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CRIMINAL LAW AND PRACTICE: SOME IMPORTANT OBSERVATIONS.

IT is generally accepted that the recently-retired Chief Justice, Sir Michael Myers, is one of the greatest authorities on criminal law and practice that we have had in this country. As he said in an address to the Grand Jury at the September sessions in Wellington, he had had fifty-four years' experience in the Courts. He was constantly in Court in attendance on one of the leaders of the Bar in his five years as a clerk; he was thirty-two years at the Bar, during the greater part of which he was Crown Prosecutor at Wellington; and, during his seventeen years on the Bench, his service in the administration of the criminal law added greatly to his experience in that branch of our legal system. Consequently, it would be a mistake if we did not place on record some extracts from his final pronouncement on certain aspects of criminal law, since they not only deserve the greatest respect, but they also should be recorded in this JOURNAL for the future guidance of the profession. As a matter of public interest and importance they are of permanent value.

CRIMINAL APPEALS.

His Honour first dealt with the subject of criminal appeals, with special reference to the Criminal Appeal Act, 1945, for which he could justly claim the credit of the introduction and passing. He said, in addressing the Grand Jury:

"Historically, legislation of this kind goes back to 1907 when its prototype was passed in England as the Criminal Appeal Act, 1907; and it was passed because of the agitation that arose in connection with the case of Adolph Beck, where it appeared that a man had been wrongly convicted on some two or three occasions. It was really a question of mistaken identity. The matter was very much discussed; and, as a result of that case, the Criminal Appeal Act was passed, and it was copied throughout the British Dominions except in New Zealand. It enabled appeals to be made by persons who had been convicted of crimes, against either conviction or sentence; against the sentence, on the ground of it being excessive. Up to 1920, there was no right of appeal in New Zealand against sentence. Shortly before 1920 there were two cases in one of which a woman was sentenced to twenty years' imprisonment, and that sentence aroused much public feeling. There was also a case in which a man was charged with manslaughter consisting of causing death by negligent driving. At that time a person could be charged only with manslaughter The offence known as negligent driving causing death was created by Parliament some years afterwards.

"I was interested professionally in the second of these cases, that is the case in which the accused was sentenced to seven years for manslaughter through negligent driving. I did not appear at the trial, but I did appear upon a petition to the House of Representatives. That was the only way in which, at that time, apart from an appeal to the Crown for clemency, the sentence could possibly be reviewed. The petition was presented to Parliament; and, on the hearing, I urged that there should be conferred upon a person convicted of a crime the right of appeal against sentence, and in 1920 the Crimes Amendment Act was passed giving such right of appeal; so that I think I may say that I was in part at least instrumental in the remedy being given to the subject by way of appeal against what he claimed to be an excessive sentence.

"As proof of the necessity for the remedy and justification of the legislation His Honour referred to the official publication, the *1945 New Zealand Year Book*, p. 134, under the title 'Justice':

> Particulars concerning applications during the last five years (1939 to 1943) for leave to appeal against sentences under the provisions of the Crimes Amendment Act, 1920, are: Applications filed, 235; granted 69, refused 160. Of the 69 cases in which leave to appeal was granted, the sentence was varied in all except six as a result of the appeal.

The learned Chief Justice continued:

"Since 1943, further justification has been shown. At one sitting of the Court of Appeal in 1944, there were thirty-three applications, and no fewer than thirteen reductions. In June, 1946, the last sitting, there were four reductions. So you will see that, however careful Judges may be, and they are careful, the remedy of an appeal for the reduction of sentences is just as necessary here as in England and other parts of the Empire. Notwithstanding the Act of 1920 we were still lagging behind England and other British countries. It is true that there was given, by the Crimes Act, 1908, a limited right of appeal, but only on questions of law. It had, however, been shown in England that miscarriage of justice happens otherwise than by mere mistake of law. The Legislature in England, in 1907, gave a person convicted a remedy which he did not have in New Zealand. The Criminal Appeal Act recently passed in New Zealand, however, permits the Court of Appeal, on any appeal against

conviction, to allow the appeal if of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, *or that on any ground there was a miscarriage of justice*."

Criminal Practice.

His Honour next referred to the refusal of a very experienced Judge of some years ago to accede to a jury's request that he should supply them with a copy of the official copy of the notes of evidence. Sir Michael said that the Judges in New Zealand are, he believed, as careful as any, but they are not infallible, and mistakes ocasionally arise. He took, as an example of what may occur, the following happening. In the words of the learned Chief Justice :

" In a case of many years ago, a Judge, who was regarded by us at the Bar as one of the wisest and most experienced Judges of his day, was trying Criminal cases. The jury asked him to supply them with the official copy of the notes of evidence. He refused, and the jury seem to have been somewhat annoyed at his refusal. This is what the learned Judge said :

> A member of the Bar who defends a great many prisoners but who was not in this case, remarked to me a few days ago that to give out the typed notes as suggested would, in his opinion, operate most unfairly against an accused person especially where the accused had not given evidence in his own behalf. The practitioner in question put it, that, after hearing the arguments of counsel for the defence, the jury would have put before them in writing everything that would tell against the accused and nothing in his favour : the effect of this would be as striking as if their witnesses gave their evidence over again—perhaps in some cases more so.
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> I agree with this criticism and think that it applies with almost equal force where the prisoner has given evidence. His evidence is generally of a negative character—denying certain statements made by witnesses for the Crown. The force of this would be greatly weakened, and, indeed, most unfairly weakened, if the Crown were allowed to answer it by again putting forward in print all the evidence that tells against the accused ; and even more so if something like this came from the Judge.
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> The matter now appears to me to raise a more serious question than occurred to me when I first wrote. After careful consideration of the position, I have come to the conclusion that thus to place something different from oral testimony before the jury is not only objectionable but illegal ; and that, without expressing with entire confidence the opinion that a conviction ensuing upon such a course would be quashed by the Court of Appeal, I can, with confidence, express the opinion that a conviction ensuing would not be regarded by sound lawyers as a satisfactory conviction. Our whole system is based on trial by oral evidence given in open Court, and no other is known to the Common Law of England, which is, in this respect, unaffected by the Crimes Act, or any other local legislation. A practice at variance with this was condemned in *The Queen* v. *Scaife*, (1851) 17 Q.B. 238 ; 117 E.R. 1271 ; and, though this case has been overruled on a point of procedure, its condemnation of the error still stands on the highest authority.
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> A Judge has no right to introduce novel procedure into the trial of criminal cases. In a case where this was done with far greater fairness than would be implied in what this jury asked for, the Privy Council, while, unable to quash the proceedings, expressed its disapproval of what had been done and virtually recommended the Government of New South Wales to reconsider the position. I call your attention to the case of *The Queen* v. *Bertrand*, (1867) L.R. 1 P.C. 520 ; and I would particularly ask you to read the general observations of the Privy Council commencing on p. 534 of the report. The actual result of that case is that the highest Court resists as far as it can the introduction of novel procedure, even when introduced with all fairness. The further result is that the consent of the prisoner or his counsel to a novel procedure is a nullity.
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> There was another appeal from New South Wales shortly afterwards. This was *The Queen* v. *Murphy*, (1868) L.R. 2 P.C. 35, where the irregularity was unknown to the Court which held the trial. Again an attempt by the Colonial Court to rectify the error was found by the Privy Council to be unauthorized ; but, again, that body virtually recommended the Crown to act on the opinion of the Colonial Court. In that case, what went before the jury was a newspaper report of the pending case with a flaming headline. What would have gone before this jury under their request would have been a typed copy of the evidence heavily underscoured for my own purposes.
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> In this country the same difficulty of procedure would not arise. Thus, in the case of *Rex* v. *Boakes*, (1911) 31 N.Z.L.R. 449, where the authority of the Court of Appeal was found insufficient to rectify certain unfair procedure in the conduct of a Crown case, the Governor-General set aside the verdict under his special power to grant a new trial.
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> It seems to me probable, however, that, if the Court of Appeal had before it a case of error in the action of the Judge, it could quash the conviction."

The learned Chief Justice added that, with great respect to the learned Judge, he thought that, at that time, there being no Criminal Appeal Act, the Court of Appeal would not have had the power to quash the conviction. The learned Judge said, in conclusion,

> Apart, however, from the legal objections, I am strongly impressed with the unfairness and impropriety of acceding to such a request as was here made.

In commenting on the foregoing opinion, Sir Michael Myers said :

" Another Judge might perhaps have permitted the notes of evidence to be handed to that jury. Personally, I have no doubt that nowadays there would be a remedy under the Criminal Appeal Act ; though I think there would have been none previously. It shows you how quite innocently a Judge might be led into a mistake. The administration of justice must be guarded against this. We now have a remedy for an accused person which was not open to him before the Criminal Appeal Act, 1945. The object of the Act is to prevent miscarriage of justice, or to remedy it when it has occurred. The Act has been exceedingly useful in other British countries, and will be as useful here, if it is administered, as I cannot doubt it will be, in the spirit which has been breathed into it by the Courts of Criminal Appeal in England and elsewhere."

The Jury System.

The jury system was the next topic to which the learned Chief Justice directed his attention. We know that, from time to time, in recent years there have been suggestions that the Grand Jury should be abolished, and, in its place, some system should be evolved for the presentation of indictments at the criminal sessions. The efficacy and justice of the jury system are frequently matters of debate amongst lawyers, legislators, and laymen alike. Again, His Honour's views on this subject are entitled to great respect. He said :

" We have heard it suggested that the Grand Jury is of no use and should be abolished. I am satisfied that that is wrong. I have said so many times. I say it again on the last occasion on which I shall be addressing a Grand Jury. I am satisfied that the Grand Jury has both present and potential practical usefulness,

It is a venerable and very valuable institution. It helps to maintain the interest of the public in the administration of justice by the Courts; and that, in itself, is a matter of great importance. It gives the Grand Jury the right as representatives of the citizens to make presentments to the Court on matters of public interest. It gives the presiding Judge the opportunity of keeping the public acquainted with matters affecting the law and the administration of justice. I have always said, and I repeat, that to abolish the Grand Jury would be in my opinion a retrograde step.

"But the institution of the Grand Jury yields in importance to our system of trial by jury in both criminal and civil cases. I have now had over fifty-four years' experience of the jury system, so I may claim to speak with some authority of the jury system, its merits, and defects. I would be the last to say that occasionally you do not find a miscarriage of justice; but I do not hesitate to say that there is a great deal more talk about the miscarriage of justice by juries than actually happens. There have been occasions when I have perhaps thought, on a jury coming back with a verdict with which I did not agree, that there was a miscarriage of justice; but, in at least some of those cases, I have on more mature consideration seen that there was a good deal more reason and justice in the verdict than at first sight appeared and that the jury's view was not a mistaken one. One hears it sometimes suggested that the verdict of a single Judge would be better on questions of fact than that of the jury. I do not agree. Even a trained Judge may have his idiosyncracies, and different Judges are just as likely to come to different conclusions on the same facts as different juries.

"My considered opinion is, that if you have twelve honest intelligent citizens deciding questions of fact, there is more likelihood of their coming to a correct conclusion after joint discussion and deliberation than any other tribunal I know or can think of. Of course the system is not perfect; but is there any system that is perfect? It may be that at time I have spoken in a way which might have led to the assumption that I had some dislike of trial by jury. Any such assumption would be wrong. When I made observations of that kind, there was method in my madness. My desire was to promote a healthy public discussion, when I thought that possibly something might be going wrong. The jury system in both Criminal and Civil cases should in my opinion remain intact. I would retain the requirement of unanimity in criminal cases; at all events, unless and until it is definitely shown that you cannot rely upon the honesty and intelligence of jurors. So long as we have jurors of intelligence and honesty, as on the whole we have now, there should be no interference with the existing system of trial by jury."

Women Jurors.

The Women Jurors Act, 1942, passed through Parliament without much consideration being given it by the profession. The general opinion, immediately after its becoming law and since, appears to be that it was an ill-conceived piece of legislation, and had little practical value even from the viewpoint of those who for many years had advocated the employment of women jurors, and the hearing of cases, especially where women and children are concerned, by a Judge and a mixed jury. His Honour had something to say about this statute, as a qualification to what he had said about the keeping intact of the jury system as it has been known since the very foundation of New Zealand as a legal entity. He said:

"But what I have said of the system being kept intact requires a qualification. It is this. In 1942, there was passed an Act called the Women Jurors Act. I have asked the Sheriff to supply me with certain information, and he has supplied me with the following particulars. There are on the Wellington jury roll 7,650 names. Under the Women Jurors Act, service is not compulsory: it is voluntary, and a woman must inform the Sheriff if she desires to serve. In 1943 there were seventeen names supplied by women, in 1944 none, in 1945 there was one, and in 1946 two. The number of women jurors drawn on panels since the passing of the Act is one. The number of women to have served on juries is nil; and, so far as I know, there is only one case in the whole of New Zealand in which a woman has ever served on a jury. And at present the number of women is ten—ten out of 7,650 names on the roll. When one considers the fuss and argument prior to 1942 about giving the right to women to serve as jurors, and when one looks at the result, one is reminded of what was said by an ancient learned Roman author, *Parturiunt montes, nascitur ridiculus mus*. Is it right to keep an Act like that on the Statute Book? What I suggest is this: that either jury service for women should be compulsory, as with men, as both a duty and a privilege, subject of course as in the case of men to proper exemptions; or else the Act should be repealed.

Sentences on Convicted Persons.

The learned Chief Justice finally considered the question of sentencing convicted persons. This, he said, as the result of a very long experience, was perhaps the most difficult, and certainly the most responsible, part of a Judge's duty. He continued:

"Sentences, whether long or short, are always liable to be the subject of public criticism. No matter how great the public criticism, the Judge should never let himself be moved by it. He must remain unmoved by criticism or panic, and impose what he thinks is the sentence appropriate in the circumstances of each individual case.

"I know, for example, the criticism that has been made in regard to conversion of motor-cars; and one cannot help noticing that there seems to be a general opinion amongst motorists that sentences are too lenient. Some actually may be. But the Courts must be careful to see that the pendulum does not swing too far the other way. Only recently I had to consider an appeal by two young men of twenty-one years of age who had been charged with converting a motor-vehicle and sentenced by a Magistrate to six weeks' imprisonment. It was quite clear in that case that these two young men had no intention of stealing. The vehicle they took was an Air Force vehicle, and they were members of that Force. The evidence showed they took it when they had had too much to drink: they drove it a few miles into the suburbs, and returned it the same night within a few hours after taking it. It was a prank which required some sort of punishment; and I should have thought that they could have been punished or disciplined by the military authorities. But they were sentenced by the Magistrate to six weeks' imprisonment. It was their

first offence. I simply refused to send those two young men to prison. I cancelled the sentence and substituted a fine of £10. I think it was ample punishment for the offence. If every person who converts a motor-car were to be sent to gaol you would be making a great many criminals. Personally, I hope I have never been a party to that, and I refused to be on this occasion.

"I am always conscious of the grave responsibility to which Lord Hewart, a former Lord Chief Justice of England, was wont to refer of sending a young man to prison for the first time. Of course it has to be done at times; but one should always remember that the Court must endeavour as far as possible to avoid making criminals, and should give the young offender, wherever possible, the opportunity of becoming a decent citizen. It is surely better in the interests of society to convert a potential or even an actual criminal into a decent citizen than to convert a potentially decent citizen into a criminal.

"The view that I have always acted upon in sentencing prisoners is that moderation, and indeed leniency, should be shown wherever possible, and many offenders, though by no means all, have responded to that treatment. I have always considered that severity should be reserved for the perpetrator of crimes of violence, the ravisher of women, the offender who debauches or interferes with young girls, the contaminator of the youth of the community, and the offender who in crimes involving dishonesty has shown himself to be a hopeless incorrigible. It is always a comfort to know that even in those cases where one is conscious of, and intends to impose, a severe sentence, the offender has the right to appeal to the Court of Appeal for a reduction of his sentence if he considers it excessive. If in the generality of cases it has been suggested—as I have been told it has been—that my sentences have been too lenient, I can only say that I would much rather have it that way than have it on my conscience that they had been too harsh."

SUMMARY OF RECENT JUDGMENTS.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. INWOOD AND OTHERS.

COURT OF APPEAL. Wellington. 1946. June 27, 28; July 11. JOHNSTON, J.; FAIR, J.; CORNISH, J.

Probate and Administration—Will—Mutual Wills—Two Sisters One Signing Will of other—Each Will giving Life Interest to Named Sister and Residue to same Niece—Operative part of Will Expressing Testatrix's intention if Christian Name of the Sister Beneficiary omitted—Evidence—Admissibility of Explanation of Inappropriateness of Opening Words and Attestation Clause and Identity of Testatrix in Circumstances of Execution—Power of Court to omit Unnecessary Words to effect Intention of Testatrix—Probate granted with Omission of Sister's Actual Christian Name.

Two sisters, Maude Lucy Remington and Jane Remington, had decided to make identical wills apart from the life interest given to each other. Two wills were drawn up for them, but, by mistake, each was given and executed the will that should have been signed by her sister. The operative part of the will signed by Jane would have expressed the real intention of the testatrix had the words "Maude Lucy" been substituted for the word "Jane," or the name after the words "my sister" omitted.

In an action for probate in solemn form of the will signed by Jane Remington, moved by consent into the Court of Appeal,

Held, 1. That if the document were admissible to probate, then evidence was admissible to show, and did show, that the names in the opening words and in the attestation clause of the will were inappropriate, but neither of those parts of the will was a necessary or an essential part of the will.

Whyte v. *Pollok*, (1882) 7 App. Cas. 400, applied.

2. That words and clauses inadvertently introduced into the testamentary document without the knowledge and instructions of the testatrix may be rejected, and the remaining portion of the will alone admitted to probate.

Morrell v. *Morrell*, (1882) 7 P.D. 68, *Fulton* v. *Andrew*, (1875) L.R. 7 H.L. 448, *In re Boehm*, [1891] P. 247, *Re Cogan*, (1912) 31 N.Z.L.R. 1204, *Tartakover* v. *Pipe*, [1922] N.Z.L.R. 853, and *Isaac* v. *Mills*, (1887) N.Z.L.R. 5 C.A. 122, applied.

3. That the operative part of the document propounded expressed exactly the testamentary intentions of the signatory except the inclusion of the word "Jane," which was at least a latent ambiguity; and the Court on ascertaining the person referred to had power to strike out the word "Jane" inserted by mistake.

4. That the testatrix knew and approved of the effective provisions contained in the document she signed, which could be read as carrying out her intentions; and the document was admissible to probate.

In re F.S., (1850) 14 Jur. 402, *In re Hunt*, (1875) L.R. 3 P. & D. 250, and *In re Meyer*, [1908] P. 353, distinguished.

The modern practice of the Court's direction for the omission from the probate of words introduced into a will by mistake, discussed.

Probate of the will was therefore granted with the omission of the word "Jane" from the will; and it was directed that the probate be noted as follows: "The Court, being satisfied that the copy of the will submitted for probate is a true copy of the will of Jane Remington and that it was duly attested and is otherwise entitled to probate, grants probate of it as her will."

Counsel: *Loughnan* and *Amodeo*, for the plaintiff; *Brassington*, for the first two named defendants; *Hutchison*, for the remaining defendants.

Solicitors: *Cassidy, Amodeo and Jacobson*, Christchurch, for the plaintiff; *Brassington and Gough*, Christchurch, for the first two named defendants; *J. J. Dougall, Son, and Hutchison*, Christchurch, for the remaining defendants.

MOON v. KENT'S BAKERIES, LIMITED.

COURT OF APPEAL. Wellington. 1946. June 25, 26; July 18. MYERS C.J.; BLAIR, J.; JOHNSTON, J.; FAIR, J.; CORNISH, J.

Annual Holidays—Holiday Pay—Baker—Award providing for Increase of Pay for Work before 4 a.m.—Forty-four-hour Week inclusive of those Hours—Whether Annual Holiday Pay computed with respect to such Increase—"Ordinary time rate of pay"—"Workers' normal weekly number of hours of work"—"Rate"—Annual Holidays Act, 1944, ss. 2 (1), 3 (1).

The Annual Holidays Act, 1944, is for the benefit of the individual worker, and not for a class: and each individual worker's claim to holiday pay must be decided in the light of the circumstances affecting that particular individual.

Booth, Macdonald, and Co., Ltd. v. *McGregor*, [1941] N.Z.L.R. 181, applied.

The statute contemplates that the worker is to have an annual holiday of two weeks on ordinary pay, which means, that his holiday pay is to be the pay which he has been ordinarily and normally receiving for his normal week's work, exclusive of overtime, and of what may be defined as "extras" or "perquisites": subject to those exceptions, the worker is to have his holiday pay without loss to himself.

The meaning to be attached to the words "ordinary time" "rate of pay" if fully expressed, would read as follows: "The rate of pay for the worker's normal weekly number of hours of work calculated at the rates of pay habitually and usually paid to him in respect of such work exclusive of overtime and the rates paid to him in respect of it."

Consequently, where a worker's normal weekly hours of work and his ordinary time rate of pay are fixed by the terms of his

employment, the weekly sum so earned is within the words of the definition of "ordinary pay."

Thus, where, as in this case, it was a term of the worker's employment that he should start work earlier than 4 a.m., and that he should be paid an additional 2s. an hour for each hour worked before 4 a.m., this was an integral and fundamental term of that employment, and the extra 2s. per hour became part of the worker's "ordinary pay." Moreover, the sum of the two amounts, the wages prescribed for the worker's forty-four-hour week and the 2s. an hour for the hours worked before 4 a.m., represented his "ordinary time rate of pay" for his normal weekly number of hours of work fixed under the terms of his employment. He was, therefore, entitled to receive as holiday pay his actual average weekly pay, exclusive of overtime, as, in this case, the number of "ordinary hours" worked before 4 a.m., was not the same in every week, and an average of the different weekly amounts or "rates" had to be taken.

So held by the Court of Appeal (*Myers*, C.J., *Fair*, and *Cornish*, JJ., *Blair* and *Johnston*, JJ., dissenting), reversing the judgment of *Callan*, J., reported, *ante*, p. 47.

Counsel: *Cooke*, K.C., and *Dickson*, for the appellant; *Alderton*, for the respondent.

Solicitors: *J. F. W. Dickson*, Auckland, for the appellant: *Lisle Alderton and Kingston*, Auckland, for the respondent.

THE KING v. CLARK

COURT OF APPEAL. Wellington. 1956. April 8, 9, 10; June 24. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Criminal Law—Forgery—Oil Fuel License signed by Person entitled to issue same, but in Name of Fictitious Person—Whether a "false document"—"False document"—"Material part"—"Intention that it [a false document] shall in any way be used or acted upon as genuine"—Crimes Act, 1908, ss. 288, 290.

Criminal Law—Trial—Judge's Direction that only two Issues of Fact arose—Whether Document False and Whether Accused made it with Intention that it should be acted upon as Genuine—Direction (in effect) that Jury should bring in a Verdict of "guilty"—No Direction as to Burden of Proof—Verdict set aside—Appellate Court's Discretion—Acquittal entered—Crimes Act, 1908, s. 442—Criminal Appeal Act, 1945, ss. 3, 4.

Accused was arraigned upon an indictment charging him on each of six separate counts, with forging a special oil fuel license (each with a specified number), purporting to have been signed by a specified person with the intent that the same should be acted upon as if it were genuine.

The accused was Chief Postmaster at Auckland, and, as such, was District Oil Fuel Controller. He had power to issue licenses. The licenses could be signed by him or by any officer directed by him to grant them. He admitted that he had signed the six licenses with fictitious names where a space was left for the signature of the issuing officer. In a statement signed by him, he said:

> These names are not the names of any person known to me and I have no particular reason for signing such names . . . I issued them as genuine licenses, after proper inquiry, and, on being satisfied that they should be issued, . . . I did not tell any of the license-holders to destroy the licenses. I have never derived any benefit personally from any license issued by me. No record was kept by me of the licenses issued. No written applications were made in respect of the six licenses.

Each license bore a date-stamp. The licensees obtained oil fuel upon the production of the said licenses.

At the close of the evidence, as counsel for the Crown was addressing the jury, the question arose as to what was "a material part" of a document. The learned trial Judge ruled that the signature of an Issuing Officer was a material part of the license, and that the presence in the licenses of purported signatures of non-existent officials rendered them false documents. He ruled further that only two questions of fact arose for determination: (i) Whether the documents were false, which was admitted by the accused, who admitted that he knew that the purported signatures were fictitious. (ii) Whether the accused made false documents with the intention that they should be acted upon as genuine. He also rules that counsel for the accused could address the jury on those two questions of fact only.

Counsel for the accused claimed the right to address the jury upon the whole case. In the course of the discussion that ensued the learned Judge said: "I am prepared to tell the jury that there is no controversial matter of fact, and that (as a matter of law) there is only one verdict they can bring in." Counsel then intimated that he preferred not to proceed. The learned Judge directed the jury that there were only two question of fact which were beyond controversy and only one possible verdict. The jury accordingly returned a verdict of "Guilty on all counts."

The learned Judge did not sentence the accused, but released him on bail and stated a case for the opinion of the Court of Appeal under s. 442 of the Crimes Act, 1908. The accused also appealed under the Criminal Appeal Act, 1945, against his conviction.

Held, by the Court of Appeal, That the verdict and conviction must be set aside, and that the Court should in its discretion direct a judgment and verdict of acquittal to be entered for the following reasons respectively.

Per *Myers*, C.J., *Blair* and *Finlay*, JJ., 1. That there were questions of fact for the jury to determine after a proper explanation of the law by the Judge—*viz.*, (i) Whether the signature to the license was material and whether the documents were false documents within the meaning of those expressions in s. 288 of the Act. (ii) Whether the accused honestly believed that he had authority to sign the licenses as he did and whether he signed and issued them believing that he had a right to do so; and (iii) Whether the signature was a material part of the document.

R. v. Stewart, (1908) 27 N.Z.L.R. 682, referred to.

2. That the learned trial Judge in actually (or in effect) directing the jury to bring in a verdict of guilty, had infringed the fundamental right of an accused person to have the facts of the case determined by the jury; as he had not informed the jury that the charge must be established beyond all reasonable doubt and that the onus of proof was on the Crown.

Per *Kennedy*, J., 1. That, the learned trial Judge, in ruling that the documents were false documents, determined, as wholly of law, matters which were essentially questions of fact and for the determination of the jury, or, having regard to any incidental direction on law mixed question of law and fact.

2. That the question whether the accused made the documents, whether they were false documents, whether the documents purported to be made by or on behalf of some person who did not in fact exist, and the materiality or not of the part of the document, wherein it was alleged falsity lay, were all either questions of fact or involved such questions, which were for the jury subject to a proper direction.

3. That the result of the learned trial Judge's confining the questions of fact to be decided by the jury to the two specified by him, was to take a verdict upon issues which were not exhaustive; and consequently, the jury had not really pronounced upon all the issues of fact.

4. That the learned Judge had, in effect, prevented counsel for the accused from addressing the jury upon the whole case, and had not given the usual direction as to burden of proof.

Per *Callan*, J., 1. That, inasmuch as issues of fact, as well as questions of law, were involved in the question whether the licenses were "false documents," that question should have been left to the jury; but, as, upon the evidence, a jury properly directed should have answered it against the accused, no miscarriage of justice resulted from the course actually taken as to that part of the case.

2. That s. 290 (1) of the Crimes Act, 1908, does not make criminal such falsity as is irrelevant to the accomplishment of deceit; and if a man is to be convicted of forgery, an intention to deceive by means of that which is false must be established by such an accusation as was contained in each count of this indictment—namely, an accusation that he made a false document, knowing it to be false, with the intent that it should be acted upon as if it were genuine; the question whether he had the necessary intention was for the jury, and that precise question was not put to them; and, therefore, the conviction could not stand.

3. That nothing in the evidence justified the conclusion that the falsity in the licenses—*viz.*, the use of fictitious names—was inserted by the accused in these licenses with the intention that this false matter should in any way induce any one to use or act upon the licenses.

Therefore, the conviction should be quashed.

Counsel: *Currie* and *Rogers*, for the Crown; *Johnstone*, K.C., and *Henry*, for the appellant.

Solicitors: *Crown Law Office*, Wellington, for the Crown; *Wilson, Henry, and McCarthy*, Auckland, for the accused.

REFRESHER COURSE.—5

THE LAW OF WILLS AND ADMINISTRATION.

Changes and Developments Since 1939.

By J. P. McVeagh, LL.M.

Succession on Intestacy.—The most important statutory provision since 1939 affecting the administration of deceased persons' estates is the Administration Amendment Act, 1944, which provides for a new order of succession in the case of persons dying intestate or partially intestate after December 31, 1944. It is not proposed to deal in this article with the effect of that statute as its provisions have been extensively reviewed in a series of articles in (1945) *21 New Zealand Law Journal*, commencing at p. 29.

Wills in Anticipation of Marriage.—By s. 7 of the Law Reform Act, 1944, a will made after the passing of that Act and expressed to be made in contemplation of a marriage shall not be revoked by the solemnization of the marriage contemplated. In *Re Hamilton*, [1941] V.L.R. 60, it was held that the will itself must express that it is made in contemplation of the particular marriage.

Promises to make Testamentary Provision.—Estates of deceased persons may now be made liable by s. 3 of the Law Reform Act, 1944, to remunerate persons for work done under a promise of testamentary provision: for an application of this section and the observations of the Court on the nature of the evidence required, see *Bennett* v. *Kirk*, (To be reported.) ——

Trust Companies.—Section 3 of the Statutes Amendment Act, 1945, makes provision for letters of administration with or without the will annexed to be obtained by a trust company in its own name and a grant is no longer made to a syndic or nominee of the company. Provision is made in the section for trust companies, on whose behalf a syndic had previously obtained a grant, to take over the administration and for the appropriate transfer of title to property which is in the name of the syndic.

Soldiers' Wills.—The Soldiers' Wills Emergency Regulations, 1939 (Serial No. 1939/276), extend the operation of s. 11 of the Wills Act, 1837, as extended and explained by s. 34 of the War Legislation Amendment Act, 1916, and s. 23 of the War Legislation and Statute Law Amendment Act, 1918. It is not proposed to deal in this article with the effect of these regulations, but reference should be made to articles on Soldiers', Sailors' and Airmen's Wills, appearing in the *New Zealand Law Journal*, Vol. 16, p. 148 and Vol. 17, p. 157. It is important to note that, whereas under s. 34 (2) of the War Legislation Amendment Act, 1916, no will made during the 1914-1918 War with Germany which depended for its validity on s. 11 of the Wills Act, 1837, should have any force or effect unless the testator died during that war or within six months after its termination. There is no similar provision relating to wills made during the recent war. As the law at present stands, wills made during the recent war which depend for their validity on s. 11 of the Wills Act, 1837, as extended and explained by the New Zealand legislation of 1916 and 1918 and by the said regulations will remain valid indefinitely until effectively revoked.

The Soldiers' Wills Emergency Regulations, 1939, Amendment No. 1 (Serial No. 1942/229) apply to Native members of the forces. In brief, the amendment, after declaring that s. 11 of the Wills Act, 1837, shall not apply with respect to any Native, provides that in any case where a will has been made *in New Zealand* by any Native member of the forces which does not comply with the requirements of s. 170 of the Native Land Act, 1931, the Native Land Court may grant probate or letters of administration with the will annexed or succession orders in pursuance of the dispositions of the will.

In the case of wills of Native members of the forces made outside New Zealand the position now is that their validity depends upon s. 170 (4) of the Native Land Act, 1931, which provides that a will may be executed by a Native in any place out of New Zealand in the same manner as if he was a European. This must now be qualified by the provision mentioned above that no Native may make a will which depends for its validity on s. 11 of the Wills Act, 1837.

Case Law.

The difficulties which always have, and no doubt always will, beset the path of executors in endeavouring to interpret the language of the departed testator, or to apply his language to circumstances, which were apparently not in his contemplation when he made his will, have resulted in the customary large section of the reports being devoted to decisions relating to the law of wills and administration. This article cannot hope to be a digest of the many decisions on that branch of the law since 1939, but is intended as a summary of the more important decisions which define matters of principle or illustrate the modern application of established rules. For the sake of convenience in reference, the decided cases are grouped as far as possible under the same headings and in the same order as the subject-matter in *Garrow on Wills and Administration*.

Execution of Wills: Signature.—In *In re Mann*, [1942] 2 All E.R. 193, testatrix wrote out her will on a sheet of notepaper. One of the two witnesses was present during the whole of the time testatrix was so engaged and the other was present during the completion of the latter part of the paper. After completing the paper testatrix wrote on an envelope the words "The last will and testament of Jane Catherine Mann." She then asked both witnesses to witness the documents as her will and they thereupon signed as witnesses at the foot of the sheet of notepaper which testatrix then placed in the envelope. The Court held that the sheet of paper and the envelope together constituted deceased's will and granted probate accordingly. The decision is an interesting illustration of the extent to which the Court is prepared to go, in suitable circumstances, in deciding whether or not a testamentary document has been "signed at the foot or

end thereof" for the purposes of s. 9 of the Wills Act, 1837, as amended and explained by The Wills Amendment Act, 1852.

This decision has been followed in New South Wales in *In the Will of Lilla Blanche Curry*, (1946) 46 N.S.W. S.R. 158, where the facts were very similar. In this case testatrix's signature on the envelope was not written in the presence of the witnesses, but was later acknowledged by her as her signature in their presence.

A somewhat similar case in which the decision was against a grant of probate was *In the Estate of Bean*, [1944] P. 83, where Hodson, J., distinguished *In re Mann* (*supra*), on the ground that the endorsement on the envelope was put there for the purpose of identifying the contents and was not intended by the testator as a signature to his will. The *intention* of the testators in *Mann's* case and in *Curry's* case that the writing on the envelope was to be considered his signature to the will was a very important factor in these decisions.

Attestation.—It is a well known provision of the Wills Act that if a beneficiary or the spouse of a beneficiary attests the will his attestation is in order, but he or his spouse as the case may be forfeits the benefit.

In *In re Priest, Belfield* v. *Duncan*, [1944] 1 All E.R. 51, testator who was at the time domiciled in England and whose estate consisted solely of moveable property, executed in Scotland a holograph will in the presence of two witnesses one of whom was the husband of one of the residuary beneficiaries. It was contended on behalf of that beneficiary that, as under the law of Scotland, a holograph will disposing of an estate, which consists wholly of personalty, does not require attestation, Lord Kingsdown's Act operated to make the gift of that beneficiary valid. Bennett, J., rejected that argument and decided that testator had not intended to make an unattested holograph will disposing only of personal property which was to have legal operation and effect by force of the combination of the law of Scotland relating to holograph wills and Lord Kingsdown's Act. Testator had in fact executed in Scotland a will in the form required by the law of England and the wife of the attesting witness accordingly forfeited her share in residue.

Incorporation of Documents.—It is a well settled rule that a gift in a testamentary document by reference to a then existing and identifiable document will be valid. In *In re Jones, Jones* v. *Jones*, [1942] 1 All E.R. 642, the Court had to decide the effect of a gift to certain college trustees upon the terms of a declaration of trust then existing, but not set out in the will, "or any substitution therefor or modification thereof or addition thereto which I may hereafter execute." The Court held that the whole gift failed as otherwise power would be given to change a testamentary disposition by a codicil not executed in accordance with the Wills Act. Furthermore the Court ruled that no inquiry could be made as to whether or not any subsequent document had in fact been executed as the original gift was expressed in the alternative and therefore failed for uncertainty.

Contract to Leave Property by Will.—A contract to leave property by will must now be read subject to the provisions of the Family Protection Act, 1908, and a person, to whom testator leaves property in fulfilment of such a contract, must be regarded not as a creditor of the estate but as a beneficiary whose rights are subject to the statute: *In re Dillon, Dillon* v. *Public Trustee*, [1941] N.Z.L.R. 557 (J.C.). It should be noted that s. 3 of the Law Reform Act, 1944, referred to above now authorizes the Court to award remuneration to persons for work done by them under promise of testamentary provision.

Informal Wills of Soldiers, Sailors and Airmen.—As was to be expected, war conditions were responsible for a number of decisions on the operation of s. 11 of the Wills Act, 1837, under conditions of modern war. The development of the air weapon and the involvement of the whole population in war operations produced new circumstances not hitherto encountered.

The most important New Zealand case on the subject was *In re Rumble*, [1944] N.Z.L.R. 94, in which Sir Michael Myers, C.J., held that a member of the Territorial Forces which had been called out for the defence of New Zealand, who was in camp, and made a soldier's will while New Zealand was in peril of attack, was a soldier "in actual military service" within the meaning of s. 11 of the Wills Act, 1837. An important factor in that case was that Japan had shortly before entered the war and New Zealand was in peril of bombardment or invasion. It would not necessarily be followed in the case of a will made at a later stage of the war, say after the Battle of the Coral Sea, or after the landing of United States Marines on Guadalcanal.

In *In re Godfrey*, [1944] N.Z.L.R. 476, it was held that a marine engineer on his ship in the Suez Canal zone was "a mariner . . . being at sea" within the meaning of s. 11 of the Wills Act, 1837.

In re Spark, [1941] 2 All E.R. 782, decided that a soldier serving in the Army in camp in England in time of war was a soldier in actual military service. *In re Rippon*, [1943] 1 All E.R. 676, carried the matter somewhat further by deciding that a Territorial Officer called up for service shortly before the outbreak of war, when the international situation was extremely critical, was also a soldier in actual military service. In *In re Gibson*, [1941] 2 All E.R. 91, Henn Collins, J., declined to accept as a soldier in actual military service an officer of the Dental Corps who performed his duties at Command Headquarters, but lived at home. Some of the dicta in this decision was criticised by Lord Merriman in *In re Anderson, Anderson* v. *Anderson*, [1943] 2 All E.R. 609. In that case the Court had to consider the position of a member of the Home Guard. While conceding that under certain circumstances a member of the Home Guard would be a soldier in actual military service the Court held that on the facts of that particular case he was not a soldier as he was not on duty at the time he made his will and was at the time a civilian. In *In re Rowson*, [1944] 2 All E.R. 36, a member of the W.A.A.F. was held in the particular circumstances of that case to be a soldier in actual military service.

Revocation of Wills: Dependent Relative Revocation.—If a testator purports to revoke his will with the intention of setting up an earlier or later will the testator's act is conditional on his being able to effect that purpose, and if that purpose fails there is no revocation. An example of this was seen in *Henry* v. *The Guardian, Trust, and Executors Co. of New Zealand, Ltd.*, [1944] G.L.R. 200, where testator destroyed a will made in 1943 and two earlier wills under the impression he would thereby revive a will made in 1895. It was held that as he had not by his act revived the 1895 will his purported revocation of the 1943 will was ineffectual

and that will was admitted to probate. In *In re McKay, Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Johnson*, [1946] N.Z.L.R. 95, testator by a codicil to his will revoked legacies to several beneficiaries described therein as having predeceased him. One of them was in fact still living and it was held that the revocation so far as the legacy to him was concerned was inoperative. The doctrine was applied in *In re Brown*, [1942] 2 All E.R. 176, where the will which purported to revoke an earlier will was incomplete and there was evidence that the revocatory clause was inserted in the later will conditional on it being a complete disposition of testator's property.

Revival of Revoked Will.—In *In re Mardon*, [1944] 2 All E.R. 397, testatrix had executed three wills each of which revoked all prior wills. She gave her solicitor instructions to prepare a codicil referring to provisions in her first will. The codicil did not confirm the whole will. It was held that the codicil revived the clauses in the first will referred to in the codicil but not the whole of the first will.

In *Perpetual Trustees Co.* v. *Wheeler*, [1946] G.L.R. 125, testatrix died leaving two wills, the second of which revoked the first and a codicil which was expressed to be a codicil to the first will and referred to some of its terms and expressly confirmed it. It was held that the earlier will was revived, and the second will revoked.

Codicil: Effect on Construction.—The general rule in the interpretation of a will and codicil is that the Court should first interpret the will and then see to what extent testator has by his codicil altered the dispositions of the will. An exception to this rule is illustrated in *Re Huddleston*, [1946] G.L.R. 127, where the codicil was not an addition to the main terms of the will but was in effect a substitution of a new will with regard to the greater portion of the estate.

Gifts to a Class.—There are rules of convenience to ensure that a class will be ascertained as soon as possible so that the beneficiaries will not be kept in a state of uncertainty as to their rights and the executor may be able to complete the administration as soon as possible. An example of one of these rules that if there is a present gift then the class is closed on the death of the testator is seen in *In re Boyd*, [1940] N.Z.L.R. 560. Where a fixed sum is bequeathed to each member of a class such as the children of a third person, the class as a general rule will be closed at testator's death. This, however, must be construed subject to the provisions of the will and does not apply where testator has set aside a fixed sum to answer the legacies: *In re Bellville, Westminster Bank, Ltd.* v. *Walton*, [1941] 2 All E.R. 629.

As an example of the application of the rule of convenience see *Re Pears, Union Trustee Co. of Australia, Ltd.* v. *Hives*, [1940] St. R. Qd. 296, where the Court fixed the date of death of the life tenant as the time for ascertaining the class, the gift in that case being to beneficiaries *surviving* the life tenant.

Gifts to Illegitimate Persons.—In a gift to persons described only by their relationship to testator or to some other person *prima facie* only persons legitimately related will be entitled to take. The effect of legitimation *per subsequens matrimonium* has come before the Courts on several occasions. In *In re Hoff, Carnley* v. *Hoff*, [1942] 1 All E.R. 547, a special power of appointment among any child or children of the appointor was vested in him under the will of a person who died in 1861. The appointor exercised the power in favour of two children born illegitimate but subsequently legitimated. It was held that the appointees were not objects of the power as the will under which the appointees took, came into operation before their legitimation. In *Re Luck, Walker* v. *Luck*, [1940] 3 All E.R. 307, the Court refused to recognize a status of legitimacy conferred by the law of a foreign state: see also *In re James*, [1942] V.L.R. 12. Where a status of legitimacy is conferred by the law of a state other than that of the state according to which a will has to be construed it therefore does not always follow that such status will be recognized as entitling the legitimated person to share.

As an example of a contrary intention, so as to bring in illegitimate children, see *In re Stevenson*, [1943] G.L.R. 324.

Mode of Taking: Gifts per Stirpes.—In a gift to the issue or descendants of several persons *per stirpes* the distribution will depend on what are to be taken as the original stocks. No general rule can be laid down and each case must be determined according to the words of the will under consideration. In *Sidey* v. *Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd.*, [1944] N.Z.L.R. 891, the Privy Council held that on the wording of the will which directed stirpital division in a clause referring to testator's own children, these children should form the stocks of descent.

In *In re Matthews*, (1941) 15 A.L.J. 254, the High Court of Australia had to consider not only what should be taken as the original stocks, but also the interesting point of the effect of intermarriage between members of two different stocks. On the latter point the Court held that the descendants were entitled to share by way of representation in both the interests which their father and mother would have taken.

Prima facie, a direction to divide between A. and the children of B. imports a division *per capita* among the whole class consisting of A. plus B.'s children. The Court refused to displace this general rule in *Re Alcock, Bouser* v. *Seville*, [1945] 1 All E.R. 613, on the ground that there was no context to justify any modification of the rule, but in *Re Daniel*, [1945] 2 All E.R. 101, the Court held that there was a context sufficient to justify a distribution *per stirpes*. In that case the direction was to distribute between testatrix's sister A., her children to take her share should she predecease testatrix, the children of her sister B. and the children of her brother C.

Period from which a Will Speaks.—In *In re Rowling, Ellis* v. *Rowling*, [1942] N.Z.L.R. 88, Sir Michael Myers, C.J., had to determine (*inter alia*) whether in a gift of "any money on deposit in my name in any bank" having regard to other context in the will there was any indication of a contrary intention within the meaning of s. 24 of the Wills Act, 1837, so as to limit the gift to money on deposit at the date of the will. He held that no such contrary intention had been shown.

(To be concluded.)

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 79.—P.T. to B.

Rural Land—Farmlet outside Borough Boundaries—Subdivisional Potentiality—Unsuitability as Market-garden—Average Farm Land in Borough Vicinity.

Appeal by the Crown against the finding of the Hawke's Bay Land Sales Committee consenting to the sale of 7 acres 2 roods 3 perches at the price of £1,401 10s.

The Court said: "The only substantial question in issue in this appeal is the unimproved value of the land which comprises 7½ acres of heavy land at present used by a tenant as a residence, and for running a few dairy cows and situated just outside the Borough boundary of Hastings.

"Mr. W., for the Crown, valued the property as a farmlet at £100 per acre, stressing its low level and tendency to hold surface water, which he said made it unsuitable for market-gardening. He refused to acknowledge any special value for subdivisional potentiality, but admitted that other properties, which he claimed were not strictly comparable, had been sold and passed by the Committee at higher values.

"Mr. A. and Mr. D., for the vendor, valued the land at £150 and £130 per acre respectively. They supported these values by reference to a number of sales, none of which, however, were in the opinion of the Court strictly comparable.

"As in previous Hastings appeals, it is regrettable that no direct and cogent evidence was placed before the Court as to values in 1942.

"Upon the evidence as a whole and after an inspection of the property the Court finds:

"(1) That the land is good heavy land, reasonably well drained, and not so detrimentally affected by surface water as claimed by Mr. W., but on the other hand not of outstanding quality or suitable for intensive cultivation as a market-garden.

"(2) That apart from such advantages as it possesses by reason of its contiguity to the Borough boundary, the price value of the land is not in excess of £100 per acre which we gather from the evidence both of Mr. W. and Mr. D. is the reasonable value of good average farm land outside the Borough but in the near vicinity of Hastings.

"(3) That the added value properly attaching to this land by reason of its situation immediately adjoining the Borough is not in excess of £15 per acre.

"The Court therefore assesses the basic value of this property as follows:—

	£	s.	d.
7½ acres at £115 per acre ..	862	10	0
Improvements as accepted by both parties	464	0	0
	£1,326	10	0

"The appeal is therefore allowed. Consent to the sale will be granted upon condition that the price is reduced to £1,326 10s."

No. 80.—A. Trustees to McN.

Rural Land—Valuation—Different Bases of Value—Maintenance of Breeding Flock—Fat-lamb Basis.

Appeal by the vendor against the basic value as fixed by the Hawke's Bay Land Sales Committee of a farm property near Havelock North. The sale price was approximately £20,079 and the sale was approved subject to a reduction in price to £17,872.

The Court said: "The valuers, both before the Committee and before the Court, were Mr. W., for the Crown, and Mr. D., for the vendor. Each presented a budget, but that of Mr. W. was based upon the maintenance of a breeding flock, while that of Mr. D. was upon a fat-lamb basis. The Committee preferred the latter method of farming and this view is in our opinion supported by the weight of evidence.

"As the two budgets presented were based upon different farming methods, it is not to be expected that they can be reconciled: and as the vendor relies on appeal upon the fat-lamb method of farming, and upon the productive value arrived at upon that basis by Mr. D., it is apprehended that the vendor cannot be heard to complain if the Court, like the Committee, relies upon Mr. D.'s budget subject to necessary adjustments in arriving at the basic value.

"The Court agrees with the Committee that Mr. D.'s budget should be amended in the three respects set out in the Chairman's report—namely, (1) The owner's remuneration should be increased by £16. (2) the item of £40 credited as revenue, being the value of mutton consumed should be deleted. (The Court takes the view tht it is not customary to claim a credit for 'killers' and that if so claimed a further and corresponding amount should be debited as labour costs). (3) The deficiency in buildings should be assessed at £2,350 in lieu of £2,050.

"The Court finds further that the sum of £200 should be added to Mr. D.'s figures, being the value to the farm of the plantation.

"The effect of these adjustments is as follows:—

	£
Basic value as found by Mr. D.	19,216
Less £56 capitalized at 4½ per cent ..	1,244
	17,972
Less difference on building deficiency..	300
	17,672
Plus allowance for plantation ..	200
	£17,872

"It may be a coincidence that the value so arrived at is identical with the basic value as found by the Committee, but it indicates that the Court is in substantial agreement with the Committee in its assessment.

"At the hearing it was contended for the Crown that several of the items of income as estimated by Mr. D. were too high, and it may properly be pointed out that the foregoing increase in building deficiency should lead to a consequential increase in the amount deducted in the budget for depreciation. These items might well result in a further reduction of the basic value, but as the Court is satisfied that the value fixed by the Committee is, viewing the matter broadly, a fair value in accordance with the Servicemen's Settlement and Land Sales Act, 1943, it is unnecessary to give these matters further consideration.

"Mr. Holderness on behalf of the purchaser, contested the Committee's finding that the property is suitable for the settlement of a discharged serviceman. It may be doubted whether there is a right of appeal against such a finding by a Committee under s. 51 of the Act; but it is unnecessary for us to consider the point as the Court is in full agreement with the Committee.

"The Court sees no reason to disturb the findings of the Committee in either respect and the appeal is in consequence dismissed."

Practice: Court Documents.—The officers of the Supreme Court Offices direct the attention of practitioners, who are preparing documents for filing, to the proper title and description of the new Chief Justice, which are set out on p. 210, *ante*.

LAND AND INCOME TAX PRACTICE.

Land and Income Tax Regulations, 1946.—Notification is given at p. 720 of the New Zealand *Gazette* dated May 23, 1946, of new Regulations under the Land and Income Tax Act, 1923. The Regulations were enacted on May 22, 1946, and bear the serial number 1946/74.

The new Regulations revoke all previous Regulations under the Land and Income Tax Act, 1923.

The previous Regulations under the Act were enacted in 1932, and the provisions of the new Regulations are of considerable importance. There are forty-three clauses. Some of the more important subjects dealt with are—

Clause 4.—Specifies the office hours for any receiver of land or income tax. The times given are from 9.30 a.m. to 12 noon and from 1 p.m. to 3.30 p.m. Payment of tax may, therefore, be made at branch offices of the Department between those times.

Clauses 5–6.—Refer to the manner of furnishing land and income tax returns and the information to be given therein.

Clauses 8–9.—Specify by whom annual returns of land and income are to be made.

Clauses 10–13.—Deal with returns furnished by partners, trustees and agents.

Clause 15.—Provides the person to whom returns must be furnished.

Clause 16.—Provides that a return is not deemed to have been duly furnished unless and until—

(*a*) All the required information and

(*b*) All balance-sheets, profit and loss accounts, statements, notices, and other documents

have been received at the place where, or by the person to whom the return is required to be furnished.

Clauses 17–19.—Deal with further matters relative to furnishing returns.

Clause 21.—Provides that an objection to an assessment is to be made to the Superintendent at the address from which the notice of assessment was issued.

Clauses 22–32.—Relate to the procedure for making an appeal against the decision of the Commissioner upon an objection to an assessment, in a Magistrates' Court, under Part III of the Principal Act.

Clauses 33–43—Cover miscellaneous subjects, and generally give the Commissioner of Taxes power to prescribe various forms required for the administration of the Act. Previously, there was a Schedule to the Regulations which specified various forms under the Act, and any amendment to a form involved an amendment to the Regulations. This procedure is not now necessary.

The Income-tax (Canadian Traders) Exemption Order, 1946.—Notification is given at p. 720 of the New Zealand *Gazette*, dated May 23, 1946, of the above Regulations, which were enacted on May 15, 1946, and bear the Serial Number 1946/71.

The Regulations give effect to an agreement between the Governments of Canada and New Zealand covering the taxation of non-resident traders.

The exemption created by the Order is retrospective to the year of assessment commencing on April 1, 1943.

Decentralization of Tax Department.—Branch offices of the Land and Income Tax Department are now at Whangarei, Auckland, New Plymouth, Wanganui, Wellington, Dunedin, and Invercargill. It is anticipated that the Christchurch branch will be opened at about the end of July. Branches at Greymouth, Nelson, and Palmerston North, should be opened within two or three months, and practitioners in the geographical districts covered by these branch offices are advised to watch for announcements in the local newspapers.

Additional Tax Consequent on Live-stock Value Adjustments.—A question has been raised concerning a taxpayer's liability for additional tax assessed as the result of an application being made for an adjustment to live-stock values, in terms of s. 17 of the Land and Income Tax Amendment Act, 1945. The Department advises that if a taxpayer furnishes all the details relative to live-stock values, as required by the Commissioner, and is then assessed with some additional tax, the taxpayer can, if he is not satisfied with the basis of assessment, elect to withdraw his application for adjustment and revert to the original live-stock values and tax assessments. The taxpayer would take such action subject to the risks involved and should understand that no relief would subsequently be given in respect of income arising from an unduly low standard value and market value at sale, or probate values, and that the Commissioner has power to require a taxpayer to alter live-stock values at any time.

British Income-tax: New Rates.—The following summary may be of interest for comparative purposes and also for the purpose of ascertaining British income-tax relief. The new rates and other alterations were announced in the Budget of October, 1945; but were not operative until the financial year commencing on April 5, 1946. Some further amendments were announced in the Budget of April 9, 1946, and become operative as from April 5, 1946.

Standard rate.—Lowered from 10s. in £1 to 9s. in £1.

Reduced rate.—Altered from 6s. 6d. in £1 on first £165 of taxable income to 3s. in £1 on first £50; 6s. in £1 on next £75.

Single persons allowance.—Raised from £80 to £110.

Wife's earned income allowance.—Raised from £80 to £110.

Married person's allowance.—Raised from £140 to £180.

Exemption limit.—Raised from £110 to £120.

Earned income allowance.—Raised from 10 per cent. to 12½ per cent., with a maximum of £150. This increase will apply for the whole of the financial year; but the benefit will not begin to accrue in the existing *paye* tables until October. New tables after October, will automatically adjust the new tax payable to the basis of a 12½ per cent. earned income allowance operative over the whole year.

Excess Profits Tax.—The rate of 100 per cent. is reduced to 60 per cent. until December 31, 1946, when Excess Profits Tax will be repealed.

Depreciation allowances.—As referred to in the United Kingdom Financial Act, 1945, in respect of new plant, buildings, &c., and the deductions in respect of patent rights, scientific research, &c., were to commence on an "appointed day," which has now been fixed as April 6, 1946.

A short table showing the new tax payable consequent on the above amendments is given below:

SINGLE PERSONS.

Income	Old United Kingdom Tax	New United Kingdom Tax	*1945 New Zealand Total Tax
£	£	£	£
200	32	12	25
400	111	81	85
600	201	160	152
800	291	239	225
1,000	381	318	305

MARRIED COUPLE, WITHOUT CHILDREN.

Income	Old United Kingdom Tax	New United Kingdom Tax	*1945 New Zealand Total Tax
£	£	£	£
200	13	—	25
400	81	50	75
600	171	129	140
800	261	207	212
1,000	351	286	290

MARRIED COUPLE, WITH TWO CHILDREN.

Income	Old United Kingdom Tax	New United Kingdom Tax	*1945 New Zealand Total Tax
£	£	£	£
200	—	—	25
400	39	13	58
600	121	84	120
800	211	162	188
1,000	301	241	263

* Total income-tax, social and national security tax, on the same amount of income expressed in New Zealand currency, as for the income year ended March 31, 1945. The new United Kingdom tax cannot be compared with New Zealand taxes until the Land and Income Tax Annual Act, 1946, and any other amendments, have been passed.

Social Security Age-Benefits, General Qualifications, and Tax Adjustments.

The following notes cover the more important aspects of age-benefits under the Social Security Act.

Age qualifications.—To qualify for age-benefit a male or female applicant must have attained sixty years of age.

Residential qualifications.—An applicant who was resident in New Zealand *on March 15, 1938*, is required to have resided continuously in New Zealand for the ten years immediately preceding the date of application. An aggregate of one year is allowed for absence during that ten-year period, and a further allowance of six months for every year of residence in excess of ten years. To qualify, an applicant must not have been outside New Zealand at any time during twelve months immediately preceding the date of application, if the absence during the ten years exceeds one year. Thus, if the period since arrival in New Zealand is 10 years an absence of 1 year will not disqualify; 15 years an absence of 3½ years will not disqualify; 20 years an absence of 6 years will not disqualify; 30 years an absence of 11 years will not disqualify; 40 years an absence of 16 years will not disqualify; 60 years and absence of 26 years will not disqualify.

An applicant who was *not resident on March 15, 1938*, is required to have resided continuously in New Zealand for the twenty years immediately preceding the date of application, subject to an allowance of two years absence within that twenty-year period and a further six months absence for every year of residence in excess of twenty years. Thus, if the period since arrival in New Zealand is 20 years an absence of 2 years will not disqualify; 25 years an absence of 4½ years will not disqualify; 30 years an absence of 7 years will not disqualify; 40 years an absence of 12 years will not disqualify; 60 years an absence of 22 years will not disqualify.

Other qualifications.—An applicant must be of good moral character and sober habits. A male applicant must not for a period of six months or more during the period of five years immediately preceding the date of application, have deserted his wife or wilfully failed to provide her with adequate maintenance or wilfully failed to maintain any child or children whom he was legally liable to maintain. A female applicant, being a married woman must not during a similar period have deserted her husband or any of her children under sixteen years of age. The Commission may refuse a benefit or pay at a reduced rate if the applicant has made default in payment of social security charge under Part IV of the Act, or where the applicant has deprived himself of property or income, with the object of becoming eligible for a benefit.

Basic rate of benefit.—For males and females is £2 per week, or £104 per annum. If the applicant is a married man over sixty years of age and his wife is not qualified in her own right to receive the benefit, the basic rate to the husband may be increased at the discretion of the Commission by an amount not exceeding £2 per week. The total chargeable income inclusive of benefit of a man and wife both qualified, or man with a wife not qualified in her own right, must not exceed £260 (but note that a partial age-benefit may be payable if gross taxable income does not exceed £282—see below.) The total chargeable income inclusive of benefit for a single person must not exceed £156 per annum.

The basic rate of benefit is payable in addition to allowable "other" income of £52 per annum for single, widowed, separated or divorced applicants; £156 per annum for married person, (husband or wife not eligible): £52 per annum (combined income) of married persons both eligible.

The basic rates of benefit payable to single, widowed, separated or divorced persons are reducible by £1 per annum for every complete £1 of income in excess of the allowable income of £52 per annum.

Where both husband and wife are eligible the basic rate is reduced by 10s. per annum for every £1 of their *combined* income in excess of £52 per annum.

Where either husband or wife only is eligible in his or her own right, the basic rate is reducible by £1 per annum for every complete £1 by which their *combined* incomes, including any monetary benefit (but except family benefit) exceeds £156 per annum. There is also provision for reducing benefits because of chargeable property, as explained later.

Taxation Adjustment.—Under the provisions of s. 25 of the Social Security Amendment Act, 1943, the Commission is empowered to make an adjustment to the chargeable income of an applicant to such extent as may be necessary to prevent any anomaly. Because most classes of allowable income for benefit purposes are liable to social and national security tax, it would be possible (except for the section referred to) for a person whose income was just outside the maximum of £260 to have a net income after payment of social and national security tax, lower in amount than that enjoyed by a person qualified to receive a benefit, and whose income is from a class which is not liable to tax—*e.g.*, dividends—

A. Superannuation £261 (subject to tax) — £234 18s. net.

B. Dividends £220 (free of tax) plus benefit £40 — £260.

Section 25 enables the Commission to correct the anomaly that B, although his private income is £41 less than that of A, receives £25 greater net income.

Examples of Benefit reduced by reason of the Applicant's Income.

1.—Private combined income—taxable—of a married couple, both qualified to receive age-benefit. £52 per annum.

The allowable income in this case is £52, and the full basic rate of £104 per annum is payable to both husband and wife

	£	s.	d.
Private income	208	0	0
	52	0	0
	£260	0	0
Social and national security tax on £52	5	4	0
*Net	£254	16	0

2.—Private combined income—taxable—of married couple, £62 per annum.

		£
Adjustment under s. 25:	Taxable income	62
	Excess over £52 is £10.	
	Tax at 2s. in £1	1
	Chargeable income	£61

Computation of benefit: Excess of chargeable income over £52, £9.

Therefore the reduction from the basic rate of £104 is 10s. *for every complete £1 of excess over £52 — £4 10s.*

Benefit payable to each person, £99 10s.

	£	s.	d.
Combined benefit	199	0	0
Private income	62	0	0
	£261	0	0
Tax on private income	6	4	0
*Net	£254	16	0

3.—Private combined income—taxable—of married couple, £242.

		£
Adjustment under s. 25:	Taxable income	242
	Excess over £52 is £190.	
	Tax at 2s. in £1	19
	Chargeable income	£223

Computation of benefit: Excess of chargeable income over £52, £171.

Therefore reduction from basic rate of £104 is £85 10s.

Benefit payable to each person, £18 10s.

	£	s.	d.
Combined benefit	37	0	0
Private income	242	0	0
	£279	0	0
Tax on private income	24	4	0
*Net	£254	16	0

* Note that the net residue remains constant.

It could be demonstrated that with a combined taxable income of £282, a benefit of 10s. per annum is payable to both husband and wife who are qualified to receive age-benefit and the residue is £254 16s. At £283 income there is not any benefit payable and the residue after taxation payment is £254 14s.

Hence, it will be found that for a married couple, both eligible, whose private income liable to social security charge and national security tax lies between the range of £53—£282 inclusive, a partial age-benefit is payable, so that the residue after payment of tax is slightly variable round £254 16s. It is presumed that the value of accumulated property does not operate to reduce the benefit. No regard is taken of any liability to *income-tax* on private income. The corresponding position for a single applicant is that a partial age-benefit is payable in addition to private taxable income ranging from £53—£167

inclusive and after payment of social security charge and national security tax on the private taxable income the net residue is variable round £150 16s.

A rule of thumb which gives an answer approximate to the calculations in the above example is to deduct social and national security tax, at the appropriate rate, from the private taxable income. The amount of benefit is the amount necessary to bring the resultant figure up to £254 in the case of a married couple, and £150 in the case of a single person.

If the Commission is awarding a benefit on the basis of income derived during the twelve months preceding the date of application the rate of tax used in the calculation of the chargeable income would appropriate to the source of income—*i.e.*, the 2s. 6d. rate would be used in respect of wages for a year ended April, 1946, but the 2s. rate would apply if the applicant's income were other than salary or wages, derived during twelve months ended April, 1946.

The "income" as used for the calculation of monetary benefits under the Social Security Act does not correspond to "income" liable to the charge of (now) 1s. 6d. in the pound Under Part IV of the same Act. The difference will be briefly discussed in an ensuing article, which will also cover the deductions made from age-benefits on account of the property owned by applicants.

CRIMINAL LAW: MENS REA.

A Footnote.

By I. D. Campbell, LL.M.

In the article, *Mens Rea and the Burden of Proof* (*ante*, p. 161), I referred to the case of *Sparre* v. *The King*, (1942) 66 C.L.R. 149. I believe that my statements with reference to this case were wrong, and that I have confused two similar but distinct situations. A jury may be unable to agree whether a defence has been made out (as in *Sparre* v. *The King*), or they may be left in doubt whether a defence has been established. In spite of their resemblances, these situations differ in one vital respect: in the first case the jury do not reach a unanimous conclusion, in the second case they do.

The correct position appears to be this:

The general rule is that if the jury are left in doubt as to whether the accused is guilty—*i.e.*, they *agree* that they cannot decide—he is entitled to the benefit of the doubt. Where, under exceptional statutory provisions, the burden of establishing a defence is placed on the accused, and the jury are left in doubt whether or not that defence has been made out, he is not entitled to the benefit of the doubt, but must be convicted. If, however, in either of the above cases the jury fail to agree on the issue and fail to agree on a finding that they are in doubt, no verdict can be given and a new trial should be ordered.

NEW ZEALAND LAW SOCIETY COUNCIL MEETING.

(*Continued from p. 209.*)

Appointment of New Governor-General.—It was decided to forward a resolution of welcome from the New Zealand Law Society to the new Governor-General, in terms to be settled by the President and, accordingly, the following resolution has been since forwarded to the Aide-de-Camp in Waiting for transmission to His Excellency:—

"The Council of the New Zealand Law Society, on behalf of the legal practitioners of the Dominion, extends to Sir Bernard Freyberg a sincere welcome to New Zealand on his entry upon the duties of Governor-General.

"The occasion is a particularly pleasant one because of His Excellency's early life in the Dominion and because, too, of the association at school and in civil and military life which so many of the profession have had with him.

"The members of the Council trust that Sir Bernard's tenure of office will be a very enjoyable one for himself and for Lady Freyberg."

Solicitors Audit Regulations, 1938.—The Joint Audit Committee had met and reported as follows:—

"The Joint Audit Committee considered the letter received from the Taranaki Society which was before your Council at its March meeting.

"The Committee was of opinion that the end of the Audit year should remain as March 31, as provided for by the Regulations. It was pointed out that Reg. 5 (4) allows the final examination to be made between April 1 and June 30. A further fourteen days is allowed for the Auditor to forward his declaration and report."

United Nations League of Lawyers.—This correspondence is reported elsewhere.

International Bar Association.—This correspondence will also be given a separate report.

Legal Conference.—The Wellington Society wrote as follows:—

"I have been requested to advise you that my Society is prepared to undertake the arrangements for the holding of a Legal Conference at Wellington during the Easter vacation, 1947.

"Following on this decision a sub-committee was appointed who have made a survey of the position in Wellington and have pencilled in accommodation at the various hotels from Tuesday, April 8, to Saturday April 12, for 206 persons.

"If his arrangement meets with the approval of your Council a circular will be sent immediately to all practitioners in New Zealand with a view to ascertaining the number who are likely to require accommodation, as hotels will require confirmation of bookings by July 31, at the latest."

The Council decided to request the Wellington Society to proceed with the arrangements.

Pilfering ("Theft") of Cargo.—The Associated Chambers of Commerce wrote as follows:—

"The Canterbury Chamber of Commerce recently wrote us suggesting the possibility of the public use of the term 'theft' instead of 'pillage' or 'pilfering' when referring to offences concerning the theft of cargo. Canterbury Chamber feels that anything which will assist in the matter of reducing loss of cargo in transit should not be overlooked and that it is possible the employment of the term 'theft' may act as more of a deterrent to this type of offence than would 'pillage' or 'pilfering' which are considered to have a softening effect.

"When this subject came before a recent meeting of my Executive, general agreement with the Canterbury Chamber was expressed, but at the same time, some doubt was felt as to whether it would be actually correct to use the term 'theft' as suggested. We realize that the use of the term 'pillage' in peace is wrong, for the reason that pillage is defined as forcible seizure in time of war. Regarding 'pilfering' and 'theft,' however, we would be grateful to learn from you whether there has been any ruling on the correctness or use of one or other of these terms.

"Thanking you in anticipation of your advice."

The Council decided that no action should be taken in this matter.

Conveyancing Committee.—Mr. A. B. Buxton was elected a member of the Conveyancing Committee in place of the late Mr. Hadfield.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Note for General Kippenberger.—While the battle of El Alamein was at its height, the Governor-General, Lieut.-General Sir Bernard Freyberg, V.C., as General Officer Commanding 2nd N.Z.E.F., reviewed the proceedings of a General Court-martial, and, incidentally, commuted the sentence of the Court. In passing on this informative anecdote to Scriblex, Weston, K. C., aptly observes: *Coelum ruat fiat justitia!*

Judicial Wit.—From the circles of the Judiciary comes this little story of one of its members who was recently explaining to a friend at a local airport that planes land into the wind. Asked how the pilot knew which way the wind was blowing, His Honour pointed to the "wind sock" and said "*Noscitur a sociis.*" This seems to Scriblex an apt, if somewhat involved, wisecrack; and when he passed it on to a professional acquaintance whose frankness is at all times disarming, he was met with the observation that such a pun deserved "a sock in the eye." He must confess a slight preference for the occasion when counsel in *Dominion Air Lines, Ltd.* v. *Strand* told the Court of Appeal that the breach of a statutory regulation in the case of an aeroplane passenger must be restricted to certain limited classes. MacGregor, J., interjected: "The upper classes, I presume!" Now, according to report, Blair, J., has selected Christchurch as the venue for a marine sample of a play on words. It seems that counsel was valiantly asserting the case of a fifteen-year-old claimant for damages, but without benefit of the presence of his juvenile client. The somewhat ingenuous excuse put to the jury was that he was not prepared to submit the boy to the rigors of cross-examination, and the damaged non-exhibit had been left to work at the fish-shop of his father in the suburbs whilst the father, as guardian-*ad-litem*, unfolded the painful story of how the little man, once the embodiment of *joie de vivre*, now viewed life as through a glass darkly. This drew from Blair, J., the following whimsy: "Why is he not here? We should like to see the extent of the change in his personality. We are told that the boy is at present at the shop looking after the fish, while the father is here at the Court this afternoon looking after the chips." (The "chips" in question were £2,500 general damages. The jury awarded £750, which was £250 less than was paid into Court.)

Road Safety.—Alarmed at the possible extinction of the pedestrian at the wheels of limousines, trucks, and flivvers, there is now held at Caxton Hall, Westminster, what is somewhat impressively described as Members' Discussion Meetings of the Pedestrians' Association on the Enforcement of Road Traffic Laws. Presiding over a recent meeting, Viscount Maugham, a former Lord Chancellor, expressed the view that now the war was over something effective should be done to beset the terrible dangers that lay in front of the ordinary road-user—one person in seven being destined sooner or later to become a road casualty, with an even greater risk during infancy or old age. In the ordinary case, he said, according to a report in the *Law Times*, of an indictment for manslaughter arising out of negligent driving, the defendant or prisoner had not been guilty of any evil intent whatsoever. The Court or jury saw before them a miserable defendant, who deeply regretted what he had done, and they felt sorry for him. In such cases it was very difficult to get justice. All these crimes or misdemeanours were due to errors of judgment, often committed by young men or women without any intention of hurting anybody, but committed mainly because they wanted to speed along the road as fast as they could, without troubling about a possible danger which they did not see before it was too late. That had to be remedied. Hence, the suggestion that it might be necessary to alter the rule about onus with regard to road crimes. Where a man drove fast enough to kill another man on the road—say, in darkness—if there was no other evidence it might be possible to prove dangerous driving because there was no witness to say how fast the vehicle was going. In such cases, the law should throw on the defendant the obligation of proving that he was exercising all due caution at the time. These observations apply also to road-users in New Zealand where, despite the plea of the Minister of Transport for greater care, elderly vehicles and young irresponsible drivers continue to extort an unfortunate toll of lives.

A Touch of Sarcasm.—Lord Justice Mathew once observed on the occasion of the judicial appointments of one Lord Chancellor: "He is careful to select only persons of tried incompetency!" But this utterance is at least equalled if not excelled, by a remark passed by Lord Ellenborough when, on one occasion, Lord Westmoreland was speaking at great length in a debate in the House of Lords. In the course of his speech, he stopped to say: "My Lords, at this point I asked myself a question," whereupon Lord Ellenborough in a loud aside said: "And a damned stupid answer you'll be sure to get!"

From My Notebook.—In answer to a question in the English House of Commons, the Secretary of State for War has stated that the average period between the inception of a divorce case under the Army Legal Aid Scheme and the granting of a decree *nisi* by the Courts was about two-and-a-half years. In the debate in the House of Lords the period, in a normal case, down to the decree absolute was given as three-and-a-half years. At the end of last year, 43,000 service cases were still pending.

There is something about a barrister's spells of overwork which makes them different in kind from those of other callings. His duties are specific as to time and place. He must be in Court at a certain hour. He must be ready to put, or reply to, an argument when he is called upon; he can postpone or rearrange his work only within the narrowest limits. He is a cog in an inexorable machine and must revolve with the rest of it. For myself I usually enter upon a period of extreme busyness with a certain lift of spirit, for there is a sporting interest in not being able to see your way through your work. But presently this goes, and I get into a mood of nervous irritation. It is easy enough to be a cart-horse, and it is easy enough to be racehorse; but it is difficult to be a cart-horse which is constantly being asked to take Grand National fences.—John Buchan (*Adventures of Sir Edward Leithen, K.C.*).

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.

2. Municipal Corporations.—*Reserve—Leasing powers—Public Tender—Public Bodies Leases Act*, 1908.

QUESTION: We act for a Borough Council. The Council has vested in it as a Council Reserve, a farm property of 700 acres odd situated in another County about 100 miles away from the Borough. The land has always been leased, and the Council receives the rent. After a succession of unsatisfactory lessees who neglected the property, the Council, when calling for tenders six and a half years ago for a seven-years' lease, obtained a most satisfactory lessee, who has looked after the farm property in a most satisfactory manner and has regularly paid the rent. In a few months' time this lease expires. The Council proposes to lease again for another seven years. The Council would like the existing lessee to obtain the new lease, and would be satisfied with the existing rental. The Council's powers of leasing are contained in ss. 159 to 167 of the Municipal Corporations Act, 1933. The Council proposes fixing a reserved rent, being the amount of existing rent, and proposes calling tenders under s. 159 (*a*). There is no provision in the Municipal Corporations Act similar to s. 8 (4) of the Public Bodies Leases Act, 1908. The questions are—

1. If tenders are called, must the Council accept the highest tender if it exceeds the reserved rent fixed when tenders are called, or has it a discretion as to which tender it accepts? Does the same principle apply as was applied in *Attorney-General* v. *Wellington City Corporation*, [1924] N.Z.L.R. 818?
2. Is a Borough Council a "leasing authority" within the meaning of the Public Bodies Leases Act, 1908?. If not, can the Borough Council apply under s. 4 of the Public Bodies Leases Act, 1908, to be declared a leasing authority? Apparently, the Borough Council does not have the power given to a "leasing authority" by s. 66 of the Statutes Amendment Act, 1945. It would be an advantage in this case if the Council did possess the powers contained in that section.

ANSWER: 1. If tenders are called, the highest or any tender need not be accepted. Councillors are regarded as trustees, and, in deciding which tender to accept, must act as such. They must not make an improvident arrangement: *Solicitor-General* v. *Dunedin City Corporation*, (1875) 1 N.Z. Jur. (N.S.) S.C. 1. They must act in good faith and on reasonable grounds: *Attorney-General* v. *Wellington City Corporation*, [1924] N.Z.L.R. 818; see also s. 362 of the Municipal Corporations Act, 1933, as to the liability of Councillors for costs and expenses. The conditions for tender should state that the Council is under no obligation to accept the highest or any tender: *cf.*, the conditions for tendering for contracts contained in the Fourth Schedule of the Municipal Corporations Act, 1933. If the land is a public reserve within the meaning of the Public Reserves, Domains and National Parks Act, 1928, the leasing powers are contained in s. 14 of that Act.

2. The Borough Council is not a leasing authority within the meaning of the Public Bodies Leases Act, 1908, unless it has been declared a leasing authority pursuant to s. 4 of that Act. Many Borough Councils have been declared leasing authorities under the Public Bodies Leases Act, 1908: for an example, see *1946 New Zealand Gazette*, 704. If a Borough Council is a leasing authority it has the power given by s. 66 of the Statutes Amendment Act, 1945. If the Borough Council for whom you act were declared a leasing authority under the Public Bodies Leases Act, 1908, it could offer the land in question, by public application, for lease at the existing rental.

J. 2.

2. Destitute Persons.—*Complaint—Failure to maintain—Whether Allegation of "wilful failure" necessary—Destitute Persons Act, 19, ss. 17, 18, 71.*

QUESTION: A wife has instituted proceedings against her husband under s. 17 of the Destitute Persons Act, 1910. The ground of the complaint is failure to maintain; and the prayer is for orders for maintenance, separation, and guardianship. Is the complaint in order?

ANSWER: According to the decision in *Judd* v. *Judd*, [1933] N.Z.L.R. 1029, 1036, an allegation of "wilful" failure to maintain is necessary, and the failure to make such allegation would "justify the Magistrate in refusing to make an order other than a maintenance order." With respect, this observation is very difficult to understand in view of the very clear wording of s. 17. That section provides: "On complaint on oath by any married woman . . . (*a*) That the husband of that woman has failed or intends to fail to provide her with adequate maintenance; or . . . a Justice of the Peace may issue his summons to the husband to show cause why a maintenance order, a separation order, and a guardianship order, or any of those orders, should not be made against him . . ." The section sets out very plainly what the complaint should contain. *Ex facie*, there is nothing in that section to justify the inclusion of "wilful default" or "without reasonable excuse" in the proceedings: there is no mention of such in that section, which expressly deals with the contents of the complaint and the summons. Then there is s. 18, which is concerned with what may happen at the hearing. The Magistrate may "if he thinks fit" make certain orders; but subs. (4) provides that no separation order or order of guardianship shall be made on the sole ground of the failure of the husband to provide adequate maintenance for his wife, unless in the opinion of the Magistrate the failure was wilful. Now that "sole ground" is what has already appeared in s. 17; and s. 18 (4) means nothing more, it is submitted, than that the Magistrate may not make an order for separation on that sole ground unless he is satisfied on the evidence that the failure has been wilful. The provisions of the subsection restrict the jurisdiction to make the separation and guardianship orders: if they were not there, the Magistrate could make a separation and guardianship orders on the sole ground of mere failure to maintain. But there does not appear to be any justification for the view that in the complaint there must be an allegation of wilful failure to maintain: indeed the language of the subsection, referring as it obviously does to s. 17 (1) (*a*), militates against such view. Moreover, under s. 71 of the Act (as amended), the onus of proving reasonable cause for failure to maintain is on the defendant, not on the complainant, and if he discharges this onus he completely answers the complaint so far as maintenance and guardianship are concerned. Such proof is a defence.

C.I.

RULES AND REGULATIONS

Biscuit Industry Labour Legislation Revocation Order, 1946 (Labour Legislation Emergency Regulations, 1940.) No. 1946/126.

Customs Export Prohibition Revocation Order, 1946. (Customs Act, 1913.) No. 1946/127.

Soldier Teachers Grading Adjustment Regulations, 1946. (Education Act, 1914.) No. 1946/128.

Revocation of the Fire Boards (Insurance Companies' Contributions) Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1946/129.

Public Service Remuneration Order, 1946. (Finance Act, 1938.) No. 1946/130.

Public Service Amendment Regulations, 1946. (Public Service Act, 1912.) No. 1946/131.