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COMMUNICATION

Law and medicine have this in common, those who practise in these fields have always been notable for the way in which they have been willing to share their knowledge with their brother practitioners and particularly with younger members of the profession in their formative years. Latterly there has been a positive move by both professions to share matters of common interest and experience by the formation of Medico-Legal Societies which provide a forum for the discussion of topical problems affecting lawyers and doctors alike.

Medicine might at first glance appear to devote more attention to the sharing of experience between the veteran and the novice. This is because of the emphasis in the medical profession on case study, diagnosis, prescription and theatre work under experienced guidance as one of the principal instruments of training. But in law there is an equal awareness among the brethren of the need for the senior members to take an interest in the problems and progress of their younger confreres in the earlier years of study and practice. No junior in the law need ever lack advice. The more eminent and the busier the practitioner the more likely is he to find the time to assist an eager junior with a problem on his hands.

Lawyers at an early stage assume responsibility for the worries of others as well as their own. It is often essential that they should have the benefit of another opinion, preferably on an informal basis, and they should and can be assured that ready help is available to them if they care to take advantage of it.

This was the theme of an address given by the Chief Justice Sir Richard Wild, who at the time was Solicitor-General, to newly admitted barristers and solicitors a few years ago. He pointed out the dangers of allowing a problem—business or personal—to get out of hand or be untended for the lack of discussion with and advice from a wiser head. He emphasised that difficulties can disappear, or at any rate be reduced to manageable proportions, if they are brought out into the open at once and subjected to experienced scrutiny, and he asserted positively as we have that no one need seek counsel in vain.

The writer remembers with affection a tea-room in the city of Auckland in the early 1920's. To that place every day resorted a cross-section of the legal fraternity in that city. Not the same ones every day, but an ebb and flow of sage experience and youthful enthusiasm which made an ideal forum for the disposal of the current worries. No " sacred cow " was sacrosanct, and no problem from the international to the domestic level appeared insoluble after being given due attention by those present. What a club that was ! Thirty years and more onwards, the writer on a short visit to Auckland made his number and although there were alas, some absentees, there were new recruits and the atmosphere appeared the same. It is to be hoped the gathering if not the venue still survives. On the personal level, then, it can safely be said that the opportunity exists to take counsel, and, if it is taken, there is no doubt that assistance will freely be forthcoming.

Which brings us to the consideration of another facet of our subject, which is whether the same free communication of questions and solutions between groups of practitioners in one part of the country with those in other parts and between practitioners and their own district societies exists, or, if it does not, what might be done about it ?

There can be no doubt concerning the devoted few who at national and district level give freely of their time and talents to the affairs

of the New Zealand Law Society and the various district law societies. These busy leaders of the profession give hours of their valuable time to its affairs without thought of reward apart from the satisfaction of service. No one who has been in a position to observe their sacrifice can do other than marvel at their selflessness.

So far as the average member of the profession is concerned, however, there appears to be a communication gap between him and his district organisation, between the districts themselves and between the districts and the national executive. Two many practitioners seem to regard the modest annual fee paid for the privilege of practising as the limit of their obligation to the profession and as the justification for quite unfounded grumbling and criticism about matters which they think are being wrongly handled or not given adequate attention.

Clearly whatever fault there is lies with the individual member. Only when members themselves ensure that their views are clearly and quickly expressed to those entrusted with the task of speaking for them will they in their turn be able to speak with authority to other district societies and to the parent body. Lawyers are individualists, trained to argument and disputation, and a consensus can only be established if they are given the opportunity of airing their own views and listening to those of others. They themselves must provide the occasions and the opportunity. There is a simple and practicable way of doing this. Regular lunch-time meetings at which questions of public and professional interest could be discussed and the mind of the profession ascertained would enable our spokesmen to state our views opportunely and with authority. In Wellington, at any rate, the facilities are at hand, and the remarkable thing is that they are not fully availed of for the purpose. No doubt equal facilities are available or could be made so in other places.

There is of course a further ready means of communication available and that is in the pages of this Journal. Perusal of our contemporaries in other countries will show, we think, that the ordinary practitioner there is more inclined to bring forward matters of interest for the widest possible discussion and consideration. This is a healthy exercise and one which we can wholeheartedly commend to our readers.

Nowhere is this deficiency more apparent than when the views of the profession are sought in connection with desirable or proposed legislation or on matters of public moment. Usually its opinion is sought during the parliamentary session or at a stage where the answer is an urgent matter. If, at that stage, consultation is necessary there is delay which cannot be readily explained or understood.

It behoves us to give consideration at the earliest possible stage to matters of the kind in which the profession is competent and expected to lead opinion and to ensure that when that view is sought, an immediate and considered reply is available. A timely reaction of this kind would go a long way towards closing the communication gap between the profession and the general public. It would do more. It would more often than not be a decisive factor in attaining the desirable solution of the particular question. Any appearance of delay or hesitancy inevitably reduces the weight of the view that is ultimately expressed.

This is an appropriate season to consider whether individually we are doing as much as we should, when we should, to make ourselves heard and understood in the general interests of the community in which we live.

F. R. MACKEN.

OBSCENITY

It is interesting to read that they are having similar trouble in America regarding obscenity to that being experienced in this country.

The Supreme Court of the United States in some recent decisions has only served to further confuse the issue as to what is obscene and what is not. Indeed it is freely assumed in that country that almost anything can be published so long as it is kept from children, is not presented to the public in a way that appeale to indecent propensities and does not infrings on an individual's privacy. Things have gone so far as to raise the suggestion that the Court judges the matter by commercial standards. If the particular matter or thing sells freely then it is assumed that it cannot offend the general standards of the community. This is indeed a new angle on the problem.

Meanwhile the Courts of the various States don't quite know where they are heading. They are certainly not getting any authoritative guide from the highest Court of the land. One can sympathise with the Chief Justice of one of the States when, after consulting the recent judgments of the United States Supreme Court, he ruefully confessed: "I don't know what they mean".

Christmas Message to the Profession

From the ATTORNEY-GENERAL

In sending the profession a Christmas message I wish to take the opportunity again of thanking practitioners all over the country who give of their time in the service of the community. This happens in many fields and I have been particularly impressed this year by the excellent co-operation which exists throughout the profession in the widest sense. The work of the Law Faculties at the Universities during the year is a stimulating example.

This co-operation has been very evident in the work of law reform where steady progress is being made thanks to a pooling of resources by lawyers from the Universities and the Departments of the Crown as well as from private practice. The Judiciary too is now represented on the Law Revision Commission so that we are able to have proposed reforms examined from all points of view at the formative stage.

The special work of the New Zealand Law Society in making representations before the Statutes Revision Committee of Parliament has again been a most valuable contribution and is much appreciated by Government.

With every good wish for Christmas and the New Year.

J. R. HANAN,
ATTORNEY-GENERAL.

SUMMARY OF RECENT LAW

BANKRUPTCY AND INSOLVENCY—PROOF OF DEBT

Secured creditors—Proof of debt deferred until security realised—Proof lodged for deficiency on realisation after considerable delay—Rejected by Official Assignee—Application to Supreme Court for leave to file refused—Appeal to Court of Appeal—Whether Court should give leave—Whether position of second mortgagee different from that of first mortgagee—Bankruptcy Act 1908, ss. 100 (9), 102. A secured creditor's rights in bankruptcy are entirely statutory and if he is to share in the division of the bankrupt's estate he must comply with the requirements of the Act which are for the benefit of the assignee and the other creditors as well as the creditor concerned. Unless he does so he is excluded from all share in any dividend. (*In re Cairns* (1888) 7 N.Z.L.R. 42, followed.) *Per McCarthy and Macarthur JJ. (Turner J. dissenting)*: The obligations of a secured creditor in the generality of cases apply equally to the second as well as the first mortgagee and in the instant case there were no grounds for treating the holder of the second charge any differently from the holder of the first charge and no evidence to persuade the Court to give it leave under s. 100 (9) to file a proof of debt out of time. *Per Turner J.* There was evidence in the instant case that the security was sold by the first mortgagee, the second mortgagee merely standing by and not effectively participating and there were in the circumstances grounds for giving it leave to file a proof of debt out of time. (*In re Nigro* [1926] N.Z.L.R. 501; [1926] G.L.R. 283; *In re Campbell* [1927] G.L.R. 516; *In re Swinson, Ex parte Brodie and the Public Trustee* [1942] N.Z.L.R. 232; [1942] G.L.R. 161 and *Re Hunter (A Bankrupt)* [1954] N.Z.L.R. 746, referred to.) Judgment of Wild C.J. [1967] N.Z.L.R. 263, affirmed. *Re H. (A Bankrupt)* (Court of Appeal. Wellington. 1967. 13 September; 1 November. Turner J. McCarthy J. Macarthur J.).

CONTRACT—AGREEMENTS CONTRARY TO PUBLIC POLICY

Breach of promise of marriage—Person making promise married at time of making it—Whether agreement enforceable—At what stage and under what conditions such a contract may be enforced. An agreement to marry is invalid as against public policy if, at the time it is made, one of the parties is to the knowledge of the other already married; this is so even though the agreement is to marry when the existing marriage ends by death or decree; and it makes no difference that the existing marriage may be an empty shell and there are grounds for immediate divorce. Only after the decree *nisi* may an enforceable agreement to marry be made. (*Fender v. St. John-*

Mildmay [1938] A.C. 1; [1937] 3 All E.R. 402, followed. *Wilson* v. *Carnley* [1908] 1 K.B. 729; [1908-10] All E.R. Rep. 120; *Spiers* v. *Hunt* [1908] 1 K.B. 720; *Skipp* v. *Kelly* [1926] 42 T.L.R. 258; *Lambert* v. *Dillon* [1933] N.Z.L.R. 1059; [1933] G.L.R. 740 and *Siveyer* v. *Allison* [1935] 2 K.B. 403, discussed. *Mortimer* v. *Mortimer* (1820) 2 Hag. Con. 310; 161 E.R. 753; *Wilson* v. *Wilson* (1848) 1 H.L.C. 538; 9 E.R. 870; *Hunt* v. *Hunt* (1861) 4 De G. F. & J. 221; 45 E.R. 1168; *Snell* v. *Potter* [1933] N.Z.L.R. 696; [1953] G.L.R. 73 (C.A.); *Mason* v. *Mason* [1921] N.Z.L.R. 955; [1921] G.L.R. 522 (S.C.), 635 (C.A.); *In re Caborne, Hodge* v. *Smith* [1943] Ch. 224; [1943] 2 All E.R. 7; *Wacker* v. *Bullock* [1935] N.Z.L.R. 828; [1935] G.L.R. 706; *Ramsay* v. *Trustees Executors and Agency Co. Ltd.* (1948) 77 C.L.R. 321 and *Griffiths* v. *Griffiths* [1956] N.Z.L.R. 723, referred to.) *Dobersek* v. *Petrizza* (Supreme Court. Wellington. 1967. 24, 28 August; 16 October. Wild C.J.).

CRIMINAL LAW—APPEAL AGAINST CONVICTION

Murder—Parties to an offence—Common purpose—Whether blow causing death "in the prosecution of the common purpose"—Whether Judge's direction adequate—Whether alternative verdict of manslaughter open on the evidence—Observations on constitutional right of jury to return a verdict of manslaughter—Crimes Act 1961, ss. 66, 168. The blow which caused the death of the constable in the instant case was struck in the common purpose of both accused to escape from custody and both were parties to the offence. The Judge's direction to the jury was adequate. (*R.* v. *Anderson and Morris* [1966] 2 All E.R. 644, referred to.) On the whole of the evidence there was no question that the offence might be manslaughter only and the Judge was accordingly not required to direct the jury at length on the ingredients of that offence. (*Kwaku Mensah* v. *The King* [1946] A.C. 83, referred to.) Observations on the constitutional right of a jury to return a verdict of manslaughter even if the crime of murder is proved and on the duty of the Judge to put that right to the jury. (*R.* v. *Mraz* (1955) 93 C.L.R. 493; *R.* v. *Ryan and Walker* [1966] V.R. 553; *R.* v. *Malcolm* [1951] N.Z.L.R. 470; [1951] G.L.R. 141 and *R.* v. *Black* [1956] N.Z.L.R. 204, discussed.) *R.* v. *Morrison* (Court of Appeal. Wellington. 1967. 3, 14 April. Wild C.J. Turner J. McCarthy J. McGregor J.).

CRIMINAL LAW—SUMMARY PROCEEDINGS

Police offences—Found by night "peering" into a window without lawful excuse—Purpose of section—Inquiry agent—Whether lawful excuse—Police Offences Act 1927, s. 52A. A private inquiry agent found by night looking in the window of a dwellinghouse and admittedly there for the purpose of prying so as to obtain evidence for a divorce is guilty of the offence of "peering" as defined in s. 52A of the Police Offences Act 1927. An instructing spouse cannot delegate to a private inquiry agent authority to be, unaccompanied, on the premises of the other spouse from whom he is separated and so provide the inquiry agent with a lawful excuse for being there. (*Carter* v. *Reaper* [1920] V.L.R. 337, distinguished. *Killen* v. *Police* [1965] N.Z.L.R. 481 and *Wilkins* v. *Condell* [1940] S.A.S.R., applied. *Riley* v. *Police* [1955] N.Z.L.R. 549 referred to.) *Police* v. *Lomax* (1967. 5, 15 September, before Mr J. F. Keane S.M., at Lower Hutt).

INCOME TAX—INTERPRETATION

"Premises," "repair", "alteration"— Land and Income Tax Act 1954, ss. 110, 111, 112, 113. A shell trotting track itself satisfies the notion of "premises" in s. 113 of the Land and Income Tax Act 1954 apart from any large aggregation of things of which it may be suggested to form part. The construction of what was substantially a new track in place of the existing track is not a "repair" or "alteration" within the meaning to be given those words by the relevant legislation. (*Auckland Trotting Club* v. *Commissioner of Inland Revenue* 1 N.Z.T.B.R. 121, Case 19; *Kemball* v. *Commissioner of Taxes* [1932] N.Z.L.R. 1305; [1931] G.L.R. 647; *Lurcott* v. *Wakely and Wheeler* [1911] 1 K.B. 905; [1911-13] All E.R. Rep. 41; *In re Leveson-Gower's Settled Estate* [1905] 2 Ch. 95; *O'Grady* (*H.M. Inspector of Taxes*) v. *Bullcroft Main Collieries Ltd.* (1932) 17 T.C. 93; *Samuel Jones and Co. (Devonvale) Ltd.* v. *Commissioners of Inland Revenue* (1951) 32 T.C. 513; *Phillips* (*H.M. Inspector of Taxes*) v. *Whieldon Sanitary Potteries Ltd.* (1952) 33 T.C. 213; *Margrett* (*H.M. Inspector of Taxes*) v. *The Lowestoft Water and Gas Co.* (1935) 19 T.C. 481 and *Lindsay* v. *Federal Commissioner of Taxation* (1960) 8 A.I.T.R. 99, referred to.) *Auckland Trotting Club* v. *Commissioner of Inland Revenue* (Supreme Court. Auckland. 1967. 22, 23 May; 6 October. Moller J.).

LOCAL GOVERNMENT—MUNICIPAL CORPORATION

Bylaw—Regulation of sales by mobile shop—Conditions imposed—Whether bylaw valid—Whether conditions properly imposed—Whether conditions reasonable—Municipal Corporations Act 1954, ss. 386 (28A), 390—Bylaws Act 1910, s. 13. Properly construed the bylaw left to be determined by the council appropriate conditions to be applied to any particular licensee of a mobile shop. (*Bremner* v. *Ruddenklau* [1919] N.Z.L.R. 444; [1919] G.L.R. 305, applied.) The conditions imposed on the licensee limiting the hours during which it could lawfully operate were not unreasonable as being in restraint of trade nor were they in essence unreasonable from any other standpoint. (*City of Toronto* v. *Virgo* [1896] A.C. 88 and *Chandler* v. *Hawke's Bay County* [1961] N.Z.L.R. 746, distinguished. *Re a Bylaw of the Whangarei Harbour Board, Ex parte Wilson's New Zealand Portland Cement Ltd.* [1933] N.Z.L.R. s. 16; [1933] G.L.R. 253, applied.) *Skeet* v. *Soft Serve Products Ltd.* (1967. 2, 22 February, before Mr A. A. Coates S.M., at Papakura).

PRACTICE—AMENDMENT OF PLEADINGS

Statement of defence pleading infancy—Application for leave to file—Delay—Special grounds—Whether leave should be given—Magistrates' Courts Rules 1948 (S.R. 1948/197) r. 113. Rule 113 (5) of the Magistrates' Courts Rules 1948 does not apply to a statement of defence filed in obedience to an order under s. 113 (6). There must be "special grounds" to persuade the Court to allow the filing of the special defence under r. 113 (4) and where there has been unjustified delay, both before and after an order of the Court requiring the defendant to furnish particulars of the defence, leave should not be given. (*Fairbrother* v. *Domain Motors* [1960] N.Z.L.R. 376, distinguished. *Redditch Benefit Building Society* v. *Roberts* [1940] 1 All E.R. 342 and *Accounts Ltd.* v. *Driver* (1949) 6 M.C.D. 133, referred to.) *Fish Processing Ltd.* v. *Chapman and Another* (1967. 2, 5, 27 October, before Mr H. J. Evans S.M., at Christchurch).

PRACTICE—EXTRAORDINARY REMEDIES

Certiorari—Mandamus—Magistrate failing by conduct to entertain prosecution—Appropriate remedy—Code of Civil Procedure RR. 466, 467. Refusal of a Magistrate by conduct to entertain a prosecution which

the informant is properly entitled to bring amounts to declining jurisdiction and *mandamus* will issue to require him to hear and determine the matter according to law. (*Hammond* v. *Hutt Valley and Bays Metropolitan Milk Board* [1958] N.Z.L.R. 720, followed.) The appropriate remedy is *mandamus* and not *certiorari* because there has been no decision from which an appeal or other remedy can follow and *mandamus* ensures that the matter will be dealt with *de novo* and a determination reached. (*Yukich* v. *Sinclair* [1961] N.Z.L.R. 752, applied.) *Nicholas* v. *Mooney and Others* (Supreme Court. Hamilton. 1967. 30 June; 17 October. Speight J.).

PRACTICE—STATEMENT OF DEFENCE

Amendment—Slander—Denial—Application after commencement of trial to amend defence so as to introduce plea of qualified privilege—Application refused—Verdict and award of damages to plaintiff—Motion for new trial—Whether leave to amend statement of defence properly refused—Code of Civil Procedure, RR. 136c, 136d, 271, 276. Even where an application for a new trial does not come within any of the nine categories mentioned in R. 276 of the Code of Civil Procedure, the Court may well have an inherent jurisdiction to grant a new trial in order to prevent a miscarriage of justice. (*G. L. Baker Ltd.* v. *Medway Building & Supplies Ltd.* [1958] 3 All E.R. 540; *Liquidators of South Canterbury Building Society* v. *Stumbles (No. 2)* (1893) 12 N.Z.L.R. 205; *Deck* v. *Reed* (1914) 33 N.Z.L.R. 883; 16 G.L.R. 517; *Hesketh* v. *Wellington Harbour Board* [1947] N.Z.L.R. 574; [1947] G.L.R. 227; *Shaw Savill & Albion Co. Ltd.* v. *Skilton* [1950] N.Z.L.R. 588; [1950] G.L.R. 260 (C.A.); *Ryan* v. *Shaw Savill & Albion Co. Ltd.* [1951] N.Z.L.R. 229; [1950] G.L.R. 49 (S.C.), 529 (C.A.); *Lyons* v. *Nicholls* [1958] N.Z.L.R. 409; *Huston* v. *Lovelock* (1914) 33 N.Z.L.R. 1556; 17 G.L.R. 16; *Lane* v. *Langley* (1867) Macassey 538; *Mackay* v. *Oram* (1888) 7 N.Z.L.R. 112; and *Cox* v. *Snowball & Kaufmann* [1930] V.L.R. 325, discussed.) A defendant in a slander action who deliberately adopts and pursues until after the commencement of the trial, a defence denying publication, denying that the words complained of meant that the plaintiff had been guilty of a criminal offence and denying injury to the plaintiff's character. credit or reputation, should not at that stage be allowed to amend his defence so as to introduce a plea of qualified privilege. (*Leersnyder* v. *Truth (N.Z.) Ltd.* [1963] N.Z.L.R. 129; *Berryman* v. *Toup-Nicolas* [1958] N.Z.L.R. 1170; *Tildesley* v. *Harper* (1878) 10 Ch. 393; *Lowther* v. *Heaver* (1889) 41 Ch. D. 248; *Cropper* v. *Smith* (1884) 26 Ch. D. 700; *Clarapede & Co.* v. *Commercial Union Association* 32 W.R. 262 and *Hunt* v. *Rice & Son Ltd.* (1937) 53 T.L.R. 931; [1937] 3 All E.R. 715, discussed.) *Sanders* v. *Anderson* (Supreme Court. Auckland. 1967. 4 September; 3 October. Hardie Boys J.).

TRANSPORT AND TRANSPORT LICENSING—ROAD TRANSPORT SERVICES

Taxicab licence—Arrangement between licensee and another person under which the latter introduces and operates a second car—Whether that person is an employee of the licensee—Whether vehicle operated under the licence—Transport Act 1962, ss. 108, 130—Transport Licensing Regulations 1963 (S.R. 1963/58), Regs. 2, 20, 48, 52, 54, 56. A taxicab licence authorises the licensee *but no other person* to carry on a passenger service. The action of a person other than the licensee introducing a vehicle and operating it himself by arrangement with the licensee and under the presumed authority of the licence, is not consistent with a relationship of master and servant between that person and the licensee and therefore the vehicle is not covered by the licence relied upon. (*Dunlop* v. *Milton* [1960] N.Z.L.R. 1096, referred to.) *Hutt City* v. *Garner-Graham* (1967. 12 April; 18 May; 24 July; 6 September, before Mr J. F. Keane S.M., at Lower Hutt).

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Driving while disqualified—Defendant convicted on three charges of driving while disqualified—Period of disqualification extended for further *period of 12 months on each conviction—Whether periods cumulative or concurrent—Defendant subsequently charged with driving while disqualified within cumulative period but not within a concurrent period of one year—Indefinite terms of sentence—Record not clear—Whether offence committed—Transport Act 1962, ss. 36, 39 (1) (a)—Transport Act 1949, ss. 31, 41, 41a—Penal Institutions Act 1954, s. 29—Criminal Justice Act 1954, s. 28.* The provisions of s. 31 (10) and (10a) of the Transport Act 1949 enable the Court to impose cumulative extended periods of disqualification in the case of several counts but do not require the Court to do so (cf. s. 33 (2) Transport Act 1962 replacing the above). Where cumulative periods of disqualification are imposed, it is desirable that the record should make that intention perfectly clear. (*Re Hastings* [1958] 1 All E.R. 707, discussed.) *Transport Department* v. *Heke* (1967. 6, 14, 22 September, before Mr J. F. Keane S.M., at Lower Hutt).

TRUSTS AND TRUSTEES—APPROPRIATION OF ASSETS

Powers of trustees under the instrument and under the Trustee Act—Powers of the Court to review the trustee's appropriation—Court's general power of review—Trustee Act 1956, ss. 15 (1) (j), 28, 68. The Court is empowered by s. 15 (1) (j) of the Trustee Act 1956 to give any direction in relation to an appropriation which it considers the case may require including the annulment of the notice of appropriation. It is the duty of the Court to examine the whole of the circumstances in relation to the appropriation with a view to ascertaining whether it is fair and equitable and then to give such directions as it thinks fit whether by way of confirmation, variation, annulment or otherwise. (*In re Beverley, Watson* v. *Watson* [1901] 1 Ch. 681, referred to.) *Semble*, The Court has additional power under s. 68 of the Act to review the action of trustees pursuant to s. 15 (1) (j) of the Act. *Re Havill (deceased)* (Supreme Court. Palmerston North. 1967. 30 July; 16 October. Macarthur J.).

Legal Education; Side Effects—It has often been said, for a smile, that legal education sharpens the mind by narrowing it. To my mind, there is more truth to this than we have been willing to admit. The methods fostered at this school and widely adopted elsewhere do have a tendency to exalt dialectical skill, to focus the mind on narrow issues, and to obscure the fact that no reasoning, however logical, can rise above the premises on which it is based: *Dean Griswold, Harvard Law School.*

CASE AND COMMENT

English Cases Contributed by the Faculty of Law, University of Canterbury

Recognition of Foreign Divorces

Readers may recall a decision of the English Court of Appeal, *Indyka* v. *Indyka* [1966] 3 All E.R. 583, concerned with the recognition of foreign divorce decrees, which was noted by the present writer in [1967] N.Z.L.J. 53. The case has since gone on appeal to the House of Lords, and the decision of their lordships is now reported in [1967] 2 All E.R. 689. It is, to say the very least of it, an extremely revolutionary one. Various reasons were given for according recognition to the decree; thus Lord Reid would have recognised the decree because the first wife had had her matrimonial home in Czechoslovakia and had habitually resided there all her life; Lords Morris, Pearce and Pearson would have recognised the decree on the reciprocity basis enunciated in *Travers* v. *Holley* [1953] 2 All E.R. 794; [1953] P. 246 (C.A.) despite the fact that the Czech Court had not taken jurisidction on the ground of residence and had granted the decree before the 1949 Act had been passed extending the English Court's jurisdiction. But the main reasoning seems to be that of Lords Morris, Pearce, Wilberforce and Pearson; they were prepared to say that the first wife had been really and substantially connected with the Court which had dissolved her marriage since the parties were Czech nationals, the first wife had married in Czechoslovakia and had lived all her life there and had been left there by the husband and the Court had taken jurisdiction on the ground of her Czech nationality. Compared with the pre-existing English law, this departure appears to be rank heresy. Even from the standpoint of New Zealand law, it is a bold decision. Hard on its heels came two further recently reported decisions and it is thought that these would be of interest in New Zealand.

Angelo v. *Angelo* [1967] 3 All E.R. 314 concerned a British subject domiciled in England who had validly married in England a German citizen who had been working in England as an *au pair* girl. The parties went to live in France, where the husband was engaged in trade, and, in 1962, the wife returned to her parental home in Germany, refusing to resume married life. After a very short residence in Germany, she obtained a decree of divorce in the appropriate German Court. Doubtless this decree could have been recognised without difficulty in New Zealand on the basis that it was a decree of the wife's domiciliary Court within s. 82 (1) (a) of the Matrimonial Proceedings Act 1963. Ormrod J. considered the decree to have been granted by the Courts of the wife's habitual residence, that the wife had not been attempting to obtain what is known in the United States as a " migratory divorce ", that she was a German national and that she might thus be said to have a sufficiently real and substantial connection with Germany to permit him to recognise the decree. It is significant that, had not the House of Lords, in laying down the new order of things, in effect abandoned the reciprocity rule in *Travers* v. *Holley* (*supra*), this decree could not have been recognised.

The second case, *Peters* v. *Peters* [1967] 3 All E.R. 318, was one in which a naturalised British subject who had formerly been domiciled in, and a citizen of, Yugoslavia, had, by arrangement, divorced her husband in Yugoslavia. He, too, was a former Yugoslav citizen with a Yugoslav domicile who had later acquired British nationality and an English domicile of choice. Neither spouse had resided in Yugoslavia for any length of time before the proceedings, in as much as the husband was only travelling there on business and was found not to have lost his English domicile of choice, and the wife had made a ten-day trip to Belgrade to attend the proceedings. The Belgrade Court took jurisdiction on the sole ground that the marriage had been celebrated in Yugoslavia, as in fact was the case. Not surprisingly, following the *Indyka* and *Angelo* cases (*supra*), Wrangham J. held that the parties had abandoned their connection with Yugoslavia long before the Belgrade Court came to adjudicate upon their status. He therefore refused to recognise the decree. The same result would, it is submitted, follow under s. 82 of the 1963 Act, since it is only *nullity* decrees which can claim recognition on the ground that the marriage was celebrated in the country whose Courts granted the decree.

P.R.H.W.

Even Homer Nods—It is reported that Dr Adenaur died without leaving a will. He apparently refused to believe that the end was near: *Canadian Bar Journal*.

SIDELIGHTS ON THE HONOLULU CONFERENCE

At a dinner some years ago in Auckland Mr L. P. Leary Q.C. opened his speech with the words :

" It is a pleasure to me after the consistently high standard of eloquence throughout the conference deliberately to pull the plug out and come down to the vernacular ".

I thought that one or two points of interest to the humble conveyancer and not mentioned in the article which quoted Sir Denis Blundell might be apposite.

On pre-trial publicity Mr Justice Nathan R. Sobel of the New York Supreme Court was quoted as saying :

" Today the newer due process demands of the Supreme Court occasionally require a Judge to dismiss a charge against a defendant obviously guilty. These commands are designed to assure that the Government observe, not break, the law in securing convictions. Press criticism of such decisions is nonetheless commonplace despite the arrogance it reflects because so often made by an editorial writer having no responsibility, no understanding of the law, and little knowledge of the facts.

" This kind of criticism is self defeating for no Judge, no matter how honest or courageous, can afford to be wholly unobjective about opinion in his community and it is a deceit to pretend that he is (shades of *Liversidge* v. *Anderson*).

" As one who has been gored I might perhaps be less sensitive if occasionally the Press would criticise a Judge for delivering pre-trial sermons assuming guilt or for exhibiting bias and prejudice against a defendant during a trial, or for excoriating a jury for a verdict of acquittal or for imposing an unnecessarily harsh sentence. This just never happens—in fact such conduct is often applauded by the Press.

" This is an aspect of the Fair Trial *v.* Free Press controversy which is never alluded to in the big debate ".

On the same subject Mr Richard D. Smyser of Oak Ridge, Tennessee, wrote in relation to Lizzie Borden three rhymes.

The original—

" Lizzie Borden took an axe
And gave her mother forty whacks
And when she saw what she had done
She gave her father forty-one ".

As it might be today—

" The Bordens, Emily and Max
Were found dead Tuesday, slain by axe.
Police say eighty blows were sledged;
Their daughter did it, it's alleged ".

As it might be tommorow—

" A terrible thing has come to pass
At the Borden home in Fall River, Mass.
Involved are father, mother, chile,
For further details hear the trial ".

Moving from here to legal history in Hawaii the State has had a penal code since 1850 since which date there have been no common law crimes in Hawaii. *Shaw* v. *Director of Public Prosecutions* could not happen in Hawaii any more than it could here. However, a statute passed in 1892 provided that in civil matters the Common Law of England as ascertained by English and American decisions was declared to be the common law of all the Hawaiian Islands in all cases except as otherwise expressed and provided. In some other respects the State has anticipated England and in a few cases even New Zealand which has always had a reputation for forward-looking legislation.

In 1847 sealing was held unnecessary to the validity of a deed. In 1860 an action for damages by a widow for wrongful death of her husband was sustained. In 1882 a deed creating an estate to vest *in futuro* was declared valid. In 1886 a conveyance to two persons and their heirs was held to have created a tenancy in common rather than a joint tenancy. In 1892 the rule in *Shelley's* case was repudiated. In 1900 estates tail were rejected and as late as 1920 common law marriages were held invalid.

From 1900-1959 the law of Hawaii not inconsistent with the law of the United States was continued in force, but the Judiciary, including the Justices of the Supreme Court and Judges of the Circuit Courts for that period, were appointed by the President of the United States. From the latter date they have been appointees of the Governor.

One thing that surprised a lot of New Zealanders visiting Hawaii was the prevalence of leasehold. A large part of Waikiki is owned by the Bishop Trust, a trust for the benefit of descendants of the original missionaries. The visitors were surprised, not at the presence of the leasehold but the terms of it. While we were there the Royal Hawaiian Hotel, which is a very

old and very gracious establishment, was facing the end of its first term of lease and during our stay the local papers came out with banner headlines " Royal Hawaiian Gets Reprieve ". The existing lessees were given a new lease for 75 years on condition that they built a parking building to hold 650 cars, completely renovated and air conditioned the old Royal Hawaiian and built a new multi-storey apartment block on part of the grounds. What was astonishing to New Zealand ears was that the lease contained no right of renewal and no compensation for improvements. The lessee in other words had to amortise the cost of the improvements within the term of the lease. The concept at first glance looks revolutionary, but when it is examined more closely we find, like Pope on the subject of vice, we first endure, then pity, then embrace. To encourage rebuilding of some old decadent buildings in New Zealand cities would not be such a very bad thing.

Mr Chilwell Q.C. quoted at a luncheon address in Auckland how surprised the Americans were when it was suggested by Mr R. H. Duncan that they should issue non-voting shares. We confess that we missed this aside at that same session, but our neighbours were very well aware of the advantage of convertible notes and convertible participating preference shares and were rather surprised that these were not mentioned by any member of the panel in the discussion on disposal of shares in a closed corporation. On the other hand we attended a session on tax law and were astonished at the dark and deep suspicion with which the average American appears to view the Inland Revenue Department. We suggested to them that they should invite their Taxation Authorities to take a leaf from the book of our Commissioner on the subject of voluntary disclosures and this suggestion was greeted with considerable enthusiasm.

The writer's particular interest in the conference was in the proposed uniform Probate Code for all the States. We had always felt that with a common basis in both countries in English Ecclesiastical Law it was slightly ridiculous that the British possessions and America should treat each other as foreign countries for the purpose of reciprocal Probate grants and this opinion was fortified by experience of the paper work and expense involved in getting a grant in America. Moreover, with the increasing investment of American capital in Australia and New Zealand this problem will become less academic and more acute as time goes on. We were heartened to find that most Americans heartily agreed with this and when and if their Uniform Probate Code comes into force in about two years' time we will, we hope, have the pleasure of putting the problem to the Law Revision Commission. Unhappily the session on this particular problem was held at 9.30 in the morning of 2 August when the New Zealand delegation was still arriving dripping with perspiration at their hotels.

Then too a gentleman from South Carolina informed us during the session on disposal of the shares in Howard Stores Inc., that their Inland Revenue Department assessed gifts for death duty, whether those gifts were charitable or non-charitable, for ten years back depending on the intent of the donor, whether his intent were to diminish his estate or otherwise, and this reminded us of the words of Ventris J. in the 18th Century that " The devil himself knoweth not the mind of man ".

Finally a reminder to us all of what The British Colonial Office lost by neglect is the fact that a large number of the older companies in Hawaii finish their title with the word " Limited " and the Union Jack is still quartered with the Hawaiian State Flag.

W. H. BLYTH.

OBITUARY

Mr B. B. Loughnan

Mr Bede Burnes Loughnan, a widely known and respected member of the profession in Christchurch, died recently at the age of 69.

Mr Loughnan, who was born in Christchurch, was educated at St. Bede's College, Christ's College and Riverview College, Sydney and studied law at Canterbury University College.

In the late 1920's he joined the firm which had been established by his father, Henry Hamilton Loughnan who was the city solicitor for a time, and William Izard.

At the time of his death, Mr Loughnan was in partnership with his son, Mr J. B. Loughnan in the firm of Izard and Loughnan. Before his son joined the firm, Mr Loughnan was for a time in partnership with his brother Mr R. J. Loughnan.

Mr Loughnan was a former Canterbury doubles tennis champion, a title which he won with another brother, Mr A. B. Loughnan. He was also an expert rifle shot.

He left New Zealand at the age of 17 to serve in France during the First World War.

Mr Loughnan is survived by his wife and his son.

For unto us is born . . . .

The Publishers and Editor of "The New Zealand Law Journal" join in wishing subscribers

A Happy Christmas and a Prosperous New Year

NEW ZEALAND LAW SOCIETY CENTENNIAL CONFERENCE 1969

Arrangements for both the business sessions and entertainment to be provided at the 1969 Centennial Conference at Rotorua are well in hand. The programme for the conference has already been determined and it is anticipated that there will be a large gathering of practitioners from throughout the country.

The President and members of the Hamilton District Law Society, to whom the organisation of the conference has been delegated, are anxious that the papers to be presented at the conference shall be of a standard which is worthy of a Centennial Conference and for this reason desire that practitioners throughout New Zealand should have the opportunity of suggesting the names of possible papers, writers or persons who might be interested in participating in discussions in open forum. So too the President and members are anxious to have as wide a range as possible of topics which might conveniently be made the subject of a paper or of a discussion.

If possible, papers and discussions should be of a forward-looking nature, with some possible significance being placed on the fact that 1969 will mark the centenary of the Law Society in New Zealand.

There is a place however for the type of paper which is more instructional in nature, and because there will be concurrent papers an endeavour will be made to preserve a balance between papers which will be of interest to practitioners engaged in common law and practitioners engaged in commercial and conveyancing work.

Would any practitioner who has any suggestions as to a name of a practitioner who might be interested in delivering a paper, or developing any theme, or opening a discussion, or who has any suggestions as to topics which might properly form the subject of a paper or discussion please forward details of these to the following address:

The Joint Secretaries,
New Zealand Law Society Centennial Conference,
P.O. Box 1217,
HAMILTON.

CORRESPONDENCE

Mental Health Research

Sir,

It has recently come to my notice, as Chairman of the newly established Oakley Hospital Mental Health Foundation (Inc.), that bequests for psychiatric research have been lost by reason of the fact that no research organisation was in existence. In one case a substantial bequest was diverted to Australia.

My Research Foundation is appealing for substantial funds to enable it to establish a research organisation into our serious psychiatric problems in New Zealand. The Foundation is controlled by ten Trustees, all well known professional and business men of Auckland, and has been offered the help of several highly qualified professional men to advise on the formation of a research policy. There is no other such research unit in operation in New Zealand.

I would like you to advise your readers of the profession that there is now, for the first time in New Zealand, a trust in the mental health field that can be recommended to such clients as may be inquiring as to charitable bequests. It is intended that the benefits from the research will be New Zealand wide.

Any further information could be obtained from me personally or by writing to the Secretary at the registered office of the Foundation, Oakley Hospital, Pt. Chevalier.

I am etc.,

H. JENNER WILY.

Chairman of the Board of Trustees, Oakley Hospital Mental Health Research Foundation.

ECCLESIASTICAL COURTS AND DOCTORS' COMMONS

This is the second and final part of an article contributed by Mr C. P. Hutchinson Q.C.

Solicitors, as such, were not allowed to practise in the Ecclesiastical Courts and, instead of solicitors, there were proctors. In order to entitle a person to become a proctor, it was required that he should have served a clerkship of seven years, under articles with one of the thirty-four senior proctors. The senior proctors could not be less than of five years standing. Each senior proctor could have only one articled clerk at a time, except that when an articled clerk had served five years out of the seven years prescribed, the proctor could take a second articled clerk. Under this system an articled clerk must at least be the sole clerk to his proctor for three out of the seven years. After the seven years had been completed, the clerk was admitted a notary, by a faculty from the Archbishop of Canterbury. A petition was then presented to the Archbishop accompanied by a certificate signed by three advocates and three proctors that the party applying to be admitted had completed his seven years. The Archbishop then issued his fiat and a commission was directed to the Dean of the Arches by whom he was admitted under the title of a supernumerary. He was then entitled to practise on his own account. The proctors were officers of the Court established to represent in judgment the parties who empowered them (by warrant under their hands called a " proxy ") to appear for them, to explain their rights, to manage and instruct their cause and to demand judgment. There were generally two proxies executed, one to institute proceedings, the other to withdraw proceedings. The proctor until his power was withdrawn was *dominus litis* (see 3 *Burns' Ecclesiastical Law*, 9th ed. 376). However, Canon 130 curtailed the rights of proctors to remain *dominus* and at the same time preserved and nurtured the rights of the advocates by providing as follows :

> " For the furtherance and increase of learning and the advancement of civil and canon law, it is ordained that no proctor, exercising in any of the Archbishop's Courts, shall entertain any cause whatsoever, and keep and retain the same for two court days, without the counsel and advice of an advocate, under the pain of a year's suspension from his practice, neither shall the Judge have power to release or mitigate the said penalty without express mandate and authority from the Archbishop."

Canon 131 went further in its protection of the advocate :

> " And no judge in any of the said Courts shall admit any libel (this corresponds to a writ and statement of claim in a non-criminal ecclesiastical cause) or any other matter, without the advice of an advocate admitted to practise in the same Court, or without his subscription ; neither shall any proctor conclude any cause depending without the knowledge of the advocate retained and feed in the cause."

In 1639 Sir John Lambe wrote to Archbishop Laud advising him not to put common law Judges on the Commissions, as such a practice would " little by little ruin our profession and deduce and turn all ecclesiastical law into common law."

In 1666 Doctors' Commons was burned down in the Great Fire of London, but was rebuilt by the profession.

In 1768 a royal charter was obtained, by virtue of which the members of the Society, and their successors, were incorporated under the style and title of " The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts ".

It is self-evident that both the members of Doctors' Commons and the proctors were very close corporations and for ever jealous of any invasion of their rights.

The present generation is indebted to Charles Dickens for having selected Doctors' Commons as the subject-matter of a chapter in the *Sketches of Boz* wherein he furnishes us with a contemporary description in the following manner :

> "Doctors' Commons is familiar by name to everybody, as the place where they grant marriage licenses to love-sick couples and divorce to unfaithful ones, register the wills of people who have any property to leave and punish hasty gentlemen who call ladies by unpleasant names.

" Crossing a quiet and shady court-yard paved with stone and frowned upon by old red-brick houses, on the doors of which were painted the names of sundry learned civilians, we paused before a small, green-baized, brass-headed-nailed door, which yielding to our gentle push, at once admitted us into an old quaint-looking apartment, with sunken windows, and black carved wainscoting, at the upper end of which, seated on a raised platform, of semicircular shape, were about a dozen solemn-looking gentlemen, in crimson gowns and wigs.

" At a more elevated desk in the centre sat a very fat and red-faced gentleman, in tortoise-shell spectacles, whose dignified appearance announced the Judge ; and round a long green-baized table below, something like a billiard-table without the cushions and pockets, were a number of very self-important-looking personages, in stiff neckcloths and black gowns with white fur collars, whom we at once set down as proctors. At the lower end of the billiard-table was an individual in an armchair and a wig ; whom we afterwards discovered to be the registrar ; and seated behind a little desk, near the door, were a respectable-looking man in black, of about twenty stone weight or thereabouts, and a fat-faced, smirking, civil-looking body in a black gown, black kid gloves, knee shorts and silks, with a short-frill in his bosom, curls on his head and a silver staff in his hand, whom we had no difficulty in recognising as the officer of the Court ".

Later Dickens says : " This was the Court of Arches and therefore the Counsel wore red gowns, and the proctors fur collars, and that when other Courts sat there, they didn't wear red gowns, or fur collars either ".

In the same chapter Dickens described the Prerogative Room :

" The room into which we walked was a long busy-looking place, partitioned off, on either side, into a variety of little boxes, in which a few clerks were engaged in copying or examining deeds. Down the centre of the room were several desks, nearly breast-high, at each of which three or four people were standing, poring over large volumes. As we knew that they were searching for wills, they attracted our attention at once. It was curious to contrast the lazy indifference of the attorneys' clerks who were making a search for some legal purpose with the air of earnestness and interest which distinguished the strangers in the place, who were looking up the will of some deceased relative ".

Charles Dickens made further reference to Doctors' Commons in *David Copperfield* where Steerforth tells David that :

" 'It is a lazy old nook near St. Paul's Churchyard. It's a little out-of-the-way place, where they administer what is called ecclesiastical law and play all kinds of tricks with obsolete old monsters of Acts of Parliament which three-fourths of the world know nothing about, and the other fourth supposes to have been dug up, in a fossil state, in the days of the Edwards. It's a place that has an ancient monopoly in suits about people's wills and people's marriages, and disputes among ships and boats. You shall go there one day and find them blundering through half the nautical terms in Young's Dictionary, apropos of the "Nancy" having run down the "Sarah Jane" . . . and you shall go there another day, and find them deep in the evidence, pro and con, respecting a clergyman who has misbehaved himself ; and you shall find the judge in the nautical case, the advocate in the clergyman's case, or contrawise. They are like actors : now a man's a judge, and now he is not a judge : now he's one thing, now he's another ' ".

However, the privileges of the members of Doctors' Commons came to an end with the passing of the Court of Probate Act 1857 and the Matrimonial Causes Act 1857, which abolished the jurisdiction of the Ecclesiastical Courts in matters of Probate and Divorce. Under the provisions of s. 116 of the Court of Probate Act 1857 the members of Doctors' Commons were empowered to sell their property. Under the terms of the trust upon which the property was held there was a proviso that if their bar was ever thrown open or dissolved the property was to be equally divided among the members then living. The Ecclesiastical and Admiralty Courts ceased to sit in Doctors' Commons in 1858 and the members took advantage of the provisions of s. 116 and sold the property to the Metropolitan Board of Works in 1865.

Under the provisions of s. 117 of the same Act the members were empowered to surrender their charter which they did in the same year. In the case of *Mauncey* v. *Robinson* [1867] 37 L.J. (Eccl.) 8, it was decided that a barrister could appear in the Ecclesiastical Courts.

Under the provision of s. 17 of the Solicitors Act 1877 solicitors were expressly empowered to practise in the Ecclesiastical Courts, and so the exclusive rights of the proctors came to an end.

No doubt after the passing of these Acts, the barristers and solicitors of those days devoutly murmured *deo gratias*.

PRIVITY OF CONTRACT

The decision of the House of Lords in *Beswick* v. *Beswick*, the important case on privity of contract, has at last been reported ([1967] 2 All E.R. 1197). The facts of the case are brief and clear-cut, and raise the basic issues of privity in as simple a form as one could wish. A. bought a business from his uncle B. The consideration supplied by A. was a promise to employ his uncle as a consultant in the business at £6 10s. a week as long as he lived, and to pay his widow C., who was not a party to the contract, £5 a week for her life when B. died. B. died, and A. failed to pay C. C. brought an action against A. both in her personal capacity and as her husband's administratrix. The House of Lords held that in this latter capacity C. was entitled to a decree of specific performance against A., i.e., a decree that he pay the annuity to C. in her personal capacity.

Statute

A fair proportion of each of the judgments is taken up in dealing with the contention that s. 56 (1) of the Law of Property Act 1925 (U.K.) is effective to destroy the fundamental common law rule that only the parties to a contract can sue on it. This is a view which both Lord Denning and Danckwerts L.J. had expressed in the Court of Appeal (*a*) and which Lord Denning has reiterated a number of times over the past few years. The House unanimously rejected it, after a full historical review, concluding that the section has application only to real property. The New Zealand equivalent of s. 56 (1)—s. 7 of the Property Law Act 1952—is restricted to deeds, so there could never be any argument that the law of privity has been abolished by statute here. Nor, however, is it possible to argue that the New Zealand section is restricted to real property. It is not in a part of the Act dealing solely with conveyancing, as is s. 56 (1), nor is there any mention of "land" or even "property" in the section. So s. 7 is both wider and narrower than its English equivalent. (*b*) *Beswick* is thus of little interest in New Zealand on this point.

Common Law

But the case is of great importance in so far as it deals with the case law position. The judgments raise, if not always as fully as one might have hoped, a number of interesting points. Taking the basic situation as being that A. has contracted with B. to pay money to C., the following points are considered.

Introductory—Quite apart from any question of remedy and enforcement, A. *may* pay C., and once he does C. is entitled to retain the money. B. has no right to recover it from C. once it has been paid, nor has he a right before it is paid to order that A. pay him, B., instead of C.; in fact if B. takes steps to prevent A. from paying C., this is a breach of contract. But if, before payment to C., A. and B. together agree to vary the contract so as to provide for payment to B., or someone other than C., they may, as the only contracting parties, do this. (c) But while the contract remains in existence, what rights have the parties to enforce it ?

Enforcement by the Third Party—(a) The House was adamant that C. has no right to enforce the contract personally. In the Court of Appeal, Lord Denning had suggested that there was such a right, provided he took the procedural step of joining B., the other contracting party, in the action. Even counsel did not think it worth while arguing this point in the House of Lords. Their Lordships found that *Dunlop* v. *Selfridge* [1915] A.C. 847; [1914-15] All E.R. Rep. 333, and *Midland Silicones* v. *Scruttons* [1962] 1 All E.R. 1 established the doctrine of privity far too clearly, and the whole point of that doctrine is that a man who is not a party to a contract cannot sue on it. Yet there is some evidence that their Lordships were not happy with the existence of such a doctrine. Lord Upjohn implied that the doctrine may not be of such antiquity as has sometimes been thought (p. 1217) and Lord Reid expressly said that if there were not signs that legislation would soon be passed to remedy the position, the House might have taken steps "to deal with this matter" (p. 1201). (b) But equity will allow C. a cause of action if he

(*a*) Reported [1966] 3 All E.R. 1.

(*b*) See *Armstrong* v. *Public Trustee* [1953] N.Z.L.R. 1042; *Re Bastings* (1909) 29 N.Z.L.R. 409; 12 G.L.R. 621 and note Lord Upjohn at p. 1222 on an earlier English section which is similar to the New Zealand one.

(*c*) Lord Upjohn at p. 1217. And see *Re Schebsman* [1943] 2 All E.R. 768.

can establish that a trust, and not merely a contract, has been created in his favour. In past days the Courts were very ready to find a trust, and some very artificial ones they found. In fact, it seemed at one stage that the device of the trust was capable of circumventing the doctrine of privity in almost any case. (*d*) But since *Vandepitte* v. *Preferred Accident Insurance Corporation* [1933] A.C. 70; [1932] All E.R. Rep. 527, there has been a definite leaning away from the device, probably as a result of its artificiality, and nowadays one can only rely on a trust if there is clear evidence that A. and B. intended one; just how one proves whether they did or not is never certain, but the best evidence of it seems to be the fact that they made the arrangement irrevocable and invariable. So far has the reaction against the trust gone that in *Beswick* counsel did not even think it worth arguing that a trust had been created.

Enforcement by the Other Contracting Party—B., as the other party to the contract, clearly must have remedies against A., for A.'s failure to perform is a breach vis-a-vis B.

(a) Suing for a debt. Suppose certain instalments of the moneys A. has agreed to pay C. have fallen due and remain unpaid. Clearly B. cannot sue A. on a debt due and owing to himself, for the moneys are not due to B. But can B. sue A. on C.'s behalf to recover the debt owing to C.? It would seem fairly certain that, apart from a decree of specific performance, there can be no such action unless B. is trustee for C. Neither law nor equity knows an action by one man on behalf of another who has himself no right to sue. Yet Lord Pearce suggested that such an action is possible. One of his reasons for granting a decree of specific performance was that that remedy is " more convenient than an action for arrears of payment followed by separate actions as each sum falls due " (p. 1212). None of the other Lords makes any such suggestion, and Lord Pearce's statement is a rather oblique one and he cites no authority for it. This statement is, with respect, of doubtful value.

(b) Action for damages. All the Lords except Lord Guest, who did not deal with this point, accepted that if B. sues A. for breach of contract he can recover damages, and three appeared to think that the measure of damages will be the amount of the loss which B. has himself suffered. Because B. alone will usually have lost nothing, his damages will usually be nominal, but there may be circumstances where B. suffers personal loss as the result of the breach, and in accordance with the ordinary principles governing the award of damages substantial damages will be recoverable by him. Lords Pearce and Upjohn both made this point at some length (pp. 1212, 1221); Lord Reid was less explicit, although he certainly suggested it (p. 1202). Lord Hodson did not consider the question of measure of damages.

Both Lords Pearce and Upjohn disagreed with a statement by Lush L.J. in *Lloyd's* v. *Harper* (1880) 16 Ch. D. 290, 321: " I consider it to be an established rule of law that where a contract is made with B. for the benefit of C., B. can sue on the contract for the benefit of C., and recover all that B. could have recovered if the contract had been made with C. himself." No doubt that statement is true if there is a trust in existence, and it is important to note that there was held to be one in *Lloyd's* v. *Harper*. But if there is no trust, B. clearly cannot be allowed to recover the amount of C.'s loss for himself, for that is not the measure of his, B.'s, loss. And if the Court were to award him such damages, ordering him to pay them to C., that would be equivalent to holding that B. was a trustee for C. for the purposes of enforcing the contract. Once it is held that B. is not a trustee for C., the only substantial damages B. will be able to recover will be those which he himself has suffered. In *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.* (*e*) Windeyer J. gave some hypothetical examples:

> " If C. were B.'s creditor, and the $500 was to be paid to discharge B.'s debt, then A.'s failure to pay it would cause B. more than nominal damage. Or, suppose C. was a person whom B. felt he had a duty to reward or recompense, or was someone who, with the aid of $500, was to engage in some activity which B. wished to promote or from which he might benefit—I can see no reason why in such cases the damages which B. would suffer upon A.'s breach of his contract to pay C. $500 would be merely nominal."

On the actual facts of *Beswick*, how much would the uncle's estate have been allowed to recover had it sued, through the widow as administratrix, for damages? Lord Hodson

(*d*) See Corbin, (1930) 46 L.Q.R. 12.

(*e*) [1967] 40 A.L.J.R. 471, 486. Windeyer J.'s judgment was mentioned by Lord Pearce at pp. 1213-1214 and Lord Upjohn at p. 1221. In the paragraph quoted here and from *Lloyds* v. *Harper* (*supra*) the letters representing the parties have been altered to accord with the convention adopted here.

stated categorically that damages would have been nominal (p. 1207). Lord Reid *assumed* that that would be so without discussing the point (p. 1202). Lord Upjohn " inclined to the view " that damages would be nominal (p. 1221). But Lord Pearce, alone of the Judges, thought that they would have been substantial (p. 1212). Regrettably he did not say why, and, with respect, it is difficult to understand why. Had the promise been to pay C. the annuity during B.'s lifetime it might have been a different matter, because it would have been foreseeable that if this contract was broken B. himself would have had to maintain C. But in *Beswick* B. was dead. He died completely without assets (per Lord Upjohn at p. 1221), and his estate could scarcely, then, suffer loss as the result of having to support the widow. In any event, she was probably the sole beneficiary in the estate. There is no mention in the judgments of any other special facts which could lead to a loss on the part of the estate.

(c) Specific performance. *Beswick* holds that in the situation we are discussing B. is entitled to claim specific performance of the agreement. In this case, it meant that the widow as administratrix could obtain a decree against the nephew to pay the annuity as promised to her in her personal capacity. Lords Reid and Guest dealt with this question regrettably briefly (pp. 1205, 1208); they said little more than that " it would produce a just result ". But Lords Hodson, Pearce and Upjohn canvassed the matter rather more fully (pp. 1207-1208, 1212-1214, 1218-1221).

A number of objections to the award of the decree were put forward by counsel. Their Lordships countered them all. Three were of a relatively minor nature, and can be briefly dealt with (as indeed they were by the House).

(1) That there was no mutuality, in that it was part of B.'s contract that he would serve as a consultant, and this was a promise of which A. could not have obtained specific performance. There was a chance here for their Lordships to deny that mutuality is an essential requirement for a decree of specific performance, something which Maitland and other equity jurists have strongly argued. But they preferred merely to say that the element of personal service was here little more than nominal; and Lord Upjohn said that the mere fact that there is an element of personal service in a contract " does not destroy that quality of mutuality " (p. 1218).

(2) That specific performance cannot be awarded of a contract to pay money. This argument was not proceeded with, and Lord Hodson dismissed it as "untenable" (p. 1207).

(3) That there was no way in which the decree could be enforced. But their Lordships pointed to R.S.C. Ord. 45 r. 9 which provides that any person not a party to a cause in whose favour any order is made is entitled to enforce obedience by the same process as if he were a party. The same provision appears in New Zealand as R. 349 of the Supreme Court Code. To some jurists this result may seem odd. What it effectively means is that a man has a right to employ sanctions to coerce another against whom he has no primary right.

But the next objections are the weightiest. It was said that specific performance is only available where damages are not an adequate remedy, and that here damages were an adequate remedy, even if they were merely nominal. But their Lordships were not attracted by this.

Suppose that damages had been substantial. The widow was, of course, before the Court in two capacities, and an award of substantial damages to her as administratrix would have ended up in her hands in her personal capacity. But, according to Lord Pearce, that would not be " adequate ", for the reason that " the parties to the agreement were intending an annuity for a widow; and a lump sum of damages does not accord with this " (p. 1212).

If nominal damages were all that could be awarded, that would no doubt compensate the estate economically, but their Lordships were all clearly of the view that this would not be an " adequate " remedy. No doubt it is true to say that an award of damages which leaves the plaintiff in a financially satisfactory position may not be " adequate "; other factors than economic ones may often be present and sometimes be quite unsatisfied by a mere award of money. This, after all, is the whole point of awarding specific performance of a contract for, say, goods of special rarity (per Lord Upjohn p. 1221). It is not money that matters here—it is the satisfaction of actual possession; one might say that the goods have a " sentimental value ".

But in the case of a contract to buy rare goods, and in the other common cases where specific performance is awarded it is *the plaintiff* to whom damages are not an adequate remedy; specific performance is necessary to do complete justice to *the plaintiff*. One wonders whether that was really so in *Beswick*. Their Lordships said that the remedy was needed to " do more perfect and complete justice ", but " complete

justice " to whom ? The natural answer to this question is, of course, " the third party beneficiary " ; her moral claims loomed large. Yet, strictly speaking, those claims were irrelevant. Once it is admitted that a person has no right, in law or equity, to enforce the payment of certain moneys, it seems rather illogical that that person's interests can be taken into account in deciding whether the moneys should be paid to him. The House does seem to have steered away from any suggestion that it was the widow's (C.'s) rights they had in mind, although Lord Pearce noted that an incident of the enforcement of the estate's right would be to " secure justice for the widow, who, by a mechanical defect of our law, is unable to assert her own rights " (p. 1213).

What were the elements, then, which made specific performance necessary to do justice, and to whom was justice thus done ? No doubt the plaintiff (the estate) was benefited in that had damages alone been awarded it might have been necessary to bring a string of actions, one each time an instalment fell due—this was a consideration mentioned by all the Judges.

The Court was also greatly influenced by the fact that the defendant had received the full consideration for which he had bargained, and emphasised that it would be contrary to all considerations of fairness that he should be allowed to get away with paying only half the price for it. There had been what Lord Hodson described as an " unconscionable breach of faith " (p. 1208). This ground for awarding the remedy might be said to be a sort of general " justice *in the air* " ; *justice to* no particular person.

But neither of these two factors—payment by instalments and execution on one side—are inevitable concomitants of a third party contract. Does this mean that specific performance is by no means an invariable remedy in this sort of case ? This is not the inference one draws from the judgments. The suggestion is that in third party contracts the remedy is readily available, for the simple reason that the plaintiff (the other contracting party) is entitled to have the satisfaction of seeing the contract performed ; he would not have made the contract in that form unless he had a special reason for wanting the third person to be benefited. Indeed Lord Pearce suggested, quoting Windeyer J. in the *Coulls* case (*supra*), that specific performance is a remedy which is readily available, on the basis that it is a *prima facie* truth that a party to a contract has a right to performance of it, not just to performance *or* damages as the other party thinks fit (p. 1214).

What, indeed, emerges as one of the most striking features of the case is the flexibility and adaptability of the remedy of specific performance. It has often been thought that it is a remedy to be awarded only in a fairly limited class of cases ; early this century Maitland said that it was granted only according to well settled rules. The statements in *Beswick* suggest that it is far less predictable than this. Lord Upjohn summed up the position thus :

> " It is in such common-sense and practical ways that equity comes to the aid of the common law, and it is sufficiently flexible to meet and satisfy the justice of the case in the many different circumstances that arise from time to time " (p. 1219).

Conclusion

Beswick has perhaps not taken the law of privity of contract much further, but it has clarified the position so far as the remedy of specific performance is concerned. But difficulties and uncertainties still remain. The following points may be noted.

1. Whether C. gets his benefit from a recalcitrant A. depends entirely on whether B. is prepared to sue A. for specific performance. Clearly C. has no right to force B. to bring an action; to hold that he had, would be to give him an indirect right to enforce the contract. So C.'s position depends entirely on the good graces of B. In *Beswick* there was no problem, for B. and C. were the same person ; but that was purely fortuitous. In cases where they are different persons, it may well be that B. will sometimes not be prepared to go to the trouble and expense of bringing an action out of which he will receive no personal benefit ; this will be so particularly if the original B. has died, and an executor is in his shoes. It is doubtful whether there is any power in the Court to order C. to reimburse B. his expenses ; B. is in no sense an agent or trustee for C., this being his own action in the eyes of the law.

2. It is well established that there are certain kinds of contract—e.g. for personal service and building—which are not specifically enforceable. It is rather unfortunate that C.'s position should depend on the availability of a remedy which is thus restricted in its operation. This simply points up the unfortunate state of the English law, which refuses to allow C. his own remedy.

3. If specific performance is available, there would seem to be no good reason why injunction, the other main equitable remedy, should not be also. This raises some interesting possibilities. Suppose that in a case like *Midland*

Silicones v. *Scruttons* (*supra*) the shipowners had in their contract with the goods owners expressly stipulated that the stevedores handling the goods would not be liable to any action by the goods owners. Could the shipowners obtain an injunction against the goods owners to prevent their proceeding with an action for damages against the stevedores? Provided the exception clause was carefully drafted so as to contain a promise by the goods owners not to take proceedings, i.e., a definite agreement not to indulge in a certain kind of conduct, there would seem to be no reason why injunction should not be available—if the shipowners thought it worth their while to request one. One wonders whether, in such a case, the Court might not, in its discretion, refuse an injunction on the ground that justice did not require it, or whether it might not say that the clause was void as ousting the jurisdiction of the Courts.

4. In New Zealand, the draftsman's best hope would seem to be reliance on s. 7 of the Property Law Act. If the contract is drawn in the form of a deed and not a simple agreement, the decided cases suggest that the section is capable of conferring enforceable rights on the third party beneficiary. (*b*) That such a great difference in legal effect should depend simply on a difference in form is a sad commentary on the state of the law.

J. F. BURROWS.

THE RIGHT OF A DESERTED WIFE TO REMAIN IN THE MATRIMONIAL HOME

Re D. (A Debtor) [1967] N.Z.L.R. 828 Considered

As Editor of the last edition of *Garrow's Law of Real Property in New Zealand*, 5th ed., I expressed the opinion that:

> "It is now settled law in England that a deserted wife has a right, as against her husband, to stay in the matrimonial home unless and until an order is made against her under s. 17 of the Married Women's Property Act 1882 (the corresponding provision in New Zealand is s. 19 of the Married Women's Property Act 1952). This right prevails against the Official Assignee in Bankruptcy, should the husband go bankrupt: *Bendall* v. *McWhirter* [1952] 1 All E.R. 1307. If she remains in possession under a contractual licence from her husband, her contractual right prevails against him and against anyone who claims through him except a purchaser for value without notice: *Ferris* v. *Weaven* [1952] 2 All E.R. 233" (*ibid.*, 133).

In the last edition of *Garrow*, written by Garrow himself (being the second, published in 1924), this doctrine was not even mentioned or discussed by the learned Professor. However, much water has flowed down the River Thames since the days of Garrow.

The above extracted opinion from *Garrow*, 5th ed., must now be read in the light of subsequent cases decided in England and New Zealand. It may be desirable to point out to practitioners and students that at the New Zealand Law Conference held in Auckland in 1963 Mr E. P. Wills gave a very learned and sound paper in the course of which *inter alia* he dealt with this doctrine of the right of a deserted wife to remain in the matrimonial home from the angle of the indefeasibility provisions of the Land Transfer Act. Said Mr Wills: "Is this seemingly all pervading doctrine of the wife's rights in the matrimonial home, which has already made serious inroads into the field of real property, itself to prevail against the provisions of the Land Transfer legislation? Surely not!" Later cases show that Mr Wills was correct. This most valuable paper will be found in [1963] N.Z.L.J. 269 *et seq.*, and the passage quoted at p. 275. That paper is worthwhile reading afresh, especially as very recently the Privy Council has, with much emphasis, (presumably for our future guidance in New Zealand) affirmed the controversial *Boyd's* case *Frazer* v. *Walker* [1967] 1 All E.R. 649. (As to *Frazer's* case see articles in [1967] N.Z.L.J. at pp. 97, 129, 347.)

After the doctrine had been much developed by the Courts of Equity in England and more or less followed in New Zealand by the Supreme Court the House of Lords threw much light and authority on it in the case of *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1965] 2 All E.R. 472; [1965] A.C. 1175. There is an excellent article on this case by Mr G. Cain in [1965] N.Z.L.J. 489 *et seq.*, and like the paper by Mr Wills previously referred to in this

article, it is worthy of careful study by the New Zealand practitioner and student of law. The House of Lords overruled *Bendall* v. *McWhirter* (*supra*) and considered *Ferris* v. *Weaven* (*supra*) on which cases I had relied for my expressed opinion in the current edition of *Garrow*. The House of Lords held that the rights of a deserted wife were of their nature personal rights and as such they could not be treated as in any sense constituting a clog on the property of the husband so as in the case of realty to run with the land; and that accordingly, a deserted wife could not resist a claim from a genuine purchaser of the matrimonial home from her husband whether the purchase took place after or before desertion. The deserted wife's rights, as pointed out by Lord Hodson, cannot be treated as in any sense running with the land.

This House of Lords case was recently followed in England by a Chancery Judge: *In re Solomon* (*a Bankrupt*) [1967] 2 W.L.R. 172. The matrimonial home was owned by the husband and wife as joint tenants and the husband deserted her in 1954 by reason of matrimonial differences. In 1960, by a Court order in her favour, the husband undertook, *inter alia*, not to dispose of or otherwise deal with the property or to charge or devise the same. In 1964 the husband was adjudicated bankrupt on his own petition. The Court held that the rights of the wife under the husband's undertaking, being personal rights under a consent order for maintenance, did not amount to an interest in the property running with the land, nor was her interest that of a contractual licensee, so as to bind the husband's trustee in bankruptcy.

His Honour Mr Justice Speight has followed the last two English cases, the *Hastings Car Mart* and *Solomon's* cases, *ante*, in a well-reasoned judgment: *Re D.* (*a debtor*) [1967] N.Z.L.R. 828. His Honour made an order that the wife, who alleged that the husband had deserted her, was not entitled to occupy the matrimonial home, and that possession of same was to be given to the Official Assignee in Bankruptcy. (The husband had previously been adjudicated a bankrupt on his own petition.) The order was made pursuant to s. 9 of the Bankruptcy Act 1908. The Supreme Court had previously refused the wife an order under s. 5 of the Matrimonial Property Act 1963: *Donnelly* v. *Official Assignee* [1967] N.Z.L.R. 83.

Speight J. held, as shown in the headnote, that where a deserted wife remains lawfully in the matrimonial home her occupation does not amount to a contractual licence to occupy the property. His Honour further held that, even if the wife's occupancy had amounted to a contractual licence, it would not have been binding on the Official Assignee in Bankruptcy of the husband's estate: in doing so he relied on *Clore* v. *Theatrical Properties Ltd. and Westby & Co. Ltd.* [1936] 3 All E.R. 483:

> "In *Bendall* v. *McWhirter* (*supra*) Lord Denning has doubted the present authority of *Clore's* case, particularly at pp. 482, 1314, when he suggests that its basis as a decision has now been removed by *Winter Garden Theatre* (*London*) *Ltd.* v. *Millenium Productions Ltd.* [1948] A.C. 173; [1947] 2 All E.R. 331. In view of the discussion of Lord Denning's views as expressed by the House of Lords in the *Car Mart* case (*supra*), this criticism may be of doubtful validity."

To those of my generation who tried to learn the law before the advent of the *Winter Garden* case (*supra*) this criticism will prove of great interest, and it will give some impetus to the student of the present decade, who, by reason of his University training, knows more of the modern judicial concept of a "licence" than we do.

The reader of this article will recollect that one of the cases on which I relied in support of my opinion in *Garrow* on the doctrine of the right of the deserted wife to remain in possession of the matrimonial home, was *Ferris* v. *Weaven* (*supra*). This case is put into its proper focus by Speight J. at p. 833: "Again, *Ferris* v. *Weaven* (*supra*) has special features relating to the sale, *which was a sham*, and this has been commented on in a number of subsequent authorities which doubt the universal applicability of any principle which one might attempt to draw from the case." The italics are mine and not his Honour's.

E. C. ADAMS.

Extra-Curricular—It is comforting to know that the insecurity of the women's jails in Dunedin and other places is unlikely to result in the situation which arose in a Mississippi prison this year. There a lass of eighteen awaiting trial for the murder of a taxi driver relieved the monotony by systematically loosening blocks of concrete in her cell wall. Her purpose was not to fly over the high prison walls but to seek the society of three young men in the adjacent cell. Her efforts were successful and we are told that before they were discovered, some convivial evenings were enjoyed by the neighbours in one or other of the now intercommunicating apartments. There is no end to enterprise.

M.

LEGAL LITERATURE

IAN BROWNLIE'S **Principles of Public International Law.** Oxford University Press. 1966. Pp. xxxi + 646 including 79 pp. of appendices and index. U.K. price 63/-.

Dr Brownlie, who is already well known for his other publications in the field, has provided a useful and at times valuable introduction to many of the important questions of international law. After discussing the sources of international law, and its relation to municipal law, he considers, in turn, statehood, recognition, territorial sovereignty, common amenities and co-operation in the use of resources, jurisdiction, nationality, state responsibility, the individual in international law, treaties and international organisations. The topics (with one exception) and, for the most part, their treatment are basically traditional, although one welcomes the rapidly increasing use in this and other recent works of the great range of basic source materials which are now becoming available. (One must also admire the extreme speed with which this book was put through the printing stages: published late in 1966, it includes material becoming available in July and August of that year.) The exception is the common amenities and co-operation chapter: it is an interesting, although at times unhappy, attempt to show how international law is groping from its base of rules of coexistence of sovereign independent States towards a law of co-operation, if you like, international welfare law.

But Dr Brownlie's book does raise a basic question. Writing a text on public international law is now comparable in scope to writing a book on English law and no one man can aspire to write a *Halsbury*. He must aim his sights lower. The short introductory book like *Brierly* or *Starke* has a place, especially for the general reader and for those subjected to short international law courses in the Universities. But what of longer texts? Until O'Connell published his massive but incomplete, and necessarily partly inaccurate and outdated two-volume work in 1965, no new large text on international law had been published in English in sixty years. International lawyers seemed to have taken the point that only general introductions and specialised monographs were within the realms of possibility. *Brownlie* falls between *Starke* and *Brierly*, on the one hand, and *O'Connell* on the other: it is neither a general introduction with all the reservations that involves nor an attempt to provide encyclopaedic, broad coverage over an ever expanding field. (In opting for a somewhat longer and more scientific book, Dr Brownlie has also decided to exclude the general, speculative discussions, found in the best introductory texts, of the role of law and organisation in international relations. Such speculation is surely valuable to the student and the general reader.)

How then is one to judge this book? Parts show a very detailed and thorough discussion of the relevant law: the discussion of nationality and State responsibility come to mind. But other sections are inevitably superficial. Thus, to take some current issues, the reader would be hard pressed to discover here the law relevant to French nuclear testing in the Pacific, he would find that the discussion of the Suez Canal makes no reference to an important decision of the United Nations Security Council holding Egyptian interference with goods destined for Israel illegal, and he would surely be astonished to discover that member States of the U.N. "probably have a collective duty [under international law] to create reasonable living standards both for their own peoples and for those of other States". Does this mean, say, that Upper Volta can take the New Zealand Government to task on the ground that its recent economic measures, first, do not help create reasonable living standards in New Zealand and, second, involve a cut in foreign aid? In the same chapter, Dr Brownlie also argues that there is an obligation to provide access to resources under reasonable conditions and instances atomic energy. Is the U.S. really obliged to apply its atoms-for-peace programme to China and France?

But such peccadilloes aside—and they can hardly be avoided in a book of this size—Dr Brownlie, to repeat what was said at the outset, has provided a useful and valuable text. The physical product is up to the Clarendon Press' high standards.

R.J.K.

Underhill's Law of Partnership, Eighth Edition, edited by G. HESKETH. Butterworths, London. 1966. Pp. xxix + 117. New Zealand price $4.25.

Those who are already familiar with the previous edition of Underhill's Law of Partner-

ship will need no introduction to the eighth edition. No changes of substance are introduced and the pattern established by earlier editions is closely followed. Partnership is an area of the law in which few developments have taken place in recent years. Since the previous edition of Underhill appeared in 1958 there has been only a handful of reported English decisions affecting the law of partnership. The opportunity is taken in the new edition to refer to recent English decisions but there are two surprising omissions. The discussion at page 113 of the rescission of a partnership contract makes no mention of *Senanayake* v. *Cheng* [1966] A.C. 63 ; [1965] 3 All E.R. 296 where the Privy Council treated a partnership as a contract with continuing obligations. It does not come within the category of " executed " contracts which are affected by the rule in *Seddon* v. *North Eastern Salt Co.* [1905] 1 Ch. 326.

The passage at pages 181-183 dealing with the partner's duties of good faith could usefully have made reference to the decision of the Court of Appeal in *Gordon* v. *Gonda* [1955] 1 W.L.R. 885 ; [1955] 2 All E.R. 762, where a partner was held accountable as trustee for a half share in partnership assets which he had retained and misappropriated when the partnership was dissolved by reason of Trading with the Enemy legislation.

Where reference is made to new cases Underhill unfortunately follows the practice of many old established textbooks by merely giving the facts and decision of the case but not attempting any revision of the existing text in the light of the later case. *Miles* v. *Clarke* [1953] 1 W.L.R. 537 ; [1953] 1 All E.R. 779 ; is referred to in the new edition but the editor's comments on this case would have been valuable. The case introduces a new test to distinguish the partnership property from the private property of the individual partners. The Court held that no more should be implied into the agreement than was necessary to give business efficacy to it. Where, therefore, it was not necessary in order to give business efficacy to the agreement to treat certain property as being part of the partnership assets, the property should be regarded as remaining the individual property of the partners. This case applies a very different test to that which was formerly thought to be applicable—that in *Waterer* v. *Waterer* (1873) L.R. 15 Eq. 402 which states " where property became involved in partnership dealings it must be regarded as partnership property ".

At page 63 reference is made to *Meekins* v. *Henson* [1964] 1 Q.B. 472 ; [1962] 1 All E.R. 899 but the full significance of the decision was not grasped and discussed in the text. In this case the three partners of a firm were sued for damages arising from a defamatory statement published by the firm. Two of the partners successfully raised the defence of qualified privilege but the Court held that the third partner had acted with malice and the defence was not available to him. The statement was not published in the ordinary course of the business of the firm so that the other two partners could not (contrary to the statement in Underhill) have been held vicariously responsible for the tort of the third partner.

It should be noted that none of the recent decisions to which reference is made in the new edition are included in the index of cases.

Underhill remains a standard text on Partnership Law. The subject matter is divided into well classified sections of particular assistance to the student.

Underhill enjoys too the advantage of being very readable. Unfortunately this is sometimes at the expense of accuracy but it is welcome to find the interest of this by-way of the law added to by such passages as :

> " A senior partner, on the other hand, generally insists on the right of consoling his declining years by indulgence in leisured ease, merely reserving the right, but not conceding any obligation to attend to business."

And

> " Now so far as an insolvent partner personally is concerned, it is necessarily a matter of small moment to him how his private property . . . is administered ; he at least will be bereft of everything ; and his only interest in the matter will be that of a captive watching with melancholy interest the quarrels of his captors over the distribution of the spoils."

P. D. MCKENZIE

The Legal Mind—There is something special about the mind of a good lawyer—he does not think as others do. He will not accept easy generalisations nor climb quickly to a conclusion. He prefers, like a mountaineer intent upon a peak, to take the more careful, circuitous route so that he can be surer of his ground. He loves facts, detests disarray and imprecision, and spends his working hours trying to define life within a framework of the law. He is not born this way ; it takes a law school to turn the necessary bent of mind : *Time*.