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SOME COMPANY-LAW CASES IN 1946.

AT this time, it may be convenient to those practitioners who are engaged in questions arising out of company law to have a collection of the principal judgments of overseas Courts wherein statutory provisions similar to or reproduced in our Companies Act, 1933, have recently come up for consideration.

In *Morris* v. *Kanssen*, [1946] 1 All E.R. 586, the House of Lords (Viscount Simon and Lords Thankerton, Porter, Simonds, and Uthwatt) affirmed a decision of the Court of Appeal ([1944] 1 All E.R. 751), but on a different ground from that in the Court below. A certain company was incorporated in 1939 with a nominal capital of £100 in £1 shares. The articles of the company incorporated certain articles of Table A, including Art. 88—reproduced as Art. 88 of Table A in the Second Schedule to the Companies Act, 1933—which validated the acts of persons acting as directors, although afterwards it was discovered that there was a defect in their appointment or qualification. Kanssen and Cromie were the first directors of the company, and each held one share, these being the only shares allotted. Disputes arose between them, and Cromie entered into a scheme with one Strelitz to remove Kanssen from his directorship. With this object, Cromie and Strelitz falsely claimed that in February, 1940, Strelitz had been appointed a director, and they fabricated an entry in the minute book to this effect. In April, 1940, Cromie and Strelitz ineffectively attempted to deprive Kanssen of his directorship, and they purported to issue one share to Strelitz. No general meeting of the company was held in 1941, as required by these articles; and, therefore, from January 1, 1942, there were no directors of the company. On March 30, 1942, Cromie and Strelitz, purporting to act as directors, appointed Morris a director of the company; and thereupon Cromie, Strelitz, and Morris allotted 34 shares to Morris, 32 to Strelitz, and 24 to Cromie. As a result of an action brought by Kanssen for, *inter alia*, rectification of the register by the removal of the names of all persons as the holders of shares except himself and Cromie as holders of one share each, an order was made that the register should be rectified accordingly. On appeal, it was contended by Morris (*a*) that the issue of shares to him had been validated by s. 143 of the Companies Act, 1929 (s. 150 of the Companies Act, 1933), and Art. 88 of Table A; (*b*) that by virtue of the rule in *Royal British Bank* v. *Turquand*, (1856) 6 E. & B. 327; 119 E.R. 886, he was entitled to treat the shares as validly allotted. Their Lordships held that s. 143 of the Companies Act, 1929 (Eng.)—s. 150 of our Act of 1933—and Art. 88 of Table A did not validate the transactions of March 30, 1942—namely, the allotment of shares to Morris and his appointment as a director—because on the facts of the case neither Cromie nor Strelitz was a director at the time; Cromie's appointment had terminated at the end of 1941, and Strelitz had never been appointed. Section 143 and Art. 88 of Table A, which were designed as machinery to avoid questions being raised as to the validity of transactions where there had been a slip in the appointment of a director, applied only to acts done by persons acting as directors whose appointment or qualification was afterwards found to be defective. They did not cover a case where there had been a total absence of appointment, or a fraudulent usurpation of authority. Their Lordships applied the judgment of Lord Russell of Killowen, L.C.J., in *Tyne Mutual Steamship Insurance Association* v. *Brown*, (1896) 74 L.T. 283, 285, where the facts were that directors had continued to act after their term of office had expired, and the meaning of the corresponding section of the Companies Act then in force and of a strictly comparable Article were considered, and the learned Lord Chief Justice held that the Article had no application to the case, an authority which had stood unchallenged for fifty years. Their Lordships further held that Morris was not entitled to invoke the rule in *Turquand's* case, because he himself was purporting to act on behalf of the company in the unauthorized transaction. The argument based on the application of *Turquand's* case, which was fully developed for the first time by the indulgence of the House of Lords, failed, since there was no authority which held that a director could invoke the rule to validate an irregular transaction to which he was himself a party.

In *Re Kitson and Co., Ltd.*, [1946] 1 All E.R. 435, the Court of Appeal (Lord Greene, M.R., and Morton and Tucker, L.JJ.) had to consider, on the construction of the memorandum of association, whether the substratum of the company had gone when the business to take over which the company was formed was sold

after fifty-six years. The appellant company, Kitson and Co., Ltd., was incorporated in 1899. By the memorandum of association the objects of the company were stated in wide terms to be as follows: (i) to acquire and take over as a going concern a business, carried on elsewhere, under the style of Kitson and Co.; (ii) to carry on the business of general engineering. On July 10, 1945, the appellant company agreed to sell the business of Kitson and Co., its goodwill and all its assets. The company had, at the same time, a subsidiary, Balmforth and Co., carrying on a similar type of business, but the premises were under requisition to the Admiralty. By reason of the sale of Kitson and Co., certain shareholders presented a petition, alleging that the substratum of the appellant company had failed, and that it was just and equitable to wind it up. At the time of the sale of Kitson and Co., the then directors of the appellant company passed a resolution in which it was contemplated to discontinue the engineering business and to use the money of the appellant company to purchase shares in a group of companies more or less insolvent. In proceedings against the appellant company and its then directors, an affidavit to this effect was filed, as a result of which the resolution was then withdrawn. At the time of the hearing of the petition, those directors, with one exception, were replaced, and an affidavit was filed by one of the directors of the appellant company stating that it was the intention of the appellant company to continue with the engineering business and to acquire, for the appellant company, the assets and undertaking of Balmforth and Co. The affidavit which formed part of the previous proceedings was introduced in support of the petition, for the purpose of showing that the appellant company had no intention of carrying on the business of engineering; and, on those facts, an order to wind up the appellant company was made. From that order, the appellant company appealed. Their Lordships held that, since the main and paramount object of the appellant company was to carry on an engineering business of a general nature, the disposal of the business of Kitson and Co., which had been acquired about forty-six years before, did not amount to a destruction of the substratum of the appellant company. Their Lordships said that it was not possible on the true construction of the memorandum to limit the company's object to that specific business so that on sale the company's substratum had gone; the paramount object was much more general, and was not confined to the carrying on of that business. So long as the company could continue to carry on a similar type of business, the position was distinguishable from that existing where the company is formed to acquire and work a particular mine, or a patent as in the *German Date Coffee Co.* case, (1882) 20 Ch.D. 169, which was explained and distinguished in the judgment of the learned Master of the Rolls. The Court of Appeal further held that the intention of the board of directors, at a given moment, to discontinue the business of engineering has no effect on the determination of the question whether the substratum has gone, the material time for consideration being the date of the winding-up petition; and, if the company is then in a position to carry on a business within the principal object of its memorandum, it is quite irrelevant that the directors held a different intention at some earlier date.

In *Re F. de Jong and Co., Ltd.*, [1946] 1 All E.R. 556, the Court of Appeal (Lord Greene, M.R., and Morton and Somervell, L.JJ.) had to consider whether one of a company's articles providing that the preference shares should have "priority as to dividend and capital over the other shares in the capital for the time being, but shall not carry any further right to participate in the profits or assets" covered rights in a winding up. The nominal capital of a private company was £25,000 divided into 10,000 preference shares and 15,000 ordinary shares of £1 each, of which 5,006 of the preference shares and all the ordinary shares had been issued, and were credited as fully paid. By the company's articles, the preference shares carried the right to a fixed cumulative preferential dividend of 6 per cent. per annum on the capital paid up and should have priority as to dividend and capital over the other shares in the capital for the time being, but should not carry any further right to participate in the profits or assets. No dividend had been paid on the preference shares since 1940. In 1944, the company went into voluntary liquidation. After the creditors had been paid in full, and the capital in respect of the 5,006 preference shares had been returned, the liquidator had in hand a balance of £3,000. The question to be determined was whether the preference shareholders were entitled to receive out of the surplus assets the arrears of the cumulative preferential dividend. Their Lordships held that, upon the true construction of the company's articles, on a distribution of the assets in a winding-up the preference shareholders were entitled to priority in respect of the arrears of the cumulative preferential dividend. They applied *In re Walter Symons, Ltd.*, [1943] Ch. 308, a decision of Maugham, J., who came to the conclusion that the word "dividends" (in the phrase in an article "shall rank both as regards the dividends and capital in priority to the ordinary shares") was intended to refer to the arrears of dividend in a winding-up. Their Lordships referred to the decision of Cohen, J., *In re Wood, Skinner and Co., Ltd.*, [1944] Ch. 323, where, on the wording of the article before him, his Lordship came to the conclusion that the preference shareholders were not entitled to have priority as to arrears of their dividends in a winding-up; but their Lordships, for the reasons given in the judgment of Morton, L.J., at pp. 558, 559, distinguished that decision on the wording of the particular article there under notice.

In *Re Greycaine, Ltd.*, [1946] 1 All E.R. 329, Lord Uthwatt, sitting as an additional Judge of the Chancery Division, had to consider the effect of s. 309 of the Companies Act, 1929 (Eng.), which is reproduced in s. 289 of the Companies Act, 1933, as follows:

> The Court may, on an application made to the Court by the liquidator of a company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver or manager of the property of the company, and may from time to time, on an application made either by the liquidator or by the receiver or manager, vary or amend any order so made.

His Lordship held that the section is not confined in its operation to cases where a receiver's remuneration has not been expressly agreed; it applies also where the remuneration has been agreed. The parties desired to have decided by the Court two questions of construction of s. 309. The first question was whether the Court has any jurisdiction at all where a receiver has been appointed at an agreed remuneration; the second was whether an order could be made which covers the past, or whether only the future could be

dealt with. His Lordship said he proposed to deal with these questions so far as raised by the facts of this particular case. He proposed to assume that the receivers were duly appointed, and that some remuneration was duly allotted to the receivers on a percentage basis applicable to the receipts as they came in. After considering various matters which should be borne in mind in construing s. 309, his Lordship said :

> As regards the first question, I have no doubt. Section 309 applies only where a receiver " has been appointed," and, normally, his remuneration will have been expressly agreed. To hold that the section applied only where there was no effective agreement as to remuneration would be to disregard entirely the position which required to be dealt with and to reduce the ambit of the section to a microscopic quantity. That microscopic quantity would be ascertained in this way : " Fix " is said to mean " make certain what is not certain." There may be cases where there is no provision in operation. The receiver in such a case would be entitled to be remunerated on a *quantum meruit* basis ; and the function of the section is to give the Court, in its winding up jurisdiction, power to fix the amount in fact payable. This argument disregards reality. The grammatical meaning is clear ; and no absurdity or departure from the intent of the legislation, as appearing in the section, is involved in adhering to it. " Fix " means fix, operative agreement or not. Just as under the Companies Act, 1929, s. 79 [*Cf.* s. 89 of the Companies Act, 1933], the liquidator and creditors have rights which override the company's bargain, so, under this section, the liquidator has rights denied to the company.
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> There is more substance in the second point raised. It was argued that, as the discretion given to the Court was a judicial discretion, there was no reason why s. 309 should not be widely construed. The Court would be bound to take into account all the surrounding circumstances, including, in particular, the fact that services had been rendered on the basis of a bargain duly made, and the further fact, if it were a fact, that the agreed remuneration referable to those services had been duly satisfied. No injustice would arise. This may be true, but it is not an argument directed to the construction of the section. In my opinion, the jurisdiction can be exercised only as respects the future. The jurisdiction is not to fix the amount payable, but the amount " to be paid," and these words point to regulating the course of events in the future, not to the possibility of reviewing the past. The section, to my mind, is directed towards enabling the Court, on the application of the liquidator, to regulate the course of business as regards a receiver's remuneration once a winding up has begun, and not to enabling the Court, when a winding up has begun, to re-open matters that have been duly carried out before an application under the section has been made.
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> It is not necessary for the purposes of the particular case before me to define the construction more closely. The parties here are not concerned with the question whether " remuneration to be paid " means remuneration to be paid in the future, whenever the services were rendered, or remuneration to be paid as respects future services. I propose to express no opinion upon that point. Nor, again, are they concerned with the question whether what I have called the future means the date of the application or the date of the order, but it is, in my view, clear that the date of the application is the material date.

On appeal from this judgment, [1946] 2 All E.R. 30, the Court of Appeal (Morton, Bucknill and Cohen, L.JJ.) affirmed Lord Uthwatt in holding that s. 309 of the Companies Act, 1929, enabled the Court on the application of the liquidator to fix remuneration for a receiver notwithstanding any agreement for remuneration made at the time of appointment. Lord Uthwatt had held that this power was exercisable from the date of the application of the receiver, but the Court of Appeal varied his judgment by taking the view that, if the words " to be paid " in the section referred to the future, the logical conclusion is that the Court can fix the remuneration only as from the date of the order of the Court. The judgments of Morton, L.J., and of Cohen, L.J., should be carefully read, especially that of the latter where he deals with the considerations which may have weighed with Parliament in enacting s. 309, which, as we have pointed out, has been reproduced in s. 289 of the Companies Act, 1933.

Owing to the limitations of space, the remaining decisions given by the Courts in overseas jurisdictions relative to company-law, have to be stood over until the next issue of the JOURNAL.

SUMMARY OF RECENT JUDGMENTS.

THE KING v. SUNDE.

COURT OF APPEAL. Wellington. 1946. October 18. O'LEARY, C.J. ; KENNEDY, J. ; CALLAN, J.

Criminal Law—Receiving Stolen Property—Necessity of Proof of Possession or Control or of Aiding in concealing or disposing of such Property—Evidence of Suspicion—No Evidence warranting Inference of Actual Possession or of Aid in Concealment or Disposal of Stolen Property—Conviction quashed—Crimes Act, 1908, ss. 284, 285—Criminal Appeal Act, 1945, s. 3.

Before a person can be convicted under s. 284 of the Crimes Act, 1908, of receiving stolen property knowing it to be dishonestly obtained, it must be proved that he has had, in terms of s. 285, possession or control over the thing dishonestly obtained, or that he has aided in concealing or disposing of it.

Where the evidence on which an accused person was convicted may warrant a suspicion that he did some of these things, but does not warrant an inference that he did any of them, his conviction should be quashed.

Counsel : *Cleary*, for the appellant ; *W. H. Cunningham*, for the Crown.

Solicitors : *Trimmer and Teape*, Auckland, for the appellant ; *Crown Law Office*, Wellington, for the Crown.

SOLUBLE SLAGS LIMITED v. LUMSDEN.

SUPREME COURT. Auckland. 1946. August 29 ; September 24. FINLAY, J.

Industrial Conciliation and Arbitration—Award—Wages—Holidays—Worker incapacited from Work on Award Holidays—Whether entitled to Ordinary Pay for those Days.

The Dominion Carpenters and Joiners Machinists' Award, 1942-44, prescribes the specific holidays which are to be paid for at ordinary rates. The days affected in the present case were Christmas Day, New Year's Day, Good Friday, Easter Monday, and Anzac Day.

Clause 6 (*b*) of the award defines the persons who are entitled to the payment as follows : " The employer shall pay wages for the above holidays to all workers performing work coming within the scope of this award who have been employed by him at any time during the fortnight ending on the day on which the holiday occurs."

The respondent, having met with an accident while in the employ of the appellant, was totally incapacitated over the period from November 27, 1944, to May 8, 1945, and was on compensation over the period during which the said holidays occurred. In an action in the Magistrates' Court claiming balance of wages in respect of the said holidays, judgment was given for the respondent. On appeal from that determination,

Held, allowing the appeal, 1. That, on its true interpretation, cl. 6 (*b*) of the award provides that only those workers who are actually engaged upon work coming within the scope of the award, and, in fact, in the employment of the employer during the specified period, are to be paid for the named holidays. In addition, payment for such holidays is payable to those workers who are inactive to the extent that they are standing down under orders, awaiting and in a state of readiness to receive direction to actual work.

2. That the respondent could not satisfy the condition imposed by the qualifying words " performing work " in cl. 6 (*b*) of the award, as he was wholly incapacitated during the relevant period in which the holidays occurred.

Bramwell v. *A. M. Bisley and Co., Ltd.*, (1946) 4 M.C.D. 507; aff. on app. [1946] N.Z.L.R. 759, considered.

Counsel: *Alderton*, for the appellant; *Finlay*, for the respondent.

Solicitors: *Lisle Alderton, and Kingston*, Auckland, for the appellant; *A. M. Finlay*, Auckland, for the respondent.

EDWARDS v. G. R. McKAY, LIMITED.

COMPENSATION COURT. Wellington. 1946. February 26; October 22. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of Employment—Tennis Elbow—Cause of Condition—Whether "tennis elbow" can arise from Trauma to the External Epicondyle of the Humerus—Proof of Injury by Accident—Incapacity possibly caused by Work or by that Work plus a Knock at Work—Duty of the Court to Consider and Balance Probabilities—Workers' Compensation Act, 1922, s. 3.

" Tennis elbow " can arise from direct trauma to the external epicondyle of the humerus, and such an injury can develop into a condition indistinguishable, either clinically or pathologically, from " tennis elbow."

So held, after reference to, and report by, a medical referee.

Where the injured worker's condition could be caused by such work as he was doing, or by that work plus a knock such as was admittedly received in the course of the employment, it is the duty of the Court, when hearing the injured worker's claim for compensation, to consider and balance the probabilities.

Mitchell v. *Glamorgan Coal Co.*, (1907) 23 T.L.R. 588; 9 W.C.C. 16, and *Lancaster* v. *Blackwell Colliery Co.*, (1919) 12 B.W.C.C. 400, applied.

Counsel: *Watterson*, for the plaintiff; *Leicester*, for the defendant.

Solicitors: *Watterson and Foster*, Wellington, for the plaintiff; *Leicester, Rainey, and McCarthy*, Wellington, for the defendant.

NICHOLLS v. NICHOLLS.

SUPREME COURT. New Plymouth. 1946. August 21, 22; October 18. CORNISH, J.

Divorce and Matrimonial Causes—Separation (as a Ground for Divorce)—Wife agreeing to Separate—Separation induced by Husband's Importunity to be released from his Obligations towards her—Separation imposed by " Wrongful conduct "—" Wrongful act or conduct "—Divorce and Matrimonial Causes Act, 1928, ss. 10 (i), 18.

Neither a husband nor a wife is entitled to impose a separation on the other just because he or she has met some one, who, for the time being, seems preferable to that other. Such conduct is " wrongful," within the meaning of that word as used in s. 18 of the Divorce and Matrimonial Causes Act, 1928, although no impropriety has taken place; and it is a bar to a subsequent divorce, if this is sought by the party who has been guilty of such conduct.

Counsel: *Moss*, for the petitioner; *O'Dea*, for the respondent.

Solicitors: *N. H. Moss*, Stratford, for the petitioner; *O'Dea and O'Dea*, Hawera, for the respondent.

DOBSON v. MALING AND COMPANY.

COMPENSATION COURT. Christchurch. 1946. August 22; November 1. ONGLEY, J.

Workers' Compensation—Assessment—Permanent Partial Incapacity—Non-Schedule Injury—Limitation of Compensation—Method of Computation—Workers' Compensation Act, 1922, s. 5.

The method of computing compensation payable under s. 5 of the Workers' Compensation Act, 1922, as amended by s. 3 of the Workers' Compensation Amendment Act, 1936, for permanent incapacity in respect of non-Schedule injuries, as set out in *Hurrey* v. *The King*, must be read subject to the six-year limit provided by s. 5 (7) of the Workers' Compensation Act, 1922, so that the aggregate number of weeks for the purpose of a lump-sum calculation, including those for which weekly compensation has been paid, must not exceed 313, or the lump-sum payment exceed £1,000 (including the amount of compensation already received).

Hurrey v. *The King*, [1943] N.Z.L.R. 278, explained.

Maloney v. *Munt, Cottrell, and Co., Ltd.*, [1923] G.L.R. 469, and *Ellison* v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1939] N.Z.L.R. 223, applied.

Counsel: *Lester*, for the plaintiff; *K. W. Walton*, for the defendant.

Solicitors: *Bishop, Godfrey, Muff, and Lester*, Christchurch, for the plaintiff; *Duncan, Cotterill, and Co.* Christchurch, for the defendant.

LAND SALES COURT APPLICATIONS.

Amendment of Forms.

Under Amendment No. 2 of the Servicemen's Settlement and Land Sales Regulations, 1943 (Serial No. 1946/214), it is now required that the following clause shall be added to each of the forms of declarations appended to Form No. 2, Form No. 3, and Form No. 4 respectively:—

5. That, with the exception of agreements referred to in paragraph 3 hereof, no contract or agreement (whether in writing or otherwise) within the meaning of section 8 of the Servicemen's Settlement and Land Sales Amendment Act, 1946, for the sale, transfer, hiring, or delivery of any personal property, or for execution of any works or the erection of any building or for the granting of an option in relation to any such matter, has been entered into by me or by my wife (husband) or by any company of which I or my wife (husband) or both my wife (husband) and I are members and as such entitled to a majority of votes at general meetings of such company; and that no such contract or agreement is intended to be entered into.

Unless this clause is added, the Court will refuse to accept applications concerning contracts entered into since January 1, 1947.

Until the present supply of printed forms is used, the Deputy Registrar of the Land Sales Court states that it will be acceptable if the clause is typed and attached to the bottom of the form.

THE TRUSTEE AMENDMENT ACT, 1946.

Statutory Powers of Maintenance and Advancement.

By J. G. HAMILTON, LL.M.

The Trustee Amendment Act, 1946, has effected the following material changes in the law :—

(*a*) It has enacted new provisions relating to the application of income and capital for the maintenance, education, advancement or benefit of persons having vested or contingent interests therein and has repealed the existing statutory provisions on the subject, including the sections in the Public Trust Office Acts.

(*b*) It has repealed subs. 4 of s. 81 of the Statutes Amendment Act, 1936, thereby empowering the Court to authorise trustees of settled land to effect any sale, lease, mortgage, surrender, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction which is in the opinion of the Court expedient, but which cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument or by law.

(*c*) It has defined for the purposes of the Amendment Act and of the Trustee Act, 1908, the expressions " authorised investments," " instrument," " personal representative," " property," " trust " and " trustee."

MAINTENANCE AND ADVANCEMENT.

The purpose of this article is to review the new provisions regarding maintenance and advancement as far as is possible at this stage. The Trustee Amendment Act, 1946, has been made retrospective and applies to trusts, including executorships and administratorships constituted or created either before or after the passing thereof. It supplies the statutory power of advancement and the statutory provisions relating to maintenance and the accumulation of surplus income contemplated in s. 7 (1) (*b*) of the Administration Amendment Act, 1944. The new sections are radically different from those which they supersede and follow fairly closely the wording of ss. 31 and 32 of the Trustee Act, 1925 (15 Geo. 5, c. 19) (*20 Halsbury's Complete Statutes of England*, 94). The English sections have been followed in Victoria by ss. 31 and 32 of the Trustee Act, 1928, No. 3792, and with considerable modification in New South Wales by ss. 43 and 44 of the Trustee Act, 1925. Considerable caution will have to be exercised in applying the older decisions : see *In re Reade-Revell*, *Crellin* v. *Melling*, [1930] 1 Ch. 52, 55, and the cases dealing with the corresponding English and Australian sections. The New Zealand sections differ in important details from their English and Australian counterparts, and have been enacted against a different background of general law. Material instances of such differences of wording are the use in the New Zealand sections relating to both income and capital of the wide words " maintenance, education, advancement or benefit " ; the reference therein to " past maintenance or education " ; the power to resort to capital to the extent of £500 where the value of the share is less than £1,000 ; and the power of a Judge to authorize a resort to capital. The English sections are part of the closely-knit Birkenhead legislation of 1925, and the full effect of the difference in background will have to be worked out in practice. Points which stand out are the absence in New Zealand of any counterpart of s. 175 of the Law of Property Act, 1925 (15 Geo. 5, c. 20) (*15 Halsbury's Complete Statutes of England*, 177), defining, for the purposes of s. 4 (3) of our Act, the circumstances under which future and contingent devises and bequests carry interest, and the omission of a definition of the term " securities " which is used in s. 5 (2). *Cf.* s. 68 (13) of the Trustee Act, 1925 (15 Geo. 5, c. 19) (*20 Halsbury's Complete Statutes of England*, 94). It may be noted that the term " securities " is defined in New Zealand in s. 2 of the Administration Amendment Act, 1944, but not for the purposes of the present Act.

The New Zealand provisions under review are mainly contained in ss. 4 and 5 of the Trustee Amendment Act, 1946. Section 4 gives trustees power to resort to the income of vested and contingent interests for the maintenance, education, advancement and benefit of infant beneficiaries whose interests carry the intermediate income or carry interest for the purpose of maintenance. It also provides for the accumulation of surplus income during minority, and for the payment of income to beneficiaries whose gifts carry income between the time when the beneficiaries attain twenty-one years and their interests vest. Section 5 gives trustees power to resort to the capital of vested and contingent interests for the maintenance, education, advancement and benefit of the persons entitled thereto, provided the conditions set out in the section are complied with.

The words " maintenance, education, advancement and benefit " which appear in the sections are wide and give trustees an extensive discretion as to the purposes for which they may apply trust moneys under the powers : see *Lowther* v. *Bentinck*, (1874) 19 Eq. 166. The words have, however, legal meanings, and there are limits to what trustees can do under the powers : see *In re Peel*, *Tattersall* v. *Peel*, [1936] Ch. 161.

Section 3 (2) of the Trustee Amendment Act, 1946, provides :

> The powers conferred by this Act on any trustee are in addition to the powers conferred by the instrument (if any) creating the trust ; but those powers, unless otherwise stated, apply only if and so far as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.

The word " powers " in this subsection extends to the directory provisions in s. 4 regarding the accumulation of surplus income, and the payment of income to a beneficiary after he attains the age of 21 years : see *Re Turner's Will Trusts*, *District Bank, Ltd.* v. *Turner*, [1936] 2 All E.R. 1435, 1447.

THE PROVISIONS AFFECTING INCOME.

The scope of s. 4 is governed by subss. 3 and 4, which provide :

> (3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing *in loco parentis* to,

the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient and subject to any rules of Court to the contrary) be four per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

Subsection 3 has the effect of enabling an infant to be maintained out of his own contingent property, but not out of someone else's income. The rules as to when a contingent interest carries the intermediate income, and when a future or contingent legacy by a parent or a person standing *in loco parentis* carries interest for maintenance, are technical and should be carefully studied in all cases where it is desired to pay or apply the income of contingent gifts in accordance with s. 4. The rules are set out in *Garrow's Law of Wills and Administration*, 306–311. The provision fixing the rate of interest on future and contingent legacies by parents or persons standing *in loco parentis* is new and should not be allowed to escape attention in cases where it applies.

THE POWER TO APPLY INCOME DURING MINORITY.

Section 4 (1) provides :

Where any property is held by a trustee in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property,—

(*a*) During the infancy of any such person, if his interest so long continues, the trustee may, at his sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance or education (including past maintenance or education), or his advancement or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(i) Any other fund applicable to the same purpose ; or

(ii) Any person bound by law to provide for his maintenance or education ; . . . .

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustee shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes ; and where the trustee has notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the Court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

In several cases the Courts have had to consider whether these provisions are excluded by a direction to accumulate. In a recent article on the subject in *201 L.T.Jo.* 107, it was pointed out that the position turns on whether " the limitation or trust carries the intermediate income " (s. 4 (3)), and it was stated that, if the infant on attaining twenty-one years will then himself pocket the accumulations, the power applies because the trust plainly carries the intermediate income. This conclusion was reached by the Victorian Court in *In re Nathan, Equity Trustees, Executors and Agency Co., Ltd.* v. *Bier*, [1938] V.L.R. 72 ; see also, *In re Thatcher's Trusts*, (1884) 26 Ch.D. 426. It would seem from the decisions in *In re Reade-Revell, Crellin* v. *Melling*, [1930] 1 Ch. 52, and *Re Stapleton, Stapleton* v. *Stapleton*, [1946] 1 All E.R. 323, that, where there is a direction to accumulate income and add it to capital, an infant who takes a contingent life interest in that capital cannot claim to be maintained out of the income subject to the direction for accumulation, the reason being that the direction prevents the trust from carrying the intermediate income within the provisions of s. 4 (3). In *Re Leng, Dodsworth* v. *Leng*, [1938] 3 All E.R. 181, Simonds, J., allowed maintenance under circumstances similar to those last mentioned where there was accumulation in accordance with a rule of law and not under an express provision in the instrument. This decision seems open to doubt.

It is clear from s. 3 (2) and from *In re Cooper, Cooper* v. *Cooper*, [1913] 1 Ch. 350, that the inclusion of an express power of maintenance in the trust instrument does not exclude the statutory power under s. 4 (1) (*a*).

The new provision applies to any contingent interest which carries the intermediate income, including a case where the contingency is the attaining of an age greater than twenty-one : see *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner*, [1936] 2 All E.R. 1435, 1445, and it is therefore wider than s. 113 of the Trustee Act, 1908, which applied only where property was held by trustees in trust for an infant for life or any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years.

In *18 Encyclopaedia of Forms and Precedents*, 2nd Ed., 734–739, it is pointed out that a trustee acting under the power must exercise a conscious discretion ; also that the wording of the subsection appears to make the amount of income to be applied depend upon a standard of absolute reasonableness, and in that way to cramp the discretion of trustees. Where a settlor desires the beneficiaries to receive either more or less than the normal amount, express provision is necessary.

Under the old rule, where two funds were available for maintenance, the practice was to consider the advantage of the infant : see *Garrow's Law of Trusts and Trustees*, 183. This rule apparently still applies in connection with capital ; but in connection with income a new rule has been introduced by s. 4 (1), which provides that, unless the Court otherwise directs, if the entire income of the funds is not required, a proportionate part only of the income of each fund is to be used. No doubt if a proper case could be made out, the Court would be prepared to make an order in accordance with the old rule.

ACCUMULATION OF SURPLUS INCOME DURING MINORITY.

Section 4 (2) provides :

During the infancy of any such person, if his interest so long continues, the trustee shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorized investments, and shall hold those accumulations as follows :—

(*a*) If any such person—

(i) Attains the age of twenty-one years, or marries under that age, and his interest in the income during his infancy or until his marriage is a vested interest ; or

(ii) On attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which the income arose in fee-simple, absolute or determinable, or absolutely, or for an entailed interest—

the trustee shall hold the accumulations in trust for that person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of that person after marriage, and though still an infant, shall be a good discharge.. and

(*b*) In any other case the trustee shall, notwithstanding that that person had a vested interest in the income, hold the accumulations as an accretion to the capital of the property from which the accumulations arose, and as one fund with that capital for all purposes, and so that, if the property is settled land, the accumulations shall be held upon the same trusts as if the same were capital money arising therefrom,—

but the trustee may, at any time during the infancy of that person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

In *Stanley* v. *Inland Revenue Commissioners*, [1944] 1 All E.R. 230, 233, Lord Greene, M.R., stated, with reference to this subsection :

> We are disposed to think that the effect of the section is better described, not as leaving the interest of the infant . . . subject to defeasance, but as engrafting upon the vested interest originally conferred on the infant by the settlement or other disposition a qualifying trust of a special nature which confers on the infant a title to the accumulations if, and only if, he attains twenty-one or marries.

This provision is not imperative, but is part of and ancillary to the statutory power of maintenance : see *Lewin on Trusts*, 14th Ed., p. 324, and *Re Turner's Will Trusts*, *District Bank, Ltd.* v. *Turner*, [1936] 2 All E.R. 1435. It can be negatived by express provision in the instrument creating the trust (s. 3 (2)). It applies only where the gift carries the intermediate income or carries interest for maintenance (s. 4 (3)). In the case of a vested annuity, accumulations made during the infancy of the annuitant are to be held in trust for him or his personal representatives absolutely (s. 4 (4)). The effect of the words " as an accretion " in s. 4 (2) (*b*) is to make the accretions subject to a hotchpot clause : see *20 Halsbury's Complete Statutes of England*, 124*n*.

Payment to a Person Contingently Entitled After He Attains 21.

Section 4 (1) (*b*) provides :

> If such person on attaining the age of twenty-one years has not a vested interest in that income, the trustee shall thenceforth pay the income of that property and of any accretion thereto under subsection two of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest :

The section applies where a person has attained twenty-one at the time of the instrument taking effect : see *Re Turner's Will Trusts* (*supra*). Unlike the power of maintenance, this provision is negatived by a direction to accumulate : see *Re Turner's Will Trusts* (*supra*) and *In re Linton, National Trustees Executors and Agency Co. of Australasia, Ltd.* v. *Linton*, [1944] V.L.R. 118. It applies only in the case of contingent interests which carry the intermediate income (s. 4 (3)).

Power to Resort to Capital.

Section 5 provides :

> (1) A trustee may at any time or times pay or apply any capital money subject to a trust, for the maintenance or education (including past maintenance or education), or the advancement or benefit, in such manner as he may, in his absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and any such payment or application may be made notwithstanding that the interest of that person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs :
>
> Provided that—
>
> (*a*) The money so paid or applied for the maintenance, education, advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property where that share or interest exceeds one thousand pounds, and in any other case shall not exceed altogether five hundred pounds ; and
>
> (*b*) If that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of that share ; and
>
> (*c*) No such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless that person is in existence and of full age and consents in writing to the payment or application or unless a Judge, on an application made to him in Chambers in a summary way by the trustee, has made an order approving the payment or application.
>
> (2) This section applies only where the trust property consists of moneys or securities, or of property held upon trust for, or with a power of, sale, calling in, and conversion, and the moneys or securities or the proceeds of the sale, calling in, and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1908.

In *In re Garrett, Croft* v. *Ruck*, [1934] Ch. 477, 481, 482, Clauson, J., commented that " The section is framed in the widest terms," and that " The Legislature in enacting s. 32 intended to enlarge the powers of trustees . . . " He held that the words " any other event " in s. 5 (1) are not restricted to an event having no reference to a specified age, and that they include a compound or double event. The power is not confined to the case of infants : see *29 Halsbury's Laws of England*, 2nd Ed., 776. In *In re Patterson, Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Patterson*, [1941] V.L.R. 233, it was held that the words " any prior or other interest " which appear in s. 5 (1) (*c*) should be construed as meaning " any prior life or other prior interest."

Where a married woman has such an interest, she may give a consent for the purposes of s. 5 (1) (*c*) notwithstanding that her interest is subject to restraint on anticipation : see *In re Garrett, Croft* v. *Ruck*, [1934] Ch. 477. On the other hand, a person having a protected life interest will forfeit his interest by consenting : see *In re Stimpson's Trusts, Stimpson* v. *Stimpson*, [1931] 2 Ch. 77. In *In re Beckett's Settlement, Eden* v. *Von Stutterheim*, [1940] Ch. 279, it was held that s. 5 (1) (*c*) does not require the consent of persons who are for the time being merely the objects of discretionary trusts.

In *In re Stimpson's Trusts* (*supra*), at pp. 82, 83, Luxmoore, J., stated with reference to the English counterpart of our s. 5 (2) :

> It is difficult to understand exactly what the subsection is aimed at. There is, so far as I am aware, no statute which provides that the proceeds of sale of property held on trust for sale are to be considered as land, and certainly there is no rule in equity to that effect. The rule is entirely to the contrary . . . The difficulty . . . is to appreciate exactly the significance of the last words in the subsection " applicable as capital money for the purposes of the Settled Land Act, 1925." It may be that these words refer to the other subject-matter of the section—namely, money or securities, for in some circumstances such money or securities may be applicable as capital money for the purposes of the Settled Land Act, 1925, but whether this be so or not, in my opinion these words have no reference to land held on trust for sale. In my view s. 32 applies in a case like the present where the property is held on a plain trust for sale . . . .

It is open to doubt whether this decision would be followed in New Zealand in all cases, in view of the case of *In re Ford*, [1921] N.Z.L.R. 875, where it was held that real estate held in trust for conversion was "settled estate" within the meaning of the Settled Land Act, 1908. Before trustees apply the proceeds of sale of land under the section, they will need to consider whether the settlement comes under the Settled Land Act, 1908, and whether the proceeds are applicable as capital moneys for the purposes of that Act. If they are, then s. 5 will not apply. In *Oliphant* v. *Corbett*, [1930] N.Z.L.R. 495, it was pointed out that the question whether a settlement comes within the Settled Land Act, 1908, depends on whether land is limited to or in trust for any person "by way of succession," and that these words ought not to be assigned a narrow or strictly technical meaning, but should be treated as equivalent to "successively upon death."

If the trust property does not consist of money or securities, there is no power to resort to capital unless there is a trust for, or a power of, sale, calling in, and conversion. It is submitted that s. 5 applies in cases where the power of sale is given by statute as well as in those where it is expressly given by the instrument creating the trust. There is a statutory power of sale under s. 4 of the Administration Amendment Act, 1944, and s. 3 (1) of the Trustee Amendment Act, 1946, makes it clear that administrators are to have power to resort to capital.

Executors and trustees commonly have no power to sell specific devises and bequests (*In re Devereux*, (1906) 26 N.Z.L.R. 242), but in proper cases the Court could be asked to grant power to sell under s. 81 of the Statutes Amendment Act, 1936, and so enable a resort to capital.

Points left in some doubt by s. 5 are the meaning of the words "securities" and "moneys" in subs. (2): see *Perrin* v. *Morgan*, [1943] A.C. 399; [1943] 1 All E.R. 187; and whether advances which are brought into account in accordance with s. 5 (1) (*b*) should carry a hypothetical rate of interest: see *In the Will of Sargood, Trustees, Executors, etc. Co.* v. *Sargood*, (1904) 10 A.L.R. 149.

Effects on Conveyancing Practice.

It is stated in *29 Halsbury's Laws of England*, 2nd Ed., 773, 776, that it is usual in England to rely on the statutory powers, but that express power of maintenance and advancement should be inserted in the case of a settlement for the purposes of the Settled Land Act; or if the statutory powers do not apply; or if it is desired to vary the statutory powers; or if the settlement is not to be governed by English law. It may be safe to follow this practice in New Zealand, though the draftsman will need to consider in each case whether the statutory powers apply before he relies on them. Cases where express provisions may be desirable are where property is specifically devised or bequeathed; where the amounts involved are large; where there will be two funds available for maintenance in the hands of different trustees; where a settlor wishes to provide either more or less than the normal amount for maintenance or advancement; or where a class fund is desired. If accumulation is intended, the statutory power to resort to income should be expressly negatived. If capital is not intended to be used, the statutory power should be expressly negatived in cases where it would otherwise apply.

In conclusion, it may be noted that, although the new legislation supersedes the existing statutory provisions, it leaves intact the inherent jurisdiction of the Court regarding maintenance, and cases may still arise where it will be expedient to invoke this jurisdiction: see *Simpson on Infants*, 4th Ed., 189.

THE TRIAL OF MAJOR JAPANESE WAR CRIMINALS.

The International and Military Tribunal For The Far East.

By Flight-Lieutenant Harold Evans, LL.B.*

I.—Introduction.

The trial of twenty-seven former leaders of Japan, which is now taking place at the War Ministry Building in Tokyo before a tribunal of Judges from eleven different countries, is more than the outcome of victory in the recent war. It is also the result both of a major development of international law over the past three decades and of certain wartime declarations by the United Nations warning Japan and other enemy nations that war criminals would be brought to justice.

The nature and extent of the modern development of international law on the subject of war crimes, the conception of aggressive and defensive wars, and the question of individual responsibility for acts of state—these and other important questions of a like nature are matters which have already been brought before the tribunal by Counsel for the Defence. The Tribunal, however, has not yet delivered itself upon them, and it is therefore proposed in this present series of articles to reserve discussion upon them in the meantime. At this stage it will be sufficient to make mention of the international events leading up to the establishment of the International Military Tribunal for the Far East.

II.—Events Leading up to Establishment of International Military Tribunal for the Far East.

On December 1, 1943, President Roosevelt, Generalissimo Chiang Kai-Shek, and Mr. Churchill,

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meeting at Cairo, issued a statement making it clear that the United States, China, and Great Britain would be satisfied with nothing less than the unconditional surrender of Japan, and declaring that their three countries were fighting to " restrain and punish " her aggression. On July 26, 1945, representatives of the same three powers, meeting at Potsdam, called upon the Government of Japan to proclaim the unconditional surrender of all Japanese armed forces, and stated, in more detail than had been contained in the Cairo Declaration, their intentions with regard to Japan and the Japanese people following capitulation. Paragraph 10 of the Potsdam Declaration provides, in part:

> We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners . . .

The concluding paragraph of the Declaration ended with a warning that the alternative to immediate compliance with the Allied demands was Japan's " prompt and utter destruction."

The swift succession of events following the Potsdam Declaration is well-known. On August 6, 1945, the first atomic bomb was dropped, on Hiroshima. On August 9, the second atomic bomb was dropped, on Nagasaki. On August 9, the Soviet Union entered the war. On August 10, the Japanese Government advised the United States Government of its readiness to accept the terms of the Potsdam Declaration—subject to a reservation with regard to the Emperor's prerogatives—and on August 14, Japan's final acceptance of the Potsdam terms was communicated to the United States, Great Britain, the Soviet Union and China. The formal Instrument of Surrender was entered into by Japan on September 2. This document reiterated her acceptance of the Potsdam Declaration provisions (including, of course, the provision regarding the punishment of war criminals), proclaimed the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all armed forces under Japanese control, and declared that the authority of the Emperor and the Japanese Government to rule the state would be subject to the Supreme Commander for the Allied Powers, who would take such steps as he deemed proper to effectuate the terms of surrender.

The establishment of the International Military Tribunal for the Far East on January 19, 1946, for the just and prompt trial and punishment of major Japanese war criminals was one of the steps for effectuating the terms of surrender. It was done by means of a special Proclamation by General MacArthur in his capacity as Supreme Commander for the Allied Powers, and the constitution, jurisdiction and functions of the Tribunal were set forth in a Charter approved and issued by him on the same day.

III.—The Charter of the Tribunal and its Jurisdiction.

Before proceeding to summarise the main provisions of the Charter of the International Military Tribunal for the Far East, it is of interest to note that five months earlier, in August, 1945, the International Military Tribunal for the trial of major German war criminals had been established. Without making a detailed comparison between the two charters, it is of interest to note a few major differences. In the first place, the " Nuremberg Charter " was part of a formal agreement between the American, British, Soviet and French Governments, establishing the Tribunal; the Tokyo Charter, as already mentioned, was issued by the Supreme Commander under the authority of the Allied Powers. Secondly, the Nuremberg Tribunal consisted of four members and four alternates—a member and an alternate from each of the signatory powers. Each alternate was to be present, so far as possible, at all sessions of the Tribunal, and was to take the place of his country's principal member if the latter was sick or incapacitated. The Tokyo Charter does not provide for alternates, there being one member only from each of the eleven countries represented. A third important difference between the two documents is that, while the Nuremberg Charter required that all official documents should be produced, and all court proceedings conducted, in English, French, Russian and in the language of the accused (German), the Tokyo Charter does not go beyond providing that the trial and related proceedings shall be conducted in English and in the language of the accused (Japanese). To this it should, however, be added that the Tokyo Tribunal has recently, during the presentation of part of the prosecution's case by French and Russian counsel, allowed the use of the French and Russian languages.

It will serve no useful purpose here to carry the comparison between the two Charters any further, and it suffices to say that they are very similar in scope and object.

To enable, however, a proper understanding of the trial now taking place in Tokyo, a familiarity with the main provisions of the Charter of the International Military Tribunal for the Far East is necessary. The following is a summary of them.

The membership of the Tribunal is not fewer than six nor more than eleven, the individual Judges (as well as the President) being appointed by the Supreme Commander from names submitted by the signatories to the Instrument of Surrender, India and the Commonwealth (now Republic) of the Philippines. A majority of all members constitutes a quorum, and decisions are taken by majority vote of members present. Where voting is equally divided, the vote of the President is decisive. The Tribunal is given power to determine its own procedure, consistent with the fundamental provisions of the Charter.

As already mentioned, the Charter provides that the proceedings shall be conducted in English and in the language of the accused. Other provisions designed to ensure that the accused shall have a fair trial are that each accused shall be entitled to be represented by counsel of his own choice, or, if unrepresented, to have the Tribunal designate counsel for him; to conduct his defence himself or through his counsel (but not both), and to examine any witness; and to secure, through the Tribunal, production of the witnesses and documents he requires for conducting his case.

The Charter expressly provides that the Tribunal shall not be bound by technical rules of evidence, and that it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure. Any evidence is admissible which the Tribunal deems to have probative value. As to the conduct of the trial generally, two important provisions require that the Tribunal " confine the trial to an expeditious hearing of the issues raised by the charges," and " take strict measures to prevent any action which would cause

any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever." At this point, it may be observed that, while there has been some criticism of the Tribunal, on the one hand, for at times giving short shrift to counsel for the accused, and, on the other hand, for permitting unnecessary delays, the critics seldom appear to appreciate the practical difficulties facing the Tribunal in its duty of carrying out both the provisions designed to ensure a fair trial and those just quoted.

(To be concluded.)

LAND AND INCOME TAX PRACTICE.

Social Securiry Benefits and Taxations.

For the purpose of that part of the Social Security Act which deals with Universal Superannuation and all classes of monetary benefits, income is defined to include all *moneys* and the value of all benefits derived or received from any source for the applicant's own use or advantage, but does not include: (*a*) Social Security benefits or pensions received under any Act repealed by the Social Security Act; (*b*) funeral benefits received from any friendly society; (*c*) any capital moneys received in respect of the sale or exchange of any property; (*d*) any moneys received under an insurance policy for fire, earthquake or damage of any kind to building or other property; (*e*) any capital moneys not exceeding £500 in the aggregate received by an applicant under life insurance policies on his own life; (*f*) any capital moneys received on the intestacy or under the will of the deceased husband or wife of the applicant; (*g*) any capital moneys not exceeding £500 received by way of legacy, under any policy of life insurance, or as compensation or damages in respect of any accident causing the death of any person, or causing bodily injury, or as a compassionate grant made by the Government, or by any employer on account of the death of the husband of the applicant; (*h*) any moneys paid in respect of any military decoration awarded for gallantry and received by the recipient of such decoration.

It will be observed that the "income" which is used for the calculation of benefits, and which may have the effect of reducing the basic rate of benefit for specified disabilities, includes "all moneys and the value of all benefits" with the exception of the receipts itemised above, and more fully detailed in s. 10 of the Social Security Act, 1938.

For the purpose of assessing the Social Security charge which forms part of the revenue of the Fund from which the various monetary benefits are paid, the Social Security Act at Part IV specifies the persons liable to pay the charge (s. 110) and what income is subject to the charge of (now) 1s. 6d. in the £ (s. 127). For practical purposes, the income liable to social security charge and national security tax is income which is "assessable" under the Land and Income Tax Act, and also "non-assessable" income derived from overseas. Compensation received under the Workers Compensation Act, 1922, and most company dividends are not liable to the charge (s. 127 (3) (6) (7)).

The most striking difference between the two definitions is that, for benefit purposes, "income includes *all moneys*, excepting those classes specified, whether those moneys would, to the ordinary accountancy view, be capital or revenue receipts. For taxation purposes, there is a clearer distinction between revenue and capital receipts, and the income subject to social security taxation is in general ordinary revenue receipts. In the case of income other than salary or wages, the chargeable income for taxation purposes is arrived at by allowing for depreciation on business assets, whereas no such allowance is made in computing chargeable income for benefit purposes.

A point of practical interest is that a pension paid under the War Pensions Act, 1943, in respect of any disability, whether payable to the person who suffered the disability or his dependants, is income for Social Security benefit purposes, but is specifically exempt from all taxation by s. 79 (*f*) of the Land and Income Tax Act, 1923.

Age Benefits: Deduction for Property.—An age benefit is reducible where the applicant or his wife is the owner of property. The statutory provisions are in ss. 17 and 20 of the Act. In computing the value of property, no account is taken of the applicant's interest in any land, including his interest under any mortgage or other encumbrance of any estate or interest in land; or his interest in any annuity or in any policy of life insurance; or any furniture used in the home of the applicant. The property remaining is termed the "chargeable property."

The value of the chargeable property of any married applicant is the equivalent of one half of the combined properties of husband and wife. For example, a married couple having a total combined chargeable property of £1,000, in the proportion of husband £700 and wife £300, would each be deemed to have chargeable property to the value of £500.

There is a £500 exemption against the chargeable property deemed to be held by every applicant, and the basic or maximum rate of age benefit is reduced by £1 for **every complete £10 of** the excess chargeable property above the £500 exemption. If the applicant is a married man in receipt of an additional allowance on account of his wife who is not eligible for benefit in her own right, each portion of the basic benefit is reducible by £1 for every complete £10 of the chargeable property in excess of £500.

Examples: 1. Single individual, separated or divorced person:

Property: Cash £15
Bonds £30
House £1,000 (subject to mortgage £300).
Life Insurance Policy £500.
Motor-car £400.

Income: Superannuation £130.

The total chargeable property is motor-car, bonds, and cash = £445, and, as this amount is less than the £500 allowed, no adjustment on account of property is required. The age benefit in this case would be adjusted by reason of the income only, and would amount to £33 per annum: see (*1946*) *22 New Zealand Law Journal*, 221.

If the cash had been £515, making the total chargeable property £945, the net chargeable property, after allowing the £500 exemption, would be £445, and a deduction of £44 would be made from the basic rate of £104, leaving an age benefit of £60. The reduction on account of income gives a smaller benefit, however, and the rate of £33 would be paid.

2. Married couple, both eligible:

Property: Husband:		Wife:	
Cash	£150	Cash ..	£10
House ..	£1,500	Jewellery ..	£40
Furniture ..	£500	Mortgage ..	£500 @ 5%
Week-end section	£100	Furniture ..	£100
Motor-car ..	£300		
Life insurance policies ..	£800		
	£3,250		£650

Income: Superannuation £208. Interest £25.

The total chargeable property excludes house, furniture, section, mortgage and insurance policies, and jewellery, and leaves £460.

The chargeable property of each applicant is deemed to be £230, and no deduction from the basic benefit would be made on account of property. The combined benefit would be computed by taking into account the combined income of £233, and would amount to £45 per annum.

3. Married couple, both eligible:

Property: Husband:		Wife:	
Cash	£70	Cash	£50
P.O.S.B. ..	£400	House	£1,800
Cheque, being lump sum value of superannuation withdrawal	£1,230	Furniture ..	£500
	£1,700		£2,350

In the first year, the chargeable assets would be assessed at £1,750, being cash, bank and superannuation cheque. Each applicant would be deemed to have £875 chargeable assets, and, after allowing £500 exemption, the net chargeable assets are £375, which means a reduction of £37 from the maximum benefit of £104 for each person. The age benefit for each person would then be £67, making a total of £134. The assessment of benefit would be made on the same basis for as long as the circumstances remained the same.

If there is a mortgage of £1,000, on the house property of £1,800, and is repaid out of the £1,230 lump sum, leaving an amount of £630 in the bank, the Department would assess the assets at £750, or £375 each, and, after allowing £500 exemption, no reduction in the maximum benefit would be made.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Land 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. 93.—D. to McR.

Rural Land—Building Deficiency—Deduction from Productive Value—Comparable Sales in Locality—Proximity to Township.

Appeal relating to an area of 54 acres 1 rood 14.2 perches at Kaikoura. For the purpose of its decision, the Committee accepted the budget presented by Mr. D. for the Crown, subject to adjustments as follows:

Productive value		£3,578
Less deficiency in buildings, etc.		1,140
		£2,438
Plus locality value		432
	Total	£2,870

The appellant contended that the sale should have been approved at the full amount of the sale price, £4,238 8s. 6d., or £78 per acre.

The principal contention at the hearing related to the propriety of the Committee's action in deducting £1,070 for building deficiency, and the appellant relied also on the fact that an adjoining area of 24 acres had been sold to one A. and approved by the Committee at £78 per acre.

The appellant also relied upon the proximity of the property to the township of Kaikoura as giving it a substantial locality value.

The Court (per *Archer*, J.) said: "It should first be made clear that, by virtue of s. 53 of the Servicemen's Settlement and Land Sales Act, 1943, the Court has no option in fixing the basic value of farm land but to ascertain its value on a productive basis, subject to such additions or deductions as are provided for by the Act. It is not disputed that the area in question is an economic unit suitable for the settlement of a discharged serviceman, and the Court is, therefore, obliged to adopt the budgetary method of valuation as put forward by the Crown Valuer. This was, by implication, acknowledged by both of the valuers for the appellant when they admitted frankly that, in the main, they accepted Mr. D.'s budget as correct, and restricted their criticism of his budget to the amount of £371 allocated for management and labour. These valuers contended, and possibly rightly so, that an energetic owner might do the whole of the work of the farm himself, or with the aid of a limited amount of casual labour, and they therefore contended that a smaller sum than £371 would be adequate for labour reward. They appear to have overlooked, however, that the labour reward in a dairy-farm budget is fixed, not by reference to the minimum amount of labour which might actually be required, but by reference to the allocation for labour reward which was agreed to on the fixing of the guaranteed price for butterfat. In that price, which is the basis of the estimated income from the farm, an amount of 9.28d. per lb. was allocated for cost of management and labour. In the present case, on an estimated output of 9,600 lbs. of butterfat per annum, the labour cost at 9.28d. per lb. amounts to £371, and this must be allowed in accordance with the declared policy of the Court in respect of normal dairy farms. The result in the present case is that, in order to give the farmer of this land an adequate return for his labour in producing 9,600 lbs. of butterfat, he has to be allowed a total sum of £371. Of this sum he will no doubt expend some part on the employment of casual labour, but the total sum to which he is entitled is not affected by any consideration as to the exact amount of labour he should employ or whether he should do the whole of the work himself or with the aid of his family.

"As the only criticism of the Crown's budget made by the appellants was with respect to labour reward, which criticism, for the foregoing reasons, cannot be sustained, it is clear that the Committee was justified in accepting the Crown Valuer's productive value of £3,578. From this sum, Mr. D. deducted a total of £1,140, being £70 for deficiency in fencing, water supply and shelter, which item the appellants did not dispute, and £1,070 for deficiency in buildings, which deduction they claimed should not have been made. In fact, there is no dwelling and there are no farm buildings whatever upon this land. Mr. Churchward, for the appellants, contended that, as the full productive value might be earned by an adjoining owner living elsewhere, and in such case without the erection of any farm buildings, no deduction for the existing deficiency is justified, and he pointed out that the present sale is to a farmer residing some quarter-of-a-mile distant, who presumably would not require to live on the farm. The Court is of opinion that such an argument is based on an inadequate appreciation of the method of valuation prescribed by the Act. The Court has always accepted the view, and considers it to be inescapable from a careful perusal of s. 53, that, in assessing a basic value, it must envisage a farm fully equipped with the buildings and other improvements normally required to produce the estimated income, and it is, of course, expressly provided by subs. (2) (*b*) that the extent to which the value of the improvements is less than the value of the improvements normally required shall be taken into account. It is conceived that the buildings normally required on any economic farm unit must include a suitable dwellinghouse, and, in the case of a dairy farm, suitable milking-sheds, piggeries and other necessary buildings. Where these buildings, which are normally required, are entirely absent, it is conceived that a duty is imposed upon the Court to make an adjustment in the productive value accordingly. The mere fact that a producer might choose to live elsewhere, and might therefore find it unnecessary to erect on the land buildings which would normally be required, cannot affect the basic value which the Court is enjoined by the Act to determine.

"We are unable, therefore, to sustain the contention that no deduction should be made owing to the absence of buildings. The sum of £1,070 deducted by the Crown was not seriously attacked as to amount, and it is clear that this sum will by no means cover the actual cost of erecting new buildings upon the land. The actual cost was estimated by the Crown to be not less than £1,610, so that we see no reason to interfere with the deduction of £1,070 which is proposed as being a necessary deduction in order to reduce the productive value, in the circumstances of the present case, to a fair value.

"The Committee then proceeded to allow the sum of £432, as locality value by reason of the proximity of the property to Kaikoura. In its recent decision in *No. 88, In re B.*, relating to the Pukeatua estate, the Court stated that the mere proximity of a farm property to a town, while being of undoubted advantage to the owner, cannot be deemed to add special value over and above the productive value of the land, except in special circumstances, such as may exist where the land, or a part of it, is likely to be required in the immediate or near future for subdivisional purposes. In this case, it was pointed out that other parts of the D. estate in close proximity to the present area had in fact been subdivided, and one area was in course of development as a Government housing block. It was contended by the Crown, however, that at best only a small area of the present farm was suitable for subdivision, and that to sell off any part of the suitable area would have a very detrimental effect on the property treated as a whole. On the other hand, the appellants contended that, by reason of being within a mile or less of the centre of Kaikoura township and of the railway station and sale yards, some added value was undoubtedly given to the property even as a farming proposition. The Court is satisfied that this particular property is not likely to be required for subdivisional purposes for many years to come, and that to sell off any part of the land would be detrimental to it as a farm. It has considerable doubt as to whether any substantial value is added by reason of its

close proximity to the township, railway station and sale yards. It is clear, however, that the Committee considered such advantages to exist, and to be of the value of £432, and in this they had the support of the Government Valuer when he appeared before them. We consider that some added value has been established, but are quite satisfied that, had the matter originally come before us for assessment, we should not have allowed the sum specifically allocated to the locality value by the Committee. As indicated in the decision previously referred to, we are of opinion that the productive value should not be increased by reason of the locality of the land, except where special value is very clearly established. Considering, however, the price of £55 per acre assessed by the Committee as the value of the property as a whole, and having due regard to the Committee's local knowledge and experience, and to the substantial reduction which has been made in the purchase price, we do not think that the basic value as fixed by the Committee should be further reduced.

"The appellants' most serious complaint, viewed at first sight, was that while the Committee had approved of a sale of 24 acres adjoining to A. at £78 per acre, the present area was reduced to approximately £55 per acre. In each case, the land was devoid of farm buildings, and it was argued that the Committee fixed a standard of value per acre on the sale to A. which should be applicable to the present land. The appellants are, of course, fully entitled to point out to the Court this apparent inconsistency, and it is not more than their due that the Court should give it very careful consideration. It should, however, be recognized that the price approved by the Committee in A.'s case is in no respect binding upon the Court, which must decide the present case purely upon its merits. The cases are not exactly parallel, as the property sold to A. was not an economic unit, and, therefore, was not valued upon a productive basis. Furthermore, it was slightly nearer to the built-up area, and it may be that the Committee thought that a greater potential or locality value attached to it on this account. In any case, the Court is entitled to have regard to the Committee's opinion, now stated in the Chairman's report in the present case, that, after an inspection of the property since the sale to A., it is satisfied that the price of £78 per acre was definitely too high. On the evidence now before the Court, it would seem that the true value on a per acre basis of the land sold to A. was little different from that of the land now under consideration, but it is of course clear that, if the Committee approved of too high a figure on the sale to A., and the present vendors benefitted by such a mistake, that is no reason why the Court in the present case should, adopt a higher basic value than is justified by the evidence.

"The Court had the benefit of a plan showing the whole of the area originally owned by the D. estate and indicating the various lots which have been sold off. The property originally consisted of some 93 acres lying in an easterly and westerly direction along Ludstone Terrace. At the extreme eastern end of the property, it reached the intersection of the Main South Road with Ludstone Terrace, and at this particular point it is clear that part of the land was suitable for subdivision. An area of 10½ acres near the intersection was sold to the Housing Department, and Government houses are being erected thereon. Opposite this land, and on the north side of Ludstone Terrace, a strip of some 3½ acres was retained by the estate as being suitable for subdivision. Two acres of this area was recently sold to a bowling club for £200, and the balance of 1½ acres was sold to A. for £150. Twenty-four acres to the north of this strip, having its frontage to Rorrison Road was the area sold to A. and passed at £78 per acre. The land at present under consideration is to the west of Rorrison Road and to the north of Ludstone Terrace, and is clearly suitable for a self-contained dairy farm. The total area originally owned by the estate might, of course, have been sold as one farm unit, and in that case the whole would have had to be valued on a productive basis, and a deficiency in buildings would have had to be taken into account. There were, in fact, a very old dwelling and certain other buildings on the area sold to the Housing Department, but it would seem that they had not been occupied for many years, and had only a demolition value. Instead of selling the property as a whole, it would appear that the trustees very wisely disposed of the land in several lots, according to the uses for which the respective areas were most suitable. By this means, we have no doubt, they obtained an adequate price for the areas immediately suitable for subdivision. Twenty-four acres was sold to A. at £78 per acre, and, from the evidence now before us, it would seem that the estate was fortunate in obtaining consent to this sale without deduction. We are satisfied that the present area of 54 acres, being the residue of the original holding, although eminently suited as a farm unit, is the least valuable per acre of the lots sold, and that this particular area enjoys only to a very minor degree the potentiality for subdivision or further development possessed by some of the other land disposed of at higher prices.

"We are, therefore, of opinion that the basic value placed upon this particular land by the Committee is a fair value in terms of the Act, and represents the maximum amount which the trustees could properly ask under the Act for this property. The appeal must therefore be dismissed."

No. 94.—D. TO H.

Urban Land—Building Section—Crown Value below Conrtact Price—Crown Representative offering to consent to Sale-price above Crown Valuation but below Contract Price—Object to avoid Contested Hearing—Offer refused by Vendor's Solicitor—Price fixed at Crown Valuation, after Hearing—Whether Committee competent to reduce Amount to which Crown Representative had agreed.

The appellant appealed against a decision of the Taranaki Land Sales Committee in respect of the sale of a building section at Fitzroy. The contract price for the section was £235. Before the hearing by the Committee, the vendor's solicitor had been advised that the Crown valuation was £195; but, in negotiation with him, the Crown representative had offered, in order to avoid a contested hearing, to agree to a settlement at £205. This offer was refused, and, after a hearing, the Committee fixed the price at £195, in accordance with the Crown valuation.

On the appeal, Mr. Sheat, for the vendor, contended that it was not competent for the Committee to fix a price lower than the sum of £205, which, he claimed, the Crown representative had agreed to prior to the hearing.

Archer, J. (orally): "The Court is satisfied that this contention is unsound. The Crown representative is not the agent or representative of the Committee, nor is he competent to bind the Committee in any way as to the fixing of the price at which consent may properly be granted. The duty of the Crown representative is to protect the public interest by seeing that the objects of the Act are carried out and by assisting the Committee to arrive at a fair value in accordance with the Act. While the Crown representative may properly suggest to the parties and to the Committee a figure at which, in his opinion, it would be reasonable for the sale to be approved, the adoption or rejection of that figure is entirely a matter for the Committee. The position is the same whether any offer or proposal by the Crown representative is made openly or made without prejudice. In either case, the Crown representative is entitled only to recommend a settlement, and it is competent for the Committee to insist upon the matter proceeding to a hearing. Where a case does go to hearing, it is the duty of the Committee to deal with the application in accordance with the evidence. Should the basic value, as found upon the evidence, be less than the sum at which, prior to the hearing, the Crown representative would have been willing to compromise, the Committee is not only competent, but is bound by the terms of the Act, to impose a condition that the price be reduced to the value so found.

"As the present appeal was directed only to the matter of the Committee's competence to make the order made in this case, and no evidence was offered as to value, the appeal must be dismissed."

PRACTICE NOTE

The correct manner of reference to His Honour the Chief Justice in Court documents as as follows:

In Court Orders: "Before the Honourable the Chief Justice."

In Judge's Orders: as above; or "Before the Honourable Sir Humphrey Francis O'Leary, K.C.M.G. Chief Justice of New Zealand."

In Probates: "The Honourable Sir Humphrey Francis O'Leary, Chief Justice of New Zealand."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Straws in the Shoe.—In litigation involving the enforcement of contracts—and, in times of depression, the suspension of personal covenants under mortgages—the term " man of straw " conjures up to the creditor the picture of a debtor over whom it is unwise to throw good money after bad. The " man of straw," however, was one who, in ancient Greece, advertised his willingness to testify on oath to any required state of facts by wearing a straw in his shoe as a badge of his profession. In Westminster Hall, where William the Conqueror established his Norman Courts of Justice, and where for centuries the Judges of the Common Law sat alongside those administering equity in the Courts of Chancery, the " professional witness " continued to draw the attention of litigants to his usefulness by placing the straw of his profession in one shoe. Hence, according to authority, the " man of straw " became known as a perjured or controllable witness, and thus, in the course of time, any unreliable person.

Marshall Hall.—While confessing to having fallen, some years ago, under the temporary spell of Majoribanks' biography of Sir Edward Marshall Hall, Scriblex has long considered it a misleading book, firstly because the writer has failed signally to see the " warts " upon his subject, and secondly because the flamboyancy of Marshall Hall's methods provide a bad example to the young apprentice in the law, whatever their use may have been to the more sensational of the English newspapers. The lack of restraint in Marshall Hall is referred to by Gilchrist Alexander in one of his articles on famous advocates in the *Law Times* (October 4, 1946):

> In civil cases from the beginning he threw himself upon the jury and poured out in an impassioned address every imaginable consideration in favour of his client. Juries were carried away and at first he secured the most resounding successes. But Nemesis lay in wait for him in the shape of the Court of Appeal. That tribunal viewed very coldly, to say the least of it, the action of counsel in offering to a jury prejudicial matters of which he had no proof. And Judges were sometimes shocked by certain lapses from those scruples which actuate members of the Bar of England. His stock fell. Solicitors became afraid to brief him. And for a spell he lost most of his practice.

He appears to have recovered to some extent after his original setback, but never to have regained the confidence of the Judges, with whom he impetuously continued to have scenes and to enter into unnecessary controversies.

The Personal Note.—The following story is told by Sir Travers Humphreys in his Autobiography, *Criminal Days* (Hodder & Stoughton, Ltd., 1946), of Sir Peter Edlin, Q.C., a Judge of the Middlesex Sessions and described as " short and fat, with the oldest and dirtiest wig ever seen on the Judicial Bench." A certain counsel acquired the habit of appearing to identify himself with his client with results that were at times amusing and even embarrassing. He was defending a person charged with assisting in the conduct of a disorderly house. The defence was that the accused was a mere servant, who was unaware of the improper character of the premises. His speech to the jury took this form : " Gentlemen, surely we can all put ourselves in the position of my client. We all know what happens in such a case. We go to the house with the woman of our choice, or maybe we rely upon the keeper of the house to supply what is desired ; we ring the bell, the door is answered by a servant. What is it to him that you or I are upon an immoral errand ? We merely leave our hats and coats with him, or perhaps the more experienced of us do not even trust him to that extent. It has happened to everyone of us over and over again," etc., etc. By this time half of the jury were highly indignant and the other half grinning with delight. Edlin interrupted with the observation : " Mr. Blank, may I suggest that you should reserve the recital of your further experiences at this establishment until you come to write your reminiscences."

The Sceptical Miner.—One of the facets of A. T. Donnelly's many-sided versatility is his skill as a raconteur. This was employed to good purpose recently when he was sitting as an assessor in the Onekaka case, the compensation marathon still being run in Wellington, and when he made reference to a speech on the Iron and Steel Industry Bill recorded in 1938 *Hansard*. The Minister had painted a very glowing picture of the industry and prophesied a profit of £419,000 for the year's working. This reminded the speaker of the story of the old miner who was dying in hospital in Central Otago. When the clergyman called to see the patient, the doctor told him that the old miner had not long to live. So the clergyman went along to the miner and read him the following passage from the Good Book : " And the building of the wall " of it was of jasper : and the city was pure gold, like " unto clear glass. And the foundations of the wall of " the city were garnished with all manner of precious " stones." Just there, the old miner raised himself up on his elbow and said to the clergyman : " What are you reading from ? Is it the prospectus or the annual report ? "

R. v. Jack T.—From a Motueka correspondent comes a note of this apparent usurpation of the Crown in its usual role of prosecutor. It seems that Jack T., who worked for his brother Rex T., was accused of committing an indictable offence, whereupon brother Rex terminated brother Jack's employment. In due course, the Registrar supplied the local newspaper with the list of causes for hearing at the then approaching sittings of the Supreme Court, and, like Leigh Hunt's Abou Ben Adhem whose name led all the rest, Jack T.'s case headed the list, reading " Rex *v.* Jack T." (and the charge). A few minutes after publication, counsel for Jack T. received a violent protest by telephone from Rex T. for publishing his name as a party to the proceedings and insisting that a disclaimer be advertised forthwith !

PRACTICAL POINTS.

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

1. Mortgage.—*Mortgage of Leasehold—Unregistered Lease—Contract to purchase Freehold—Balance of Principal to be secured by Mortgage of Freehold—Protection of Mortgagee's Rights.*

QUESTION: I am acting for a purchaser who has just entered into a contract for the purchase of buildings, which at the present time are held by him from the vendor under a lease which has three years to run. The lease is not a registered one, for the reason that portion of the ground floor of one of the buildings was retained by the lessor. Under the contract for sale, however, the whole building passes, and, subject to the consent of the Land Sales Court, a transfer will be registered in two or three months' time.

The purchaser became the owner of the present lease by purchase from the original tenant; and, as security for the purchase money, the first tenant holds from the present purchaser a mortgage over the unregistered lease. Under the terms of the purchase of the freehold, the purchaser is to give the vendor a first mortgage, or to give a first mortgage which the vendor may arrange for the purchaser. There is still some £2,000 owing to the original tenant, the mortgagee of the lease.

What will the rights of the mortgagee be when the freehold is transferred, and how will his interests be protected? Would he have been in a stronger position if it had been possible for him to have been given a registered mortgage over a registered lease?

ANSWER: There are conflicting decisions as to whether the mortgagee of the leasehold is entitled to prevent the merger of the lease in the freehold and to retain his security over the leasehold interest: (*Bevan* v. *Dobson*, (1906) 26 N.Z.L.R. 69), or whether he is entitled to a charge over the freehold acquired by the mortgagor: *Trumper* v. *Trumper*, (1878) L.R. 8 Ch. 870, *Mackenzie* v. *Building and Loan Association*, (1898) 28 S.C.R. 407.

His interest should be protected by a caveat, which will, of course, require to trace title from the registered proprietor by reciting the unregistered lease from him, and then purport to protect the mortgage claiming under the unregistered mortgage of such lease. If possible, it would be desirable to have the lease and mortgage registered, and thus obtain the rights in respect of the land given by a registered mortgage.

A.2.

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2. Chattels Transfer.—*Instruments comprising Stock—Description—Identification—Method of Identifying Specific Stock by Description.*

QUESTION: I am under the impression that some years ago the Supreme Court held that in an instrument comprising dairy stock the description in the schedule:

"The grantor's dairy herd, comprising 50 cows 1 bull branded marked (brand and mark shown)"

was sufficient to comply with s. 28 of the Chattels Transfer Act, 1924, a dairy herd being a definite entity. I have accordingly used this sort of description for years past, but always inserting the covenant to brand, so as to comply with s. 29.

Recently I have been asked to particularize by stating breed, colour, name, and age of each cow. This, besides being well-nigh impossible in most cases, is futile (apart from the law), because the identity of the animals in a herd changes greatly from year to year.

I have not been able to find the case, and should be glad if you would state briefly the law on the point, and also if stock described as above can be said to be "reasonably capable of identification" in the light of the cases.

ANSWER: There does not appear to be any reported case as mentioned.

The method of describing existing stock indicated above is not thought to be a particularly happy one. The question as to whether stock so described can be said to be "reasonably capable of identification" would depend on the circumstances of the case. If it were shown that, at the time of execution of the instrument, the grantor had exactly the number of stock stated and they were all branded as shown, then possibly the description might be good: *Davidson* v. *Carlton Bank, Ltd.*, [1893] 1 Q.B. 82, and *Herbert* v. *Wairarapa Farmers' Co-operative Association, Ltd.*, (1910) 12 G.L.R. 680. But, if it could not be shown that the number of stock enumerated exhausted all the stock on the premises, then the description would certainly be sufficient: *Carpenter* v. *Deen*, (1889) 23 Q.B.D. 566, and *In re Christie*, (1901) 19 N.Z.L.R. 615.

This, briefly, is the law on the subject. Section 28 relates to specific stock existing at the time of the execution of the instrument. Such stock must be so described as to be reasonably capable of identification, as must also the land on which they are. "There should be annexed to the instrument a schedule containing a description of the chattels sufficiently specific to enable any person taking the schedule in his hand and applying it to the subject-matter, to identify the chattels assigned without the aid of any other document," *per* Kay, J., in *Davidson* v. *Carlton Bank, Ltd.* (*supra*), at p. 87.

It cannot be agreed that to particularize each cow by age, name, colour, breed or other mode of description, so as to be reasonably capable of identification, is very difficult; it is done in the vast majority of cases, nor can it be agreed that it is futile because the identity of the animals in a herd changes from time to time.

Section 29 brings in, in the absence of express provision to the contrary, the natural increase of the original stock, and all stock of the class or classes described in the instrument which are the property of the grantor, and which, after the execution of the instrument, are on the lands mentioned in the instrument or lands used as part of such lands. But, in order that s. 29 may operate, two things are essential. First, there must be in the instrument a covenant to brand, earmark, or mark, and secondly, a brand, earmark or mark must be specified in the instrument.

A brand cannot be better specified than by supplying a drawing in the instrument: *Honore* v. *Farmers' Co-operative Auctioneering Co., Ltd., and Official Assignee*, [1923] N.Z.L.R. 56.

A.2.

RULES AND REGULATIONS.

Rabbit-destruction (Tokarahi District) Regulations, 1946. (Rabbit Nuisance Act, 1928.) No. 1946/209.

Health (Food) Amending Regulations, 1946. (Health Act, 1920.) No. 1946/210.

Waterfront Industry Emergency Regulations, 1946, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1946/211.

Death Duties Interest Order, 1946. (Death Duties Act, 1921 and Finance Act, 1932.) No. 1946/212.

Factories Act, 1921-22, Extension and Modification Order, Amendment No. 2. (Finance Act, 1936.) No. 1946/213.

Servicemen's Settlement and Land Sales Regulations, 1943, Amendment No. 2. (Servicemen's Settlement and Land Sales Act, 1943.) No. 1946/214.