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## SOME COMPANY-LAW CASES IN 1946.

IN our last issue, we commenced a summary of the decisions relative to company law heard during the year 1946 in the Chancery Division and Court of Appeal in England, and reported. We now conclude the summary of these decisions, and add some Australian ones.

Section 56 of the Companies Act, 1933, which prohibits the provision of financial assistance by a company for the purchase of its own shares, was held, under the corresponding English section, by Roxburgh, J., in *Victor Battery Co., Ltd.* v. *Curry's, Ltd.*, [1946] 1 All E.R. 519, not to invalidate a debenture the object of which was to facilitate the purchase of shares ; in other words, upon its true construction, it does not invalidate or avoid the security to which it refers. One, Jaina, had agreed to buy the whole of the issue share capital of the Victor Battery Co. from certain vendors for the sum of £15,000. He was, however, only able to pay down £6,000, for which he received 40 per cent. of the shares. In order to obtain the £9,000 necessary to enable him to purchase the remaining shares, Jaina entered into an agreement with Curry's, Ltd., whereby Curry's, Ltd. loaned the sum of £10,000, the greater part of which was used through the medium of two other companies with which Jaina was connected in paying the vendors for these remaining shares. After the transfers had been executed, the Victor Battery Co. issued a debenture for £10,000 to Curry's, Ltd. It was contended by the Victor Battery Co. that the debenture was void, because it had been issued in contravention of s. 45 of the Companies Act, 1929 (corresponding with our s. 56). Roxburgh, J., held that, upon its true construction, s. 45 did not invalidate or avoid the security to which it referred. The debenture was, therefore, valid. His Lordship, assuming that the issue of the debenture was an illegal transaction by reason of s. 45, held that the Victor Battery Co. could not maintain an action to be relieved thereof, because the object of s. 45 was not to protect but to punish a company providing security in contravention of the section, and, therefore, the Victor Battery Co. did not come within the exception to the maxim *in pari delicto potior est conditio defendentis*. Consequently, while an offending company may be punishable by fine, yet the debenture in the case under notice remained valid. A contrary decision would have the effect of penalizing the debenture holder to an unlimited extent, while the offending company remained liable only to a fine not exceeding £100 (see subs. 3).

In *Re "L" Hotel Co., Ltd., and Langham Hotel Co., Ltd.*, [1946] 1 All E.R. 319, Uthwatt, J. (as he then was), had to deal with a point of practice in regard to an order transferring the property of a company. He held that, where an application is made to the Court under s. 154 of the Companies Act, 1929 (Eng.) (s. 160 of the Companies Act, 1933), for an order transferring the property and liabilities of the transferor company to the transferee company, the order should not contain any limitation showing that it cannot have the effect of transferring a purely personal contract, because such an order can only transfer such property as could be transferred by an act *inter partes*. Where the order is one transferring all the property of the transferor company, it is not legally necessary to specify all the various properties of the company in schedules to the order. Such an order transfers all the property of the one company to the other company for such estate and nterest as the former has.

In *Greenhalgh* v. *Arderne Cinemas, Ltd.*, [1946] 1 All E.R. 512, the Court of Appeal (Lord Greene, M.R., Morton and Somervell, L.JJ.), had to consider whether a subdivision of shares resulted in a "variation" of the voting powers of the company within the meaning of that term in Art. 3 of Table A, which is reproduced in the corresponding article in the Second Schedule to the Companies Act, 1933. The respondent company was a private company, formed in 1936, with a nominal capital of £26,000, originally divided into 21,000 preference shares of 10s. each and 31,000 ordinary shares of 10s. each. The articles of the company incorporated certain articles of Table A, including Arts. 3, 37 and 54. Under Art. 54, on a poll, every member was to have one vote for each share of which he was the holder. Under Art. 37, the company had the power of subdividing its existing shares. By March, 1941, 26,295 of the ordinary shares had been issued. In March, 1941, the company was in financial difficulties, and an agreement was entered into with the appellant whereby debentures were to be issued to him for the sum of £11,000 advanced by him to the company. The agreement further provided that the company was to sub-

divide the whole of the unissued ordinary shares of 10s. each into ordinary shares of 2s. each, ranking *pari passu* with the issued ordinary shares for all purposes; the new subdivided shares (called the 1941 2s. shares) were to be allotted as to 19,213 shares to Greenhalgh and as to 4,312 shares to certain directors of the company; and Greenhalgh was to be appointed an additional director. In order further to protect his interests during the continuance of the debenture debt, Greenhalgh entered into a collateral agreement with the three directors to whom the new shares were issued. By this agreement, it was provided that these three directors should vote with and support Greenhalgh, as and when required by him, and that Greenhalgh would use his votes to re-elect them as directors upon their retirement by rotation. In November, 1941, however, each of the three directors transferred his 2s. shares and some of his 10s. ordinary shares to other members of the company, and it was held, in an action brought at the time by Greenhalgh, that the transferees held the shares free from any obligation arising under the collateral agreement. As a result, Greenhalgh lost to a certain extent the protection which he had endeavoured to secure under the two agreements. On March 12, 1943, at an extraordinary general meeting of the company, it was resolved by a small majority that the existing 10s. ordinary shares should be subdivided into 2s. shares ranking so as to form one class of shares with the 1941 2s. shares and carrying the same voting rights, etc. The effect of this was that Greenhalgh was no longer able to enforce any control whatever over the affairs of the company. It was contended on behalf of Greenhalgh that this resolution for subdivision was void because (i) it constituted a breach of an implied term in the agreement of March, 1941, to the effect that the company would be precluded from acting in any way which would interfere with the voting control acquired by Greenhalgh as a result of the agreement, (ii) the resolution varied the voting rights attached to the 1941 2s. shares without the consent of the holders of those shares, which was required under the provisions of Table A, Art. 3. Their Lordships, in affirming the decision of Vaisey, J. ([1945] 2 All E.R. 719), held that there could not be implied in the agreement of March, 1941, a term that the company would be precluded from acting in any way which would interfere in the voting control acquired by Greenhalgh as a result of the agreement. Only in a very exceptional and absolutely clear case could an implied term be read into a contract. Their lordships further held that the voting rights of the holders of the 1941 2s. ordinary shares had not been varied by the resolution of March 12, 1943. The only voting right attached to that class of shares was the right to have one vote per share *pari passu* with the other ordinary shares of the company for the time being issued, and that right remained. Consequently, since the company had the power to subdivide its existing shares, the resolution of March 12, 1943, was valid and effectual. The judgment is useful in its construction of Arts. 3, 37 and 54 of Table A, as set out in the Second Schedule to the Companies Act, 1933.

In *Re Sound City (Films), Ltd.*, [1946] 2 All E.R. 521, it was held by Evershed, J., that in order to clothe a petitioner with the necessary authority to make an application, under s. 61 of the Companies Act, 1929 (s. 73 of the Companies Act, 1933), on behalf of a dissentient minority, to have an alleged variation of the rights attached to any class of shares cancelled, not only must such authority be in writing, as required by the section, but the fact of its having been given must have been communicated to the person making the application, before he can commence proceedings by presentation of a petition to the Court. The petitioner presented a petition praying that a certain alleged variation of the rights of the preference shareholders in the company should be cancelled. Though a sufficient number of preference shareholders had in fact signed a document purporting to confer authority upon the petitioner prior to the time when he presented the petition, the fact that they had so signed was unknown to him at the date when he presented the petition. The learned Judge took the view that, in the circumstances of the case, the petitioner had not satisfied the requirements of s. 61 (2) of the statute. It was ordered that the petition be removed from the file and struck out. This judgment carries further the decision in *Re Suburban and Provincial Stores, Ltd.*, [1943] 1 All E.R. 342, in which the Court of Appeal held that, at the time of the presentation of a petition under s. 61 of the Companies Act, 1929 (our s. 73), the petitioner must be fully clothed with authority by the requisite number of qualified shareholders, and that a defect in that respect could not be cured by shareholders subsequently giving him authority. As we have shown, the present case takes the matter further by deciding that not only much of the authority must have been given at the time of the presentation of the petition, but that fact must also have been communicated to the petitioner at that time.

In the Law Reports of other jurisdictions available to us at the time of writing, there is a singular dearth of company-law cases reported in 1946. An exception is Queensland, where some judgments of interest were recorded.

In *Re Backhouse Pty., Ltd.*, [1946] Q.W.N.3, Macrossan, A.C.J., made an order in terms of the summons on an application under s. 210 of the Companies Act, 1931 (Qd.), by George Rees, liquidator of Backhouse Pty., Ltd., for an order that he summon a general meeting of the contributories of the company for the purpose of appointing directors; that all further proceedings in relation to the voluntary winding-up of the company be stayed; and that a copy of the order be delivered to the Registrar of Joint Stock Companies. The company was registered in the year 1907 and in 1932 converted into a proprietary company under the Companies Act, 1931. On April 18, 1941, George Rees was appointed receiver by Thomas Brown and Sons, Ltd., mortgagee under a bill of sale given by the company. By resolution passed at an extraordinary general meeting, held on May 5, 1941, it was resolved that the company be wound up voluntarily and that the receiver be appointed liquidator. From April, 1941, Mr. Rees conducted the business of the company and discharged all its liabilities, which included £2,437 owing to Thomas Brown and Sons Ltd., out of profits, leaving the whole of the capital assets intact. The business of the company had increased, and the costs, charges, and expenses incurred by the liquidator were paid. There was no breach of trust on the part of the directors and no failure on their part or on the part of the shareholders to comply with the requirements of the Companies Act, 1931. From July 1, 1945, the company, which carried on the business of general storekeeper at Killarney, was managed by John James Chaffey Backhouse on behalf of the shareholders, who desired that the company continue to trade.

In the result, where the company in voluntary liquidation had paid all its creditors in full out of trading profits, without recourse to capital, and its business had increased, all proceedings under the winding-up were altogether stayed under s. 210 of the Companies Act, 1931 (Qd.), which corresponds with s. 202 of our Companies Act, 1933. The case resembles *In re Barr-Brown Construction Co., Ltd.*, [1946] N.Z.L.R. 333, where Johnston, J., eight years after the company had gone into voluntary liquidation, made an order under s. 202 staying the proceedings in the winding-up.

In *In re Ruhamah Property Co. Pty., Ltd.*, [1946] Q.W.N. 35, the Court dispensed with notice of the presentation and hearing of a petition to confirm the resolution of a company for reducing its capital by repayment of portion thereof to the shareholders; and directed that s. 68 (2) of the Companies Act, 1931 (Qd.) (s. 68 (2) of our Companies Act, 1933), as regards classes of creditors should not apply. The Ruhamah Property Co. Pty., Ltd., was duly incorporated in 1931, and registered as a private company on May 19, 1932. Its objects were to deal in and to traffic by way of sale, lease, or exchange, or otherwise, with real and personal property. It had a capital of £30,000, divided into 30,000 shares of £1 each. Shares to the number of 30,000 were issued and 10s. paid in respect of each share. The articles of association provided that the company might from time to time by special resolution reduce its capital. By a special resolution passed in accordance with s. 127 of the Companies Act, 1931 (Qd.) (s. 125 of our Companies Act, 1933), at an extraordinary meeting of the company, held on May 23, 1946, it was resolved :

> That the capital of the company be reduced from £30,000 divided into 30,000 shares of £1 each to £125 divided into 30,000 shares of one penny each and that such reduction be effected by returning to the shareholders capital to the extent of 9s. 11d. per share ; by altogether extinguishing the liability in respect of uncalled capital ; and by reducing the nominal amount of each of the shares from £1 to one penny.

The assets of the company amounted to £37,206. It had no liabilities except for income-tax to be assessed, which was estimated at £642. The capital proposed to be returned to the shareholders was not required for the purposes of the company, which had not traded since May 23, 1946, and had no intention of trading in future. It was not in the best interest of the shareholders that the company be liquidated, since the balance of the accumulated profits standing to the profit-and-loss account would be taxable in the hands of the shareholders, and the incidence of taxation would be crippling to the shareholders. The form of minute which the company proposed to have registered was as follows :

> The capital of the Ruhamah Property Co. Pty., Ltd., is from henceforth £125 divided into 30,000 shares of one penny each, on which the sum of one penny has been and is to be deemed paid up instead of the original capital of £30,000 divided into 30,000 shares of £1 each with ten shillings per share paid up.

The company applied to the Court by petition verified by affidavit setting out the above-mentioned facts, and praying (*a*) that the reduction of capital might be confirmed and the minute approved of by the Court, and (*b*) that to this end all enquiries and directions necessary and proper might be made and given. Counsel for the applicant made a preliminary application, that as the company had no creditors, all notices should be dispensed with, and a direction be given that s. 68 (2) of the Companies Act, 1931 (Qd.) (s. 68 (2) of our Companies Act, 1933), as regards classes of creditors, should not apply. Stanley, A.J., ordered that notice of the presentation of the petition by advertisement and of the hearing be dispensed with, and directed that s. 68 (2) of the Act (s. 68 (2) of our 1933 statute) should not apply as regards any class of creditors and further ordered the hearing *instanter*. The learned Judge declined to follow the judgment of Kekewich, J., in *In re Wallasey Brick and Land Co., Ltd.*, (1894) 63 L.J. Ch. 415 ; and he ordered that the reduction of capital of the company resolved on and effected by special resolution be confirmed and the proposed minute be approved ; and he further ordered that notice of registration by the Registrar of Companies of the order be published once in the Government *Gazette* and once in a local newspaper.

The only New Zealand case reported in 1946, in addition to the *Barr-Brown* case (*supra*), dealt with the construction of a special clause in each of the memoranda of association of three co-operative dairy companies : *Mercury Bay Co-operative Dairy Co., Ltd.* v. *Lilley*, [1946] N.Z.L.R. 766.

# SUMMARY OF RECENT JUDGMENTS.

## McMANAWAY v. AIRD.

COURT OF APPEAL. Wellington. 1946. September 13, 15. O'LEARY, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

*Insurance—Motor-vehicles (Third-party Risks)—Joint Tort-feasors—Passenger in Motor-vehicle injured in Collision with another Motor-vehicle—Driver of latter (sued by passenger for Damages) claiming Contribution from Driver and Owner of former—Whether such Owner made by s. 40 of the Statutes Amendment Act, 1938, joint Tort-feasor* quoad *such claim for Contribution—Motor-vehicles Insurance (Third-party Risks) Act, 1928, ss. 3, 6 (4) (c)—Law Reform Act, 1936, ss. 4, 17—Statutes Amendment Act, 1938, s. 40.*

The effect of s. 40 (1) of the Statutes Amendment Act, 1938, is to extend the indemnity afforded by any contract of insurance under the Motor-vehicles Insurance (Third-party Risks) Act, 1928, and thereby, for the purpose only of determining the liability to contribution under s. 17 of the Law Reform Act, 1936, the driver of a motor-vehicle is deemed the authorized agent of the owner thereof, acting within the scope of his authority in relation to such motor-vehicle, even though the claim for contribution arises in respect of a liability for injury to a passenger in the owner's motor-vehicle.

*Stewart* v. *Bridgens*, [1935] N.Z.L.R. 948, distinguished.

*So held*, by the Court of Appeal (*Blair, Kennedy, Callan* and *Finlay*, JJ., *O'Leary*, C.J., dissenting).

Per *O'Leary*, C.J., dissenting, That, while s. 40 of the Statutes Amendment Act, 1938, extends the indemnity against claims for contribution under s. 17 of the Law Reform Act, 1936, it does not create a claim for contribution that did not exist prior to the Statutes Amendment Act, 1938. To entitle a tort-feasor to claim contribution from another tort-feasor in respect of the same damage under the Motor-vehicles (Third-party Risks) Act, 1928, the latter must have been a tort-feasor under the latter Act.

*Mitchell* v. *Walpole and Paterson, Ltd.*, [1945] N.Z.L.R. 565, doubted.

Counsel: *Crossley*, for the appellant; *Yortt*, for the respondent.

Solicitors: *Fitzherbert, Abraham, and Crossley*, Palmerston North; for the appellant; *Oram and Yortt*, Palmerston North, for the respondent.

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**CASCADE-WESTPORT COAL COMPANY, LIMITED v. THE KING.**

SUPREME COURT. Greymouth. 1946. July 17; November 4. BLAIR, J.

*War Emergency Legislation—Price Stabilization Regulations—Railway Department imposing new Freight Charge—Price Tribunal refusing Increase in Cost of Goods consequent thereon—Whether Crown bound by Regulations thereafter—Reasonable Price—Whether additional Freight Charge reasonable in Circumstances—Acts Interpretation Act, 1924, s. 5 (1) (k)—Price Stabilization Emergency Regulations, 1939 (Serial No. 1939/122), Regs. 6, 8.*

A coal-mining company had its coal-bins about a quarter of a mile from the main railway line, and was served by a single-line railway siding which ran from the main railway line to the bins and which had been constructed at the company's expense. From 1927 to 1943, the Public Works Department performed the same services, while construction work on the main line was proceeding, and worked the company's line, including the shunting work at the company's siding. In 1943, the Railway Department resumed control of the line and the shunting work. On resuming the line, the Railway Department increased the siding rental payable by the company from £25 to £50 per annum, which the company did not dispute as it was a standard railway charge.

In October, 1940, the Railway Department had informed the company that it would impose on it a shunting charge of 2s. per each four-wheeled wagon, with a minimum charge as for twelve such wagons, when the Department resumed control of the line. It had not previously been imposed by either the Railway Department or the Public Works Department, and the company objected. In December, 1944, the company applied to the Price Tribunal for permission to increase the selling price of its coal to meet the new charge imposed by the Railway Department, but its application was refused, and it was advised to apply to the Mines Department for an increase in its coal subsidy.

When sued by the Crown for the amount of such extra shunting charges, the company pleaded the Price Stabilization Emergency Regulations, 1939, as prohibiting any increase in any charge for performing any service for reward above that charged on September 1, 1939, as the service charged for was performed without any additional charge on that date. The Department submitted that the Crown was not bound by those regulations.

On appeal from the judgment of a Stipendiary Magistrate in favour of the Crown,

*Held*, allowing the appeal, 1. That (without deciding whether or not the Crown was bound by the Price Stabilization Emergency Regulations, 1939, but assuming that it was not so bound), as the company had accepted the Department's services in carrying its coal, it was under a legal duty to pay a reasonable charge for such services.

2. That, in the circumstances of the case, the charge was unreasonable, because the effect of compelling the company to pay it would impose a loss on the company by virtue of the Tribunal's refusal to permit the company to recoup itself for payment of such charge by increasing the price of its coal by reason of the Price Stabilization Emergency Regulations, 1939; though it would have been a reasonable charge if the company had not been prevented from recouping itself by being forbidden to do so by the Regulations.

*Semble*, In the circumstances of this case, it may have been too late for the Crown to plead that it was not bound by the Price Stabilization Emergency Regulations, 1939, although it was not so expressly provided therein, because the Crown, in the person of the Price Tribunal, had refused to allow the company to make an increase in its price for coal to meet the extra charge imposed by the Department, and His Majesty, in his capacity as the Railway Department, had treated himself as entitled to the benefit of, and also as subject to, the handicaps imposed by those Regulations.

Counsel: *A. J. Mazengarb*, for the appellant; *F. A. Kitchingham*, for the Crown.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, fo the appellant; *F. A. Kitchingham*, Greymouth, for the Crown.

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**GREY CABS, LIMITED v. NEIL.**

SUPREME COURT. Wellington. 1946. October 8, 11. JOHNSTON, J.

*Bailor and Bailee—Gratuitous Bailee—Registered Letter containing Money accepted by Taxi-cab Company—Letter addressed to Owner-driver, a Shareholder of the Company—Letter received by Company's Servant and placed in Rack in Unlocked Glass Case in Public Waiting-room in Company's Office—Disappearance of Letter therefrom—Whether Company under Legal Obligation to Addressee—Whether Company negligent.*

A taxi-cab company, one of whose objects was the organization and co-ordination of the business of taxi-cab services, had as its shareholders taxi-cab drivers owning and operating their own respective vehicles and paying levies to the company, and making use of the services provided by it. One of such services was the receipt by the company of letters addressed to such taxi-cab owner-drivers.

H., who drove the respondent's taxi during his absence on business, posted to the respondent the money owing to him in a registered letter addressed to the latter, care of the company. This was duly received by a servant of the company, whose duties included the receipt of registered mail, and who placed the letter in a rack in an unlocked glass case on the wall of the public waiting-room of the company, from which it had disappeared when the respondent went for it.

*Held*, dismissing an appeal from the decision of the Magistrates' Court in an action by the respondent against the company for damages for negligence, in which judgment was given in favour of the respondent,

1. That the appellant company, by its servant's signing for the registered letter, became a gratuitous bailee thereof.

*Wellington Racing Club* v. *Symons*, [1923] N.Z.L.R. 1, applied.

*Howard* v. *Harris*, (1884) 1 Cab. & El. 253, *Lethbridge* v. *Phillips*, (1819) 2 Stark. 544; 171 E.R. 731, distinguished.

2. That the act of placing such registered letter in an unlocked glass case to which the public had access was negligent.

Counsel: *Watterson*, for the appellant; *Sievwright*, for the respondent.

Solicitors: *Watterson and Foster*, Wellington, for the appellant; *A. B. Sievwright*, Wellington, for the respondent.

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*In re* **STEWART,** *Ex parte* **STEEL SHIPS, LIMITED.**

COMPENSATION COURT. Auckland. 1946. October 9; November 25. ONGLEY, J.

*Workers' Compensation—Liability for Compensation—Weekly Payments—Application for Leave to end or diminish payments—Principles to be applied in assessing Lump Sum to be paid—Workers' Compensation Act, 1922, s. 5 (3)—Workers' Compensation Amendment Act, 1945, s. 6 (2) (3).*

Section 5 (3) of the Workers' Compensation Act, 1922, requires the Court, in awarding a lump sum instead of weekly payment, to estimate (*a*) the period of incapacity due to the accident, and (*b*) the loss of earnings during that period due to the accident.

The issues that arise on an application for leave to end or diminish payments of compensation made under s. 5 of the Workers' Compensation Amendment Act, 1945, are these: Is the worker's incapacity due to the accident? Is he fit for light work? Will he be fit for his pre-accident employment again? A further factor for consideration is that the worker had worked up to the time of the accident.

*Lammas* v. *Manawatu County*, [1946] N.Z.L.R. 232, referred to.

Counsel: *F. L. G. West*, for the appellant company; *A. M. Finlay*, for the respondent.

Solicitors: *Jackson, Russell, Tunks, and West*, Auckland, for the appellant; *A. M. Finlay*, Auckland, for the respondent.

## BROCKELSBY v. GOULDING AND OTHERS.

SUPREME COURT. Wellington. 1946. September 5, 9. FAIR, J.

*Wages Protection and Contractors' Liens—Jurisdiction—Joinder of Party—Notice—Assignment by Contractors to Assignee for Benefit of Creditors—Notice of such Assignment not given to Subcontractor until after Commencement of proceedings by him against Contractors—Whether Subcontractor required to make Assignee Party to Proceedings—Power of Magistrate to Order Joinder of Assignee—Wages Protection and Contractors' Liens Act, 1939, ss. 26, 29, 34.*

Where contractors in partnership execute an assignment for the benefit of their creditors, and notice of such assignment is not given to the subcontractor until after he has taken proceedings against the contractors, both his notice of lien or charge and his proceedings being in order and properly constituted, the subcontractor is not required by the Wages Protection and Contractors' Liens Act, 1939, to make the assignee (of whose existence he had no notice at the time he commenced proceedings) a party thereto.

Section 34 (2) of the statute enables the Stipendiary Magistrate hearing the claim, of his own motion to order the joinder of the assignee, if the latter desires to be heard, or, if it be doubtful whether the latter had knowledge of the proceedings, to adjourn the proceedings so that the assignee might be notified of them and be given an opportunity of applying to be joined if he so wished.

*Richards* v. *Provan and Wanganui Hospital Board*, [1935] N.Z.L.R. 84, distinguished.

Counsel: *Cleary* and *Page*, for the plaintiff; *Reaney*, for the second and third defendants.

Solicitors: *Bunny and Gillespie*, Wellington, for the plaintiff; *J. H. Reaney*, Lower Hutt, for the defendants.

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## STEELE v. HEWITT.

SUPREME COURT. Wanganui. 1946. November 7. FAIR, J.

*By-law—Building Permit—Building erected without Building Permit required by By-law—Building, when erected, in Compliance with all Requirements—Whether the Existence of the Building after its Completion a Continuing Offence of "causing or permitting" its Erection—"Commence to erect"—"Cause or permit the erection"—Municipal Corporations Act, 1933, ss. 370 (3), 371.*

Section 370 (3) of the Municipal Corporations Act, 1933, refers to the continued existence of a work in any physical state or condition contrary to any by-law, and not to the continued existence in a sound, physical, engineering, and hygienic condition of a completed work which, complying with all necessary requirements for every purpose, has been erected without the required permit.

A city building by-law provided that "(*a*) No person shall erect, or commence to erect, any building without first obtaining a permit from the engineer," and "(*b*) No person shall cause or permit the erection of any building if a building permit in that behalf has not first been obtained from the engineer."

There was provision, both in another by-law and in s. 371 of the Municipal Corporations Act, 1933, for the local authority to make ample provision to deal with buildings existing in contravention of any by-law.

The appellant was convicted of commencing the erection of a building without first obtaining a building permit as required by the above recited by-law, and was fined under the authority of s. 370 of the Municipal Corporations Act, 1933, as for a continuing offence over a period from May 15 to 31, 1946. The building was completed before June 10, 1946.

Subsequently, on another information, he was convicted of "causing or permitting" the erection of the same building without first obtaining a building permit, the period over which it was alleged the offence had been committed being stated as from June 11 until July 14, 1946.

The learned Magistrate, who heard that information, held that, a building permit not having been obtained, under s. 370 (3) of the Municipal Corporations Act, 1933, the offence with which the appellant was charged was a continuing one, so long as the building continued in existence irrespective of its compliance with all the necessary requirements, convicted the appellant and fined him 5s. a day for the said period.

Upon appeal from such conviction,

*Held*, That, on the above-stated interpretation of s. 370 (3) of the Municipal Corporations Act, 1933, as the judgment appealed from was founded on the assumption that there was a continuing offence after the building work was completed, the appeal must be allowed and the conviction quashed.

*Marshall* v. *Smith*, (1873) L.R. 8 C.P. 416, referred to.

*James* v. *Wyvill*, (1884) 51 L.T. 237, *Airey* v. *Smith*, [1907] 2 K.B. 273, *London County Council* v. *Worley*, (1894) 71 L.T. 487, and *Rumball* v. *Schmidt*, (1882) 8 Q.B.D. 603, distinguished.

Counsel: *C. F. Treadwell*, for the respondent; *Armstrong*, for the appellant.

Solicitors: *Treadwell, Gordon, Treadwell, and Haggitt* Wanganui, for the respondent; *Armstrong, Barton, and Armstrong*, Wanganui, for the appellant.

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## OPIE v. GOLDFINCH.

SUPREME COURT. Auckland. 1946. August 28; September 2. CALLAN, J.

*Licensing—Offences—Sale to Members of Unchartered Club—Aiding and Assisting in Commission of Offence—Club purchasing Liquor wholesale from Breweries and supplying it Retail to Members in Club-rooms—Secretary-Manager of Club buying Liquor from Breweries and Paying for it—No evidence of his being in Club Premises on Dates of Sales to Members or taking Active Part therein—Whether such Evidence necessary for conviction of Aiding and Assisting*—Mens rea—*Inference from Conduct—"Aid and assist"—Licensing Act, 1908, s. 195 (2) (b)—Justices of the Peace Act, 1927, s. 54.*

Actual presence at the site and time of an offence is not always necessary to support a charge of aiding and assisting in the commission of such offence: each case must be decided upon its own facts.

*R.* v. *Brown*, (1896) 15 N.Z.L.R. 18, and *Cook* v. *Stockwell*, (1915) 84 L.J.K.B. 2187, applied.

*Bowker* v. *Premier Drug Co., Ltd.*, [1928] 1 K.B. 217, distinguished.

A substantial portion of the activities of the Old Golds Old Boys' Association (Inc.) (hereinafter referred to as "the association"), was the purchase of beer wholesale from breweries and its supply by sale at retail rates to its own members for consumption in the association's rooms. Two methods were successively adopted. Each in succession was declared illegal. In the latter case, the association was convicted of selling liquor to its members without a license, contrary to the provisions of s. 195 of the Licensing Act. The appellant was the secretary-manager of the association and a member of its committee, subject to the approval of which he had the duty of controlling the association's paid officials and servants.

The evidence established that the association's business, of buying beer in considerable quantities from the breweries and paying for it, was transacted by the secretary-manager. He was charged with "aiding and assisting" the association in its said breaches of law on seven different dates, and was convicted by a Stipendiary Magistrate on seven informations and fined £50 in respect of each of four dates.

In general appeals against all the convictions in respect of which the appellant was fined,

*Held*, 1. That the appellant had been properly convicted of aiding and assisting in the commission of the offences committed by the association, even though the evidence did not show that he took any part in the actual sales to members in the association's premises, or that he was even in the premises when the sales on the particular dates charged took place.

2. That, so far as *mens rea* was concerned, it was unreasonable not to assume that the association's responsible office-bearers had been well aware that there were at least considerable doubts as to the legality of each of the two methods they had successively adopted: and, as each in turn had been declared illegal, no responsible office-bearer to whom active participation in the illegal conduct could be sheeted home could escape by a suggestion that he had an entirely innocent mind.

*Williamson* v. *Norris*, [1899] 1 Q.B. 7, and *R.* v. *Graham-Campbell*, [1935] 1 K.B. 594, distinguished.

Counsel: *Terry*, for the appellant; *V. R. S. Meredith*, for the respondent.

Solicitors: *J. J. K. Terry*, Auckland, for the appellant; *Meredith, Meredith, Kerr, and Cleal*, Auckland, for the respondent.

# LAW OF DESCENT OF INTESTATE ESTATES.

## The Succession of Illegitimates.

By J. P. McVeagh, LL.M.

As was pointed out in the article, "The New Law of Descent of Intestate Estates," (1946) 21 New Zealand Law Journal, 45, if a daughter of the intestate, who is alive at the intestate's death and could, on attaining the age of twenty-one years or on marrying under that age, take on the statutory trusts, has an illegitimate child living at the intestate's death, such child cannot take under the statutory trusts even if its mother dies unmarried before attaining twenty-one because of the provisions of s. 7 (1) (*a*) of the Administration Amendment Act, 1944, that only issue of the intestate whose parent *predeceases* the intestate can share.

This anomaly has now been removed by s. 2 of the Statutes Amendment Act, 1946, which also extends the statutory trusts to cover certain illegitimate children born after the death of the intestate. The section is in the following terms:

> Section seven of the Administration Amendment Act, 1944, is hereby amended as follows:—
>
> (*a*) By omitting from paragraph (*a*) of subsection one the words "whose parent is living at the death of the intestate and so capable of taking," and substituting the words "whose parent takes an absolutely vested interest":
>
> (*b*) By adding to paragraph (*a*) of subsection one the following proviso:—
>
> "Provided that if any female capable of taking under this paragraph (including this proviso) dies before taking an absolutely vested interest leaving any illegitimate child or children who shall be living at the expiration of twenty-one years from the death of the intestate or who shall sooner attain the age of twenty-one years or marry under that age, that child or those children shall take, in equal shares if more than one, the share which his or their mother would have taken if she had not so died."

At first glance it might appear that the new proviso set out in para. (*b*) above is sufficiently wide to have the extraordinary result that if a female predeceases the intestate leaving both a legitimate and an illegitimate child the illegitimate child takes to the exclusion of the legitimate child the whole of the share its mother would have taken had she not died. To reach this result the words "capable of taking under this paragraph" appearing in the new proviso must be construed as applying not only to a female who survives the intestate but also to one who predeceases him. Such a construction would result in so manifest an injustice to the legitimate child that its adoption can be justified only if the language of the legislation has been manifested in express words: *Maxwell on the Interpretation of Statutes*, 8th Ed. 177.

It is submitted that there are no express words in the section which would justify so extraordinary a result and that only females who are living at or born after the death of the intestate are "capable of taking" within the meaning of the section. It must be remembered that under s. 7 (1) (*a*) and s. 8 of the Administration Amendment Act, 1944, an illegitimate child whose mother predeceased the intestate was already provided for, but it shared with the legitimate children (if any). As *Maxwell* says, at p. 73, it is in the last degree improbable that the Legislature would overthrow fundamental principles or infringe rights without expressing its intention with irresistible clearness and to give any such effect to general words simply, because they have a meaning that would lead thereto when used in their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. It has been a fundamental principle of British law that illegitimate children cannot compete with legitimate children in the distribution of an estate. This principle has to some extent, in New Zealand at any rate, been altered so as to enable them to compete on terms of equality, but it would require very clear language to reverse the principle altogether and permit an illegitimate child to oust the legitimate children altogether. The Amendment Act, 1944, did not allow an illegitimate child whose mother survived the intestate to share though illegitimates were otherwise provided for and it is difficult to see that the Legislature had any intention other than to meet the cases not already provided for. The words used certainly do not express an intention with irresistible clearness that an illegitimate child whose mother predeceased the intestate should take her share to the exclusion of her legitimate children.

It is permissible in construing an amending statute to refer to the language of the repealed Act for it is presumed that the Legislature uses the same language in the same sense, when dealing at different times with the same subject, and also that any change of language is some indication of a change of intention: *Maxwell on the Interpretation of Statutes*, 8th Ed. 33, 34. The 1944 Act used the expression, now repealed, "living at the death of the intestate and *so* capable of taking." It appears that the Legislature viewed survival of the intestate as an essential element of capability to take and it is submitted that the expression must have the same meaning in the new Act. Furthermore, it is submitted that on the natural meaning of the word "capable" a person must survive the period of vesting (in the case of the mother of the illegitimate, the death of the intestate) in order to be capable of taking a share and to give the expression any other meaning, particularly when a manifest injustice would result, is not justified.

The effect of the words "including this proviso," appearing in parentheses in the new proviso to s. 7 (1) (*a*), is that if a female illegitimate, whose mother survives the intestate but dies before taking an absolutely vested interest, also dies unmarried and under twenty-one years of age leaving an illegitimate child who survives the date fixed in s. 2 of the Statutes Amendment Act, 1946, that last-mentioned child takes the share in the estate of the intestate which its grandmother would have taken had she not so died. To quote an example, if A., a female issue of the intestate living at his death, has an illegitimate female child B. (born either during the lifetime of the intestate or after his death), and

dies unmarried and under the age of twenty-one years, and if B. also has an illegitimate child C. and dies unmarried and under twenty-one years of age, C., providing it survives the date fixed in the statute, will take the share A. would have taken had she attained the age of twenty-one years or married under that age. It will be seen, therefore, that the new provision may, in certain circumstances, have the far-reaching effect of including among the issue of the intestate an illegitimate child born after the intestate's death of a female illegitimate who also was born after the intestate's death.

It is accordingly submitted that the effect of s. 2 of the Statutes Amendment Act, 1946, is to include among the class of issue of the intestate for the purposes of ss. 6 and 7 of the Administration Amendment Act, 1944 :

(*a*) An unadopted illegitimate child (whether born before or after the death of the intestate) of a female who survives the intestate but dies unmarried and under the age of twenty-one years, such child to take provided it survives the date set out in s. 2.

(*b*) An unadopted illegitimate child, who survives the date set out in s. 2, of a female who was capable of taking under (*a*) but who died before taking an absolutely vested interest.

The following paragraphs (*e*) and (*f*) should therefore be added to the summary appearing at the end of the article in 21 NEW ZEALAND LAW JOURNAL at p. 45 :

" (*e*) The unadopted illegitimate child or children (whether born before or after the death of the intestate) of a female who survives the intestate but dies under the age of twenty-one years without having married, succeed on surviving the date set out in s. 2 of the Statutes Amendment Act, 1946, and, if more than one, in equal shares, to the share of the estate of the intestate which such female would have taken had she attained the age of twenty-one years or married.

" (*f*) The unadopted illegitimate child or children of a female illegitimate, who was capable of taking under para. (*e*) above, but who died before the expiration of twenty-one years from the death of the intestate unmarried and under the age of twenty-one years, succeed on surviving the date set out in s. 2 of the Statutes Amendment Act, 1946, and, if more than one in equal shares, to the share in the estate of the intestate which his, her or their mother would have taken had she not so died."

Paragraph (*b*) of the summary must be read as applying only in the case of an illegitimate child whose mother predeceases the intestate.

# THE TRIAL OF MAJOR JAPANESE WAR CRIMINALS.

## The International Military Tribunal for the Far East.

BY FLIGHT-LIEUTENANT HAROLD EVANS, LL.B.*

### III.—THE CHARTER OF THE TRIBUNAL AND ITS JURISDICTION—(*Continued*).

It remains to mention the Tribunal's jurisdiction. Article 5 classifies acts " for which there shall be individual responsibility," and declares that the Tribunal shall have jurisdiction over persons who committed them. They are :

> (*a*) Crimes against peace ; namely the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing ; (*b*) Conventional war crimes ; namely, violations of the laws or customs of war ; and (*c*) Crimes against humanity ; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Under this latter heading, the Charter goes on to provide that leaders, organisers, investigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan. In order to limit the trial to " major " war criminals, the Charter also provides that jurisdiction is over persons who commit some or all of the acts mentioned above, including in every case those listed under (*a*). The twenty-seven accused now being tried are, therefore, all charged with the commission of crimes against peace, though not all of them are charged with crimes under the second or third headings.

It should finally be mentioned that Article 6 provides that neither the official position of an accused nor the fact that he acted pursuant to an order of his government or of a superior shall, of itself, be a defence, but that circumstances of this kind may be considered in mitigation of punishment, if the Tribunal decides that justice so requires.

### IV.—THE PROSECUTION, THE TRIBUNAL, AND THE DEFENCE.

As has already been mentioned, the International Military Tribunal for the Far East was established and its Charter promulgated on January 19, 1946. By this date, however, a certain number of preliminary steps to bring major Japanese war criminals to trial had already been taken by the Supreme Commander's

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Headquarters—in particular, the International Prosecution Section had been established. Lawyers and other personnel to staff this organisation had begun to arrive in Tokyo from the United States by the end of 1945.

At the head of the International Prosecution Section is the " Chief of Counsel," whose responsibility was declared by the Charter to be " the investigation and prosecution of charges against war criminals within the jurisdiction of the Tribunal," and the rendering of " such legal assistance to the Supreme Commander as is appropriate." The Charter also provided that any United Nation with which Japan was at war might appoint an Associate Counsel to assist the Chief of Counsel.

It was the Supreme Commander's function under the Charter to designate the Chief of Counsel, and he appointed Mr. Joseph B. Keenan, of Washington, D.C. Mr. Keenan was formerly head of the Criminal Division of the United States Department of Justice and Assistant to the Attorney-General. Since 1939, he has been in private law practice.

The Associate Counsel appointed by the other United Nations are as follows : United Kingdom, Mr. A. Comyns Carr, K.C., a leading English barrister ; China, Judge Che-Chun Haiang, Chief Prosecutor of the First Special District Court of Shanghai ; Russia, Mr. S. A. Colunsky, Chief of the Legal and Treaties Section of the Soviet Ministry of Foreign Affairs and Member of the Board of that Ministry ; France, M. Robert Oneto, Chief Prosecutor on the Court of Assizes of the Department of Seine and Marne ; Canada, Brigadier H. G. Nolan, C.B.E., M.C., K.G., Vice-Judge-Advocate-General of the Canadian Army ; Holland, Mr. Justice W. G. F. Bergerhoff Mulder, Judge of the District Court of The Hague and Judge in the Special Court for Political Delinquents in The Hague ; Australia, Mr. Justice A. J. Mansfield, Judge of the Supreme Court of Queensland ; New Zealand, Brigadier R. H. Quilliam, Crown Prosecutor for Taranaki, and formerly Deputy Adjutant-General, New Zealand Military Forces ; India, Mr. Govinda Menon, Crown Prosecutor High Court of Madras ; Philippines Republic, Mr. Pedro Lopez, formerly criminal and company lawyer in Cebu City, Philippines, and Member of the House of Representatives of the Philippine Congress. In addition to the above, a Burmese counsel, Mr. H. Maung, was present for a time representing his country. He was associated with the United Kingdom Prosecutor, Mr. Comyns Carr.

The International Prosecution Section is divided into a number of divisions—notably the Administrative, Legal, Investigative, Documents and Language Divisions. These consist almost entirely of American personnel. In addition, however, each of the United Nations represented on the prosecution has its own division, consisting of its Associate Prosecutor and his staff.

We come now to the Tribunal and its personnel. The Charter provided that the members—not fewer than six nor more than eleven in number—should be appointed by the Supreme Commander from names submitted by the signatories to the Instrument of Surrender, India and the Philippines. The appointments, the last of which was made in May, when a Judge representing the Commonwealth (now the Republic) of the Philippines was added to the Tribunal, were as follows : United States, Mr. Justice J. P. Higgins, Chief Justice of the Superior Judicial Court of Massachusetts (replaced in July by Major-General Myron C. Cramer, formerly United States Judge-Advocate-General ; United Kingdom, Lord Patrick, Judge of the Court of Session, Scotland ; China, Mr. Justice Ju-Ao Nei, Member of the National Legislative Yuan (the National Legislature of China), and formerly the holder of various University appointments ; Russia, Major-General of Justice IM. Zaryanov, of the Military Collegium (Military Affairs Division) of the Supreme Court of the Soviet Union ; France, Mr. Justice Henri Bernard, formerly Vice-Chief Prosecutor at the Court of Appeal of Brazzaville (French Congo) ; Canada, Mr. Justice E. S. McDougall, Judge of the Court of King's Bench, Montreal (Appeal Jurisdiction) ; Holland, Mr. Justice B. V. A. Roling, Judge of the Court of Utrecht and Professor of Criminal Law at Utrecht University ; Australia, Sir William Webb, Judge of the High Court of Australia and formerly Chief Justice of the Supreme Court of Queensland ; New Zealand, Mr. Justice M. H. Northcroft, Judge of the Supreme Court of New Zealand ; India, Mr. Justice N. B. Pal, formerly Judge of the High Court of Calcutta ; Republic of the Philippines, Mr. Justice D. Jaranilla, Associate Justice of the Supreme Court of the Philippines. The Charter gave the Supreme Commander the function of designating a President of the Tribunal, and he appointed Sir William Webb, the member for Australia.

While the Judges have their own secretary-stenographers, and some also their associates and other special assistants, the office work of the Tribunal as a whole is done by the Secretariat. This body, which was set up by the Charter, is headed by a General Secretary (an American Army Colonel) appointed by the Supreme Commander. Its function is to receive all documents addressed to the Tribunal, maintain its records and provide all necessary clerical services.

The proper defence of the accused was, as mentioned in a previous article, expressly required by the Charter, and the Tribunal early devoted attention to implementing its provisions on this subject. In March, soon after a quorum of members had assembled in Tokyo, consideration was given to the question of obtaining the services of American and British lawyers to aid in the defence of prospective accused. The Tribunal decided that American counsel should be obtained, that practical difficulties stood in the way of procuring British counsel, and that the appointment of American counsel would substantially satisfy the need for lawyers trained in the Anglo-Saxon legal systems. Following this decision, General MacArthur's Headquarters, who had already taken initial steps to procure a panel of Army, Navy and civilian lawyers from the United States who would be available as counsel for Japanese accused, began obtaining a further number of American counsel. By the end of April, when the list of accused was finally decided upon by the prosecution, and the indictment presented to the Tribunal, each defendant had one or more Japanese counsel, and American counsel had been allotted to a number of individual defendants. American counsel continued to arrive in May and June, and at the present time each of the defendants has three lawyers aiding him in his defence—two Japanese (a " Chief " and an " Associate " Counsel) and one American counsel.

## V.—The Indictment.

The first phase of the International Prosecution Section's work was completed on April 29, 1946, when an Indictment against twenty-eight individual Japanese accused was presented to the Tribunal by Chief of Counsel for the Prosecution.

This document, which, with its appendices, runs to forty-five pages of close print, is a statement of the crimes with which the accused are charged. The plaintiffs or accusers are the nine Nations which signed the Instrument of Surrender of Japan (together with India and the Philippines), the twenty-eight accused being the "defendants." The Indictment is headed "No. 1"—a reminder that this is not necessarily the only Indictment which will be presented against major Japanese war criminals.

Looking more closely at the document, we find that it begins with a preamble setting out in non-legal language the gist of the charges against the defendants. Immediately following this are fifty-five counts or charges, each alleging against all or some of the defendants a different crime or number of crimes. These counts are grouped under the three headings of "Crimes against Peace," "Murder," and "Conventional War Crimes and Crimes against Humanity." Then follow several appendices. Appendix A. is a summary of the principal matters and events to be relied upon by the Prosecution in support of the counts of Group One. Appendix B. lists the articles of treaties which the Prosecution contend were violated by Japan (Groups One and Two). Appendix C. sets out the official assurances violated (Group One), and Appendix D. the Conventions and Assurances to be relied upon in proving the breach by Japan of the Laws and Customs of War and particulars of those breaches. Finally, Appendix E. states the various offices held by each defendant between 1928 and 1945, and charges that each defendant "used the power and prestige of the position he held and his personal influence in such a manner that he promoted and carried out the offences set out in each Count of this Indictment in which his name appears."

The defendants will not be enumerated at this stage, it being more convenient to do so in later articles, when we are considering the development of the prosecution's case against them.

It was mentioned in an earlier article that the Charter itself specified the acts for which there should be individual responsibility and classified these under the three headings of "Crimes against Peace," "Conventional War Crimes," and "Crimes against Humanity" ("Murder" being included in the third category). The Indictment might, therefore, have gone no further than to charge the defendants with the commission of these acts as crimes under and by virtue of the Charter: for the Charter is quite specific that there shall be individual responsibility for them. The Indictment does not, however, stop at this point. In the case of the crimes charged in all three Groups it makes it clear that the Prosecution also bases the responsibility of the defendants upon "International Law," and, in the case of crimes charged in Group Two (Murder and Conspiracy to Murder) reliance is also placed upon the fact that the acts charged are contrary to the domestic laws of all countries, including Japan. (Indeed, under the laws of Japan, it is unnecessary for the purpose of establishing guilt to prove the intention to kill.)

For a proper understanding of the trial, some familiarity with the individual counts of the Indictment is necessary, and the following is a brief description of them.

The first five counts charge all the defendants that they participated as leaders, organisers, instigators or accomplices in the formulation or execution of a common plan or conspiracy. The plan as a whole is comprehensively described in the first count, while Counts 2 to 5 each cover a different phase of the plan as it is alleged to have developed. In Count 3, for instance, the plan or conspiracy alleged is that Japan was to "secure the military, naval, political, and economic domination of the Republic of China, either directly or by establishing a separate State or States under the control of Japan," and, for that purpose, was to "wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements, and assurances, against the Republic of China." Counts 6 to 17 charge the "planning and preparing" of a war of aggression and a war in violation of international law, etc., against the various United Nations separately. Count 10, for example, charges that all the defendants planned and prepared such a war against New Zealand. Counts 18 to 26 charge the "initiation" and Counts 27 to 36 the "waging" of such a war. The first two counts in the second group ("Murder"), Nos. 37 and 38, charge certain of the defendants, in language similar to that used in the first five counts, with the formulation or execution of a common plan or conspiracy to kill and murder by initiating unlawful hostilities—the hostilities being unlawful because they were breaches of the Hague Convention, 1907, and of several other international agreements, and therefore the defendants not acquiring the rights of "lawful belligerents." Counts 39 to 43 make charges in respect of the surprise attacks on December 7 and 8 at Pearl Harbour, Kota Bahru, Hong Kong, Shanghai, and in the Philippines. Count 44 charges all the defendants with a common plan or conspiracy to procure or permit the murder on a wholesale scale of prisoners of war and civilians. Counts 45 to 50 charge certain of the defendants in respect of attacks on Chinese cities and populations. Counts 51 and 52 relate to attacks by Japanese armed forces in 1938 and 1939 upon the territory and armed forces of Mongolia and the Soviet Union. The remaining counts of the Indictment, which are under the heading of "Conventional War Crimes and Crimes against Humanity," charge certain of the defendants with breaches of the laws of warfare in respect of Japan's treatment of prisoners of war and civilian internees.

The vastness of the field and the extent of the period (January, 1928, to September, 1945) covered by the Indictment is some indication of the difficulty of the task which the Prosecution faced in deciding whom to make defendants. Many of those who played principal parts are, of course, already dead. The Indictment does, however, include the survivors of those who, the Prosecution claim, bear responsibility at the highest level for the most serious of the crimes alleged against Japan.

*(To be continued.)*

# LEASE OF RURAL NATIVE LAND.

## Alienations of Native Land by Maori Land Board, as Agent for Native Owners.

By E.C. ADAMS, LL.M.

One of the most beneficial features introduced by the Native Land Act, 1909 (which was drafted by the late Sir John Salmond), and continued in the present Act of 1931, is the authority conferred on Maori Land Boards, under Part XVIII of that Act, to act as the agent of the Native owners in respect of an alienation of Native land. Where, as is often the case, there are numerous Native owners, the simplification in procedure is considerable: only one confirmation by the Native Land Court is necessary, and the Natives are not required to execute the instrument, thus saving much time in the obtaining and witnessing of signatures and the checking thereof in the Land and Deeds Registry Office.

Procedure under Part XVIII is compulsory where there are more than ten owners of the legal estate in fee-simple of a block of Native land: s. 258 of the Native Land Act, 1931. But in computing the number of owners for the purposes of s. 258 the successors of a deceased Native are computed as being one person only. Thus, where the original number of Native owners of a block of Native land is only six, procedure under Part XVIII is not compulsory but merely optional, although at the date of the resolution of assembled owners their number may have been increased to more than ten by reason, say, of succession orders: *Foster* v. *Tokerau Maori Land Board*, [1916] N.Z.L.R. 1006.

In ascertaining the number of owners for the purposes of Part XVIII, it is necessary to look beyond the title for the parent block, if such block has been partitioned. A partition order itself constitutes the legal title, even though unregistered: *The King* v. *Waiariki District Maori Land Board*, [1922] N.Z.L.R. 417, *In re Hinewhaki No. 3 Block*, [1923] N.Z.L.R. 353. Therefore, for example, if the owners of the parent block are more than ten, but it has been partitioned into two or more parts each possessing, say, six owners, the owners of each such part may alienate their undivided shares individually, *or* an alienation of the land comprised in each respective partition order may be effected through the agency of the Maori Land Board under Part XVIII.

If there are less than six beneficial owners of the fee-simple of a block of Native land, an alienation thereof cannot be effected under Part XVIII, because s. 417 (7) of the Native Land Act, 1931, provides that at the meeting of assembled owners *five* owners present or represented thereat shall constitute a quorum: *Te Wata Taunoa* v. *Davey*, (1914) 17 G.L.R. 114.

Part XVIII of the Act deals with an alienation of a specific parcel or parcels of land, and not with an alienation, of merely undivided shares therein: *Harvey* v. *Tairawhiti District Maori Land Board*, (1912) 31 N.Z.L.R. 1267. If there are dissenting owners, their interests may be partitioned out, and the alienation will then take effect as to the residue of the block: ss. 427 (2), 435 (5).

What part XVIII contemplates is that there shall be two separate and independent documents, (1) a confirmation by the Court in writing and under seal of a resolution of Native owners in favour of a proposed alienation, and (2) an instrument executed by the Maori Land Board to give effect to such alienation: *Karanga Puhi* v. *Templeton*, [1917] N.Z.L.R. 348. Although s. 435 (12) provides that every instrument of alienation so executed by the Board shall contain a statement or recital that the Board is duly authorized to execute the same as the agent of the owners under Part XVIII, *and every such statement or recital shall be accepted by the District Land Registrar and all Courts as sufficient* prima-facie *evidence of the facts so stated or recited*, if the precedent requirements of the Act with regard to dealing with Native land are not complied with, a Native owner may obtain an injunction, at any time before the registration of the instrument, forbidding its registration. In the absence of any such injunction, however, the District Land Registrar is fully protected by such recital: *In re a Lease of Mangawhariki 1D Block*, [1937] N.Z.L.R. 1173.

It is also of interest to note that, by s. 435 (7), every such instrument of alienation may contain such terms, conditions, and provisions as are consistent with the resolution confirmed and with the Act, and as are agreed on between the Board and the other parties to the instrument other than the owners: as to this, see *Waimarino Development Co., Ltd.* v. *Aotea District Maori Land Board*, [1943] G.L.R. 355. The Act does not require that the resolution of the assembled owners should contain more than the essential terms of the proposal or a broad outline of the terms of alienation. The Board may fill up the details: *Te Wata Taunoa* v. *Davey*, (1914) 17 G.L.R. 114, 118.

Although probably only a limited number of practitioners are interested in alienations of Native land, the following precedent, *mutatis mutandis*, could be conveniently adapted for a lease of rural land other than Native land.

### PRECEDENT.

WHEREAS the persons whose names are set out in the Partition Order hereinafter mentioned (hereinafter called "the Lessors") being registered as the proprietor of an estate in fee simple of undivided interests subject, however, to such encumbrances, liens and interests as are notified by memorandum underwritten or endorsed hereon, in that piece of land situated in the Land District containing [*Set out here the area* being the land known as [*Set out here name of block*] as partitioned by the Native Land Court on the day of , and being the whole of the land comprised in Certificate of Title Volume Folio AND WHEREAS the said land is Native Freehold land subject to the Native Land Act, 1931 AND WHEREAS the owners thereof as defined by Part XVIII of the said Act by resolution of the assembled owners at a meeting held at on the day of , duly passed in accordance with the law agreed to the alienation hereinafter appearing and such resolution was duly confirmed as by law required AND WHEREAS the District Maori Land Board (hereinafter called "the Board") is duly authorised to execute this Instrument of Alienation as agent of the owners under Part XVIII of "The Native Land Act, 1931" AND WHEREAS all statutory declarations required to be made all notices required to be given all steps matters or things required to be taken or done and all

times required to elapse have been so made given taken or done or elapsed so as to entitle these presents to be executed Now THEREFORE the Lessors do and each of them doth hereby lease and the Board by virtue of the powers conferred on it by statute and any power it enabling doth hereby execute these presents as agents of the owners for the time being of the said lands and as such agents and so far as it hath powers so to do DOTH HEREBY LEASE AND CONFIRM unto A. B. of Otaki, Farmer (hereinafter called "the Lessee") all the said land to be held by the Lessee for the space of twenty-one years from the day of , at the annual rental of POUNDS (£ ) per annum during the said term subject however to the following covenants conditions and restrictions herein implied by law that is to say the Lessee doth hereby jointly and severally covenant with the Board as follows:—

1. That the Lessee will pay the said rent by yearly payments in advance to the Board as agents for or on behalf of the Lessors on the first day of March in each and every year throughout the said term and will also at the same times pay to the Board a further sum equal to FIVE POUNDS (£5-0-0) per centum of such rental as commission upon the disbursement by the Board of the said rental and all such payments of rent and commission shall be paid at the Board's office in the City of free of exchange or other deduction.

2. That the Lessee will during the said term pay the said rent in manner aforesaid and will also during the said term duly and punctually pay all rates taxes charges or assessments other than the landlord's land tax which during the said term may be payable in respect of the said land.

3. That the Lessee will at all times during the continuance of the term hereby created cultivate and manage in a proper and husbandlike manner the land hereby demised and will at the proper season for so doing in each year top dress so much of the land as herein demised as shall be laid down in pasture with artificial manure suitable to the nature of the soil with not less than two hundredweight of such manure to the acre and will not at any time during the said term hereby granted take from the said land or any part thereof two white crops in succession and that the Lessee will within three years from the day of plough up and cultivate the said piece of land and lay it down in good English grasses and during the continuance of the said term will farm the said lands in a proper and husbandlike manner and will not at any time during the said term take from the said land or any part thereof two white crops in succession and at the expiration of the said term will leave the said land sown down in good English grasses.

4. That the Lessee will erect and put upon the boundaries of the land herein demised or on such boundaries on which no substantial fence exists a good and substantial fence.

5. That the Lessee will at least once in every year of the term open and keep clear all ditches drains and watercourses on the said land.

6. That the Lessee will not at any time during the term hereby created overstock the said land and will not during the last year of the said term depasture upon the said land a greater number of stock than he shall have had depasturing upon the said land during the previous twelve months of the said term .

7. That the Lessee will in respect of the said lands comply with the provisions of "The Noxious Weeds Act, 1928" or any statutory amendment or modification thereof and will at all times during the said term or any renewal thereof keep the said land free and clear of all noxious weeds and shrubs and will keep indemnified the lessors against the consequences of non-compliance with the provisions of the said Acts or any of them in respect of the said land and will keep the said land free from rabbits and other noxious vermin.

8. That the Lessee will at his own cost and expense do all things necessary to comply with the provisions of "The Rabbit Nuisance Act, 1928" or of any Act or Acts passed in amendment thereof or in substitution therefor and to keep the said land free and clear of rabbits and other noxious vermin and will indemnify the Lessors against all and any contribution or contributions costs charges and expenses which the Lessors may be called upon or compelled to pay under such Act or Acts.

9. That the Lessee will maintain and keep in good order condition and repair all buildings fences drains culverts and every description of improvements which are now or which hereafter during the continuance hereof may be made thereon and in the like good order and condition will deliver up the same at the end or sooner determination of the said term (inevitable accident and the act of God alone excepted).

10. That the Lessors may at all times during the continuance of the term hereby created enter upon the said land hereby demised by their agent officers or servants or by any member of or officer employed by the Board for the purpose of viewing the state and condition thereof.

11. That the Lessee will not assign sublet or part with the possession or occupation of the said lands or any part thereof without the precedent consent in writing of the Board.

12. That the Lessee will at all times during the said term at his own cost and expense perform observe and comply with the provisions of "The Dairy Industry Act, 1908" and its amendments and every Act which may hereafter be passed in amendment thereof or in substitution therefor and all rules and regulations made or to be made thereunder so far as the same relate to the demised premises and under no circumstances shall the Lessors be liable to pay or contribute to expenditure by the Lessee on buildings or other improvements upon the demised premises notwithstanding the provisions of "The Dairy Industry Amendment Act, 1926" or of any Act that may be passed in amendment thereof or in substitution therefor.

13. That the Lessee will not at any time during the continuance of the term hereby created without the written consent of the Lessors first had and obtained request or permit any Electric Power Board to instal any motor electric wires electric lamps or other electrical fittings or equipment on or about the premises hereby demised or to do or cause or permit to be done any act deed matter or thing whereby any charge under Section 119 of "The Electric Power Boards Act, 1925" or any amendment thereof shall or may be created upon the said premises in respect to the same.

14. That if any rent reserved remains unpaid for the space of twenty-one days after the time hereby appointed for payment thereof whether the same has been legally demanded or not or if the Lessee commits any other breach or non-observance of the covenants or conditions of this lease then and in any of those cases the Lessors may re-enter upon the premises hereby demised and the same have again repossess and enjoy as in their former state but such re-entry shall not prejudice the right of the Lessors to recover rent then due and payable or any rights of distress action or suit that may have arisen under these presents or by law prior to such re-entry.

15. IT IS HEREBY DECLARED that all proceeds or other moneys received by the Board under this lease shall be held by the Board as Agent for the owners to be expended:—

(*a*) In paying all proper fees commissions or other charges payable to any Government Department including the Board.

(*b*) In paying off to such extent and at such times as the Board thinks fit all charges and outgoings to which the said land is subject.

(*c*) In distributing the residue among the persons beneficially entitled thereto in accordance with their respective interests.

AND IT IS HEREBY DECLARED AND AGREED by and between the Board and the Lessee that for the purpose of recovering any rent or for compelling the performance of the covenants and conditions herein set forth and agreed upon the Board may exercise either in its own name or in that of the Lessors all rights of action distress re-entry or otherwise in as ample a manner as if it were the actual owner of fee-simple.

AND IT IS FURTHER AGREED that any of the terms conditions and provisions of these presents which are not expressly or impliedly contained in or covered by the resolution passed under the said Part XVIII or the conditions of confirmation thereof as hereinbefore mentioned shall be deemed to be terms conditions and provisions which have been agreed upon between the Board and the Lessee pursuant to subsection 7 of Section 435 of "The Native Land Act, 1931."

I, A. B. of Otaki Farmer do hereby accept this lease of the above described land to be held by me as tenant and subject to the conditions restrictions and covenants above set forth.

DATED this day of One thousand nine hundred and forty .

SEALED with the Common Seal of DISTRICT MAORI LAND BOARD with the authority of the president of the Board whose signature appears hereto this day of 194 . } L. S. (*President's signature*)

SIGNED by the abovenamed A. B. as Lessee in the presence of:— } A. B.

C. D.
Solicitor,
Palmerston North

# THE UNITED NATIONS LEAGUE OF LAWYERS.

## Its Origin and Purpose.

By D. I. GLEDHILL.

Members of the legal profession having been recently invited by the New Zealand Law Society, through its District Societies, to become members of the United Nations League of Lawyers might be interested to learn something of its origin and the purpose of its inauguration.

The Society's first introduction to the League was in 1945, when the Rt. Hon. Sir Michael Myers, G.C.M.G., was attending the meeting of the United Nations Committee of Jurists and the San Francisco Conference. At that time, meetings were being held in Washington for the purpose of exchanging views regarding the advisability and feasibility of forming an international organization of lawyers. At one of these meetings, Mr. C. C. Aikman of Wellington (who accompanied Sir Michael) attended as an observer for New Zealand, subsequently furnishing a report on the proceedings.

The outcome of these meetings was the setting up of a Preparatory Committee to sit in Washington, its function being to take the necessary steps to establish an association of United Nations Lawyers.

By arrangement, Mr. J. S. Reid of the New Zealand Bar, First Secretary to the New Zealand Legation, attended further meetings of the Committee and from time to time furnished progress reports, through the New Zealand Government and direct to the Society.

At the initial Conference held in March, 1946, at Washington, Mr. Reid and Colonel G. R. Powles, also of the New Zealand Bar, represented the New Zealand profession.

Among those who accepted sponsorship of the League for its inaugural conference in March were the Chief Justice of the United States (the late Hon. Harlan Stone); His Honour Mr. Justice Dixon, of the High Court of Australia; and other eminent lawyers.

At the request of the New Zealand Law Society, in March of last year, the Chief Justice at that time, the Rt. Hon. Sir Michael Myers, G.C.M.G., and the President of the New Zealand Law Society, Mr. H. F. O'Leary, K.C., agreed to act as its sponsors.

It may be of interest to state here that a very active part was taken in the preparatory work of the League by Sir Frederick Eggleston, the Australian Minister in Washington, who acted as Chairman of the Planning Committee.

At the meeting held in July, 1945, at which Colonel Heber W. Rice (who was a past President of the Federal Bar Association) officiated as Chairman, China, France, the United Kingdom, the United States, Belgium, Norway, and other countries were represented. At this stage most of the representatives were acting as observers only, and held no mandate from their Government or from the Law Society of their country.

The result of the meeting was that a resolution was passed to continue the Committee appointed in May, with power given to the Chairman to add to its numbers if found necessary. Up to this point, it was not decided whether the association should consist of individual lawyers or of representatives of law societies or similar institutions.

It was finally decided that the association should be composed of individual lawyers and should be called the United Nations League of Lawyers, and that, among its objects and purposes, it should establish and maintain co-operative relations among the lawyers of the United Nations; advance the service of law in all its phases and the study of International and Comparative Law; encourage the development of law as the basis of international relations, and study and support the Charter of the United Nations. By these means it is hoped to further the cause of friendship, peace, and goodwill among all nations.

Until now, there has not been in existence an international association of lawyers, and much therefore may be expected as a result of an association of men and women who, by their very training in the interpretation of law, are qualified above all others to lead the world in matters pertaining to the rule of law.

In considering the proposed Constitution of the League, the Conference included a very significant clause in its objects and purposes: "To encourage the use of arbitration and judicial settlement in international disputes."

Power was given in the by-laws to form national subdivisions which may have a Constitution of their own, and by-laws which are not inconsistent with the by-laws of the League.

It is understood that to assist in the success of the era of post-war rehabilitation and the peace of the future, the League hopes to publish a journal and to arrange for legal studies on comparative and international law.

It is also hoped, by its associations, to provide the nucleus of professional contacts and friendships in the various countries.

It is further proposed to set up machinery for obtaining expert evidence on foreign laws.

The first Annual Conference was held on November 22, 1946, in Washington; and reports by officers and Committees were submitted, and addresses given, on special subjects. The Rt. Hon. Sir Hartley Shawcross, Attorney-General of England, delivered an address which was extremely impressive.

It is to be hoped that there will soon be available literature which will supply further particulars of the activities of the League.

The aims and objects of the League should meet with the whole-hearted interest and support of the members of the profession, who, by reason of the geographical position of New Zealand, have been deprived to a great extent in the past of personal intercourse and friendship with members of the legal profession of other nations.

The requests for membership of the League should be made direct to Mr. J. S. Reid, First Secretary, New Zealand Legation, Washington 8, D.C. The subscription of five dollars should be sent to Mr. Reid, who is acting as Assistant-Treasurer. Members so joining should advise the Secretary of their District Society, so that a record may be kept of New Zealand members of the League.

# IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

**Brighter Judgments.**—A correspondent who has enjoyed reading the many references to relevant literary illusions in Maurice Gresson's article "Brighter Judgments" in this JOURNAL (December 17, 1946) suggests that one of the happiest and most apt of all literary quotations should not be omitted from a consideration of this topic. W. D. Campbell, of Timaru, enunciating a proposition from which Denniston, J., strongly dissented, was asked by the learned Judge, "Have you any authority for such a proposition, Mr. Campbell?" Campbell handed up the *Reports* with a decision of Denniston's own exactly in point. The Judge read it carefully and then, turning to Campbell, said in a melancholy tone of voice, but with a twinkle in the corner of his eye:

"*So the struck eagle, stretch'd upon the plain,*
*No more through rolling clouds to soar again,*
*View'd his own feather on the fatal dart,*
*Which winged the shaft that quivered in his heart.*"

The quotation is from Byron's *English Bards and Scotch Reviewers*. But, if omissions have to be sought, Scriblex would like to argue the case for Lord Sumner who had a remarkable flair for apposite quotation and caustic humour and exercised it to the full, even in the House of Lords, which he described as "the most august and least taciturn of tribunals." Extracts from his judgments are a feature of the *Oxford Book of English Prose*, the compilers of which have chosen as his judicial companion therein Lord Macnaghten, who possessed a ready, and, at times, devastating wit.

**Gresson and Uthwatt.**—Few counsel, if any, can claim the experience of Maurice Gresson, who, in 1926, led a present-day Law Lord in argument before the Privy Council. Appearing for the appellant in *Morgan* v. *Wright*, (1926) N.Z. P.C.C. 678, Gresson had "with him" Augustus Andrewes Uthwatt, appointed a Lord of Appeal in Ordinary last year. Against him were Myers, K.C. (as he then was), and Stamp. The judgment of the Court of Appeal was varied, the major victory going to the respondents. Sir Augustus Uthwatt was born in Ballarat, Victoria, in 1879, was a B.C.L. of Balliol, Oxford, and Vinerian Scholar in Law, being made a Chancery Judge in 1941, and holding this office until his appointment to the House of Lords.

**What is Law?**—The most compact definition of law is "the sum of the rules of human conduct," or, in the more philosophical terms of Savigny, "the common consciousness of a people." To the average practitioner, it may be the familiar blue volumes of *Hailsham*, the yellow reprints of our statutes, or the tawnier brown of the reported cases. But what does it mean to the average schoolboy whose opinion may be just as important as that of the "man in the street." Lord Simonds, proposing "The Profession of the Law" at the Lord Mayor's Banquet in London, said it was a noble profession, but that few outside it sang its praises. The reason might be that the great body of citizens had too little understanding of what the law was. Two thousand years ago a Greek philosopher had urged the young people of a Greek city to fight in defence of the law as in defence of their city wall. In contrast, he related that the only question a group of schoolboys could ask about the law, when invited to do so by a benevolent Judge, was whether a man wriggled when he was hanged. To many citizens the law meant pomp and ceremony, heralds and trumpeters on assize. To many other, it meant that Court where the story of broken vows and homes was retold. To others, it meant what was miscalled the Police Court, where it was associated with something with which no honest man would have anything to do. To an increasing number of others, the law meant not order but orders—rules, regulations, and chaos. It was the grave and burdensome duty of those who professed the law to guide their fellow-citizens along the narrow way between those pitfalls and thickets.

**Time and the Landlord.**—The amendment last October to the Economic Stabilisation Regulations enables the landlord of business premises seeking possession to have his difficulties put on an equal footing with the landlord of a dwellinghouse induced to litigation by optimism or despair rather than experience. The amendment also drives another nail into the coffin of the time-worn legal maxim, "A man's house is his castle," that has its origin in antiquity. In the third volume of his *Institutes*, published in 1628, Sir Edward Coke, L.C.J., clothes the maxim in the language in which it is used to-day, although thirty years earlier, we have *The Merry Wives of Windsor* in which the host of the Garter Inn directs Simple to Sir John Falstaff's room with "There's his chamber, his house, his castle, his standing-bed and his truckle-bed." The elder Pitt endeavoured, with that licence in words that the politician commonly usurps, to drive home the importance of the proverb to the ordinary citizen when he addressed the House of Commons on the Excise Bill of 1760: "The poorest man in his cottage bids defiance to all the force of the Crown. It may be frail, its roof may shake; the wind may blow through it, the storms may enter—the rain may enter—but the King cannot enter; all his forces dare not cross the threshold of the ruined tenement." This view of the law caused an Irish counsel to submit to the Bench that the rain might enter his client's home but not the King. "What," exclaimed the Judge, "not even the reigning King?"

**Neat Point.**—Scriblex has just heard of a practitioner who is frankly puzzled over a nice point of professional etiquette. It seems that he was sitting in Chambers awaiting his turn and listening idly to an argument upon an abstruse point of divorce procedure when the Chief Justice looked to him with a smile and said to counsel, "Perhaps we'd better ask Mr. Blank, who is an expert in these matters." What Mr. Blank now wishes to know is whether he can, with propriety, add to his letter paper the further description, "Divorce Expert and Judicial Consultant."

# 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. Husband and Wife.**—*Married Women's Property—Summary Proceedings—Service out of the Jurisdiction—Married Women's Property Act, 1908, s. 23.*

QUESTION: I act for A., whose wife has deserted him and gone to Australia. Before leaving New Zealand, she sold certain goods belonging to A. and wrongfully took the proceeds with her to Australia. Being a property dispute between husband and wife, it appears the husband's only remedy is under s. 23 of the Married Women's Property Act, 1908. As, however, there is no provision in the Code for service of such summary proceedings out of the jurisdiction, my client appears to be without redress. It appears that a writ may be served out of the jurisdiction (RR. 48–51) under certain circumstances; but these rules do not seem to apply to a summons under the above Act. Conceivably he might appoint someone in Australia to act for him under power of attorney and prosecute the suit in Australia. He is confined to hospital and unable to travel. What remedy has he?

ANSWER: Section 23 (1) of the Married Women's Property Act, 1908, provides: "In any question between husband and wife as to the title to or possession of property either party, etc., *may* apply by summons or otherwise in a *summary manner* to a Judge of the Supreme Court . . ." It is not certain that s. 23 is the only remedy, or whether it is alternative to the issue of a writ of summons, the remedy under the section being an inexpensive and easy method of procedure. Rules 48–51 of the Code of Civil Procedure deal with the service of a writ of summons, and set out the circumstances when a writ may, with the leave of the Court, be served out of New Zealand. A summons under s. 23 does not appear to come within the provisions of these rules.

There is no jurisdiction to allow service of process out of the jurisdiction except by statutory enactment: *Rasch* v. *Wufert*, [1904] 1 K.B. 118. In that case it was held there was no jurisdiction to allow service out of the jurisdiction of a summons for leave to enforce an award under the Arbitration Act.

In the circumstances, it would seem that a summons under s. 23 could not be served out of the jurisdiction, and the remedy would be to issue a writ of summons, and apply for leave to serve out of the jurisdiction.

E.2.

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**2. Debtors Emergency Regulations.**—*Method of ascertaining whether Debtor is a Member of the Forces, or a Dependant of a Member of the Forces.*

QUESTION: The Debtors Emergency Regulations, 1940, make certain proceedings against judgment debtors unlawful without leave of the Court, if the debtor (*inter alia*) is a member of the forces. "Member of the Forces" includes a person who has served overseas at any time during the past war. Is any simpler method available of ascertaining if a debtor has had such service, than by writing to each of Base Records, New Zealand Navy Headquarters, and R.N.Z.A.F. Headquarters?

ANSWER: No simpler method is available; and, in addition, search would also have to be made in the War Pensions Branch of the Social Security Department to ascertain whether a person is a dependant of a member of the Forces: see Reg. 2 (1) of the Debtors Emergency Regulations, 1940. A search at Base Records would not disclose whether a person was dependant upon a pension. Unless full details as to Christian names, etc., are available, possibly a search might not disclose the true position.

In some places it is the practice to write to the debtor and ask whether he is a member of the Forces, or a dependant; but this procedure is not satisfactory. Another method adopted is to apply to the Court in every case, without any preliminary search, the debtor being served, then giving him the opportunity of appearing and disclosing whether or not he is a member of the Forces or a dependant.

E.2.

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**3. Gift Duties.**—*Gift of Motor-car* inter vivos *within Th Years of Death—Liability of Donee to Gift Duty.*

QUESTION: Deceased gave a motor-car valued at £400 to hsi wife within the period of three years prior to the date of death No gift Schedule was filed. In deceased's estate, the value of the gift (£400) was brought in. The widow of the deceased is the life tenant and receives the whole of the income from the deceased's estate. The trustee now seeks to recover from the widow death duty in respect of the gift. Can the trustee do this? Should not the death duty in respect of the gift be chargeable to the capital account of the estate and not the income?

ANSWER: The question does not state whether or not there are any special provisions in the will as to incidence of payment of death duty, but assuming that there are no such directions, or if there are, that they are in the usual form (*e.g.*, "I direct that death duties payable in my estate shall be payable out of the residue") and assuming that there are no directions to the effect (as in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639) that deceased's estate must bear the death duties payable in respect of his *notional* estate (such as gifts *inter vivos*) as well as his actual transmissible estate, the trustee can recover from the widow the amount of the death duty payable in respect of the gift of the motor-car: *Elder's Trustees* v. *Gibbs*, [1923] N.Z.L.R. 503, *In re Reid, Guardian, Trust* v. *Reid*, [1946] N.Z.L.R. 334, and see *Adams's Law of Death and Gift Duties in New Zealand*, p. 138, where other cases are cited.

As to what amounts to a sufficient direction that deceased's estate should bear death duty payable in respect of his notional estate, see articles in (1944) 21 N.Z.L.J. 267, and (1945) 22 N.Z.L.J. 118.

In the apparent circumstances outlined in the question, the death duty payable in respect of the gift should be charged neither to the capital nor income account of deceased's estate; the gift of the motor-car is in fact not part of the estate. X.2.

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# RULES AND REGULATIONS.

**Customs (Aircraft) Regulations, 1939, Amendment No. 1.** (Customs Amendment Act, 1921.) No. 1946/215.

**Butter Marketing Regulations, 1937, Amendment No. 2.** (Marketing Act, 1936, and Agriculture (Emergency Powers) Act, 1934.) No. 1946/216.

**Opticians Regulations, 1930 (Reprint).** (Opticians Act, 1928.) No. 1946/217.

**Industrial Efficiency (Motor-spirits Retailers) Regulations, 1941, Amendment No. 2.** (Industrial Efficiency Act, 1936.) No. 1946/218.

**Motor-spirits Prices Regulations, 1942, Amendment No. 6.** (Motor-spirits (Regulation of Prices) Act, 1933.) No. 1947/1.

**Patents Amending Regulations, 1947.** (Patents, Designs, and Trade-marks Act, 1921–22.) No. 1947/2.

**Samoa Police Regulations, 1947.** (Samoa Act, 1921.) No. 1947/3.

**Post and Telegraph (Staff) Regulations, 1925, Amendment No. 21.** (Post and Telegraph Act, 1928.) No. 1947/4.