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FAMILY PROTECTION: SOME RECENT JUDGMENTS.

IN summarizing some judgments under the Family Protection Act 1955, delivered in the recent months, we have adopted a suggestion made by several readers that a review of the latest cases dealing with the claims of sons and daughters would be welcomed.

ADOPTED DAUGHTER.

In an oral judgment, *In re Nielsen, Bootten* v. *Gordon* (Palmerston North, December 11, 1959), McCarthy J. disposed of an application brought by a daughter for provision out of the estate of her deceased mother by giving her half the estate.

The applicant was a married woman, aged thirty-four years, with two children. She was an adopted daughter of the testatrix, having been adopted at an early age. She lived with her adopting parents until the age of eighteen years, when she left home. She married at the age of twenty. After that, there was not a very close intimacy between the daughter and the testatrix. His Honour did not accept that they were unfriendly. He said:

> I take the position to be that there was no great affection between them. That may, in part, be due to the fact that the parents themselves had difficulties, and eventually separated. There may well have been some division of loyalties arising out of that, as is suggested; but while the daughter and her mother did not have a lively affection one for the other, there is nothing which satisfies me that the plaintiff was other than a dutiful daughter and there is certainly nothing amounting to disentitling conduct.

By her last will, the deceased left the whole of her estate to five sisters. She left nothing to the daughter, the plaintiff. Of the five sisters, one predeceased the testatrix, the remaining four then sharing the estate equally.

The estate was not a large one. The net residue was somewhere in the vicinity of £2,267, but it appeared that the estate was still in the process of being liquidated and that the final cash in hand when the assets were all liquidated should be somewhere in the vicinity of £2,000.

The plaintiff was in good health, with a husband who, too, apparently is in fair health, was earning a wage of somewhere about £16 a week. They had two children. They lived in a rented home. They did not own a home and their capital position was meagre.

Mr Justice McCarthy said:

> Having regard to the financial position of the daughter and her husband, I am satisfied in this case that there was a duty upon the testatrix to make some provision for her daughter. I reach that view, having regard to the relationship, the lack of competing obligations, and the needs of the daughter. On the other hand, I do not consider that the circumstances were such as call for a gift of the whole of the deceased's estate to her daughter. I consider that the testatrix's duty towards her daughter would be satisfied by something less than that, and that she was entitled to leave something to her sisters, particularly in view of their financial positions.
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> On the whole case, I reach the conclusion that the duty to the daughter would have been satisfied if the deceased had left her half the estate; and I now make an order that the plaintiff receive half the estate of the deceased.

As to costs, the plaintiff and the testatrix's sisters were each entitled to forty guineas and disbursements, including proper agency charges to be paid out of the estate.

ILLEGITIMATE DAUGHTERS.

In *In re Wicksteed (deceased)* (Gisborne, November 27, 1959), Shorland J. had to consider an application for further provision for the plaintiffs, the illegitimate son and two illegitimate daughters of the testator born to the same mother, a Maori woman who was for different periods in the employment of the testator. The son was aged nineteen years and the daughters twelve years and five years, respectively, at the date of the testator's death. The testator lived and farmed at Ruatoria where he associated with the mother of the plaintiffs over a number of years.

In March, 1952, the testator gave a small dwelling-house property, the Government valuation of which was £730, to the mother of the plaintiffs, and the daughters lived with their mother therein. Both girls were at a school of full high school status. The son was away from home, employed as a telegraphist, and is and has for some time past been self-supporting.

In terms of an agreement, the testator's estate was still bound to pay maintenance for each of the daughters, but liability thereunder for the son had long since ceased. Save for the rights to maintenance conferred by the agreement, the plaintiffs had no property or assets, and little in the way of ultimate expectations from their mother. The provision made by the agreement represented the standard of the provision made by the testator for these children in his lifetime.

Under his will, the testator made no provision for the plaintiffs. The testator left an estate, the gross value of which was £30,000, and which, after payment of debts and duties, should yield about £22,000 net. The income earned by the testator's farming business in the year 1955 was (in round figures) £4,500; in

1956, £3,078 ; in 1957, £2,541 ; and in part of the year to November 25, 1958 (the date of death), £3,660.

The testator had been married three times and was survived by his third wife, whom he had married in 1954. He was also survived by three daughters born to him by his first wife. Each was married. Each was upwards of fifty years of age, and each was supported by a husband still living ; but the individual position of each married daughter differed from that of her sisters.

The testator was thus survived by the following persons who come within the purview of the Family Protection Act 1955 : (a) his widow to whom he had been married for less than four years at the time of his death ; (b) three adult legitimate married daughters, each of whom was supported by her husband ; and (c) the plaintiffs in the present proceedings.

By his will and codicil the testator bequeathed to his widow live stock to the value of £4,500, and an annuity of £300 per annum free of tax charged upon income and residue in the first place, but to the extent of deficiency upon the share given to each married daughter in equal shares. It was conceded on the hearing that the testator had discharged the moral duty owed to his widow, and that a claim for further provision which had been advanced in the widow's affidavit was abandoned.

To each of his three married daughters the testator devised a specific interest in realty. Making a conservative assessment of values, and making an ample allowance for the utmost extent to which the widow's annuity might cut into the devise of each daughter, the net value of the respective devise to each daughter was £2,500, £5,000, and £6,250 (approximately. The first two were provided for by their husbands. The third daughter had three children, all of school age. Her husband was unable to work because of ill health, and she herself had had some illness. War veteran's pension allowances provide the mainstay of the income of the family.

Mr Justice Shorland said that the differences in circumstances and family history which obtained in respect of the daughters were fairly and justly reflected in the differences between the respective provisions made for them by the testator in his will. In his opinion, the respective provisions made by the testator for his two elder daughters materially exceeded the measure of the moral duty owed to them, and the provision made for the youngest daughter was in excess of the measure of the duty owed.

His Honour continued :

> The duty owed by the testator to the plaintiffs was to make adequate provision for their proper maintenance, having regard to all the relevant circumstances.
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> In my view, the approach to be made in determining the measure of the moral duty in circumstances like the present case is (if I may respectfully say so) well and accurately indicated by F. B. Adams J. in *In re B.* [1958] N.Z.L.R. 362, 369, where the learned Judge said :
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> > I am not suggesting that the illegitimacy of the relationship is irrelevant. In my opinion it is a matter requiring to be considered in determining the extent of the duty owed by the testator to the claimant, just as the remoter relationship of the grandchildren in *In re Wright*: *Willis* v. *Drinkwater* [1954] N.Z.L.R. 720 was relevant in the same connection. It must be taken into account along with every other circumstance which enables one to determine what moral duty was owed by the testator to the claimant. In some cases it may weigh heavily, and in others where there are different circumstances it may have little or no bearing. I think the present case lies between the two extremes. I am not prepared to say that this testator owed the plaintiff the same duty as would have rested upon him had she been born in wedlock. I do not think the general moral sense of the community would envisage so great a duty in this particular case. But I hope that I interpret the general moral sense correctly in holding that there was in this case a very substantial duty owed by the testator. The plaintiff is flesh of his flesh and bone of his bone, the natural relationship being precisely the same as in the case of legitimate children, and closer than in the case of grandchildren.

In the present case, the relevant circumstances were perhaps even more complex than usual. His Honour did not think any good purpose would be served by discussing the circumstances in detail. Weighing all the relevant circumstances as best he could, he was left in no doubt that the testator failed to discharge the moral duty he owed to the plaintiffs under the statute.

The learned Judge went on to say :

> It was urged that as the son was able-bodied and self-supporting, no duty was owed to him. It is relevant to record that beyond providing bare maintenance, the testator has never done anything for his son.
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> I have had careful regard, in the first place, to what has been said by the Court of Appeal in *In re Goodwin* [1958] N.Z.L.R. 320 in reviewing earlier authorities and restating the principles regarding able-bodied sons, and, in the second place, to the special circumstances of the present case. In my opinion, the testator's son has established a claim to some further provision. It is true that being able-bodied and self supporting, the need for maintenance does not go beyond some assistance towards meeting a future capital outlay likely to be involved in such matters as setting up a home for himself, or possibly in advancing himself in his calling. In all the circumstances, I hold that he is entitled to the further allowance of £250 to be paid to him if and when he attains the age of twenty-five years.
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> In regard to the plaintiff daughters, I hold that they are entitled to further provision by the setting aside from the estate of the sum of £1,750, to be paid to the Maori Trustee to be held by him as a class fund for their benefit upon the ordinary trusts prescribed by s. 6 (2) of the Family Protection Act 1955. Pursuant to s. 6 (4) of the Act I direct that the said sum of £1,750 may at the election of the trustees of the estate of the deceased either be paid to the Maori Trustee immediately, or alternatively (subject to payment of interest as hereunder stated) be paid to the Maori Trustee as follows : (a) As to £350, within twenty-eight days of the sealing of the order herein ; (b) As to the balance of £1,400, by four equal annual payments of £350 each payable respectively within twelve, twenty-four, thirty-six, and forty-eight months of the sealing of the order. All portion of the total sum of £1,750 not paid within twenty-eight days of the sealing of the order will bear interest at five per cent. per annum payable by the estate to the Maori Trustee half-yearly as from the sealing of the order until the same will have been paid.

His Honour said that he had considered the submission that the provision should be subject to a condition returning to the estate some proportion of the fund in the event of the death of a child before attaining the age of twenty-one years ; but the provision made was a class fund, and he did not consider that there should be any such condition in the present case.

The only additions to the statutory powers and discretions conferred upon the Maori Trustee by s. 6 of the Family Protection Act 1955 that appeared to be necessary were : (a) that the trust would include power to the Trustee to deduct and have reasonable commission or remuneration ; and (b) leave was granted to the Maori Trustee to apply for any further directions he may from time to time find necessary.

The plaintiffs were allowed sixty guineas for costs, with disbursements as fixed by the Registrar. The

only daughter of the testator who conceded the right of the plaintiffs to an award, was allowed costs fixed at thirty guineas and disbursements. The trustees required no order as to costs. All other parties had to bear their own costs.

The costs and disbursements are to fall on residue, and thereafter on income earned by the trustees so far as it is available after payment of the widow's annuity. The sum of £250 allowed to the plaintiff son is to fall upon the bequest to the widow of the testator's cattle. The sum of £1,750 (with interest payable thereon) is to fall equally upon the share of each daughter.

Sons and Daughters.

In beginning his oral judgment in *In re Blackman (deceased)* (Hamilton, August 28, 1959), Hardie Boys J. said it was clear—indeed, it was conceded by all counsel—that the deceased recognized *no* moral claims on his bounty by any of his children: he mentioned none of them in his will. It was equally clear, and again conceded, that some, if not all, the children had claims on his bounty within the Family Protection Act 1955. His Honour added:

> He is shown by the affidavits in a most unfavourable light, and, while *de mortuis nil nisi bonum*, one must face realities and agree that the children and their mother throughout the years till they left home were treated without consideration, often harshly to the point of cruelty, required to work long hours, some of them in his unlawful as well as his lawful occupations, taken early from school—one was eleven-and-a-half years old, another at twelve-and-a-half when at ten she was still in the primers—and that when the parents separated at some time prior to 1938 (and in that year the youngest boy was only eleven) the children contributed much towards their mother that was really the father's responsibility to provide.
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> But at the date of his death in March, 1958, all the children were adult—the youngest thirty-two: it is at that point of time that one looks at the father's moral duty; but that consideration does not obliterate the past, for, if a testator has the means to do it, one of his moral obligations to his children is to make up to them as his means allow the deficiencies in his duties to them during his lifetime.

Continuing, His Honour said:

> In *In re Borthwick (deceased)*, *Borthwick* v. *Beauvais* [1949] Ch. 395, 400, Harman J. declined to accept the cynical proposition that the worse a man treats his wife in his lifetime the less he need leave her when dead. The same applies to children. Here, what the children suffered throughout their childhood were two important things that should be the rightful heritage of children: (*a*) the opportunity through lack of education of a better start in life (see Stringer J. in *Cook* v. *Webb and Matson* [1918] N.Z.L.R. 664, 671); and (*b*) the diminishment of their own means in undertaking the responsibilities of their father. This last was the basis of Turner J.'s award to an adult daughter in comfortable circumstances where the father had spent the mother's money rather than his own in paying for her hospitalization, thereby diminishing the daughter's inheritance from her mother (*Re Bennett* (1959) 35 N.Z.L.J. 35).

While the children did work—all of them—and work hard and long hours for their father without wages till they left home, it was not shown to be a case really of building up the estate he left, but was rather its effect upon their own start in life for themselves. Not unnaturally this brought about estrangement and, except in the case of the plaintiff and one son, the father is shown to have had no contact with his family for many years before his death. But, His Honour adopted the passage from the judgment of McGregor J. in *In re Easton, Gavin* v. *Easton* [1958] N.Z.L.R. 125, 129, ll. 20-39, pointing out that the daughters were mentioned therein only because all the capital went to sons.

The whole of this estate—a net £4,655—was left to two charities, £3,500, and, as to the balance to a stranger in blood who said she had no claim on the testator's bounty, and, indeed, knew of no reason therefor. The learned Judge said she very properly had left herself in the hands of the Court as did the charities, though they, of course, were not free to abandon what the will gave to them. He added that it was obvious that their rights must be cut down, and Mr Murray, for the trustee of the £3,000 fund, contemplated its reduction by one-half in order to meet the moral claims of the children, though, in so doing, he contemplated that the other charity and the residuary beneficiary would be excluded altogether in order to leave £3,000 for division between the surviving children. He continued:

> Now it has been said over and over again that what the Court must do is to carve out of the estate of the testator an adequate provision for the proper maintenance of those who prove their claims (see *Dillon* v. *Public Trustee* in the Judicial Committee [1941] N.Z.L.R. 557 at p. 560); but that in so doing one must not interfere with the will more than is necessary for that purpose: see F. B. Adams J., delivering the judgment of the Court of Appeal in *In re Wright, Willis* v. *Drinkwater* [1954] N.Z.L.R. 630, 638, line 27.
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> As, however, so frequently happens in practice, it is here impossible to give proper provision for those entitled without substantially interfering with this testator's will. It is a relatively small estate: it does not, as Mr Grace contended, come within the second class referred to in *Allen* v. *Manchester* [1922] N.Z.L.R. 218, 222, for there is no abundance of resources here, although there is enough to do something towards satisfying the testator's moral obligations.

His Honour then compared the respective positions of the six surviving children and considered their claims, not only in relation to their father's duty to each of them, but also in comparison with one another. He said that the plaintiff, the younger of the only two daughters, was forty-six and her gross salary as a member of the N.Z.W.R.A.C. was £542 9s. 5d., though there was no information before the Court whether she was in effect living free of board or whether there was some deduction for living in. For fourteen years after she left school at the age of fourteen she worked for her father with either no or little wages and helped the youngest boy with his schooling. She alone appeared to have adhered to the father after the separation, visiting the mother and maintaining contact with both. She really had no assets.

Her elder sister, Mrs Anderson, aged forty-seven and, separated from a husband who paid no maintenance, worked as a clerk in a Government Department at a net salary after deduction of tax of £520 per annum. Nothing was said about superannuation. She spoke of a hard and unhappy childhood with her father whom she left when she was seventeen and fended for herself after working in the shop without wages for five years. She had a property said to be worth £650 with a mortgage on it of £240. While her income might be slightly less than that of the plaintiff (if the plaintiff lived in), she had her own abode and served her father for a lesser period than did her sister. His Honour said there was little between them, but such difference as there was favoured the plaintiff, and her capital position was better by some £400.

Various submissions were made as to the relative claims of sons as against daughters, and, in particular, it was claimed that the daughters as such were entitled to preferential treatment. His Honour observed:

> In my view, all other factors being equal, the Court must still recognize, as was done in cases such as *In re Cavanagh*

[1930] N.Z.L.R. 376 and in *Gibson* v. *Public Trustee* [1933] G.L.R. 241, that a single daughter, particularly one who has spent her spinsterhood in assisting in the care of her parents, has a special claim and that, even without that additional factor, the needs of a single woman in the later stages of her life can be very much greater than those either of able-bodied brothers or of a sister who can look to her husband or children or both to assist her in the inevitable handicaps of old age.

The learned Judge placed the claims of the plaintiff as paramount here, and, in so doing, regarded the testator as having had a paramount obligation towards her in his testamentary dispositions. Her sister ranked not far behind; but the possession of a home, though small, which came to her in part as the result of an unsuccessful marriage, made her need of provision the less.

His Honour, in considering the sons' claims, started at the other end of the scale, and first took the youngest son Neil aged thirty-two, single, on a good salary as a foreman with assets worth approximately £2,500, some of which were an inheritance from his mother, though it was not contested that in large measure he provided the asset he inherited from her. As to his claim, His Honour said:

> I cannot feel that a wise and just testator, in whose armchair as he makes his will I must now sit, would have regarded his resources as sufficient to extend to this son as a bounty owed on account of moral duty anything more than a token recognition of services rendered to the father and the assumption of his obligations to his wife who was this boy's mother.

The next two brothers stood in almost equal relationship to one another in the matter of their present circumstances. Norman was thirty-seven, Allan thirty-nine. Each had three children between twelve and six. Norman, with his wife owned a bakery business and lived on the premises. Allan had his own house. The net assets of each were roughly £2,500 to £3,000, the one in business assets, the other in a mortgaged house and a car, assets of rather greater value than his younger brother. Norman and his wife by working long hours earned between them £1,300 per annum; Allan, whose wife also worked, earned with her about £1,000 per annum. Both helped their father in his business activities till they went out to work on their own account. Both went with the mother when Norman was thirteen and Allan, who was two years older, helped her with the sale of milk from cows given by a neighbour. Allan was for four years on a war pension and suffers periods of ill-health. Visiting his father to show him the children (the only one of his boys who appears to have done this) his vehicle broke down and the £100 received from his father to repair it, believed by him to be a gift, has become a judgment debt of £105 5s. in proceedings he had no mind to contest. His Honour regarded each as an equal claimant with the other of them.

The learned Judge continued:

> The eldest brother James William is in different case. He is forty-four, with four children, the eldest fourteen and the youngest six—all born since he married after his return from four-and-a-half years' war service. He occupies a State house at a rent of £2 5s. per week and earns £850 per annum as a fencer.
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> As might be expected in this curious upbringing to which the testator subjected his children, he suffered the most: from an early age he worked without wages leaving school at eleven-and-ahalf years of age. He left home at thirteen to work for a neighbouring farmer and gave his wages to his mother who was not then parted from her husband. Till he was twenty-six he gave all his wages to his mother and then went into the Army, making his whole allotment over to her. Her plight can be gauged by the fact that on his return after four-and-a-half years of service there was nothing saved from it for him and, indeed, he seems to have expected nothing. All this is not contested by the other members of the family and marks him clearly as one who has shouldered his father's obligations to his detriment, and that detriment is now reflected in his having no home of his own and almost his only capital is a bicycle and some furniture. He must clearly rank high in the claims on moral grounds to provision from the estate. Indeed, I rank his needs as equal to those of the plaintiff herself. It so happens that only his counsel and Mr Fitzgerald as counsel for the plaintiff nominated a sum which, having regard to the size of the estate and to the competing claims of others, was claimed to be warranted. In each case the same sum was put forward—namely, £1,000, though Mr Butcher for the younger sister, after that sum had been mentioned by the plaintiff's counsel, said his client had a prior—and I gather that means a greater—claim.

No one disputed, and His Honour concurred in the views of counsel, that this was a case for lump-sum payments.

The learned Judge then proceeded to assess the amounts which should be awarded to the claimants. He said, in a very interesting example of "how a Judge thinks" in a case such as this:

> Where then does one begin and end? I am not disposed to accede to the notion that I should first leave something for the trust created by the will and then distribute the remainder to the six children to the exclusion of the Servicemen's Trust and the residuary legatee. I think I must first ask myself, are the sums of £1,000 each claimed for these two children, one a son and one a daughter, reasonable in all the circumstances, particularly having regard to the size of the estate? If I so find, and then endeavour to equate the merits of other children to this standard of bounty, I shall by a simple process of addition see very readily whether I have started too high or whether there is something left over with which, though as a remnant, to give some effect to the testator's intentions towards those to whom he owed no duty.
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> I do not regard the figure of £1,000 in the case of either the plaintiff or James William Blackman as too high. In comparison, and having regard to her better capital position, I rank Mary Elizabeth Anderson as entitled to £750. The two brothers, Allan Gordon and Norman Tremaine, by the same yardstick should receive £200 each, though this like that of the youngest brother Neil Howard is really only a token of their services to father and mother. But Neil Howard's award must be token indeed, and I fix it at £100. In the case of Allan Gordon, it is preferable to make it £100 and forgive the debt.
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> My arithmetic makes this total £3,250 plus anything for costs in the debt of Allan over the £100, and the estate has £4,655 available out of which must come some costs although they may not cover all that has been incurred between solicitor and client in some cases. I have looked ahead at the provision for costs and with seven counsel involved and properly representing different interests, I must reserve £250 if I am to be practical.

That left £1,150 for purposes outside the family. The learned Judge was not disposed to ignore the named legatee. For reasons he deemed good, the testator, who can have had few friends, desired to remember her, even though it might be the case that she is named more by relation to her foster-sister than for her own sake. It would be churlish to treat her very proper attitude before the Court as an abandonment of so large a sum as the £1,155, which constituted the residue left to her. As the merest token, she would get the first £50 of residue, thus leaving a balance of £1,100. The two charities were preferred by the testator in the proportions of six parts for the Nurses' Trust and to one part for the Servicemen's Trust; and accordingly from the balance of residue £950 will go to the trusts of the will expressed therein as the Nurses' Assistance Fund in lieu of the sum of £3,000 mentioned therein, and £150 to the Women's Section of the Returned Services Association,

Taumarunui Branch, for the purposes set out in the will, following the bequest of £500 which this £150 replaced. This was shaded slightly in favour of the first of these two trusts as being the one the testator had mentioned first.

His Honour concluded his judgment by saying:

Now I have calculated my figures this way for a particular reason—namely, that the residue is quite uncertain before costs are ascertained. I have said I wish to be practical, and, giving it the best consideration I can, and subject to the reservation I shall add, I make the following orders for costs to be paid out of the estate: to the plaintiff fifty guineas and disbursements; to Mary Elizabeth Anderson thirty-five guineas and disbursements; to James and Neil Blackman, represented by the one counsel, thirty-five guineas and disbursements; to Allan and Norman, represented by the one counsel, thirty-five guineas and disbursements; to the trustee in his capacity for the Nurses' Trust fifteen guineas and disbursements; to counsel for the Women's Section fifteen guineas and disbursements; to counsel for the legatee fifteen guineas and disbursements.

Now these amount to two hundred guineas without disbursements and there will be costs of the Trustee himself in finally realizing and distributing the estate. The reservation I make is this, that to the extent that the residue is insufficient to meet these orders for costs after the Trustees' costs as such are paid, all other awards for costs shall abate rateably. To the extent that there remains a surplus above costs, however, that surplus shall go to the Nurses' Assistance Fund. It follows that these may not in every case be adequate as solicitor and client costs, the balance of which will have to be paid by the parties themselves.

Finally, in order to put the matter in proper form, I order that by way of provision out of the estate of the deceased William James Blackman there shall be paid the following sums pursuant to the provisions of the Family Protection Act 1955 in priority to the provisions contained in the will:

To the plaintiff, Phyllis Charlotte Blackman, the sum of £1,000; to Mary Elizabeth Anderson, the sum of £750; to James William Blackman, the sum of £1,000; to Allan Gordon Blackman, the sum of £100 and he shall be forgiven any debt owing by him to the estate of the deceased; to Norman Tremaine Blackman, the sum of £200, and to Neil Howard Blackman, the sum of £100. And I make the orders as to the residue and costs already stated. One further thing: the diminished fund for the Nurses' Trust may make it necessary for the trustee to seek aid from the Court to make the fund workable particularly as regards the restriction of three years on accumulation of income. But these are not the proceedings, nor is this the time to endeavour to adjust that.

COSTS.

The question of costs was the most important feature of the judgment of Henry J. in *In re Kelly* (Invercargill, November 20, 1959), which was a claim for further provision out of the estate of a testatrix who died on October 3, 1957, at the age of eighty-eight years. She left her surviving twelve children whose ages ranged from seventy-one to fifty-two years. The estate, excluding notional estate, was worth slightly less than £5,750. After payment of administration expenses up to date there was a sum of £5,145 2s. 6d. for distribution. The last will was made on October 26, 1955. It contained the following gifts—namely, to the eldest son, the plaintiff, £1,000 to Alfred Kelly, £1,000; to Ellen Elizabeth Findlay, £250; to Grace Cribb, £250, and the balance was divided equally among five daughters—namely, Victoria Ethel Pearse, Christina McPherson, Evelyn Beatrice Duncan, Euphemia Ruth O'Hagan, and Mary Frances Aspray. Three children, being a son and two daughters, were not provided for in the will. This son and one of these daughters were also claimants. In addition to the above gifts of £1,000 each, the plaintiff and Alfred Kelly each got £900 during 1955 and shared furniture valued at £152. The plaintiff received a gift of £100 or £150 in about 1922.

The learned Judge, after a detailed consideration of the position of each claimant, rejected the claims of the plaintiff and his brother, and made an order that Mrs Lemm should be paid the sum of £250 from the residue. This would put her on the same footing as her sisters Ellen Elizabeth Findlay and Grace Cribb. She would also get costs in the sum of fifteen guineas and Court disbursements from the residue.

His Honour concluded his judgment as follows:

Mr French has asked that the plaintiff should be ordered to pay costs. He pressed that on a careful analysis of the evidence which, he contended, showed that the plaintiff's claim was completely without merit. I have not traversed his arguments, which impressed me as being sound. I have preferred to adopt the basis set out above rather than give a critical survey of the claims advanced by the plaintiff. I think the overall picture given above demonstrates that the testatrix did not fail in her moral duty towards the plaintiff even if some of the plaintiff's exaggerated claims were acceptable. She had a large number of children and the estate was modest. She rewarded each of her children, except three, on what appears to be a fair and equitable basis. Of those three, only one, in my view, was overlooked although her present needs are reasonably well provided for. Nevertheless, it seems proper, and most of the parties agree, that her services were valuable and were given over a long period. She has accordingly been included as a recipient of the testatrix's bounty.

Applications are too readily made under this Act—seemingly on the basis that, even if no order is made, the estate will pay the costs. For myself, I propose in future to visit unsuccessful applicants with payment of costs unless reasonable grounds are shown why such an order should not be made. In the present case, the residuary beneficiaries should not bear all the costs of the trustee. An order is made that the costs of the trustee in this application are to be charged against the share of the plaintiff, and not against the residue. All other parties, except Mrs Lemm, are to bear their own costs.

In our next issue, we shall consider some recent cases under the Law Reform (Testamentary Promises) Act 1949.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Cinematograph Films—Licensing Officer issuing Exhibitor's Licence—No Duty to act judicially—Issue of Licence in Nature of Privilege allowing dispensation from General Statutory Prohibition—Cinematograph Films Act 1928, ss. 32, 43—Cinematograph Films (Issue of Exhibitors' Licences) Regulations 1937 (S.R. 1954/153), Regs. 3, 3A.—*See* CINEMATOGRAPH FILMS (*infra*).

BY-LAW.

Plumbing—No Permit Sought for Plumbing Work—Work completed to Required Standard—Permit subsequently issued—Contractor not disentitled by Illegality to recover Payment for Work Done. The plaintiff company, carrying on business as a registered plumber did certain plumbing work which was completed before June 12, 1958. On July 10, 1958, a formal "plumbing permit" for the work was issued by the local authority. A clause of the local authority's relevant by-law was in part as follows: "8. (a) No person shall establish, install, extend, alter, repair, or remove, or shall cause to have established, installed, extended, altered, repaired, or removed, any drain, sewage tank, or fitting, or do any sanitary plumbing work as described in clause 17 hereof, unless he has received from the local authority under the hand of the Engineer a permit for such work in accordance with the provisions of this clause." The plaintiff company sought to recover the unpaid portion of the cost of the work involved. It was contended that the claim was tainted with illegality by reason

of the fact that the necessary permit was not obtained before the commencement of the work, and that the moneys were therefore irrecoverable. *Held*, 1. That the purpose of the by-law was to ensure that, when plumbing was performed, such work should be of the required standard. 2. That the work, when completed, reached the required standard and there was no danger of its being required to be re-done or altered, and no fundamental illegality pervaded the whole work; and that, notwithstanding the breach of the by-law, the local authority had seen fit to issue a permit. (*Townsends (Builders) Ltd.* v. *Cinema News and Property Management Ltd.* (*David A. Wilkie and Partners Third Party*) [1959] 1 All E.R. 7 applied.) *Worth Ltd.* v. *Teehan and Another*. (1959. September 3. Kealy S.M. Auckland.)

CINEMATOGRAPH FILMS.

Exhibitor's Licence—Licensing Officer—Power to issue Licence is to grant Dispensation from General Statutory Prohibition, and so confer Privilege—No Duty to act judicially—Nothing in Statute to prevent Issue of Licence to Theatre Chain—Inquiry, at Licensing Officer's Request, by Department of Industries and Commerce—Minister's Approval of Its Report not Direction to Licensing Officer—Cinematograph Films Act 1928, ss. 32, 43—Cinematograph Films (Issue of Exhibitors' Licences) Regulations 1937 (S.R. 1954/153), Regs. 3, 3A. On January 22, 1957, K. which controlled a chain of theatres, applied for an exhibitor's licence for a proposed new theatre. The location of the proposed theatre was one mile thirty chains away from the C. theatre, operated by M. which controlled a small number of theatres in Auckland only. The licensing officer, having received K.'s application, sent a circular letter to the management of the independent theatres in the locality, and invited representations from them pertinent to the provisions of the legislation. Two further applications were received. M.'s application lodged on May 6, 1957, indicated an intention to erect a theatre on a site, which it claimed had advantages over the one proposed by K. F. lodged a further application and M. and F. advanced submissions supporting their applications. All the applicants took it for granted that there would be only one new licence issued. The applications were not filed in answer to an invitation by the Department of Internal Affairs for applications for one particular licence, and the letters written by the Department to the applicants did not say that one licence only would be granted. It did not take steps to remove that impression which, in addition to the applicants, the local bodies concerned had acquired. On April 12, K. amended its application to make it a joint application on behalf of itself and A., the other large theatre chain. The licensing officer, a member of the Internal Affairs Department, notified the applicants of his intention to order an investigation, invited further submissions from them, and asked the Department of Industries and Commerce to hold an investigation for him. In due course, that Department's report was sent to the Minister of Industries and Commerce, favouring M. in preference to the other applicants. The report was sent by that Minister to Judge Stilwell asking for his comments. After asking the various applicants for further submission, a request to which M. replied at length, the Judge recommended that M.'s application and the joint application of K. and A. be both granted, and that F.'s be refused. The report and recommendation was approved by the Minister of Industries and Commerce, and in due course was transmitted to the licensing officer, who, on September 5, 1958, granted the two licences. M. moved for an order of certiorari to quash the decision of the licensing officer to issue an exhibitor's licence to K. and A. jointly, and, alternatively, for a writ of injunction restraining the licensing officer from proceeding further with the issue of the licence and directing him to hear and consider further representations. *Held*, 1. That the power of a licensing officer to issue an exhibitor's licence under the Cinematograph Films Act 1928 is to grant a dispensation from the general statutory prohibition effected by the statute; in other words, to confer a privilege. There is nothing in the statute out of which arises a duty on the part of the licensing officer, expressly or impliedly, to act judicially. (*Buller Hospital Board* v. *Attorney-General* [1959] N.Z.L.R. 1259, applied). 2. That the Cinematograph Films (Issue of Exhibitors' Licences) Regulations 1937 do not prohibit the grant of new licences to a chain; and, in recommending as he did, the licensing officer had not acted in excess of his powers. 3. That, under the Regulations, as a matter of law it was competent to grant a licence to a chain; and, if M. was of the view that there was room for one licence only, M. should have directed submissions to that effect. The mere fact that there was a misjudgment on M.'s part, even a misjudgment which might have been apparent to the licensing officer, did not of itself entitle M. to certiorari. (*Drewitt* v. *Price Tribunal* [1959] N.Z.L.R. 21 followed.) 4. That the Minister of Industries and Commerce, when endorsing his approval, meant no more than that he was satisfied with the steps which had been taken by his Department, and that the documents were sent on to the Department of Internal Affairs with his approval of what had been done. There was no inference that the licensing officer had accepted as a direction the approval of the Minister, who was not the Minister in charge of the licensing officer's Department. 5. That it was not necessary that Judge Stilwell's recommendations should have been revealed to M. before the final decision was issued, so that M. could consider, and, if he desired, make representations on those recommendations. (*Local Govt. Board* v. *Arlidge* [1915] A.C. 120 followed.) 6. That, accordingly, it had not been shown that there was an error on the part of the licensing officer, either in the sense of a failure to observe the principles of natural justice or in the sense of acting outside the limits of his statutory powers. *Modern Theatres (Provincial) Ltd.* v. *Peryman*. (S.C. Wellington. 1959. November 28. McCarthy J.)

CRIMINAL LAW.

Provocation—Question for Jury—Proper Direction—Crimes Act 1908, s. 184. It is proper to direct a jury that, in considering whether there is provocation, regard is to be had to the relationship between the acts or word of provocation and the mode of retaliation employed. (*Taylor* v. *The King* [1948] 1 D.L.R. 545, referred to.) Under s. 184 (4) of the Crimes Act 1908, the whole question whether there was provocation is for the jury alone. It is not to be elevated into a matter of law. The relationship or disproportion between the acts or words of provocation and the mode of retaliation is a factor, and indeed a weighty factor, to be considered by the jury in determining whether or not the accused acted as he did by reason of the provocation. (*Attorney-General for Ceylon* v. *Numarasinghege D. J. Perera* [1953] A.C. 200, followed.) *So held*, by the Court of Appeal, dismissing an appeal from a conviction for murder. *R.* v. *Noel*. (C.A. Wellington. 1959. December 9. Gresson P. North J. Cleary J.)

PATENTS.

Notice of Opposition to Grant of Letters Patent—Commissioner's Power to Extend Time for filing Notice of Opposition, a Ministerial Act done before Existence of Lis between Parties—Duty to Exercise Ministerial Powers without Delay—Grant of Extension of Time without Notice to applicant for Grant, valid—Patents Act 1953, ss. 21, 94. On March 25, 1959, in pursuance of the requirements of s. 20 (2) of the Patents Act 1953, the advertisement of N.'s application for a grant of letters patent was contained in the issue of the *New Zealand Patent Office Journal*. The defendant company applied, in terms of s. 20 (2), for an extension of time for giving notice of opposition to the grant of the patent, and the Commissioner of Patents granted the application without prior notice to N. During the extended time, the defendant company lodged notice of opposition to the grant of the patent, and gave the plaintiff notice thereof. N. claimed an injunction to restrain the defendant company from opposing the grant of the patent, on the ground that the grant of extension of time for giving notice of opposition, made ex parte and without giving N. any opportunity to be heard thereon, was a nullity, and, in consequence, the notice was out of time. *Held*, 1. That, the exercise by the Commissioner of the power of extension of time for notice of opposition to be given, was in the nature of a ministerial act done before there existed a lis between the parties. 2. That, in patent matters, the Commissioner has to consider not only the interest of the parties but the overriding matter of the public interest. In the public interest, it is necessary that the Commissioner, in his ministerial or administrative capacity, must be in a position to exercise discretionary powers without delay. 3. That, considering the scheme of the Patents Act 1953, as a whole, and the special provisions of s. 21, the Commissioner validly exercised his authority to grant an extension of time to the defendant company without notice to N., the applicant. 4. That, as the remedy of injunction is a discretionary one, and N. had not suffered any real prejudice, but the rights of the defendant company might be seriously prejudiced by the grant of the injunction sought, and as the procedure adopted by the Commissioner had been adopted as standard procedure over many years, the grant of an injunction should be declined. *Noonan* v. *Giant Products Ltd.* (S.C. Wellington. 1959. September 29; October 28. McGregor J.)

THE ESTATE AND GIFT DUTIES AMENDMENT ACT 1959.

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

The learned editor of this JOURNAL has requested me to write a separate article on the amendments made to the Estate and Gift Duties Act 1955 by the amending Act of 1959.

Gift duty does not appear to be affected by the amendments; but there are certain important amendments to estate-duty law, which has come much into the public eye during the last two years on account of demands from certain quarters for the reduction of, and indeed from a few, for the total abolition of death duties in New Zealand. These discontents have been caused chiefly by the present high land rates prevailing for estate and gift duty. As the Estate and Gift Duties Amendment Act 1959 makes certain concessions to the taxpayer, it will be welcome for that reason, but the concessions can scarcely be described as substantial.

SUPERANNUATION SCHEMES.

Section 2 of the Estate and Gift Duties Amendment Act 1959 provides that the exemption from estate duty under s. 3 of that statute shall extend to approved superannuation schemes *for the self-employed*. There has been a strong demand for this extension, as public opinion thinks that the self-employed should have the benefit of the present exemptions granted, for instance, to the widows of civil servants and Parliamentarians, and it is gratifying to witness, and to record, the granting of this privilege to the self-employed by the Legislature. What is good for one section of the community is equally good for another.

Accordingly, s. 2 of the Estate and Gift Duties Amendment Act 1959 repeals the special provisions for exemption in this respect that have hitherto applied to certain superannuation schemes, including those under the National Provident Fund Act 1950, and makes provision for one rule *in all cases*. This has been effected by the enacting of the following definitions.

> "Superannuation fund" means:
> (a) Any fund out of which pensions are payable under the Superannuation Act 1956:
> (b) The National Provident Fund:
> (c) Any superannuation fund established for the benefit of the employees of any employer and approved for the time being by the Commissioner for the purposes of this Act:
> (d) Any other superannuation fund established for the benefit of contributors thereto otherwise than as employees of any employer and approved for the time being by the Commissioner for the purposes of the Land and Income Tax Act 1954.
>
> "Contributor", in relation to a superannuation fund, means a person by or in respect of whom contributions were made to the superannuation fund.

However, those (whether employees or self-employed) in receipt of, or eligible in due course for, pensions exceeding £1,000 per annum will not be so well-pleased with s. 3 of the 1959 amendment, which imposes a limit of £500 a year to the superannuation benefits in respect of which a widow is entitled to exemption from estate duty. However, s. 5 (2) (f) of the principal Act, as enacted by s. 3 of the Estate and Gift Duties Amendment Act 1959, cannot but be applauded as a very beneficial piece of legislation. It reads:

> (f) Where the deceased was a contributor to a superannuation fund and in accordance with its rules a pension is payable from that fund to or for the benefit of an infant child of the deceased until that child attains an age not greater than twenty-one years, that pension shall not be deemed to be included in the dutiable estate of the deceased.

EXTENSION OF EXEMPTIONS FOR SUCCESSIONS OF WIDOW, WIDOWER, AND INFANT CHILDREN.

Section 4 of the Amendment Act 1959 increases the amount for which a widow can claim exemption in her husband's estate, and extends the scope of her exemption and of the exemptions of widowers and children. Where the value of the estate does not exceed £7,500 the value of the widow's succession will not attract estate duty. Where the value of the estate does not exceed £30,000, the duty on the widow's succession up to the value of £7,500 will be remitted. Thereafter the concession will be tapered off £1 in £4 as the value of the estate exceeds £30,000, so that it disappears when the estate is £60,000 in value. This special exemption is much more liberal than the one which is superseded.

The position as from July 9, 1959, appears to be as follows.

In any case where the final balance of an estate does not exceed £60,000 and where:

(a) the widow takes an interest, there shall be deducted from the total duty an amount bearing the same proportion to the total duty as the value of the widow's interest or £7,500 (whichever is the less) bears to the final balance.

(b) an infant child (see below for meaning of child) of the deceased takes an interest, there shall be deducted from the total duty an amount bearing the same proportion to the total duty as the value of such child's interest or £500 (whichever is the less) bears to the final balance.

(c) the husband of the deceased takes an interest, there shall be deducted from the total duty an amount bearing the same proportion to the total duty as the value of such husband's interest or £1,000 (whichever is the less) bears to the final balance.

PROVIDED that the maximum allowance, however many deductions are made, will be an amount bearing to the total duty the same proportion as one quarter of the difference between the final balance and £60,000 bears to the final balance.

PROVIDED further that if there is more than one deduction each deduction shall be decreased proportionately so that the total allowance shall not exceed the maximum allowance.

NOTE: "Child" includes stepchild and any other infant actually dependent on the deceased.

ALLEVIATING PROVISIONS WHERE ALIENORS OF PROPERTY RESERVE TO THEMSELVES LIFE BENEFITS.

I think that I am safe in saying that the decision of the Privy Council in *Ward* v. *Commissioner of Inland Revenue* [1956] N.Z.L.R. 367 came somewhat as a shock to most members of the legal profession in New Zealand: following, as it did, the literal wording of s. 5 (1) (j) of the Death Duties Act 1921 (now s. 5 (1) (j) of the Estate and Gift Duties Act 1955), it appeared to offend against a principle of death-duty law that property is not taxed for death-duty purposes, if the deceased *inter vivos* has disposed of property for a *quid pro quo*. In order for property to be taxed there should be some element of bounty on the part of deceased. "It is not subtracting from his means if the deceased has received a full equivalent in return for what he has laid out": see *Lethbridge* v. *Attorney-General* [1907] A.C. 19, as noted by His Honour, the Chief Justice, Sir Harold Barrowclough, in *Ward's* case in the Court of Appeal [1955] N.Z.L.R. 361, 377, l. 51. It is true that *Lethbridge's* case was not on para. (j), but on the United Kingdom provision corresponding to our para. (g) of s. 5 (1); but it may be submitted that the words quoted indicate the real justification for the inclusion of "notional property" in any assessment of dutiable estate for the purposes of death duty.

The deceased, Charles Cameron Ward, died on April 18, 1949, aged seventy-seven years. The transaction in issue took place on June 15, 1932, Ward then being sixty years of age. Ward was the owner in fee simple of a shop property of the value (then accepted by the revenue authorities) of £11,195 which was subject to mortgages totalling £5,000. That transaction took the form of a sale and transfer by Ward to his four sons of the "equity of redemption" thus valued at £6,195 and the securing by mortgage back of the consideration on sale, being annuities to Ward and his then wife, which were then assessed by the Commissioner of Stamp Duties at £7,247 on the tables of mortality then accepted. In other words, the equity of redemption assessed as worth £6,195 was sold for annuities valued and assessed at £7,247, both valuations being those assessed by the Commissioner.

A reference to the judgment of Gresson J. [1956] N.Z.L.R. 361, 362, will show the circumstances in which this transaction was undertaken.

The transfer was expressed to be in consideration of the sons' executing a mortgage securing to the deceased an annuity of £650 per annum payable at £12 10s. per week and—after his death—an annual payment to his widow of £6 per week so long as she should remain unmarried. A memorandum of mortgage of even date with the transfer was executed by which there was secured on the property the sons' covenant to pay to the deceased during the remainder of his life an annuity of £650 and upon his death—if his wife, Selina Ward, should have survived him and should at the time of his death be his wife or if divorced should not have remarried—to pay to her during the remainder of her life so long as she should remain unmarried an annuity of £416 while the youngest son was a minor and thereafter of £312.

When the divorce petition had been served upon Selina Ward early in 1932, the question of securing her future maintenance had been discussed, and she had agreed to allow the petition to proceed undefended provided she was properly secured as regards her future maintenance, and as well she could feel assured that her four sons would be protected against the possibility of the deceased's property being disposed of or becoming charged in favour of any other person if he should remarry. At that time, the four sons held the majority of the shares in the company. The transfer of the property and the mortgage securing the annuity to the deceased and the payment to his widow were the outcome of negotiations between her solicitor and the deceased. After the decree absolute was pronounced on November 7, 1932, an order was made for permanent maintenance in the terms agreed upon, which order provided that "payment of the said annual sum of £416 referred to in 'the preceding paragraph of this order is secured and shall during the continuance of this order be secured by a Memorandum of Mortgage given by the said Charles Cameron Ward to the said Selina Ward dated June 15, 1932, and registered . . . under No. 65979'".

In 1956, the executors of the deceased in the *Ward* case petitioned the House of Representatives (a) for relief in respect of death duties, and (b) for the amendment of s. 5 (1) (j) as interpreted by the Privy Council. On October 26, 1956, the Statutes Revision Committee of the House reported back to the House and recommended that the prayer of the petition be referred to the Government for favourable consideration. The then Attorney-General, however, intimated that the matter of amendment of the law would be referred to the Law Revision Committee, and that the question of relief to the estate would be held over.

The Council of the New Zealand Law Society was also early on the scene in protesting against the effect of *Ward's* case. As early as March 19, 1957, the Secretary wrote to the then Minister of Finance as to the desirability of amending s. 5 (1) (j). The Council suggested that an amendment be considered whereby para. (j) should not apply to transactions under which full consideration has been given by the purchaser, and whereby credit should be allowed by way of deduction in transactions under which partial consideration has been given by the purchaser. The Council drew attention to s. 54 (2) of the Estate and Gift Duties Act 1955 (dealing with gift duty) which was introduced by way of amendment in 1952, and suggested that similar provisions relating to an annuity or other periodical payment as are therein contained might apply to death duty as well.

Let us disgress for a minute as to the gift-duty aspect. It is provided in s. 41 of the Estate and Gift Duties Act 1955 that in that statute, the term "gift" means any disposition of property which is made otherwise than by will, whether with or without an instrument in writing, *without fully adequate consideration in money or money's-worth*. Therefore no gift duty is ever payable in respect of any disposition of property which has been made for fully adequate consideration in money or money's-worth. Consequently, the transfer in *Ward's* case could not be liable to any gift duty. Section 54 (1) of the Act provides that when a *gift* is made in consideration or with the reservation of any benefit or advantage to or in favour of a donor, whether by way of any estate or interest in the same or any other property, or by way of mortgage or charge, or by way of any annuity or other payment, whether periodical or not, or by way of any contract for the benefit of the donor, or by way of any

condition or power of revocation or other disposition, or in any other manner whatsoever, whether that benefit or advantage is charged upon or otherwise affects the property comprised in the gift or not, no deduction or allowance shall be made in respect of that benefit or advantage in calculating the value of the gift, and the gift shall be valued and gift duty shall be paid as if the gift had been made without any such consideration or reservation. But subs. (2) of that section (referred to by the Council of the New Zealand Law Society) provides that s. 54 shall not apply to a gift made in consideration of any benefit or advantage to or in favour of a donor by way of any annuity or other payment, whether periodical or not, if and so far as the annuity or payment

(a) is of a fixed or ascertainable amount in money payable over a fixed or ascertained period or at a fixed or ascertainable date or dates or on demand; and

(b) is secured to the donor under an instrument executed by the beneficiary either creating a mortgage or charge over the property comprised in the gift or being an agreement for the sale and purchase of land comprised in the gift, or is secured to the donor under a deed executed by the beneficiary.

At first sight, it is difficult to see why in this respect different rules should apply to gift duty and estate duty; but the fact is the rules *are* different; and s. 5 of the Estate and Gift Duties Amendment Act 1959 does not do away with this difference.

The Council of the New Zealand Society made representations to the Law Revision Committee and submitted a draft of amending legislation which it considered would meet the case and would be fair both to the taxpayer and to the Revenue.

The Department, however, although not objecting to alleviating along the lines of s. 40 (2) of the Finance Act 1944 (U.K.), which it considered should meet the position regarding the element of purchase which could arise out of annuity payments, objected emphatically to the Law Society's draft legislation. It submitted the following additional facts in the *Ward* case:

(a) The property was leased to a private company named "C. C. Ward Ltd." for a term of ten years from February, 1930, at a rental of £600 per annum (on expiry of the lease the tenancy was continued at the rental of £600 until 1942, and thereafter at the rental of £800 per annum). The lessee company was a drapery company operating on premises on the property and had a share capital of £10,000. At all relevant times the deceased and his sons held all the shares.

(b) Although the property had a high prospective value and was then producing £600 a year, values generally were depressed in 1932; and, accordingly for the purpose of assessing stamp duty on the transfer and determining whether gift duty was payable the Department accepted the existing Government valuations of £11,195 made in 1922 and 1923 as being the value as at June, 1932. On that basis, there was no gift, as the values of the annuities to the deceased and Selina Ward as calculated by the Department totalled £7,247 while the value of the equity in the property transferred then totalled £6,195.

In disposing of property bringing in rents of £600 per annum (and later £800 per annum) in consideration of a life annuity of £650 per annum, the Department considered that Ward was not selling the property any more than he would if he had settled it on those terms. "There is no bona fide sale where the substance of the matter is that the donor reserves the income of his gift. The first characteristic of a sale (the Department submitted), is a price paid out of the pocket of the purchaser." (*Green on Death Duties*, 4th ed. 692.)

The following propositions elaborated the Department's view:

(a) If A settles property worth £10,000 (and bringing in income of £500 per annum) for a life interest to A and remainder to B, B is not buying the property. A is enjoying the property up to his death and B commences to enjoy it thereafter.

(b) If A has disposed of the property to B in consideration of B paying him an annuity of £500 for his life, B would not be buying the property.

(c) If the amount of the annuity was £600 per annum, B would be purchasing the property at the rate of £100 a year (not £600 a year).

In other words, the Department rejected for the purpose of assessing under para. (j) of s. 5 (1) (j) life benefits to alienors of property, the customary method laid down by the Act, that of valuation by means of the statutory actuarial tables based on property producing income at a set rate of five per cent. per annum.

Another reason making it really very difficult to get enacted any worthwhile alleviating legislation is a fact mentioned pithily in *Green on Death Duties*, 4th ed. 120.

It had doubtless been observed that such men who bought life annuities from their sons often turned out to be "bad lives".

As enacted, s. 5 of the Estate and Gift Duties Amendment Act 1959 reads as follows:

5. Section five of the principal Act is hereby amended by adding to subsection three the following paragraphs:

(c) Where, after the date of any settlement or trust or disposition of property made by the deceased, improvements are made, otherwise than by or at the expense of the deceased, to any land comprised in the settlement or trust or disposition of property, the value of the land for the purposes of paragraph (j) shall be reduced by the value of those improvements as at the date of death of the deceased:

(d) Where any settlement or trust or disposition of property was made by the deceased for a consideration in money or money's-worth paid, or payable at the date of death of the deceased, either to the deceased for his own use and benefit, or to any other person in satisfaction of a debt incurred by the deceased for full consideration in money or money's worth wholly for his own use and benefit, the value of the property comprised in the settlement or trust or disposition of property shall for the purposes of paragraph (j) be reduced by:

(i) The amount of any such consideration so paid together with interest at the rate of five per cent. per annum on so much thereof and for such period as, in the opinion of the Commissioner, is in all the circumstances reasonable; and

(ii) An amount equal to the value as at the date of death of the deceased of any such consideration so payable:

Provided that no such reduction shall be made in respect of any consideration by way of a benefit to the deceased for the term of his life or of the life of

> any other person, or for any period determined by reference to the death of the deceased or of any other person, except to the extent to which the aggregate of the amounts paid in respect of that benefit exceeds the aggregate of the income from the property for the period from the date of the settlement or trust or disposition of property until the date of death of the deceased; and in this proviso, the expression "the aggregate of the income from the property" means such amount as, in the opinion of the Commissioner, is in all the circumstances equal to a reasonable return from the property.

I think that the practitioner will find that this section takes some time to digest and construe adequately; the wet towel wound around the fevered forehead may give some mental relief, if but little real edification. However, a perusal of the Explanatory Note which accompanied the Bill when it was presented to Parliament may save one's time.

The case of *Ward* v. *Commissioner of Inland Revenue* [1956] N.Z.L.R. 361 has directed attention to the operation of s. 5 (1) (j) of the Estate and Gift Duties Act 1955, which brings into the dutiable estate of a deceased person property comprised in a disposition which was made by him and under which he retained an interest during his lifetime. The clause provides that, in calculating the value of the property for estate duty purposes, there shall be deducted:

(a) The value of any improvements made to the property after the date of the disposition, otherwise than by or at the expense of the deceased:

(b) The amount of any consideration paid in the lifetime of the deceased plus interest at 5 per cent. thereon; and for this purpose the payment of a life annuity or other life benefit is a consideration to the extent to which the aggregate payments exceed the aggregate income of the property:

(c) The value of any consideration payable to the deceased or in satisfaction of a debt of the deceased.

It appears to the writer of this article, however, that the Explanatory Note draws no attention to the last proviso which in effect detracts considerably from the preceding words of the section:

> Provided that no such reduction shall be made in respect of any consideration by way of a benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person, except to the extent to which the aggregate of the amounts paid in respect of that benefit exceeds the aggregate of the income from the property for the period from the date of the settlement or trust or disposition of property until the date of death of the deceased; and in this proviso, the expression "the aggregate of the income from the property" means such amount as, in the opinion of the Commissioner, is in all the circumstances equal to a reasonable return from the property.

There can be no doubt, in my opinion, that s. 5 follows very closely the corresponding legislation in the United Kingdom. Owing to the varied course which it has taken the United Kingdom legislation is very difficult to fathom out and follow: an outline of that legislation, however, will be found in *Green's Death Duties*, 4th ed. 120 *et seq.* In considering the new proviso to s. 5 (3) (d) one notes that the expression therein "the aggregate of the income from the property" means "such amount as, in the opinion of the Commissioner, is in all the circumstances equal to *a reasonable return from the property*". (The italics are mine.) Now in *Green*, at the bottom of p. 125 and top of p. 126, we find this statement:

> In the case of property yielding a normal income and retained by the donee, the actual income would probably be taken as a "reasonable return".

I should say that in all probability the Commissioner of Inland Revenue in New Zealand will follow the United Kingdom practice in this matter.

I desire to submit, however, that the United Kingdom practice as to what is "a reasonable return" might not always be fair to the taxpayer under New Zealand conditions. Take a case, for instance, such as *Ward's* case, where the settlor is elderly; if he had no vigorous son or other relative to take the property over, he would be faced with the expense of employing a paid manager which would reduce the net profits from the property; whereas the Commissioner, if he follows the United Kingdom practice, would take as "a reasonable return" the profits actually earned and in such circumstances under s. 5 there will be very little deduction to be made in favour of the taxpayer.

THEIR LORDSHIPS CONSIDER.

By COLONUS.

Laches and Statutory Compensation.—An important principle was stated by Earl Cairns in *Tiverton & North Devon Railway Co.* v. *Loosemore* (1884) 9 App. Cas. 480, 489: "There have been cases in which a railway company has given a notice to a landowner to treat for the purchase of land and no further step has then been taken, either by the company or the landowner, and the extended period for completing the works has expired, and the question has been raised, could the company in that state of things proceed with its notice to treat, and assess the compensation under the Lands Clauses Act Were such a case now to arise, I should be disposed to think, as I was disposed to think in *Richmond* v. *North London Railway Co.* (1868) L.R. 5 Eq. 352, that, if nothing more was done, and the company have slept upon their rights, and certainly if the delay cannot be explained, they should be held to be disabled from going on with any compulsory purchase and in such a case the landowner should, as I think, be held to be disabled also. Both parties have been content to let the time run out."

Appeal: Discretion.—Lord Simonds L.C. in *Re Yorkshire Copper Works Ltd.'s Application* [1954] 1 All E.R. 570, 572, said, in relation to an appeal on the issue of distinctiveness: "And if it were a borderline case, which it is not, I think that a Court, to which an appeal is brought from the Registrar, though, no doubt, it must exercise its own discretion in the matter, should be slow to differ from the experienced official whose constant duty it is to protect the interests of the public not only of today but of tomorrow and the day after. In uttering that warning I only repeat what has been said more than once in this House."

DOMINION LEGAL CONFERENCES: A RETROSPECT.

II. Personalia

The records of the first ten Dominion Legal Conferences may be regarded, in some respects, as almost a *Who's Who* of the legal profession during the thirty-two years that have elapsed since the First Conference was held in Christchurch at Easter, 1928.

The successive roll-calls in the various centres comprise a formidable cross-section of the profession over three decades, and there is material for interesting, if not instructive, reflection in the record of achievement of many of those who have identified themselves actively with the organization of Conferences or with the problems and topics discussed.

When the First Conference was convened in Christchurch, 172 practitioners answered the roll-call, and there were no Judges of the Supreme Court present. At the Tenth Conference in 1957, again in Christchurch, the attendance was 342, and the gathering included the Chief Justice, Sir Harold Barrowclough, five other members of the Judiciary, and three Judges of inferior Courts. It may be regarded as significant that the name of every Judge of the Supreme Court present that day had figured at some time in the list of contributors to Conference discussions.

Christchurch, 1928.

At the 1928 Conference, the Canterbury President was Mr K. Neave and the control of the formal proceedings was in the hands of the President of the New Zealand Law Society, Sir Alexander Gray K.C. The Conference secretary was Mr W. J. Hunter, later a Judge of the Court of Arbitration, at whose suggestion, in 1927, serious consideration was first given to the matter of national Conferences. Those who contributed papers included Mr A. F. Wright (Christchurch), Mr Harold Johnston later Mr Justice Johnston, whose death occurred only last year; Mr M. Myers K.C. (Wellington), who, as Sir Michael Myers, was to be appointed Chief Justice in the following year, and hold that position till his retirement in 1946; and Mr W. R. Lascelles (Christchurch).

Future Judges of the Supreme Court cut a wide swathe through the 1928 Conference. Legislation by regulation found stern critics in Mr F. B. Adams (Dunedin), now Mr Justice F. B. Adams, resident Judge in Christchurch, and Mr A. Fair K.C. (Wellington), then Solicitor-General, later Mr Justice Fair from 1934 to 1955, and now living in retirement in Wellington.

When Mr H. H. Cornish (Wellington), later Solicitor-General, and from 1945 to 1950 Mr Justice Cornish, moved a remit on Judges' salaries and pensions, he had the support of Mr R. Kennedy (Wellington), who in less than a year was to become Mr Justice Kennedy and retain his seat on the Supreme Court Bench until his retirement in 1950, when he went, as Sir Robert Kennedy, to live at Waikanae. Also in agreement with the remit was Mr M. H. Oram (Palmerston North), who as Sir Matthew Oram resigned from the Speakership of the House of Representatives in 1957.

The following year's Chief Justice, Mr M. Myers, had both Messrs Kennedy and Adams on his side in support of one of Mr M. J. Gresson's remits, and that trio were joined by Mr A. K. North (Auckland), who became a Judge in 1951 and was appointed to the Court of Appeal in 1957.

Mr Harold Johnston's paper on "The Jury System" attracted comments from Messrs Fair, Cornish, Kennedy, Adams, W. J. (now Sir Wilfrid) Sim, A. T. Donnelly (afterwards Sir Arthur), and M. J. Gresson.

Wellington, 1929.

When the Second Conference was held in Wellington in 1929, Mr C. G. White was president of the local host society and as his first lieutenant had Mr W. E. Leicester in the role of Conference secretary. Sir Alexander Gray K.C. again presided over the business sessions. A distinguished guest of the Conference was Sir Robert Stout, who three years earlier had retired from the Chief Justiceship after an incumbency of twenty-seven years. He was then in his eighty-fifth year. He died in the following year.

The inaugural address was given by the Attorney-General, the Hon. T. K. (later Sir Thomas) Sidey. A feature of the Conference was the attendance of the Governor-General, Sir Charles Fergusson, whose remarks to the gathering were characteristic of the unostentatious charm and dignified efficiency that marked a Vice-regal stewardship that was to end that year.

Papers were presented by Sir John Findlay K.C. (Wellington), Mr R. L. Ziman (Auckland), Mr P. J. O'Regan (Wellington), later a Judge of the Arbitration Court and, later, still of the Compensation Court, and a temporary Supreme Court Judge, Mr A. H. Johnstone (Auckland), and Mr A. T. Donnelly (Christchurch).

A discussion on "Actions by and against Government Departments" drew the fire of two future Chief Justices, Mr M. Myers (Wellington), and Mr H. F. O'Leary (Wellington), who, in 1946, was to succeed Sir Michael Myers and, as Sir Humphrey O'Leary, die in office seven years later. They had the support of Mr A. Fair K.C. (Solicitor-General) and Mr J. D. Hutchison (Christchurch), now Mr Justice Hutchison and senior puisne Judge of the Supreme Court.

Auckland, 1930.

The Conference moved to Auckland in 1930, still under the chairmanship of Sir Alexander Gray K.C. The host president was Mr R. P. Towle, who had the assistance as Conference secretaries of Professor R. M. Algie, later Minister of Education in the Holland Government of 1949-1957 and Mr A. M. Goulding, who, after ten years as a Stipendiary Magistrate in Wellington, was, in 1949, appointed chairman of the newly-established Licensing Control Commission whose activities he guided until his retirement last year.

The inaugural address was delivered by the Chief Justice, Sir Michael Myers, and served as an illustration, to use the Chief Justice's own words, that those "who leave the Bar and become Judges do not lose their interest in, and sympathy with, those who were their brother practitioners".

The Attorney-General, Sir Thomas Sidey, again addressed the Conference, and another distinguished Dunedin practitioner followed him with a paper on "Appeals to the Privy Council". This was Mr J. B. Callan, who five years later was appointed to the Supreme Court Bench, and died in 1951 at the peak of a judicial career that was the admiration of both Bench and Bar. His paper was described at the time as attaining "the highest level reached at any of these Conferences".

Other active roles at the business sessions were taken Sir Francis Bell K.C. (Wellington), Mr A.K. North (Auckland), Mr H. F. O'Leary, Mr A. Fair K.C. (Wellington), Mr G. P. Finlay (Auckland), who became a Judge in 1943 and, as Sir George Finlay, retired from the Bench last year and devoted himself to the codification of the Crimes Act 1908, and Mr R. Hardie Boys (Wellington), now Mr Justice Hardie Boys in Auckland, where he moved on his appointment as a Judge in 1958.

Dunedin, 1936.

After a lapse of six years due to the economic disruption of the country, the Fourth Conference was held in Dunedin in 1936. Mr H. F. O'Leary K.C. (Wellington), who in ten years was to become Chief Justice, had succeeded Sir Alexander Gray K.C. at the head of the New Zealand Law Society, and he had with him as partner in control of the Conference Mr A. N. Haggitt, still one of the leading counsel in Dunedin, and then president of the Otago and Southland District Law Society. The Hon. H. G. R. Mason attended as Attorney-General, which office he had assumed with the return the previous year of New Zealand's first Labour Government.

In his inaugural address, Mr Mason dealt with a topic of the deepest interest today—delegated legislation—and said he did not propose to discuss whether it was a good thing or a bad thing. He was sure, however, that it was "inevitable", and since anything that was inevitable tended to increase, it behoved them to consider how best to use "the inevitable".

Remits by Mr P. J. O'Regan (Wellington) on workers' compensation drew comments from Messrs H. F. O'Leary and F. B. Adams (Dunedin), and the issue was later discussed by Mr K. M. Gresson (Christchurch), who, in 1947, was to follow his grandfather, Mr Justice H. B. Gresson on to the Supreme Court Bench, and in 1957, one hundred years after his ancestor's appointment, to assume the distinction of President of the first separate Court of Appeal in New Zealand.

The present president of the New Zealand Law Society, Mr D. Perry (Wellington), and one of his predecessors in that office, Mr W. H. Cunningham (Wellington), were associated in a remit on King's Counsel rules which was rejected and Mr W. J. (now Sir Wilfrid) Sim spoke on "Law Reform in New Zealand".

Dr A. L. Haslam (Christchurch), now Mr Justice Haslam (Wellington) since his appointment as a Judge in 1957, delivered a paper on the "Trial of Collision Cases" which was commented on by Mr P. J. O'Regan (Wellington) and Mr J. D. Hutchison (Christchurch), and when Mr O'Regan once again bestrode his hobby horse—compensation—this time deaths by accidents—Mr W. J. Sim (Wellington), Mr M. J. Gresson (Christchurch), Mr C. H. Weston K.C. (Christchurch), the President (Mr O'Leary), and Mr F. B. Adams (Dunedin), all took part.

Personalities at the Bar dinner included the Hon. W. Downie Stewart (Dunedin), lawyer, author, and one-time Minister of Finance in the Reform Government, Mr Justice Kennedy, now Sir Robert Kennedy, Mr Justice Callan, Mr A. C. Hanlon K.C. and the Hon. W. Perry M.L.C.

Christchurch, 1938.

Mr H. F. O'Leary K.C. was again president of the Conference in 1938 at Christchurch. The Canterbury president was Mr J. D. Hutchison (now Mr Justice Hutchison) and he had as Conference secretary Mr V. G. Spiller. Mr H. G. R. Mason returned once again as Attorney-General and with him Mr H. H. Cornish K.C. as Solicitor-General.

With suitable pomp and display the foundation stone of the new Christchurch Law Courts was laid by the Governor-General, Viscount Galway, in a colourful ceremony at which the Chief Justice, Sir Michael Myers, Mr Justice Kennedy, and Mr Justice Northcroft (the resident Christchurch Judge) displayed for the first time, to the admiration of the assembled multitude, the full-dress trappings of the New Zealand Judiciary—white gloves, black cap, and all. But the Canterbury capital is still—twenty-two years after—waiting for its new Courthouse.

The president and the Attorney-General again delivered the opening addresses and these were followed by Mr A. H. Johnstone K.C.'s paper on "The Jury System", a subject which had engaged the attention of Mr Harold Johnston K.C. ten years before at the First Conference. As on the previous occasion, future Judges in 1938 found it a fruitful field of discussion. Mr H. E. Barrowclough (Auckland), now Sir Harold Barrowclough, Chief Justice since 1953, followed the Attorney-General and the Solicitor-General, and others who took part were Mr K. M. Gresson (Christchurch), Mr F. B. Adams (Dunedin), Mr G. I. McGregor (Palmerston North), who became Mr Justice McGregor in 1953, and Mr L. K. Munro, now Sir Leslie Munro, United Nations emissary on Hungary and from 1951 to 1958 New Zealand Ambassador to the United States and the Dominion's permanent representative on the United Nations.

Other papers or remits were presented by Mr A. C. Stephens (Dunedin), Mr W. J. Sim (Wellington), Mr D. Perry (Wellington), and Mr F. B. Adams (Dunedin). Among the speakers were Mr F. J. Rolleston (Timaru), one-time Attorney-General and Mr E. P. Hay, who became Mr Justice Hay in 1949, retiring because of ill-health in 1955. He died in the same year.

Wellington, 1947.

The Second World War caused a gap of nine years between Conferences and the sixth was held in Wellington in 1947. In the meantime, Mr O'Leary had been called to the Chief Justiceship, and his successor as President of the New Zealand Law Society was Mr P. B. Cooke K.C. (Wellington). Three years later he was to become Mr Justice Cooke, but his term of office was cut short by his untimely death in 1956.

When Mr Cooke took the chair at the 1947 Conference, it was at the invitation of Mr J. R. E. Bennett, president of the host Society. The Conference

secretaries were Messrs H. R. C. Wild, now Solicitor-General and a member of the Inner Bar, and J. C. White—almost a family affair. In acknowledging the Conference's thanks to the joint secreteries, Mr Wild referred to his colleague, Mr White, as one who had been his friend of many years' standing, his brother-in-arms, his brother in the law, and in fact, his brother-in-law. (This year Mr Wild, as President designate of the Wellington District Law Society, is the Conference host. And his Vice-President designate is Mr J. C. White.)

The new Chief Justice, Sir Humphrey O'Leary, less than a year in office, received a warm welcome and the Hon. H. G. R. Mason K.C. again attended in his capacity of titular head of the profession.

Papers were read by Mr A. C. Stephens (Dunedin), Professor R. O. McGechan, Dean of the Law Faculty at Victoria College (Wellington), Mr J. D. Hutchison (Christchurch), Mr R. J. Larkin (Matamata), Mr Julius Hogben (Auckland), and Mr L. F. Moller (Auckland). Of Mr Moller's contribution, the President, himself a master of style, said it was " a graceful and artistic triumph ".

Two Wellington practitioners who were later to sit upon the Supreme Court Bench together—Mr R. Hardie Boys (Wellington) and Mr I. H. Macarthur (Wellington), sponsored a remit deploring the effect of " new " tribunals on the traditional standards of the administration of justice. Mr Hardie Boys was appointed to the Supreme Court in 1958, and Mr Macarthur became Mr Justice Macarthur and moved to Christchurch to succeed the late Mr Justice Haggitt last year.

Mr K. M. Gresson and Mr L. P. Leary discussed Professor McGechan's paper on " Teaching of Law " and they were joined by Mr W. P. Shorland, who became Mr Justice Shorland in 1954 and has his Court in Auckland.

The present President of the Court of Appeal had some comments to make on a paper dealing with " The Etiquette of the Profession ", delivered by the senior puisne Judge at the present time.

Auckland, 1949.

Mr P. B. Cooke K.C. presided over his second Conference at Auckland in 1949. His local president was Mr V. H. Hubble, and the Conference secretaries were Messrs F. J. Cox and J. T. Sheffield.

The Hon. H.G.R. Mason K.C. was present as Attorney-General and guests of the Conference included the Chief Justice Sir Humphrey O'Leary, Mr Justice Callan, Mr Justice Finlay, Mr Justice Stanton, and a former Judge, Sir Alexander Herdman.

The inaugural address was delivered by the Governor-General, Lord Freyberg. Mr A. K. North K.C. spoke on " Law and the Public Conscience " and comments were made by Mr H. E. Barrowclough (Auckland) and Dr A. M. Finlay M.P. (Auckland).

Sir David Smith, who had retired from the Supreme Court Bench a year before after a judgeship of twenty years, and was reappointed temporarily after the Conference, delivered an outstanding paper on " The Development of the Legal System ".

Other papers and remits presented by Messrs H. R. C. Wild (Wellington), J. C. White (Wellington), S. R. Dacre (Christchurch), A. C. Stephens (Dunedin), R. Q. Quentin-Baxter, and Mr A. H. Johnstone K.C.

Dunedin, 1951.

There was an atmosphere almost of gunpowder around the top table of the 1951 Conference in Dunedin. Sir William Cunningham had followed Mr P. B. Cooke K.C. (by this time Mr Justice Cooke) as president of the New Zealand Law Society and of the Conference, and the Dunedin President was Mr A. J. H. Jeavons.

Major-General Sir William Cunningham C.B.E., D.S.O., (whose death occurred last year) was a soldier as well as a lawyer, and had survived two world wars with a final rank of Major-General. But he was not alone in his military distinction. He had two other Major-Generals at the Conference—Major-General H. E. Barrowclough C.B., D.S.O., M.C., who was to become Chief Justice in three years' time, and Major-General L. M. Inglis C.B., C.B.E. D.S.O., M.C., now senior Stipendiary Magistrate at Hamilton and a member of the Courts-Martial Appeal Court.

And as if that were not a fragrant enough military flavour for any Conference, there were the host, Mr Jeavons, whose vigorous and promising army career was cut short by serious wounds in the Western Desert of North Africa in 1941, and his two Conference secretaries—Messrs J. P. Cook and D. L. Wood. Mr Cook served for six years in the Middle East and attained the rank of Lieutenant-Colonel. He was awarded the O. B.E. and Mentioned in Dispatches for his work as A.A. and Q.M.G. Mr Wood also served in the Middle East from 1940 to 1945, won the M.C. as Brigade Major of the 6th Brigade and was twice Mentioned in Dispatches.

The trio of Major-Generals all saw service in both world wars, Sir William Cunningham was in the Pacific, Mr Barrowclough in both the Middle East and the Pacific, and Mr Inglis in the Middle East for six years after which he was attached to the British Commission in Germany from 1945 to 1950 as Director of Military Government Courts, Chief Judge of the Control Commission Supreme Court, and President of the Court of Appeal.

The familiar figure of Labour's much-respected Attorney-General, the Hon. H. G. R. Mason K.C., was absent from this conference, his place being taken by the Hon. T. C. Webb, now Sir Clifton Webb, and until 1958 High Commissioner for New Zealand in London.

Papers were read by Mr W. E. Leicester (Wellington), Mr D. J. Riddiford (Wellington), Mr L. M. Inglis S.M. (Palmerston North), and Dr A. L. Haslam (Christchurch), and a remit on Judges' salaries was presented by Mr G. M. Lloyd (Dunedin). Although some of them were present, no Judges-to-be joined in the last-mentioned discussion.

Napier, 1954.

The flight from precedent represented by the holding of the Conference away from the metropolitan centres was accentuated at the 1954 Conference in Napier by the selection of an episcopal dignitary—Bishop N. A. Lesser, of Waiapu—to deliver the inaugural address. Sir William Cunningham presided over his second Conference, and Mr J. H. Holderness was the local President. The Conference secretaries were Messrs G. E. Bisson and D. D. Twigg.

The Chief Justice, Sir Harold Barrowclough, who had been appointed only a few months before on the death of Sir Humphrey O'Leary in 1953, was accompanied by Mr Justice Stanton and Mr Justice Hutchison.

The Hon. J. R. Marshall, Acting-Attorney-General, in the absence overseas of the Hon. T. C. Webb, addressed the Conference and Mr L. P. Leary Q.C. (Auckland) argued the case for a permanent Court of Appeal. He was supported by Mr T. P. Cleary (Wellington), now Mr Justice Cleary, a member of the Court of Appeal to which he was appointed from the Bar on its establishment in October, 1957.

Other papers were read by Dr P. P. Lynch (Wellington), Messrs E. S. Bowie (Christchurch), R. A. Young (Christchurch), Dr J. L. Robson (Wellington), Messrs H. W. Dowling (Napier), and J. C. White (Wellington).

By now there was developing a sort of Conference alumni, and the attendance at Napier included three hosts at previous Conferences—Mr A. N. Haggitt (Dunedin), 1936; Mr Justice Hutchison (Christchurch), 1938; and Mr J. R. E. Bennett (Wellington), 1947—and five former Conference secretaries, the doyen of whom was Mr W. E. Leicester (Wellington) who had suffered that arduous distinction in 1929.

Christchurch, 1957.

The Tenth Conference was held in Christchurch for the third time in 1957 under the presidency of Mr T. P. Cleary (now Mr Justice Cleary) who had been elected President of the New Zealand Law Society following the resignation of Sir William Cunningham in 1954. The President of the Christchurch District Law Society was Mr R. A. Young, and his Conference secretaries were Messrs A. Hearn and A. D. Holland.

The Chief Justice, Sir Harold Barrowclough, was present and with him Mr Justice Hutchison, Mr Justice F. B. Adams, Mr Justice McGregor, Mr Justice T. A. Gresson, and Mr Justice McCarthy. The two last-named Judges had left the Bar to sit on the Bench since the last Conference. Also present were Judge Dalglish (Compensation Court), and Judge Archer (Land Valuation Court). Sir Arthur Fair, who had retired from the Bench in 1955, was also there.

The Hon. J. R. Marshall attended with his acting rank of Attorney-General made substantive by the appointment of Mr T. C. (nowSir Clifton) Webb Q.C. to be High Commissioner in London. Mr H. R. C. Wild, who was to commence his duties as Solicitor-General after the Easter vacation was also present.

Mr Marshall's inaugural address was notable for his announcement of the Government's intention to proceed, in the next session of Parliament in that year with legislation setting up a permanent Court of Appeal.

Among those presenting papers was Mr R. L. Ziman (Auckland) who dealt with titles to motor-vehicles. Twenty-eight years before he had delivered a paper on "The Crown in Business" to the 1929 Conference in Wellington. The 1957 papers and discussions covered an unusually wide field, those contributing being Sir Wilfrid Sim (Wellington), Mr P. H. T. Alpers (Christchurch), Mr R. Hardie Boys (now Mr Justice Hardie Boys), and Mr I. L. M. Richardson (Invercargill).

* * * *

History has a habit of repeating itself. The Dominion Legal Conference of 1960 will be held at Wellington during Easter week. When, in perhaps twenty-five years' time, a retrospect of its transactions comes to be written, it will no doubt feature the names of celebrities of the future who took part in its activities.

R.J.

Statutes: "Include".—It is worthwhile to recall a passage from the judgment of the Privy Council in *Dilworth* v. *Stamp Commissioners, Dilworth* v. *Land and Income Tax Commissioners* N.Z.P.C.C. 578, 583, dealing with definitions which incorporate the word "include": "Section 2 [of the Charitable Gifts Duties Exemption Act 1883] is, beyond all question, an interpretation section, and must have been intended by the Legislature to be taken into account in construing the expression 'charitable devise or bequest', as it occurs in s. 3. It is not said in terms that 'charitable bequest' shall mean one or other of the things which are enumerated, but that it shall 'include' them. The word 'include' is very generally used in interpretation sections in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

Exclusion of Evidence.—So vital is the concept of fair trial that while the rules of evidence are the same in our civil and criminal procedure, there is in practice a great difference in their application. The reason for this difference was given by Lord Moulton in *R.* v. *Christie* [1914] A.C. 545, 559, where he said: "The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the Judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for everyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Astrological Findings.—In the course of a lecture given at the Hebrew University of Jerusalem last year (and since published by the Oxford University Press), Lord Parker C.J., speaking on the development of commercial arbitration, refers to a case in the Rolls of the Mayor's Court of the City of London which was determined by arbitration in 1424. Eight medical men were appointed to examine the merits of a complaint regarding the treatment of a thumb wound; and their award shows that they took into account the course of the stars so that "the dispute seems largely to have been decided on astrology". It is known that litigants on occasions, even in these days, resort to astrology to determine the most propitious month in which their case should be heard and in order to obtain some indication as to the possible result. As far as Scriblex knows, however, astrology seems to have fallen into disfavour as a means of judicial determination.

Judicial Pensions.—The pensions of Judges appointed under the proposed Judicial Pensions Act (Great Britain) will be on a graduated scale, starting with one-quarter of the last annual salary in the case of a Judge who retires after five years' service or less, and rising by equal annual increments of one-fortieth to a maximum of one-half of the last annual salary after 15 years' service. The Act makes provision for the pensions of the higher judiciary in England, Scotland, and Northern Ireland, and it includes increases in the pensions of retired Judges. The effect is that the maximum pension of a Lord Chief Justice will rise from £3,000 to £5,000, of a Master of the Rolls or Lord of Appeal in Ordinary from £2,812 10s. to £4,500, and of a President of the Probate, Divorce, and Admiralty Division, a Lord Justice of Appeal, or a Puisne Judge of the High Court of Justice from £2,625 to £4,000. Judges are to vacate office on becoming seventy-five; but, even though they may not have completed fifteen years' service, they are permitted to retire on reaching the age of seventy.

A Prospective Partner.—A correspondent from University College, Oxford, has referred Scriblex to a colourful advertisement appearing in *The Times* of November 29 last which reads:

> "A firm of East Midlands Solicitors, grasping, avaricious, and greedy for the expansion which it earns (but not quickly enough) by the sweat of its brow needs a young Solicitor of similar ideas to sweat with it in building up a new and promising branch practice. A sense of humour, personality, and capacity for work are essential. The pittance which it is proposed to offer the successful candidate will be increased in direct proportion to his ability to expand the practice, with a partnership on generous terms at the end of it."

Any successful applicant will not be heard to contend that he obtained the position with his eyes shut.

The Use of a Vehicle.—The words "by or through or in connection with the use of the motor vehicle in New Zealand", as used in s. 70 (1) of the Transport Act 1949, must be read as if the words "as such" were inserted after the word "motor vehicle" (Barrowclough C.J.) or, as if the words "in its vehicular function" were so inserted (Hutchison J.): *State Fire Insurance Office* v. *Blackwood* [1956] N.Z.L.R. 125. Under the Road Traffic Act 1930, the motorist seems to be confronted with a much harsher position. In *Elliott* v. *Grey* [1959] 3 All E.R. 793, the appellant was charged with using a motor-vehicle on the road without there being in force in relation to the user a third-party risk policy complying with the Act. The position was that on the day in question the car was standing on the road outside the appellant's house and had been there since it had broken down some six weeks before. The appellant had jacked up the wheels, removed the battery, and terminated the insurance cover. On the day on which he was charged he had no intention of moving the car or of driving it, but he had unjacked the wheels, cleaned the car, and sent its battery to be recharged. As the engine would not work, the vehicle could not be mechanically propelled. Nevertheless, the Court of Appeal (Lord Parker C.J., Cassels and Edmund Davies JJ) held that, even though the car could not be driven, it could be moved, and therefore the appellant had the use of it on the road.

Baron Ashburton of Ashburton.—"In his day he was a great figure at the Bar and in the political world. He had the sort of forensic reputation which makes clients race each other to a counsel's chambers, confident of victory when they have secured his services, apprehensive when they see him on the other side. In the stormy House of Commons of the early years of George III he played a notable part. He had force, wit, and an extraordinary verbal felicity, yet he enjoyed no physical advantages at all. He was ugly and ungainly in person and had not even a good voice. A stranger seeking directions how to find him in a room full of people was told that he looked like a knave of clubs, and, on that description, had no difficulty in recognizing him. You can see his blunt, heavy features today in a small portrait on the Benchers' staircase in the Middle Temple. His voice was husky and his speech so impeded by phlegm that he was constantly clearing his throat, especially when under the influence of strong excitement. He would grind his jaw and move his head with peculiar emphasis. Nothing in his delivery charmed or pleased, nor had his matter the graces of a man of letters or of the world, but he held his audiences by the sheer force of his reasoning, for, at his best, he would condense into thirty minutes what another man would take two hours to express. He was a natural logician."—Francis Cowper in *Notes by the Way*.

Tailpiece:

"At the same time she [the wife] made it plain that she was not going to drop the charges against Nystrom. This was done in emphatic language by which she told her solicitor to tell the husband's solicitors to drop dead."—Per Hodgson L.J. in *Schlesinger* v. *Schlesinger* [1959] 1 All E.R. 155, 159.

TOWN AND COUNTRY PLANNING APPEALS.

Waikanae Country Town Committee *v.* Horowhenua County.

Town and Country Planning Appeal Board. Wellington. 1959. June 26.

District Scheme—Objections—Re-zoning—Insufficient Attention given to Railway and State Highway Separating Area—Area zoned "Commercial A" re-zoned as "Commercial B"—Scheme not required to show in Detail All Proposed Roads for Undeveloped Areas—Area Zoned "Industrial A" insufficient for Full Planning Period of Twenty Years but Sufficient for First Five Years thereof—Town and Country Planning Act 1953, s. 26.

Appeal against the disallowance of four objections.

When the Horowhenua County's proposed district scheme (Waikanae Section) was publicly advertised, the present appellant filed a series of objections to various provisions of the plan. These objections were duly heard by the Council; some of them were allowed, one was allowed in part and others were disallowed. This appeal which had been filed in the form of a blanket appeal related to the disallowance of four objections. At the hearing the four issues involved were heard seriatim, as if they were separate appeals, and in this decision the Board proposed to give separate decisions in respect of the four issues involved.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel the Board finds as follows:

First Ground of Appeal:

(a) That there is insufficient provision for "commercial B" area shown on the plan.

(b) That the "commercial A" area shown on the plan as fronting the north and south sides of Reikorangi Road should be rezoned as "commercial B".

The Board considers that in zoning this particular area as "commercial A" insufficient attention was given to the existence of the Main Trunk Railway and State Highway separating this area from that part of the Waikanae township lying to the west of the railway and highway. The evidence establishes that this particular area is at present predominantly "commercial B" in character and it serves not only the residential population living to the east of the railway line, but also serves the Reikorangi township area and the farming community living to the east of the railway. Furthermore with the anticipated development of a large residential area in the north of Reikorangi Road but east of the railway there will in future be a substantial residential population in the locality all of whose needs cannot be served by a "commercial A" zone only. If the community living to the east of the railway line could only be served by a "commercial B" area sited to the west of the State Highway it would mean that these people would need to cross the railway line and the State Highway to get to a "commercial B" area, and would then have to recross the State Highway and railway to return to their own locality. This is something which should be avoided if possible and the Board considers that there should be a "commercial B" area provided east of the railway line. Accordingly this part of the appeal is allowed and the Board directs that the area shown on the plan as "commercial A" be rezoned "commercial B".

Second Ground of Appeal:

This falls under two headings and the appellant prays that:

(1) The respondent be required to amend the alignment of a proposed alternative road to the beach.

(2) The respondent shows on the plan details of all proposed roads.

As to the first of these grounds the plan makes provision for a proposed road running from a point west of the State Highway to the Beach north of the Waimeha Stream. The respondent Council's proposal in respect of this alternative road is that it should be a local road giving additional means of access to the Beach for the residents in the Waikanae Town and more particularly those expected to reside in the future in land zoned for residential use on the northern boundary of the town and to give an alternative means of access to Waikanae to the potential inhabitants of a residential area expected to be created on the beach north of the Waimeha Stream. At the present time there is no development of either of the areas which it is contemplated this road would eventually serve. The appellant claims that this should be more than a local road, it should be an arterial road linking the State Highway with the beach and providing for visiting traffic as well as local traffic. The present main access road to the beach is the Te Moana Road. This has been created a main highway and it is being gradually developed into a 99 foot wide arterial highway. The plan for the projected motorway which will pass between Waikanae town and the beach envisages a junction station at the point where the motorway will cross Te Moana road. When that plan comes to completion it is obvious that this junction station will be the only one giving access to and from the motorway and it is the opinion of the Board that the appellant has not advanced any grounds which would justify the creation of another arterial road to the north. The Board agrees in principle that in the future a local road giving access to and from the northern part of the beach residential area will be desirable and necessary but it also considers that the present is not the time to determine the exact route that this road should follow. The Council's scheme will be due for a review 5 years after it becomes operative. By that time it is quite possible that the pattern of residential development at the beach and at the northern end of the Waikanae town will have reached a stage that will enable the most appropriate route for this local road to be determined. At present the Board sees no ground for interfering with the plan in its present state.

(2) Whilst in appropriate cases it might be helpful to potential subdividers to indicate on a town plan the suggested siting of possible secondary roads through undeveloped areas it would be unrealistic and impractical to require a local authority to show in detail all proposed roads for undeveloped areas. The practice carried out by the Council of making provision for such roading as subdivisional plans are submitted for approval is in accord with the general practice followed in other counties. The provisions of the Land Subdivision in Counties Act 1946 offer ample protection against unsuitable subdivisions conflicting with town and country planning principles. Appeal on this ground disallowed.

Third Ground of Appeal:

This is against a disallowance by the respondent of an objection that provision should be made for future road access to the subdivisions in the Hutt County south of the Waikanae River and to the proposed aerodrome provided for by the Hutt County's proposed district scheme for the Paraparaumu-Raumati area.

The Board does not consider this a question which it should be called upon to determine. The matter is not one for determination by the Council alone. If and when additional access over the Waikanae river is considered necessary then that would be a matter for consultation between the Council and the Hutt County Council, the Ministry of Works and Air Administration. The Board declines to deal with this question in the form in which it has been submitted.

Fourth Ground of Appeal:

This complains that the area zoned for "industrial A" use is insufficient for the anticipated industrial development in this locality.

The area so zoned is an area comprising three acres which has already been subdivided. The Council considers that this could be divided into twenty-six lots which is considered to be sufficient to meet the industrial needs of the area. The appellant's proposal is that an area comprising some 16 ac. should be zoned for industrial use. The Board considers that the area of 3 ac. might well be insufficient for the industrial needs of the community for the full planning period of twenty years but it also considers that it should be sufficient for the first five years of the planning period. It also considers that if the area of 3 ac. proves to be insufficient in the future there should be no expansion of industrial zoning in this particular locality. If further land is required for industrial development it should be sited elsewhere away from residential and commercial areas.

This appeal on this ground is disallowed.

Judgment accordingly.