of this moment to apologize in advance if any of my hearers have heard me before, on either or both of those occasions!"

I have no special claim to speak on a subject like advocacy. It is disconcerting at the outset of one's speech to feel there is nothing new to be said about it, that eighteen or nineteen centuries ago two great men said everything which can be said about advocates and about advocacy—Cicero and, in a later age, Quintillian.

Indeed, unconsciously no doubt, the advocate of today owes a very great deal to the teachings of Quintillian. Everybody knows how wise it is to laugh when the judge makes a joke, whether it is a bad one or not; if you cannot laugh, at least smile appreciatively. That was Quintillian, because he said in memorable language that it was very wise for the advocate to study his judge. "If he is grim, try to mollify him; if he is pleasant, try to humour him; but, in any event, make the judge be upon your side." He it was, for example, who taught the value of anticipating the cross-examination whilst you are conducting the examination-in-chief, and many more practical matters of that kind.

At any rate, I may just add a few words which come to me from my own experience at the Bar and on the Bench. I am not too certain that advocacy can ever be taught. You can improve, but your real advocate, is born, and not made.

Perhaps the greatest advocate who ever trod our courts was the great Erskine. When Erskine made his first speech in defence of Captain Baillie before Lord Mansfield he had just been called to the Bar. He had never conducted a case in court before; he had no experience whatsoever. Yet the speech he made that day was referred to by Lord Campbell in the *Lives of the Chancellors* as being the greatest speech which ever fell from the lips of an advocate. "Every eye was fixed upon the advocate; every breath was held almost suspended; and if a snowflake had actually fallen," said Lord Campbell, "in that silence and that stillness, it could have been heard to fall." No doubt Lord Campbell was guilty of some exaggeration in that particular passage, as he was in very many other passages in the *Lives of the Chancellors* but the fact seems to be that Erskine that day created an impression in his very first speech which was never afterwardsexcelled.

Some of you will be familiar with the interesting diary of Henry Crabb Robinson, who lived to be nearly ninety. His diary had been kept for nearly fifty years, and there is an entry of how at the Norfolk Assizes he noticed a man in the court, a man called Erskine, who had been conducting a simple probate action. The diarist recorded that the impression which was made by Erskine in that court that day was one which never faded throughout his ninety years.

Those of you who are familiar with your Macaulay will remember his description of the Trial of the Seven Bishops, and how Somers, young John Somers, then utterly unknown but afterwards Lord Chancellor, was the last of all the counsel for the defence. All the leaders had spoken, and finally John Somers, the unknown, rose and spoke for less than ten minutes. "But when he sat down," said Macaulay, "his fame as an advocate and his fame as a constitutional lawyer was firmly established."

Great advocates are born not made, like the poets, but we of a lesser mould can learn from the great examples. You here in Gray's Inn venerate the memory of Francis Bacon. Ben Jonson said of him: "No man ever spoke so neatly . . . he commanded where he spoke; and had his judges angry, and pleased, at his devotion. No man had their affections more in his power. The fear of every man that heard him was lest he should make an end."

Clarendon, in his history of the Rebellion, said of Coventry, the Lord Keeper of the Great Seal: "He had in the plain way of speaking and delivery, without much ornament of elocution, a strange power of making himself believed, the only justifiable design of eloquence."

All that leads me to the first main point which I want to make,and that is that in considering advocacy, whether it be in any particular court or any particular place, the all-important thing is the advocate himself. When Lord Rosebery came to try to analyse the oratorical supremacy of the great Chatham he tried to search out the secret of his skill; and he spoke about his elegant use of language, his knowledge of words, his premeditated speech, the eloquence of his rhetoric, his passion, his poetry, his actions, his movements. When he had described them all in an attempt to fathom the secret of Chatham's supremacy as an orator, as an advocate, he said this: "But a clever fellow, who had mastered all of these outward things which were gifts to Chatham, would have been but a pale reflection of the man himself. For it is not only the thing which is said that matters but the character of the man who says it."

Certainly, so far as the practice of advocacy is concerned, I would always put first the character of the man himself. You can never separate the thing said from the man that says it. You know Emerson and his great essays. He was also a most wonderful speaker, and James Russell Lowell, in some very memorable verses speaks of the immense power of the man himself.

Therefore it is important to consider, first of all, the advocate himself. Whatever your gifts may be, however shining and brilliant, unless you possess what in the old-fashioned way is called character, it will all come to nothing. When you go into court, whatever the case may be, the court must be able to rely on your word

An address delivered in Gray's Inn Hall on July 1, 1957. (Reproduced from *Graya*, the magazine of the members of the Honourable Society of Gray's Inn, by permission of the Editorial Board.)

perfectly. When you state matters of fact the court must know of a surety that they are true. You must build up that reputation for integrity and high-mindedness without which all other gifts are in vain.

Mr Justice Crampton in the great case of *The Queen* v. *O'Connell*, said that an advocate " gives to his client the benefit of his learning, his talents and his judgment ; but all through he never forgets what he owes to himself. He will not knowingly misstate the law—he will not wilfully misstate the facts, though it be to gain the cause of his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice ; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer." To-day, in the century and age in which we live, there never was more need to assert that in the profession of the Bar the uprightness and the integrity of the advocate himself are beyond all other gifts.

The second thing I would like to say about the advocate, from my own experience, is this. It is important that your advocate should be a man of law. Without that, of course, other things are of no avail. But your man of law should also be a man of letters ; and your true advocate must try to combine the two.

Sir Walter Scott was the Scottish equivalent of an English county court judge and when he wrote *Guy Mannering* he attributed to one of his characters, Counsellor Pleydell, what were undoubtedly his own views of an advocate. When he took Mannering to his chambers in High Street, Edinburgh, Pleydell pointed to some books of English literature upon the shelves, and he said : " A lawyer without literature is a mechanic, but a lawyer with some knowledge of literature and history can be a great craftsman, and he can be an architect. These are my tools of trade."

Perhaps the greatest Chief Justice the United States of America ever had, Chief Justice Marshall, always said that he would deny the appellation of " learned " to any man who only knew the law and the statutes—and John Marshall was a man of wide reading and of great culture.

I have a good many likes and a good many dislikes. I like to see the advocate who stands straight up in court, and never lounges or leans on the back of the bench and puts his feet up. I like to see him standing straight when addressing the court or addressing the jury, and never letting the court or the jury escape his look. Focus them, as the Ancient Mariner did, and never let them escape. I like to see the man who speaks right on without taking endless sips of water from tumblers or beakers, and keeping the usher on the run filling up his tumbler whilst he is addressing the court. I remember an old friend, the late Patrick Hastings. I have known him speak for two or three days and never look at a tumbler, because he felt it important not to lose touch with the court or with the jury. When you see some counsel, as I have seen them, pick up a glass and pour water into it while addressing the court, suddenly you feel like saying, " Why, I will have one with you ! " It is most distracting ; and the last thing an advocate must do, is to allow something to disturb or distract the attention of the court or the jury.

I like to see the advocate who examines and cross-examines because he has got the matter in his head, and does not have to keep looking for papers and never finding the one he wants. I like to see a man who is firm and resolute, and courteous to the court, but independent like Erskine was before Mr. Justice Buller in the great case of the *Dean of St. Asaph*, standing on the rights of the Bar, maintaining his dignity and his courtesy.

I like to hear counsel speaking the Queen's English and giving an appropriate quotation in an argument. I remember the Master of the Moots coming into the Court of Appeal one day on an appeal about the measure of damages. There had been an accident, and his client had lost the sense of smell. The judge below, he submitted, had ignored it. Quite suddenly, without any preparatory words, he quoted Dante Gabriel Rossetti's " I have been here before," which you will recall was a poem dealing with the evocative powers of the sense of smell. That is the kind of thing I particularly like to hear, an argument enforced by the appropriate quotation.

These are my own personal likes and dislikes, but in forensic presentation, there is infinite variety. You can even go to George Borrow who said, " My friend can succeed if he has only got an attractive grin upon his face."

The advocate should not merely be a man of character ; he should not merely be a man of law ; but he should aspire to be a man of letters. Just let me say why I think it is important. Words are the raw material of the advocate. Whatever the court you are going to address, your task as an advocate is to persuade. Advocacy is not merely confined to courts of law, but is everywhere where men seek to win other men to their own view or their own opinion. There the arts of advocacy are being shown, and the arts of persuasion are being practised, but always by means of words. Words are very powerful. They have an emotional quality which cannot quite be described. A professor of English Literature in the University of Cambridge once said that to see words like " Zion " and " Jerusalem " printed upon the ordinary sheet, for some men had an overpowering effect because of their emotional quality, though they had not been to Jerusalem or read about Zion. That is why in the law, in certain matters, we have to use language which is not emotional, what Swift once called the jargon, the hereinbefores and the whereinbefores and all the rest of it, in order to try to achieve precision and to prevent emotion coming into words.

There are great spheres in which words can be used in all their literary power and their literary pride. Master Treasurer, you will remember on the Midland circuit the days when the foreman of the Grand Jury took that noble oath which, with the abolition of the Grand Jury, passed away from our courts for ever. It was one of the finest pieces of English prose ; it was a delight always to listen to it. Similarly, whether the advocate is addressing a jury, whether he is addressing the Court of Appeal, whether he is addressing a judge alone or whether he is addressing some administrative tribunal, his task is to persuade. It is the greatest possible mistake to imagine that your advocate is a man who merely makes a flowery speech. There may have been days when a flowery speech was effective, but it is no

longer effective. Times change; manners change; all things change. Though the advocate of to-day does not seek to commend himself by a flowery speech, he does seek still to be persuasive.

In doing that you must be able, when you are upon your feet as an advocate, to find the right words coming to you at the right moment. Secondly, you must have the faculty, either innate or acquired, of putting those right and proper words in the right and proper order. "The vision and the faculty divine." The words open a window on the infinite because of their choice and their order; but "the vision and the divine faculty" let in on light at all upon us. You must get the right words in the right order. "Great is Diana of the Ephesians"—"Diana of the Ephesians is great;" the difference between a revolutionary and a peaceful protest. The right words in the right order.

I used to go into court with the late Marshall Hall. Sometimes, of course, he was in tremendous form, and sometimes he was not! Sometimes you would have thought his language was scarcely grammatical; it was almost hysterical; but there were other moments. I shall remember always a great and solemn moment in a murder trial when Marshall Hall was trying to tell a jury how irrevocable their verdict was. "You will speak a word, and if it is a word of doom, why, there is no going back;" and suddenly he quoted those famous lines of Othello:

> "Put out the light, and then put out the light:
> If I quench thee, thou flaming minister,
> I can again thy former light restore,
> Should I repent me; but once put out thy light,
> Thou cunning'st pattern of excelling nature,
> I know not where is that Promethean heat
> That can thy light relume."

Whether the jury understood the reference or not, the effect was overwhelming.

The effective advocate to-day must have the same power, the same choice of words, and the same faculty of putting the words in the right order. I not only practised in the courts as an advocate a long time ago, but I sat for fifteen years on the Bench and so I saw the advocate from the other point of view. I say to you now, and I say it, I am sure, with the concurrence of all the judges, that never can you be more effective than the advocate who stands there and in graceful English, with a thorough knowledge of his case, presents his view in that attractive and persuasive way.

The advocate must be a man of character; the advocate must be a man of law; and the advocate I think ought to be a man of letters. He should be very widely read. Master Hilbery in mentioning to me at dinner this very night, when we were exchanging reminiscences of days long past, a case about which I was asking him, said: "If I had had a man who had been well read against me, I should have had a much more difficult task."

The other night I spoke upon the wireless on the "Spoken Word," and I received a batch of letters from people saying "Would you, please, give me a list of books which will make me a master of the spoken word?" The answer, of course, is that it is the wide reading of years which gives a choice of vocabulary. For the advocate to have a choice of vocabulary is simply beyond rubies in value.

It is important that the advocate should always remember the power of orderly presentation. The late Lord Simon had that gift of orderly presentation more than anybody else I ever knew. He could make the most intricate case surprisingly clear.

You may remember the words used by the late Mr. Justice Maule, a judge for whom I have a particular fondness. He endeared himself to me, as I am sure he did to other judges, for what he said to the witness who was mumbling away, as witnesses continually do. He said, "Woman, for the love of God, and your expenses, speak up!" It was he who, on this matter of orderly presentation,said this to a counsel who was mixing everything up. "Mr. Smith, do you not think that by introducing a little order into your narrative you might possibly render yourself a trifle more intelligible? It may be my fault, but I cannot follow you. I know that my brain is getting old and dilapidated, but I should like to stipulate for some sort of order. There are plenty of them. There are the chronological, the botanical, the metaphysical, the geographical. Why, damn it all, even the alphabetical order would be better than no order at all!"

The last thing I want to quote to you comes from Sterne's *Tristram Shandy*: "'Are we not here now' continued the corporal" (Corporal Trim), "'and are we not'—(dropping his hat plumb upon the ground—and pausing, before he pronounced the word)—'gone! in a moment?' . . . Now—Ten thousand, and ten thousand times ten thousand (for matter and motion are infinite) are the ways by which a hat may be dropped upon the ground without any effect. Had he flung it, or thrown it, or cast it, or skimmed it, or squirted, or let it slip or fall in any possible direction under heaven—, or in the best direction that could be given to it,—had he dropped it like a goose—like a puppy—like an ass—or in doing it, or even after he had done, had he looked like a fool,—like a ninny—like a nincompoop—it had failed, and the effect upon the heart had been lost. Ye who govern this mighty world and its mighty concerns with the engines of eloquence,—who heat it, and cool it, and melt it, and mollify it,—and then harden it again to your purpose. Ye who wind and turn the passions with this great windlass—and, having done it, lead the owners of them, whither ye think meet . . . Meditate, I beseech you, upon Trim's hat." The right words in the right order, and the effect upon the heart will not be lost.

The student at the Bar can train himself or herself, with all the enthusiasm of youth, in the career of the advocate, to use words as they ought to be employed, to maintain the Queen's English in its beauty and its purity, and to assist the court in the work of justice and its administration of the law. In Parliament. in the Law Courts, on the platforms of the country, you see men who have really mastered their instrument so that they can, as Tristram Shandy said, just mould people to their will. It is a very great power. It is in your hands. Lucidity makes speech enjoyable; grace makes speech memorable; lucidity and grace can only come as the result of prolonged application. In all you do, I wish you well.

EQUITABLE CHARGE IN FAVOUR OF PERSON BUILDING ON LAND OF ANOTHER.

Deed to Evidence Charge: Precedent.

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

Where a person builds on land belonging to another, we are at once met by two very salutary maxims of law. *Quicquid plantatur solo, solo cedit, Aedificatum solo, solo cedit.* (That which is built upon the land goes with the land). But equity mitigates the rigour of these maxims by certain doctrines such as that of "standing by," part performance or equitable estoppel. Thus it has always been treated by the Courts of Equity (which have always been Courts of "conscience") as being against *conscience* to suffer a party who has entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he has laid out: *White and Tudor's Leading Cases in Equity*, 9th ed., 414. A Court of Equity will, as far as possible, prevent the Statute of Frauds (now, in New Zealand, the Contracts Enforcement Act 1956) from being made an instrument for fraud: *Rouchefoucauld* v. *Boustead* [1897] 1 Ch. 206).

Now the general question as to the equity which arises upon the expenditure on land belonging to another, was dealt with by Sir Arthur Hobhouse in delivering the judgment of the Privy Council in the New Zealand case *Plimmer* v. *Wellington City Corporation* (1884) N.Z.P.C.C. 250, 258:

> "In such a case as *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, the evidence (according to Lord Kingsdown's view) showed that the tenant expected a particular kind of lease, which Stuart V.C. decreed to him, though it does not appear what form of relief Lord Kingsdown himself would have given. In such a case as the *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60; 51 E.R. 954, nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent their money on it, and it was secured to them at a valuation. In such a case as *Dillwyn* v. *Llewellyn* (1862) 4 Deb. F. & J. 517; 45 E.R. 1285 nothing but a grant of the fee simple would satisfy the equity which the Lord Chancellor (Lord Westbury) held to have been raised by the son's expenditure on his father's land. In such a case as that of the *Unity Joint Stock Mutual Banking Association* v. *King* (1858) 25 Beav. 72; 53 E.R. 563, the Master of the Rolls (Sir John Romilly), holding that the father did not intend to part with his land to his sons who built upon it, considered that their equity would be satisfied by recouping their expenditure to them. In fact, the Court must look at the circumstances in each case to decide in what way the equity would be satisfied."

The two leading cases (*Dillwyn* v. *Llewelyn* and *Unity Joint Stock Mutual Banking Assn.* v. *King*) are worthy of the closest examination.

In *Unity Joint Stock Mutual Banking Assn.* v. *King* the arrangement was in the words of the father as follows: "In May, 1855, two of my sons, Octavius and Alfred King, entered into partnership together, in a business which chiefly consisted of buying and selling corn. Shortly afterwards, I allowed them the use and occupation of my granary and the land and premises so purchased by me of the railway company, for the purposes of their partnership business; and although I contemplated and intended, at some future time, to make over the said land and hereditaments to them, yet I never in fact did so, *nor did I ever engage or promise to do so*; and I allowed my said sons the use or occupation of the said premises, without binding or placing myself under any obligation to allow them to continue such use and occupation, and without any arrangement as to the terms on which they should hold the same; but the whole transaction was a matter of mutual confidence between us, and subject to future arrangement. However, I distinctly say, I never made over or relinquished, and never engaged to make over or relinquish, to my sons the property in the land and hereditaments, but reserved, and intended to reserve, the same in my own hands and power, until I should think fit otherwise to deal therewith; and I deny that I allowed my sons, or either of them, to deal herewith as their or either of their own absolute property, or (save as aforesaid) that I allowed them to enter into of remain in possession thereof. I admit as already stated, that my sons Octavius King and Alfred King, caused to be erected and built, upon the piece of land, in or about the months of May and August, 1855, two other granaries; and in or about the months of May and June 1856, a coal shed and a dwelling house, and that the cost thereof, which amounted to about £1,200, was paid by my sons Octavious King and Alfred King; but I say that the charges for building the three granaries, coal-shed and dwelling house, were all made out and included in one or more bills, and charged to me, and I was the person on whose credit the whole was built; but the charges for building the said two granaries, shed and house, were, in fact, paid by my said sons." The Master of the Rolls, in giving judgment, said: at pp. 77 and 78 "Upon the statement of the father, I am of opinion that he could not have taken possession of that land again, without allowing to his sons the amount of the money they had laid out upon it. Without therefore coming to the conclusions which, upon the evidence, I have not come to, that he had intended to make, or that he had made over, to his sons his interest in the property, I am of opinion that the money laid out by the sons was a lien and charge upon it, as against the father."

In this case, therefore, the sons were not held to be entitled to the land itself, but they were entitled to an equitable charge to secure the money paid out by the sons with the father's permission and knowledge. The father had never actually promised to transfer the land to the sons.

In *Dillwyn* v. *Llewelyn* (1862) 4 De. G. F. & J. 517; 43 E.R. 1287, the facts were as follows: AB devised his real estate to trustees to the use of his wife for life, with remainder to his son CD for life, with remainders over. AB afterwards gave the H estate to CD, and signed a memorandum as follows: "H, together with my other freehold estates, is left in my will to my dearly beloved wife; but it is her wish, and I hereby join in presenting the same to our son CD, for the purpose of furnishing him with a dwellinghouse." CD took possession of the H estate and with the approbation of AB expended £14,000 on the erection of a dwellinghouse thereon. Upon the death of AB it was held that

CD was entitled to have a conveyance to himself of the fee simple of the H estate: per the Lord Chancellor (Lord Westbury): "Now about the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity; in cases of mere gift, if anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it, for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A gives a house to B, but makes no formal conveyance, and the house is afterwards on the marriage of B included, with the knowledge of A, in the marriage settlement of B, A would be bound to complete the title of the parties claiming under that settlement; so if A puts B in possession of a piece of land, and tells him, "I give it to you that you may build a house on it," and B, on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract which arises therefrom and to complete the imperfect donation which was made. The case is somewhat analogous to that of a verbal agreement, not binding originally for want of a memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance.

". . . If, therefore, I am right in the conclusion of law that the subsequent expenditure by the son, with the approbation of the father, supplied a valuable consideration originally wanting, the memorandum signed by the father and son must be thenceforth regarded as an agreement for value, extending to the fee simple of the land. . . . The only inquiry, then, is whether the son's expenditure on the faith of the memorandum supplied a valuable consideration and created a binding obligation. On this I have no doubt, and it therefore follows that the intention to give the fee simple must be performed, and that the decree ought to declare the son absolute owner of the estate comprised in the memorandum."

Dillwyn v. *Llewelyn* was applied by Gresson J. in *Thomas* v. *Thomas* [1956] N.Z.L.R. 785, a case under s. 19 of the Married Women's Property Act 1952, as to the beneficial ownership of the matrimonial home which was registered in the names of the husband and wife as joint tenants. The husband was ordered by the Court to execute a proper transfer of his interest in the property to his wife, His Honour holding that a supervening equity in favour of the wife had arisen "from the expenditure of money by her on the faith of the husband's abandonment to her of his interest in the property," said:

> "When the property upon which the dispute centres is realty, and is unsold, ownership can and should, it appears to me, be decided upon on application of the ordinary principles of law and equity, with perhaps this qualification, that the Court is not bound to be over-technical or too rigid in the application of such principles."

(His Honour was referring to disputes between husband and wife which come to the Court by way of summons under s. 19 of the Married Women's Property Act 1952). It is also interesting to note that the learned Judge in the course of his judgment referred incidentally to the famous case, *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130; [1956] 1 All E.R. 256.

As we have seen, the promisee or intended donee is not always entitled to a transfer of the land; there are cases where he has an equitable charge on the land, and it is this type of case which the following precedent is intended to cover. A perusal of the Court of Appeal case, *Whitehead* v. *Whitehead* [1948] N.Z.L.R. 1066; [1948] G.L.R. 167 will be found helpful in this connection. It was the not uncommon case of a father making available an area of land on which he encouraged his son to expend labour and material in the building of a cottage on the property. But there were title difficulties in the way—also not an uncommon feature in this type of case—probably lack of frontage to a public highway or something of that nature. In delivering the judgment of the Court, the late Sir Humphrey O'Leary C.J., said:

> It does not follow, however, that the estate acquired by the person making the expenditure would necessarily be one equal to the whole estate of the person standing by; it would, in our opinion, in the circumstances, be co-extensive with the amount of expenditure; that is to say he would have a charge or lien to that extent.

Accordingly the Court of Appeal held that, on the facts, the son had acquired an equitable charge or lien to be reimbursed to the value of the labour and materials expended on the building and property.

Another important point of practice arises from this judgment. It appeared from the evidence that, in addition to the expenditure of £281 on materials for the cottage, the son himself spent at least eighty to ninety full working days labouring in connection with the cottage and for this, his own labour, the Court allowed him about the sum of £150. It is clear from the judgment that in the circumstances, *the son was not entitled to the full marketable value of the cottage.*

Whitehead v. *Whitehead* was applied by Turner J. in *Hammond* v. *Commissioner of Inland Revenue*, [1956] N.Z.L.R. 690. It was agreed between a father and his son that the son should be permitted to erect a workshop on Lot 3 of the father's property, and the father promised to give Lot 3 so his son, and to transfer it to him. The son built on Lot 3 a workshop, which cost him £804 14s. 7d. It was held that the son had an enforceable claim against the father for the reimbursement of the sum of £804 14s. 7d., and an equitable charge or lien on the land for the amount in respect of which he was entitled to reimbursement. It is to be noted that the transfer of Lot 3 to the son could not be completed, because Lot 3 had no road frontage. As to *Hammond's* case, see the interesting article by the learned Editor of this JOURNAL in (1956) N.Z.L.J. 145.

When family transactions of this nature occur it is always advisable at the earliest opportunity to prepare and register the transfer, if that is possible, or, if it is a case like the last two cited, of the promisee being entitled to a charge, to draw a formal deed evidencing the transaction. This course will save trouble with the revenue authorities or with other members of the family when the intending donor dies.

PRECEDENT.

THIS DEED made the.....day of.....One thousand nine hundred and fifty-eight (1958) BETWEEN A.B. of Wanganui, Retired (hereinafter with his heirs executors administrators and assigns called "the owner") of the one part AND C.D. of Wanganui, Farmer (hereinafter with his executors administrators and assigns called "the chargee") of the other part WHEREAS the owner is the registered proprietor of the land described in the first schedule hereunder written AND WHEREAS the chargee with the consent and full knowledge of the owner

and in contemplation of a gift from the owner to the chargee of part of the lands described in the said first schedule has built certain buildings and effected certain improvements on the said part of land, as the parties hereto do hereby freely admit and acknowledge AND WHEREAS particulars of the said buildings and improvements are set out in the second schedule hereto AND WHEREAS the total cost of erecting the said buildings and effecting the said improvements amounts to the sum of..... AND WHEREAS the parties hereto have been advised by counsel that the chargee has an equitable charge or lien, on the lands described in the said first schedule, to be reimbursed the said total cost of erecting the said buildings and affecting the said improvements AND WHEREAS the owner has agreed to give to the chargee security as hereinafter appearing for payment to the chargee of the amount of the said charge or lien NOW THEREFORE THESE PRESENTS WITNESSETH as follows:

1. The owner doth hereby covenant with the chargee that he will on demand pay to the chargee the said sum of..... .....in satisfaction of the said charge or lien.

2. The owner doth hereby covenant with the chargee that he will on demand at any time before payment in full of the said sum of.....execute in favour of the chargee or his legal representative or assigns a registrable Memorandum of Mortgage or a registrable Memorandum of encumbrance over the land described in the said first schedule to secure payment on demand of the said sum, such mortgage or encumbrance to contain such covenants conditions provisions and powers as are usually inserted in mortgages or encumbrances of land.

3. The owner doth hereby authorize the chargee to lodge a caveat against the title to the land described in the said first schedule to protect his interests under this deed.

4. The chargee doth hereby covenant with the owner that he will pay the stamp duty on and the costs of and incidental to this deed and the said mortgage or encumbrance and the discharge thereof if and whenever the same shall be required.

5. The parties hereto hereby agree to submit any questions difficulties or disputes arising out of these presents to arbitration under the law relating to arbitration for the time being in force in New Zealand.

6. The parties hereby admit that I.J. of Wanganui farmer has an equitable charge or lien over the land described in the said first schedule for the amount of..... in respect of buildings erected and improvements effected by the said I.J. on another part of the lands described in the said first schedule, and it is hereby declared that the equitable charge or lien evidenced by these presents shall rank *pari passu* with the said equitable charge or lien vested in the said J.J.

7. IT IS HEREBY AGREED by and between the parties hereto that the words "upon demand" as used in this deed shall have the meaning ascribed to these words in the Fifth Schedule to the Chattels Transfer Act 1924.

IN WITNESS whereof these presents have been executed the day and year first hereinbefore written.

FIRST SCHEDULE HEREINBEFORE REFERRED TO.

ALL that parcel of land containing [*set out area*] more or less situate in.....Survey District and being part of Section..... of the.....District and being all the land comprised and described in Certificate of Title Volume..... Folio.....Wellington Registry.

SECOND SCHEDULE HEREINBEFORE REFERRED TO
[*Insert here details of improvements.*]

SIGNED by the said A.B. in the presence of:

Witness:
Occupation:
Address:

SIGNED by the said C. D. in the presence of:

Witness: E. F.
Occupation: Solicitor.
Address: Wanganui.

Witness: G. H.
Occupation: Solicitor.
Address: Wanganui.

"**Affray.**"—"It is remarkable what a lack of authority there is with regard to this offence. There seems to be no reported case which deals with it. It is barely mentioned in *Hale's Pleas of the Crown*. Coke devotes a chapter in his *Third Part of the Institutes of the Laws of England* (1809) Chap. 72, p. 157 to private fights, duels and affrays; he says that an affray is a public offence to the terror of the King's subjects and that it is inquirable in the leet as a common nuisance, and a perusal of the paragraphs which deal with the subject certainly suggests that, in his opinion, the fact that a combat in public is a great breach of the royal peace is ipso facto an affright and terror to the subjects. Blackstone in his *Commentaries on the Laws of England*, 8th ed., Book IV, chap. 11, p. 145, described the offence as the fighting of two or more persons in a public place, to the terror of the King's subjects, and evidently considers that those taking part in a duel can be indicted for an affray. That would also seem to negative the necessity of calling evidence to prove that someone was actually put in terror as duels were generally, one would suppose, fought with as little publicity as possible and those present in the capacity of seconds or surgeons would, of course, not be put in fear. The author who devotes most attention to the matter is Hawkins, in *Pleas of the Crown* (1824) 8th ed., vol. I, c. 28, p. 488. He lays down that there may be an affray when there is no actual violence, as when a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people. This, he says, was always an offence at common law and dealt with by many statutes. He then quotes in particular the Statute of Northampton, 2 Edw. 3, c. 3. Dealing with that statute he says that no wearing of arms is within the meaning of this statute unless it be accompanied by such circumstances as are apt to terrify the people. The wearing of unusual or dangerous weapons in public is only one species of affray and, in our opinion, it is open to a jury to find that the circumstances amount to an affray although no person is actually called to say that he was put in terror. Just as the mere wearing of a sword in the days when this was a common accoutrement of the nobility and gentry would be no evidence of an affray while the carrying in public of a studded mace or battle axe might be, so if two lads indulge in a fight with fists no one would dignify that as an affray, whereas if they used broken bottles or knuckle dusters and drew blood a jury might well find it was, as a passer-by might be upset and frightened by such conduct"—Lord Goddard C.J. in *R.* v. *Sharp*, *R.* v. *Johnson* [1957] 1 Q.B. 552, 558; [1957] 1 All E.R. 577, 578.

Parent's Duty of Care.—"It is true that there is a propensity in children to throw things. Their ingenuity in finding things to throw may be difficult to circumvent. It seems to me that it cannot be said that it is the duty of a reasonable, careful, and solicitous parent to endeavour to put a child into a straight jacket or to seek to remove from his reach anything that may conceivably be used by him to indulge his mischievous propensity, always provided that reasonable, proper, and adequate supervision over the child is exercised"—Morris L.J. in *Rich* v. *London County Council* [1953] 1 W.L.R. 895, 905; [1953] 2 All E.R. 376, 381.

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

Clip Analysis.—"It is nothing less than the truth to say that the average practitioner works for his staff from Monday morning till Tuesday afternoon, for the landlord till well into Wednesday, for the sundry creditor until Thursday morning, for Mr Nash till the evening of the fourth day, and gathers his failing strength to win some bread for his own family on Friday." These were the sage observations of H. R. C. Wild, now the Solicitor-General, when he spoke at the Auckland Conference of 1949 on "Some Aspects of Office Administration." In London recently (according to *Time* 17/2/58) a survey has been published by Lloyd's Bank on the fate of 100,000 paper clips—a matter of some moment, Scriblex would assume, to the Crown Law Department. The survey revealed that out of the 100,000 clips, only one-fifth served their proper function; 14,163 were twisted and broken during telephone conversations; 19,413 were used as card-game stakes; 7,200 became makeshift hooks for garter belts and brassieres; 5,434 were converted to toothpicks or ear cleaners; 5,308 were used as nail cleaners; 3,916 became pipe cleaners and the balance were dropped on the floor and swept away, or swallowed by children.

Taxation Enlightenment.—Scriblex is obliged to an Auckland correspondent who, his eye still vigilantly on a now-distant colleague, has drawn attention to the following passage in the judgment of Henry J. in *Parker* v. *Attorney-General* [1958] N.Z.L.R. 108, 109:

> "On May 10, 1954, one Brian Rainton Patton, having dully applied for the same, was appointed by the Public Service Commission to a position as a cadet in the Inland Revenue Department (Taxes Division) at Dunedin."

These cadets may be dull when they first apply to this Department, but they seem to get fly enough later on.

Loeb and Leopold.—At the time of the Parker-Hulme case, a parallel was drawn by some of the newspapers with the Loeb-Leopold case of 1924, in which the spoiled and indulged sons of two millionaires were convicted of the wanton and brutal murder of a fourteen-year-old boy. As the result of efforts on their behalf by the famous Clarence Darrow they escaped execution to be sentenced to ninety-nine years' imprisonment with the hope of ultimate parole. An interesting and instructive note on their subsequent history is given by "Richard Roe" in a recent number of the *Solicitors' Journal*. Loeb was killed in a prison fight in 1936, and Leopold, he says, is still in gaol, in the Illinois State Penitentiary, surely one of the most remarkable convicts in the world. He knows twenty-eight languages, including Greek, and in 1933 he was given leave to start a correspondence school. Men with little or no education applied themselves over a period of years with considerable success to spare-time study. Leopold relates that "some of our examinations were administered to 500 students from Chicago public high schools and their highest marks turned out about the same as our lowest." Naturally, he runs the prison library, which, thanks to a fortunate fire in 1931, was re-organized according to modern library methods. He has worked in the X-ray laboratory and the pathology laboratory. He has volunteered as a subject of experiments with anti-malaria drugs. If he were released, he has the chance of employment with an organisation which has a public health service and a small hospital in Puerto Rico. While teaching German and biology to a murderer sharing his cell, he has written a book on his prison experiences. These are his conclusions: "Sending a man to prison oughtn't to be just punitive. Even more important is rehabilitation. The men in here, all of them hope some day to be in the free world again. There seems little point in simply punishing a man, if, at the same time, you don't try to change his attitude." So there, "Richard Roe" concludes, within the bounds of the same American State you have two personalities as strangely contrasted as any you could imagine anywhere.

From My Notebook.—"With him (Lord Jowitt) passes one of the last exponents of advocacy in the grand manner."—*Law Times*, 23/8/57.

"The award of compensation should not be left to the discretion of civil servants in Whitehall. The citizen who has been wrongfully convicted and imprisoned should be able to claim compensation through the Courts as of right. It is to be hoped that, under the new dispensation in the Home Office, legislation will be introduced to meet such proved claims out of public funds."—Montgomery Hyde M.P. in *The Spectator*, 16/9/57.

"*The Times* of October 9 reported proceedings in the English Court of Criminal Appeal, in which eighteen applications for leave to appeal were dismissed in 30 seconds. No counsel appeared. The Lord Chief Justice said that the papers had been considered by each Judge forming the Court individually and separately, and no Judge had been able to find in any single case any grounds for interfering with either conviction or sentence."—*Justice of the Peace Review*, 26/10/57.

"The company, which carried on the business of manufacturers of pharmaceutical products and wholesale druggists with a world-wide trade, had an agency in Burma and entered into an agreement with the Burmese Government under which it undertook to supply that Government with information as to secret processes relating to the manufacture of pharmaceutical products and also technical data, drawings, designs and plans for the erection of a factory and the installation of machinery suitable for the manufacture of pharmaceutical and other products in Burma. All this was described compendiously, if not euphoniously, as 'know-how'."—*The Law Times* (20/12/57) in a comment upon *Evans Medical Supplies Ltd.* v. *Moriarty* [1957] 1 All E.R. 336. (Incidentally, Lord Evershed M.R., in his judgment, describes "know-how" as a new and expressive word).

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

QUESTION: Could you kindly inform me where there is a complete list of goods subject to customary hire-purchase

ANSWER: So far as we can ascertain, there is no official list to be had, but the following list is complete to date:

CHATTELS TRANSFER ACT 1924.

Seventh Schedule.

Furniture.
Pianos and pianolas.
Gramophones.
Typewriters.
Motor-vehicles of all descriptions.
Sewing machines.
Cash-registers.
Shearing machines.
Engines.
Pumps, and machinery, implements, and accessories for use in pumping.
Windmills.
Milking-machines, and all other machinery and implements and accessories for use in the dairy industry.
Reapers-and-binders, and all other machinery and implements and accessories thereto for use in agriculture.
Machinery, implements, and accessories thereto for use in the bootmaking industry.
Electric motors.
Machine-printing presses and slug-casting machines, type-composing machines, and other machinery accessories and attachments for use in connection with the printing and bookbinding industry.

Additions by Orders in Council.

Gas stoves, gas geysers, gas washing coppers: *1925 New Zealand Gazette*, 1517.
Electrical equipment, apparatus, and appliances required in connection with the use of electric energy: *1925 New Zealand Gazette*, 1517.
Computing-scales, weighing-machines, bread and bacon slicing machines, cheese-cutting machines: *1925 New Zealand Gazette*, 3055.
Tractors: *1925 New Zealand Gazette*, 3353.
Equipment, apparatus, and appliances for use in connection with the consumption of coal-gas: *1926 New Zealand Gazette*, 1805.
Cinematograph-projection machines, and lighting and other equipment peculiar thereto: *1928 New Zealand Gazette*, 2465.
Electric ranges and water-heaters: *1935 New Zealand Gazette*, 2273.
Electric vacuum cleaners, electric refrigerators, radio sets and equipment, bicycles: S.R. 1938/49.
Electric washing-machines; electric ironing-machines; electric floor-polishing machines and petrol-driven washing-machines: S.R. 1940/311.
Electric dish-washing machines: S.R. 1950/68.
Electric clothes-drying machines and appliances, electric garbage disposal machines and appliances: S.R. 1955/148.
Equipment and appliances for road-making, earth-moving, tree-moving or tree-haulage purposes and attached to or for use with:
(a) motor-vehicles or tractors, or,
(b) self-propelled machinery or plant for road-making, earth-moving, tree-moving or tree-haulage purposes: S.R. 1956/146.
Equipment, apparatus and appliances for use in connection with the storage, pumping and serving of beer (excluding barrels): S.R. 1957/33.
Piano accordians: S.R. 1953/45.
Motor mowers: S.R. 1954/78.
Laws of England, by the Right Honourable Earl of Halsbury.
Encyclopaedia of Forms and Precedents, published by Butterworth and Co. (Australia) Ltd.
The English and Empire Digest, published by Butterworth and Co. (Australia) Ltd.
The New Zealand Law Reports.
Gazette Law Reports, published by Trade Auxiliary Company of New Zealand Ltd.: 1930 *New Zealand Gazette*, 1509.

Meal as Gift.—"I do not think that when a person simply as a matter of hospitality treats or entertains another to a drink or food, there is a gift of the articles consumed. . . . If I offer liquor or food to my guest to be then and there drunk or eaten, my intention is not to pass the property in those things to him, but that those things shall be destroyed by consumption and be no longer the subject of property rights. The immediate destruction or consumption of the things is part of the offer made and the acceptance by him of my offer is not accompanied by any intertion on his part of accepting any property in the goods, but that they be destroyed in consumption forthwith"—O'Bryan J. in *Charlesworth* v. *Federal Hotels Ltd.* [1943] V.L.R. 88, 95.

Certiorari and Jurisdiction.—"It is now suggested that the learned Magistrate's decision is to be brought up and quashed on certiorari because it is said that she never ought to have convicted on the second information. In one sense that is quite right, but what happened here was that the parties being in front of Miss Campbell, the applicant pleaded guilty. What option had she but to proceed to convict? She convicted on both these informations. It is said that the new decision must be quashed on one of them, and the applicant selects the conviction on which a fine of £250 was imposed because the other one in which a fine of £500 was imposed—and which included according to his case, and so we hold, the whole of the cargo—came first in point of time. That may be, but there is a great distinction, which is not always sufficiently borne in mind in connection with the very special remedy of certiorari, between what a Magistrate or Court does within and what is done outside jurisdiction. If the matter is within the jurisdiction, the decision cannot be quashed on certiorari. If the decision is wrong, the remedy is appeal"—Lord Goddard C.J. in *R.* v. *Campbell, ex parte Nomikos* [1956] 1 W.L.R. 622, 626; [1956] 2 All E.R. 280, 282.

"Charitable Institution."—"There may be a charitable institution for the relief of sickness, and incidental advantages can be gained by a subscriber to the funds, without the institution losing its character; but if there is an object, e.g., the promotion of the profession in addition to the promotion of science that is collateral and not merely incidental, the result is that the institution cannot be described as established for charitable purposes only"—Lord Hanworth M.R. in *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [1932] 1 K.B. 149, 161.