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NEW LEGISLATION OF INTEREST TO PRACTITIONERS.

IN this issue, we endeavour to give detailed explanations of changes in the law made by last year's statute-book which are of particular interest to practitioners.

We have already dealt with the amendments of the Municipal Corporations Act 1954, and of the Land Subdivision in Counties Act 1946, in relation to subdivisions of land in cities, boroughs, and counties: (1958) 34 NEW ZEALAND LAW JOURNAL 289; and Mr R. T. Dixon has explained some recent amendments of the Road Transport legislation (*ibid.*, 347).

Changes made in property and death duties legislation form the subject of an article by Mr E. C. Adams.

The Simultaneous Deaths Act 1958 and the Wills Amendment Act 1958, both of which make considerable changes in the law with their corresponding impact on the incidence of death duties in appropriate circumstances, are the subject of a review and explanation by Mr. J. G. Hamilton.

Modification, by the new ss. 94A and 94B of the Judicature Act 1908, of the common-law doctrine which denied relief on the ground of mistake of law, as distinguished from one of fact, is dealt with by Mr B. J. Cameron.

Acts, in general use by practitioners and not within the above-mentioned categories are considered hereunder.

ADMINISTRATION.

Section 42 (1) of the Administration Act 1952 was as follows:

> (1) Notwithstanding anything to the contrary in any Act, any trust company shall be entitled to apply for and obtain letters of administration of the estate of a deceased person, either with or without the will annexed, and to perform and discharge all other acts and duties of an administrator as fully and effectually as a private individual may do when granted letters of administration.

By s. 2 of the Administration Amendment Act 1958, s. 42 (1) is repealed, and the following subsection is substituted:

> (1) Notwithstanding anything to the contrary in any Act, any trust company shall be entitled—
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> (a) To apply for and obtain letters of administration of a deceased person, either with or without the will annexed; and, notwithstanding anything to the contrary in section seventy-three of the Court of Probate Act 1857 of the United Kingdom Parliament, it shall not be necessary in the absence of evidence to the contrary for a trust company to prove in the case of any estate, whether insolvent or not, that there is any circumstance rendering it necessary or convenient to appoint it rather than any other person who would by law be entitled to a grant of administration of the estate:
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> (b) To perform and discharge all other acts and duties of an administrator as fully and effectually as a private individual may do when granted letters of administration.

Section 73 of the Court of Probate Act 1857 (20 & 21 Vict. c. 77) has been held, *mutatis mutandis*, to be in force in New Zealand: see *In re Hunter; Hunter* v. *Hunter* [1932] N.Z.L.R. 911; and this meant that in the circumstances to which s. 42 (1) of the Administration Act 1952 related, the Court had only a limited discretion in passing over the persons entitled to the grant, viz., the next-of-kin. The discretion was limited by the following words in s. 73,

> Where . . . it shall appear to the Court to be necessary of convenient in any [such] case, by reason of the *insolvency* or the estate of the deceased, *or other special circumstances*, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate . . . .

Doubts were raised concerning the effect of the words italicized above. Their effect, prima facie, was to place restrictions upon grants to strangers, including trust companies, by authorizing the Court to sever the nexus between appointment and succession *only* where insolvency or like special circumstances existed. Whether a broader interpretation, accepting "special circumstances" not tied to insolvency, was permissible, was a moot point, with some tendency for authorities to conflict. Furthermore, the questions, "What are special circumstances?" and "How special do circumstances have to be before the Court may properly exercise this power to pass over next-of-kin?" had to be answered in each instance: *In re Egan* [1951] N.Z.L.R. 323.

Now the difficulty is removed for the substitute appointment of trust companies. The Public Trustee already has the benefit of s. 45 of the Public Trust Office Act 1957, freeing him from the restrictions of s. 73.

The new legislation should make more straightforward the task of the Court, in its probate jurisdiction, in relieving elderly or otherwise disabled next-of-kin who do not want, or are not fit, to be

burdened with the duties and responsibilities of administration. The new provision, like its predecessor, is not limited to personalty, for, as Ostler J. pointed out in *Hunter's* case (*supra*) at p. 930,

> Although s. 73 refers in terms only to personal estate, yet inasmuch as by our law we have abolished the right of descent to the heir, and real property for all purposes of descent has been put in the same position as personal property, in that it vests in the administrator and is available as assets for the payment of debts, the section now applies not only to wills affecting personal estate but also to wills affecting real and personal estate, and even to wills affecting real estate only.

It appears that grants to strangers, other than to the trust companies or the Public Trustee, remain subject to the restrictions imposed by s. 73.

Crown Proceedings.

The following definition is added in s. 2 (1) of the Crown Proceedings Act 1950 :

> " Servant ", in relation to the Crown, means any servant of Her Majesty, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown, and a member of the New Zealand armed forces ; but does not include the Governor-General, or any Judge, Magistrate, Justice of the Peace, or other judicial officer.

This was enacted, in view of the observations of Stanton J. in *Ebbett* v. *Attorney-General* (unreported : Auckland. 1957. August 30), to give to the term " servant " (of the Crown) for all the purposes of the Crown Proceedings Act 1950 the meaning assigned to it where it is used as part of the definition of " officer." That Act, as well as the corresponding Crown Proceedings Act 1947 (U.K.), uses the terms " agent ", " servant " and " officer " in relation to the Crown, the definition of " officer " being fuller in our Act than in the United Kingdom Act ; but neither Act defines the term " servant." The new definition removes all doubts as to the meaning of the term " servant," wherever it appears in the Act.

Defamation.

A new s. 22A, added to the Defamation Act 1954, declares that the Act binds the Crown.

Divorce and Matrimonial Causes.

Section 12A (added by s. 10 of the Divorce and Matrimonial Causes Amendment Act 1953) is repealed, and a new s. 12A is substituted to extend the class of cases in which recognition will be given in New Zealand to decrees of divorce or nullity that are made overseas. The provisions in the new subs. (2) and in subparas. (iii), (iv.), and (v) of para. (a) of the new subsection are new ; and the provisions in para. (a) (ii) differ from the corresponding existing provisions. Otherwise the new section follows the now repealed section.

Under s. 55 of the Divorce and Matrimonial Causes Act 1928 the Court has power on the application of the petitioner or the respondent, or at its discretion, to hear proceedings in Chambers, if it thinks it proper in the interests of public morals ; and it may in any case forbid the publication of any report of the evidence or proceedings. That section is amended to enable any party (including a co-respondent), to any suit or proceeding under the Act, to apply for a Chambers hearing.

A new section, s. 55A, which applies in any case and restricts the particulars that may be published to the names, addresses, and occupations of parties and witnesses, the names of the counsel and solicitors engaged, the grounds of the petition, a concise statement of the charges, defences, and countercharges on which evidence has been given, submissions and decisions on points of law, the summing up of the Judge and the finding of the jury (if any), and the decision of the Court on the case together with the Court's observations. The Court may, however, authorize the publication of other particulars, subject to such conditions relating to any matter to be published as it thinks fit. No prosecution for a breach of the new section is to be commenced without the leave of the Attorney-General. The restrictions do not apply to periodicals of a technical character bona fide intended for circulation among members of the legal or medical professions, psychologists, advisers in the sphere of marriage guidance, or other social welfare workers.

The abovementioned provisions follow s. 1 of the Judicial proceedings (Regulation of Reports) Act 1926 of the United Kingdom (*5 Halsbury's Statutes of England*, 1057). In all other respects, the new section is the same as s. 7 of the Domestic Proceedings Amendment Act 1958, to which reference is made below.

Section 48 of the principal Act authorized the use of affidavits only with the leave of the Court. As from December 1, 1943, the date of the commencement of the Matrimonial Causes Rules 1943, the provisions in those Rules for the taking of evidence by affidavit on applications for ancillary relief are validated ; and s. 48 is amended to permit the taking of evidence by affidavit, not only with the leave of the Court, but also where so authorized by rules of Court.

Domestic Proceedings.

Under s. 7 of the Domestic Proceedings Act 1939 it is an offence to publish in a newspaper any particulars relating to proceedings between husband and wife for separation or maintenance under the Destitute Persons Act 1910, or to proceedings for the maintenance of children under that Act, before the Magistrate has heard and determined the case.

Section 7 of the Domestic Proceedings Act 1939 is extended (by s. 2 of the Domestic Proceedings Amendment Act 1958) by restricting the particulars that may be published after the determination of the case to the names, addresses, and occupations of parties and witnesses, the names of the solicitors and counsel engaged, the grounds of the proceedings, a concise statement of charges, defences, and counter-charges on which evidence has been given, submissions and decisions on points of law, and the decision of the Magistrate on the case together with his observations. The Magistrate may, however, authorise the publication of other particulars, subject to such conditions relating to any matter to be published as he thinks fit.

The Act also amends s. 7 by providing that the restrictions on publication do not apply to periodicals of a technical character bona fide intended for circulation among members of the legal or medical professions, psychologists, advisers in the sphere of marriage guidance, or other social welfare workers. There are also minor drafting amendments of the existing provisions of s. 7 designed to secure conformity with the new s. 55A of the Divorce and Matrimonial Causes Act 1928.

The amendments so made follow s. 58 of the Magistrates' Courts Act 1952 of the United Kingdom (*32 Halsbury's Statutes of England*, 416, 467) which re-enacted s. 3 of the Summary Procedure (Domestic Proceedings Act) 1937.

(The amendments reflect the modern trend of restricting, in the interest of justice, unnecessary publication of details of evidence: see, for example, the recent Tucker Report summarized on p. 15.)

Wages Protection and Contractors' Liens.

Section 13 of the Wages Protection and Contractors' Liens Act 1939 has been repealed and re-enacted so as to provide in effect that an employer cannot directly or indirectly coerce a worker into contributing to a sickness or accident insurance policy covering the worker. A voluntary arrangement may be arrived at between the parties where by the worker is covered by such insurance, both parties contributing to the cost of the policy. This provision in no way nullifies or affects the complete prohibition under the Workers' Compensation Act 1956 against a worker being required to contribute to premiums payable by the employer under that Act in respect of his liability to pay compensation or damages for injuries to the worker in the course of his employment.

A more important amendment is the addition made to s. 20 of a series of definitions providing in effect that money which is required under the principal Act to be retained until after thirty-one days from the date of the completion of the work may be paid out thirty-one days after the date on which the work is completed by any person authorized by the contractor or subcontractor or by any claimant who has given notice of a lien or charge, and not only when the work is completed by the contractor or subcontractor himself.

The effect of the amendment of ss. 26 (2), 32, and 34 (4) (by the insertion, after the word "completion" where used therein respectively, the words "or abandonment" is that money which is required under the principal Act to be retained until after thirty-one days from the date of the completion of the work may be paid out when the work has been abandoned for thirty-one days by the contractor or subcontractor.

It remains to be seen whether or not these amendments to an already difficult statute will assist in practical improvement in its application. It seems to us that experienced legal advice would have led to a different approach and possibly to a much-needed redrafting of the whole Act.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Medical Council—Charge based on Alleged Crime—Medical Practitioner acquitted by Jury—Parties to Proposed Proceedings before Medical Council Same as Parties to Indictment—Issue Estoppel—Res Judicata: See MEDICAL PRACTITIONERS, *In re a Medical Practitioner.* (S.C. Wellington. 1958. November 12. McGregor J.).

ESTOPPEL.

Issue Estoppel—Medical Practitioner acquitted by Jury on Indictment charging Indecent Assault on Patient—Subsequent Action by Medical Council charging Practitioner, on Same Facts, with Infamous Conduct in Professional Respect—Same Parties in Both Proceedings—Declaration that Issue of Indecent Assault Res Judicata in Proposed Proceedings before Medical Council: See MEDICAL PRACTITIONERS, *In re a Medical Practitioner.* (S.C. Wellington. 1958. November 12. McGregor J.)

MEDICAL PRACTITIONERS.

Medical Council—Practitioner acquitted by Jury in Indictment charging Indecent Assault on Patient—Council subsequently charging Him on Same Facts with Infamous Conduct in Professional Respect—Same Parties to Proposed Proceedings before Medical Council as Parties to Indictment—Issue Estoppel—Declaration that Issue of Indecent Assault Res Judicata in Proceedings before Medical Council—Medical Practitioners Act 1950, ss. 43B, 43C, 44 (1) (Medical Practitioners Amendment Act 1957, s. 6). The plaintiff, a registered medical practitioner, was acquitted in a trial by jury in the Supreme Court on a charge that on June 23, 1958, he did indecently assault a named female. Subsequently, a complaint was made to a Crown Solicitor, pursuant to s. 43B (1) of the Medical Practitioners Act 1950, (as amended by s. 6 of the Medical Practitioners Amendment Act 1957), that the plaintiff had been guilty of infamous conduct in a professional respect in that on June 23, 1958, while treating the same person for a sore back, he indecently assaulted her. In an action claiming in the alternative writs of prohibition or injunction or a declaration, *Held*, 1. That in any proceedings between the Crown and the plaintiff, the plaintiff must be taken to be entirely innocent of the charge of indecently assaulting the named female on June 23, 1958. (*Sambasivam* v. *Public Prosecutor, Federation of Malaya* [1950] A.C. 458 and *The King* v. *Wilkes* (1948) 77 C.L.R. 511, followed.) 2. That, in bringing or arranging action before the Medical Council on the recommendation of an Investigation Committee, pursuant to s. 43C (6) of the Medical Practitioners Act 1950, the Solicitor-General was acting in his office and as an officer of the Crown. The parties to the proceedings before the Medical Council were the same, the Crown and the practitioner, as the parties to the indictment before the Supreme Court. (*Burdett* v. *Abbott* (1811) 14 East 1; 104 E.R. 501; *Petrie* v. *Nuttal* (1856) 11 Exch. 569, 156 E.R. 957; *Wilkes* v. *The King* (1770) Wilm. 322; 2 E.R. 244; *General Council of Medical Education and Registration for the United Kingdom* v. *Spackman* [1943] A.C. 627; [1943] 2 All E.R. 337, referred to.) 3. That, the Medical Council's duty of "due inquiry", in a matter relating to an alleged criminal offence, involves the same investigation and consideration as in a criminal case. In both, the public interest and the protection of society generally is of supreme importance. In the latter the liberty of the subject is at stake, but in the former equally the reputation, future livelihood, and standing in the eyes of the community of the professional man concerned are involved. The burden of proof is no less before the medical tribunal than in the criminal trial. (*Bhandari* v. *Advocates Committee* [1956] 3 All E.R. 742, followed.) 4. That, in so far as the facts relating and relevant to the earlier charge of indecent assault were concerned, and relied on as the basis of the charge of infamous conduct, the domestic tribunal was bound by the earlier conclusive finding of the Court; and the plaintiff was entitled to a declaration that the issue as to whether the plaintiff did indecently assault the girl named on June 23, 1958, was res judicata in the present proceedings, and in the proposed proceedings before the Medical Council, by reason of the verdict of not guilty and the acquittal of the plaintiff in the earlier proceedings before the Court. (*In re Isdale, Isdale* v. *Medical Council* [1945] N.Z.L.R. 136, distinguished.) *In re a Medical Practitioner.* (S.C. Wellington. 1958. November 12. McGregor J.

TRANSPORT.

Offences—Using Warning Device otherwise than as Reasonable Traffic Warning—Circumstances wherein Such Use "reasonable"—Traffic Regulations 1956 (S.R. 1956:217), Reg. 43 (2). The use by a driver of a motor vehicle of his horn in a city street is "reasonable" traffic warning, within the meaning of Reg. 43 (2) of the Traffic Regulations 1956, if it is used to keep traffic moving, so that, if a driver in front in a line of stationary traffic fails to see a signal indicating that the way ahead is clear, the driver behind gives a short signal to attract the attention of the driver in front and warn him not to hold up traffic. Furthermore, if the driver who uses his warning device in those circumstances is the driver of a public vehicle, it is in the public interest that (subject to the overriding requirement of safety) he should perform his duty to operate to a timetable. *Geylswyk* v. *Brown.* (S.C. Christchurch. 1958. June 16. Barrowclough C.J.)

PAYMENTS MADE UNDER MISTAKE.

Judicature Amendment Act 1958.

By B. J. CAMERON, B.A., LL.M.

Among 1958 Statutes of special interest to practitioners on the common law side is the Judicature Amendment Act 1958, which, in inserting new ss. 94A and 94B in the Judicature Act 1908 has made important changes in the law relating to recovery of payments made under a mistake. This piece of legislation, which follows a recommendation of the Law Revision Committee, appears to have no precedent in any Commonwealth country; and, indeed, as far as the writer is aware, s. 94B has no counterpart anywhere.

The primary purpose of the Act is to put payments made under a mistake of law on the same footing as those made under a mistake of fact. This purpose is achieved, in part, by providing that relief in respect of a payment made under a mistake is not to be denied merely because the mistake is one of law, and, in part, by providing that recovery is to be denied in all cases of mistake, whether of fact or of law, if the person receiving the payment did so in good faith and has so altered his position in reliance on its validity that it would be inequitable to grant relief.

It is of importance to note that the new Act not only allows recovery in cases of mistake of law where recovery could not hitherto have been obtained, but also, in some cases, as will be explained later, restricts the right that previously existed to recover payments made both under a mistake of law and under a mistake of fact.

PREVIOUS LAW.

In order to understand the significance of the changes made by the new legislation, it is desirable to refer in some detail to the previous law as to recovery of payments made under a mistake of law.

The law, as commonly stated before the passing of the new Act, was that money paid voluntarily under a mistake of law could not be recovered by the person paying it, even though it was paid under protest or following threats of legal proceedings. The principal exceptions were where the mistake was one of foreign law (foreign law being treated as a matter of fact and not of law), where the payment was made to an officer of a court, and in certain cases where the person receiving the payment sanctioned or knew of the mistake at the time.

The rule denying recovery of money paid under a mistake of law seems to have been of comparatively recent origin. Thus, in 1772, it was said (though obiter) in *Farmer* v. *Arundel* [1] that an action for money had and received would lie where money was paid by one person to another on a mistake either of fact or of law. There are other reported cases of the same period which seem to have treated the distinction between mistakes of fact and law as immaterial.[2]

The foundation of the modern rule appears to have been the decision of Lord Ellenborough in *Bilbie* v. *Lumley*.[3] Lord Ellenborough's decision was founded on the maxim that everyone is presumed to know the law; but, while that maxim without doubt is sound and necessary in many fields, for example, criminal law, its applicability in this field is doubtful. Moreover, the earlier case on which the decision in *Bilbie* v. *Lumley* rested, *Lowry* v. *Bourdieu*,[4] did not relate to a mistake at all, but to the recovery of money paid under an illegal contract. Nevertheless, *Bilbie* v. *Lumley* was accepted and acted upon in England and in all but two of the States of the United States as establishing mistakes of fact and of law.

There are a number of cases in the modern reports illustrating the rule. For example, in *Sharp Bros. & Knight* v. *Chant*,[5] a landlord increased the rent of his tenant. Under the law as it then stood, the tenant was not liable to pay this increase but in ignorance of the position he did so for nine months. It was held that he could not recover the excess rent he had paid. In *Ord* v. *Ord*,[6] a man paid an annuity to his wife without deducting from it the amount he had paid as income tax, doing so under a mistake as to the interpretation of the words "free of all deductions." In an action by his wife he counter-claimed for the recovery of the amount of the deduction which he should have made but failed since his mistake was one of law. Again, in *Twyford* v. *Manchester Corporation*,[7] a man paid under protest certain sums to a Burial Board. These were in respect of charges which the Board had no authority to impose. Despite the fact that his payment was made under protest, he was unable to recover what he had paid. A somewhat similar case in New Zealand was *Julian* v. *Mayor, etc., of Auckland*.[8]

The status of the rule in equity however was by no means so clear. It could be said with some confidence that in equity money paid under a mistake of law might in proper cases be recovered wherever the mistake was made not by the person on whose behalf recovery was sought, but by a trustee for some third person. Thus in *Sinclair* v. *Brougham* [9] Lord Sumner referred to the availability of a tracing order in a case where the mistake (an ultra vires payment thought to be intra vires) was certainly one of law. In the most recent and authoritative decision, *Ministry of Health* v. *Simpson*,[10] Lord Simonds, with the benefit of an exhaustive analysis of the authorities, said:

> The man who makes a wrong payment because he has mistaken the law may not plead his own ignorance of the law and so cannot recover what he has wrongfully paid. It is difficult to see what relevance this distinction can have where a legatee does not plead his own mistake or his own ignorance, but, having exhausted his remedy against the executor who has made the wrongful payment, seeks to recover money from him who has been wrongfully paid. To such a suit the executor was not a necessary party and there was no means by which the plaintiff could find out whether his mistake was of law or of fact or even whether his wrongful act was mistaken or deliberate. He could guess and ask the Court to guess, but he could prove nothing. I reject, therefore, the suggestion that the equitable remedy in such circumstances

(1) (1772) 2 Wm. Bl. 824; 96 E.R. 485.
(2) E.g. *Bize* v. *Dickason* (1786) 1 Term. Rep. 285; 99 E.R. 1097.
(3) (1802) 2 East 469; 102 E.R. 448.
(4) (1780) 2 Doug. (K.B.) 468; 99 E.R. 280.
(5) [1917] 1 K.B. 771.
(6) [1923] 2 K.B. 434.
(7) [1946] Ch. 236; [1946] 1 All E.R. 621
(8) [1927] N.Z.L.R. 453, [1927] G.L.R. 359.
(9) [1914] A.C. 398, 452.
(10) [1950] 2 All E.R. 1137.

was thus restricted, and repeat that it would be a strange thing if the Court of Chancery, having taken on itself to see that the assets of a deceased person were duly administered, was deterred from doing justice to creditor, legatee, or next of kin because the executor had done him wrong under a mistake of law. If, in truth, this were so, I think that the Father of Equity would not recognise his child.

The same principle had already been stated categorically in New Zealand by Salmond J. in *Dempsey* v. *Piper*.[11] On the other hand, it seems clear that even in equity there was no remedy where the payment was made by or on behalf of the person who later claimed to recover it.[12]

Although as has been mentioned the existence of the rule denying recovery of payments made under a mistake of law was beyond dispute, it was never universally accepted as either sensible or just. The illogical nature of the distinction is perhaps nowhere better expressed than in the Connecticut case of *Northrop's Executors* v. *Graves*.[13] In this case, executors had paid a legacy to the defendant under a mistaken interpretation of the will. The Court in departing from the rule followed in other States and allowing recovery, said :

> . . . But we mean distinctly to assert, that, when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of indebitatus assumpsit, whether such mistake be one of fact or of law ; and this we insist, may be done, both upon the principle of Christian morals and the common law And such only was the doctrine of the charge to the jury, in the present case. In such a case as we have stated, there can be no reasonable presumption that a gratuity is intended ; nor is the maxim volenti non fit injuria, at all invaded The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts ; the delusion is the same in both cases ; in both alike, the mind is influenced by false motives.

Perhaps the most telling criticism of the justice of the former rule is that if money was paid to an officer of the court—for example, the Official Assignee or a company liquidator—under a mistake of law, the court would order its repayment on the ground that an officer of the court must act as a man of principle.[14] The distinction also caused great practical difficulties for the courts trying to determine whether a mistake was one of law or of fact. So much was this so that a writer in 1948 compared the rule to the old common-employment rule as a source of subtleties and artificial distinctions.

The New Legislation.

Following a report and recommendation of the New York State Law Revision Commission, the rule denying recovery in cases of mistake of law was modified by statute in New York in 1942. The approach followed was to remove the handicap of the distinction between mistakes of fact and of law without attempting the almost impossible task of laying down the cases in which relief against a mistake of law should and should not be recoverable. It was accordingly provided in s. 112 (f) of the Civil Practice Act that, when relief against a mistake was sought in an action or proceeding or by way of defence or counterclaim relief should not be denied merely because the mistake is one of law rather than one of fact.

It was this approach that found favour in New Zealand also as the basis of our legislation, the wording of subs. (1) of the new s. 94A of the Judicature Act 1908 following substantially that of the New York section. Section 94A provides as follows :

> 94A (1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any Court, whether in an action or other proceeding or by way of defence, set off, counterclaim, or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law, whether or not it is in any degree also one of fact.
>
> (2) Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.

The following comments may be made on this section.

1. Its operation is restricted to " payments made " under mistake. The use of this phrase rather than the term " money paid " should make it clear beyond argument that the section covers payments made by way of cheque or other negotiable instrument.[15] On the other hand, the language of the section is not apt to cover cases where property is transferred under mistake.

2. What the section does in substance is to extend the old action for money had and received to cases where the money was received : see *Kerr on Fraud and Mistake*, 7th ed. 500 under a mistake of law. It should be observed that the section does not purport in any way to affect the law as to contracts entered into under mistake. If the payment itself was made in the mistaken belief that it was pursuant to a legal obligation, whether contractual or non-contractual, the section will apply, and, subject to the provisions of s. 94B, there will be a right of recovery even though none existed under the previous law. If however the payment was made under a valid legal obligation, even though that obligation may itself have been entered into under a mistake or misapprehension, it would appear that the new Act does not apply. In this respect, s. 94A departs from the provisions of the New York legislation which was its prototype. That legislation refers to " relief against mistake " and in this respect is much wider than s. 94A

3. Section 94A appears intended to apply to an individual mistake as to the law and not to a general misapprehension. Subsection (2) accordingly makes it clear that relief cannot be claimed on the ground that perhaps as a result of the decision of a higher court over-ruling an earlier decision, the law as it was commonly understood to be is no longer the law. Probably, the subsection is unnecessary ; as in such cases it can hardly be said that there was any mistake in the law at the time the payment was made. It should, however, serve to avoid doubts, and, in particular, will prevent any argument based on the fiction that the law has always been what the latest and most authoritative decision has decided that it is.

Section 94A (*1*) provides that the courts may give reflief in cases where a payment has been made under a mistake of law. If the new legislation had gone no further than that it would have created an undesirable area of uncertainty. It might, for instance, have been

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(11) [1921] N.Z.L.R. 753.

(12) See *Rogers* v. *Ingram* (1876) 3 Ch.D. 351 and the comments on that case in *Ministry of Health* v. *Simpson*.

(13) [1849] 19 Conn. 547.

(14) *Re Condon* (1874) L.R. 9 Ch. 609.

(15) See *Kerr on Fraud and Mistake*, 7 Ed. 500.

argued that recovery could be obtained under the section in all cases of payments made under a mistake of law. This would probably have created as many injustices as it cured. Even if this interpretation had not prevailed, however, the courts would have been left without any sort of guide as to the principles to be followed in deciding whether to allow recovery.

Section 94B appears to have been enacted primarily in order to overcome difficulties of this sort. It provides as follows :

> 94B. Relief, whether under section ninety-four A of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the paymont in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may ne.

It will be seen that s. 94B is much more than a mere qualification of s. 94A : it lays down a principle applicable to all classes of payments made under a mistake. This seems to have been thought necessary in order to effect a complete assimilation of payments made under a mistake of law to those made under a mistake of fact. The alternative—limiting s. 94B to cases where relief was sought under s. 94A—would have had the disadvantage of replacing the distinction between mistakes of fact and law by a new and even more arbitrary distinction between mistakes of law where recovery could be obtained only by virtue of s. 94A, and mistakes of law where there was a right of recovery apart from that section.

In future, therefore, recovery of any payment that has been made under a mistake may be resisted on the ground that the recipient has so altered his position in reliance on the validity of the payment that it would be inequitable to grant relief. This may have far-reaching effects. For example, if s. 94B had qeen in force, the result of *Ministry of Heallh* v. *Simpson* [16] might well have been different. That case was a sequel to an earlier ruling of the Court which held to be invalid trusts that were declared by the will of Caleb Diplock under which £250,000 was left to be distributed among other things, for charitable or benevolent purposes. Unfortunately the trustees had made substantial distributions on the assumption that the trusts were valid and the decision arose out of proceedings for the recovery of the amounts that had been distributed. Lord Simonds said :

> Acting under a mistake the personal representatives of a testator whose residuary disposition is invalid distribute his residuary estate on the footing that it is valid. Have the next of kin a direct claim in equity against the persons to whom it has been wrongfully distributed ? I think that the authorities clearly establish that, subject to certain qualifications which I shall state, they have such a claim (*ibid.*, 1140).

Later on in his judgment, Lord Simonds said :

> The broad fact remains that the Court of Chancery in order to mitigate the rigour of the common law or to supply its deficiencies, established the rule of equity which I have described, *and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid* (*ibid.*, 1147).

Section 94B clearly negatives the last sentence quoted and italicized. The change which has been effected in the law in this respect appears on balance to be a salutary one. It is not sufficient under s. 94B that the recipient has received the payment in good faith and changed his position in reliance on its validity. He must in addition, to quote the words of the section, have so changed his position that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief or to grant relief in full. This should ensure that the new provision, which was designed to do justice, will not create any new injustices.

[16] [1950] 2 All E.R. 1137.

LEGAL LITERATURE.

Workers' Compensation.

Macdonald's Law Relating to Workers' Compensation in New Zealand. By the late J. W. MACDONALD, C.M.G., Barrister and Solicitor, sometime Public Trustee. Third Edition. Revising Editor, O. E. SMUTS-KENNEDY, B.A., LL.B., Barrister and Solicitor of the Supreme Court, assisted by E. B. TAYLOR, formerly Assistant Secretary to the Department of Labour. Wellington : Butterworth & Co. (Australia) Ltd. Pp. ci + 844. Price : £7 7s., post free.

An eminent English Judge has said that any question relating to workers' compensation is a difficult one ; and, while this is no doubt an overstatement, it contains, nevertheless, a great deal of truth in it. The standard New Zealand work on the subject has long been *Macdonald's Law Relating to Workers' Compensation in New Zealand.* It has become an even more important occupant if the New Zealand, and indeed the Australian, lawyer's shelves since the English authority on the same subject, *Willis*, is apparently to go through no more editions, no doubt in consequence of the passing in England of the Natonial Insurance (Industrial Injuries) Act 1946, which substituted for the previous English legislation a system of insurance. There appears to be no indication of any such change being likely in New Zealand, and, indeed, the importance of *Macdonald* has been further increased by progressive and substantlal increases in the rate and amount of compensation recoverable under the appropriate New Zealand legislation. There has been no new edition of the work since the Second Edition in 1934, while on the other hand, there have been numerous and important starutory amendments of the Workers' Compensation Act 1922, culminating in the consolidating workers' Compensation Act 1956, and numerous and important judicial decisions on the subject of workers' compensation both in New-Zealand, England and Australia in the same period. The Third Edition of *Macdonald* stating the law in New Zealand as at the end of September 1958 is therefore to be welcomed.

The task of revising editors of the Third Edition appear to have been well and adequately performed.

The amendments in the law made by the 1956 Act have been incorporated into the appropriate passages of the text, and attention drawn to them. There has not yet been time for much judicial authority in regard to these amendments and the revising editors have, no doubt for this reason, included a number of useful discussions as to the probable legal effects of a number of the amendments. All relevant matter contained in the last cumulative supplement appears to have been incorporated in the appropriate poztion of the text, and more recent New Zealand and Australian decisions have been added and discussed to bring the case lae up to date. A lot of dead wood resulting from changes in the legislation has been removed from the work, in particular by largely omitting the chapter in the previous edition entitled " Employments to which the Act applies," since the 1956 Act applies to all employments, and by omitting the chapter in the previous edition under the heading " Principal," since the 1956 Act contains no provisions replacing s. 13 of the 1922 Act relating to the liability of a principal who contracts for the execution of work by a contractor who employs workers. The chapter in the previous edition entitled " Average Weekly Earnings," has been incorporated into the now more appropriate chapter entitled " Weekly Earnings." In addition, an important chapter on the subject of Employers' Liability Insurance has been added in which are discussed the functions of the Workers Compensation Board.

Macdonald has always been a comprehensive statement of the law on the subject, both in its enunciation of general principles and of matters of detail and its citation of authority, and the present edition continues the work fully in that character. It may be confidently predicted that the Third Edition of *Macdonald* will find its place in the library of most, if not all, New Zealand practitioners and of many Australian ones.—C. H. A.

LEGAL ANNOUNCEMENTS.

(*Continued from p. i.*)

It is announced that following the retirement of Mr A. P. Blair upon his appointment as a Magistrate, his place in the legal firm heretofore carrying on practice at Gisborne under the name of Blair Parker and Evans has now been taken by MR KENNETH NEWMAN STRUTHERS, LL.B., formerly a partner in Messrs Smith, McSherry & Co., Solicitors, Pahiatua, and the first named practice will be carried on hereafter under the firm name of BLAIR, PARKER & CO.

G. I. PARKER, K. N. STRUTHERS,
H. J. EVANS, and W. L. HOCQUARD,
Barristers, Solicitors and Notary Public,
GISBORNE.

ROBERT ALAN HOUSTON and ALAN LOUGH HASSALL, practising as Barristers and Solicitors under the firm name of Houston and Hassall at Hamilton and Huntly wish to announce that they have admitted into the partnership LARRY MICHAEL O'NEILL LL.B. who has been associated with the firm for the past two years. The Partnership will be carried on at Hamilton under the firm name of HOUSTON, HASSALL AND O'NEILL and will continue to be carried on at Huntly under the firm name of HOUSTON AND HASSALL.

MESSRS W. E. LEICESTER, W. B. RAINEY, A. H. ARMOUR, C. B. BOOCK and R. G. COLLINS who have been practising as Barristers and Solicitors at 125 Featherston Street, Wellington and at 15-17 Dudley Street, Lower Hutt under the firm name of Leicester Rainey and Armour, announce that they have admitted to partnership as from the 1st January, 1959, Mr DANIEL FRANCIS DONOVAN LL.B., who has been a member of their staff for some years. The practice will continue to be carried on as formerly under the name of LEICESTER, RAINEY AND ARMOUR, at the same addresses.

SIMULTANEOUS DEATHS AND STATUTORY SUBSTITUTIONAL GIFTS IMPLIED IN WILLS.

Changes in the Law.

By J. G. HAMILTON LL.M.

Two recent acts of special importance to lawyers are the Simultaneous Deaths Act 1958 and the Wills Amendment Act 1958.

The Simultaneous Deaths Act 1958 provides a much fuller code than previously existed in connection with the devolution of property in cases where two or more persons have died at the same time, or in circumstances which give rise to reasonable doubt as to which of them survived the other or others.

The Wills Amendment Act 1958 negatives in its application to New Zealand s. 33 of the Wills Act 1837, which prevents the lapse of gifts to children or other issue of a testator.

The new Act provides that, in almost the same class of cases, the gift (instead of going to the estate of the deceased beneficiary)

> shall take effect as if the will had contained a substitutional gift devising or bequeathing or appointing the property to such of the children of that person as are living at the time of the testator's death and if more than one in equal shares.

THE SIMULTANEOUS DEATHS ACT 1958.

The new code governing the devolution of property in cases of simultaneous deaths is set out in dubs. (1) of s. 3 of the Simultaneous Deaths Act 1958. The opening words of the subsection expand the corresponding former provision in s. 27 of the Property Law Act 1952 so as to state explicitly that the new code applies where the deaths occur at the same time (e.g., in an explosion as in *Hickman* v. *Peacey* [1945] A.C. 304), and so as to avoid the doubts as to the meaning of the word "uncertain" which were expressed in the case of *In re Smith, Huzziff* v. *Public Trustee* [1955] N.Z.L.R. 1122. It is thought that the new wording in this part of the subsection merely expresses the effect of the previous wording as construed in the cases.

Presumption as to Order of Deaths.

At common law, there was no presumption as to the order in which deaths occurred where persons perished in a common disaster. The onus of proof of survivorship lay on the person who alleged it. Trifling factors would be adduced in evidence, and evidential problems of great difficulty used to arise. In the case of *Wing* v. *Angrave* (1860) 8 H.L. Cas. 183; 11 E.R. 397, a husband and wife made wills each leaving the whole estate to the other and each providing that if the other did not survive the property should go to the same third person. It was held that it was necessary for the person entitled under the gift over to show affirmatively that one or the other of the spouses was the survivor of them; and that, in the absence of such proof, the property passed as if neither the husband nor the wife had made a will.

To avoid such difficulties and absurdities, provision was made in s. 184 of the Law of Property Act 1925 of the United Kingdom that in all cases where, after the commencement of that Act,

> two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

Identical legislation was enacted in New Zealand in s. 6 of the Property Law Amendment Act 1927, which was re-enacted as s. 27 of the Property Law Act 1952.

The provision worked satisfactorily and met normal expectations in cases involving a parent and any child or remoter issue. It did not work well as between husband and wife in cases where there were no children or where, after the commencement of the Administration Amendment Act 1944, all the children died under 21, perhaps in the common disaster. In these cases the property of the elder spouse, say the husband, would pass by virtue of the presumption to the estate of the wife (assuming she was the younger spouse); and her next-of-kin, perhaps her parents or brothers and sisters, would thus inherit the husband's property. In the case of inherited property or property given to him by his parents the result was manifestly unjust.

Though cases of simultaneous deaths are relatively rare, they do arise, particularly from fires and motor-car accidents, and the Tangiwai rail disaster highlighted the problems. Consequently, this branch of the law was carefully re-examined; and a Simultaneous Deaths Bill was introduced into Parliament in 1957 and left lie for a year to permit the fullest possible examination before it was enacted in 1958.

Paragraph (a) of subs. (1) of s. 3 of the Simultaneous Deaths Act 1958 provides that, in cases of simultaneous deaths occurring after the commencement of that Act,

> (a) The property of each person so dying shall devolve, and if he left a will it shall take effect unless a contrary intention is shown thereby, as if he had survived the other person or persons so dying and had died immediately afterwards.

This avoids the difficulties that previously arose in the husband-and-wife cases, and saves death duty by avoiding the possibility of the same property devolving through two or more estates.

Special applications of the rule laid down in para. (a) are provided for in paras. (b) and (c). Paragraph (b) provides that a "*donatio mortis causa* made by any person so dying to any other person so dying shall be void and of no effect." Such a case might arise where a husband, overtaken by sudden illness, made a *donatio* to his wife, and then perished with her in a car accident while she was attempting to drive him to hospital. Paragraph (c) covers the special case of the proceeds of an insurance policy, where the devolution of the proceeds depends, not on any will or on the intestacy of any person, but in some other document, perhaps the terms of the policy itself.

Property Owned Jointly.

Paragraph (d) of subs. (1) of s. 3 provides :

> (d) Any property owned jointly and exclusively by two or more of the persons so dying shall devolve as if it were owned by them when they died as tenants in common in equal shares.

The special case of joint family homes is covered in similar terms by s. 2 of the Joint Family Homes Amendment Act 1957. This Act was introduced into Parliament at the same time as the Simultaneous Deaths Bill of 1957, but its passing was not delayed as was the rest of the legislation.

Paragraph (e) of subs. (1) of s. 3 covers in similar terms the special case where the persons dying at the same time are jointly and exclusively entitled to any property under an existing trust. The same problem of survivorship arises, and it is met by treating the beneficiaries as tenants-in-common in equal shares.

Paragraph (f) of subs. (1) of s. 3 covers with similar effect the special case where a power of appointment could have been exercised in respect of any property by any of two or more persons dying at the same time if any of them could be shown to have survived the other or others of them. In such a case the power may be exercised as if an equal share of the property had been set apart for appointment by each of those persons, and that share devolves in default of appointment in the manner in which the property would have devolved if the person entitled to appoint the share had been the survivor of those persons.

Paragraph (g) of subs. (1) of s. 3 covers the further special case where, by a will, any property is devised or bequeathed or appointed to the survivor of two or more of the testator's children or other issue within the meaning of s. 16 of the Wills Amendment Act 1955 (hereafter discussed in this article) and all or the last survivors of those children or issue die at the same time in the testator's lifetime. In such a case that section is to apply as if the devise or bequest or appointment were in equal shares to those of them who so die and leave a child or children living at the death of the testator.

Additional Rules.

Paragraph (h) of subs. (1) of s. 3 clarifies the application of s. 33 of the Wills Act 1837 in cases of simultaneous deaths. Under the Wills Amendment Act 1958, s. 33 will continue to apply to all wills made before January 1959, and para. (h) will be relevant in relation to such wills.

Paragraph (i) of subs. (1) of s. 3 provides :

> (i) For all other purposes affecting the title to property or the appointment of trustees, the deaths of the persons so dying shall be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

The previous rule is thus preserved in this residual class of cases. The provision is particularly relevant in connection with subs. (1) of s. 43 of the Trustee Act 1956, which confers the power of appointing new trustees on the personal representatives of the last surviving or continuing trustee. A point that has emerged since the legislation was passed is that where the last survivors of trustees die at the same time, the right to appoint new trustees will devolve under para. (i) of subs. (1) on the personal representatives of the younger of them, but the legal estate in the trust property will not devolve as formerly (by virtue of survivorship under the joint tenancy on which trustees normally hold property) on the personal representatives entitled to make the appointment. Apparently the trustee's legal estate in the property will devolve, in accordance with para. (d) of subs. (1) and having regard to the definition of the term " property " in section 2, as if it were owned by the trustees when they died as tenants-in-common in equal shares. This will involve joining the personal representatives of all those trustees in the transfer of the property to the new trustees.

Exemption from Duty in Certain Cases of Simultaneous Deaths.

Section 3 of the Finance Act 1958 provides :

> (3) Where, before the commencement of the Simultaneous Deaths Act 1958, two or more persons have died at the same time or in circumstances which give rise to reasonable doubt as to which of them survived the other or others and, after the commencement of that Act, a person who became entitled to any property on the death of any of them makes a gift of the whole or part of that property (or of property representing that property) to the person who would have become entitled to that property on that death if that Act had then been in force, the gift shall not be taken into account as such under the Estate and Gift Duties Act 1955 either for the purposes of gift duty or for the purposes of estate duty.

In cases coming within the spirit of the section where the gifts were made before the commencement of the Simultaneous Deaths Act 1958, persons concerned are advised to approach the Commissioner of Inland Revenue as to the possibility of an *ex gratia* grant being made to do equity in the circumstances.

The Wills Amendment Act 1958.

Section 33 of the Wills Act 1837 of the United Kingdom Parliament provides as follows :

> Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

The section attracted repeated criticism, partly because (under the section) the issue whose existence prevents the lapse of a gift to, say a son of the testator, do not take the gift, which falls into the son's estate and may pass to his wife in terms of his will or to his creditors if he is insolvent ; partly because, as a result of the gift falling into the son's estate, it attracts estate duty in the estates of both the father and the son, a point that is not rendered wholly unimportant by s. 19 of the Estate and Gift Duties Act 1955, which gives partial relief in such cases ; and partly because the Courts have held that the section does not apply to class gifts.

The Wills Amendment Act 1958 extends the legislation to class gifts, and provides for the children of the deceased beneficiary to take instead of his estate. To preserve the benefit of English cases and textbooks, the wording of the existing section has been adhered to as closely as the changed scheme permits. Legislation that is similar in principle, though not identical in form, appears in s. 31 of the Wills Act 1928 (Victoria), as substituted by s. 2 of the Wills (Amendment) Act 1947 of that State. In 1957, the Commissioners on the Uniformity of Legislation in Canada recommended

similar legislation in that country; and effect has been given to that recommendation in three Canadian Provinces.

The new provisions apply to wills made on or after January 1, 1959, and s. 33 continues to apply to wills made before that date.

Section 3 contains the important provisions of the Wills Amendment Act 1958. These are enacted as s. 16 of the Wills Amendment Act 1955, which Act contains all the legislation of the New Zealand Parliament relating to wills.

Subsection (1) of s. 16 is the key provision. It provides:

> (1) Unless a contrary intention appears by the will, where any person is a child or other issue of the testator to whom (whether as a named or designated person or as a member of a class) any property is devised or bequeathed or appointed in terms that would enable that person to take the property for any estate or interest not determinable at or before the death of that person if that person survived the testator, and that person dies in the lifetime of the testator (whether before or after the testator makes the will) leaving any child or children living at the time of the death of the testator, the devise or bequest or appointment shall take effect as if the will had contained a substantial gift devising or bequeathing or appointing the property to such of the children of that person as are living at the time of the testator's death and if more than one in equal shares.

This is the subsection that provides for the statutory substitutional gift and extends the new provisions to class gifts as well as to gifts to named or designated persons.

The use of the term "appointed" in subs. (1), coupled with the definition of that term in subs. (4) extends the implied statutory substitutional gift to all appointments in exercise of general powers, and also to appointments in exercise of special powers if every child in whose favour the section would operate is an object of the power. Section 33 does not apply to special powers. The words "whether before or after the testator makes the will" are taken from the Canadian precedent. They do not appear in s. 33 of the Wills Act 1837, but the note on that section in *26 Halsbury's Statutes of England*, 2nd ed., 1353 shows that they are merely declaratory of the effect of that section.

Subsection (1) speaks of a "child" or other issue "of the testator and a "child" of a beneficiary. The definitions of the terms "child" and "issue" in subs. (4) and the terms of subs. (5) should be noticed as to the extent to which illegitimate relationship is recognized.

It would seem from the decision in *Elliott* v. *Joicey* [1935] A.C. 209 that the statutory substitutional gift would operate in favour of posthumous children of a beneficiary, though such children would probably not prevent lapse under s. 33.

Subsection (2) of s. 16 preserves existing drafting practice, and provides that the section is not to apply to a gift which is in any way expressed to be conditional on the person being alive at or after the time of the death of the testator or any subsequent time or event. It also declares that any other unfulfilled condition excludes the statutory substitutional gift.

Paragraph (a) of subs. (3) of s. 16 declares that the section shall not apply to any bequest or appointment of personal chattels. These are defined in subs. (4) as meaning personal chattels within the meaning of the Administration Act 1952. These have been excluded from the section because of the difficulties inherent in a substitutional gift of a particular chattel to a number of children of the named beneficiary. Paragraph (b) of subs. (3) declares that s. 16 shall not apply to any devise or bequest or appointment to any person as one of two or more joint tenants. In the case of *Re Butler, Joyce* v. *Brew* [1918] 1 I.R. 394, it was held that s. 33 did not apply in cases of joint tenancies.

In the common case where a testator makes a gift to his son with an express substitutional gift to the son's children if the son fails to survive, the statutory substitutional gift will operate in relation to these grandchildren if one of them as well as the son should die in the testator's lifetime.

Sale of Incomplete House.—"It is well-established by numerous authorities, to some of which Serjeant Sullivan [counsel for the builders] has called our attention, that, in the case of the sale of a completed house, there is to be implied on the part of the vendor no warranty as to the house being in any particular condition. The same rule would apply in the case of an uncompleted house, which is the subject-matter of a sale, where the structure stands at the time of the sale. Where, however, the contract is for the sale of a house when completed, there is an implied contract on the part of the vendor, in the absence of there being any express contract as to the way in which the house is to be completed, that the house shall be completed in such a way that it is fit for human habitation."—Romer L.J. in *Perry* v. *Sharon Development Co. Ltd.* [1937] 4 All E.R. 390, 394.

Opinion and Evidence.—"It frequently happens that a bystander has a complete and full view of an accident; it is beyond question that, while he may inform the Court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the Court has to decide; but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant; but his opinion is not. The well-recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the Civil Court, the opinion of the Criminal Court is equally irrelevant."—Goddard L.J. in *Hollington* v. *Hewthorn and Co. Ltd.* [1943] 2 All E.R. 35, 40.

RECENT LEGISLATION OF INTEREST TO THE CONVEYANCER.

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

The learned Editor of this Journal has asked me to write a short article on the legislation passed by Parliament during the year 1938.

Amendment to the Land Transfer Act.

I think that any amendment to the Land Transfer Act is of general interest to the conveyancer.

In *Fama* v. *Ryder* [1954] N.Z.L.R. 523, His Honour Mr Justice Turner held that the effect of ss. 38 (3) and 157 (2) of the Land Transfer Act, 1952 was that a registrable instrument duly executed acquired the force and effect of a deed when, *and not until* it was registered. Consequently, His Honour held that an unregistered mortgage under the Land Transfer Act 1952 was not a deed within the meaning of the Property Law Act 1952, and that accordingly, the obligations created by it were not specialty obligations ; they were simply contract debts, and a defence, based on s. 4 (1) (*a*) of the Limitation Act, 1950, would succeed, if an action to recover the principal sum and interest was brought after *six* years from the date when the cause of action accrued.

Section 2 of the Land Transfer Amendment Act 1952 abrogates the above rule laid down in *Fama* v. *Ryder*, with the result that an action may now be brought on a covenant contained in an unregistered instrument duly attested as required by the Land Transfer Act within twelve years from the date of the instrument, for every instrument so executed shall have the effect of a deed executed by the parties executing the same. Another result of this amendment to the law will be that any such covenant cannot be varied by an instrument other than a deed unless there is present the element of valuable consideration : *Berry* v. *Berry* [1929] 2 K.B. 316, *Commissioner of Inland Revenue* v. *Morris* [1958] N.Z.L.R. 1126, 1134.

In Fama's case Turner J. also held that an instrument not being registered was in terms of s. 41 of the Land Transfer Act, 1952, ineffectual to render the land therein described liable as security for the payment of money. In other words the *registered* estate or interest does not pass or become liable as a security until the instrument is duly registered under the Land Transfer Act : this rule will still apply, despite the recent amendment. If there is present the element of valuable consideration an unregistered instrument under the Land Transfer Act, however, constitutes a *contract* to do what the instrument purports to do : thus, if it purports to transfer the fee simple, it operates as an agreement to transfer the land : if it is in the form of a mortgage, it operates, as Turner J. pointed out, as an agreement to mortgage. If the instrument is in the form of a Memorandum of Lease, it operates as an agreement to lease : but here there is one exception : if the term of the lease is for less than three years, it operates as a valid legal lease by reason of the exception created by s. 115 (2) of the Land Transfer Act, 1952 : *Domb* v. *Owler*, [1924] N.Z.L.R. 532 ; [1924] G.L.R. 97.

The Rule as to Priority according to Date of Registration modified.

Every conveyancer knows that, under the Land Transfer Act, priority of registration is according to date of registration. Section 37 (2) of the Land Transfer Act 1952 provides that instruments registered with respect to or affecting the same estate or interest shall, notwithstanding any express, implied, or constructive notice, be entitled in priority the one over the other according to the date of registration, and not according to the date of each instrument itself. There were already two or three exceptions to this general rule. The 1958 legislation produces two more special exceptions : the Family Benefits (Home Ownership) Act 1958, and the Social Security Amendment Act 1958.

The Family Benefits (Home Ownership) Act 1958.

The general purpose of this Act is to enable family benefits payable under the Social Security Act 1938 to be paid in a lump sum in advance, for housing purposes.

Section 2 includes a definition of the term " beneficiary " for the purposes of the Act. A beneficiary is the person who under the Social Security Act 1938, is entitled to receive a family benefit under that Act in respect of any or children under the age of sixteen years, but does not include any person other than a parent of the child or children. If the benefit is payable to any person other than a parent of the child or children, he will not be eligible for a benefit under the Act. We all know that as a general rule the mother of the child is entitled to the family benefit.

Section 3 provides that on the application of an eligible beneficiary who complies with the rules to be prescribed by regulations, an advance not exceeding the capitalized value of the family benefit may be made to the beneficiary for housing purposes. " Capitalized value " in relation to any family benefit means the captitalized value of the benefit until the child in respect of whom it is payable attains the age of sixteen years determined in accordance with regulations to be made under the Act. The advance that may be made in respect of two or more children is not to exceed the capitalized value of benefits payable in respect of two children for a period of sixteen years. No advance may be made where the capitalized value of the benefit is under £200.

Section 5 provides that where an advance is made the family benefit is to cease to be payable to the beneficiary until the child attains the age of sixteen years, and when the child attains that age the advance shall be deemed to have been repaid. When the advance has been repaid, the benefit is to be resumed to the beneficiary if under the Social Security Act 1938 it is still payable after that date, e.g., if the child continues at school after attaining sixteen years of age, or if the advance is repaid before the child attains that age.

If the child dies after the expiration of one year from the making of the advance and before attaining the age of sixteen years and before any event has occurred by reason of which the advance is repayable, the advance, or so much of it as relates to the benefit payable in respect of that child, will be deemed to have been repaid.

Section 6 sets out the land in respect of which advances may be made. It reads as follows :

> No advance may be made under this Act, unless—
>
> (a) The beneficiary is the sole owner of the land in respect of which the advance is made or will be the sole owner of the land when acquired ; or
>
> (b) The land in respect of which the advance is made is or will be settled on the beneficiary and the spouse of the beneficiary as a joint family home under the Joint Family Homes Act 1950 ; or
>
> (c) In the case of an advance made in respect of Maori freehold land,—
>
> (i) The beneficiary is the sole owner of the land or will be the sole owner of the land when acquired ; or
>
> (ii) The beneficiary and the spouse of the beneficiary are the owners of the land as joint tenants or will be the owners of the land as joint tenants when acquired.
>
> (b) Prescribing the purposes that are housing purposes for which advances may be made under this Act (including the discharge or partial discharge of encumbrances on dwellings owned by beneficiaries and the payment or partial payment of the purchase money owing under registered agreements for sale and purchase or under registered leases or licences under which the beneficiary is purchasing the fee sinple) :

There is the usual section authorizing the making of Regulations. Of a particular interest are paras. (b), (g), and (i) of s. 9, providing for the following matters :—

> (g) Providing for the repayment of the whole or any part of the unpaid balance of any advance—
>
> (i) On the occurrence of any event (other than the death, after the expiration of one year from the making of the advance, of a child in respect of whom the benefit was granted) by reason of which the benefit or any part thereof would have ceased to be payable to the beneficiary if it had not been capitalised under this Act :
>
> (ii) On the transfer or lease or other disposition by the beneficiary of the land in respect of which the advance was made or the occurrence of any event by which the beneficiary ceases to be the owner or one of the owners of the land :
>
> (iii) On the beneficiary ceasing to occupy as a home the land in respect of which the advance was made :
>
> (iv) On the occurrence of any other event specified in the regulations,—
>
> and for the payment of interest on the amount so repayable at a rate prescribed in the regulations :
>
> (i) Providing for the registration of charges created by virtue of this Act, defining the rights and liabilities of the holders of such charges, and prescribing the manner in which any such charge may be enforced on any default in the payment of any money to which the charge relates.

As this article is being written, it is announced in the Press that steps are being taken for the drafting of the rules for qualifications to receive advances. In general, the principle would be that to the extent of the qualification of the mother and children loans would be available up to £1,000 by way of advances towards the cost of obtaining a home. These would be based on the age of the children for whom the mother would be entitled to receive a family benefit. The scheme would start on April 1, 1959, and applications would be received after that date.

Section 7 provides for the advances to be *charged* on the land, and this is the section which may have in certain circumstances the effect of altering the Land Transfer legal priorities—an alteration which in the circumstances is inevitable. Subsection 1 provides that the amount of any advance under the Act shall be a charge upon the land in respect of which it is made, and the charge may be registered against the land in the manner prescribed by regulations under the Act. Subsections (2) and (3) read as follows :

> (2) Notwithstanding anything in any other Act, where the amount of any advance is applied in discharging or partially discharging any registered encumbrance existing on the land, the charge created by this section shall, when registered under the Land Transfer Act 1952 or other appropriate Act, have priority over all registered encumbrances over which the encumbrance so discharged or partially discharged had priority, subject to the registration before the registration of the charge of a discharge or partial discharge, as the case may be, of the encumbrance so wholly or partially discharged.
>
> (3) The provisions of subsection two of this section shall apply in the manner prescribed by regulations under this Act to the payment or partial payment from an advance under this Act of the purchase money owing by the beneficiary under a registered agreement for sale and purchase of land or under a registered lease or licence under which the beneficiary is purchasing the fee simple.

The Social Security Amendment Act 1958.

Section 29 of this Act provides for advances to beneficiaries and war pensioners for repair and maintenance of their homes.

The Social Security Commission may make advances of such amount, not exceeding £200, and subject to such conditions as it thinks fit to any person (being the owner of an estate fee simple in any premises occupied by him as a home, or being the lessee under a lease which is perpetually renewable of any premises occupied by him as a home) who is in receipt of a benefit under Part II of the Social Security Act 1938* or of a pension or allowance under the War Pensions Act 1954 for the purpose of carrying out essential repairs to and maintenance of the premises. It is expressly provided that any advance under the section shall be a charge upon the estate or interest of the beneficiary in the land, *and may be registered against the land under the provisions of the Statutory Land Charges Registration Act 1928.* This is the provision incorporating the provisions of the Statutory Land Charges Registration Act 1928, which may have the effect in certain circumstances of altering the relative priorities conferred by registration under the Land Transfer Act. Money expended in the maintenance or repair of a home would constitute a permanent improvement of the home and when registered the charge would take priority over all other existing charges, the *ratio* being that a statutory charge of this nature is deemed to improve every person's estate and interest in the land : *Mayor, etc., of Wellington* v. *Attorney-General* (1913) 33 N.Z.L.R. 394, 400.

With the intent of further protecting the State's interest in the charge, subs. (4) provides that except with consent of the Commission, no disposition of the land or, as the case may be, of the leasehold interest in the land (other than a transmission on the death of the beneficiary) shall be registered while a charge under this section is registered against the land or, as the case may be, that leasehold interest.

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* Part II of the Social Security Act 1938 is the part dealing with superannuation benefits, and benefits in respect of age and other special conditions (e.g., widowhood, orphanhood.)

AGREEMENTS FOR SALE AND PURCHASE OF CROWN LEASES AND LICENCES.

There have for many years now been in force special provisions as to the transfer of the rights and liabilities of a Crown lessee or licensee on the transfer of a Crown Lease or Licence. However, as we all known, Crown Leases and Licences are frequently sold and for some considerable time held under agreement for sale and purchase, and an agreement for sale and purchase is not the same as an actual transfer.

Following previous statutory law the new subs. (4) of s. 89 of the Land Act 1948 (as enacted by s. 2 of the Land Amendment Act 1958) provides that where any lessee or licensee has transferred all his estate and interest in his lease or licence by a *legal* transfer with the consent of the Board, the person to whom the lease or licence has been so transferred shall have all the rights and privileges of and be subject to the same obligations as the original lessee or licensee, and the former lesse or licensee shall thereupon cease to be liable for any subsequent branch of any covenant, condition, or obligation (express or implied) in the lease or licence. In other words on a legal transfer the transferor drops out and the transferee takes his place with regard to any covenant, condition, or obligation (expressed or implied) in the Crown lease or licence—an important departure from the ordinary law of landlord and tenant.

The new provision is now numbered s. 89 (4A) and is also enacted by s. 2 of the Land Amendment Act 1958. It provides that where any lessee or licensee has agreed by an agreement for sale and purchase *consented to by the Board* to transfer at a future date his interest in his lease or licence, then, so long as the agreement for sale and purchase continues in force, both the lessee or licensee and the person to whom he has agreed to transfer his interest shall jointly have all the rights and privileges of the lessee or licensee under the lease or licence, and shall be jointly and severally liable to the Crown for the observance and performance of all the covenants, conditions in the lease or licence. However, so long as the agreement continues in force the condition as to residence (express or implied) in the lease or licence shall be deemed to be complied with, if performed by the purchaser under the agreement for sale and purchase.

I should say, however, that from a practical point of view it is preferable that a Crown lease or licence should not be held under a long term agreement for sale and purchase: the sooner the legal estate is transferred to the purchaser the better for all concerned.

AMENDMENTS TO THE STAMP DUTIES ACT 1954.

During 1958, two slight amendments were made to the Stamp Duties Act 1954—one dealing with sales and purchases of shares through the agency of a sharebroker, and the other adding an exemption with respect to instruments of guarantee.

Returns by Sharebrokers to the Stamp Office of Sales of Shares without Executed Transfer. Section 2 of the Stamp Ducies Amendment Act 1958 excludes sales and purchases of shares through the agency of a sharebroker from the operation of s. 76 of the principal Act, which requires transfers of shares to disclose in ink the name of the transferee. Sharebrokers will be required to furnish within one month of the date of the sale a statement to the Inland Revenue Department where they make a sale without a transfer being executed, and ro pay the duty which the transfer would have attracted. Similar legislation exists in New South Wales and Victoria.

Any shareholder who pays any amount to the Inland Revenue Department under the section may recoup that amount out of any money in his hands belonging to the purchaser of the shares. Any sharebroker who fails to comply with the provisions of this section shall be liable to a fine not exceeding £100.

Exemption in favour of the Crown of duty on Guarantees. In New Zealand, wha eve a special section dealing with stamp duty on instruments of guarantee. By s. 154 of the principal Act, every instrument of guarantee where the undertaking of the promisor is the principal object shall be charged with a stamp duty of three shillings, for which the promisor shall be liable. Section 3 of the Stamp Duties Amendment Act 1958 exempts from duty under s. 154 instruments of guarantee in favour of the Crown *or to which the Crown is a party.*

PRACTICAL POINTS.

Income Tax—Person convicted of "negligently" making False Return of Income—Liability for Assessment of Penal Tax.

QUESTION: Is a person convicted of an offence of *negligently* making a false return under s. 228 (1) (b) of the Land and Income Tax Act 1954 (as distinct from *wilfully* making a false return) liable to be assessed with penal tax under s. 231? It seems to the writer that the word ng of s. 231 and the stfet meaning of the word "evade" as used in that section requires intent, as distinct from negligence, but we have not found any authorities on this point.

ANSWER: 1. Sections 228 and 229 of the Land and Income Tax Act 1954 provide for a penal remedy by way of prosecution before a Magistrate with a fine as the result of successful proceedings, while ss. 231-233 confer a right to assess penal tax which is deemed to be *tax* of the same nature as the deficient tax. Neither proceeding is a necessary preliminary to the other and each is independent of the other.

2. Intent is a necessary ingredient of an offence before penal tax is chargeable; but there is nothing in law to prevent the Commissioner establishing intent in objection proceedings to an assessment of penal tax, irrespective of the nature of any charge laid under s. 228 or of the result of any such charge or whether any charge at all has laid under that section. The result of proceedings taken under s. 228 may render more difficult the task of discharging the onus laid on the Commissioner by s. 234; but that is a matter of evidence.

3. The short answer to the question is "Yes", if the Commissioner considers there is sufficient proof of the offence under s. 231.

ROAD TRAFFIC LAWS.

Transport Legislation 1958.*

By R. T. Dixon.

The Transport Amendment Act 1958.

The Transport Amendment Act (No. 2) 1958 was considered in the writer's last article, and this time the Transport Amendment Act 1958, which concerns itself principally with motor spirit taxation, is reviewed.

The motor-spirit tax now amounts to 2s. 3¾d. per gallon, a further 1s. per gallon having been imposed, as from Budget date, June 27, 1958, by the Customs Acts Amendment Act 1958.

Section 2 of the Transport Amendment Act 1958 provides that of the 2s. 3¾d. per gallon tax (¾d. representing surtax) 1s. 3¾d. is to be paid to the credit of the National Roads Fund and the remaining 1s. per gallon is paid to the Consolidated Fund as general revenue.

Section 3 is an important section, as it provides for refunds of the additional 1s. per gallon in certain cases. Briefly, the shilling is refunded (in addition to whatever amount was refundable before the amendment) for petrol used in all E-plate vehicles: (*i.e.* those exempted from annual licence fees), in all commercial fishing vessels, in all "passenger-service motor-vehicles" (as defined , and in all cases where the petrol is not used for licensed motor-vehicles or for vessels other than commercial fishing vessels. Thus, total refunds are now obtainable as follows: aircraft and commercial fishing vessels, 2s. 3d.; E-plate or unlicensed motor-vehicles, stationary engines, chemical purposes and motor-vehicles never used on roads, 2s. 1d.; vessels other than commercial fishing vessels, 9d.; "passenger service motor vehicles," 1s.

The term "passenger-service motor-vehicle" is specially defined as a motor vehicle designed exclusively or principally for the carriage of passengers (but not to include taxis or rental cars) and used exclusively in one or more of the following ways: (a) under a passenger-service licence; (b) as a contract vehicle (which is defined in the principal Act as a "motor-vehicle carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole"); (c) for the carriage to or from school of school children and their teachers.

Solicitors acting as trustees may find it important to note that application for refund of the additional tax (as in the case of the former tax) must be made within three months of the end of the quarter ended on the last day of March, June, September, or December, and, if lodged after two months, a 10 per cent. reduction is made in the refund.

Section 4 provides for a system whereby refunds of duty will be obtainable only on coloured motor spirit (except for that used in aircraft or as a solvent or as prescribed) but the section does not come into force until a date to be fixed by Order in Council. In the main, the system is to be brought into effect by regulations, but certain enforcement powers are specifically set out in the section. For example, any constable in uniform or any Traffic Officer with a distinctive cap or badge will be entitled to inspect and take samples from any part of the fuel system of a motor-vehicle on a road. The latter is defined in s. 2 of the principal Act to include any place to which the public have access whether as of right or not. Note also the provision that when any person is convicted of an offence relating to the coloured petrol system the Court, additional to imposing a fine, may disqualify the defendant from obtaining any refund of motor spirits tax for such period as the Court may specify. Provision is made for a right of appeal to the Supreme Court when such an order of disqualification is made.

Section 5 has the effect of distributing the mileage tax (being road tax for motor-vehicles not propelled through use of motor spirit) between the National Roads Fund and Consolidated Fund on a basis corresponding to the distribution between those funds of the motor spirits tax.

Section 6 makes it clear that mileage tax is payable in appropriate cases for road use of motor-vehicles used under the authority of dealer's (D) plates.

Section 7 is the only section in this Act dealing with the transport licensing system. The section amends s. 125 of the principal Act by repealing subss. (5) and (6) and (consequentially) certain words in subs. (7). Section 125 deals with applications to fix charges for the use of public road transport. Before this amendment, when an application by the authorized person or organisation was made to the Commissioner of Transport to fix, review, alter, or revoke the charges for a goods service, the Commissioner was not obliged to make any order unless he was satisfied that the applicant had made reasonable endeavours to arrange agreement between the licensee or licensees and the user or users of the goods service likely to be affected by any such order. For this purpose, the Commissioner was empowered to accept organizations as representatives of licensees or users respectively. If the Commissioner was satisfied that the proposed order had been agreed to by such licensees or such users, he was compelled to make an order in terms of the agreement. This is all repealed by the above amendment. The effect is that the Commissioner is entitled to consider an application on its merits; and he may treat an agreement between licensees and users as a favourable factor towards the grant of the application without in any way being bound by such agreement.

* The first part of this article appeared in (1958) 34 N.Z.L.J. 347.

INTERNATIONAL BAR ASSOCIATION.

Conference at Cologne, 1958.

At Cologne, Germany in July, 1958, the International Bar Association of which the New Zealand Law Society is a member, held its seventh biennial conference.

New Zealand Law Society was ably represented by Mr Justice McGregor and Mr R. L. Ronaldson, of Christchurch, both being accompanied by their wives. Other New Zealand practitioners attended as conferees. Thirty-six countries were represented by 520 members of the legal profession, who were accompanied by 191 guests.

The opening session of the conference was held in the magnificient Gurzenich ; conferees were welcomed to Germany by Federal Minister of Justice Fritz Schaffer. The same evening, the Mayor of Cologne, Oberburgermeister Theo Burauen, extended the city's greetings at a reception held at the Wallraf-Richartz Museum.

To the thorough advance planning and the gracious hospitality could be attributed the success of the conference, (the hospitality being provided by the host organization and the members of the German legal profession) and particularly to the efforts of Dr. Emil von Sauer, President of the Deutscher Anwaltverein and of the International Bar Association and to the Vice-President and officers of the Deutscher Anwaltverein.

The Gurzenich, where the working sessions of the conference and the opening session were held, is the site of ecclesiastical and civil headquarters from medieval times. It has been completely restored and modernized since World War II, and is now a unique and striking blending of the new and the old.

At the general meeting, constitutional amendments were approved to provide for one member of the Council from each member organisation, and to permit the variation from country to country of the patron's or subscriber's contribution to the Association. As a result it is hoped that many new patrons or subscribers will be enlisted to support the Association. The general meeting also approved in principle the report of the joint Commission of the Association and the Union Internationale des Avocats and a study of a possible fusion of the two organizations was approved.

It was also decided to continue negotiations for the establishment of an International Legal Aid Association under the auspices of the International Bar Association. Funds for an initial period of two years have been collected by the National Legal Aid Association of the U.S.A. and by the Committee on Legal Aid of the American Bar Association.

The newly-constituted Council of the I.B.A. consists of 27 representatives from 22 countries among which New Zealand was included, the name of the nominee from New Zealand having yet to be referred to the New Zealand Law Society for its approval.

The topics discussed in the plenary sessions and symposia were as follows :

International Problems of Tort Liability and Financial Protection arising out of Atomic Operations ; The American Close Corporation and its Equivalents and the Status of Wholly-Owned Subsidiaries in other Countries ; Monopolies and Restrictive Trade Practices ; Committee Meetings were held to consider the following : Consideration of the Various Plans for Providing Retirement Income for Member of the Legal Profession ; Insurance Protection against any and all types of Lawsuits ; International Shipbuilding Contracts ; International Judicial Co-operation—Bases for Agreement between Civil Law and Common Law Countries ; Administration of Foreign Estates ; Protection of Investments Abroad in Time of Peace ; Qualification to Practice Law in the Foreign and International Field Legal Aid ; Professional Ethics.

The use of simultaneous translating equipment for meetings held in the Great Hall of the Gurzenich contributed to the interest and accomplishment of those sessions.

The Association hopes that it will be possible to include all papers and reports in the official conference report.

The social programme was held on a very high level. Conferees were warmly welcomed at the opening session by the President of the Deutscher Anwaltverein, by the Minister of Justice and on behalf of the Lord Mayor of the City of Cologne. Responses were made on behalf of the various countries, that of New Zealand being ably made by Mr Justice McGregor.

History and art in the baroque style surrounded conferees and their guests when they were welcomed by the Federal Minister of Justice. The castle's beautiful gardens were also open.

Daily excursions were arranged for guests. An excursion was also arranged for everybody when buses drove from Cologne to Petersberg atop one of the "Seven Mountains" where the German hosts offered a "kaffeetafel." In this historic spot which was the seat of the three Western powers from 1948 to 1953, conferees spent a pleasant afternoon, and returned to Cologne via river steamer to the strains of a German band.

The officers of the Association and retiring councillors were invited to Bonn to meet Chancellor Adenauer. There the Chancellor recounted his early years as a practising lawyer in Cologne and expressed his firm faith in the rule of law as the only possible basis for civilization and for peace. He deplored the decline in

(Concluded on p. 16.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Tucker Report.—The report of the twelve members of a departmental committee set up in June 1957 largely as the result of counsel's criticisms in the case of Dr. John Bodkin Adams is now available. After much deliberation and a considerable amount of evidence, it has unanimously reached a conclusion in regard to publicity arising from the committal of an accused person for trial. If the report is adopted, the following particulars only are publishable before the discharge of the accused or the end of the trial: (a) the identity of the Court and the names of the examining Justices; (b) the name, address, occupation and age of the accused; (c) the name, address and occupation of the prosecutor; (d) the offence or offences (or a concise summary of them) with which the accused is charged; (e) the name, address, occupation and age of the witnesses; (f) the name of counsel and solicitors engaged; (g) the decision to commit for trial, the charge or charges (or a concise summary of them) on which the accused is committed and the Court to which he is committed; (h) where the proceedings are adjourned, the date to which they are adjourned; and (i) on committal or adjournment, whether or not the accused is admitted to bail, and if admitted to bail, the terms of his bail. The Press and its representatives, almost without exception, opposed in evidence before the committee any change in the law; and, as might be expected, the report has been followed by a series of moans and howls from the dailies of Fleet Street.

Fingerprint Evidence.—In *According to the Evidence* (Cassell, London, 1958), Mr Gerald Abrahams, formerly acting Professor of Law at Belfast University, refers to the lengths to which the police have gone in the detection of crime through the medium of fingerprints. As recently as 1948, a man named Griffith was executed at Liverpool, having been proved the perpetrator of a most appalling child-murder. The proof was mainly through fingerprints and footprints. The marks of large feet approaching the bed from which the baby was snatched constituted useful yet not convincing evidence. But with the identification of his fingers as the probable source of marks left on the scene of the crime, the case became overwhelming. In order to trace the man, it may be mentioned, the police (with the co-operation of the public) fingerprinted the entire male population of Blackburn, and many who had left the town. He proceeds, however, to put forward an interesting theory that may have its appeal to some counsel in the future. From the standpoint of the lawyer, he says, it is worth remarking that fingerprints may be said to constitute a legal departure. To the best of the author's knowledge, it has not yet been argued, yet it seems to be true, that use by the prosecution of fingerprint evidence is a contravention of the Anglo-Saxon principle that the prisoner is not a compellable witness. Further, it is arguable that where, in an English Court, the only evidence is fingerprint evidence, the jury are probably being told, inferentially, that the prisoner has a criminal record. These reflections do not mitigate the fact that in modern times the finger has become the finger of accusation, and is more eloquent than the tongue.

Encumbrance Note.—The evidence of a defendant recently that his condition while driving after a wedding breakfast was one "cumbered with food and drink" reminds Scriblex that there is, in Westminster Abbey, a statute to St. Uncumber. According to Ivor Brown, in his *Having the Last Word*, this lady, originally of Royal Portuguese descent, has the double distinction of being both a saintly and a circus type. For she was a bearded woman as well as a benefactress of wives; her particular power was to get rid of unsatisfactory husbands. She also seems to have had a curious and somewhat farmyard appetite, since the usual offering made by distressed wives in search of conjugal relief, was a gift of grain Of St Uncumber, Sir Thomas More observed that "for a peck of oats she would provide a horse for an evil husband to ride to the devil upon" and there are other references to the oat-offering The functions of St Uncumber, Ivor Brown adds, have now been largely taken over by those legal gentlemen who cumber themselves with wigs.

Skylarking.—A local newspaper carries the report of a decision by three Judges of the New York State Appellate Division in the case of a compensation claim by a messenger boy of seventeen who injured his eye while amusing himself by shooting paper clips with a rubber band. This Court held that "momentary indulging in some diversion may be expected of boys and young men full of life and health and may become part and parcel of the employment." They also noted that "the injury arose from the use of office supplies readily available to the messenger boys." The case is somewhat in contrast to *R.* v. *National Insurance (Industrial Injuries) Commissioner, ex parte Richardson* [1958] 1 W.L.R. 851, where the applicant, who was an omnibus conductor, was injured when two young hooligans jumped on to the platform of the bus and kicked and struck him. While recognizing that the injury had arisen in the course of the applicant's employment, the National Insurance Commissioner held that the accident did not arise out of his employment as the evidence showed that other persons had been similarly assaulted, and it was not shown that the particular attack was connected with the applicant's employment. In New Zealand, we appear to follow the view of Slesser L.J. in *Calton* v. *Samuel Fox & Co.* (1938) 31 B.W.C.C. 43; but the mere fact that boys tend to indulge in larking and horseplay without proof of some special inducement or special risk is not in itself to be taken to be an incident of the employment, giving rise to a right to compensation merely from the fact that the injury has happened. The important element is whether there is in the character of the employment, or in the surrounding circumstances, something that creates a risk peculiar to the employment: *Swaney* v. *Blackwell Motors Ltd.* [1954] N.Z.L.R. 948.

Tailpiece.—*Senior-Sergeant*: This is an historic occasion, Your Worship. The accused today makes her two hundredth appearance.

The Magistrate: What am I expected to do—clap?

INTERNATIONAL BAR ASSOCIATION.

(*Concluded from p. 14*).

respect for law and expressed the hope that the work of the Cologne Conference would bear fruit and that the I.B.A. would continue its work and further true international understanding in this age of grave division.

On the last evening, the Great Hall was transformed into a ballroom, when Dr von Sauer spoke briefly closing the conference, Mr Lloyd Wright of the U.S.A. responding.

A decision as to the time and place of the 1960 conference was deferred.

D. I. GLEDHILL.

IS PARLIAMENT NECESSARY?

ADVOCATUS RURALIS.

One upon a time, in the last days of our holidays we were handed a single-bore shotgun and a box of cartridges. We went forth and shot a rabbit or two, and several things we weren't supposed to shoot, and having fired off all our cartridges, we left next day for school—thereby dodging the necessity for explaining ourselves.

We were reminded of this as we watched the recent session of Parliament galloping to its close—when, if rumour is true, it was not possible to print the Bills as amended so that members could read them before they were passed.

When we were very young, if we are permitted to coin a phrase, the making of laws was a more leisurely and perhaps a more dignified business than at present.

In the first place, under the New Zealand Constitution Act, our Parliament was then permitted to make laws for the good government of New Zealand, provided such laws were not repugnant to the laws of England. The Mother of Parliaments was genially complacent towards our experimental legislation, and matters of purely domestic evolution, such as the Women's Franchise Bill of 1893; and certain customs and currency matters foreign to English practice were assented to by the Governor without reservation. To let us know that the control was still there, the Divorce Act of 1912 had to be recognized as ultra vires on account of the restriction of appeal to the Privy Council, and the Act was quietly amended in 1913. Since that time the Statute of Westminster has been adopted by the New Zealand Government. This was done after Advocatus had given up studying law, but we doubt if even the No Longer Junior Partner could tell us whether, say, the Habeas Corpus Act, is still good law in New Zealand. The adoption of this Statute of Westminster was, of course, a large onward step in the battle waged by the permanent officials for the control of our statute-making machinery.

Perhaps even worse than the Statute of Westminster was the wiping out of the Legislative Council. In the period above referred to (when we were very young), Parliamentary parties were not dependent on the Maori vote to decide whether they were in or out, and appointments to the Legislative Council were made frequently as an acknowledgment of distinguished service to the country, rather than to a political party. The Legislative Council then adopted the view that its work was not to interfere with the broad issues of legislation, but to see that the Acts passed were workable in the form in which they had passed the Lower House. To the outsider, the Upper House was frequently regarded as a dormitory for aged politicians, but there are probably ex-under-secretaries still living, who can remember the gruelling times they had before the Select Committees of the Upper House. These Committees frequently had a number of lawyers and business men on the panel; and these gentlemen were fully aware of the battle by the Civil Service to make legislation more simple for the Civil Service; and, to where did you say with the taxpayer?

Unfortunately this revisionary attitude was sometimes departed from, and a new Government (always a young man in a hurry) did not want to be stopped by a lot of old fogies. New members of the Legislative Council were therefore appointed on the same principle as volunteers for a dirty job in the two gong war—"Three volunteers wanted tonight—you, you, and you." This, of course, was right into the hands of the Civil Service, and, provided it was wrapped up in long enough words, almost anything could pass the Upper House. The Lower House, of course, never has time to read a Bill—unless it is going to be discussed on the wireless.

The permanent officials were now moving into the position where their chief trouble was the Supreme Court; so as a feeler, in 1936, under the Transport Licensing Amendment Act, they created an Authority to deal with applications for transport licences. By the same Act, a Court of Appeal from this Authority was created—this Court of Appeal being the Minister of Transport himself. Some eighteen years ago, as an appeal under this Act trod on the toes of a client, we refused to appear before this Appeal Court on the ground that the Act was ultra vires. After some weeks of silence, our client complained that he was having difficulty in obtaining permits for tyres. The Department did not pursue the appeal. The Act was, however, amended.

The next move, of course, was government by regulation. This was greeted with enthusiasm by Ministers who were busy opening inns in Invercargill, and whares in Whangarei. Unfortunately, however, the Supreme Court was still in business, and once again the Civil Service received a check. This government by regulation was too good a thing to lose lightly, so, after a tentative feeler or two, a clause (now appearing in s. 167 (6) of the Transport Act 1949) was introduced saying that even if a regulation was too silly for words (a free translation), no Court could upset it. So far on this point the Courts have had to bow to the Civil Service.

And all this is being accentuated because we have no Upper House.