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MONEY PAID UNDER MISTAKE OF LAW.

II.—Moneys Recoverable.

IT may not be said that relief can never be given for the recovery of money paid under mistake of law. There are several exceptions to the general rule. Moneys paid voluntarily under mistake of law may be recovered on equitable grounds in certain circumstances. As Mellish, L.J., said in *Rogers* v. *Ingham*, (1876) 3 Ch.D. 351, 357:

> There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the Court of Equity did not, in such cases, interfere with Courts of law. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by Courts of Equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice Turner, in *Stone* v. *Godfrey*, (1854) 5 DeG. M. & G. 76, 90, 43 E.R. 798, 804, "This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact"; that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inevitable that the party who received the money should retain it.

And in the same case, James, L.J., at pp. 355, 356, said:

> I have no doubt that there are some cases which have been relied on, in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court, but relief has never been given in the case of a simple money demand by one person against another, there being between these two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties.

In *Daniel* v. *Sinclair*, (1881) N.Z.P.C.C. 140, accounts between a mortgagor and his mortgagee were drawn up and assented to under a common mistake that the mortgage deed required the payment of compound interest. There, the question of a private right was under discussion, and both parties might be taken to have misunderstood the effect of the deed, to have drawn up and assented to the accounts under that mistake as to their respective rights and liabilities. The Judicial Committee, dismissing an appeal from our Court of Appeal ((1880) O.B. & F. 1, C.A.), held that the signature of a particular account, occurring in a series of accounts, all alike drawn up in error, did not prevent its being reopened upon accounts under the mortgage deed being taken. Their Lordships, in a judgment delivered by Sir Robert Collier, said that in Equity the line between mistakes in law and mistakes in fact had not been so clearly and sharply drawn as in the Courts of common law. They then went on to cite the observation of Lord Chelmsford in *Earl Beauchamp* v. *Winn*, (1873) L.R. 6 H.L. 223, 234:

> With regard to the objection, that the mistake (if any) was one of law, and that the rule, *ignorantia juris neminem excusat*, applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well-known rule of law; and there are many cases to be found in which Equity, upon a mere mistake of law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake.

Their Lordships referred to *Cooper* v. *Phibbs*, (1867) L.R. 2 H.L. 149, 170, where Lord Westbury says:

> Private right of ownership is a matter of fact; it may be also the result of matter of law, but if parties contract under a mutual mistake as to their relative and respective rights, the result is that the agreement is liable to be set aside, as having proceeded upon a common mistake.

Reference was also made by their Lordships to *McCarthy* v. *Decaix*, (1831) 2 Russ. & M. 614, 621, 39 E.R. 528, 531, where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, and to the observation of the Lord Chancellor:

> What he has done was in ignorance of law, possibly of fact, but, in a case of this kind, this would be one and the same thing.

The distinction between mistake of fact and mistake of law, it may be observed, is somewhat more easy to lay down in general terms than to follow out in particular cases, even in regard to the application of the rule. Lord Brougham, L.C., in *Clifton* v. *Cockburn*, (1843) 3 My. & K. 77, 99, 40 E.R. 30, 38, observed

that he could, without much difficulty, put cases in which a Court of justice, but particularly a Court of Equity, would find it an extremely hard matter to hold by the rule, and refuse to relieve against an error of law. He went on to say that there could be no reason to find fault with the cases where Equity had relieved, notwithstanding the distinction between payment made in error of law and in error of fact; for in truth they lie on the very border of the two kinds of error and are to be classed rather among instances of error in fact than in law, even when there are no circumstances of circumvention or fraud as there clearly were in some of them.

Cooper v. *Phibbs* (*supra*) was applied in *Mutu* v. *Michel*, [1919] N.Z.L.R. 521, in which it was held that the mistake was a mutual mistake as to a private right, and was treated as a mistake of fact, where a conveyance which was executed by a Native in an erroneous belief that it was Native freehold land, and consequently that the Maori Land Board would in due course determine whether the consideration was adequate; but when the conveyance came before the Board it was found that the land was not Native freehold land.

It follows that the rule prohibiting the recovery of money paid by mistake of law, properly so called, applies in its full rigour only in Courts of common law, as Salmond, J., pointed out in *Dempsey* v. *Piper*, [1921] N.Z.L.R. 753, 756. He said that it is well recognized that there is equitable jurisdiction to give relief against mistakes of law. As a matter of principle, he added, the rule prohibiting the recovery of money paid by mistake of law should be fully applicable only in the case of him who pays away his own money. In *Dempsey's* case, the Official Assignee, who had paid dividends to creditors by mistake of law, could not recover in the Magistrates' Court because of its lack of equitable jurisdiction; and, if the Official Assignee had any remedy at all, it had to be sought in the equitable or bankruptcy jurisdiction of the Supreme Court. Payment of money by mistake of law does not create any debt recoverable by action at common law, and only such a debt could be recovered in the Magistrates' Court. The remedy was to apply to the Supreme Court in its equity or bankruptcy jurisdiction for an order requiring the creditors who had illegally received dividends to refund them to the Official Assignee.

The rule does not apply, except with such limitations as equitable considerations demand, to moneys paid under an honest mistake of law by trustees not beneficially interested; and it has been the practice of the Court of Chancery, when administering the estate of a deceased person, where the trustees have under an honest mistake overpaid one beneficiary, in the adjustment of accounts between the trustees and the *cestui que trust*, to make allowance for the mistake in order that the trustee may, as far as possible, be recouped the money which he has inadvisedly paid. In thus applying the principle of *Stone* v. *Godfrey* (*supra*), Neville, J., in *In re Musgrave, Machell* v. *Parry*, [1916] 2 Ch. 417, allowed trustees who had paid annuities without deducting income-tax to recoup themselves out of future payments of the annuities. So, too, in *Livesey* v. *Livesey*, (1830) 3 Russ. 542, 38 E.R. 649, an executrix who, under mistake in the construction of a will, had overpaid an annuitant was permitted to deduct the overpaid amount from subsequent payments.

Other applications of the same principle were given by Salmond, J., in *Dempsey* v. *Piper* (*supra*) (which was followed by Ostler, J., in *Official Assignee of Bredow* v. *Newton King, Ltd.*, [1926] N.Z.L.R. 198), at pp. 756, 757:

> In *Ex parte Ogle* (L.R. 8 Ch. 711), where an attempt was made to surcharge a trustee in bankruptcy for having paid an excessive dividend to a creditor by mistake of law, the Court refused to do so on the ground of undue hardship; and James, L.J., says on page 716: "There was no reason of public policy to induce the Court to act thus harshly; for if any creditor found that another creditor had been overpaid, he could summon him to the Court of Bankruptcy and obtain an order that he should refund what he had wrongfully received." So in *In re Flood, Ex parte Lubbock*, (4 DeG. J. & S. 516), a creditor who had been overpaid by a mistake of law was ordered by the Court of Bankruptcy to repay the excess. So in *Ex parte Dewdney* (15 Ves. 479), affirmed *sub nom. Ex parte Reffey* (19 Ves. 468), a dividend paid by mistake of law in respect of a debt barred by the Statute of Limitations was ordered to be refunded by the creditor. In *Ex parte Soper* (2 Mont. & A. Bank. Rep. 55), on the other hand, special equitable considerations were held sufficient to preclude an order of refund—the dividend having been received seven years ago by a creditor who had received it *in alieno jure* and had paid it over.

Similarly in *In re Fleetwood and District Electric Light and Power Syndicate*, [1915] 1 Ch. 486, in which it was decided that the liquidator of a company had acted erroneously in paying a statute-barred debt, the Court was prepared to make an order for refund, and would have done so had the creditor not voluntarily undertaken to repay the amount.

Another exception to the general rule is that money paid under a mistake of law, with a full knowledge of the facts, but paid involuntarily, is recoverable.

An involuntary payment, which is a payment "forced" from the payer within the contemplation of the law, is defined by Isaacs, J., as he then was, in *Smith* v. *William Charlick, Ltd.*, (1924) 34 C.L.R. 38, 56, where he said:

> "Compulsion" in relation to a payment of which refund is sought, and whether it is also variously called "coercion," "extortion," "exaction," or "force," includes every species of duress or conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee and applied to the person or the property or any right of the person, or, in some cases, of a person related to or in affinity with him. Such compulsion is a legal wrong and the law provides a remedy by raising a fictional promise to repay. . . . It is not sufficient that it is merely "unconscientious for the defendant to retain it": *Sinclair* v. *Brougham*, [1914] A.C. 398, 417; or that "it would be a right and fair thing that it should be refunded to the payer" (*ibid.*, 456).

An illustration of a recovery of moneys paid under mistake of law because the payment was not voluntary, though made in mistake of law, is seen in *Clutha County Council* v. *McDonald*, (1883) N.Z.L.R. 2 S.C. 257, where Williams, J., following *Morgan* v. *Palmer*, (1824) 2 B. & C. 729, 107 E.R. 554, dismissed an appeal from a Magistrate. The respondent, an hotelkeeper at Clinton, applied for and obtained a publican's license and paid for his license fee to the Clerk of the Licensing Committee, who forwarded it to the Clutha County Council; and, afterwards, the Clinton Town Board, being advised they were entitled to licensing fees in respect of licenses situated within the town district, threatened the respondent with legal proceedings, and he paid the license fee again to the Town Board. He sued and obtained judgment from the Council for recovery of the license fee first paid. In dismissing the Council's appeal, Williams, J., said "money paid under compulsion of law can be recovered," and,

looking at ss. 60 and 70 of the Licensing Act, 1881, it was impossible to say that the payment to the appellant Council was a voluntary one, because it was absolutely necessary that the respondent should make the payment to the County Council to be able to carry on his business.

We have seen that if a person, voluntarily, and with full knowledge of the facts, but under a mistake of law, makes a payment on account of a tax for which he is not liable, he cannot recover. But a payment of money which is not due is not, however, necessarily a voluntary one because it is made with a full knowledge of the facts. Money paid in discharge of a demand illegally made under colour of office, although claimed and paid in the common belief that the officer had a right at law to demand it, may be recovered back as a debt, as it is not deemed a voluntary payment, and so is not irrecoverable as having been voluntarily paid under a mistake of law: *The King* v. *Bannatyne and Co.*, (1901) 20 N.Z.L.R. 232. This, however, as Sir Charles Skerrett, C.J., said in *Julian's* case (*supra*), applies only where the plaintiff is entitled to have some service performed or act done upon the payment of a fee, and that service has been performed or the act done, accompanied by the demand of an illegal or illegally excessive fee. In such circumstances, the payment is held not to be voluntary, and the money recoverable as having been in substance exacted *colore officii*.

The right to recovery after a demand *colore officii* rests upon the assumption that the position occupied by the defendant creates virtual compulsion, as the parties are not on equal ground, and their relative positions convey to the person paying the knowledge or belief that he has no means of escape from payment strictly so called if he wishes to avert injury to or deprivation of some right to which he is entitled without such payment but to procure something of which the person paying is in urgent need: *Great Western Railway Co.* v. *Sutton*, (1869) L.R. 4 H.L. 226, 263; *Lancashire and Yorkshire Railway Co.* v. *Gidlow*, (1875) L.R. 7 H.L. 517, 527; *Morgan* v. *Palmer*, (1824) 2 B. & C. 729, 107 E.R. 554; *Knibbs* v. *Hall*, (1794) 1 Esp. 84, 170 E.R. 287; and the converse *Hills* v. *Street*, (1828) 5 Bing. 37, 130 E.R. 973; and *Steele* v. *Williams*, (1853) 8 Ex. 625, 155 E.R. 1502.

In the Victorian case, *Payne* v. *The Queen*, (1901) 26 V.L.R. 705, payment was demanded by the Commissioner of Probates, and was made in order to obtain probate under circumstances in which non-compliance would have placed the plaintiff in a position of extreme embarrassment. He was executor of a large estate, to the proper management and administration of which probate was indispensable. The Commissioner was at liberty to withhold that probate until the duty demanded was paid; and to dispute the legality of the claim would have involved a long delay, including, possibly, an appeal to the Privy Council. The amount overpaid was held to be recoverable, as, in the circumstances, it was a compulsory payment, having been exacted *colore officii*.

In *The King* v. *Bannatyne and Co.* (*supra*) the Collector of Customs had demanded a payment by shipping agents of poll-tax in respect of three escaped Chinese members of the crew of vessel, and this had been paid in consequence of the intimation of the Customs authorities that the vessel would be detained until such payment was made or arranged for. The Court of Appeal, dismissing an appeal from Sir Robert Stout, C.J. (*sub. nom. Bannatyne and Co.* v. *Carter*, (1900) 19 N.Z.L.R. 482), held that the payment was made in discharge of a demand illegally made under colour of office, though claimed and paid in the common belief that the officer had a right in law to demand it, and that it was recoverable as not being a voluntary payment. In that case, it was further held that where money has been received on behalf of the Crown under such circumstances that an action for moneys had and received would lie if it had been received by a subject—on the ground that it would be unconscientious as against the plaintiff to retain it—it may be claimed from the Crown on petition under the Crown Suits Act, 1908, as upon a "contract" within the meaning of s. 37 (1) of the Crown Suits Act, 1881 (*cf.* s. 3 (*a*) of the Crown Suits Amendment Act, 1910).

Finally, in appropriate circumstances, even though a payment be made by a person in mistake of law out of his own moneys, Equity will supervene to give him relief if it would be inequitable that the payee should retain such moneys. Thus, if a payee, knowing the law himself, induces the payer, by misinformation as to the law, to make him a payment, which the payer would not have made if he were not ignorant of the law, the payee is not allowed to benefit by his *mala fides*, as the money here is extorted by a form of compulsion which rendered the payee an accessory to the payment by the payer: *Dixon* v. *Monkland Canal Co.*, (1831) 5 Wills & S. 445, 451. But, if a Municipal Corporation at the time of a demand for rates knew that litigation was pending between it and other ratepayers to determine the question as to the rights, and did not inform the plaintiff of it, these circumstances do not give the latter a right to recover. That does not amount to *mala fides* or misconduct on the part of the Corporation, as Sir Charles Skerrett said in *Julian's* case (*supra*, at p. 459), nor does it show that it knew it was doing something not authorized by the Municipal Corporations Act.

DENIAL OF ACCESS TO THE HIGHER COURTS.

LAWYERS are not deceived by the terms of the Industrial Conciliation and Arbitration Amendment Bill now before Parliament, or by the specious arguments advanced in its favour. Last year, we dealt with the question of jurisdiction in civil and industrial matters: 18 N.Z.L.J. 85; and public protest was made by the New Zealand Law Society against proposals which are now embodied in the Bill.

The Bill's extension of the jurisdiction of the Court of Arbitration creates a judicial dictatorship in that Court, by denial of the right of appeal to the higher Courts in matters which should be decided on purely common-law principles. Moreover, this proposal carries with it the nasty implication of existing or prospective denial of justice on the part of all our judicial tribunals—other than the Court of Arbitration—when dealing with civil matters arising in the industrial sphere. This implication is hotly resented by all practising lawyers. They know it is not founded on truth or on reality.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
1943.
July 15.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

THE KING v. KINO.

Criminal Law—Appeal against Sentence—Sentence Fixed by Law—Jurisdiction—Crimes Amendment Act, 1920, s. 2 (1)—Crimes Amendment Act, 1941, s. 2 (1)—Justices of the Peace Act, 1927, s. 176.

The Court of Appeal has no jurisdiction to entertain an application for leave to appeal against sentence made by a person convicted on indictment of a crime, or sentence on a plea of guilty in pursuance of s. 181 of the Justices of the Peace Act, 1927, if the sentence is one fixed by law.

R. v. *Twynham*, (1920) 90 L.J. K.B. 586, and *R. v. Collins*, [1943] 1 All E.R. 203, referred to.

Case Annotation: R. v. *Twynham*, E. and E. Digest, Vol. 14, p. 504, para. 5544.

COURT OF APPEAL.
1943.
March 24;
July 9.
Myers, C.J.
Blair, J.
Smith, J.
Johnston, J.
Fair, J.

HAMILTON BOROUGH
v.
PUBLIC TRUSTEE.

Public Trustee—Unclaimed Moneys remaining in Public Trust Office—Public Trustee Sinking Fund Commissioner of Sinking Fund for repayment of Debentures issued under Borough Conversion Loan—Debentures unpresented—Moneys in such Fund held in respect of such Debentures due for Exchange for Substituted Debentures under Conversion and for Payment—Whether s. 95 of the Public Revenues Act, 1926 (as amended by s. 16 (2) of the Finance Act, 1929), applies to such Moneys—Public Revenues Act, 1926, s. 95—Finance Act, 1929, s. 16 (2).

Where the Public Trustee was appointed the Sinking Fund Commissioner in respect of a consolidated sinking fund for securities under a conversion loan by a borough and holds in such fund a sum of money in respect of bearer debentures issued by a borough, which had not been presented in exchange for the substituted debentures under the conversion plan, or for payment, and in respect of which interest had not been claimed for some twenty-nine years, he remains in the same position in which any other Sinking Fund Commissioner would be in relation to the said sinking fund.

Section 95 of the Public Revenues Act, 1926, does not apply to the said sum of money; and the Public Trustee must continue to hold it accordingly as part of the said sinking fund.

Wellington City Corporation v. *Wellington City Improvements Loan Sinking Fund Commissioners*, (1909) 29 N.Z.L.R. 300, 12 G.L.R. 242; *Auckland City Sinking Fund Commissioners* v. *Auckland City Corporation*, [1922] N.Z.L.R. 48, G.L.R. 624; *In re Tewkesbury Gas Co., Tysoe* v. *The Company*, [1911] 2 Ch. 279; *Murray* v. *Scott*, (1884) 9 App. Cas. 519; *In re Maskelyne British Typewriter, Ltd., Stuart* v. *Maskelyne British Typewriter, Ltd.*, [1898] 1 Ch. 133; *Bowen* v. *Brecon Railway Co., Ex parte Howell*, (1867) L.R. 3 Eq. 541; *Knowles* v. *Scott*, [1891] 1 Ch. 717; and *Pulsford* v. *Devenish*, [1903] 2 Ch. 625, referred to.

So held by the Court of Appeal (*Myers*, C.J., *Blair*, *Smith*, and *Johnston*, JJ., *Fair*, J., dissenting) on a special case stated, and removed by consent.

Counsel: *O'Shea*, for the plaintiff Corporation; *Carrad*, for the Public Trustee; *O'Leary*, K.C., and *Cleary*, for the Attorney-General.

Solicitors: *J. O'Shea*, Wellington, for the plaintiff; *Carrad*, Wellington, for the Public Trustee; *Barnett and Cleary*, Wellington, for the Attorney-General.

Case Annotation: In re Tewkesbury Gas Co., **Tysoe** v. *The Company*, E. and E. Digest, Vol. 10, p. 784, para. 4906; ***Murray*** v. *Scott*, *ibid.*, Vol. 7, p. 488, para. 206; *In re Maskelyne British Typewriter, Ltd., Stuart* v. *Maskelyne British Typewriter Ltd.*, *ibid.*, Vol. 10, p. 791, para. 4971; *Bowen* v. *Brecon Railway Co., Ex parte Howell*, *ibid.*, Vol. 10, p. 1189, para. 8438; *Knowles* v. *Scott*, *ibid.*, Vol. 10, p. 990, para. 6857; and *Pulsford* v. *Devenish*, *ibid.*, Vol. 10, p. 1000, para. 6943.

COMPENSATION COURT.
Wellington.
1943.
June 17, 25.
O'Regan, J.

DURLING v. ALCO LIMITED.

Workers' Compensation—Accident arising out of and in the Course of Employment—Dermatitis—Liability for Compensation—Disease contracted before Dermatitis was gazetted as a Disease under Workers' Compensation (Industrial Diseases) Order, 1942—Incapacity commenced after Publication of such Order—Whether Worker entitled to Compensation—Workers' Compensation Act, 1922, s. 10 (4)—Workers' Compensation (Industrial Diseases) Order, 1942 (Serial No. 1942/104), Second Schedule.

Section 10 (4) of the Workers' Compensation Act, 1922, is substantive and not merely executory.

A worker contracted dermatitis between March 30 and April 9 or 10, 1942, and she ceased work on account of such incapacity on August 14, 1942. The Workers' Compensation (Industrial Diseases) Order, 1942, in which dermatitis was included as a disease within the operation of the statute, was published in the *New Zealand Gazette* on April 16, 1942.

Held, That, although the disease was contracted before such publication, the date of incapacity according to s. 10 (4) of the Worker's Compensation Act, 1922, must be treated as the date when the accident happened, and that the worker was entitled to compensation.

Counsel: *R. R. Scott*, for the plaintiff; *Buxton*, for the defendant.

Solicitors: *R. R. Scott*, Wellington, for the plaintiff; *Bell, Gully, Mackenzie, and Evans*, Wellington, for the defendant.

COMPENSATION COURT.
Auckland.
1943.
March 3, 4.
O'Regan, J.

SULLIVAN
v.
R. AND W. HELLABY, LIMITED.

Workers' Compensation—Assessment—Loss by Accident of Two Joints of Left-hand Forefinger amputated on Advice of Surgeons—Whether Worker entitled to 10 or 15 per cent. Compensation—Workers' Compensation Act, 1922, Second Schedule, cls. 3, 8.

Where a worker in an accident arising out of and in the course of his employment loses two joints of the forefinger of the left hand by physical severance and there is left full range of movement in the remaining joint, he is entitled only to 10 per cent. of the full compensation provided by the Second Schedule of the Workers' Compensation Act, 1922, although, acting reasonably under the advice of two surgeons of standing, he had the whole finger amputated.

Harkins v. *Wm. Wood and Co., Ltd.*, [1943] N.Z.L.R. 407*n*, applied.

Hales v. *Seager Bros.*, (1913) 16 G.L.R. 111, referred to.

Counsel: *J. J. Sullivan*, for the plaintiff; *J. Hore*, for the defendant.

Solicitors: *J. J. Sullivan*, Auckland, for the plaintiff; *Buddle, Richmond, and Buddle*, Auckland, for the defendant.

THE PRESERVATION OF LIBERTY.

A Post-war Duty of Vigilance.*

By G. G. G. WATSON.

Yesterday—the 15th June—was the anniversary of the day when, over 700 years ago, the Barons of England forced a despotic and brutal King to acknowledge at Runnymede the fundamental rights of freedom of Englishmen. Magna Charta was not a declaration of new rights nor a charter of a newborn liberty; it was the acknowledgment of the ancient claims of the common people to justice and freedom. It was not the liberty and freedom of any one class. The Barons, the aristocracy of England, forced John to sign it. But Magna Charta was no class legislation to benefit the Barons—it was the charter of and for the common people. Under it, rich and poor, Baron and Commoner, were alike guaranteed freedom from illegal taxation and wrongful imprisonment. Fair and impartial and speedy justice was promised, not merely to the Barons who were responsible for the Charter, but to all citizens alike. For all the people of England it was the expression of their ancient right to liberty and freedom within the law.

Liberty and Freedom are priceless possessions. History shows that they can be preserved only by careful vigilance, and at times by the strong acts of brave and right-thinking men. Despotism from time to time seeks to stifle liberty. Many Kings after John had to confirm Magna Charta. When we come to the evil days of the Stuarts, we find that, in spite of the many times confirmed Magna Charta, the people were oppressed by illegal taxes, cruel punishments, and the trampling upon of the rights of free men. Resolute action by the leaders of the people compelled Charles I to accept the Petition of Right and acknowledge once more the principles of Magna Charta. Again at the end of the Stuart Period the same necessity arose for the vigilant safeguarding of the liberty and freedom of the subject, and we have the Bill of Rights, the last and perhaps the most complete of all our Charters of Liberty. Truly it was the coping stone on the edifice of English freedom. From the Bill of Rights down to the twentieth century, the history of England has been the history of the preservation of the liberties which in these Charters were asserted against despotic Kings and rulers. In addition, there has been in that period a history of extension and development of liberty as the result of the brave efforts of brave men. Do we realize that complete religious freedom and toleration was only achieved a little over a century ago in the passing of the Emancipation Act, 1829? Do we stop to consider that a free and independent Press, which is so vital to the maintenance of freedom in any country, only emerged in 1840—with the passing of Lord Campbell's Libel Act? How many young men and women to-day who exercise the privilege of universal adult voting rights realize the value of that privilege and how recently it was won for them? The liberty and freedom which we enjoy was won for us in the distant past: it has been preserved down the ages and extended from time to time by brave and far-seeing men. Is there any reason to suppose that it will not require to be guarded and fought for in the *future*?

The struggles of Englishmen to attain, preserve, and extend liberty have not affected the people of Britain only. Those struggles have benefited a large section of mankind. The British ideal has followed Britain's sons and daughters into all those parts of the globe which make up the British Commonwealth of Nations. The foundations of our Empire were not laid by Kings and Princes. Colonies were not established by State planning in Whitehall or Downing Street. Our Empire was founded by liberty-loving men—men of self-reliance and adventurous mind, who risked all to achieve their ideals in new lands, and who carried to those lands the British ideals of liberty and justice. Our kinsmen and allies in the U.S.A. have those same ideals. In the Atlantic Charter, the leaders of the two free democracies promised after the destruction of Nazi Tyranny a peace which would afford assurance that all men in all lands may live out their lives in freedom from fear and want. When that is achieved, the ideals of liberty born and nurtured in Britain will have influenced the destiny of all mankind. That is the issue before the world to-day in the life and death struggle of the great nations. On the one side there are grouped the peoples which desire for themselves, and for all the world, peace and individual freedom. On the other side are grouped the nations who treat the individual as a cog in the State machine, entitled to no freedom, denied of all liberty other than State slavery. The world is now at the great divide: liberty and peace must either prevail for all mankind, or must disappear from the face of the earth for untold years. The world either moves on to freedom or falls back into the chains and fetters of dictatorship, with all its cruelty and brutality.

But when the day comes—*and it surely will come*, be it soon or be it late—when the forces of liberty prevail over the forces of darkness in this ghastly conflict, the duty of the protectors of liberty in each country will not be at an end. Liberty will still require its protectors and champions in each land.

Conditions of wartime necessarily in the public interest impose great restrictions on individual freedom, restrictions which are willingly borne to achieve victory, but which would be intolerable in time of peace, and which even in wartime should not be tolerated if imposed for any purpose other than war purposes. War conditions necessarily beget bureaucracy. The dividing line between a powerful bureaucracy and the totalitarian state is a fine one, the step from one to the other as easy as it is dangerous. A powerful bureaucracy, born of wartime conditions, becomes firmly engrafted on the life of the people. It is jealous of its powers and tenacious of its position. When the day of peace comes, and the need for wartime restrictions ceases, will the bureaucracy which enforced those necessary restrictions on liberty willingly surrender its privileges, so that the liberty for which the Allied Nations have risked all and paid so dearly may have full sway in each of those countries. Once more the lovers of

* An address delivered to the Royal Society of St. George, Wellington, June 16, 1943.

liberty will need to be on guard lest the liberty of the individual citizen is crushed by the machinery of the State. In wartime, freedom of speech, freedom of public discussion, freedom of the Press must be restricted for one paramount purpose—lest information reach the enemy. In wartime, industry must be controlled, man-power must be directed, consumption must be regulated, our manner of living circumscribed by all manner of restriction and control, but only for one purpose and to one end—victory in war. If these restrictions and controls survive after their justification is dead, then liberty will be encased in a strait-jacket. We shall then all be servants of the State and the bureaucrats will be masters of us all. We shall have won the war waged in the name of liberty, only to lose it once more.

LICENSING ACT AND EMERGENCY REGULATIONS.

Recent Decisions.

Graham v. Sloan, [1943] N.Z.L.R. 292.

Licensee's Right to supply Liquor by way of Hospitality.—The Full Court, in this case, decided that Reg. 3 (1) of the Licensing Act Emergency Regulations (No. 2), 1942 (Serial No. 1942/186), takes away the old established right of a licensee to treat his *bona fide* guests to liquor during closing-hours. The case turned on the meaning of the word "supplies." The majority of the Court held that the word must be construed in the same way as in *Wilson* v. *Carmine*, [1922] N.Z.L.R. 835, G.L.R. 344, *Waterson* v. *Low*, [1926] N.Z.L.R. 751, G.L.R. 147, *O'Connell* v. *Clauson*, [1928] N.Z.L.R. 227, G.L.R. 225, and *McKenzie* v. *Harper*, [1937] N.Z.L.R. 672, G.L.R. 451—namely, as including a delivery by way of gift. It follows that every supply of liquor on licensed premises during closing-hours (whether by way of sale or by way of gift) is prohibited unless the supply comes within one of the exemptions in Reg. 3 (3). Sir Michael Myers, C.J., and Smith, J., in coming to their decisions, laid stress on the exemption in subcl. (3), which permits the consumption of liquor in any licensed premises during closing-hours "by any lodger therein or his *bona fide* guest, or by the licensee or any member of his family or his servants." Their Honours considered that the specific reference to a lodger and his guest, and the omission of any reference to a licensee's guest, showed a clear intention to exclude a licensee's guest from the privilege of consuming liquor on the premises during closing-hours. The Chief Justice drew attention to the anomalous position which would arise if the Court held that the licensee was entitled to give his guest a drink but the guest was prohibited from consuming it. "I cannot think it possible, said the Chief Justice, "to read the regulation as meaning that every guest of a licensee is a Tantalus to whom the licensee is permitted to supply liquor which the guest is not permitted to consume. That would be too sardonic a practical joke to attribute to the author of the regulation." If this reasoning is correct, a joke has been played upon the guest of a lodger, because the subclause allows him to consume liquor on licensed premises during closing-hours, but does not permit the lodger to supply the liquor. The right of a lodger to supply the liquor has, however, always been recognized, and the Full Court does not suggest that it has been taken away by Reg. 3.

If Reg. 3 stood alone as a substantive enactment unaffected by the Licensing Act, 1908, upon which it is grafted, or by the Emergency Regulations Act, 1939, under the authority of which it was made, the interpretation placed on it by the Full Court undoubtedly is correct. When, however, the regulation is read together with those two Acts, as indeed they should be, a serious doubt arises. The learned Judges did not consider fully the scope and purpose of s. 3 of the Emergency Regulations Act, 1939. The Chief Justice said he was conscious that the result of his conclusion prevented a licensee from entertaining his guests as other citizens were allowed to do in their private houses, but the regulations were emergency regulations and one must assume that that result was intended and there must be some good reason for it. Smith, J., said that the regulations were intended to help in the efficient prosecution of the war.

When s. 3 is looked at, it will be seen that the provision which authorized the making of the Licensing Act Emergency Regulations is the power given the Governor-General to make regulations for the public safety and the maintenance of public order. It follows that "the public safety and the maintenance of good order" is the true purpose of the regulations, and they should be construed accordingly. If they had specifically prohibited a licensee from treating his *bona fide* guest to a drink during closing-hours, that would have settled the question. But Reg. 3 is general in its character, and there is room for giving the word "supply" a limited meaning and at the same time giving full effect to the scope and purpose of the regulation—namely, protecting the public safety and the maintenance of public order. The nature of the supply should be the relevant and material consideration. The word "supply" would then be construed as possibly including a supply by way of gift. Whether it does so or not would be a question of fact to be determined according to the particular circumstances of the case. If a licensee treats his guest to a drink in the ordinary course of hospitality, just as a host would do in his own house, it would be impossible to say that the public safety or the maintenance of public order has been endangered in the slightest degree. Where, however, a licensee from a mistaken idea of generosity or for the purpose of building up the goodwill of his business frequently makes gifts of liquor to people who "call" upon him, his acts might well be held to endanger the public safety or the maintenance of public order.

The obvious criticism of the suggested interpretation of the word "supply" is that, by the same reasoning, a sale of liquor after hours would not be an offence under the regulations unless the prosecution proved that the particular sale or class of sale endangered the public safety or the maintenance of public order. That raises an interesting question. It is submitted that Reg. 3 (1) does not repeal s. 190 of the Licensing Act, 1908, but is a new enactment dealing with the

same and additional matters. So far as the same matters are dealt with, it would seem that the author of the regulations did not intend that it should be left to a prosecutor to choose between laying an information under the Act and laying one under the regulations. The respectively prescribed penalties are so different. Under the Act the penalty is a sum not exceeding £10; under the regulations the penalty is a sum not less than £10 and not more than £100. It is at least arguable that any offence under the Act, which is also an offence under the regulations, should not be dealt with under the regulations unless the facts show that the public safety or the maintenance of public order was endangered in the particular circumstances under which the offence was committed. Unfortunately, the learned Judges did not deal with this aspect of the question, nor was it raised by counsel.

In re Criterion Hotel, Paeroa, Police v. Waugh, (1943) 3 M.C.D. 131.

Cancellation of Licenses under the Regulations.—This was an application for the cancellation of the license of the Criterion Hotel at Paeroa, made under Reg. 8 of the Licensing Act Emergency Regulations (No. 2), 1942. The application was based on the ground that the licensee had been convicted of several breaches of the Licensing Act, 1908.

The powers of a Magistrate on such an application are set out in Reg. 10, which provides that—

> Upon the conclusion of the application, the Magistrate may, on all or any of the grounds stated in the application, if in his opinion it is advisable in the public interest so to do, make an order—
>
> (*a*) Cancelling the license in respect of which the order is made.
>
> (*b*) That no license shall thereafter be granted in respect of the premises held under the license for such period not exceeding two years as he may direct.

Mr. Paterson, S.M., in refusing to make an order of cancellation, said that the offences committed by the licensee were of an ordinary nature and could not be said to endanger the public safety or the maintenance of public order within the meaning of s. 3 of the Emergency Regulations Act, 1939. Further, that there was ample power given by the Licensing Act, 1908, to the convicting Magistrate or the appropriate Licensing Committee to deal with the license should the nature of the offences have so justified; consequently the regulations should not have been invoked in the particular circumstances. The effect of this judgment is that unless breaches of the Licensing Act are of such a nature as to endanger the public safety or the maintenance of public order, within the meaning of s. 3 of the Emergency Regulations Act, 1939, an order of cancellation should not be made. In other words, the learned Magistrate adopted the method of construction which it is suggested should have been adopted by the Full Court in *Graham* v. *Sloan*, [1943] N.Z.L.R. 292.

(To be concluded.)

LONDON LETTER.

Somewhere in England,
June 10, 1943.

My dear EnZ-ers,

Mr. Justice Farwell.—The news of the death, on April 15, of Mr. Justice Farwell was received by the profession with much regret, and by all who knew him with a very real sense of loss, for he was a Judge both respected and beloved. Christopher John Wickens Farwell was the son of the late Lord Justice Farwell, who was famous as a Chancery Judge, as a Lord Justice of Appeal, and as the author of *Farwell on Powers*; and he was the grandson of Vice-Chancellor Wickens, also a famous Chancery Judge. Born in 1877, he was educated at Winchester, and was called by Lincoln's Inn in 1902. He had a very successful practice as a junior, and if he never quite achieved the front rank as a leader—he took silk in 1923—there was no surprise when, in 1929, he was appointed a Judge of the Chancery Division on the retirement of the late Mr. Justice Astbury. Within the space of weeks the profession realized that in Mr. Justice Farwell the Division had acquired a strong Judge, who knew his own mind and did not hesitate to express it. He reserved very few judgments; in cases in which authority was of use in establishing principles, he expected the cases to be cited, and he frequently called the attention of counsel to cases which they had not proposed to read; but on matters of pure construction, he disliked the citation of cases, and frequently said so in no uncertain manner. To the Registrars and Masters who won his confidence, he was kindness itself, and though he maintained a very strict discipline in his Court, his relations with the Bar were those of mutual trust and respect. For several years, ill-health kept him for periods of time from his judicial duties, and, during last autumn, his manful efforts to carry on when obviously suffering became distressing to those who knew him best. His death is a great loss to the Bench and to the profession, which will long treasure the memory of one who was a great Judge and a great gentleman.

The New Judge.—Whilst the appointment of Mr. Lionel Leonard Cohen, K.C., to fill the vacancy on the Bench of the Chancery Division created by the lamented death of Mr. Justice Farwell, was not, perhaps, generally anticipated, his name had been mentioned in well-informed quarters as that of one who was well in the running, and the announcement of his appointment occasioned no surprise. Mr. Cohen, who was born in 1888, was educated at Eton and at New College, Oxford, where he took first classes both in history and in law. He was called by the Inner Temple in 1913, and in 1934 he was elected a Bencher of Lincoln's Inn, having taken silk five years earlier, in 1929. He enjoyed a large practice as a junior and has been very successful as a leader, practising more particularly in company matters. Mr. Cohen's appointment inevitably recalls those of the first Jew to be appointed to the judicial bench in Great Britain, Sir George Jessel, whose name is still held in honoured remembrance by every Chancery lawyer, and of the first Jew to become Lord Chief

Justice, Lord Reading, whose memory is still green. The new Judge commences his judicial career with the cordial good wishes of all who know him; they confidently expect him to prove himself a worthy successor of those illustrious predecessors.

The Society of Individualists.—In August, 1942, a number of prominent men issued a Manifesto on British Liberty, and they, and others, have since formed a society called The Society of Individualists. That it is a body which may well exercise a potent influence on public affairs may be judged from the fact that among its vice-presidents are Lord Fairfield—better known to lawyers as Lord Justice Greer—Professor F. J. C. Hearnshaw, Sir William Holdsworth, K.C., who has just been appointed to the Order of Merit, Lord Leverhulme, Lord Plender, and Lord Perry, whilst its National Council includes Sir Ernest Graham Little, M.P., Mr. Francis W. Hirst, Dr. Inge, Mr. George Lambert, M.P., Mr. D. M. Mason, Professor A. S. Turberville, Lord Wardington, and Mr. Hartley Withers. The manifesto sets out the principles which the new society will seek to uphold. As regards the State and the individual, it rejects "the notion, common to all totalitarian systems, whether Communist, Fascist, or National-Socialist (Nazi), that the State is a supreme and monopolistic super-entity, the sole source of authority and morality. 'Power corrupts, and absolute power corrupts absolutely'; the omnipotent State lacks the moral elements inherent in the individual; it not only devours its own creators, but becomes a force for evil both inside and outside its own boundaries. The unit of existence is the natural human being, and his or her natural extension in the family, not the artificial personality of the State."

The Individualists and Government.—As to government, the Manifesto urges that State interference with the liberty of the subject should be reduced to a minimum. "There must be a lopping-off of the ever-spreading tentacles of bureaucracy, and a severe restraint on the processes by which Westminster has long been yielding its constitutional powers to Whitehall." And with what it says as to the administration of justice most lawyers will agree. "The Rule of Law must be reasserted and jealously safeguarded. By the Rule of Law we understand the ancient constitutional principles that the administration of justice is the function of the Courts of Justice, and not of secret administrative tribunals; that there is only one system of justice applicable to all citizens; that all men, whether private individuals or officials, have the same standing before it; and that justice shall not be suffered to yield to any real or supposed requirements of governmental convenience or expediency." With regard to social and economic policy, it is contended that equality of opportunity, and the encouragement of promise and ambition, should be an important aim not only of education, but of social policy generally; "but this should not be allowed in the minds of the young, to degenerate into a belief that they can rely on a secure existence, not upon their own efforts, but upon the State"; and that, whilst certain essential public services must be organized and guaranteed by the State, it is not the true function of government to manage private life, and trade, whether domestic or international, should be freed from unnecessary restrictions, and profit (regarded as a premium on economy and efficiency) should be regarded as a proper motive of commerce. "Individual initiative, independence, and achievement, within the limits of legitimate competition, should be regarded as virtues in the citizen. This applies specially at the present time to the small trader, for long our economic infantryman, but now threatened with extinction." The principles thus enumerated will, I think, commend themselves to very many of my readers, whether they be of any political party or of none.

Yours ever,

APTERYX.

LEGAL LITERATURE.

International Law.

International Law of the Sea, by A. PEARCE HIGGINS, C.B.E., K.C., LL.D., late Whewell Professor of International Law in the University of Cambridge, and Lecturer of Maritime International Law at the Royal Naval War and Staff Colleges, Greenwich, and late President of the Institute of International Law; and C. JOHN COLOMBOS, LL.D., of the London School of Economics, and of the Middle Temple, Barrister-at-Law, sometime Professor at The Hague Academy of International Law. Pp. xvi + 647. London: Longmans, Green and Co.

The late Professor Higgins had practical knowledge of international law, in addition to his academic exposition of it, as he was adviser in international law to the Procurator-General and Treasury Solicitor during the War of 1914–18, and was adviser to the Admiralty at the Peace Conference, in addition to his appearances in leading cases before the Prize Court and the Judicial Committee of the Privy Council. His comprehensive work was unfinished when he died, and it has been the duty of Professor Colombos to complete it and bring it up to date. So well has this been done that the treatise, which is a treatment of international law in all its aspects as regards the maritime law in peace and war in international relations, that it contains cases down to 1941, such as *The Altmark* and *The Ramb IV*, which appeared in incidents that have become part of the history of the present hostilities. The result is an up-to-date survey of British practice and it includes the cases and practice relating to the other Naval Powers, including Japan, but more particularly the United States.

The work is written most interestingly, and should prove a boon to students of international law, as well as to practitioners whose work may require an up-to-date and well-documented treatment of problems arising out of present-day conditions in connection with the sea.

LAND AND INCOME TAX PRACTICE.

Interest on National Savings Bonds, Bomber Bonds, Liberty Bonds, National Savings Accounts.

In terms of s. 15 (2) of the National Savings Act, 1940, the difference between the price paid on the issue of any National Savings Bond and the nominal value of the bond is deemed to be income derived from the bond, and is deemed to have accrued by instalments on the 31st March in each year during the term of the bond (five years).

Section 3 (2) of the Finance Act (No. 2), 1940, provided that the present value of the total social security charge and national security tax estimated to become payable in respect of income derived from the bond is added to the purchase price of the bond.

Due to alterations in the rate of social security charge and national security tax the position has changed since National Savings Bonds were first issued.

National Savings Bonds, first issued in October, 1940 :—

	£1 Bond.	*£10 Bond.*	*£100 Bond.*
	s. d.	£ s. d.	£ s. d.
Purchase price	17 6	8 15 0	87 10 0
Social security charge and national security tax included (at 2s. in £1 rate)	3	2 6	1 5 0
Present value of bond ..	17 3	8 12 6	86 5 0
*Income, for *income-tax* purposes	2 9	1 7 6	13 15 0
Sum on maturity	£1 0 0	£10 0 0	£100 0 0

*One-fifth should be returned each year for five years.

Bomber Bonds were issued in March, 1942, the position being the same as shown above.

Liberty Bonds (1st Liberty Loan) were issued in May, 1942, for nominal amounts of £1 only. The maturity date was fixed at September 15, 1949 :—

	£ s. d.
Purchase price	1 0 0
Social security charge and national security tax included	5
Present value of bond	19 7
*Income for *income-tax* purposes	4 5
Sum on maturity	£1 4 0

*One-seventh should be returned each year for seven years, commencing with the income year ended March 31, 1943.

As from July 1, 1942, **National Savings Bonds** were issued at increased purchase prices :—

	£1 Bond.	*£10 Bond.*	*£100 Bond.*
	s. d.	£ s. d.	£ s. d.
Purchase price	17 7	8 15 8	87 16 8
Social security charge and national security tax included (at 2s. 6d. in £1 rate)	4	3 2	1 11 8
Present value of bond ..	17 3	8 12 6	86 5 0
*Income for *income-tax* purposes	2 9	1 7 6	13 15 0
Sum on maturity	£1 0 0	£10 0 0	£100 0 0

*One-fifth should be returned each year for five years.

As from March 1, 1943, **National Savings Bonds,** and **Liberty Bonds (3rd Liberty Loan)** were issued as under :—

	£1 Bond.	*£10 Bond.*	*£100 Bond.*
	£ s. d.	£ s. d.	£ s. d.
Purchase price	1 0 0	10 0 0	87 16 8
Social security charge and national security tax included (at 2s. 6d. in £1 rate)	4	3 7	1 11 8
Present value of bond ..	19 8	9 16 5	86 5 0
*Income for *income-tax* purposes	3 1	1 11 1	13 15 0
Sum on maturity	£1 2 9	£11 7 6	£100 0 0

*One-fifth should be returned each year for five years.

The amounts of income shown in the tables above are returnable in income-tax returns only. The social security charge and national security tax payable is already included in the purchase price of the bond.

The 2nd Liberty Loan involved Government Stock only—Liberty *Bonds* were not issued.

National Savings Accounts.

Interest on National Savings Investment Accounts with the Postmaster-General or an authorized savings-bank is calculated to June 30 in each year, and *not to March 31,* as with Post Office Savings Bank accounts. Hence the interest credited to June 30, 1943, should be included in a return of income (and a declaration of income other than salary or wages for social security purposes) for the year ended March 31, 1944.

Interest from Government Securities.

All interest paid on Government Debentures and Stock is now subject to income-tax as unearned assessable income. Interest on Inscribed Stock bearing the inscription number B. 52/ was paid "free of tax" (that is to say, returnable for income-tax purposes as non-assessable income) up to November 15, 1941. Interest paid since that date is subject to tax, and the Commissioner will include all interest from Government securities derived during the year ended March 31, 1943, as unearned assessable income.

Interest-free Loans to Government—Deduction of Expenses.

In some cases taxpayers have borrowed capital—*e.g.*, by bank overdraft—to lend to the Government free of payment of interest, in order to assist the war effort. Any interest paid by the taxpayer on such capital is not deductible for taxation purposes against assessable or non-assessable income.

Where taxpayers borrowed the funds which they were required to invest in the War Loan, 1953 (Compulsory War Loan Stock issued in 1940), any interest on the borrowed capital cannot be claimed as a deduction until the interest-free period of the War Loan expires—*i.e.*, at October 1, 1943. After this date interest is paid on the War Loan at 2½ per cent. per annum, to October 1, 1953, and any interest on capital borrowed to subscribe to the Loan is then permissible as a deduction, first against the interest received from the War Loan, or if the interest paid by the taxpayer on borrowed capital is in excess of the interest received from the War Loan, the excess interest paid may be set off against income from any other unearned assessable source, or if there is not sufficient unearned assessable income, the excess of interest paid may be set off against assessable earned income derived during the same income year.

Depreciation—Special Allowances to meet War Conditions.

In certain circumstances the Commissioner is prepared to agree to special depreciation allowances where plant and machinery is installed, or buildings are erected for war production or allied purposes.

These circumstances are—

(*a*) Where schedule rates of depreciation do not cover abnormal wear and tear resulting from war production. The excessive depreciation may be due to extended hours of operation or to the fact that owing to war exigencies, particular plant may be engaged on heavier work than that for which it was designed.

(*b*) Where temporary structures or installations are provided for war production only and it is established that post-war requirements will involve demolition, abandonment, or scrapping.

Where capital expenditure is undertaken for the purpose of expanding production and such expenditure provides a permanent asset, the Commissioner, except in the circumstances set out above, cannot agree to any allowance which will reimburse the taxpayer for capital expenditure abnormally inflated as a result of present conditions.

The Commissioner requires that full details of the circumstances under which a claim for a special rate is sought must be submitted to him in writing.

A special rate has already been fixed with respect to additional new buildings used by approved poultry producers to ensure an increase in the production of eggs. The new buildings may be erected with special monetary grants made by the Government, or by the poultry-keeper's own capital, provided that—

(*a*) Small additions are not to come within the scope of this special arrangement; and

(*b*) The special rate of 10 per cent. per annum, calculated on original cost, is to apply from the date of completion of the buildings until the date of cessation of hostilities only;

(*c*) The special rate is to apply only to poultry buildngs erected for the express purpose of immediately effecting increased production;

(*d*) Depreciation at the special rate is to be allowed where a certificate is given by an officer of the Department of Agriculture to the effect that new buildings have been erected with the approval of the Department of Agriculture.

Earlier this year the Rt. Hon. the Prime Minister announced that the United Kingdom Government had decided to pay an additional 15 per cent. to the 1941–42 price already agreed upon, in respect of last season's export greasy wool clip. Payment for the increased value will be made partly in cash and partly in negotiable Government securities. The original intention was to pay in cash and non-transferable Government stock, but the Government has now decided to pay 5 per cent. of the amount due to each wool-grower in National Savings Bonds. The balance payable to growers will be made in cash, or, if desired, some form of security applicable to the 3rd Liberty Loan.

It is anticipated that a summary of the whole position, with particular reference to including the increased prices in taxation returns, will be available for the next issue of these notes. Any inquiries should be addressed to the Director, Marketing Department (Export Division), Wellington.

Honorarium of Mayors and Chairmen of Local Bodies.

As a general practice the Commissioner will assess income-tax on 50 per cent. only of the gross honorarium paid to—

(*a*) The Mayor of a City or Borough Council;
(*b*) The Chairman of a Town Board;
(*c*) The Chairman of a Harbour Board;
(*d*) The Chairman of an Electric-power Board;
(*e*) The Chairman of a Hospital Board.

The balance of the honorarium received by the above persons is deemed to cover expense items.

The full amount of honorarium received by the following is assessable, but actual permissible expenses not covered by an expense allowance in addition to the honorarium may be claimed as deductions from assessable income—Chairmen of County Councils, Fire Boards, River Boards, Domain Boards, Rabbit Boards, Road Boards, Tramway Boards, &c.

Employers' Contributions to National Patriotic Funds or Troops Comforts Funds.

Donations made to subsidize employees' contributions to National Patriotic Funds, or payments to funds established for the purpose of forwarding parcels to employees who are in the armed forces overseas, cannot be allowed as income-tax deductions, in any circumstances.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on Friday, June 11, 1943.

The following Societies were represented: Auckland, Messrs. A. H. Johnstone, K.C., W. H. Cocker (proxy); Canterbury, Mr. R. L. Ronaldson; Gisborne, Mr. H. D. Chrisp; Hamilton, Mr. H. M. Hammond; Hawke's Bay, Mr. H. B. Lusk; Nelson, Mr. M. C. H. Cheek; Otago, Mr. A. N. Haggitt (proxy); Southland, Mr. J. H. B. Scholefield; Taranaki, Mr. F. W. Horner; Wanganui, Mr. A. B. Wilson; and Wellington, Messrs. G. G. G. Watson, T. P. Cleary, and A. B. Buxton (proxy).

The Vice-President, Mr. A. H. Johnstone, K.C., occupied the chair.

Apologies.—Apologies for absence were received from Messrs. H. F. O'Leary, K.C., J. Stanton, J. B. Johnston, A. Milliken, A. W. Brown, A. E. L. Scantlebury, and C. J. L. White.

Crown Suits Amendment Act, 1910.—The Secretary of the Law Revision Committee reported to the Society that it was hoped to hold a meeting before the end of the year. Members were of opinion that this Committee should meet, and that some statement should be made concerning the amendment suggested by this Society.

Bankruptcy Act.—The following report was submitted by the Conveyancing Committee:—

"We have considered the letter from the Taranaki Law Society enclosed in your letter to us of March 23, 1943, concerning the inclusion of household furniture in the order and disposition clause of the Bankruptcy Act.

"The suggestion made by the Taranaki practitioner that New Zealand should follow the English precedent and restrict the possession of goods under s. 61 (*c*) of the Bankruptcy Act, 1908, to possession in the bankrupt's trade or business seems to us to be sound and should be adopted.

"At the present time a creditor extending credit to a customer cannot rely entirely upon the latter's household chattels being his own and free from encumbrances, owing to s. 57 of the Chattels Transfer Act, 1924, and ss. 2 and 3 of the Chattels Transfer Amendment Act, 1931, and it is illogical to imperil the goods of a landlord while the goods of certain vendors are protected.

"We think that the English provision, s. 38, Bankruptcy Act, 1914 (Imp.), might be adopted by us in its entirety and thus also exempt 'things in action other than debts due to the bankrupt in the course of his trade or business.' Under New Zealand law shares in companies are within the clause: *Re Harrison*, [1927] G.L.R. 120, 122 (Skerrett, C.J.)."

It was decided that steps should be taken to bring the matter to the attention of the Attorney-General with a view to having New Zealand law brought into line with that of England.

The Nelson Society was of opinion that the law relating to bills of exchange and allied matters might also be brought into line with English legislation.

Divorce Rules.—The resolution of the Council with regard to the promulgation of the Divorce Rules had been forwarded to the Prime Minister in March last.

Mr. J. Thorn, M.P., had replied for the Prime Minister, as follows:—

"I have to acknowledge receipt of your letter of the 25th March conveying a resolution passed at the annual meeting of the Council of the New Zealand Law Society with reference to the promulgation of a new code of Divorce Rules.

"The representations contained in the resolution have been noted and will receive careful consideration."

It was decided to again bring the matter to the attention of the Prime Minister, asking that the rules be promulgated without further delay.

Verification of Documents executed by Members of the Forces Overseas.—The Chairman reported that an amendment was at present being prepared by the Law Drafting Office and would be shortly completed.

In order to expedite the enactment of the regulation, the Wellington members were asked to approve the draft amendment.

Council of Legal Education.—The Registrar of the University of New Zealand drew attention to the fact that the term of office of the representatives of the Society upon the Council of Legal Education would expire on the 30th June, and asked for nominations for the ensuing term.

Messrs. A. H. Johnstone, K.C., and W. H. Cocker were re-elected as representatives of the Society and were thanked for their past services.

Conveyancing Committee.—Mr. R. H. Webb advised that, owing to increased duties due to partners and staff being absent on war service, he was unable to continue to act as a member of the Conveyancing Committee. It was decided in the circumstances to accept Mr. Webb's resignation with regret and to thank him for his past services.

Mr. H. E. Evans was elected a member of the Committee in place of Mr. Webb.

(*To be concluded.*)

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The Dangers of Bureaucracy.—If the general public is to be made alive to the dangers of bureaucracy the legal profession will have to assume the duty of seeing that public opinion is properly informed on the subject. At present it is a case of everybody's business being nobody's business. Luxford, S.M., is to be congratulated upon his plain speaking when addressing the Auckland Rotary Club recently. The Magistrate suggested the constitution of a tribunal with power to suspend, on application by an aggrieved party, the operation of any provision in an Act or regulation if its enforcement might lead to evil or unjust consequences which the Legislature could not have had in mind. It may be easy to advance criticisms of this particular suggestion, but it is refreshing, nevertheless, to find a constructive and original proposal put forward. The great cry of the bureaucrats is: "Show us a practicable alternative." When peace comes the alternative must be found; but the finding of it will require the unselfish devotion of much time and thought by the best brains of our profession.

Not Bothered by Precedents.—Bacon, V.-C.—the last of the Vice-Chancellors—once prefaced one of his judgments with these words: "The facts in this case are admitted and the law is plain; yet it has taken seven days to try—one day more than it took the Almighty to make the world." Recently the Lord Chancellor (Viscount Simon), during the course of a lengthy argument in an appeal to the House of Lords, reminded counsel of Bacon, V.-C.'s words. But Lord Thankerton came to the rescue of counsel by observing that the Almighty was not bothered by precedents!

Solicitors and the Council of Legal Education.—The Council of Legal Education owes its genesis to the New Zealand University Amendment Act, 1930. The members of the Council hold office for three years and, a triennium having expired, the Council has just been reconstituted. It now consists of Myers, C.J., and Callan, J. (nominated by the Chief Justice); A. H. Johnstone, K.C., and W. H. Cocker (nominated by the New Zealand Law Society); and Professors A. G. Davis and R. O. McGechan (nominated by the University Senate). It involves not the slightest criticism of the two nominees of the Law Society to point out that one practises simply as a barrister and the other mainly as such. Further, both are members of the University Senate (which has the final control of legal education) and the profession therefore already has the advantage of their valuable services. Accordingly, the profession could not have suffered at all if, on the recent reconstitution of the Council, the Law Society had nominated as its representatives two men practising mainly as solicitors. There is undoubtedly a strong case for giving adequate representation on the Council to the solicitors' side of the profession.

The Parliamentary Bar.—In England there have always been barristers specializing in work before Parliamentary Committees. In the days when there were numerous Bills for the promotion of railways, canals, and other public utilities, huge incomes were earned by certain men at the Parliamentary Bar. Two of them were Bidder, Q.C., and Balfour Browne, Q.C. They are mentioned by the late Lord Dunedin in an article entitled "The Bench and the Bar," which he wrote some eleven years ago for *The Times* (London), and he tells the following anecdote of these two men:—

> Balfour Browne was a most vigorous and able counsel, but he had a very strident voice. Bidder, also able and vigorous, was not an Adonis. They were opposed to each other and were both speaking at once. "Mr. Chairman," shouted Bidder, "would you ask Mr. Balfour Browne to allow me to speak without interruption?—his voice worries me." To which came the immediate retort: "Mr. Chairman, would you ask Mr. Bidder not to keep looking this way?—his face worries me."

A Probationary Period for Judges.—The recent death of Farwell, J., of the English High Court recalls an incident that happened in our own Court before Blair, J., on the argument of an originating summons on a complicated question arising under hotchpot provisions of a will. There were a number of English decisions on the matter, but they were not altogether easy to reconcile. The latest was a decision of Farwell, J., given shortly after his appointment to the Bench in 1929; but before Blair, J., there were valiant attempts to distinguish this decision and, indeed, to contend that it was wrongly decided. "Your Honour," said one counsel, warming to his subject, "that decision was given by Farwell, J., within a few weeks of his appointment to the Bench." "That is interesting," replied Blair, J. "What do you suggest should be the period of probation for a Judge?"

The Law before the Facts.—Among the appeals heard at the last sittings of the Court of Appeal was one involving facts of considerable complexity and difficult questions of law. Three counsel were briefed for the appellant and three for the respondent, and the argument lasted twelve days. It had been arranged between appellant's counsel that the leader should argue the law and second counsel the facts; and the Court accordingly allowed leading counsel for the appellant to open the appeal with his argument on the law. But, not surprisingly, the Court soon found this course an inconvenient one, and leading counsel's argument was interrupted so as to allow second counsel to interpose an address on the facts of the case. In a case where the facts are complicated and disputed it must be seldom, if ever, that the law can be conveniently argued before the facts have been fully traversed.

The Witnesses.—In a recent case before O'Regan, J., in the Compensation Court there was a considerable conflict of evidence. The Judge believed the evidence for the plaintiff, and he put it rather neatly: "I do not think that the witnesses for the defence endeavoured deliberately to mislead the Court. . . . The attitude of the witnesses is not dissimilar to that of Moore's hero in *Lalla Rookh*, who fell under the influence of the Veiled Prophet of Khorassan:

> *And ne'er did Faith with her smooth bandage find*
> *Eyes more devoutly willing to be blind.*"

PRACTICAL POINTS.

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

1. **Practice.**—*Magistrates' Court—Substituted Service—Powers of Clerk of Court—Procedure.*

QUESTION: Are the powers of a Clerk of Court to make an order for substituted service commensurate with those of a Magistrate? How should an order for substituted service be obtained?

ANSWER: The only circumstances in which a Clerk of Court can make an order is where a defendant cannot conveniently be found: Magistrates' Courts Act, 1928, s. 82 (2) (3). In all other cases, the order must be made by a Magistrate: s. 82 (6).

An order for substituted service is obtained by *ex parte* application under the Magistrates' Courts Amendment Rules, 1940, supported by affidavit. The motion should suggest a mode of substituted service, and should mention any case relied upon (*cf.* R. 413B of the Supreme Court Code). The affidavit should disclose all the facts relied upon; it must be shown clearly that the plaintiff is unable to effect personal service and that the summons, &c., are likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted: *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, applied in *In re Churchill and Co., Ltd. and Lonberg*, [1941] 3 All E.R. 137. There is a form of affidavit prescribed in the Magistrates' Courts Rules and also a form of order; the latter, however, is applicable to cases under s. 82 (3). The particulars required in the affidavit in the form No. 22 are left to the plaintiff to supply; it is suggested that form No. 11A in *Stephens's Supreme Court Forms*, p. 9, should be adopted as a model. It will be noted that the prescribed form of affidavit contains a marginal note giving explicit directions as to what facts the affidavit should state.

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2. **Land Transfer.**—*Devisees in equal Shares—One devisee dying—Procedure to perfect Title.*

QUESTION: A. died appointing B. his executor and giving all his estate to his children C. and D. *in equal shares*. After administration of A.'s estate was completed, B., by memorandum of transfer, transferred A.'s land to C. and D. *simpliciter*, there being in the transfer no expression of equal shares or other indication of a tenancy in common. C. and D. did not execute the transfer, which was duly registered. C. is now dead and E. is his sole executor and beneficiary. Is D. or E. beneficially entitled to C.'s share, and what is the correct procedure to perfect title?

ANSWER: Although, for the purpose of registration, C. and D. are joint tenants (s. 57 of the Land Transfer Act, 1915), in equity they are tenants in common in equal shares: *In re Harrison*, [1922] G.L.R. 379; *Brown* v. *Oakshot*, (1857) 24 Beav. 254; 27 *Halsbury's Laws of England*, 2nd Ed. 754, *n.* (*f*); *Cameron* v. *Smith*, (1910) 13 G.L.R. 193. E. is therefore beneficially entitled to C.'s share.

D. should apply for transmission by survivorship in his favour: this will make him the sole registered proprietor. He then should transfer to himself and E. as tenants in common in equal shares, the transfer reciting the relevant facts. The stamp duty on the transfer will be 15s., as a deed not otherwise charged.

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3. **Gift Duty.**—*Father leasing Farm to Son with Right of Renewal—Adequacy of Consideration—Liability for Gift Duty.*

QUESTION: My client owns a sheep-farm, worth about £10,000, and stock approximately £5,000, and desires to lease and bail the property to his son for a term of five years, with a right of renewal for a further five years. In particular, he does not desire to incur any liability for gift duty. Please advise as to best procedure.

ANSWER: The practitioner must steer his client clear of the perils presented by s. 49 of the Death Duties Act, 1921, as to which, see *Adams's Law of Death and Gift Duties in New Zealand*, 166–170, and particularly, Example 5, p. 169. If the Commissioner holds that the consideration is inadequate, the consideration (unless it is a cash payment on or before the execution of the instruments) will be wholly disregarded, and the value of the lease and bailment estimated as if the rental were a peppercorn one. First ascertain from the Stamp Department the name of a suitable valuer to value the stock and whether the existing Government valuation of the land together with a declaration as to improvements will suffice, or whether a new Government valuation will be required. If a new Government valuation is insisted upon, the practitioner must guard against an increase in value: insert a provision in the lease that if any such increase be shown, the rental will be increased *pro rata*. As a general rule, the Commissioner considers any yearly rental less than 5 per cent. of the total value of the property to be inadequate.

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4. **Destitute Persons.**—*Illegitimate Child—Affiliation Order—Child subsequently adopted—Father's Liability under Order for Maintenance.*

QUESTION: Under an order of the Court, a soldier, who is now a prisoner of war, was adjudged the father of an illegitimate female child who was born on August 24, 1938. The child has been brought up by the mother's parents. The order of the Court provided for maintenance being paid by the father. This payment has been made regularly by the Army. The mother and father of the mother of the child now desire to adopt the illegitimate child. What will be the effect of the order of adoption on the liability of the father to continue to pay for the maintenance of the child under the Court order?

ANSWER: This case is covered by s. 12 of the Destitute Persons Act, 1910, which provides that the adoption of an illegitimate child does not affect the validity or operation of any affiliation or maintenance order made against the natural father before the adoption.

RULES AND REGULATIONS.

National Provident Fund Regulations, 1943. (National Provident Fund Act, 1926.) No. 1943/115.

Sale of Potatoes Control Order, 1943. (Primary Industries Emergency Regulations, 1939.) No. 1943/116.

Board of Trade (Meat Grading) Regulations, 1943. (Board of Trade Act, 1919). No. 1943/117.

Fertilizer Control Order, 1943. (Primary Industries Emergency Regulations, 1939.) No. 1943/118.

Steel Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/119.

Purchase of Wool Emergency Regulations, 1939, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1943/120.

Pig Marketing Emergency Regulations, 1943, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1943/121.

Licensing Act Emergency Regulations, 1942 (No. 2), Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1943/122.

Goods-service Charges Tribunal Emergency Regulations, 1943, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/123.

Agricultural Workers Labour Legislation Modification Order, 1941. Amendment No. 1. (Labour Legislation Emergency Regulations, 1940.) No. 1943/124