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COMPANY LAW: RATIFICATION BY SHAREHOLDERS.

A COMPANY is bound in a matter *intra vires* the company, although it may be an act that is *ultra vires* the directors, if ratified by the agreement of its shareholders. It is certain that such an act of the directors may be ratified in general meeting, or at an informal meeting of all the shareholders; but it is open to doubt whether it may be ratified by the acquiescence of all the shareholders without a meeting, except, in New Zealand, in the case of a private company.

Upon the authority of *Parker and Cooper, Ltd.* v. *Reading*, [1926] Ch. 975, all the authors of leading textbooks on company law seem to accept the proposition there laid down that the unanimous agreement of shareholders will operate in law as a ratification by the company of an act done *intra vires* the directors, even though there is no meeting and even though their assent is not expressed simultaneously. We propose to examine the authorities as to the method of validating the acts of directors who have exceeded their powers, and to consider also whether *Parker and Cooper and Co., Ltd.* v. *Reading* is of binding authority in New Zealand in respect of the resolutions of a company that is not a private company.

The facts of the case were as follows: The defendant Reading advanced to the company, of which he was a director, £1,750, and this advance was secured by a £2,000 debenture to him. The only shareholders (of whom there were four) individually assented to this arrangement (which was carried out at a board meeting), but the sealing of the debenture was irregular within Table A, Art. 76. Nine months afterwards, Reading appointed a receiver under his debenture, and the receiver took possession of the company's undertaking and assets. In the following week the company went into voluntary liquidation and appointed a liquidator. The points taken by counsel for the plaintiffs were that the original appointment of the defendants Reading and Botterill as directors was invalid (on facts and grounds with which we are not here concerned); that the defendant Reading was not entitled to vote at the board meeting as being interested in the resolution authorizing the issue of the debenture (Art. 18), and there was consequently no quorum present, and, finally, that the seal was not affixed in the manner prescribed by Art. 76 of Table A. Astbury, J., commenced his judgment by assuming that Reading and Botterill were not validly appointed directors, and that the sealing of the debenture was quite irregular. The sole point at issue remaining was whether the shareholders' assent to the irregular transactions, though not given at any actual meeting, was valid against the company.

In *In re George Newman and Co., Ltd.*, [1895] 1 Ch. 674, Newman, the chairman of the company in which most of the shares were held by himself and his family, applied £3,000 out of money borrowed by the company for the purpose of its business upon his private house. The payment was sanctioned by resolutions of the directors and approved by all the shareholders. It was held that Newman was liable for the £3,000, first, because the shareholders for the time being had no power to authorize the making of presents to directors out of money borrowed by the company; secondly, because if there had been such power it could be exercised only at a general meeting. Lindley, L.J., in delivering the judgment of the Court of Appeal (Lord Halsbury, Lindley, L.J., and A. L. Smith, L.J.), at p. 686, said:

> The shareholders at a meeting duly convened for the purpose can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. . . . But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity.

To interrupt here, the act complained of was *ultra vires* the company, which particularly distinguishes *In re George Newman and Co., Ltd.*, from *Parker and Cooper, Ltd.* v. *Reading* (*supra*). Lindley, L.J., adds that even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. His Lordship continued:

> It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired: but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting.

The stress upon the difference between the corporate capacity of a company and the capacity of the individual shareholders here made by the learned Judge is the basis of all company law. Otherwise meetings, particularly in the case of small companies, would be

superfluous, and it can easily be conceived that adroit canvassing might enable directors to remedy any excess of their powers. The knowledge of their ability to make, and the power of such canvassing, would encourage some directors to exceed their powers with impunity; *bona fide*, no doubt, and often with advantage to the company, but unhappily, sometimes to the company's disadvantage. The carefully-chosen restriction upon directors' powers set out in the articles might go for naught.

However, in *In re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466, an issue of debentures, invalid in that the directors who voted for it were in fact precluded by the articles from voting as being interested parties, was held to be confirmed by the assent of the five directors at the directors' meeting, since they also constituted the only shareholders, and the transaction, being *intra vires*, could not be set aside. Lord Sterndale, M.R., and Warrington, L.J., treated the meeting as a general meeting. The former, at p. 470, said:

> It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, "We will now constitute this a general meeting," it would have been within their powers to do so, and it appears to me that that was in fact what they did.

Warrington, L.J., at pp. 470, 471, said:

> It happened that these five directors were the only shareholders of the company, and it is admitted that the five acting together as shareholders could have issued these debentures. As directors they could not, but as shareholders acting together they could have made the agreement in question. It was competent to them to waive all formalities as regards notice of meeting, &c., and to resolve themselves into a meeting of shareholders, and unanimously pass the resolution in question.
>
> Inasmuch as they could not in one capacity effectually do what was required, but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment, they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out.

Younger, L.J., declared that he was content to rest his conclusion upon what was said by Lord Davey in *Salomon* v. *Salomon and Co., Ltd.*, [1897] A.C. 22, 57, that a company is bound in a matter which is *intra vires* by unanimous agreement of all the corporators; but the learned Judge went on to say:

> In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company.

In the view of all these opinions of the learned Judges, every one of which opinions embraces and does not ignore the fact that a meeting of some sort was held, we turn with interest to the case of *Salomon* v. *Salomon and Co., Ltd.* (*supra*), cited by Younger, L.J. This well-known case is often said to have established the one-man company. Salomon, the owner of a boot business, sold it to a company of which he held all the shares excepting six, which were allotted to members of his family. Part of the purchase-money consisted of debentures issued to Salomon. On a winding-up of the company, it was sought to have these debentures set aside on the grounds that the price paid for the business by the company was excessive; that the arrangement was a fraud upon the creditors of the company; that no independent board of directors was ever appointed. It is only the last allegation which is material to the point we are considering. Lord Watson, in this connection, said: "No evidence was led tending to support the allegation that no board of directors was ever appointed or that the board consisted entirely of the appellant." Further, when the whole of their Lordships' speeches are referred to, it becomes clear that the debentures were never attacked on the ground that they were issued *ultra vires*, but solely on the ground that their issue was fraudulent. It appears, therefore, that *Salomon's* case is of no authority upon the point of *ultra vires*, though it is of general authority when fraud is to be considered.

All the shareholders of a company, acting together, in the absence of fraud, can waive the formalities of notice of meetings, &c., required by statute, as such formalities are designed for their protection. Thus, in *In re Oxted Motor Co., Ltd.*, [1921] 3 K.B. 32, the principle of the *Express Engineering Works* case (where a resolution to issue certain debentures was in question) was applied by a Divisional Court (Lush and Greer, JJ.) to a resolution of all the shareholders to wind up the company, although the shareholders had not had any notice of intention to propose the resolution as an extraordinary resolution, and the statutory requirements had not been complied with: *cf.* s. 221 (1) (*d*) and s. 125 (2) of the Companies Act, 1933. In this case there was a meeting at which all the shareholders of the company were present, and at which they together agreed that it was desirable that the company should be wound up, and they signed a minute of the resolution at such meeting.

To return to the judgment of Astbury, J., in *Parker and Cooper, Ltd.* v. *Reading*: The first thing revealed is that fraud is entirely absent from the action. The learned Judge held that what had been done was done with the utmost *bona fides*, and solely for the benefit of the company. After reference at length to *In re George Newman and Co., Ltd.*, and *In re Express Engineering Works*, His Lordship, referring to the latter case, at p. 984, said:

> All three Judges no doubt refer to the fact that there had been a meeting. But I cannot think that they came to their decision because the five shareholders happened to meet together in one room or one place as distinct from agreeing to the transaction *inter se* in such manner as they thought fit.

While it may be admitted that the room or place is immaterial, it is difficult to understand that a meeting is of such slight importance. Decisions *inter se* or given individually are not the same as those given at a meeting, with its opportunities for exposition and discussion. The opinion of each individual juror is not the equivalent of a jury's verdict.

The learned Judge, Astbury, J., continued:

> Now the view I take of both these decisions is that where the transaction is *intra vires* and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously.

His Lordship, in conclusion, said that he could find nothing in *Newman's* case to prevent all the corporators from arranging to carry out an honest *intra vires* transaction entered into for the benefit of the company, even if they do not meet together in one room or place, but all of them merely discuss and agree with one

another separately. It may be observed that he overlooked the words of the judgment of the Court in that case, first above cited, in which Lindley, L.J., referred to " a *meeting* duly *convened* for the purpose."

There is no doubt that *Parker and Cooper, Ltd.* v. *Reading* was a hard case, but there is usually some danger invoked by the generous consideration of such type of cases. The directors of the company were, it was thought at the time, singularly fortunate; and, as there was no appeal, this good fortune escaped the further risks of the law. Be that as it may, it seems that the following statement in *1 Palmer's Company Precedents*, 15th Ed. 997, is misleading, in the light of the foregoing consideration of the cases cited in support:

> If *all* the members of the company meet and agree to a particular course of action, it is immaterial that a meeting of shareholders as such was not properly convened. " A company is bound in a matter which is *intra vires* by the unanimous consent of all the corporators ": *In re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466; *Parker and Cooper, Ltd.* v. *Reading*, [1926] Ch. 975.

The emphasis seems to be upon the " meeting " of the members of the company, which, in the case last cited, is expressly held to be unnecessary so long as the unanimous consent is obtained.

In *H. Jaffe, Ltd. (in Liqdn.)* v. *Jaffe*, [1932] N.Z.L.R. 168, 190, Smith, J., pointed out that there is nothing in the comments on *Newman's* case made in *In re Express Engineering Works, Ltd.*, and in *Parker and Cooper, Ltd.* v. *Reading* which qualifies a liquidator's right to ascertain whether the company is bound by transactions which are in question, notwithstanding the fact that the shareholders themselves made no complaint.

Although the authors of the standard text-books on company law accept the principle of the judgment in *Parker and Cooper, Ltd.* v. *Reading*, so far as we have been able to ascertain, without question, it must be remembered that it is the decision of a single Judge. Years before it was so determined, Denniston, J., in the Court of Appeal in *In re New Zealand Pine Co., Ltd., Ex parte Official Liquidator*, (1898) 17 N.Z.L.R. 257, in a judgment with which Conolly, J., expressly concurred, and with which the learned Chief Justice, Sir James Prendergast, C.J., did not disagree, dealt with the point later to be decided by Astbury, J., in *Parker and Cooper's* case. Applying *In re George Newman and Co., Ltd.* (*supra*), Denniston, J., at p. 275, said:

> So long as each company remains a separate entity, its assent can only be given by a proper resolution; and the most complete knowledge and acquiescence of the individual shareholders, *not evidenced by some corporate action or proceeding*, would not be sufficient.

(The italics are ours.) When he referred to " some corporate action," it would seem that the learned Judge did not have in mind shareholders who were in different places and at different times expressing their individual assent: it would seem that he meant their presence together at a meeting.

It may, however, be argued that " corporate " in the context of Denniston, J.'s, judgment means, as its popular meaning does, " united in one body," or " unanimous," so that the corporators of a company may act " corporately " by expressing their unanimous assent separately, as in a document signed by them all though at different times and in different places, without a meeting. However that may be, we must also bear in mind that our Court of Appeal had *Newman's* csae, and not the *Parker and Cooper* case before it, when Denniston, J., cited the former, a decision of the Court of Appeal in England, as the authority for his statement of the law. In the judgment of that Court, it will be remembered, Lindley, L.J., in the following passage which we have in part italicised, said: " Individual assents given separately may preclude those who give them from complaining of what they sanctioned; but for the purpose of binding a company in its corporate capacity *individual assents given separately are not equivalent to the assent of a meeting.*" It would appear, therefore, that the judgment of our Court of Appeal in *In re New Zealand Pine Co., Ltd.* (*supra*), is of binding authority in this Dominion, and not *Parker and Cooper, Ltd.* v. *Reading*, the decision of a single Judge.

The latter view is, in New Zealand, limited to resolutions of companies other than private companies. Its correctness, it is submitted, is emphasized by the special provisions of s. 300 of our Companies Act, 1933, and in particular by subs. (3) of that section, relating to the method of passing resolutions of private companies, since there is no similar provision in the statute in respect of any other companies. Under s. 300, private companies may pass resolutions without a meeting or the necessity for previous notice, and by means of an entry in the company's minute-book signed by at least three-fourths of the members holding in the aggregate three-fourths in nominal value of the company's shares. We understand that the learned draftsman of this section was of opinion that company law required that all shareholders must act together at a meeting, so long as it is a meeting. He negatived this, in making the concession in respect of the resolutions of private companies, by means of subs. (3), whereby a memorandum, pasted or otherwise permanently affixed in a private company's minute-book and purporting to have been signed for the purpose of becoming an entry therein, may consist of several documents in like form, signed by or on behalf of one or more members. It follows that, in respect of private companies only, a memorandum of a resolution of assent may be signed by its shareholders in different places and at different times without the necessity of a meeting.

Not without significance was the brief appearance of *Parker and Cooper, Ltd.* v. *Reading* in the opinion of the Judicial Committee of the Privy Council in *E.B.M. Co., Ltd.* v. *Dominion Bank*, [1937] 3 All E.R. 555, 566. In the Court of Appeal for Ontario, [1934] 4 D.L.R. 204, 222, Davis, J.A., had held, following *Parker and Cooper, Ltd.* v. *Reading*, that, if all the individual corporators in fact assent to a transaction that is *intra vires* the company, though *ultra vires* the directors, it is not necessary that they should hold a meeting in one room or in one place to express the assent simultaneously. In referring to this passage in the judgment, Lord Russell of Killowen, who delivered the opinion of their Lordships' Board, said, not without significance, that their Lordships found it unnecessary to express any view as to the correctness of *Parker and Cooper, Ltd.* v. *Reading*, or as to the view that the unanimous agreement of all the shareholders of a company, ascertained otherwise than in general meeting, is capable of operating in law as a ratification by the company.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1943.
June 25, 28, 29;
July 23.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

ASSOCIATED MOTORISTS PETROL COMPANY, LIMITED v. BANNERMAN.

Shops and Offices—Overtime—Right of Office Employee to Payment for Overtime under Statute whether engaged in Clerical Work of not, unless "Occupier"—"Office-assistant"—"Occupier"—Shops and Offices Act, 1921–22, ss. 2, 49—Shops and Offices Amendment Act, 1936, ss. 19, 24.

All persons employed in an "office," as defined by the Shops and Offices Act, 1921–22, except the "occupier" as defined thereby, whether or not employed directly or indirectly in clerical work and whatever their status, are "office-assistants" within the meaning of the statute; and, therefore, are entitled to payment for overtime under s. 49 of the statute as amended by s. 19 of the Shops and Offices Amendment Act, 1936.

So held by the Court of Appeal (*Myers*, C.J., *Kennedy*, *Callan*, and *Northcroft*, JJ., *Blair*, J., dissenting), dismissing an appeal from the judgment of *Johnston*, J., [1942] N.Z.L.R. 218.

Per *Blair*, J., dissenting, the statute should be so construed as to confine the term "office-assistant" to a person employed in an office who is engaged upon clerical work; and, upon such construction, as the respondent was not engaged in clerical work, he was not entitled to payment for overtime.

Semble, per *Myers*, C.J., *Kennedy*, *Callan*, and *Northcroft*, JJ. Generally speaking, except in the case of a partnership, there can be only one "occupier," or, if there is no person who can at any particular time be said to be in that position, then the agent, manager, foreman, or other person who is at the time acting or apparently acting in the general management or control of the office, is the "occupier."

Edwards v. *Timaru Milling Co., Ltd.*, (1907) 26 N.Z.L.R. 989, 9 G.L.R. 552, and *Smith* v. *Wilson*, [1938] N.Z.L.R. 477, G.L.R. 272, distinguished.

Meigh v. *Wickenden*, [1942] 2 All E.R. 68, referred to.

Counsel: *Spratt* and *North*, for the appellant; *Stephenson*, for the respondent.

Solicitors: *Morison, Spratt, Morison, and Taylor*, Wellington, for the appellant; *Stephenson and Anyon*, Wellington, for the respondent.

SUPREME COURT.
Auckland.
1943.
June 29;
July 12.
Fair, J.

TAUPIRI COAL-MINES, LIMITED v. THE KING.

Public Revenue—Stamp Duties—Company's Annual License—Exception from payment of License Duty—Industrial Company—Coal Company—Whether exempt from Annual License Duty as being formed for such specified Industry "exclusively"—Statute—Statutory Form of Imposition of Duty and of Exemption retained in successive Re-enactments—No License Duty demanded or collected for more than Forty Years—Whether a Practice adopted by Legislature in re-enacting Provisions imposing such License Duty—Stamp Duties Act, 1923, ss. 185, 188 (3).

Among the objects in the memorandum of association for which plaintiff company was established were the following:—

"(*b*) To carry on the trades or businesses of colliery proprietors and miners in all their respective branches.

"(*c*) To work mines or quarries and to sell coal stone or lime.

"(*d*) To search for get work raise and made merchantable buy sell and deal in coal coke iron ironstone fireclay brick earth and bricks.

"(*j*) To amalgamate with any other company having objects altogether or in part similar to those of this company."

On an originating summons, issued with the consent of the Crown, to determine whether the plaintiff company was by virtue of s. 188 (3) of the Stamp Duties Act, 1923, exempt from payment of the license duty imposed by s. 185 of that statute in respect of the annual license required of companies carrying on business in New Zealand,

Held, That both paras. (*d*) and (*j*) of cl. 3 of the memorandum of association prevented the plaintiff company from coming within the terms of the exemption in s. 188 (3) of the Stamp Duties Act, 1923.

Oceanic and Oriental Navigation Co. v. *The King*, [1931] N.Z.L.R. 304, [1930] G.L.R. 670, and *In re Magnetic Gold Dredging Co., Ltd.*, (1898) 16 N.Z.L.R. 318, applied.

Rein v. *Lane*, (1867) L.R. 2 Q.B. 144; *Armytage* v. *Wilkinson*, (1878) 3 App. Cas. 355; *Ashbury Railway Carriage and Iron Co., Ltd.* v. *Riche*, (1875) L.R. 7 H.L. 653; *Midland Railway Co.* v. *Checkley*, (1867) L.R. 4 Eq. 19; *Earl of Rosse* v. *Wainman*, (1845) 15 L.J. Ex. 67; *Re Peruvian Railways Co., The International Contract Company's* case, (1869) 20 L.T. 96; *In re Anglo-Cuban Oil Bitumen and Asphalt Co., Ltd.*, [1917] 1 Ch. 477; *In re German Date Coffee Co.*, (1882) 20 Ch.D. 169; *In re Crown Bank*, (1890) 44 Ch.D. 634; *In re Amalgamated Syndicate*, [1897] 2 Ch. 600; *Cotman* v. *Brougham*, [1918] A.C. 514; *In re Electric Light and Power Co., Ltd.*, (1883) N.Z.L.R. 2 S.C. 28; and *In re Gear Meat Preserving and Freezing Co., Ltd.*, (1883) N.Z.L.R. 2 S.C. 30*n*, referred to.

The facts that the form in which the imposition of license duty and the exemption appeared in the Stamp Duties Act, 1923, had been in force since the Stamp Duties Act, 1882, and had been re-enacted in 1908 and 1923, and that successive Commissioners of Stamp Duties had omitted to demand and collect duty from the plaintiff company for more than forty years, did not amount to a practice which must be taken to have been adopted by the Legislature in its re-enactment of the provisions.

Sadler v. *Whiteman*, (1910) 79 L.J. K.B. 786, and *Feather* v. *The Queen*, (1865) 35 L.J. Q.B. 200, followed.

Special Income Tax Commissioners v. *Pemsel*, [1891] A.C. 531, distinguished.

Clyde Navigation Trustees v. *Laird*, (1883) 6 App. Cas. 658, and *Goldsmiths' Co.* v. *Wyatt*, [1907] 1 K.B. 95, applied.

Counsel: *West*, for the plaintiff; *V. R. S. Meredith*, for the Crown.

Solicitors: *Jackson, Russell, Tunks, and West*, Auckland, for the plaintiff; *The Crown Solicitor*, Auckland, for the defendant.

SUPREME COURT.
Wellington.
1943.
July 20;
August 3.
Johnston, J.

PUBLIC TRUSTEE v. COMMISSIONER OF STAMP DUTIES.

Public Revenue—Death Duties (Estate Duty)—Public Service Superannuation—Contributions by deceased Male Teacher—Payment in Lump Sum to Widow—Annuity to Child—Whether Part of his Dutiable Estate—Death Duties Act, 1921, s. 5 (1)(g)—Public Service Superannuation Act, 1927, s. 85.

Contributions made by a deceased teacher to the Teachers' Superannuation Fund under the Public Service Superannuation Act, 1927, and paid in a lump sum to his widow, and the value of any annuity paid to his widow or to any child of his, pursuant to s. 85 (*a*) or s. 85 (*c*) of that statute respectively, are within the provisions of s. 5 (1) (*g*) of the Death Duties Act, 1921, and form part of the deceased's dutiable estate.

Nixon v. *Attorney-General*, [1931] A.C. 184, and *Attorney-General* v. *Quixley*, (1929) 141 L.T. 288, distinguished.

Counsel: *H. E. Evans*, *E. P. Hay*, and *J. Byrne*, for the appellant; *Broad*, for the respondent.

Solicitors: *Solicitor to the Public Trust Office*, Wellington, for the appellant; *Crown Law Office*, for the respondent.

Case Annotation: Nixon v. *Attorney-General*, E. and E. Digest, Sup. Vol. 39, pp. 50, 51, para. 841a, and *Attorney-General* v. *Quixley*, *ibid.*, Sup., Vol. 19, p. 49, para. 293b.

THE NEW DIVORCE RULES.

By W. J. Sim, K.C.

Since the passing of the Divorce and Matrimonial Causes Act, 1928, practice in divorce has had its special difficulties for the reason that no new rules were passed in keeping with the new Act. The Rules Committee has now been able to give this matter attention, and a completely new set of rules comes into force as from December 1, 1943.* This will mean that all proceedings issued on or after the date mentioned will have to comply with the new rules. The Order in Council has, however, the following saving provision with regard to existing suits:—

> That all citations, orders, decrees, registers, records, certificates, instruments, and generally all judicial acts and other acts of authority, and all petitions, applications, and other documents, proceedings, matters, acts, and things and all periods of time which originated or had effect under the rules thereby revoked and are of continuing effect at the time of coming into force of the rules hereby made shall enure for the purposes of the rules hereby made as if they had originated thereunder, and shall, where necessary, be deemed to have so originated, and doth hereby further declare that the rules hereby made, in their application to causes and matters pending on the said 1st day of December, 1943, shall have effect subject to such directions as the Supreme Court, or a Judge thereof, may in any particular case think fit to give.

The purpose of this article is to give the profession a general survey of changes to be effected in practice. It is also hoped that the exigencies of the war, including paper difficulties and delays in printing, will permit the publishers to issue the new edition of *The Divorce and Matrimonial Causes Act* before practitioners will be called upon to apply the new rules.

It is proposed herein to deal with the subject under two headings: (*a*) The history of divorce rules in New Zealand, which may hereafter serve as some record on the subject; and (*b*) The new rules and the changes effected by them.

History of Divorce Rules.

The first New Zealand divorce rules were made under the Divorce and Matrimonial Causes Act, 1867, taking effect on January 1, 1869: *1868 New Zealand Gazette*, 628. With the exception of such now obsolete provisions as the setting-down and hearing of demurrers, and a declaration that "on a decree for judicial separation being pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again," these were in general similar to the rules of 1909, until recently in force.

The rules next made were under the Divorce and Matrimonial Causes Act, 1867, and the Divorce Act, 1898, and took effect on July 1, 1901: *1901 New Zealand Gazette*, 971. Many alterations from the previous rules were made, although many were of little consequence. The principal change was the substitution of a "Writ of Summons" for the citation. The form was but little changed, but the original writ did not require to be taken out of the Registry for service and returned, as in the case of a citation: see now the comparatively simple notice to respondent substituted for citation under R. 8 of the new rules; and as to the service thereof, R. 12. It was also provided that counter-charges in an answer (or statement of defence as it was alternatively referred to) "shall be deemed to be denied unless the petitioner files a reply stating they are true." Pursuant to s. 8 of the Divorce Act, 1898 (see now s. 25), a rule and form were introduced providing for a "request" to the Registrar to issue a decree absolute. With amendments as to directions for service, and as to setting down causes for hearing—*1902 New Zealand Gazette*, 967—these rules remained in force for a period of only eight and a half years.

They were superseded by the rules of 1909—*1909 New Zealand Gazette*, 3322—which took effect on February 1, 1910, and have remained in force until the enactment of the present new rules. The 1909 rules were amended on three occasions: On February 27, 1922—*1922 New Zealand Gazette*, 685—providing for setting down six days in lieu of three days before the sitting, and also special provision (now spent) as to opposing a motion for decree absolute where s. 2 (3) of the amending Act of 1921–22 applied; on July 11, 1925—*1925 New Zealand Gazette*, 2424—substituting a new R. 52 as to mode of trial; and on December 12, 1935—*1935 New Zealand Gazette*, 3980—making minor amendments to R. 97 (reference to Judge or Registrar of pleadings on petition for maintenance, &c.) and to R. 109 (remission of fees).

Mode of Trial.

Under the rules of 1868, application by a party was necessary after the conclusion of the pleadings, on the hearing of which application the Judge was to decide whether the case should be tried before a Judge, a common jury, or a special jury. Elaborate provisions were included for the stating in writing of questions of fact raised in the pleadings, for their service (after being settled by the Judge), for application by other parties to alter or amend, and finally for the filing of the settled statement before setting down the cause for trial.

The procedure was simplified in 1901. Rule 35 provided as follows: "The trial of all cases shall, in the absence of an order to the contrary, be (*a*) in undefended causes, before a Judge alone; (*b*) in defended causes, before a common jury. A Judge may, on application for that purpose, fix the trial of any cause for trial before a jury, for trial before him, or before a special jury." And R. 36: "The issues to be tried by the jury shall be fixed by the Judge before or at the trial," the latter provision being repeated with verbal alteration in the 1909 and present new rules.

Rule 35 was substantially repeated in R. 52 of the 1909 rules; but reference to special juries was eliminated; provision for directions for trial "otherwise" followed (*a*) and (*b*); and the Judge was given a discretion to order trial without a jury where an answer had been filed, but where there was no attendance by either respondent or co-respondent at the trial.

In 1925 a new R. 52 was enacted, requiring all defended adultery causes to be tried by a Judge and jury, and all other causes by a Judge alone; but with provision for a direction for trial "otherwise," subject to the right of a party under s. 24 of the 1908 Act (omitted on the re-enactment of that section in s. 11 of the 1928 Act) to trial by jury in all contested adultery

* By Order in Council, dated August 18, 1943. (Serial No. 1943/135).

cases, and subject to the requirement of s. 38 (continued in s. 31 of the 1928 Act) for ascertainment of damages by a jury. The provision for discretion where respondent and co-respondent do not attend was repeated.

Rule 37 of the new rules now leaves the matter entirely to the provisions of ss. 31 and 43 of the present Act. Section 31 is the section of the Act which provides that damages to be recovered on any petition shall be in all cases ascertained by the verdict of a jury. Section 43 provides that in questions of fact arising in proceedings under the Act, it shall be lawful for, but, except as hereinbefore provided, not obligatory on the Court to direct the truth thereof to be determined by the verdict of a jury. The position now is, therefore, that the only instance where a party has an absolute right to a jury is under s. 31, and even under the section the Court may dispense with a jury, if an agreement as to damages exists between the petitioner and the co-respondent: *Nairn* v. *Nairn*, [1936] N.Z.L.R. 119, G.L.R. 672.

Time for Filing Answer.

The following table of times within which a respondent may file an answer shows the variation in this respect from time to time :—

Distance of Residence	1868	1901 and 1909	1942
	Days.	Days.	Days.
Up to 20 miles ..	21	14	14
Up to 50 miles ..	28	21	21
Over 50 miles ..	35	28	21

The New Rules.

The principal changes effected by these rules are the adoption of certain improvements in procedure embodied in the Matrimonial Causes Rules brought into force in England in 1937, and the removal of any unnecessarily complex procedure under the old rules. Some of the old provisions have been omitted as duplicating provisions of the Act, while various weaknesses, arising in some instances from successive changes in the law since their enactment without appropriate amendment to the rules, have been removed. Rules are also included covering points of practice or procedure which have from time to time been suggested or required by the Court or Judges.

The order of the rules has been arranged to deal, first, with the procedure common to all matrimonial causes, or not conveniently separable from such, and thereafter with incidental or more unusual matters.

Following are the principal alterations made :—

Service Procedure.—Service procedure is simplified by adopting the English method of notice accompanying the petition, in lieu of citation. This avoids taking out the original for service and returning and filing it after service. Certificates of service are no longer required: see RR. 8, 12, and 14.

Appearance.—Entry of appearance has been dispensed with. Such effect of appearances as would seem to have served any useful purpose is preserved by requiring parties to give an address for service by subscribing the same at the foot of the first document filed by the respondent (thus avoiding the filing of a separate document) or, where given before the filing of any other document, then by memorandum separately filed. These provisions are similar to RR. 583–584 of the Code of Civil Procedure, which have been adapted to matrimonial causes: see RR. 10 and 11.

Prayer for Further or Other Relief.—Order 20, r. 6, of the English Supreme Court Rules has been followed in dispensing with the necessity for a prayer for further or other relief, which may always be given, as the Court or a Judge may think just, to the same extent as if it had been asked for, but a judicial separation shall not be deemed to be included in a prayer for a dissolution of marriage or in general or other relief and shall not be granted unless it is specifically asked for in the prayer: see R. 26.

Setting Down.—New provisions for the setting-down of causes for trial or hearing are contained in RR. 34, 35, and 36; and the question of the mode of trial—before Judge alone or Judge and jury—is now stated simply in R. 37 to be according to the relevant sections of the Act.

Search for Appearance.—Affidavit of search for appearance on setting down is also dispensed with and a short certificate by the Registrar is substituted, to be endorsed on the praecipe to set down: see R. 36. This procedure is based on the provisions of the English rules, but the Registrar's certification is necessarily different under the two Court systems.

Other Affidavits of Search.—Affidavit of search on application for decree absolute is also avoided by means of a further certificate by the Registrar to be endorsed on the request or motion to issue the decree: see R. 40.

Ancillary Relief—Alimony, Maintenance, &c.—Separate petition for alimony, maintenance, and kindred relief is displaced by notice of application for ancillary relief, in accordance with the English mode of procedure introduced in 1937. In adopting the English method, however, the rules have been adapted to the requirements of the New Zealand Courts and have been considerably simplified, while at the same time incorporating such provisions of the former New Zealand rules as seem desirable, and workable under the new method: see RR. 41–52.

Applications for ancillary relief, as defined in the rule, comprise applications for the following :—

(*a*) Alimony pending suit:
(*b*) Periodical payments in lieu of attachment on non-compliance by a husband with a decree for restitution of conjugal rights—s. 9:
(*c*) Alimony and maintenance, including orders to secure, and orders as to variation, suspension, &c.—s. 33:
(*d*) Settlements of wife's property—s. 36:
(*e*) Orders as to property subject to ante-nuptial or post-nuptial settlement—s. 37:
(*f*) Custody, maintenance, education, and protection of children—s. 38:
(*g*) Variation, suspension, &c., of orders made under the provisions of the Act for the periodical payment of money—s. 41.

Service on Adulteress.—Service is now required on a woman named as adulteress when not required to be made a respondent in the suit: see R. 54. Similar provision is contained in the English rules.

Chamber Matters by Motion.—Summons procedure has been entirely displaced, motions being required for all applications in Court or Chambers, except where a petition or notice of application for ancillary relief is provided for: see R. 66.

"*Dissolution of Marriage.*"—The term "dissolution of marriage" has been retained in the rules and forms, notwithstanding the adoption of the term "divorce" in the 1928 Act. While this does not seem objectionable terminologically, the use of "dissolution of marriage" in Court papers has at the same time been found preferable in practice. "Dissolution of marriage" is used in the forms to the English rules (see Forms 1 and 15), but "divorce" is used in the English rules themselves, except in r. 4 (1) (*h*) (as also in s. 8 of the 1937 Act) in connection with a "petition for presumption of death and dissolution of marriage."

Forms.—In addition to the new forms required by the changes in procedure, the forms retained have been revised. Reference to the judicial district does not appear in the forms as being without significance in matrimonial causes and serving no practical purpose, reference to the Registry appearing to give all information required in this respect.

Scale of Fees.—The separate scale of fees in divorce matters has been repealed and Table D of the Code of Civil Procedure adopted, subject to the provisions of R. 77.

SERVICEMEN'S SETTLEMENT AND LAND SALES ACT, 1943.

Necessary Clauses in Sale and Purchase Agreements.

By S. I. Goodall.

When the above statute comes into operation it will presumably be necessary in most cases to provide that a transaction is subject to the consent of the Land Sales Court; and to avoid complications in respect of stamp duty the contract of sale, together with the application, should be filed within the ordinary stamping period of one month. The clauses which appear below are suggested as covering the general position so far as one can discern it from the statute itself, and in advance of any regulations which doubtless will be made governing the preparation and filing of applications for consent.

The scheme of the first clause is that the parties shall proceed to file the application within, say, twenty-one days; and if either party makes default the other may proceed with and file the application; and if the consent should not be forthcoming, or should be obtainable only upon conditions which are unacceptable, the transaction may be rescinded and the deposit refunded to the purchaser.

The second clause has reference to the commission payable to an agent effecting the sale, making payment of remuneration conditional upon completion of the contract; and, in effect, providing "no sale—no commission."

I.

(1) This transaction (comprising the present agreement and the transfer intended to be executed pursuant hereto) is entered into subject to the consent of the Land Sales Court and each party hereto will within *twenty-one* days from the day of the date hereof furnish all necessary particulars information and documents to the other of them concur in completing severally sign and make and join in filing all such instruments and pay all such fees and thereafter severally do all such acts as may be necessary or expedient for applying for and endeavouring to obtain such consent.

(2) The fees payable for filing any such instruments and sealing such consent (if the same shall be forthcoming) or any order upon such application and one duplicate thereof respectively shall be borne by the vendor [or *the parties hereto in equal shares*] but subject thereto and subject to any order of the Court each party will bear his (or its) own costs of and incidental to the application including personal attendance of the party and his (or its) solicitor counsel agent valuer or other witnesses before the Court or any appropriate Land Sales Committee.

(3) If either party hereto shall not within the said period of [*twenty-one days*] do or concur in doing all such acts and things having reference to the preparation and filing of the application for such consent it shall be lawful for the other of them on behalf of either party or both parties to do the same with the like incidence as to costs as if the party primarily liable had done the same and with power to recover against the defaulting party accordingly.

(4) If notwithstanding the due filing and prosecution of such application such consent shall not be forthcoming within [*three calendar months*] [or *a reasonable time from the day of the date hereof*] or shall be refused or shall be forthcoming only on a condition with which the vendor [or *either party*] shall be unable or unwilling to comply (including specifically a reduction of the purchase-money) then the vendor [or *either party*] shall notwithstanding any intermediate negotiation or litigation be entitled by written notice to the purchaser [or *the other of them*] to rescind the transaction (including this agreement) and thereupon the purchaser shall be entitled to a refund of the deposit moneys theretofore paid but without interest damages costs or compensation whatsoever.

II.

The sale evidenced by this agreement has been made through the instrumentality of whom the vendor has appointed and doth hereby appoint as his (or its) agent to effectuate such sale but payment of remuneration for the agency is conditional and if the consent of the Land Sales Court to the transaction shall not be duly obtained or if the transaction shall be rescinded as hereinbefore provided no commission or other remuneration shall be payable by the vendor but if the sale shall be completed with a reduction in the purchase-money then commission on the sale computed on the basis of the amount of the purchase-money so reduced shall be payable.

"NO LIABILITY" CLAUSES IN CONTRACTS OF CARRIAGE.

The Tragedy of the Bananas.

By Flying Officer HAROLD J. EVANS, R.N.Z.A.F.*

Bananas ?—not in June, 1943, when we expect to be nearing the beginning of the end and the return to a more balanced scale of food values, but in September, 1940, long before we had reached even the end of the beginning. Not a few dozen only, such as a journeying Prime Minister might stuff into his pockets to gladden a grateful household at 10 Downing Street, but two whole truck loads of them—a spectacle, one might have thought, sufficient to try the consciences of those dutiful officials of the London, Midland, and Scottish Railway Company and perhaps to cause among them a sit-down strike on the way from Avonmouth to Kew Bridge.

Hartstoke Fruiterers, Ltd. v. *L.M.S.*, [1943] 1 All E.R. 470, was not, however, an action for conversion of the bananas; it was for breach of cl. 9 of the company's conditions of carriage—a clause which obliges the company in every case where merchandise is consigned to a station and is not to be delivered by the company to "give notice in writing or by telephone of arrival to the consignee." For, incredible as it may seem, there was some oversight on the part of some one and, unfortunately for the would-be consumer, no notice of arrival of the consignments was given until three days after the trucks had come to rest at Kew Bridge Station, even though the plaintiff's premises were but four hundred yards away. Bananas could hardly be expected to remain undeteriorated for three days of so amazing a summer, and the result was an action for damages to the amount of £226 18s.

Clause 3 of the conditions of carriage provided—

> The company shall not be liable for loss, damage, deviation, misdelivery, delay, or detention of or to a consignment . . . except upon proof that the same arose from the wilful misconduct of the company or their servants.

Mr. Justice Hallett considered that, in order to succeed, the plaintiffs must show that the delay in giving notice was due to wilful misconduct. This they were not able to do, judgment was entered for the defendants, and the plaintiffs appealed.

The Court of Appeal apparently took the same view of the conditions. It is clear from the judgment of the Master of the Rolls, in whose reasoning both MacKinnon and Goddard, L.JJ., concurred, that he considered the non-compliance with condition 9 was covered by the generality of exemption contained in condition 3. "Damage" to the consignment had in fact occurred; the failure to give notice of arrival did not amount to wilful misconduct; the defendants were therefore not liable for the damage.

Whenever the Court's duty is to construe a written contract, it is of course axiomatic that the duty is one of ascertaining the intentions of the parties so far as they may be gathered from the written document. If the parties have taken the trouble to contemplate all the various situations they may find themselves in, between the making of their contract and its fulfilment, and to provide in clear language for these situations in advance, so much the better for them; if they have not, and unforeseen circumstances arise, they have themselves to blame when the Court looks only to the document for their intentions and arrives at a construction which does not give them equal satisfaction. If this is true of contracts under which the normal liabilities for negligent performance or non-performance are not deliberately misplaced, it can be said to be equally true of contracts such as the one under consideration. Here we have carriage of goods on "owner's risk" conditions and at "owner's risk" rates. As Lord Justice Goddard pointed out, the plaintiffs could have chosen to send their goods forward at a higher rate and at the company's risk. They did not do so, and it therefore hardly lay in their mouth to reproach the company for setting up in defence a condition which *prima facie* was perfectly apt to exempt them from liability.

When this is said, however, the case is not disposed of. The Courts have long conceived it to be their duty, particularly in the case of contracts of carriage, to construe all "no liability" clauses with the utmost circumspection and to lean heavily against any extension of exemption that is not perfectly apparent from the language. Judicial notice has, perhaps, been taken of the fact that, where standard conditions of carriage are agreed upon, as in these contracts they usually are, the carrier's familiarity with them usually stands in sharp contrast to the consignee's ignorance of them. In any event, the practice of the Court in this respect is now sufficiently consistent and long-lived to have become a rule of law: see per Scrutton, L.J., in *Neilson* v. *London and N.W. Railway Co.*, [1922] 1 K.B. 192, 201 *et seq.*, and, upon appeal, per Lord Buckmaster and Lord Dunedin, [1922] 2 A.C. 263, 266 *et seq.*

The principle being well established, we look for a general test of liability. *Neilson's* case (*supra*) in which most of the earlier authorities were reviewed, supplies us with one. Is the carrier doing what he has contracted to do or not ? If he is, then a general exemption clause will be sufficient to protect him. If he is not, only very clear language will suffice. Thus, where the carrier has not specifically protected himself against liability for damage arising out of a deviation from the agreed route, the fact that he has protected himself against "delay" will not relieve him; for the delay in carriage is not a delay in the performance of the contract of carriage: *Mallet* v. *Great Eastern Railway Co.*, [1899] 1 Q.B. 309. A later decision of the Divisional Court, *Foster* v. *Great Western Railway Co.*, [1904] 2 K.B. 306, in which the company was held to be relieved from liability in similar, though not identical, circumstances, was disapproved of by the House of Lords in *Neilson's* case and, according to the headnote, overruled. In *Foster's* case the company had, after having in error conveyed the goods some way off the contemplated route, done their best to avoid further delay by using a substituted route. "Deviation" again not being covered by the exempt-

* This article was written by a former editor of the *Students' Supplement* to this JOURNAL while on active service in Great Britain, where he has recently suffered injuries while engaged on air operations. He wrote it for the *Law Journal* (London), in the pages of which it has appeared.

ing clause, this departure from the agreed manner of performance should have prevented the common-law liability from being displaced.

Applying now the test in *Neilson's* case to the present facts, we find that, whereas there the company went outside the contract by conveying the goods to wrong destinations, here they failed fully to perform the contract by omitting to give notice of arrival. The only difference, it would seem, is that in the one case the act complained of was an act of commission, in the other an act of omission. The duty of giving the consignee notice of arrival was one which the company had specifically and—so far at least as condition 9 was concerned—unreservedly taken upon itself. Upon principle, therefore, it is difficult to see why the two cases should be decided differently. With respect, too, it is not obvious how Lord Greene, M.R., can regard the "contract of carriage" as having been performed as soon as the goods have arrived at their station of destination. The "contract of carriage" is the whole contract, including condition 9; and if it is in a sense true that condition 9 is "merely an ancillary provision," that does not mean that it is not regarded by the consignee as quite a necessary part of the contract. On the contrary, we are bound to assume that the consignee in fact regards it as such.

With deference to the judgments in *Neilson's* case, I submit that an even more apt and simple test of liability—and one equally supported by the authorities—can be applied. Does the act or omission complained of by the consignee constitute part of the contemplated risk of the contract of carriage? If it does, the carrier will not, of course, be liable; if it does not, he will be. To ascertain in any given case what are the contemplated risks of the contract we must look to the contract as a whole and to the exemption clause in particular. Normally we shall find the latter expressed in quite general language, and in such cases we shall, I submit, be bound to assume that the risks intended to be covered are those of and incidental to the actual carriage of the goods. After all, whether the goods are conveyed at "owner's risk" or at "company's risk," the risks to which we are referring in either case are normally the risks of and incidental to carriage. If it is to be maintained that the parties have intended to include other risks—risks, for example, that the company may negligently fail to perform such specific terms of the contract as are unconnected, or only remotely connected, with the carriage of the goods—it should be possible to point to clear and deliberate language.

For the foregoing reasons it is submitted that *Hartstoke's* case is wrongly decided and contrary to authority. It remains, however, to deal with one further point in the judgment of the Master of the Rolls. Lord Greene observed that if, as the appellants argued, condition 3 does not apply after the transit has come to an end, the following would be the result. Until the goods arrived at the station of destination the company would be protected by condition 3; at the expiration of one clear day after the notice of arrival was given, the company would be protected by the special warehousing conditions in condition 11; whereas in the interval of time between those two points of time condition 3 would have no application at all, and would not protect the company. To these observations two answers may be made. In the first place, upon what I am here submitting to be the true construction of this contract, condition 3 would not necessarily cease to apply after the transit had come to an end. It may well be that certain risks of and incidental to carriage do in fact remain even after the transit itself is over. In the second place, where, owing to the particular act or omission of the company, the operation of condition 3 gave way to common-law liability, the results envisaged by Lord Greene could hardly be described as remarkable. Differences in liability will, of course, occur; but, apart from the operation of the special warehousing conditions, those differences will depend upon the nature of the acts or omissions of the company, and so ultimately upon the contemplated risks of the contract and the intentions of the parties.

LEGAL LITERATURE.

Matrimonial Causes.

Rayden's Practice and Law of Divorce, 4th Edition. Consulting Editors: NOEL MIDDLETON, K.C., and C. T. A. WILKINSON, Registrar of the Probate and Divorce Division of the High Court of Justice. Editors: J. F. COMPTON MILLER and F. C. OTTWAY. Pp. cxxvii–782 (with index, 117 pp.). London: BUTTERWORTH AND CO. (Publishers), Ltd.

The appearance of the Matrimonial Causes Rules, 1943, makes the appearance of the new *Rayden on Divorce* very timely indeed, since the text of the former edition, entitled *Rayden and Mortimer on Divorce*, has undergone considerable alteration and emendation because of the corresponding English Matrimonial Causes Rules, 1937, and the new English Divorce statute which has added similarities to our own. The greater part of the book deals with the general law and practice of divorce, while the rest of the work is conveniently divided into parts; others supply the complete texts of the Matrimonial Causes Act, 1937, and all relevant statutes, and the new rules to which reference has been made, and all forms. Practitioners who have long used the predecessors of this extensive work know their quality and convenience of their arrangement. They will find, in the new edition, even greater satisfaction, for, in its arrangement and comprehensiveness, it outshines anything hitherto attempted on the subject of divorce and other reliefs in matrimonial matters. The format of the work deserves a special word of commendation.

This work, it may be remarked, is No. 7 of *Butterworths' Modern Text-books* series, and throughout its useful life it will be kept up to date in respect of additional matter by means of pocket supplements.

LAND AND INCOME TAX PRACTICE.

Wool Retention Money.

The New Zealand Government has an agreement with the United Kingdom Government whereby the whole of the export wool clip is sold to Great Britain at a fixed price. The fixed price paid for the 1941–42 wool clip was 12·25 pence per pound for the total weight of the export clip, but the United Kingdom Government decided to increase the price payable for the 1942–43 clip by 15 per cent. The New Zealand Government originally announced that payment in full of the additional 15 per cent. for the 1942–43 season's export greasy-wool clip would be made to growers, paid partly in cash and partly in Government securities, but the 15 per cent. increase is not to be paid to growers in respect of wool which would be used in New Zealand.

The price paid to individual growers was not, of course, 12·25 pence (plus 15 per cent.) for every pound of wool appraised, but was based on those values for an overall price for all export wool and appraised according to classes and qualities submitted by each grower. The Marketing Department retained 10 per cent. of the appraisal value due to each grower, to meet any possible adjustments, after which the amount retained—*i.e., wool retention moneys*—was paid out to the growers, through Government brokers.

Of the 10 per cent. appraisal value retained in respect of greasy wool for the 1942–43 season, it was originally intended that 5 per cent. should be paid in cash, and 5 per cent. in non-transferable Government Stock, to be known as "Wool Deferred Payment Stock," but this decision was subsequently amended to permit the issue of negotiable bonds or stock in the Third Liberty Loan in lieu of the non-transferable Government Stock.

The final payment of wool retention moneys to growers for the 1942–43 season is—

(*a*) 5 per cent. of appraisal value to be made in National Savings Bonds, or Stock issued under the 3rd Liberty Loan.

(*b*) 5 per cent. of appraisal value, in cash.

(*c*) A further cash payment of 3·82183 per cent. of the appraisal value. This payment is the final adjustment necessary to bring average appraisal values of the clip up to the average sale price allowed for the sale of wool to local mills at the 1941–42 level of prices.

An example of the pay-out for the 1942–43 season is as follows:—

	£	s.	d.
Appraisal value 1942–43 clip	623	11	8
Less 10 per cent. retained by Marketing Department	62	7	2
Cash paid on appraisal	£561	4	6

Final distribution at end of season (approximately September, 1943).

	£	s.	d.
5 per cent. Bond retention, £31 3s. 7d.			
Bonds issued to nearest multiple of £5	30	0	0
Balance paid in cash	1	3	7
5 per cent. ordinary retention, paid in cash ..	31	3	7
Final payment of 3·82183 per cent. of appraisal value, paid in cash	23	16	8

Summary.

	£	s.	d.
Cash on appraisal	561	4	6
Cash on final pay-out	56	3	10
Bonds or Stock	30	0	0
Total..	£647	8	4

For taxation purposes, the total value, £647 8s. 4d., must be shown in taxation returns. It is important to note that the nominal value of Bonds or Stock *must be included.* In practically every case, however, all the receipts do not fall within the same income year, and care must be exercised to ensure that the total amount received is returned at some time or other. If, in the foregoing example, the entire wool clip was sold prior to the end of the taxpayer's financial year, which may be assumed to be June 30, 1943, the cash on appraisal, £561 4s. 6d., would be included as income in the income-tax return for that year. The value of Bonds and cash, £86 3s. 10d., would be received about September, 1943, and must be included in the return of income derived during the year ended June 30, 1944. It is essential to note that if a return is being prepared from the bank pass-book, then Bonds or securities will not appear therein, but must nevertheless be treated as a cash receipt.

If, however, a taxpayer has included the full appraisal value as income derived during his financial year ended March 31, or June 30 (in the above example, £623 11s. 8d.), the Department is prepared to view the final adjustment cash payment (£23 16s. 8d.) as income derived during the income year ended March 31, 1944, or June 30, 1944.

In the final return to date of death of a deceased taxpayer, moneys payable as final distribution moneys on wool sold during the lifetime of the deceased are assessable as income received by the deceased, and not by the trustees. Where trustees have furnished returns, and subsequently received wool retention moneys which have not already been included, their proper course is to furnish amended returns including the moneys as income of the period to which they relate. In this respect wool retention moneys are treated in the same fashion as *dairy bonuses* received by trustees of a deceased taxpayer.

Social Security Charge and National Security Tax on National Savings Bonds, issued as part of Wool Retention Moneys.

Where a wool-grower accepts these bonds in satisfaction of the 5 per cent. Bond retention, it should be noted that social security charge and national security tax is included in the purchase price. In the year of receipt, the full value of Bonds must be included with gross income in arriving at the income for income-tax, social security charge, and national security tax purposes. For each of the five years commencing with the year ended March 31, 1944, or the taxpayer's equivalent balance date, the income for *income-tax purposes only* should include as unearned income, one-fifth of the income from the Bond. To this extent the net income other than salary or wages for income-tax and social security charge purposes will not be the same amount: see paragraph *re* treatment of such interest, *ante*, p. 169, and cl. 3 of the Purchase of Wool Emergency Regulations, 1939, Amendment No. 2, which provides that "interest on all bonds, stock, and investments issued or made for the purposes of paragraph (*a*) of Regulation 5 (4) hereof (as to payment of 5 per cent. Bond retention moneys) shall be calculated from 1st February, 1943."

The regulations covering payment of what are now commonly known as wool retention moneys are—Purchase of Wool Emergency Regulations, 1939 (Serial No. 1939/269), with Amendment No. 1 (Serial No. 1943/47), and Amendment No. 2 (Serial No. 1943/120).

Sundry Practice Points.

Cost of Next-of-kin Parcels—Dependent Relative Claim.—The cost of quarterly next-of-kin parcels forwarded by a taxpayer to his brother, a prisoner of war overseas, is not allowable as a special exemption under the heading of contributions made towards the support of a dependent relative.

Interest on Income-tax paid in advance.—Interest at the rate of 1½ per cent. per annum will be allowed on income-tax paid in advance of the due date for payment of tax on income derived during the year ended March 31, 1943. Any taxpayer may forward remittances direct to the Department. Brief instructions to credit the payment as *income-tax* paid in advance will assist the Department considerably. Interest is calculated in monthly rests as from the sixth day of the month following receipt of the payment until February 6, 1944; therefore remittances should be forwarded to reach the Department before the sixth day of any month, in order to give the maximum amount of interest.

Income-tax may also be paid in advance by the purchase of income-tax certificates at chief post-offices. Certificates are sold at a discount equivalent to interest at the rate of 1½ per cent. per annum. Such certificates must be presented with the demand at the time of payment.

Interest on Legacies.—Interest payable to legatees out of trust income is assessable to the trustees under the provisions of s. 102 (*a*) of the Land and Income Tax Act, 1923, if the income is actually paid to or applied for the benefit of the legatee. If the interest on a legacy is credited but not actually paid pending the fulfilment of some contingency, the interest so accumulated is assessable under the provisions of s. 102 (*b*) of the Act, as trustees income—*i.e.*, no personal or other special exemption is allowable in arriving at the taxable income.

If for some reason a legatee has not received, for some years, the interest on a legacy, the interest is considered to be income derived during the year of distribution, and is not assessable as income during the year of crediting in account. The Commissioner considers that the words "credited in account" in s. 90, Land and Income Tax Act, 1923, mean that the amount so credited must be available at the time of crediting to be dealt with in the interest of or on behalf of the creditor. If funds are not available, s. 90 does not apply and any distribution subsequently made is assessable under s. 102 (*a*) to the recipient in the year in which it is received by him.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The Court of Arbitration and the Press.—The *Evening Post* (Wellington) in its report of a meeting of the Wellington Harbour Board at which there was considerable discussion of the provisions of the Industrial Conciliation and Arbitration Amendment Bill and of claims for wages that had been made on the Board under the award governing Harbour Board employees, stated that the general manager of the Harbour Board had given an affirmative answer to a question by a Board member asking whether the Court of Arbitration had given an interpretation and upheld the men's claims. It was somewhat surprising to read the following paragraph in a letter which the Board's general manager sent to the *Evening Post* a few days later :—

> As general manager of the Board I have been informed by the Registrar of the Court of Arbitration that the Court of Arbitration desires this statement to be corrected as the Court did not deal with the claims of individual workers.

From the rest of the general manager's letter it would seem at least doubtful whether his answer at the Board meeting could really be described as incorrect; for the Court of Arbitration, although it had not adjudicated on any *individual* claim, had apparently given a judgment interpreting the award in the way which the men claimed was correct. However, even if the general manager had made an entirely incorrect statement at the Board meeting, one would think it hardly in accord with tradition for the Court of Arbitration to call for a correction. If a litigant publicly misstates the effect of a decision of a Court, there is no need for the Court to take any steps in the matter. The opposing litigant can usually be relied upon to do the correcting. If he fails to do so, there is always, in the case of the ordinary Courts, the Minister of Justice, and, in the case of the Court of Arbitration, the Minister of Labour. A Court best conserves its dignity and its regard in public opinion by taking no part in the matter.

Class Grievances and Legislation.—In the recent case of *Davies* v. *Warwick*, [1943] 1 All E.R. 309, the English Court of Appeal had to consider the provisions of the Rent and Mortgage Interest Restrictions Act, 1939 (Eng.), and found itself driven to arrive at a conclusion which involved considerable hardship to the landlord. MacKinnon, L.J., said in his judgment that he was reminded of these words of the late Sir Frederick Pollock in *The Genius of the Common Law* (1912) :

> It is certain, in any case, that far more class grievances have been raised by legislation than by the purely judicial development of the common law.

The Higher Tribunal.—In the days before our Arbitration Amendment Act, 1938, an appeal was brought from a decision of a Supreme Court Judge on a case stated by arbitrators *during* an arbitration. In those days such an appeal did not lie. The only remedy of the aggrieved party was to allow the arbitrators to make their award upon the basis of the erroneous opinion of the Supreme Court, and then to move to set aside the award upon the ground of error of law apparent on its face : *British Westinghouse Electric Co., Ltd.* v. *Underground Electric Railways Co., Ltd.*, [1912] A.C. 673, had so decided. When the appeal was called in the Court of Appeal counsel for the respondent, relying on the *Westinghouse* case, took the preliminary objection that no appeal lay. The Court seemed disposed to agree, and counsel for the appellant asked for a short adjournment to enable him to consider the position. "Your Honours," he said, "it may well be that I shall take this case to a higher tribunal." Skerrett, C.J., replied smilingly : "Surely it will have to be a very high one, Mr. . For it seems clear that the House of Lords has decided against you."

Government Officials as Prosecutors.—It is to be hoped that the authorities will take notice of the recent observations of Paterson, S.M., on this subject. Things have indeed reached a curious state when a prosecuting official can make a statement to the Court, adduce no evidence in support of it, and call that his case ! The Magistrate is reported as having said :

> Of recent years there has been a large increase in the number of Government officers and Inspectors appearing in the Courts to conduct prosecutions, very few of whom have the ability, training, or aptitude for such work. Their efforts often impede, rather than assist, the administration of justice. The Courts and the public are entitled to have prosecutions properly conducted. There is a tendency on the part of many of these amateur prosecutors to adopt the bureaucratic attitude : that, because a Government Department is prosecuting, there should be a conviction irrespective of the merits of the case, or the evidence adduced.

These are strong words, but they will be endorsed by all lawyers with experience in these matters.

"Heirs" and Statutory Next-of-kin.—Conveyancers should think many times before they use the word "heir"—either in the singular or in the plural—in a deed or will. In *Hodgkinson* v. *New Zealand Insurance Co.* (July 9), a case of a substitutionary gift by will of personal estate, the Court of Appeal, in four separate judgments (and for reasons different from those given by Blair, J., in the Supreme Court) has unanimously given the word "heirs" the meaning of "statutory next-of-kin." But the case relates simply to a *substitutionary* gift of *personal* estate, and conveyancers should not regard it as an authority of any general application. A draftsman who means to refer to statutory next-of-kin should never rely on the word "heirs" for achieving his purpose.

Exclusion of Lawyers.—In proceedings under the Australian National Security (Landlord and Tenant) Regulations legal practitioners are debarred from appearing. This matter was mentioned by David Maughan, K.C., President of the Law Council of Australia, during the course of his address to the last annual meeting of that body. He said :

> It is producing a class of non-lawyer practitioners who are under no disciplinary control either as to conduct or fees and who render to the unfortunate litigants less efficient service than would be secured by employing the services of legal practitioners. Persistent protests have been made against this regulation and although no satisfactory results have yet been secured I hope that they may be in the near future.

Latest Judicial Wisecracks.—"Women in general are credibly supposed to take some interest in dress."—Lord Greene, M.R. "The business in which the appellant had been engaged is described as that of a speculative builder, though I doubt if there is any distinction between the business of a builder with or without the adjective."—Luxmoore, L.J.

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. Death Duties.—*Bookmaker's Estate—Betting Debts—Whether returnable in Stamp Accounts.*

QUESTION: (*a*) A., a bookmaker, dies, owing and being owed large sums for bets. With regard to such debts owed *to* A., should his executor include in the death-duty accounts all such debts? (*b*) With regard to such debts owed *by* deceased, may they be paid by the executor, and, if they are paid, are they deductible from his dutiable estate for the purpose of ascertaining his final balance for death-duty purposes?

ANSWER: (*a*) Include in the death-duty accounts only such debts as have been paid to deceased or his executor. If any such debts are paid subsequently to the filing of accounts, the executor should then file amended Statement L, and pay additional death duty accordingly: Death Duty Regulation No. 5 set out in *Adams's Law of Death and Gift Duties in New Zealand*, 218; *Attorney-General* v. *Murray*, [1904] 1 K.B. 165.

(*b*) The executor should not pay such debts without the consent of all the beneficiaries being *sui juris*. The payment without such consent would constitute *devastavit*: *14 Halsbury's Laws of England*, 2nd Ed. 326. The payment of a betting debt is in reality a *gift*: *Morgan* v. *Ashcroft*, [1937] 3 All E.R. 92, 105. "Debts" in s. 9 of the Death Duties Act, 1921, mean only such debts as an executor may properly pay or retain: *Green's Death Duties*, 204. Therefore betting debts owed *by* A. are not deductible and no allowance can be made therefor.

2. Executors and Administrators.—*Debt Statute-barred owed to Spouse—Right to Pay—Deduction for Death Duty.*

QUESTION: A.'s wife lent him a sum of money many years ago for the purpose of his business. A. is now dead. No part of the sum has been repaid. No interest has been paid, nor was there any agreement as to interest. A. never gave any written acknowledgment of the debt. Consequently it is now statute-barred. (*a*) Is there anything to prevent A.'s executors from paying the sum, with interest thereon, say at 5 per cent.? (*b*) If so, can the amount so repaid be deducted as a debt for death duty?

ANSWER: (*a*) Yes; provided it has not been declared barred by a Court of competent jurisdiction: the question would suggest that it has not been so declared. It is also assumed that A. never went bankrupt: *14 Halsbury's Laws of England*, 2nd Ed. 326, para. 607. The foregoing answer refers only to the principal sum. It is not thought that in the circumstances the executors would be entitled to pay interest: *Commissioner of Stamp Duties* v. *Cadd*, [1940] N.Z.L.R. 645.

(*b*) Yes; but the Stamp Department would have to be convinced that the sum was a genuine loan and was not intended originally as a gift, and also that the executors intended to pay it: *In re Elfora*, [1914] V.L.R. 609, 36 A.L.T. 89. The better course would be to prepare a statutory declaration by the widow on above lines and submit same to the Stamp Department.

3. Stamp Duty.—*Cross Receipts—Necessity for Stamping.*

QUESTION: A. owes B. £2, and B. owes A. £2. No money passes between them, but each gives the other a receipt acknowledging payment. Must each receipt be stamped with a 2d. stamp?

ANSWER: Yes; see *Lucas* v. *Jones*, (1844) 5 Q.B. 949, 114 E.R. 1506. Such receipts would come within the definition of "receipt" in s. 176 of the Stamp Duties Act, 1923.

4. Bankruptcy.—*Crown Lease—Assignment by Official Assignee—Consents Required.*

QUESTION: A., who is the owner of a Crown leasehold duly registered under the Land Transfer Act, is adjudicated a bankrupt on his own petition. The Official Assignee in Bankruptcy has agreed to sell the leasehold to B. Must the transmission to the Official Assignee in Bankruptcy and the transfer from him to B. be consented to by the Minister and the Land Board under s. 90 (*a*) of the Land Act, 1924? What other acts, if any, must B. perform before the transaction is completed?

ANSWER: Neither the transmission nor the transfer requires to be consented to under s. 90 (*a*) of the Land Act, 1924, which subsection appears to refer only to voluntary transfers and not to transfers *invitum* or by operation of law. In *Munro* v. *Pedersen*, [1921] N.Z.L.R. 115, G.L.R. 76, Salmond, J., pointed out that the restriction imposed by the statute was not upon the acquisition of the lease by the purchaser, but upon the assignment of it by the vendor; and he likened it to the restriction imposed on the lessee of private land by a covenant not to assign without the lessor's consent: see also *Doe d. Goodbehere* v. *Bevan*, (1815) 3 M. & S. 353, 105 E.R. 644; and *Wilkie* v. *Commercial Property and Finance Co., Ltd.*, (1890) 8 N.Z.L.R. 385; (*1936*) *12 N.Z. Law Journal*, 274. A transfer by the Sheriff would be in the same position.

Before going into possession B. must deposit with the Commissioner of Crown Lands the statutory declaration required by s. 90 (*b*) of the Land Act, 1924.

5. Land Transfer.—*Lease purporting to be inalienable—Whether registrable.*

QUESTION: Can there be registered under the Land Transfer Act a lease "for a term commencing on the 1st day of July, 1943, and ending on the 1st day of July, 1948, or on such earlier date as the said E. F. shall die or the lessees shall assign transfer mortgage underlet or part with the possession of the said lands or any part thereof or shall attempt so to do"?

ANSWER: Such a lease cannot be registered.

The duration of the term of a lease must in the first instance be fixed: *Garrow's Real Property in New Zealand*, 3rd Ed. 523. The words "after 1st day of July, 1948," are intended as a limitation of the term, and they are bad, because, if the term be fixed by reference to some collateral matter, such matter must either be itself certain, or capable before the lease takes effect of being rendered so: *Foa on Landlord and Tenant*, 6th Ed. 115.

An estate under the Land Transfer Act, it is conceived, cannot be made absolutely inalienable: s. 89 of the Land Transfer Act, 1915. It is submitted that novel and unauthorized restrictions and prohibitions against alienation cannot be made to attach to estates registered under the Land Transfer Act. A provision in a lease not to assign without the lessor's consent in the recognized conveyancing form is unexceptionable, but it was held in *In re Duggan*, (1882) N.Z.L.R. 2 S.C. 144, that a District Land Registrar cannot refuse to register a transfer of a lease in breach of a covenant not to assign without the lessor's consent. This lease appears to be an ingenious attempt to get over *In re Duggan*.

RULES AND REGULATIONS.

Marketing Department Advances Order, 1942, Amendment No. 1. (Finance Act, 1941.) No. 1943/133.

Board of Trade (Meat Grading) Regulations, 1943, Amendment No. 1. (Board of Trade Act, 1919.) No. 1943/134.

Matrimonial Causes Rules, 1943. (Divorce and Matrimonial Causes Act, 1928, and the Judicature Amendment Act, 1930.) No. 1943/135.

Emergency Fire Service Conditions of Service Order, 1941, Amendment No. 1. (Emergency Reserve Corps Regulations, 1941.) No. 1943/136.