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SOME RECENT FAMILY-PROTECTION JUDGMENTS.

IN the last three months, there have been many applications before the Court under the Family Protection Act 1955. In accordance with the wishes of readers, we give here a selection from judgments dealing respectively with claims by widows, daughters, sons, and grandchildren.

WIDOWS.

In *In re Peacock* (Dunedin, December 22, 1958), the widow claimed for further provision under the Family Protection Act 1955. The testator, who died on January 20, 1954, married the plaintiff on August 9, 1945. The testator had been previously married, but there was no issue of either of his marriages. The plaintiff had been previously married. She had one son of that marriage, who was sixteen years of age when his mother remarried. The testator and the plaintiff were forty-nine years and thirty-seven years of age respectively when they were married, so that the plaintiff at the time of the hearing was fifty years of age. She was forty-six years of age when her husband died.

The plaintiff was given an immediate lump sum of £500 together with an annuity of £500 during her widowhood. The testator clearly considered that his estate would be able to produce a greater annual income, as indeed it did, so he disposed of the balance of the income to his three brothers and sister. The brothers and sister also took the annuity in the event of its ceasing to be payable. There was a substitutionary clause in the event of the death of the brothers and sister. The will provided for a final distribution of the estate upon the death of the last survivor of the brothers and sister. The residuary beneficiaries were the five named third defendants, nephews and nieces of the testator, of whom three were of age.

It was conceded that the plaintiff was entitled to further provision, and, with that concession the Court was in entire agreement. The only question before the Court was what, in terms of the principles laid down, that provision should be.

The learned Judge, Henry J., first dealt with the residue of the estate which was shown in the balance sheet dated July 20, 1956. He said:

> Although the testator died in 1954, it is reasonable to accept that he should regard his estate as being capable of producing the income which it was then producing, and, as being worth approximately the value which it then had. By adopting this method, necessary expenses and duties are taken care of and the Court is dealing with the estate which is really available to provide for the plaintiff and which the testator should properly have considered would be available for that purpose. A balance-sheet dated June 23, 1958, shows a deterioration in the net position, but, by then, the estate had been subjected to considerable unforeseen expenses. The assets in July, 1956, were worth £26,729, less a bank overdraft of £6,600, and (excluding the plaintiff's £500 legacy) pecuniary legacies of £700. That is, the net value available was £19,379 after payment of all pecuniary legacies and costs, and after the payment of the plaintiff's action against the estate to recover certain moneys alleged to be due to her. As I see the position generally, the testator could properly look forward to leaving a net estate of something in the vicinity of £20,000 out of which to provide for his widow's "needs" as that term was used in *Bosch* v. *Perpetual Trustee Co. Ltd.* [1938] A.C. 463; [1938] 2 All E.R. 14, and *In re Goodwin* [1958] N.Z.L.R. 320. The substantial estate of the deceased comprises a one-half interest in a city property which half-share is valued at approximately £23,000. This is the Henry Dodd estate. For the year ended December, 1957, the gross return of rents from the Dodd estate was £4,980 5s. 8d. From this sum rates, insurance, and repairs were paid. At present it is safe to say that the premises will return a rent of £4,000 per annum plus the actual amount of rates. This will leave the Dodd estate the burden of insurance and repairs only. The testator's estate will be entitled to one-half of the net amount available for distribution. A renewal of part of the roof of the building and the sealing of a right-of-way require to be done. Generally, the maintenance expenses have not been high, but prudent management may require further work since the building is an old one and already part of the roof requires renewal. The Court is not aware of the cost of this work. It was contended that a safe basis upon which the return to the testator's estate from his half-share should be based was £1,500 per annum. Perhaps that figure might be increased a little, but it would be unsafe to increase it by very much. It may be called a wise figure but perhaps a little too conservative.

The plaintiff had previously married a Canadian, and, together with her husband, lived in Shanghai. She was an accomplished woman, artistic, and, apparently during her first marriage up till the outbreak of hostilities in the East, lived in reasonably comfortable circumstances. Upon the outbreak of war, she and her son were evacuated to Australia. Her husband fell into enemy hands and ultimately died in a prisoner-of-war camp. When the plaintiff remarried, she was in receipt of a total income of £A14 per week. Her first husband had given her assets worth £3,600. She got a further capital sum of approximately £1,500 after her husband's death. The plaintiff's first husband died in February, 1941, so she remarried just over four years later. At that time she and the testator were both living in Australia. They went to Dunedin for a year. There was no reason to believe that their marriage, which lasted for eight-and-a-half years, was other than a happy one and that she was a

good and dutiful wife. The testator did not work. He then had a considerable income from his investments in shares and from the half-interest in the building already mentioned. The plaintiff sent £2,000 to relatives and spent some £2,000 on her son's education, which included a trip round the world. She claimed that capital moneys so spent were spent with the testator's approval. Her husband took over her investments and his activities in that connection resulted in an action which was brought against the estate, in respect of which action the plaintiff was awarded a sum of £913 14s. 10d. She had been paid her pecuniary legacy of £500 and appeared to be left with only £460 in a Savings Bank account as her sole capital asset. She had had considerable expense for medical attention and also in respect of an acute difficulty with her sight. There was no suggestion that she had, since her husband's death, unnecessarily denuded herself of her capital. On the contrary, it was clear her income had not been sufficient to sustain her and that she had had to have resort to her capital to augment the annuity.

His Honour said :

I consider the proper standard to which this Court should have regard is that standard which, in fact, the testator adopted during the eight-and-a-half years of his married life. It was a reasonable standard in all the circumstances, and a proper one upon which the fair requirements of the plaintiff should be based. For this reason, I do not consider it proper to accede to the claim that a home should be provided for the plaintiff during her life, or that she should be placed in a position to make a world trip [which she and the testator had proposed to make]. Moreover, to comply with that request it would be necessary to raise a further substantial sum upon the half-share in the Dodd estate, or even probably to sell it. That would materially cut down the income-earning capacity of the estate and should not be done. The estate is now substantially the half-share in the Dodd estate previously mentioned and already it is encumbered by reason of an overdraft for a substantial sum. The provision for the plaintiff should be within the income producing capacity of the estate, without further encroachment on capital unless there is a drastic change in circum-

His Honour continued :

After a careful consideration of the affidavits which throw light on the plaintiff's health, and, taking into account all the matters which have been pressed upon the Court by counsel for the plaintiff, I consider that the plaintiff should have the annuity increased to £1,000 per annum as from the date of death of the testator. The arrears of annuity will provide a lump sum which will reimburse the plaintiff for the capital she has had to use to augment her income since the date of death. All sums payable to the plaintiff (including her pecuniary legacy) are to be paid free and clear of all estate or succession duty. No interest shall accrue or be deemed to have accrued in respect of the arrears of annuity which now become payable. There does not appear to be any necessity to grant the request of the plaintiff's counsel that the annuity should be charged on capital. If the position so changes that such a charge is necessary, further application may be made in the light of circumstances then prevailing. No order is necessary as to the incidence of the additional provision since the substitution of the new annuity for the old itself resolves any such question. If necessary, leave is reserved for counsel to make further submissions on this point. Costs of each party shall be paid out of the estate. Costs, except those of the trustee which are otherwise provided for, are reserved for counsel to confer with the Registrar and thereafter to submit proposed amounts to the Court. Costs are reserved on this basis accordingly.

In *In re Woodward* (Napier, December 22, 1958), Cleary J. had to consider a widow's application. The applicant was aged fifty-seven years, and was married to the testator in 1920. There were three children, Mrs Bunn, Donald Woodward, and David Woodward, the last-named having been adopted in infancy by the testator and the applicant. All the children were adult, and Mrs Bunn had four children of her own, ranging from seventeen years down to five years. The estate after payment of death and administration expenses, consisted wholly of a dwellinghouse at Bay View with four acres of land valued at £2,000.

The applicant lived with the testator until his death in April, 1957, and worked hard in times of adversity through which they passed. The applicant stated that the testator had often said that on his death she would receive the Bay View property free from any mortgage, and in January, 1943, the testator made a will leaving her the whole of his estate. Despite this, on November 17, 1954, he made another will leaving his estate to the daughter Mrs Bunn for life, and after her death for her children on attaining twenty-one years, or if female, marrying before that age. The reason for this will was that, in 1952, the applicant and both sons became members of the Seventh Day Adventist Church. The testator took strong exception to this and told the applicant she would never get the property. Apart from this difference as to religious matters, Mrs Bunn spoke of the applicant and the testator as having lived harmoniously together.

The four acres at Bay View was acquired through the initiative of the applicant in 1942 for £220, when the testator was serving with the Air Force. Mrs Bunn said that at the time it was covered with tussock and scrub and that the applicant and the two sons worked extremely hard clearing the property. It was described by counsel as being low-lying land liable to flood in winter and being dry in summer. After being cleared, the land was used as a market garden and the applicant herself worked hard in the market-gardening operations. Some ten years ago, a packing shed on the property was converted into a dwelling-house which had since been added to ; but, at the time of the testator's death, it was still in a rather primitive condition with limited conveniences and required further improvements. By various ways which it is unnecessary to recapitulate, the applicant provided £300 from her own earnings and resources towards the purchase of the property and the building of the house.

The applicant had no assets and apart from her Social Security benefit had no income. She appeared to be no longer able to work as she was accustomed to in the past. Her application was made on the advice, His Honour gathered, and with the encouragement of Mrs Bunn and the two sons. Mrs Bunn's husband was in reasonably comfortable circumstances with assets approaching £6,000 in value. The two sons were self-supporting.

His Honour said :

There is no question, of course, that the applicant is entitled to relief as she has been wholly excluded from the testator's punitive will. Nor can there be any question that the least to which she is entitled is a life interest in the Bay View property, but, on her behalf, Mr Twomey asked that the property be vested in her. On behalf of Mrs Bunn's children, however, Mr Monagan, quite properly felt constrained to resist the vesting of the property in the applicant, although he agreed that if it were practicable the merits of the applicant were such as to entitle her to rather more than a life interest in the property.

I have given the best consideration I can to the nature of the relief which should be ordered for the applicant. I can see no alternative between giving the applicant a life interest in the Bay View property on the one hand, and the vesting of it in her absolutely on the other hand. It is not feasible in the circumstances of this case to provide for payment

to the applicant of a periodic sum, and I do not think the suggestion discussed in argument that the property be charged with a fixed sum for the testator's grandchildren is really workable. There is one factor which influences me towards the exceptional course of vesting the property in the applicant, and that is that one of the sons is prepared to complete the house so that his mother will be comfortable, if an order is made vesting the property in her.

I have referred to this course as being an exceptional one; and I bear in mind what was said by Gresson J. in giving the judgment of the Court of Appeal in *In re Williamson* [1954] N.Z.L.R. 288, 300, that unless there are special reasons to warrant payment to a widow of a lump sum such an order should not be made. There have, however, been exceptional cases where such orders have been made in small estates, such as the unreported case of *In re Bond* referred to *In re McInnes* [1942] N.Z.L.R. 547, 552, and in *In re Thomas* [1953] N.Z.L.R. 302. Even where there have been no infant children, such orders have on occasion been made. The unreported decision of T. A. Gresson J. in *In re Parker* referred to in (1958) 34 N.Z.L.J. 36 appears to be such an instance. I think the present case is an exceptional case where I am justified in making such an order. There is the consideration I have already mentioned as to the willingness of one of the sons to complete and improve the house; and, although I must bear in mind that the paramount question is the need of the applicant, I am also entitled to have regard to the contributions she has made both in cash and in labour to the Bay View property. Moreover this is not a case where anyone with a moral claim on the testator would be excluded by the course I propose to take. It seems to me that the designation of the grandchildren as beneficiaries arose principally from the testator's unreasonable attitude towards the applicant, and, in any case, it would appear that their parents will be able to provide for them. Having regard to these considerations, to the size of the estate, and to the circumstances under which the will was made, I think that in this case there are special circumstances and that I may make the order sought by the applicant.

His Honour concluded by saying that he was not altogether clear whether all liabilities of the estate had been completely satisfied, although his impression was that they had been. But there was probably no estate, apart from the property, to meet the costs of the proceedings. In these circumstances he said that the applicant would have to bear her own costs, and he fixed the costs of the parties represented by Mr Monagan and the costs of the trustee at fifteen guineas each, together with disbursements.

Subject to the applicant undertaking to the satisfaction of the trustee the discharge of any liabilities of the estate which might still be outstanding and the costs fixed as above, it was ordered that the trustee hold the estate of the testator for the applicant absolutely.

In *In re Price* (Wellington, November 28, 1958), an application under s. 12 of the Family Protection Act 1955 for an increase in an annuity ordered in favour of the claimant by an order made in March, 1957, was heard by Hutchison J. who had made an order that the widow, the claimant, should have £364 per annum, the trustee to pay the outgoings on the house which she would use, but that, when she became entitled to Universal Superannuation, the annuity should be reduced by the amount of the Universal Superannuation. His Honour expressly said that it was entirely for her to say whether or not she wished to work, and that her annuity was not to be affected if, in fact, she worked and earned moneys.

Her application was to allow her to have the £364 and to have the Universal Superannuation in addition. This presently amounted to £110. There was a policy statement by the Government that the Universal nuperannuation would be increased to £156 as from April 1, next.

His Honour, in an oral judgment, said:

I am unhappy about this application, for the reason that, while the claimant sets out a statement of her expenditure over a period of two months, which accounts for out-payments of about £6 a week, which would absorb the whole of her annuity, all but a few shillings per week, and she says that she cannot buy any clothes, we still do not know what has become of the £10 a week that she did, in fact, earn over a period of about fifteen months. As Mr Virtue said, she may have some tax liability having regard to those earnings plus the annuity. Another thing that makes one unhappy is that it now appears that she has a bank account with the Bank of New Zealand. It does appear to be true that she uses that simply as an account to receive the moneys from the Public Trustee and on which to draw for what she needs; but nevertheless, it has gone up somewhat and there is £154 in it, and that is an asset that has not been disclosed.

I think that no reasonable criticism can be made of the widow's spending a few shillings a week on her cats and £1 a week on her motor-car. It seems clear to me that reasonable maintenance and support for a widow, aged now sixty-five years, of a man who left an estate of £7,000 odd must include reasonable provision for hobbies, and I see nothing serious to cavil at in the payment of £1 a week for the car and a few shillings a week for the maintenance of cats. I am inclined to think that I was a little bit low when I fixed the £364. That is a factor that I think can be taken into consideration under what the Court of Appeal said in *Kallil v. Koorey* [1957] N.Z.L.R. 31, 38, as read by Mr Rose, though it should not be given a great deal of weight. I think we may take it that costs have risen over the eighteen months or more since the order was made and that the increase in costs bears somewhat hardly on persons on fixed annuities. I am inclined to increase the amount of this annuity, but I am not prepared to go as far as Mr Rose says in the state in which we find ourselves of ignorance as to what happened to the £10 per week, and with no real explanation why the additional moneys held in the Bank of New Zealand were not disclosed.

His Honour made an order for an interim increase of £1 a week in the annuity, that to apply straightaway, and the parties might come back when the further information which ought to be before the Court was available, and the application on behalf of the widow could then be further considered.

His Honour was inclined to think, in any event, as far as costs were concerned, that the parties should pay their own costs, but that was reserved in the meantime.

In re Ritchie (Court of Appeal. December 8, 1958) was an appeal from an order made by Hutchison J. on the application of the widow of the testator, whose net estate amounted to approximately £6,500—£782 the value of furniture and motor-car, realty valued at £4,662 and cash. The realty consisted of a property at Wellington worth £2,850, and the half-share of a property at Sumner, the value of the half-share being £1,812. The testator and his wife held this property as tenants in common in equal shares. The widow was fifty-six years of age and was married to the testator on March 27, 1939. He had three children of an earlier marriage all living and married; the respondent has a grown-up son of her first marriage. The testator by his will dated January 17, 1952, gave his estate after payment of debts, funeral, and testamentary expenses upon trust to pay to his wife until her death or remarriage the whole of the net annual income and to permit her to occupy the property jointly owned by them both subject to her paying all rates, taxes, insurance premiums and maintenance. Upon her death or remarriage the estate became divisible between his three children above mentioned. The respondent had considerable assets of her own.

The order made by Hutchison J. allowed the widow during life and widowhood an annuity of £416 per

annum charged on capital but later to be reduced by whatever amount the plaintiff should receive by way of Universal Superannuation. The order made in her favour contemplated the expediency of a sale of the property jointly owned in which event another property might with the consent of the trustees be purchased and the trustees were authorized to make an advance on first mortgage bearing interest at five per cent on any property so purchased the term of the mortgage to be for the life or widowhood of the widow and to be in the usual form. The order gave absolutely to the widow the furniture and motor-car owned by the deceased at the date of his death. In the Court of Appeal it was claimed that the order in the respondent's favour was too generous, in that her Church Bay property was capable of producing income for her, or, if sold at its value of £1,000, might be expected to produce about £50 per annum. This asset was not overlooked by Hutchison J. when he fixed, as he did, £8 per week as an appropriate annuity for the widow for he concluded that part of his oral judgment which related to the annuity with the observation; "The effect of this is to leave her any income that she may have from the Church Bay property and not to bring that into account." It was upon this aspect of the matter that counsel for the appellants concentrated his attention. He conceded that, if the respondent had not had the Church Bay property, the order made in her favour would not have been too much; but he claimed that, having regard to her ownership of the Church Bay property and her ability to obtain income from that source in some way, the annuity should not have been fixed at so high a figure as £8 per week.

The question raised by the appeal was therefore whether the provision ordered by Hutchison J. for the applicant widow was unjustifiably generous.

The judgment of the Court of Appeal, delivered by Gresson P., said in part:

> We are inclined to agree that the order made in the respondent's favour was on the generous side but we are not satisfied that the learned Judge in the Court below reached a wrong conclusion and therefore do not consider we should disturb the order made by him: see *In re Goodwin, Goodwin* v. *Wilding* [1958] N.Z.L.R. 320, 330. She has considerable assets of her own of a total value of £3,377. The expectant income of the estate has been estimated at £163, hence payment of the annuity charged as it is on the capital of the estate will over the years reduce the corpus considerably. If the respondent wishes to remain in the house (half of which she owns herself) considerable expenditure is inevitable. The house is in a bad state of disrepair. It is reported on as requiring a thorough overhaul and may require to be completely re-roofed. If, on the other hand, it is put in order and sold for a sum somewhere between £3,650 and £4,000 yielding after the cost of the renovations possibly £3,500, the respondent will then have to purchase another house for a home for herself. She will have her half-share of the purchase money—something less than £2,000—and she can borrow from the estate; but will have to pay interest on any amount so borrowed. In either event, she will have £8 per week to live on plus any income that her Church Bay property can be made to yield. None of the children has been shown to be in such circumstances as to require every effort being made to conserve the capital of the estate. . . . How much of the capital of the estate will be available for distribution amongst these children at the death or re-marriage of the respondent it is impossible to forecast. But the recourse to capital of the estate will be diminished by something over £100 a year as soon as the respondent becomes qualified to receive Universal Superannuation.

The appeal was accordingly dismissed.

SUMMARY OF RECENT LAW.

NEW YEAR HONOURS.

Knight Bachelor—

The Honourable Mr Justice Hutchison, Wellington.

Officer of the Most Excellent Order of the British Empire (O.B.E.)

Mr Campbell Larnach MacDiarmid, Hamilton.

Mr Arthur Montague Ongley, Palmerston North.

CRIMINAL LAW.

Evidence—Deposition of Witness "so ill as not to be able to travel"—Witness suffering from Aphasia but able to attend Court—Such Witness within Description—Deposition to be read as of Right—Manner of Presentation of Medical Evidence as to Witness's Condition—Summary Proceedings Act 1957, s. 184 (1). Under s. 184 (1) of the Summary Proceedings Act 1957, the trial Judge is to rule whether a person who has made a deposition is "so ill as not to be able to travel"; but, if he does so rule, either counsel may have the deposition read as of right. (*R.* v. *Ferguson* [1950] N.Z.L.R. 583; [1950] G.L.R. 452, followed.) Where it appeared from medical reports placed before the trial Judge that the witness was probably medically unfit by reason of aphasia to give evidence, though physically fit enough to come to Court, he was "so ill as not to be able to travel", as those words are used in s. 184 (1). (*R.* v. *Cockburn* (1857) 7 Cox C. C. 265 and *R.* v. *Wilson* (1861) 8 Cox C. C. 453, applied.) *Semble*, The evidence of the medical practitioner who made the principal report on the condition of the prosecution witness should be taken in the presence of the jury, so that counsel for the accused could have before the jury his answers to any questions directed as to the condition of the witness at the time when the depositions were taken. *The Queen* v. *Rea.* (S.C. Wellington. 1958. November 10. Hutchison J.)

FISHERIES.

Toheroas—Person charged with "opening toheroa at a place below high-water mark"—Regulation creating such offence ultra vires—Fisheries Act 1908, s. 5—Toheroa Regulations 1955 (S.R. 1955/206), Reg. 6. There is nothing in the Fisheries Act 1908 (except in special circumstances relating to oysters) giving express power to make regulations governing the opening of fish or shellfish or to make it an offence to do so. (*Crosbie* v. *Mercury Bay Co-operative Dairy Co. Ltd.* [1937] N.Z.L.R. 314; [1937] G.L.R. 258, distinguished.) Consequently, Reg. 6 of the Toheroa Regulations 1955: "No person shall open toheroa in any place below high-water mark"—is ultra vires the Fisheries Act 1908. (*Smith* v. *Crabbe* (1910) 30 N.Z.L.R. 286; 13 G.L.R. 289, referred to.) *Quaere*, whether uncertainty, as distinct from unreasonableness, renders a statutory regulation ultra vires, when the subject is charged with a criminal offence. (*Brierly* v. *Phillips* [1947] K.B. 541; [1947] 1 All E.R. 269 and *R.* v. *Minister of Health, Ex parte Davis* [1929] 1 K.B. 619, referred to.) *Strawbridge* v. *Simeon and Others.* (S.C. Auckland. 1958. September 17. Hardie Boys J.)

LAND TRANSFER.

Certificate of Title—Mining Privileges—Validly-granted Mining privileges under the Mining Acts prevailing over Certificate of Title and over Bona-fide Purchasers of Land Transfer Land—Land Transfer Act 1952, s. 62—Mining Act 1926, ss. 44, 58, 97, 98, 106 (j).—Mining—Mining Privileges—Lands other than Crown Lands—Warden's Jurisdiction not limited to Gold-mining Privileges—Mining Privileges prevailing over Certificate of Title under Land Transfer Act—Mining Act 1926, s. 58. The holder of a certificate of title under the Land Transfer Act takes subject to all valid grants made under the Mining Acts, and, as neither registration under the Land Transfer Act nor the lodging of a caveat is necessary, validly-granted mining privileges prevail over bona-fide purchasers who acquire a "clean certificate of title" under the Land Transfer Act. (Dictum of Williams J. in *Gray* v. *Urquhart* (1910) 30 N.Z.L.R. 303, 308; 13 G.L.R. 406, 408, applied. *Bishop* v. *Rowe* (1903) 23 N.Z.L.R. 66; 5 G.L.R. 504, referred to. *MacKenzie* v. *Waimumu Queen Gold-dredging Co. Ltd.* (1901) 21 N.Z.L.R. 231, distinguished.) The Warden's jurisdiction under s. 58 of the Mining Act 1926 is not limited to the granting of privileges for the mining of gold. *Miller* v. *Minister of Mines and Attorney-General.* (S.C. Invercargill. 1958. October 10. Henry J.)

Mortgage—Mortgagee in Possession—First Mortgagee in possession refusing Redemption by Second Mortgagee—Taking of Accounts between them—Nature of Order. Where an order is made for the taking of accounts, between a first mortgagee in possession and the second mortgagee, of the rents and profits of land received by the first mortgagee in possession, the first mortgagee having denied the second mortgagee a right to redeem, the account over the whole period of the first mortgagee's possession should be ordered to be taken with rests. (Statement of Callan J., in *Couzens* v. *Francis* [1948] N.Z.L.R. 567; [1948] G.L.R. 193, followed.) There is no power for the Court to order that the first mortgagee should be credited in the account with interest at the rate of 6 per cent. per annum, and not the penal rate, because the first mortgagee's right to the penal rate is contractual. (*Union Bank of London* v. *Ingram* (1880) 16 Ch.D. 53, followed. *Wrigley* v. *Gill* [1906] 1 Ch. 165, distinguished.) The account should be taken up to the time when the first mortgagee denied the second mortgagee a right to an account and to redemption; but, for the period after that date, the second mortgagee should on settlement pay the first mortgagee simple interest up to then at the rate of 5 per cent. per annum on the amount found by the account to be due. In the redemption action in the Supreme Court between the same parties, *Richards* v. *Weggery* [1957] N.Z.L.R. 621, the formal judgment reserved the question of costs. There was nothing in the mortgage document itself, which in terms applied to those costs; and, in exercise of his discretion, the learned Judge disallowed the first mortgagee his costs as a mortgagee, as it was his refusal of the second mortgagee's request for accounts and redemption that compelled the second mortgagee to take that action. An order was made referring to the Registrar the taking of accounts sought by the second mortgagee. *Weggery* v. *Richards.* (S.C. Wellington. 1958. September 26. Hutchison J.)

LICENSING.

Offences—Sale of Liquor during Closing Hours—Person accommodated overnight in Annexe not forming Part of Licensed Premises but entitled to Meals and Services offered by Hotel—Such Person "not really lodger living or staying in the licensed premises"—Licensing Act 1908, ss. 190, 191. A person is not within the description of a "lodger" (as that term is used in s. 191 of the Licensing Act 1908), unless he sleeps in the licensed premises, or, at all events, he has a room in those premises in which he may sleep if he so desires. (*Heawood* v. *Bone* (1884) 13 Q.B.D. 179, referred to.) Consequently, no one can be regarded as having the status of a "lodger", or be "really a lodger living or staying in the licensed premises", within the meaning of s. 191 of the Licensing Act 1908, unless there is on his part, and on the part of the licensee, an intention that he will at least have a room in which he can sleep or spend the night. Thus, where a person who had "booked in" at a licensed hotel but is accommodated overnight in an annexe not forming part of the licensed premises (though he pays the full hotel tariff and is entitled to meals and other services offered by the hotel) and purchases liquor in the bar of that hotel after closing hours, the licensee is guilty of selling liquor during the time at which licensed premises are directed to be closed in breach of s. 190 of the Licensing Act 1908, since the person so accommodated had not acquired the status of a "lodger". *Bennett* v. *Mitchell.* (S.C. Nelson. 1958. December 11. Barrowclough C.J.)

NATIONAL EXPENDITURE ADJUSTMENT.

Annuity payable to Divorced Wife under Husband's Deed of Covenant Entered into on Making of Decree Absolute—Husband's Performance of Obligations thereunder secured by Husband and Second Wife giving Security over Their Jointly-owned Property—Death of Husband—Second Wife's Application for Modification of Maintenance Payments—Second Wife able to comply with Terms of Deed of Covenant without "causing undue hardship"—Application refused—"Undue hardship"—National Expenditure Adjustment Act 1932, s. 42. By a deed of covenant made on December 12, 1955, and approved by the Court on the making of a decree absolute, H. covenanted, inter alia, to provide his first wife with a free home and maintenance at the rate of £5 per week for her lifetime or until her remarriage. H. gave security over certain property. H. remarried and, in March, 1957, he and his second wife charged a substituted property, in their joint names, with a new memorandum of encumbrance to secure the first wife an annuity of £260. H. died on April 30, 1957. He bequeathed his whole estate to his second wife. As at April 14, 1958, payments to the first wife, who was in poor health, had fallen into arrears amounting to £217 7s. 7d. causing her acute financial embarrassment. She gave notice under s. 92 of the Property Law Act 1954, of her intention to exercise the power of sale in pursuance of the memorandum of encumbrance. The second wife, as executrix of H.'s estate and on her own behalf, applied for relief under s. 42 of the National Expenditure Adjustment Act 1932, by modification and reduction of the first wife's maintenance of £5 per week under the deed of covenant, on the ground that the terms of that deed could not be complied with or could not be complied with without causing undue hardship to H.'s estate or to the second wife, and on the ground of change of circumstances. *Held*, 1. That the Court should not lightly upset or go behind the terms of the deed of covenant freely entered into by H. and the second wife. (*Morton* v. *Morton* [1954] 2 All E.R. 248, applied.) 2. That, on the facts, the second wife could comply with the terms of the maintenance covenant without causing undue hardship in terms of s. 42 (*1*), and the application should be dismissed, although the loss of H.'s income made compliance onerous, capital might have to be resorted to, and a less expensive home acquired by the second wife; but her application could be renewed when the first wife became eligible for an age benefit. Observations on the Court's reluctance to modify contractual relations in the absence of "undue hardship" and on the proper application of the National Expenditure Adjustment Act 1932 to cases of this sort. (*In re Parr* [1936] G.L.R. 283, considered. *Turner* v. *Turner* [1935] N.Z.L.R. 235; [1935] G.L.R. 257, and *In re a Deed of Separation, J. with J.* [1935] N.Z.L.R. s. 20, referred to.) *Higgins* v. *Higgins.* (S.C. Auckland. 1958. December 18. T. A. Gresson J.)

Restoration of Rent to Original Amount provided in Lease—Jurisdiction—Application for Restoration to Annual Rent not Exceeding £300 to be made to a Magistrate—National Expenditure Adjustment Act 1932, ss. 38 (3)—Finance Act 1933, s. 2. Where rent under a lease was compulsorily reduced by 20 per cent. under the National Expenditure Adjustment Act 1932, the Supreme Court has no jurisdiction to entertain an application for restoration of the rent to the original figure provided by the lease unless that rent exceeded £300. In all other cases, the application must be made to a Stipendiary Magistrate from whose order, in terms of s. 2 of the Finance Act 1933, no appeal lies. By reason of s. 38 (3) of the National Expenditure Adjustment Act 1932, and of s. 2 of the Finance Act 1933, the Supreme Court must decline jurisdiction to hear and determine the questions of construction and interpretation of s. 38 raised before it in the application for restoration of the original rent and placed before it on originating summons under the Declaratory Judgments Act 1908. (*Auckland Harbour Board* v. *Northern Roller Milling Co. Ltd.* [1946] N.Z.L.R. 701, distinguished.) *Auckland Harbour Board* v. *New Zealand Shipping Co. Ltd.* (S.C. Auckland. 1958. December 18. T. A. Gresson J.)

NEGLIGENCE.

Invitor—Customer of Hotel Stepping on Rubber Mat projecting on Hotel Entrance Step—Mat giving Way and Customer injured—Duty of Hotelkeeper as Invitor. A customer of an hotel is the invitee of the occupier, the hotelkeeper, who owes him the highest duty to take reasonable care that the premises are safe. There is no absolute warranty that the premises are safe, but only that reasonable skill and care have been used to make them safe. The invitee must use reasonable care for his own safety. (*London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737; [1951] 2 All E.R. 1, followed. *Hall* v. *Brooklands Auto-Racing Club* [1955] 1 K.B. 205, referred to. *Weigall* v. *Westminster Hospital* [1936] 1 All E.R. 232, distinguished.) *Ritchie* v. *Harris.* (M.C. 1958. August 13. Coates S.M., Pukekohe.)

PUBLIC WORKS.

Compensation for Land Taken—Pasture Land with Underlying Metal Deposits—Principles on which Compensation Awarded—Injurious Affection—Measure of Compensation for Loss of Outlook to Claimant's Remaining Land by Reason of Work to be done on Land taken—Public Works Act 1928, s. 42. Public Works—Compensation for Land Taken—Costs—No Formal Offer of Compensation made to Claimant—Claim Excessive—Exercise of Discretion as to awarding Costs to Claimant—Statutes Amendment Act 1939, s. 64 (3). Where pasture land is taken under the Public Works Act 1928, deposits underlying the land must be regarded as part of the land itself; and it is neither practicable nor desirable to attempt to value the land and the metal deposits separately; but due weight must be given to any potential value it may have. This value is the extent to which the presence of the deposits would have affected

the price realized if the land had been offered for sale on the date of taking. The fact that the metal taken from the land is likely to result in a profit for the local authority taking the land by sales, to private purchasers, is no concern of the Compensation Court, save to the extent that evidence that metal can profitably be quarried may indicate the extent to which, if at all, the presence of the metal gives additional value to the land, but that must be balanced against the fact that while that land had high value as pasture land, its value for that purpose would be substantially destroyed by the quarrying of metal. Loss of outlook to a homestead area retained by the claimant—giving to the term "loss of outlook" a liberal interpretation—may be the subject of an award of compensation, the true measure to which the claimant is so entitled being the depreciation in value to his remaining land. Where no formal offer is made by the local authority to the claimant, the discretion as to costs conferred in the Compensation Court by s. 64 (3) of the Statutes Amendment Act 1939 is to be exercised on the footing that the claimant was obliged to bring the claim before the Court. *Vile* v. *Manawatu County*. (L.V.Ct. Wellington. 1958. December 8. Archer J.)

STATUTE.

Interpretation—Offences—Two Offences created by Same Section—Command and Prohibition, for Breach of Either of which Penalty provided—Weights and Measures Act 1925, s. 20—Acts Interpretation Act 1924, s. 5 (j). See WEIGHTS AND MEASURES (*infra*), *Wynn Abel Ltd.* v. *Montgomery*. (S.C. Auckland. 1958. December 11. Hardie Boys J.)

TENANCY.

Possession—Payment and Acceptance of Rent after Notice to Quit—Intention of Parties—Landlord demanding Rent and Giving Receipts "For Use and Occupation without prejudice to Notice to Quit"—Tenancy terminable by Month's Notice implied—Landlord negotiating for Fair Rent and having Agreement approved by Rents Officer—Evidence of New Tenancy—Tenancy Act 1955, s. 25. Payment and acceptance of rent after the expiration of a tenancy for a fixed term operates in favour of the tenant, as implying the creation of a new tenancy or a continuance of tenancy, if it can be shown that such as the intention of the parties, which should be attributed to their actions and accompanying statements at the time when payment was made and accepted. (*Clarke* v. *Grant* [1950] 1 K.B. 104; [1949] 1 All E.R. 768 followed.) The procedure sanctioned by s. 25 of the Tenancy Act 1955 is available only to a landlord and tenant of property who stand in that relationship by virtue of a tenancy under which rent is payable, and not between an owner and an occupier who is no more than tenant at sufferance, liable for use and occupation or double value, but not for rent as such. The action of a landlord, in negotiating for a fair rent, and having the agreement approved by a Rents Officer under s. 25 of the Tenancy Act 1955, is conclusive of the landlord's intention to elevate a tenancy at sufferance into a tenancy which would yield him the legal right to rent payable at a higher figure than was thitherto lawfully recoverable, and this is evidence of the creation of a new tenancy. A landlord, after the expiration of the contractual tenancy and the giving of a notice to quit, demanded rent unequivocally as rent, and, having received payment in discharge, stated on the receipt for each rent payment that it had been received "for use and occupation of premises. Without prejudice to notice to quit." On an application for an order for possession, *Held*, 1. That the landlord's qualification of the receipt issued subsequently to the notice to quit, could not countervail the fact that it was he who requested payment as rent, and received it from the tenant as such; and a tenancy determinable at the will of either of the parties by one month's notice in writing was to be implied. 2. That the act of the landlord in demanding the increased payment (in advance) as rent, and the payment thereof by the tenant, which occurred at a time when no tenancy (other than; tenancy at sufferance) subsisted, evidenced a new tenancy as the landlord could not (for the reasons earlier stated in reference to the earlier receipts) in the circumstances of the demand and payment, avail himself of the attempted qualification of his receipts to show that the money was received for use and occupation and not for rent. (*Davenport* v. *The Queen* (1877) 3 App. Cas. 115, applied.) *Whitcombe and Tombs Limited* v. *Keyvar*. (S.C. Auckland. 1958. September 18; October 13. Shorland J.)

Possession—Tenement being Part of Premises owned by Mental Defective and used by Him as Matrimonial Home before Committal—Wife remaining in Exclusive Occupation of Part and letting Other Part to Tenants—Public Trustee, as Committee, only Person authorized to let Such Tenement—Mental Health Act 1911, s. 88. A wife, thitherto living with her husband but left in possession of his house on his committal to a mental hospital, has no authority to let the house, or part of it. The power to let, while her husband remains committed, is vested exclusively in his committee, or, in the absence of a committee, in the Public Trustee by virtue of s. 88 of the Mental Health Act 1911. (*Lloyds Bank* v. *Oliver's Trustee* [1953] 1 W.L.R. 1460; [1933] 2 All E.R. 1443 and *Barclays Bank Ltd.* v. *Bird* [1954] Ch. 274; [1954] 1 All E.R. 449, distinguished.) *Public Trustee* v. *Lumsden et Ux.* (S.C. Auckland. 1958. October 3. Turner J.)

WEIGHTS AND MEASURES.

Offences—Offence of not having "in a convenient place, capable of being seen by the purchaser, a suitable weighing-machine"—Such Offence distinct from Offence of "refusal to weigh" Goods at Purchaser's Request—Weights and Measures Act 1925, ss. 20, 34. The company sold groceries in the main part of its self-service store, which was a room surrounded by showcases having what is termed a "gondola" showcase in the centre. It sold potatoes, grain, manure, and other produce in a separate room in the rear part of the shop where the only weighing-machine was kept. It was possible to catch a glimpse of the weighing-machine, though not its face, from one corner of the main shop through the doorway between it and the rear part of the premises. The company was convicted of exposing goods for sale by retail without having "in a convenient place capable of being easily seen by the purchaser a suitable weighing instrument for weighing such goods", in breach of s. 20 of the Weights and Measures Act 1925. On appeal from such conviction, *Held*, 1. That it is the convenience of the purchaser to which s. 20 alludes when using the term "convenient place", so that he may easily see the weighing-machine and have his request that the goods should be weighed in his presence carried out; and there is no express right conferred on the purchaser to do his own weighing. 2. That, on the facts, the weighing-machine was not in terms of s. 20 of the Weights and Measures Act 1925, "in a convenient place, capable of being easily seen by the purchaser" of goods in the main part of the shop. 3. That s. 20 defines two classes of act: (i) the having in a convenient place, capable of being easily seen by the purchaser, a suitable weighing-machine, and (ii) the refusal to weigh the goods of a purchaser when requested so to do—each of which is an offence carrying a penalty as imposed by s. 34. Consequently, the appellant was properly convicted of the offence, with which he was charged—namely, not having a weighing-machine in a convenient place capable of being easily seen by the purchaser in breach of s. 20 of the Weights and Measures Act 1925. See STATUTES (*supra*), *Wyni Abel Ltd.* v. *Montgomery*. (S.C. Auckland. 1958. December 11. Hardie Boys J.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Conversion Hysteria—Nervous Effect of Accident—Element of Exaggeration to be taken into Account when Awarding Compensation—Effect of Delay in Settling Claim for Compensation on Cases based on Functional Disorder—Workers' Compensation Act 1956, s. 3. A condition of "conversion hysteria", provided it is shown to have resulted from injury by accident, can be a good ground for an award of compensation. (*Sangster* v. *Riley* (1912) 11 N.Z.W.C.C. 36, and *Nicholls* v. *Winstone Ltd.* (1913) 12 N.Z.W.C.C. 41, distinguished.) "Conversion hysteria" is a definite mental disorder, not consistent with malingering. If the condition is shown to have resulted from accident, compensation is payable, it is not material that the worker may have been predisposed to the condition, or may have suffered from it to a less degree before the accident on which his claim is based. (*Lewis* v. *Wrexham and Acton Collieries Ltd.* (1916) 9 B.W.C.C. 518). If it is established by evidence that the condition of "conversion hysteria" in fact exists, the element of exaggeration (for which the employer cannot be held responsible) is a matter affecting the extent to which the condition is attributable to the accident, and is to be taken into account in assessing compensation. A payment of a lump sum is the appropriate award in claims in respect of neurasthenia. Observations on the effect of delay in disposing of a claim based upon a functional disorder, and the result of delay contributing to the worker's mental condition; and on the fact that the defendant's liability could be correspondingly greater than it would have been if an earlier settlement could have been effected. *Harris* v. *Union Steam Ship Company of New Zealand*. (Comp. Ct. Wellington. 1958. October 2. Archer J.)

CONTRACT SUBJECT TO FINANCE.

By P. G. HILLYER.

An article in this JOURNAL (1958) 34 N.Z.L.J. 357, discusses the decisions of Cleary J. in *Barber* v. *Crickett* [1958] N.Z.L.R. 1057 and Stanton J. in *Carmody* v. *Irvine* (Auckland; February, 1954, unreported). The learned author makes two points: first, he suggests there was no contract in these two cases: there was merely an offer followed by a conditional acceptance; secondly, it is not possible to determine what "reasonable efforts to obtain finance" would be.

With respect, I would suggest as to the first point that the learned author has overlooked the fact that the condition as to finance was a term in the document signed by both parties. One starts with the fact that two people have solemnly appended their names to a written document. One of them has paid a substantial sum to the other for some purpose, and that document is expressed to be an agreement.

In these circumstances, one is justified in assuming that the document is intended to be something more than a mere option to purchase to be cancelled at the whim of the purchaser. In these circumstances, one is justified in implying a condition that the purchaser will use all reasonable efforts to obtain the finance; and it was on this basis that the learned Judges in the cases mentioned above proceeded. Further, in *Barber's* case, the clause referring to the condition continued: "In the event of the purchaser *being unable* to secure the finance . . .". This, of course, supported the view that both parties intended that the purchaser would make some efforts to obtain the necessary finance. When one asks: "What efforts?", the answer must be: "Reasonable efforts".

One can understand a vendor being prepared to bind himself with a purchaser who may demonstrate that he has a good chance of being able to raise the finance, and refusing to consider such a proposition from another who is of less financial standing. The vendor ties up his property for a period in reliance on the purchaser trying to obtain finance, and it would indeed be a hard business world if he had no remedy if the purchaser did nothing.

With this understanding of the attitude of the two parties, let us examine the document they signed. The learned author of the article is not entitled to assume that Barber offered to sell his property for £4,850, and Crickett said: "I will accept that offer provided I can obtain the necessary finance".

If one must dissect the document into offer and acceptance, it consisted either of an offer by Barber to sell his property subject to Crickett being able to obtain finance, with the understanding that Crickett would use all reasonable efforts to do so, and an acceptance of that offer by Crickett, or an offer by Crickett to purchase Barber's property on the same terms and an acceptance of that offer by Barber. If two parties choose to agree to such terms, how can it be said that they have not made a contract? Here is the offer and acceptance asked by the learned author, and I respectfully suggest that it does add up to a contract.

As to the learned author's second point, the pages of our law books are full of discussions of what a reasonable man would do. Difficult as this task may be, time and again our Judges have faced up to the problem and said that in one particular set of circumstances a litigant has behaved reasonably and in another he has not. When the Courts have decided what a vulgar and unintelligent reasonable man would understand of words in a newspaper (*Newstead* v. *London Express Newspaper Ltd.* [1940] 1 K.B. 377, 391; [1939] 3 All E.R. 263, 267), what a reasonable man would do if confronted by children while carrying a tea urn (*Glasgow Corporation* v. *Muir* [1943] A.C. 448; [1943] 2 All E.R. 43) and how far a reasonable man would go to prevent a snail getting into a ginger-beer bottle: (*Donoghue* v. *Stevenson* [1932] A.C. 562) why should they shrink from the task of deciding whether a purchaser has made reasonable efforts to obtain the money he needs?

We have daily examples of the reasonable motorist, pedestrian, or testator; and the question posed by the learned author: "Who is going to decide whether the financial deal he is offered is reasonable—the Judge?", poses no problem. The answer is that the purchaser must decide, but having contracted to be reasonable, he will suffer the penalty if a Judge holds he has acted unreasonably.

Charitable Appeal.—"I am quite prepared to assume that the contributors knew, or may be taken to have known, of the letter to the *Daily Telegraph*, and accordingly that their gifts would be devoted (subject to the rather nebulous reference to "among other things") to the two objects first specified and, subject thereto, to the "worthy causes" therein mentioned. It appears, however, to be almost impossible, from a practical or commonsense point of view, to attribute to the donors an intention to create separate interests in their gifts in favour of the three objects respectively. It seems to me that the intention of a donor in writing a cheque or putting a coin in a collecting-box, and the legal effect of his so doing, was to vest in the trustees a legal interest in the subject-matter of his contribution coupled with an obligation, enforceable in equity, to apply the gift in accordance with the provisions of the appeal. Subject to this, no interests, in my judgment, were "created" by the various donors in the contributions which they made. I recognize, of course, the desirability of applying the surplus of the fund which is now in question to charitable purposes cy-pres; but for my part I cannot arrive at this result by holding that every person who put a coin in a collecting-box created three interests (which must, of course, mean legal or equitable interests) in the coin, the third being subject to the first two. I would be disposed to agree with counsel for the Attorney-General that it is no fatal objection that the donor was unable to quantify the interests if he did in fact create them; but, in my judgment, no separate interests were created at all."—Romer L.J. in *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor* [1958] 2 All E.R. 749, 755.

THE FIJI COURT OF APPEAL.

New Zealand Judges Sit on Bench.

What could be described as a re-constituted Court of Appeal in Fiji sat in Suva on November 19, when the Chief Justice of the Colony, the Hon. A. G. Lowe, had associated with him on the Bench two retired Judges of the Supreme Court of New Zealand—the Hon. Sir George Finlay and the Hon. Sir Joseph Stanton. The sitting, which was the occasion of a special ceremonial opening, marked the beginning of a new period of co-operation between the Judiciary in New Zealand and the nine-year-old Fijian Court of Appeal. In the past, Colonial Judges, both active and retired, and, on occasions, retired practitioners in New Zealand and Fiji, have filled the breach, but an endeavour is now being made to ensure a regular flow of judicial aid for the Colony from New Zealand. The invitations extended to Sir George Finlay and Sir Joseph Stanton represented the first practical application of a principle originally canvassed twenty-two years ago in Fiji during one of the periodical revivals of the move for the establishment of a Court of Appeal there.

The Chief Justice, the Hon. A. G. Lowe, presiding in the Court of Appeal, in welcoming his New Zealand colleagues recalled how he had been helped as a junior in his earlier days by both Sir George Finlay and Sir Joseph Stanton. He spoke of an occasion thirty years before when, as a nervous junior ,he " crossed swords " with Sir Joseph, who at that time had been for many years City Solicitor for Auckland. He said he remembered being impressed as a junior by the prodigious memory of Sir George.

" I believe it was my early association with Sir George," he said, " that was possibly the main turning point of my career. I was an easy-going junior in those days, and life came fairly easily, but, after being associated with Sir George, I realized that hard work is very necessary to achieve success."

" My two eminent legal brothers from New Zealand will strengthen this Court because their eminence is so well-known."

" It is a great privilege to me," he continued, " that my two distinguished colleagues have accepted me as their President in this Court after having been their junior in practice for so many years in New Zealand and being their junior—but not by so very much—in age."

Commenting that Sir George Finlay had recently completed the preparation of a new Criminal Code for New Zealand, the Chief Justice observed : " I hope publication will not be long delayed in order that we may have the benefit of perusing it in this Colony, because it will be up-to-date and a first-class Code."

The Attorney-General, Mr. A. M. Greenwood, joining in the welcome said :

" For all practical purposes the Court of Appeal is the highest authority on the law in Fiji. There is provision for appeals to the Privy Council, but in practice they are difficult both on account of expense and delay. Sometimes it takes up to two years to get a case heard by the Privy Council. The Privy Council is not a Court of Criminal Appeal and the Privy Council will not intervene except where there is a departure from natural justice or some important principle of law is involved."

The speaker recalled that the first request for the establishment of a Court of Appeal in Fiji was made as far back as 1930. The proposition was rejected then as being impracticable, but a local practitioner persisted and the matter was raised again. As a result, a select committee was set up in 1936 but again the attempt to secure an Appeal Court did not succeed. Then war intervened. After the war the matter was revived with renewed vigour and on March 31, 1949, the Governor's Assent was given to the Court of Appeal Ordinance.

" Since then " said Mr Greenwood, " the work of the Court of Appeal has gradually increased, but it has always been difficult to get Judges for the Court. Among those who have sat have been retired Judges from Malaya and North Borneo ; serving Judges from Tonga, Samoa, the New Hebrides and the British Solomon Islands ; Magistrates from Fiji and practitioners, mostly retired, from New Zealand and Fiji. But today is the first occasion on which we have had the honour to have with us retired Judges from New Zealand."

Announcing that at the sitting of the Court that day there were twenty appeals—twelve criminal and eight civil—Mr Greenwood added :

" It is obviously of great importance that this Court of Appeal should be a Court of great strength and authority—first of all to foster the confidence of the public in the administration of the law in the highest tribunal of this Colony ; secondly, because it sets a standard which runs throughout the legal fraternity in the Colony and affects all the Courts from the highest to the lowest ; and, thirdly, because it gradually sets up a sound body of case law."

Mr Greenwood reviewed the distinguished careers of both Sir George Finlay and Sir Joseph Stanton. He said Sir George became a barrister and solicitor in 1909 and was appointed a Judge of the New Zealand Supreme Court in 1943. He sat as a Judge for fifteen years, and, retiring in August of this year, he had not given himself much of a rest before being in harness again.

Sir Joseph, he said, qualified in 1907 and was the City Solicitor in Auckland for thirty-five years—from 1913 to 1948, when he was appointed a Judge of the Supreme Court. He retired last year.

The President of the Fiji Law Society, Mr D. M. N. McFarlane, said : " We in the profession regard it as a signal honour that such distinguished Judges from New Zealand should come to sit in our Court of Appeal. We regard your visit as a mark of recognition of the growing importance of Fiji in the Pacific."

He recalled that in 1936, when he had been in the Colony only three years—in his " salad days " in fact—he was presumptuous enough to write a long letter to the Press advocating the establishment of a Court of Appeal. He also advocated that Fiji should obtain the services of retired Judges from New Zealand or

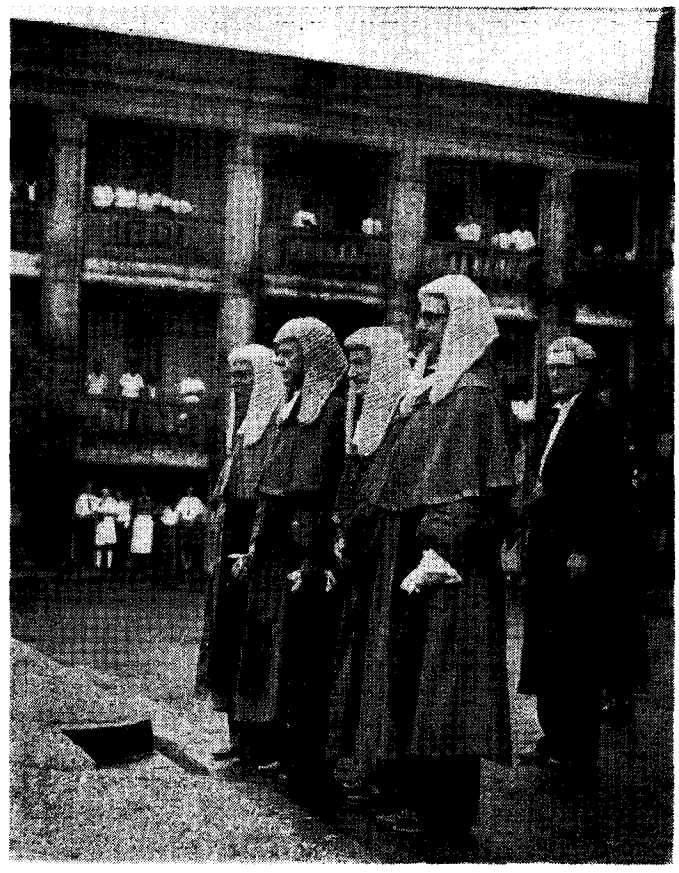
Australia—being an Australian he offered the alternative! It was very satisfying to see the accomplishment of something he had advocated twenty-two years before.

Mr McFarlane, addressing Sir George and Sir Joseph said: "You will not feel lonely or out of place, or that you are in a strange country here, because you will see not only our Chief Justice but other New Zealanders, not only in the Courts but also around Suva. We have close ties with New Zealand both in war and peace, and you will know us particularly for our prowess at football. I hope you will see a high standard maintained not only on the football field but in the Courts."

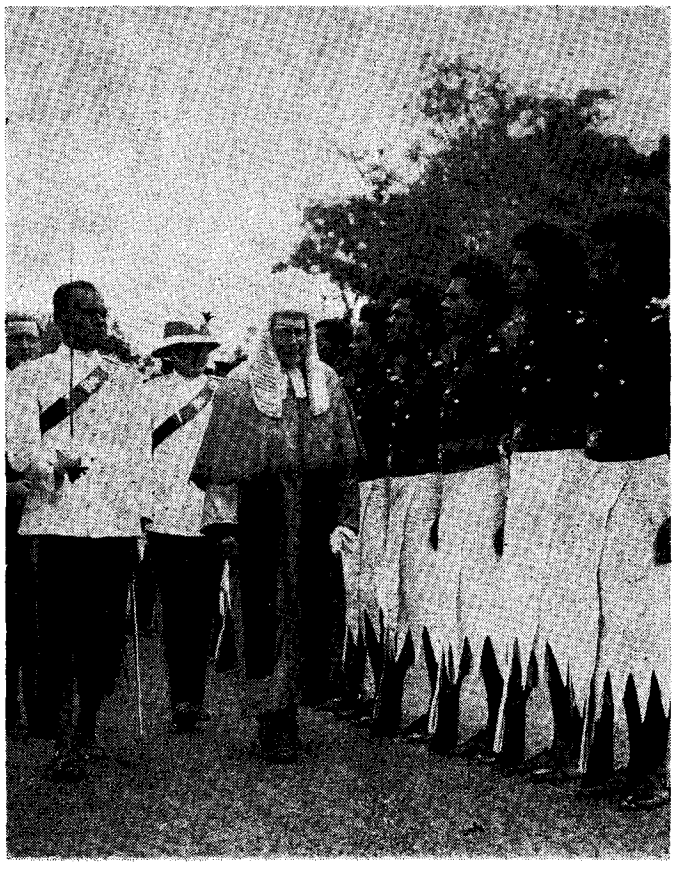
Bastion of the Common Law.

Sir George Finlay, in replying, said it was a very great pleasure to sit with the Chief Justice, who had always been a good associate and a very great friend. It was a great joy to know that he had achieved so much in his judicial career.

"In the days when we were associated in New Zealand," he said, "I must confess that no thoughts of the Bench had entered my mind, and I doubt if they had entered his. Perhaps Sir Joseph and I may, by virtue of the knowledge and experience that life has brought us, give some help to you, in the Courts of Fiji and, who knows, to Fiji itself.



Top: Their Honours take the salute at the Police March Past. *From left to right:* The Hon. Sir George Finlay, the Chief Justice, the Hon. E. G. Lowe, the Hon. Sir Joseph Stanton, and Mr Justice Hammett. *At the rear:* the Registrar of the Supreme Court, Mr George Yates. *Below:* Sir George Finlay inspecting the Police Guard of Honour at the opening of the Court of Appeal.



"Lest there be any misunderstanding, let this be said: We do not come as buttresses to your Bench—far from it. We come as, what you might call, supplementary troops to help your Judges to carry the burden of responsibility that is pressing on them in an increasing degree. It is only to help and not to teach. It may be that it is to learn that we have come amongst you.

"In these modern days, and in these rapidly changing conditions, the administration of the law, from the judicial standpoint at any rate, is growing increasingly burdensome. In addition to the responsibility of judicial work, there is the continual effort to keep step with progress. We found it necessary in New Zealand to read all the *Law Reports* as they came in and when you have done a full day of judicial work that is a burdensome addition.

"At the root of your law, and of ours, lies that firm bastion of British justice that we know as the common law of England. It is upon that that all our peace and security and personal liberty are founded, and it is upon that that your peace, security and personal liberty are founded. It is a glorious heritage that we have inherited and we have inherited it in common with powerful nations. They, too, have founded their constitution, their ideals and their hopes on that common law that we share with them."

Sir George envisaged that, from common ideals and common concepts between territories of the Pacific, a mighty unity might be built which would create in the Pacific a new power for good—a new power which could supplement in the material sense the power of Britain; and, what was perhaps more

important, could supplement in the spiritual sense that great spirit of dedication to service that inspired Britain in the interests of all the people of the world.

"That may be an ambitious dream," the speaker concluded, "but I venture to suggest that it is from such dreams that reality evolves. Towards that great objective you and I can do but little. It only behoves us to practice the law in the spirit of the law; to judge carefully; to realize the frailties of humanity and to adjust our judgment and action accordingly; and to act honourably and uprightly so that we may inspire the weak and the ignorant with a firm conviction that, in our law and in our Courts, they will find justice pure and unalloyed, a justice which is given equally to the rich and the poor, the weak and the strong."

Sir Joseph Stanton also expressed thanks.

Before the opening of the Court, the Chief Justice, the visiting Judges, and Mr Justice Hammett were received by a Police Guard of Honour, when they arrived at the entrance to the Court. The red-robed Judges and the ceremonial uniforms of the Police Guard introduced an effective motif of colour to a dull, showery morning.

Sir George Finlay inspected the guard and spoke to several of the men. He was accompanied by the Registrar of the Supreme Court, Mr George Yates, in wig and gown, and Superintendent F. Wigley, who wore the white ceremonial uniform of an officer of the Fiji Police. Assistant Superintendent Josevata Kuboutawa was the officer of the guard.

The ceremonial gathering was welcomed by the profession in Fiji as an event of the first importance in the legal history of the Colony, and was celebrated in less formal vein two days later by a Bar Dinner at which the guests of honour were the visiting New Zealand Judges, the Chief Justice and President of the Court of Appeal, the Hon. A. G. Lowe, and Fiji's only puisne Judge, Mr Justice Hammett.

GIFT DUTY.

The Doctrine of Equitable Estoppel with Respect to Intended Gifts.

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

The recent Court of Appeal case, *Commissioner of Inland Revenue* v. *Morris* [1958] N.Z.L.R. 1126, draws attention to the above interesting topic, in which, by the way, the much-discussed case, *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130; [1956] 1 All E.R. 256, once again gets an airing. It is perhaps of interest to note that, eight years before the controversial *High Trees* case commenced to plague our lives, Ostler J. applied the principle of equitable estoppel in *Coles* v. *Topham* [1939] G.L.R. 485.

In *Coles* v. *Topham*, the plaintiffs, as executors of the will of Coles deceased, claimed from the defendant the sum of £550 alleged to be due under a mortgage executed by the defendant in favour of the testator on December 8, 1921, and expressed in the mortgage to be due on December 8, 1926. The substantial defence to the claim was that the debt was forgiven by the testator in December, 1936, some two months before his death, or alternatively that the plaintiffs were estopped from alleging that the debt was not forgiven by reason of a representation of fact made by the testator, *on the faith of which the defendant altered his position for the worse.*

It must be pointed out here that when the alleged representation was made there was in force the Mortgagors and Lessees Rehabilitation Act 1936, which, as an aftermath of the depression of the early thirties authorized the writing down of mortgages to the basic value of the land. The kernel of the decision is to be found at p. 488, in the following passage:

> I therefore hold it as proved that the testator did make to the defendant a statement of existing fact with a view to inducing the defendant to act on it, and that the defendant was induced by that statement to act on it by abstaining from disclosing his liability to the testator, and he thus lost the chance of claiming any relief in respect of that mortgage which he would have had had he disclosed it. It is hardly necessary to cite authorities for the proposition that estoppel applies not only when the representee is induced by a statement of fact on the part of the representor to take active steps which alter his position for the worse, but also to the case where, induced by a statement of fact, he abstains from taking measures for his protection or advantage which he had in contemplation, and but for the representation, he would have taken; but authority for that proposition will be found in *Dixon* v. *Kennaway and Co.* [1900] 1 Ch. 833 and *McKenzie* v. *British Linen Co.* (1881) 6 App. Cas. 82, 91.

Consequently, His Honour gave judgment against the plaintiffs. It may be noted that the mortgage was never registered. *Quaere*, what would have been the position if the mortgage had been registered? Could the plaintiffs relying on their State-guaranteed mortgage have exercised their power of sale?

Coles v. *Topham* was distinguished (but not dissented from) by the Court of Appeal in *Chambers* v. *Commissioner of Stamp Duties* [1943] N.Z.L.R. 504; [1943] G.L.R. 330, in which the Mortgagors and Lessees Rehabilitation Act 1936 also loomed large. This case also by a few years preceded the *High Trees* case. In *Chambers's* case, it was sought to establish the validity of a waiver of interest payments under the Land Transfer Act: the form of the alleged waiver was by entry in the books of the mortgagee. It was argued that the debtor's conduct in forbearing to apply for relief under the then legislation authorizing relief to mortgagors constituted good consideration, so that the remission was part of a bargain raising an estoppel against the mortgagee's executors. But as the majority of the Court of Appeal (Gresson P. and Cleary J.) in *Commissioner of Inland Revenue* v. *Morris* [1958] N.Z.L.R. 1126, 1136; pointed out

the evidence did not support that contention: it appeared that the debtor's abstention from an attempt to use the legislation was not for this reason at all, for he himself believed the remission had been effectively made.

In *Chambers's* case, the Court of Appeal was at great pains to distinguish an Australian case which has often been cited in support of a plea of equitable estoppel by a mortgagor. In delivering the judgment of the Court of Appeal in *Chambers's* case, Callan J. said:

Lewis v. *Levy* (1876) 2 V.L.R. (Eq.) 110, was also cited. In that case Molesworth J. held that a mortgage being overdue, a verbal bargain between mortgagor and mortgagee to reduce the rate of interest, acted upon for some time, was binding in equity, because the mortgagor had the right to pay off on giving six months' notice, and might have done so, had the mortgagee not reduced the rate, so that the mortgagor forbearing to serve notice and pay off supplied consideration for the reduction. This case is distinguishable. The mortgagor, as a direct consequence of what the mortgagee said to him, abstained from a course of action which was open to him by which he would have benefited. That is to say, relying on the promise that for the future he could continue to have the use of the money at a lower rate than that mentioned in the mortgage, he abstained from borrowing elsewhere at the lower rate and repaying the mortgagee. But here there was no such conversation as had happened in the Victorian case, and it is not shown that the mortgagor had open to him any course by which he could have bettered himself independently of the concurrence of the mortgagees.

A leading New Zealand case on the principle of equitable estoppel is *Whitehead* v. *Whitehead* [1948] N.Z.L.R. 1066; [1948] G.L.R. 365. Unfortunately the judgment of the Court of Appeal, as delivered by Sir Humphrey O'Leary C.J. is, with all respect to the Court, rather sketchy, and the student must regard this case with care and caution; but its importance is undoubted. This case was an action for a declaration of ownership or for compensation or damages based on the allegation that the testator undertook to transfer by way of gift to the appellant, his, son, a site for a cottage; it was found on the evidence that the testator and the appellant arranged to build two cottages on the testator's land; that two cottages were built, the first for the testator and the second primarily for the appellant; that there was no undertaking to subdivide the land or transfer it; that both the testator and the appellant helped with the building and that that appellant expended labour and materials with the testator's knowledge. It was held that the testator, having made available the land on which he had encouraged the appellant to expend labour and materials in the expectation that the second cottage was his, the appellant had acquired an equitable charge or lien for the value of the labour and materials expended, and, accordingly he was entitled to judgment for that amount.

It will be noted that the Court did not hold that the son was the equitable owner of the land. Two special facts are to be borne in mind. First, there was no undertaking by the father to subdivide or transfer the land; secondly, there were statutory difficulties in acquiring title to the second cottage. These difficulties arose apparently from s. 125 of the Public Works Act 1928 or the Land Subdivision in Counties Act 1946. Had these two special facts not been present, I think that the authorities show that the son would have been entitled to an estate in fee simple in the land.*

* E.g. Decision of Gresson J. in *Thomas* v. *Thomas* [1956] N.Z.L.R. 785, a case under s. 19 of the Married Women's Property Act 1952.

The learned Chief Justice said:

It does not follow, however, that the estate acquired by the person making the expenditure would necessarily be one equal to the whole estate of the person so standing by; it would, in our opinion, *in the circumstances*, be co-extensive with the amount of the expenditure; that is to say he would have a charge or lien to that extent (*ibid.*, 1071; 367).

In the above-cited passage, the italics are mine. They are the words of which the student should take particular notice when studying this case.

This leading New Zealand case was followed by Turner J. in *Hammond* v. *Commissioner of Inland Revenue* [1956] N.Z.L.R. 690, a case of deductible debts for the purposes of s. 9 (1) of the Estate and Gift Duties Act 1955. The facts were that, in 1951, one Hammond (hereinafter called "the father") was the registered proprietor of the land described as Lots 2 and 3 which adjoined the family home. He and a son called "Sydney" (hereinafter called "the son") were builders, the son being the employer and the father his employee. It was agreed between them that the son should be permitted to erect a workshop on Lot 3 of his father's property, and the deceased (the father) promised that he would give the section (of only a very small value) to the son, and execute a transfer putting the title into his name. The son accordingly built upon Lot 3 a workshop of a value of some £800. On taking legal advice about the transfer, father and son were informed that Lot 3 had no legal frontage, *and could not be transferred unless other adjoining land were included in the transfer.* Lot 2, suitable in other respects, had a house upon it.

There were other somewhat complicated facts dealing with merger, etc. which, however, need not concern us here. It was held in a Case Stated for the opinion of the Court, pursuant to s. 62 of the Death Duties Act 1921, that the appellant (the father's executor) had an enforceable claim against the estate for reimbursement of the sum of £800, and accordingly that in computing the final balance of the father's estate, the appellant was entitled to an allowance of £800. It also follows that in building the workshop on Lot 3 the son did not make a gift of £800 to the father, and that, therefore, such a transaction (the value of the land being slight) does not attract gift duty. In the circumstances (i.e., the difficulties arising as to title) the son had acquired on the erection of the workshop an equitable charge for the amount (£800) in respect of which he was entitled to reimbursement.

After this brief survey of the foregoing cases we are perhaps in a better position to consider and appreciate *Commissioner of Inland Revenue* v. *Morris* [1958] N.Z.L.R. 1126.

By deed dated May 29, 1946, Mary Elizabeth Morris, since deceased, agreed to transfer to her son, George Leonard Morris, a debenture to which she was entitled, and which secured the principal sum of £10,117 2s. 3d.; and by cl. 2 of the deed it was provided:

The said George Leonard Morris hereby agrees that as from the 1st day of April, 1946, he will pay to the said Mary Elizabeth Morris during her lifetime the sum of £250 per annum payable by equal half-yearly payments on the 1st day of October and the 1st day of April exception so far as for any specific half-year the said Mary Elizabeth Morris shall waive payment.

By a further deed, dated October 1, 1951, made between the same parties, and expressed to be supplementary to the original deed of May 29, 1946, the

deceased confirmed that she had waived payment of ten of the half-yearly payments of £125 covenanted to be paid by her son under the earlier deed. This confirmation was expressed as follows in the later deed :

> The said Mary Elizabeth Morris hereby confirms that she has waived payments under the said cl. 2 of the deed of May 29, 1946—namely :
>
> (a) Payment of £125 due on October 1, 1946, waived by verbal waiver given during the month of October, 1946.

And the deed went on to repeat, in respect of each of the nine succeeding half-yearly payments, that there had been " verbal waivers " given during the months of the first days of which the payments had been due.

The first question to be decided by the Court was whether it was competent for parties by deed to provide for a parol release to be given in the future notwithstanding the rule of law that a unilateral discharge was ineffective unless it was made under seal or unless there was something which would constitute consideration in law, or to put it another way (since the releases alleged in this case amounted to gifts) the rule that a voluntary release of a debt owing at law was void if not made by deed.

Then, Gresson P., in a most informative manner, discussed the application to the facts of the case of the well-known maxim, *modus et conventio vincunt legem* (Custom and agreement overrule law.) He said :

> The maxim, *modus et conventio vincunt legem*, is not without limitations. The general principle that parties may by express agreement between themselves acquire rights or incur liabilities which the law of itself would not have conferred or imposed is subject to some restrictions. The parties cannot alter, exclude, or supersede by agreement a peremptory rule of law, as for instance where the Legislature has so clearly expressed its will on a question as to make it a declaration of State policy, incapable of being altered at the will of the parties.† There are numerous instances, and it is not necessary to mention them. Even if a statute contains no express prohibition against contracting out of if the enactment may be of such a nature as to preclude the parties dispensing with its provisions : see *Soho Square Syndicate Ltd.* v. *E. Polland & Co. Ltd.* [1940] Ch. 638, 644 ; [1940] 2 All E.R. 601, 605 ; *Bowmaker Ltd.* v. *Tabor* [1941] 2 K.B. 1 ; [1941] 2 All E.R. 72 ; with which may be compared *Smart Brothers Ltd.* v. *Ross* [1943] A.C. 84 ; [1942] 2 All E.R. 282. But, in this case, the rule of law which the parties have sought to qualify is not one created by statute. It is, however, one which has been embodied in the common law for centuries—that a covenant for payment of money cannot be discharged without a deed : *Pinnel's Case* (1602) 5 Co. Rep. 117a ; 77 E.R. 237 ; *Rogers* v. *Payne* (1768) 2 Wils. K.B. 377 ; 95 E.R. 871 ; *Reeves* v. *Brymer* (1801) 6 Ves. 516 ; 31 E.R. 1172 ; *Edwards* v. *Walters* [1896] 2 Ch. 157, 168.

To those of my generation, nurtured as we were, on *Williams on Real Property* and *Williams on Personal Property*, classic works clearly explaining and not minimizing the formalities attendant on dealings with property, the rejection by our Court of Appeal of this neat little maxim to the facts of the instant case, will cause no surprise whatsoever. At the same time, we cannot but admire and perhaps envy the ingenuity of the draftsman of the relevant deeds.

The reasoning of North J. in this case did not precisely follow that of the majority of the Court, but His Honour definitely held that, where a deed provided for half-yearly payments in reduction of a debt " except in so far as [the creditor] shall waive payment ", any release of a half-yearly payment had to be made by deed in order to be effective in law ; and, as both parties to the deed are deemed to know that legal requirement, it must be presumed that they intended that the release would be given in a form recognized by law ; and that the language so used in the deed was not sufficiently precise to justify the conclusion that the parties intended that the release could be given orally in modification of the rule of law.

At p. 1134 of the report, the majority of the Court point out that the rule at *common law* that, if the original contract for the payment of a sum certain were under seal, it could be altered or discharged only by deed and that a subsequent parol contract afforded no defence to an action on the covenant became modified in equity to the extent that a parol alteration or rescission was effectual provided it was founded on consideration.

So it is therefore no longer law that such a contract under seal can only be altered or rescinded by a deed ; a parol release or rescission of a specialty contract is effectual if founded on or accompanied by consideration : *Steeds* v. *Steeds* (1889) 22 Q.B.D. 537 ; *Berry* v. *Berry* [1929] 2 K.B. 316.

Two observations on this may be apposite. First, it must, in practice, be read in conjunction with s. 92 of the Judicature Act 1908, which reads as follows :

> An acknowledgment in writing by a creditor, or by any person authorized by him in writing in that behalf, of the receipt of a part of his debt in satisfaction of the whole debt shall operate as a discharge of the debt, any rule of law notwithstanding.

As pointed out by Blair J. (the Judge of first instance in *Chambers's* case [1943] N.Z.L.R. 504 ; [1943] G.L.R. 330) the elements necessary to obtain the benefit of that section are : (a) an acknowledgment by a creditor of his acceptance of part of his debt in satisfaction of the whole debt ; (b) that acknowledgment must be in writing ; (c) such an acknowledgment may be given by an authorized agent of the creditor, but, if so, then the authority to the agent must be in writing from the creditor and such authority must be an authority to give such an acknowledgment.

The second observation which may be made is that the common-law requisite of a deed to release a debt applies apparently only to a debt at law :‡ it appears that an equitable debt may be released by writing, if the intention to release is clear, whether or not there is any consideration for the release : *Re Hall, Hall* v. *Attorney-General* [1941] 2 All E.R. 358 ; 57 T.L.R. 563—a release by conduct and in writing of an equitable charge for death duty paid by the chargee.§

Finally, in *Inland Revenue Commissioner* v. *Morris*, the Court of Appeal considered the question whether the conduct of the deceased had given rise to any equitable estoppel :

† Parties cannot contract themselves out of the Family Protection Act 1955 : *Stephens's Family Protection in New Zealand*, 2nd ed. 48, 61, 82. On the other hand, the Court of Appeal held in *Connell* v. *Phoenix Aerated Water Co. Ltd.* (1915) 34 N.Z.L.R. 666 that mortgagors could waive the benefit of a war-time moratorium.

‡ The better practice for the conveyancer to follow, however, is to release such a debt or charge by deed.

§ There is also another exception created by the Bills of Exchange Act 1908. The holder of a bill of exchange or a promissory note may unconditionally renounce his rights by writing or by delivery of the instrument to the person liable, but this exception is by virtue of the Bills of Exchange Act and had no application to *Commissioner of Inland Revenue* v *Morris*.

It remains to consider the contention of counsel for the respondents that an equitable estoppel arose by virtue of what is commonly termed "the High Trees doctrine" (*Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] 1 K.B. 130; [1956] 1 All E.R. 256), though in truth the so-called "High Trees doctrine" is no more than a resurgence of an equitable principle that had long been recognized, and had been applied for nearly a hundred years. This topic was discussed in *Odlin & Co. Ltd.* v. *Pillar* [1952] G.L.R. 501, and in *Buckland* v. *Commissioner of Stamp Duties* [1954] N.Z.L.R. 1194, 1205, and it is not necessary to repeat the views expressed in those cases. In the latter case North J. referred to a decision of the Court of Appeal in *Tungsten Electric Co. Ltd.* v. *Tool Metal Manufacturing Co. Ltd.* (1950) 69 R.P.C. 108; [1954] 2 All E.R. 28. Since then there has been further litigation between these parties culminating in the decision of the House of Lords in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 2 All E.R. 657.

After an examination of certain leading cases, the majority of the Court, per Gresson P., proceeded as follows:

The essence of the doctrine is that a person is not permitted to enforce strict legal rights when it would be unjust that he should be allowed to do so, having regard to the dealings which have taken place between the parties. But those dealings must amount to one party having been led by the attitude of the other to alter his own position. We cannot discover any ground at all in the facts of this case as set out in the Case Stated to warrant application of the principle. All that is recorded is that payment of interest was waived from time to time. This, in the absence of any evidence that the debtor was thereby led to alter his position, can be no more than "acts of indulgence". In all the cases where the principle has been applied, there has been conduct of some sort in reliance on a promise. In *Ledingham* v. *Bermejo Estancia Co. Ltd.* [1947] 1 All E.R. 749, payment of interest was either waived or postponed in order to enable the company to carry on, and the company had carried on business in reliance upon the promise. It was, in short, a bargain to induce action of a particular sort, and it was held such a bargain ought in equity to be enforced. There is nothing of the kind in this case.

Accordingly, the Court held in a Case Stated under the Death Duties Act 1921, that the total sum of £1,250 (being the aggregate of the half-yearly payments from and including October 1, 1946, down to and including April 1, 1951, which George Leonard Morris by deed, dated May 29, 1946, agreed to pay to Mary Elizabeth Morris), formed part of the dutiable estate of Mary Elizabeth Morris, deceased, since these ten payments of £125 each had not been effectively released before her death, and therefore were caught by s. 5 (1) (a) of the Death Duties Act 1921, as an actual asset in her estate.

It will thus be seen that the doctrine of equitable estoppel comes into our estate and gift-duty law, and it is reasonable to assume (especially as the rates of estate and gift duty have recently been substantially increased) that the doctrine will in New Zealand play an increasingly-important part in the assessments of estate and gift duties. But the decided cases show that the doctrine cannot always be successfully invoked in order to prove that an intended gift has been completed: therefore, it behoves us, if our clients are to get the fullest benefits of lower estate duties by gifts completed *inter vivos*, to take care that all formalities of a gift are complied with as soon as possible, and these formalities vary with the nature of the property intended to be gifted. As the Solicitor-General, Wild Q.C. pointed out in argument [1958] N.Z.L.R. 1130, 1131, parties cannot provide that what they do orally or by parol will have an effect that the law does not recognize; and, as to the principle of the *High Trees* case, there is no case in which that principle has been applied simply on the ground that a debtor has accumulated money that he would have paid otherwise.

Living on Demised Premises.—"My attention was called not only to this case but to another in which covenants not unlike those before me have recently been construed by the Court. The earlier case is *R.* v. *Brighton and Area Rent Tribunal, Ex parte Slaughter* [1954] 1 All E.R. 423. That was a case under the Rent Restrictions Acts, the question being whether a shop with a self-contained flat over it ought to be classed as a dwellinghouse. The covenant in question was that the tenant would not permit the premises to be used otherwise than for the business of a greengrocer, and it was held that, so long as he carried on a greengrocer's business there, he was not in breach of covenant, though he lived on the property. Lord Goddard C.J., in a reserved judgment, after quoting the covenant, said: 'The rule with regard to the construction of a covenant is conveniently stated in *Foa's Landlord and Tenant*, 7th ed., p. 111, and, as we think, the passage accurately states the law, we will quote it instead of setting out the various cases which deal with this point: 'A covenant, like any other contract, is to be construed according to the intent of the parties as expressed by their own words, and by regard to the whole of the instrument, and the surrounding circumstances of the case, it being also a rule that if the words be doubtful, that construction is to be taken which is most strong against the covenantor'. Bearing that in mind, it is, in our opinion, impossible to construe this covenant so as to prohibit the tenant from living on the premises. Provided that the tenant carries on a greengrocer's business it would, in our opinion, be impossible, and, indeed, absurd, to say that he was in breach of his covenant because he lived on the premises. So to hold would mean that the whole of the upper part was sterilized, at least to the extent that the rooms could be used only as a store or for some such purpose, and not for that which they were designed although the tenant is under covenant to preserve and not to alter them'."—Harman J. in *City and Westminster Properties* (1934) *Ltd.* v. *Mudd* [1958] 2 All E.R. 733, 740.

A NOVEL FOR LAWYERS.

Rosalind in *As You Like It* says that Time stands still with lawyers in the vacation: for they sleep between term and term, and then they perceive not how Time moves. The allegation has long been resented and its absurdity is even more plain now that ball-by-ball commentaries on the Test matches have joined the other attractions which make the decision as to how to divide our fleeting periods of respite so troublesome. The attempt to keep abreast of even the most discussed contemporary books in any sort of systematic way is soon abandoned as hopeless. But if there is any member of the profession, especially if he does Court work, whose Christmas presents did not include a copy of the new American novel *Anatomy of a Murder* by Robert Traver (Faber and Faber), he may be assured that he will find it a most rewarding self-indulgence to buy the book for himself.

The author is described on the jacket as once a Public Prosecutor and now—rather vaguely—" a High Court Judge ". His fiction has the unmistakable ring of truth. This, we feel, really is the way in which a trial for murder would proceed at the present day in a country town on the shores of Lake Superior; and these are the authentic plans, worries and reflections of counsel for the defence—for it is from his point of view that the case is seen. The title is a little misleading. The book presents the anatomy of the trial and the preparation of the defence case for trial, rather than an objective account of the events which led to the trial. We see those events only through the accounts of witnesses and potential witnesses, with all their varying distortions through interest or mistake.

The facts of the case are basically very simple. The wife of a Lieutenant in the United States Army returns one night to their trailer, distraught and saying that she has been raped by the proprietor of a nearby hotel. Her condition and other evidence support her account; yet to the end a faint question hovers over her character, though not over her attractions. Taking a pistol, her husband goes to the hotel, finds the proprietor standing behind the bar, and, uttering no word, shoots him down with five shots.

Prima facie it is not easy to see a defence to the charge of murder. The killing was obviously intentional; there is no room for invoking a right to kill to prevent the completion of rape by a man caught *in flagrante delicto*; nor is it any use thinking of the right of a private citizen to arrest an escaping criminal, and to shoot if he resists, for the Lieutenant had made no attempt at arrest. But the researches of the defence lawyers at length produce a possible line of defence.

The leading criminal lawyer in the area, a tub-thumper of the old school, has been unable to undertake the defence because he has broken his leg. The case is offered to a man of forty who has just lost his office of Prosecuting Attorney through defeat at an election by a younger opponent with more popular appeal. He is trying to build up a private practice and it would be important to him not to lose his first major case as defending counsel. Unpromising though this case is in many ways, he decides to take it; apparently the conventions of American practice allow a choice. The Lieutenant he finds an unpleasant character—this becomes increasingly clear as the book progresses—but there is nevertheless an obvious possibility of getting considerable sympathy from the jury, at any rate if the rather ambiguous character of the wife can be kept from them. Counsel's inquiries establish that the Lieutenant, although a battle-hardened veteran, has in matters concerning his wife the type of instability that is caused by intense jealousy. At a party he will knock down a man whose interest in her seems to be influenced by anything more than politeness. Could the defence of temporary insanity be sustained?

The accused has also the gratuitous services of an elderly and alcoholic lawyer of Irish extraction whose own practice has dwindled to nothing. The opportunity of engaging in legal research of moment induces this practitioner to resist the bottle (thus reversing a more usual process) and the defence team unearth an old decision to the effect that the McNaghten Rules are not an exhaustive test of insanity in Michigan: that is one of a handful of States in which irresistible impulse has been held to constitute insanity in law. It is from such a discovery as this; from the fluctuation of fortunes at the trial; from the tactical struggle between two competent counsel, each contending with all his mental energies; and, especially, from plausibility and apparent accuracy of detail, that the book derives its fascination. It is not a detective story; the author keeps no tricks up his sleeve. The verdict ultimately reached by the jury is as convincing as the rest.

Various aspects of the procedure are striking. The Judge is portrayed very sympathetically. He is a sort of superior Judge Hardy, combining professional and general learning, tolerance, homely philosophy, firmness and a calculated informality of manner, in a peculiarly American way. The author's enthusiasm for this character goes so far that he makes his Irishman say of him: " It seems that humility and kindness and profound intelligence are so seldom blent in one man that the world—at least the English-speaking world—has never felt compelled to coin a word to describe it ". It is rather curious to find this judicial paragon, after ruling that no photographs are to be taken in Court, consenting to pose for a Press photograph outside, in company with counsel for the prosecution. Counsel for the defence craftily declines an invitation to join the group, hoping to build up in the public mind a picture of the " all-powerful, much publicized State against the lone, unsung—and unphotographed—defence ".

Indeed, the ease with which one side seems to be allowed to communicate privately with the Judge in connection with the case would perhaps still raise some eyebrows in New Zealand. At a pre-trial conference with counsel, the Judge observes: " I say to both of you men that anything you may feel you can legitimately confide to me, to expedite the *correct* resolution of this case, will be treated in confidence ". Accordingly he treats as " a confidential trial memorandum for the sole assistance of the Court " a draft set of requests for instructions submitted by the defence. The general idea of requests for instructions appears,

(*Concluded on p. 32.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

A Hanging Matter.—When Samuel Johnson approached his mother for her blessing upon his proposed marriage to Elizabeth Porter, whom he nicknamed "Tetty," his mother expressed amazement: "No, Sam, my willing consent you will never have to so preposterous a union. You are not twenty-five and she is turned fifty. If she had any prudence, this request had never been made to me. Where are your means of subsistence? Porter has died poor, in consequence of his wife's expensive habits. You have great talents, but as yet have turned them into no profitable channel." Sam retorted: "Mother, I have not deceived Mrs. Porter; I have told her the worst of me: that I am of mean extraction; that I have no money; and that I have had an uncle hanged. She replied that she valued no one more or less for his descent; that she had no more money than myself; and that, though she had not had a relation hanged, she had fifty who deserved hanging."

Gardening Note.—In *Public Trustee* v. *Edgar* (as yet unreported), T. A. Gresson J. seems to indicate that years of devotion to a fine garden in Christchurch have left their influence. In this case, a medical practitioner who spoke of the testatrix having developed "practically an obsession" in regard to her husband was asked what she criticized in his conduct and he replied, with what the Judge described as engaging candour: "She reckoned he was not pulling his weight about the house. He was not working long enough hours in the garden to keep it tidy." This was a comment, says T. A. Gresson J., which "one may boldly assert is not infrequently passed between the most devoted of spouses, and which I decline to interpret as proof per se of testamentary incapacity. To hold otherwise would surely be to condemn many amiable but outspoken wives to an arbitrary and ill-deserved intestacy." Scriblex is inclined to range himself on the side of the husband who no doubt felt that the hours he spent in the garden might have been better employed. The point does not warrant over-elaboration. There is much to be said for the view of Sir William Temple who, in 1685, concluded his essay on gardening: "So that for all things out of a garden, either of sallads or fruits, a poor man will eat better, that has one of his own, than a rich man that has none. And this is all I think of, Necessary and Useful, to be known upon this subject."

Preventive Detention.—A curious instance of kleptomania is to be found in *R.* v. *Downham* heard by the Court of Criminal Appeal and reported in *The Times* (3/10/58). The applicant who asked for leave to appeal against sentence had been sentenced by quarter sessions to nine years preventive detention for larceny of candlesticks from a church and of a bicycle. He had asked for eighty-two other offences, all involving the theft of candlesticks from churches, to be taken in consideration. Counsel for the applicant said there was now available a report by the psychiatrist which made it clear that imprisonment would have no deterrent effect and that a further term would destroy what was left of good intent, while medical treatment might be of good effect. He suggested that the applicant, who had been anxious to get into the Church, had a religious mania which had become kleptomania. The stolen bicycle had been used by the applicant on a tour of churches from which he stole candlesticks. His record was not that of a normal man. Everything had been tried but medical treatment. In the course of delivering the judgment of the Court, Lord Parker C.J. said this was a tragic case. The applicant appeared to have an irresistible impulse to steal candlesticks from churches. Everything had been tried, probation, imprisonment, preventive detention, and again probation. This man could not be left at large, and the Court had no power to put him in a mental institution for more than twelve months. The only course was to let the sentence rest, with the intimation that if the prison doctor thought that mental treatment would serve some useful purpose he could so report to the Home Office.

The Birds in the Case.—Scriblex has on more than one occasion expressed his indebtedness to "Richard Roe" of the *Solicitors' Journal* who has a positive genius for getting the scent of a good story. Following up the observation that birds seem to be infiltrating our legal system he cites the part that a mynah, whose name was not revealed, played in a recent breach of promise case in the Lambeth County Court, where another central figure was Tommy, a seventy-seven year old parrot. "The birds were not actually the parties to the action. They had not allowed their tongues to run away with them in a projected mesalliance. They were members of the supporting cast in the drama, but important members of it. The defendant was a gentleman who, having quarrelled with a lady to whom he had become attached, impulsively advertised in a newspaper for a wife. A new lady duly answered it. They found that they were both bird-lovers. He shared his life with a parrot and a mynah; she hers with nine budgerigars. On this basis of kindred enthusiasms, they decided to join forces, and the parrot and the mynah were transferred to the lady's home. The banns were published; the ring was bought; a hall was hired for the reception. Then three days before the wedding, the defendant broke off the engagement. He had made up his quarrel with the first lady, whom he subsequently married. The plaintiff now sued for breach of promise; the defendant counterclaimed for the return of his birds. She was awarded £150 damages; he recovered judgment on his counterclaim. The parrot was not called to give evidence, because, as the solicitor appearing for the defendant said, it had a confirmed habit of swearing and would be in grave danger of committing contempt of Court. The plaintiff was strangely unwilling to part with the parrot. "I love him," she said. "He calls me 'Mum' and follows me about just like a kid. I have been made to look a fool all round the neighbourhood." The report does not make it entirely clear whether the £150 damages was for the deprivation of the prospective husband or of the parrot—possibly a judicious mixture of both.

Tailpiece.—"There's been an accident," they said,
"Your servant's cut in half; he's dead!
"Indeed!" said Mr. Jones, "and please
Send me the half that's got my keys."

—Harry Graham, *Ruthless Rhymes.*

A NOVEL FOR LAWYERS.

(*Concluded from p. 30.*)

however, to be a useful one in jury trials involving points of law. In effect, both sides may tender written submissions setting out the directions on the law that each wants to be given to the jury. The summing-up in this case gives the jury little help on the facts, consisting of little more than a bare statement of the legal issues. It is understood that this is not uncommon in the United States.

As for counsel, prowling about the open spaces in the Court like caged leopards as they maul the witnesses and each other, neither the representative of the People nor his opponent makes much pretence of being influenced by anything other than the aim of winning at all costs. After the defence evidence is closed, the prosecution is allowed two addresses, between which the address for the defence is sandwiched. All addresses are subject to a time limit, but apparently to no other form of restraint. " I turned and pointed scornfully at Claude Dancer " [leading counsel for the prosecution] . . . " Ah, yes, this is the able little man who has come up here into the brambles to show us bumpkins some of the sly city tricks he has learned so well from experts. . . . For shame, Mr Dancer! You brought only discredit and tarnish on your own considerable talents ".

But in the end the overriding impression is of the basic similarity between the American procedure and our own, and the author's adroit capturing of the atmosphere of a trial. According to Hazlitt, it is a very bad sign when you cannot tell a man's profession from his conversation. Certainly good " shop " can be as interesting to the layman as to the initiate, and so it is with this book, as its sales have proved. The current success of fiction about the legal profession leads to the speculation whether a best-selling serious novel could be made of a civil case. We await the author who bases his plot on an attempt by counsel to extend the *High Trees* doctrine.

R. B.

Evidence : Test of Admissibility.—The appellant had been searched by a police constable without warrant, and, as a result of the finding of certain weapons in the course of the search, had been convicted of unlawful possession of the weapons. On appeal he submitted that the evidence procured by the illegal search was inadmissible. On behalf of their Lordships, who dismissed the appeal, Lord Goddard said : " In their Lordships' opinion, yhe test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it and, in their Lordships' opinion, it is plainly right in principle. In *R.* v. *Leatham* (1861) 8 Cox. C.C. 498; an information for penalties under the Corrupt Practices Prevention Act, objection was taken to the production of a letter written by the defendant because its existence only became known by answers he had given to the commissioners who held the inquiry under the Act, which provided that answers before the tribunal should not be admissible in evidence against him. The Court of Queen's Bench held that, though his answers could not be used against the defendant, yet, if a clue was thereby given to other evidence, in that case the letter, which would prove the case, it was admissible. Crompton J., at (p. 501), " It matters not how you get it ; if you steal it even, it would be admissible." *Lloyd* v. *Mostyn* (1842) 10 M. & W. 478 ; 152 E.R. 558 was an action on a bond. The person, in whose possession it was, objected to produce it on the ground of privilege. The plaintiff's attorney, however, had got a copy of it and, notice to produce the original being proved, the Court admitted the copy as secondary evidence. To the same effect was *Calcraft* v. *Guest* [1898] 1 Q.B. 759. There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the Judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasized in the case before this Board of *Noor Mohamed* v. *The King* [1949] A.C. 182, 191-2 ; [1949] 1 All E.R. 365 ; and in the recent case in the House of Lords, *Harris* v. *Director of Public Prosecutions* [1952] A.C. 694, 207 ; [1952] 1 All E.R. 1044. If, for instance, some admission of some piece of evidence, *e.g.*, a document, had been obtained from a defendant by a trick, no doubt the Judge might properly rule it out. It was this discretion that lay at the root of the ruling of Lord Guthrie in *H.M. Advocate* v. *Turnbull*, 1951 S.C. (J.) 96. The other cases from Scotland to which their Lordships' attention was drawn, *Rattray* v. *Rattray* (1897) 25 Rettie, 315 ; *Lawrie* v. *Muir*, 1950 S.C. (J.) 19, and *Fairley* v. *Fishmongers of London*, 1951 S.C. (J.) 14, all support the view that, if the evidence is relevant, it is admissible and the Court is not concerned with how it is obtained. No doubt their Lordships in the Court of Judiciary appear at least to some extent to consider the question from the point of view whether the alleged illegality in the obtaining of the evidence could properly be excused, and it is true that Horridge J., in *Elias* v. *Passmore* [1934] 2 K.B. 164 used that expression. It is to be observed, however, that what the learned Judge was there concerned with was an action of trespass and he held that the trespass was excused. In their Lordships' opinion, when it is a question of the admission of evidence, strictly it is not whether the method by which it was obtained is tortious but excusable, but whether what has been obtained is relevant to the issue being tried. Their Lordships are not now concerned with whether an action for assault would lie against the police officers and express no opinion on that point. Certain decisions of the Supreme Court of the United States of America were also cited in argument. Their Lordships do not think it necessary to examine them in detail. Suffice it to say that there appears to be considerable difference of opinion among the Judges both in the State and Federal Courts whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution.—*Kuruma Son of Kaniu* v. *The Queen* [1955] A.C. 197, 203 ; [1955] 1 All E.R. 236, 239.