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DAMAGES: ALLOWANCE OF TAX LIABILITY ON LOST EARNINGS.

PRACTICE: COURT OF APPEAL'S DUTY TO FOLLOW THE HOUSE OF LORDS.

IN this place, at p. 49, *ante*, we gave an extended summary of the recent judgment of the House of Lords in *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796, in which their Lordships held that, in assessing damages for personal injuries, account should be taken of tax liability which would have been incurred on earnings which the injured person would have earned but for the accident. We showed how this judgment conflicted with that of our Court of Appeal in *Union Steam Ship Co. of New Zealand, Ltd.* v. *Ramstad*, [1950] N.Z.L.R. 716; [1950] G.L.R. 311. It was not our purpose, as we said, to consider whether *Gourley's* case should, or should not, be followed or applied in New Zealand in preference to *Ramstad's* case.

The question has now been determined by the Court of Appeal, sitting as one Division, which consisted of Sir Harold Barrowclough C.J., and Stanton and McGregor JJ., in *Smith* v. *Wellington Woollen Manufacturing Co., Ltd.*, in a judgment of that Court delivered on April 24. The judgment will be reported at an early date.

The judgment, as their Honours pointed out, involved an important matter of principle, and a review of recent authoritative decisions. It decides, contrary to the decision in *Ramstad's case*, that, in assessing damages for loss of earnings in actions involving personal injuries, allowance must be made for the plaintiff's liability for income tax and social security charge. In other words, the plaintiff is entitled to be compensated in respect of his net loss only.

The judgment is also of importance in that it states, as a matter of principle, that the Court of Appeal in New Zealand, even when sitting as one Division, is bound to follow a decision of the House of Lords upon a matter of general legal principle where there is a clear conflict between a decision of the Court of Appeal and a subsequent judgment of the House of Lords.

We propose to treat these two matters separately.

I. Allowance of Tax Liability In Award of Damages.

Smith's case was the outcome of an accident suffered by the plaintiff on July 2, 1954, while he was engaged in the employment of the defendant company, and arose out of such employment; and, as a result of this accident, the plaintiff suffered personal injuries. The trial took place before Hutchison J. and a jury; and the jury held that the cause of the accident was negligence on the part of the defendant company.

Special damages claimed included a claim for loss of wages to the date of trial, and an important head in the assessment of general damages was future loss of earnings. The defendant argued before the jury that from the special damages to be assessed for loss of earnings there should be deducted social security charge and income tax which would ordinarily be assessable on such earnings; and likewise there should be similar deductions from the amount of general damages which would otherwise be assessed in respect of future economic loss. Such submissions were based on the recent judgment of the House of Lords in *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796.

The learned trial Judge, considering himself bound by the decision of the Court of Appeal in *Union Steam Ship Co. of New Zealand, Ltd.* v. *Ramstad*, [1950] N.Z.L.R. 716; [1950] G.L.R. 311, declined to direct the jury as requested by the defendant, but requested the jury—the parties having agreed on any necessary adjustment in the special damages—to assess the general damages, disregarding questions of taxation, and, in the alternative, taking into account deductions for income tax and social security charge. On the former basis, the jury assessed general damages at £1,550, and on the alternative basis at £1,300.

The defendant company moved for a new trial on the ground of misdirection by the learned trial Judge on a material point of law. The motion was removed by the trial Judge into the Court of Appeal.

In the judgment of the Court of Appeal, delivered by McGregor J., their Honours began with an analysis of the judgment in *Union Steam Ship Company of New Zealand, Ltd.* v. *Ramstad*, where it was held by the Court of Appeal that social security charge on wages should be left out of account in the assessment of special and general damages for loss of earnings, both in an action brought by a servant against his master and in actions brought by servants against other persons. Their Honours said:

The judgment of the Court delivered by Cooke J. contains a valuable review of the authorities to the date of the judgment and the judicial consideration of the matter not only in England and Scotland, but also in Canada and Australia. The judgment is based on three main reasons:

(1) That matters of taxation should be disregarded and that such matters were *res inter alios acta*. In this respect the judgment follows the reasoning of the English Court of Appeal in *Billingham* v. *Hughes*, [1949] 1 K.B. 643; [1949] 1 All E.R. 684.

(2) The fundamental basis for the view that questions of tax should be ignored is the fact that it is only where the gross earnings have either actually or notionally become the income of the employee that they attract the tax, and the liability that descends on the employee for tax is a matter that is foreign to the assessment of damages for the past or future loss of those earnings.

(3) That the conclusion reached is merely an application of the general principle that collateral matter cannot be used in mitigation of damages: *Mayne on Damages*, 11th Ed., 151, and *Shearman* v. *Folland*, [1950] 2 K.B. 43; [1950] 1 All E.R. 976.

Their Honours went on to say that it was clear that the decision in *Ramstad's* case was entirely in accord with the line of authorities referred to in the judgment of Cooke J.; but the same authorities had been considered fully in the recent decision of the House of Lords in *Gourley's* case, and had been expressly disapproved. They continued:

It is interesting to note that, in his speech in *Gourley's* case, Lord Goddard remarks that the matter in issue had never been previously before the House of Lords "nor does there seem to be any decision in the appellate Courts of the other Commonwealth countries, or of the United States of America on the matter" (*ibid.*, 804). It seems, therefore, that the decision of the New Zealand Court of Appeal in *Ramstad's* case had not come to the notice of counsel or the learned Law Lords.

Their Honours then said that *Gourley's* case expressly decides that, in assessing damages for loss of earnings in actions for personal injuries, allowance must be made for the plaintiff's tax liability, and it is only in respect of the plaintiff's net loss that he is entitled to be compensated. In that case the plaintiff, an eminent civil engineer, suffered severe personal injuries in an accident caused by the negligence of the appellants' servants or agents. For some time after the accident, he was disabled by his injuries from taking any effective part in his business, and, after he returned to work, his earning capacity and consequently his income was much reduced. He was awarded the sum of £37,720 in respect of loss of earnings, on the basis that the incidence of income tax and surtax should not be taken into account. On the basis that liability to tax had to be taken into account, an alternative award of £6,695 was made. The majority of the House of Lords decided that the latter was the correct method of assessment of damage.

The Court of Appeal continued:

In their respective speeches, the learned Law Lords expressly considered the reasons which had found favour with the Court of Appeal in *Ramstad's* case and in the judgments in the earlier cases which were followed in that case. Earl Jowitt accepts the principle that the general principle of "restitutio in integrum" should govern the assessment of damages and can afford some guidance to the tribunal in assessing compensation for financial loss resulting from accident (*ibid.*, 799); and, in summarizing the matter, he says:

"I see no reason why in this case we should depart from the dominant rule, or why the respondent should not have his damages assessed on the basis of what he has really lost; and I consider that, in determining what he has really lost, the Judge ought to have considered the tax liability of the respondent" (*ibid.*, 803).

Lord Goddard, in whose judgment Lord Radcliffe and Lord Somervell of Harrow concurred, rejects the earlier decision that the incidence of tax on a man's earnings should be treated as *res inter alios acta* (*ibid.*, 805). He adopts the general principle in these words:

"The basic principle, so far as loss of earnings and out of pocket expenses are concerned, is that the injured person should be placed in the same financial position so far as can be done by an award of money as he would have been had the accident not happened" (*ibid.*, 804).

Lord Reid accepts the same general principle and also rejects as the wrong approach the application of the *res inter alios* principle (*ibid.*, 808). Likewise, Lord Reid discusses the question as to whether the matter of liability for tax is a collateral matter, and he says:

"I do not think that it is possible to formulate any principle by which it can be determined what is and what is not too remote. *Mayne on Damages* (11th Ed.), 151, refers to 'Matter completely collateral', and for a general description of what is too remote I cannot find better words, but I do not think that every case can be solved merely by applying those words to it. Taking this description, however, and applying it to the present case I do not think that the respondent's personal position is completely collateral. It is not something brought in as a separate factor, but only something which helps to quantify an obligation which is imposed by an Act of Parliament as a consequence of earning income, and I cannot regard that obligation as in itself collateral—certainly not completely collateral" (*ibid.*, 809).

It will be seen, therefore, that not only is the decision in *Gourley's* case in conflict with that in *Ramstad's* case, but the reasons on which the decision in *Ramstad's* case was based have been rejected in the later decision of the House of Lords.

The question therefore arose as to whether the Court of Appeal should feel itself bound by the later decision of the House of Lords, or whether it should follow its own earlier decision.

Before their Honours dealt with this aspect, they considered a further submission of counsel for the plaintiff—namely, that owing to the complexities of tax-law and the difficulties of explanation and calculation, which would arise in jury trials, the English decision should not be followed in New Zealand. Their Honours said, in answer:

We appreciate the undoubted fact that in some cases practical difficulties may occur, more particularly in regard to assessment of general damages for future loss of earnings, and the necessity for consideration of such matters as graduated rates of tax, the amalgamation of personal earnings with income from other sources, aggregation of income of husband and wife, exemptions in respect of wife, children, and other dependants, and superannuation, life insurance payments, and other matters of a similar nature. But similar difficulties arise in England, and it is emphasized in the judgments referred to that the matter can, and must be, determined on broad lines and with the application of reasonable common sense. It seems to us such observations are equally applicable in New Zealand, and we do not think that such practical difficulties in any event should stand in the way of the application of the appropriate principles of law.

Their Honour's important pronouncement on the application of the doctrine of judicial precedent in relation to a judgment of the Court of Appeal and a subsequent, and conflicting, judgment of the House of Lords is considered below. In brief, their Honours held that it was the duty of the Court of Appeal to follow *Gourley's* case.

Accordingly, the first award of the jury (£1,550) was set aside, and the Court held that judgment should be entered in terms of the alternative award (£1,300), thus allowing the sum of £250 for the liability of the plaintiff to pay social security charge and income tax on the amount of the damages awarded.

The Court of Appeal has power under R. 42 of the Court of Appeal Rules 1955 to give any judgment which ought to have been given in the Court below. Their Honours, therefore, directed that judgment in the Supreme Court be entered for the plaintiff in terms of the latter award.

II. The Doctrine of Judicial Precedent.

An even more important aspect of the judgment in *Smith's* case is the Court of Appeal's pronouncement on the question whether that Court, even though sitting in one Division, should follow a judgment of the House of Lords, which, in effect, on a question of general legal principle, has overruled an earlier decision of the Court of Appeal.

The question whether our Courts should follow a decision of the House of Lords in preference to a decision of the Judicial Committee of the Privy Council, where those august tribunals are in conflict, was the subject of an illuminating article by Professor A. G. Davis in this JOURNAL last year (Vol. 31, p. 42). This was not, however, the problem before the Court of Appeal in *Smith's* case. The general question was, simply, the duty of the Court of Appeal to follow a judgment of the House of Lords.

Their Honours' judgment on this topic was as follows :

> The principle embodying the duty of obedience of this Court to the House of Lords is settled and has the direct and compelling authority of the judgment of the Judicial Committee of the Privy Council in *Robins* v. *National Trust Co., Ltd.*, [1927] A.C. 515, where Viscount Dunedin said :
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> " . . . when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board " (*ibid.*, 519).
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> The binding authority of decisions of the House of Lords was expressed in definite terms by three and recognized by all the Judges in *R.* v. *Seaton*, [1933] N.Z.L.R. 548 ; [1933] G.L.R. 451. There, Sir Michael Myers C.J. said :
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> " It is necessary therefore carefully to consider the effect of the judgment of *Russell* v. *Russell* [[1924] A.C. 705] and to determine whether the admission in a New Zealand Court of the disputed evidence is consistent with the duty of obedience to the decision of the House of Lords by which our Courts are bound " (*ibid.*, 557 ; 453).
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> Likewise, in *Piro* v. *W. Foster and Co., Ltd.*, (1943) 68 C.L.R. 313, it was held by the High Court of Australia that, where there is a clear conflict between a decision of the House of Lords and a decision of the High Court of Australia, the High Court and other Courts in Australia are bound to follow the decision of the House of Lords upon a matter of general principle. There the principle as laid down by Lord Dunedin in *Robins* v. *National Trust Co., Ltd.*, [1927] A.C. 515, was expressly applied : see the judgment of Sir John Latham C.J., at p. 320.
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> In *In re Rayner, Daniell* v. *Rayner*, [1948] N.Z.L.R. 455 ; sub nom., *In re Rayner, Rayner* v. *Daniell*, [1948] G.L.R. 51, the question arose as to the jurisdiction of this Court to overrule a previous decision of the Court inconsistent with a decision of the House of Lords. There the majority of the Court accepted such principle, which is expressed by Finlay J in this manner :
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> " Viewing the whole position broadly, it is inconceivable that a judgment of the Court of Appeal of New Zealand inconsistent with a decision, or the spirit of a decision, of the House of Lords, and inconsistent with a considered judgment of the High Court of Australia, should have to be perpetuated by this Court. The circumstances clearly place this case in that undefined category which it was adumbrated in *Young's* case [*Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] K.B. 718 ; [1944] 2 All E.R. 293] might well exist when a jurisdiction to overrule might properly be exercised " (*ibid.*, 508 ; 74).
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> *Rayner's* case was a decision of both Divisions of the Court sitting together; but it seems to us that, as the matter is one of principle, a single Division of the Court is equally bound to decline to follow an earlier decision of the Court which is in conflict with a subsequent decision of the House of Lords.

Their Honours concluded by saying :

> In our opinion, as the earlier decision of this Court [in *Ramstad's* case] and the previous decisions on which it was based have been disapproved by the House of Lords in its subsequent judgment [in *Gourley's* case], it is the duty of this Court to follow the authoritative decision of the supreme tribunal of the British Commonwealth.

It seems to us inevitable that, on a reading of the judgment in *Smith's* case, some one may doubt the correctness of the Court of Appeal's designation of the House of Lords as " the supreme tribunal of the British Commonwealth." That their Honours were correct in so describing it was made clear in the article by Professor Davis to which we have already referred. He even anticipated those who may query the appellation, when he asked :

> " Can it be said that the House of Lords is the highest tribunal having authority to lay down a principle of English law ? In what respect is it higher than the Judicial Committee of the Privy Council ? "

The learned Professor continued as follows :

> Those questions can be answered by stating that, if the aim of the doctrine of judicial precedent is to obtain certainty in the administration of the law, then the House of Lords is " superior " to the Privy Council. For, as has been pointed out in an earlier article, the House of Lords is bound by its own previous decisions, whereas the Judicial Committee is not so bound. Greater certainty will, therefore, be imparted to the law if the decision which our Courts follow is one which can be reversed only by legislation, rather than one which might be reversed by the tribunal which enunciated it.

The judgment in *Smith's* case, therefore, makes it clear that the Court of Appeal is bound to follow a decision of the House of Lords upon a matter of general principle, where there is a clear conflict between a decision of the House of Lords and an earlier judgment of the Court of Appeal. And further, a single Division of the Court of Appeal is equally bound to decline to follow a decision of the Court of Appeal which is in conflict with a subsequent decision of the House of Lords.

SUMMARY OF RECENT LAW.

ADOPTION OF CHILDREN.

Foreign Adoptions and Rights of Succession. *100 Solicitors' Journal*, 101.

COMPANY LAW.

Company Constitution: Entrenched Rights. *106 Law Journal*, 100.

Company Dog-fights. *100 Solicitors' Journal*, 99.

Compulsory Purchase of Dissenters' Shareholdings. *100 Solicitors' Journal*, 62.

CONTRACT.

Misrepresentation—Fraudulent Misrepresentation on Sale of Farm Property—Damages—Jury assessing Damages in Respect of Purchase of Farm and for Loss incurred in carrying on Farming Operations—Claim for Loss on Farming Operations after taking Possession of Farm not maintainable. Where there has been fraudulent misrepresentation and the representee has in fact lost his money, the assessment of damages by a Judge (or jury) will be upheld if there is any evidence to support it. (*Mc Connel* v. *Wright*, [1903] 1 Ch. 546, followed.) In an action claiming damages for fraudulent misrepresentation in connection with the sale of a farm property, the jury found that both the alleged misrepresentations were made by the defendant and that they were false and fraudulent. There was abundant evidence on which the jury could find that the misrepresentations induced the plaintiff to purchase the property. The damages assessed by the jury were (*a*) £3,519, in respect of the purchase of the land, and (*b*) £2,625, on account of the loss which the plaintiff alleged he had incurred in farming the property, due to misrepresentations of the defendant as to its carrying-capacity. On cross-motions for judgment, *Held*, 1. That the plaintiff could not hold the jury's award of damages for loss in carrying on farming operations, as any loss made after he had taken taken possession of the farm and the stock could not be taken into account in assessing the damages. (*Easterbrook* v. *Hopkins*, [1918] N.Z.L.R. 428; [1918] G.L.R. 379, followed. *McAllister* v. *Richmond Brewing Co. (N.S.W.) Pty., Ltd.*, (1942) 42 N.S.W.S.R. 187, referred to.) 2. That, furthermore, the plaintiff as purchaser could not claim for loss in farming operations which accrued subsequently to March, 1952, as the jury found that he had discovered or should have discovered the untruth of the defendant's representations as to the carrying-capacity of the farm not earlier than November, 1951, or later than March, 1952, during the earlier part of which period he was acting as the defendant's manager on the farm and he took possession as purchaser in February, 1952. *Wright* v. *Canavan*. (S.C. Auckland. March 5, 1956. Stanton J.)

CRIMINAL LAW—CORRECTIVE TRAINING.

Nature and Purpose of Corrective Training—Considerations in imposing Sentence—Difference between New Zealand and United Kingdom Legislation—Criminal Justice Act 1954, s. 21 (1). The Full Court in *Howe* v. *Roberts*, [1955] N.Z.L.R. 673, did not intend or purport to express the view that the matters mentioned in its judgment should be exhaustive, and that in individual cases there might not be other matters which might be of considerable importance in deciding whether or not the Court's discretion should be exercised. That part of the Full Court's judgment which says that a sentence of corrective training should not be passed "in cases in which nothing short of a substantial sentence of imprisonment is appropriate", is not to be read as forbidding corrective training merely because a sentence of up to three years' imprisonment might have been appropriate before the passing of the Criminal Justice Act 1954. (*Howe* v. *Roberts*, [1955] N.Z.L.R. 673, explained.) While corrective training is, in substance, a form of imprisonment, in essentials it is substantially different from imprisonment in the ordinary sense, as the purpose of a sentence of corrective training is to facilitate the reformation of the offender, and advantages and benefits are given to the offender serving a sentence of corrective training which are not available to an offender serving a sentence of imprisonment. The real effect of the sentence is to place the offender under the Parole Board to enable it to exercise the wide discretions vested in it. It is not material when imposing a sentence of corrective training to consider whether three years is the right length of the term of detention but rather to consider whether it is expedient that the offender should receive training of a corrective character for a substantial period and whether there is reasonable prospect of such training facilitating the reformation of the offender. Distinction between corrective training under s. 21 of the Criminal Justice Act 1948 (U.K.) and under the provisions of the Criminal Justice Act 1954 (N.Z.) explained. (*R.* v. *McCarthy*, [1955] 2 All E.R. 927, 39 Cr. App. R. 118, distinguished.) *So held* by the Court of Appeal declining leave to appeal where the appellant had been convicted of an offence punishable by imprisonment for a term of three years or more, and had been sentenced to corrective training. *The Queen* v. *Smith*. (C.A. Wellington. March 28, 1956. Barrowclough C.J., Stanton, McGregor JJ.)

DEATH DUTIES.

Problems of the Family Business. *106 Law Journal*, 53.

DESTITUTE PERSONS—MAINTENANCE.

Order made in Supreme Court and registered in Magistrates' Court—Variation of Order—No Jurisdiction in Magistrates' Court to Vary Order—Maintenance Orders (Facilities for Enforcement) Act 1921, s. 3. The Magistrates' Court has no jurisdiction to vary a maintenance order made in the Supreme Court and registered in the Magistrates' Court under s. 3 of the Maintenance Orders (Facilities for Enforcement) Act 1921, as proceedings taken "on" the order in that Court are limited to proceedings taken for its enforcement. (*Wilson* v. *Morris*, [1929] N.Z.L.R. 901; [1930] G.L.R. 1, applied. *Cook* v. *Bolton-Moss*, (1938) 33 M.C.R. 79, referred to.) *Fewson* v. *Fewson*. (Auckland. May 17, 1955. Sinclair S.M.)

Reciprocal Enforcement of Order—Order made in Wales and registered in New Zealand Court—No Jurisdiction in Court of Registration to Confirm or Vary Order—Maintenance Orders (Facilities for Enforcement) Act 1921, s. 3. The Magistrate's Court, when it is the Court of registration of a maintenance order under s. 3 of the Maintenance Orders (Facilities for Enforcement) Act 1921, has no jurisdiction to confirm or vary a provisional maintenance order made in proceedings initiated in the Court in which the order originated. (*Pilcher* v. *Pilcher*, [1955] 2 All E.R. 644, followed. *Fewson* v. *Fewson*, *supra*, referred to.) *Peart* v. *Peart*. (Auckland. April 18, 1956. Sinclair S.M.)

DIVORCE AND MATRIMONIAL CAUSES.

Divorce—Cruelty—Desertion—Criminal Conduct—Wife's Conviction for Espionage—Husband a Regular Serving Airman—Conduct of Wife tending to strike at Roots of Matrimonial Relationship—Inference of Intention to injure—Constructive Desertion—Inference of Intention to end Cohabitation—Inference to be drawn from Indictment and Conviction. The parties were married in Germany in 1922, the wife being a German subject and the husband being a British regular soldier stationed in that country. In 1923 they came to England and set up home in Portsmouth, and the husband transferred on a regular engagement to the Royal Air Force. In the 1930's the wife became an ardent believer in the Nazi régime in Germany. In 1938 she joined the British Union of Fascists, a fact which she concealed from the husband because she realized that it would hurt him to know. In 1940 the wife was arrested and tried on charges of espionage. She was found guilty on two counts and sentenced to ten years' penal servitude. As a result of that conviction the husband's life in the Air Force became difficult and his health was affected. In 1945 he visited the wife in prison when she told him that she did not want anything more to do with him. The husband subsequently visited the wife in prison again, when there was discussion between them of divorce, and subsequently there was correspondence concerned mainly with financial matters, neither party evincing a desire to resume cohabitation with the other. After the wife's release from prison in 1947 the parties never came together. In March, 1954, the husband petitioned for divorce on the ground of the wife's desertion. At the trial the indictment against, and conviction of, the wife were admitted in evidence without objection and the petition was amended to allege cruelty on the part of the wife. *Held*, (*i*) The wife's conviction was rightly admitted in evidence and from it the Court could draw such inferences as a reasonable man would normally draw from it; in the present case the inference so to be drawn was that the wife had been guilty of active and overt treasonable conduct (*Hollington* v. *Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35, distinguished). (*ii*) That conduct amounted to cruelty since (*a*) it was of such seriousness and character that, considered against the background of the marriage, it struck at the roots of the matrimonial

LEGAL ANNOUNCEMENTS.

Continued from page i.

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Continued on page v.

relationship, and (*b*) as it had been pursued by the wife regardless of the hurt which might ensue to the husband, it was shown thereby to have been intended to injure him; accordingly, he was entitled to a decree on the ground of the wife's cruelty. (*Waters* v. *Waters*, [1956] 1 All E.R. 432, applying the reasoning in *Lang* v. *Lang*, [1954] 3 All E.R. 571, to cruelty cases, followed.) *Semble*, the treasonable conduct of the wife leading to her conviction showed animus deserendi on her part since, as she knew, if her conduct had become known to her husband it would have rendered life with him impracticable. (Dictum of Lord Porter in *Lang* v. *Lang*, [1954] 3 All E.R. 571, 580, applied.) Per Curiam, the wife having taken the initiative and shown an unswerving intention not to live with the husband, his actions really constituted a recognition of her intentions, and such a recognition does not, it seems, result in law in such a mutual agreement as would terminate desertion. *Ingram* v. *Ingram*. [1956] 1 All E.R. 785 (P.D.A.)

Domicil—Petitioner on Return to New Zealand on "Temporary Permit to Remain"—Petition issued during Currency of Such Permit—Petitioner later restored to Status of Permanent Resident of New Zealand with Effect as from Date of Return—Petitioner "domiciled in New Zealand"—Divorce and Matrimonial Causes Act 1928, s. 12 (4). A wife petitioner for divorce on the ground of desertion permanently resided in New Zealand until she left the country. On her return in February, 1952, and at the time of filing her petition, she was in New Zealand by virtue of a "temporary permit". Later, the Immigration authorities restored to her the status of a permanent resident of New Zealand, and, for immigration purposes, deemed her to have resumed that status with effect from the date of her return to New Zealand, i.e., February 28, 1952. Since that date, the petitioner had been habitually and without just cause left by the respondent without reasonable maintenance. *Held*, 1. That the petitioner had, since February, 1952, and indeed from an earlier date, had an intention of residing permanently in New Zealand, and, in view of the Immigration authorities' decision, she had, in fact, resided in New Zealand since February 28, 1952, and so was within s. 12 (4) of the Divorce and Matrimonial Causes Act 1928, and accordingly entitled to bring her petition. *Harris* v. *Harris*, (Unreported: Auckland 1954. Stanton J.); *Cruh* v. *Cruh*, [1945] 2 All E.R. 545; *Boldrini* v. *Boldrini and Martini*, [1932] P. 9; and *Zanelli* v. *Zanelli*, (1948) 64 T.L.R. 556, referred to.) 2. That, under s. 13 of the Divorce and Matrimonial Causes Act 1928, the respondent had deserted the petitioner from February 28, 1952. *Miletic* v. *Miletic*. (S.C. Wellington. March 23, 1956. Hutchison J.)

FAMILY PROTECTION.

Family Provision: The Source of Maintenance. *106 Law Journal*, 102.

GAMING.

Offences—Evidence—Fact that Person "offered to make a bet" deemed Prima facie Evidence of His Carrying on Business of Bookmaker—Meaning of "offered"—Gaming Amendment Act 1920, s. 5. Section 4 of the Gaming Amendment Act 1920, formulates a rule of evidence which comes into operation only in relation to a person who has "offered" to make a bet (whether or not a bet was actually made), and not to every person who made a bet irrespective of who offered to make it. The act of directly or indirectly offering to make a bet, associated as it is with the act of being knowingly party to the issue of any card intimating where or with whom a bet may be made, suggests something in the nature of soliciting business—namely, conduct which would or might be expected from a bookmaker in furtherance of his business. (*R.* v. *Whitta*, [1921] N.Z.L.R. 519; [1921] G.L.R. 353, explained and distinguished.) The Crown must prove either that the accused did one or more of the things mentioned in s. 4—of which making a bet is not one—or it must prove that the bet was made by a person part of whose business occupation it was to make bets. Where a person is charged under s. 4, the jury should be asked to consider whether the accused offered to make a bet, or whether, if a bet was made, it was part of the occupation or business of the accused to make bets. *So held* by the Court of Appeal in quashing a conviction and ordering a new trial. *The Queen* v. *Kearns*. (C.A. Wellington. March 28, 1956. Barrowclough C.J., Stanton, McGregor JJ.)

INFANTS AND CHILDREN.

Liability to Trespassing Children. *221 Law Times*, 80.

LAND AGENTS.

Commission. *100 Solicitors' Journal*, 79.

LANDLORD AND TENANT.

Notice to Quit—Notice to be given by, or on Behalf of, Person entitled to immediate Reversion—Agent's Authority to give Notice either General or Particular—Requirements of Notice given by Agent with Particular Authority—"Calendar month"—Word "calendar" Unnecessary—Property Law Act 1952, ss. 13, 105. The person who gives a notice to quit or on whose behalf it is given, should, in fact, be the person entitled to the immediate reversion, whether or not he or she is so described in the notice. A notice to quit may be given either by the person legally entitled to the immediate reversion, or by his duly authorized agent, whose authority may be either a general or a particular one. A general agent is not required to refer in the notice to quit to his agency with the degree of particularity which is required if he has the status of a special agent. If the agent's authority is particular only, then any notice must be given expressly on behalf of the landlord, who should be either named or sufficiently identified in the notice. (*Liddle* v. *Rolleston*, [1919] N.Z.L.R. 408; [1920] G.L.R. 162, and *Lemon* v. *Lardeur*, [1946] 2 All E.R. 329, followed.) In view of the provisions of ss. 13 and 105 of the Property Law Act 1952, it is not now necessary to insert in a notice to quit the word "calendar" before the word "month". A tenancy falling within the scope of s. 105 of the Property Law Act 1952, as to the duration of which there is no agreement, may be validly determined by a notice given at any time; and its validity is not affected if such notice does not expire at the end of a peridoic period from the commencement of the tenancy. A tenancy which does not fall within s. 105 of the Property Law Act 1952 can be determined validly only by a notice for the appropriate period expiring at the end of a periodic term of the tenancy. (*Hodge* v. *Premier Motors, Ltd.*, [1946] N.Z.L.R. 778; [1946] G.L.R. 346, and Dictum of Henry J. in *Capill* v. *Norman Andrews, Ltd.*, [1955] N.Z.L.R. 808, referred to.) *Hill* v. *Miller*. (Wellington. December 15, 1955. Carson S.M.)

Reservation of Rent containing "Gold" Clause. *100 Solicitors' Journal*, 46.

LICENSING.

Mens rea—Intention to do Act made Penal by Statute—Presumption of Offender's Knowledge that Act forbidden—Doing of Prohibited Act in itself supplying Mens rea—Justices of the Peace—Offences—Having Liquor in Possession in Dance-hall while Public Dance being held—Liquor intended as Base for Non-intoxicating Beverage—Intention to do Act made Penal by Statute—Offence consisting of having Liquor in Accused's Possession in Dance-hall—Statutes Amendment Act 1939, s. 59 (2). The true translation of the phrase "mens rea" is criminal intention, or an intention to do the act which is made penal by statute. What has to be considered in each case is what is the act struck at. (*Allard* v. *Selfridge and Co., Ltd*, [1925] 1 K.B. 129, followed.) As part of the refreshments at a dance, the committee which organized it sold a punch mixture which contained liquor and a large quantity of ginger ale. It was not "intoxicating liquor" within the meaning assigned to that term by s. 4 of the Licensing Act 1908. A new mixture, in course of preparation when the Police entered the hall, then contained 7.35 per cent. of proof spirit. In addition to this, the Police also seized a substantial quantity of intoxicating liquor which was under the control of one of the committee members. Informations charging three members of the committee with having liquor in their possession and control while a public dance was being held in the hall, contrary to s. 59 (2) of the Statutes Amendment Act 1939 were dismissed by a Magistrate. On an appeal on question of law against such dismissals, *Held*, 1. That the respondents must be presumed to have known the provisions of s. 59 (2) of the Statutes Amendment Act 1939, and that knowledge was sufficient to make them aware that they were offending against those provisions of the statute, or, in other words, was sufficient to constitute mens rea. (*Bank of New South Wales* v. *Piper*, [1897] A.C. 383, and *Kat* v. *Diment*, [1951] 1 K.B. 34; [1950] 2 All E.R. 657, followed. *R.* v. *Ewart*, (1905) 25 N.Z.L.R. 709; 8 G.L.R. 22, considered.) 2. That the committee member who had control of the liquor knowingly and wilfully had intoxicating liquor in his possession and control in the hall while the dance was being held; and he, therefore, had an intention to do an act made penal by s. 59 (2), and that was sufficient to render him guilty of the offence charged; and it was not an ingredient of the offence that it should also be shown that he intended that the liquor should be consumed as intoxicating liquor. *Gordon* v. *Schubert and Others*. (S.C. Hamilton. March 2, 1956. North J.)

Sale of Liquor during Closing Hours—Day of Election of Licensing Committee for District wherein Licensed Premises

situated—Nature of Offence—Licensing Act 1908, s. 95 (2)—Licensing Act 1908, s. 46 (2). The effect of s. 46 (2) of the Licensing Act 1908 (as enacted by s. 95 (2) of the Licensing Amendment Act 1948) is that licensed premises must be closed for the afternoon of the day on which an election is held for a licensing committee for the district in which the licensed premises are situated. *Police* v. *Bonner and Others.* (Christchurch. October 5, 1955. Ferner S.M.)

Wholesale Licence—Sales of Liquor—Record to be kept of All Sales of Liquor delivered at the Licensed Premises to which Wholesale Licence attached—Licensing Amendment Act 1948, s. 110 (1). Section 110 (1) of the Licensing Amendment Act 1948, requires every person who is the holder of a wholesale licence to keep a record of every sale of liquor made by him: and then, in a proviso, waives the necessity of a record in regard to "any sale of liquor for delivery at any building, vessel, or place at or upon which liquor may lawfully be sold". As the words "for delivery at" in the proviso to s. 110 (1) indicate the place of completion of transit or destination of liquor sold by the holder of a wholesale licence at a building, vessel, or place other than the fixed licensed premises of the holder of a wholesale licence, the proviso applies only to the position where the liquor is conveyed and the transfer of possession to the purchaser takes place at the purchaser's licensed premises, i.e., at a building, vessel, or place other than the premises of the licensed wholesaler. Consequently, the holder of a wholesale licence must keep a record of every sale of liquor which is sold for delivery, and is delivered, by him at the licensed premises to which his wholesale licence is attached. *Shannahan* v. *Wairarapa Farmers' Co-operative Association, Ltd.* (S.C. Wellington. March 20, 1956. McGregor J.)

MASTER AND SERVANT.

Loss of Service—Established Civil Servant injured through Negligence of the Defendant—Claim by the Crown to recover Damages for Loss of His Services—Status of an Established Civil Servant—Whether under Contractual Relationship with Crown. The defendant B. was an established civil servant, a tax officer in the Inland Revenue. When riding a motor cycle off duty he was injured in a collision with the defendant's motor vehicle, and responsibility for the accident was apportioned by agreement as to two-thirds to the defendant and as to one-third to B. B. was away from work for over nine months and the Crown sued the defendant for damages for loss of B.'s services during the period. The amount claimed was equivalent to the whole of B.'s pay (i.e., full pay, half pay and half increased pay) during the period less a credit for sickness benefit which he had not drawn. It was conceded that the payment of this pay to B. was a voluntary act, and no evidence was tendered of any other damage suffered. *Held*, the action, viz., an action *per quod servitium amisit*, did not lie because (i) one element in the cause of action was that the relationship of master and servant should have existed between the plaintiffs and the servant, and the relationship between the Crown and an established civil servant was a different relationship (*A.-G. for New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1955] 1 All E.R. 846, 856, applied), and further (ii) damage was essential to the cause of action and the payment of sick pay to B. was an act of bounty which did not amount to damage in law. (*A.-G.* v. *Valle-Jones*, [1935] 2 K.B. 209, not followed; *Martinez* v. *Gerber*, (1841) 3 Man. & G. 88, and dictum of Lord Sumner in *Admiralty Comrs.* v. *S.S. Amerika*, [1917] A.C. 38, 60, applied.) Per Curiam: (i) An established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament. His employment depends not on contract with the Crown but on appointment by the Crown, though there may be exceptional cases . . . where there is a contractual element. (ii) If the action *per quod servitium amisit* had lain, it would have been immaterial that the injury occurred when B. was off duty. *Inland Revenue Commissioners* v. *Hambrook.* [1956] 1 All E.R. 807 (Q.B.D.)

The Position of the Careless Servant. *106 Law Journal*, 68.

NEGLIGENCE.

Causation and Dangerous Machinery. *106 Law Journal*, 132.

Valuation and Survey of landed Property—Measure of Damages—House purchased in Reliance on Surveyor's Report. In 1952, the plaintiff employed the defendant, a surveyor, to survey and advise him on the structural and general condition of a manor house which he proposed to buy. The defendant reported that the house was of very substantial construction and valued it with land and other buildings at between £25,000 and £27,000, but he negligently overlooked the fact that much of the timber in the house was badly affected by death-watch beetle and worm. The plaintiff bought the property for £25,000, and he subsequently brought an action for damages for negligence against the defendant. The work of repairing the house would have cost £7,000 in 1952, and at the time of the hearing of this action would have cost substantially more. It was found by the Court that, having regard to the bad condition of the timber, the value of the property in 1952 was £21,000. *Held*, (i) The measure of damages was the difference between the fair value of the property if it had been in the condition described in the defendant's report (£25,000) and its value in its actual condition (£21,000); accordingly the amount recoverable in damages was £4,000. (Dictum of Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673, 689, applied.) (ii) The damages should be assessed at the date when the damage occurred, viz., 1952, and accordingly allowance should not be made for the increase of the cost of executing the requisite work of repair between that time and the date of the hearing of the action. Appeal dismissed. *Philips* v. *Ward.* [1956] 1 All E.R. 874 (C.A.)

POLICE FORCE.

Money in Possession of Police—Moneys taken from Person on Arrest—Such Person convicted of obtaining from Several Persons Money by False Pretences—No Statutory Provision to revest Money in Persons defrauded—Common-law Right of Recovery—Magistrate, in His Discretion, ordering Money to be distributed pro rata according to Amount whereof Persons respectively defrauded—Order within His Jurisdiction—Police Force Act 1947, ss. 41, 71. Proceedings under s. 41 of the Police Force Act 1947 should be commenced by originating application under the Magistrates' Courts Rules 1948. The Magistrates' Court has jurisdiction under s. 41 to make an order for distribution of a sum of money of which possession had properly been taken following the arrest of a person who was arrested upon, tried for, and convicted of charges of obtaining money by false pretences; and a right of appeal from such an order is given by s. 71 of the Magistrates' Courts Act 1947 to any party without leave where the value of the property in issue exceeds £20. F. was arrested upon, tried for, and convicted of eleven charges of obtaining money by false pretences—namely, by issuing valueless cheques and obtaining money or consideration for them. On his arrest an unidentifiable sum of money was properly taken from him by a member of the Police Force. A Magistrate made an order, pursuant to s. 41 of the Police Force Act 1947, for distribution of the money pro rata among the persons F. had defrauded. On an appeal from that order, *Held*, 1. That, as F.'s convictions were for obtaining money by fraud, and not for theft, there is no statutory provision which would revest the money in the persons who paid it to F. (*In re Kirkham*, [1952] N.Z.L.R. 75, distinguished.) 2. That, at common law, each of the defrauded parties, transferors to F. of money obtained by fraud, had the right, upon discovering the fraud, to rescind or disaffirm the contract to pay the money, and thereupon the title to the money revested in that party enabling him to sue in trover for the amount of which he was defrauded, provided he had disaffirmed the contract before the money passed to a third person. (*Load* v. *Green*, (1846) 15 M. & W. 216; 153 E.R. 828, and *White* v. *Garden*, (1851) 10 C.B. 919; 138 E.R. 364, referred to.) 3. That, as each of the defrauded parties surrendered the dishonoured cheque in his possession to the Police and sought to recover his moneys, and as the fact that each defrauded party had adopted that course became known to F. on his arrest, there was then a sufficient intimation to F. of the election of the defrauded parties to rescind the contract to revest the property in any money of a defrauded party F. might then have in his possession. (*Freeth* v. *Burr*, (1874) L.R. 9 C.P. 208, applied.) 4. That, as the moneys were unidentifiable, the Magistrate, in exercise of the discretion conferred upon him by s. 41, could order the money to be distributed pro rata according to the respective amounts of which the parties had been defrauded. *Fry* v. *Mathieson and Others.* (S.C. Auckland. November 11, 1955. Shorland J.)

PRACTICE.

Parties—Adding Persons as Parties—Defendants applying for Order to join Another Defendant—Prima facie Case that proposed Defendant's Rights might be legally affected by the Result of the Action—R.S.C., Ord. 16, r. 11. (*Cf. Code of Civil Procedure RR. 89, 90, 91.*) By his statement of claim in an action against the defendants the plaintiff alleged that he was the inventor of a new design of adhesive dispenser in the shape of a pen, known as the Fastik pen; that he disclosed the "know-how" of the pen to the defendants during negotiations for an agreement

whereby the defendants were to market the pen; that in February, 1954, the negotiations broke down; that there was an implied contract that the defendants would treat as confidential the information given to them during the negotiations; and that the defendants were in breach of that contract in that they had made use of the information by manufacturing an adhesive dispenser called the Stixit pen which contained three distinctive features of the Fastik pen. The plaintiff claimed damages against the defendants and an injunction to restrain the defendants from disclosing to other persons or making use of the information disclosed by the plaintiff without his consent. The defendants, before filling a defence, applied by summons under R.S.C., Ord. 16, r. 11, for leave to join as a defendant one D. who by affidavit alleged, among other things, that he was the inventor of the Stixit pen. Subsequently D. filed another affidavit alleging, among other allegations, that the defendants were under contractual obligation to him to manufacture and distribute the Stixit pen in certain territories. *Held*, (i) The test whether under R.S.C., Ord. 16, r. 11, the Court had jurisdiction to add as defendant a person whom the plaintiff did not wish to sue was whether the order for which the plaintiff was asking in the action might directly affect the intervener (i.e., the person proposed to be added as a party) by curtailing the enjoyment of his legal rights; for the only reason which might render the presence of a party before the Court to be "necessary" to enable the Court to adjudicate completely (within the meaning of R.S.C., Ord. 16, r. 11) was that he should be bound by the result of the proceedings. (*Moser* v. *Marsden*, [1892] 1 Ch. 487, as interpreted by Buckley J. in *McCheane* v. *Gyles (No. 2)*, [1902] 1 Ch. 911, and dictum of Wynn-Parry J. in *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, [1950] 2 All E.R. 605, 611, followed; observations of Wynn-Parry J. in *Atid Navigation Co., Ltd.* v. *Fairplay Towage and Shipping Co., Ltd.*, [1955] 1 All E.R. 698, 699, considered; dicta of Lord Esher M.R. in *Byrne* v. *Brown & Diplock* (1889), 22 Q.B.D. 657, 666, criticized.) (ii) D. should be added as defendant in the present case because the defendants were shown prima facie to be bound to him in contract to manufacture the Stixit pen, which obligation constituted a legal right of D.'s the enjoyment of which might be curtailed by relief (i.e., the injunction) asked by the plaintiff in this action. *Amon* v. *Raphael Tuck and Sons, Ltd.* [1956] 1 All E.R. 273 (Q.B.D.)

PUBLIC REVENUE—DEATH DUTIES (ESTATE DUTY).

Dutiable Estate—Deceased, in 1932, transferring Property to Sons in Consideration of Their giving Mortgage securing Annuity to Deceased, and, after His Death, to His Wife—Sons executing Mortgage accordingly—Value of Property, at Deceased's Death in 1949, in Excess of Value at Date of Transfer—Commissioner of Inland Revenue entitled to include Value of Property at Deceased's Death in computing Final Balance of His Dutiable Estate—"Disposition of property which is accompanied by . . . a contract for any benefit to the deceased for the term of his life"—Death Duties Act 1921, s. 5 (1) (j) (ii). The deceased was the owner of a property which was subject to mortgages of £3,000 and £2,000. On June 15, 1932, he transferred this property, subject to the two mortgages, to his sons as tenants-in-common in equal shares. The transfer was expressed to be in consideration of the sons' executing a mortgage securing to the deceased an annuity of £650 per annum payable at £12 10s. per week, and, after his death, an annual payment to his widow of £6 per week so long as she should remain unmarried. By virtue of the mortgage executed contemporaneously with the transfer, there was secured on the property the sons' covenant to pay to the deceased during the remainder of his life an annuity of £650, and upon his death, if his then wife should have survived him and should at the time of his death be his wife or if divorced should not have remarried, to pay her during the remainder of her life so long as she should remain unmarried an annuity of £416 while the youngest son was a minor, and, thereafter, an annuity of £312. It was common ground that there was no element of gift or bounty in the transaction. The deceased died on April 18, 1949. The value of the property at the time of the transfer was £11,195 less the debt of £5,000 secured by the mortgages which remained on the property. The value of the annuities, as assessed at the time of the transfer, was £7,247. At the death of the deceased, the value of the property was £22,265, less the mortgage debt. The Commissioner of Inland Revenue claimed, under s. 5 (1) (*j*) of the Death Duties Act 1921, to include in the dutiable estate of the deceased the sum of £17,265, being the value of the property at the death of the deceased, less the amount owing under the two mortgages, £5,000. On Case Stated by the Commissioner, Gresson J. ([1955] N.Z.L.R. 363), held that the transaction was not a "settlement, trust, or other disposition of property" within the meaning of s. 5 (1) (*j*) of the Death Duties Act 1921, and that the amount of £17,265 was not to be included in the computation of the final balance of the deceased's dutiable estate. On appeal from that judgment, it was held by the Court of Appeal by a majority, that the transaction comprised in the contemporaneous transfer and mortgage of the property, was not strictly within the meaning of the term "settlement" as used in s. 5 (1) (*j*) of the Death Duties Act 1921; but, it was, nevertheless, within the meaning of the expression "other disposition of property", as used therein, as it possessed the qualifications required by subpara. (ii) thereof ([1955] N.Z.L.R. 361). On appeal from that judgment, *Held*, by the Judicial Committee, 1. That the transfer exactly answered the description of "a disposition of property which is accompanied by . . . a contract for any benefit to the deceased for the term of his life", and consequently the property came within s. 5 (1) (*j*) (ii) of the Death Duties Act 1921. (*Lethbridge* v. *Attorney-General*, [1907] A.C. 19, distinguished. *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520; [1948] G.L.R. 127, and *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550; [1948] G.L.R. 357, approved.) 2. That, accordingly, the Commissioner of Inland Revenue, in computing the final balance of the estate of the deceased, was entitled, pursuant to s. 5 (1) (*j*) (ii) to include the sum of £17,265, the value of the property at the date of the deceased's death less the mortgages thereon. Appeal from the judgment of the Court of Appeal, [1955] N.Z.L.R. 361, dismissed. *Ward and Others* v. *Commissioner of Inland Revenue*. (Judicial Committee. February 14, 1956. Viscount Kilmuir of Creich, L.C. Lord Oaksey. Lord Morton of Henryton. Lord Radcliffe. Lord Cohen.)

PUBLIC REVENUE—INCOME TAX.

False Returns by Company—Onus of Proof—Appreciation of Assets Method to Assess True Income—No Source of Income of Taxpayer disclosed other than Private Company in which He and His Wife only Shareholders—No Evidence on Behalf of Company or Shareholders—Onus of Proof discharged by Commissioner—Land and Income Tax Act 1923, s. 149 (b), (f)—(*Land and Income Tax Act 1954, s. 228 (1)* (b), (e)). Informations charged the company with wilfully making false returns of income, and G. (who was a director and manager of the company, in which the shares were held by G. and his wife) was charged with aiding and abetting the company in committing such offences. The returns made by the company for the years in question were signed by a Public Accountant on behalf of the company. An Inspector of the Inland Revenue Department investigated the assets position of G. and his wife, and he verified the information obtained from them, in so far as he was able to do so. No source of income other than those set out in the Inspector's statements were disclosed by G. and the Inspector was unable to discover any source of income of G. and his wife other than the company. The Inspector adopted the appreciation of assets method in assessing the company's income, and ascertained, according to this method and from the information supplied to him, the increase in assets of the defendant and his wife during the years in question. The statements were prepared by the Inspector on that basis, and were discussed with G. and certain allowances were made for the proceeds of successful betting. On these facts, and in the absence of any evidence on behalf of the company or of G. controverting them, the Magistrate held that the Commissioner had discharged the onus of proof that lay upon him and had established the charges. On appeal from the convictions of the company and of G. on the ground, inter alia, that the Magistrate had misdirected himself in regard to the onus of proof, and in holding that the prosecution had discharged the onus of proof required to support a conviction under the statute, it was conceded that the returns were false, but it was contested that such falsity was made wilfully. *Held*, 1. That, from the evidence of the Inspector, coupled with the fact that the information was obtained from G. and his wife and was verified in so far as it was possible and they had not disclosed any sources of income other than those set out in the statements, the Court was entitled, and was almost impelled, to draw an inference that the source of appreciation of assets was money derived from their private company; and that it followed as a necessary inference that the company had wilfully made false returns in regard to the years in question. (*Federal Commissioner of Taxation* v. *Galt*, (1947) 8 A.T.D. 272, applied.) 2. That, for the reasons given in the judgment, the Commissioner had discharged the onus of proof in that the clear degree of proof required to establish a wilful offence was present; that there was ample evidence to support the decision that the mistake was made knowingly and intentionally; and that there was the requisite proof of mens rea in so far as the company was concerned. (*Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ltd.*, [1944] K.B. 146; [1944] 1 All E.R. 119, referred to.) 3. That, accordingly, the Magistrate had not

misdirected himself as to the onus of proof with respect of the informations against the company or those against G. for aiding and abetting the company to commit the offences of which it was convicted. (*Ferguson* v. *Weaving*, [1951] 1 K.B. 814; [1951] 1 All E.R. 412, mentioned.) *Commissioner of Inland Revenue* v. *Parisienne Gown Co., Ltd.: Commissioner of Inland Revenue* v. *Gold.* (S.C. Wellington. March 9, 1956. McGregor J.)

SALE OF GOODS.

Licence necessary for Exports—Whether Buyers' or Sellers' Duty to obtain—English Contract—Export Licences granted only to Portuguese Suppliers. By a contract made in London in April, 1951, the sellers, an English company, agreed to sell to the buyers, an American company, for United States dollars, a quantity of Portuguese turpentine f.a.s. buyers' tank steamer at Lisbon during the second half of May, 1951, payment by confirmed irrevocable credit in sellers' name in Lisbon. At the time when the contract was made, the sellers knew that the buyers required the goods for shipment to Eastern Germany. The sellers then entered into a contract to purchase the goods from suppliers in Portugal. Under Portuguese law, at all material times, the export of turpentine was prohibited except under licence, export licences were granted only to Portuguese suppliers, and goods could not be delivered f.a.s. at Lisbon until they had been cleared through the Portuguese Custom House where the licence had to be produced. There was no mention of an export licence in the contract between the buyers and sellers, and, at the date of the contract, the buyers, apparently, did not know that a licence was necessary; but the contract between the sellers and their Portuguese suppliers, whose identity the sellers withheld from the buyers, was subject to the licence being granted. On May 4, 1951, the buyers wrote to the sellers giving them the name of the tanker which they had chartered and enclosing a copy of the charter-party which showed that the goods were to be carried to Rostock, and, subsequently, the buyers opened a letter of credit in the sellers' name in Lisbon. On May 22 the suppliers applied to the Portuguese authorities for a licence to export the turpentine to Rostock but the application was refused, and, in consequence, the goods could not be delivered f.a.s. the buyers' tanker at Lisbon since they could not be cleared through the customs. The sellers requested the buyers to give shipping instructions for a port other than Rostock but the buyers refused to do so. It was common ground that the proper law of the contract was English. The sellers claimed damages. *Held*, the sellers could only succeed if they established a breach of contract by the buyers and this they failed to do because (i) in the circumstances no obligation on the buyers to obtain an export licence should be implied, and (ii) (per Viscount Simonds, Lord Morton of Henryton and Lord Somervell of Harrow) when the contract could not be carried through in the manner contemplated by both parties thereto there was no obligation on the buyers to nominate a port of destination for which an export licence could be obtained. (*H. O. Brandt and Co.* v. *H. N. Morris and Co., Ltd.*, [1917] 2 K.B. 784, distinguished.) *Semble*, no general rule is established for f.o.b. or f.a.s. contracts for the sale of goods, in relation to which a prohibition on export exists, that an obligation on the buyers to obtain an export licence for the goods, or to supply a ship into or alongside which the goods can lawfully be placed, is to be implied in default of express stipulation between the parties, but each case depends on the contract and surrounding circumstances in that case. (Dictum of Scrutton L.J., in *H. O. Brandt and Co.* v. *H. N. Morris and Co., Ltd.*, [1917] 2 K.B. 784, 798, criticized. Decision of the Court of Appeal, sub nom. *M. W. Hardy and Co., Incorporated* v. *A. W. Pound and Co., Ltd.*, [1955] 1 All E.R. 666, affirmed.) *A. V. Pound and Co., Ltd.* v. *M. W. Hardy and Co., Inc.*, [1956] 1 All E.R. 639 (H.L.)

SHIPPING AND SEAMEN.

Deserting Seaman—Order for Detention in Custody—Appeal therefrom—Such Order a "sentence passed on the conviction"—Jurisdiction of Supreme Court to hear Appeal—Shipping and Seamen Act 1952, s. 158 (5)—Justices of the Peace Act 1927, s. 315 (2). The determination of a Magistrate under the first proviso to s. 158 (5) of the Shipping and Seamen Act 1952, ordering a deserting seaman to be detained in custody for a further period not exceeding three months is a "sentence" within the meaning of that word as used in s. 315 (2) of the Justices of the Peace Act 1927. Consequently, the Supreme Court has jurisdiction to entertain an appeal from such a determination, as it is a "sentence passed on the conviction" within the meaning of s. 315 of the Justices of the Peace Act 1927. *Miller and Others* v. *McRae.* (S.C. Wellington. March 20, 1956. Cooke J.)

STATUTE.

Nelson Hospital Reserves Act 1888 (L.)—Interpretation—Title to Land vested in Board "for the purposes of a general hospital at Nelson"—Such Land an "endowment", but "held in trust for a special purpose"—Board's Power of Sale subject to Consent of Minister of Health—Proceeds of Sale may be expended by Way of Capital Expenditure "for the purposes of a general hospital at Nelson" only—Nelson Hospital Reserves Act 1888 (L.), s. 2—Hospitals Act 1926, s. 73. The effect of the Nelson Hospital Reserves Act 1888 was to transfer to the Nelson Hospital and Charitable Aid Board the title to certain land which had been previously vested in the Crown, and the land, instead of being held in terms of the Crown Grant, "as an endowment for hospitals and lunatic asylums" was, by virtue of s. 2, thereafter held by the Board "for the purposes of a general hospital at Nelson". On an originating summons for an interpretation of the words "for the purposes of a general hospital at Nelson", *Held*, 1. That the land ceased to be an "endowment" on the passing of the Nelson Hospital Reserves Act 1888, and was thereafter held by the Board "for the purposes of a general hospital at Nelson", subject to the Hospitals and Charitable Institutions Act 1885. 2. That the Board held the land "in trust for a special purpose" within the meaning of s. 73 of the Hospitals Act 1926—namely, "the purposes of a general hospital at Nelson subject to the [1885] Act"; and the Board had the power of sale, subject to the consent of the Minister of Health, given by s. 73 of the Hospitals Act 1926. 3. That, on any such sale, subject to such consent, the Board would be under no obligation to invest the proceeds, but it might expend the moneys by way of capital expenditure, provided that, in doing so, it applied such moneys "for the purposes of a general hospital at Nelson" only. *Nelson Hospital Board* v. *Public Trustee.* (S.C. Nelson. March 29, 1956. Turner J.)

TENANCY—FIXATION OF FAIR RENT.

Order made by Magistrate fixing Fair Rent—Dismissal of Landlord's Subsequent Application to re-fix Fair Rent on Ground of Increased Rates and Land Tax—Such Refusal not "an order fixing the fair rent of the premises"—No Jurisdiction to hear Appeal therefrom—Tenancy Act 1955, ss. 21 (1), 22, 27. In November, 1954, an order was made fixing the fair rent of premises, and, in August, 1955, the landlord applied to the Magistrates' Court for an order fixing the fair rent on the ground that there had been an increase in rates and in land tax. The application was dismissed. The landlord appealed from that determination. *Held*, That the order of the Magistrate dismissing the application did not constitute an order, in terms of s. 21 (1) of the Tenancy Act 1955, fixing the fair rent at the amount previously fixed; and the Court had no jurisdiction to entertain the appeal. *Semble*, That, by virtue of s. 22 of the Tenancy Act 1955, the order made in November 1954 was still in force, because no subsequent order fixing the fair rent of the premises had yet been made. *Gideon Trading Co., Ltd.* v. *Civic Motors, Ltd.* (S.C. Wellington. March 8, 1956. Cooke, J.)

TRUSTS AND TRUSTEES.

Some Duties of Trustees. *106 Law Journal*, 51.

Tenant for Life as Trustee. *221 Law Times*, 5.

Variation of Trusts by the Court. *221 Law Times*, 49; *100 Solicitors' Journal*, 64.

VALUATION OF LAND.

Abbatoirs—Property of City Corporation—Considerations affecting Valuation of Unimproved Value and Valuation of Improvements—Suggestion that Complicated Valuations should be exchanged by Counsel before Hearing by Court—Land Valuation Court Act 1948, s. 30—Valuation of Land Act 1951, ss. 22, 43. Upon a revision of the Valuation Roll, the Dunedin City Corporation objected to the valuation placed upon its abbatoirs property. The Land Valuation Committee reduced the value of the improvements by £7,500, and did not alter the unimproved value. The Corporation appealed against that decision. *Held*, 1. That, as to the unimproved value, the valuation placed on the adjoining area could be taken as a standard; and, in consequence, there should be a reduction in the unimproved value from £6,750 to £6,225. 2. That, on an apportionment of individual improvements (including the many separate buildings and other improvements, such as yards, races, and paths), by the Court, after having due regard to considerations affecting the market value of the property as a whole, a reduction of £9,750 should be made in the value of the improvements, in lieu of the reduction of £7,500 made by the Committee. *Semble*, That, where complicated valuations of buildings or city properties are to be presented to the Land Valuation Court, the valuations

to be presented to the Court should be exchanged by counsel before the hearing, so as to enable the valuers on both sides to be fully conversant with each other's views and able to offer considered opinions in relation thereto. *Quaere*, Whether the Land Valuation Court can make a further reduction in the value of the property, which was owned by the local authority, under s. 43 of the Valuation of Land Act 1951, in consequence of the restricted purpose to which the land could be applied, and so exercise on an appeal the powers vested by s. 43 in the Valuer-General. *In re Dunedin City Corporation's Objection.* (L.V.Ct. Dunedin. April 4, 1956. Archer J.)

WILL.

Construction—Estate to Husband "absolutely" during his Lifetime—On Husband's Death Gift of "residue of my estate . . . to my daughter for her sole use and enjoyment"—Husband taking Life Interest in Corpus of Estate—Subject thereto, Whole Estate to Daughter—Daughter's Interest vested at Death of Testatrix—"Absolutely"—"Residue." The testatrix devised to her husband "all my property both real and personal of whatsoever kind and wheresoever situated including all or any policy or policies of insurance in existence at any time of my decease after payment of all debts and funeral expenses to my said husband absolutely for him to have the sole use and enjoyment thereof during his lifetime and in the event of my husband predeceasing me or on his subsequent death then the whole or residue of my estate of whatsoever kind to my daughter . . . for her sole use and enjoyment". On originating summons to determine the interests respectively taken by the husband and the daughter, *Held*, 1. That the use of the word "absolutely" did not necessarily operate to make the gift to the husband a gift of an estate in fee simple. (*Rosenberg* v. *Scraggs*, (1901) 19 N.Z.L.R. 196, and *In re Cate, Moulder* v. *Cate*, [1923] N.Z.L.R. 419; [1922] G.L.R. 410, applied.) 2. That the gift to the daughter of "residue" on the death of the husband did not authorize the husband to appropriate or abstract capital in which he had only a life interest. (*In re Brooks Will*, (1865) 2 Dr. & Sm. 362; 62 E.R. 659, and *In re Cate, Moulder* v. *Cate*, [1923] N.Z.L.R. 419; [1922] G.L.R. 410, applied.) 3. That, accordingly, the husband took a life interest in the corpus of the estate; and that, subject thereto, the whole estate went to the daughter absolutely, her interest being vested as at the date of the death of the testatrix. *In re Bennett (deceased), Coulam* v. *Bennett.* (S.C. Auckland. February 1, 1956. Stanton J.)

Construction—Rule against Perpetuities—Testator directing Residuary Estate to be held Upon Trust at Expiration of Twenty-year Period from Death of Last Survivor of His Nine Children for "the issue per stirpes of my said children who shall then be living who being male shall attain the age of twenty-one years or being female shall attain that age or previously marry"—Rule against Perpetuities infringed—Trusts determining at End of Twenty-year Period—Incidence of Payment of Income during Such Period—Residuary Capital at Expiration of That Period to go as on Intestacy. The term "issue", if standing alone, prima facie means descendants of every degree, and should be so construed unless the context or the language of the will as a whole shows that the testator intended it to have the more restricted meaning of "children". (*In re Birks, Kenyon* v. *Birks*, [1900] 1 Ch. 417, and *Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Ramage*, [1927] N.Z.L.R. 288; [1927] G.L.R. 141, referred to.) The narrower construction of "issue" cannot be adopted to avoid a breach of the rule against perpetuities. (*Dungannon* v. *Smith*, (1845) 12 Cl. & F. 546; 8 E.R. 1523, followed.) The testator, by his will, directed his trustees to hold his residuary estate "upon trust". (*a*) To pay to his wife out of the income of the residuary estate until her death or remarriage an annuity equivalent to £10 per week; (*b*) To pay and divide the balance of the net annual income to and among his nine children and the survivor and survivors of them during their respective lives; and, for a period of twenty years from and after the death of the last survivor of his nine children, "to pay and divide the income . . . among the issue per stirpes of my said children"; (*c*) At the expiration of the twenty-year period, to hold the residuary estate upon trust "for all and every the issue per stirpes of my said children who shall then be living who being male shall attain the age of twenty-one years or being female shall attain that age or previously marry and if more than one as tenants in common in equal shares". On originating summons to determine the validity of the dispositions under para. (*c*), *Held*, 1. That the word "issue" in para. (*c*) should be read with the wider meaning of "descendants of all degrees". (*Edyvean* v. *Archer*, [1903] A.C. 379, followed. Rule in *Sibley* v. *Perry*, (1802) 7 Ves. 522; 32 E.R. 211, not applied.) 2. That the limitation in para. (*c*) was void, in that it infringed the rule against perpetuities in so far as the trustee was directed, after the expiration of the twenty-year period, to hold the residuary estate upon trust for persons then living who should attain the age of twenty-one years or being female should sooner marry, such expiration not being the termination of a life in being at the testator's death. (*In re Williams, Williams* v. *Williams*, [1907] 1 Ch. 180, distinguished. *In re Ussher, Foster* v. *Ussher*, [1922] 2 Ch. 321; *In re Parker, Barker* v. *Barker*, (1880) 16 Ch. D. 44; *In re Hume, Public Trustee* v. *Mabey*, [1912] 1 Ch. 693, and *In re Blackwell, Blackwell* v. *Blackwell*, [1926] Ch. 233, mentioned.) 3. That the trusts specified in para. (*c*) determined at the expiration of the period of twenty years therein mentioned. 4. That the income during the twenty-year period was divisible "among the issue per stirpes" of the testator's children, i.e., it was divisible into as many equal shares as there were families or stocks of the testator's children at the commencement of that period. 5. That the residuary capital at the expiration of the period of twenty years was to be paid to those who were entitled on an intestacy. *In re Harding (deceased), New Zealand Insurance Co., Ltd.* v. *Milne and Others.* (S.C. Wellington. November 16, 1955. Barrowclough C.J.)

Construction—Words of Futurity—Gift to Children in Equal Shares—Direction that "if any child of mine shall die in my lifetime" leaving Children, Such Children to take Parent's Share—Child of Testatrix already dead before Date of Will, but leaving Child surviving Distribution—Words "die in my lifetime" meaning simply "die"—Such Modification of Will construed as "shall be dead", to effect Intention of Testatrix to include among Participating Grandchildren, Child of Daughter who died before Making of Will. The will of the testatrix, which was made on July 17, 1917, provided that her estate other than her home property and furniture (hereinafter referred to as "the home") should be converted and distributed after providing for certain legacies to three named daughters. The home was to be retained as a home for unmarried daughters, and, on the death or marriage of all such daughters, was to be realized and the proceeds "divided equally between and among all my children who shall be living at the date of such distribution." The last unmarried daughter having died on April 29, 1954, the home was sold. The final clause was as follows: "AND LASTLY I direct that if any child of mine shall die in my lifetime leaving issue him or her surviving who being male shall attain the age of twenty-one years or being female shall attain that age or marry such issue shall take and if more than one equally between them the share to which his her or their parent would have been entitled hereunder had such parent survived me and attained a vested interest." When the time arrived for conversion of the home and distribution of the proceeds, there were no children of the testatrix living. One child died in 1891, many years before the making of the will, in the lifetime of the testatrix, leaving issue. The other children who died leaving issue survived the testatrix, but died before April 29, 1954, the time for distribution of the proceeds of the home. On an originating summons for interpretation of the will, *Held*, 1. That the final declaration referred to the home fund, and was inserted primarily, if not wholly, to provide for the ultimate destination of that fund; that the reference to death "in my lifetime" was not a sufficient indication of a contrary intention, and that the concluding words "and attained a vested interest" would be meaningless if the words "in my lifetime" were retained. 2. That the Court was entitled to consider what was the contingency really contemplated by the testatrix, and to give effect to the will if that contingency happened. (*Re Donald, Royal Exchange Assurance* v. *Donald*, [1947] 1 All E.R. 764, and *In re Joyce, Milliken* v. *Public Trustee*, [1926] N.Z.L.R. 835; [1927] G.L.R. 6, applied.) 3. That the testatrix intended the home fund to be divided among her then living children and the issue of those then dead, and to give effect to that intention, the words "die in my lifetime" should be read as meaning simply "die", and the redundant word "me" after the word "survived" should be omitted, thereby establishing that the home fund was to go to the grandchildren who survived in equal shares per stirpes. 4. That the word in the will, "die" as construed above, meant, in respect of the daughter who predeceased the making of the will, "shall be dead" so that the child of that daughter was to be included amongst the participating grandchildren. (*In re Williams, Metcalf* v. *Williams*, [1914] 2 Ch. 61, and *In re Birchall, In re Valentine, Kennedy* v. *Birchall*, [1940] Ch. 424; [1940] 1 All E.R. 545, followed. *In re Nicholson*, (1913) 33 N.Z.L.R. 203; 16 G.L.R. 317, not followed. *Miller* v. *Gerrard*, [1947] A.C. 461, distinguished.) *In re Taylor (Deceased), Carr* v. *Read.* (S.C. Auckland. March 26, 1956. Stanton J.)

INTERPRETATION OF STATUTES.

An Interpretation Section Misapplied.

By D. A. S. WARD.

The case of *In re Myers*, [1956] N.Z.L.R. 263, in which McGregor J. affirmed the jurisdiction of a Magistrate's Court to extend, under the Criminal Justice Act 1954, an order for detention in a borstal institution made before the coming into force of that Act, is a striking example of the misapplication of an interpretation section in a statute. The decision of McGregor J. also appears to be in direct conflict with the earlier decision of Sir Harold Barrowclough C.J. in *In re Beale*, [1956] N.Z.L.R. 24.

In November, 1954, a Magistrate's Court had ordered that the accused, Myers, be detained in a borstal institution. In September, 1955, the accused escaped and was convicted by a Magistrate's Court of escaping from lawful custody. In the meantime (on January 1, 1955) the Criminal Justice Act 1954 had come into force. When the accused was convicted of escaping, the Magistrate, by way of sentence, extended the term of the original order of detention. In doing so, he purported to act under s. 29 (4) of the Criminal Justice Act. That subsection, so far as it is relevant, reads as follows:

> (4) Notwithstanding anything in this Act, where any person who is serving a sentence of borstal training . . . is convicted of any offence or offences punishable by imprisonment and committed after that sentence was passed, the Court may, if it thinks fit, pass a sentence extending the maximum term of borstal training . . . for which he could then be detained under the sentence he is serving for such period, not exceeding one year, as it thinks fit . . . .

The Crown then moved to quash the conviction and the sentence extending the term of the original order of detention. It is clear from the judgment that the ground of the motion was that s. 29 (4) did not apply and that the Magistrate had no jurisdiction to impose that sentence. Counsel for the accused agreed that the Magistrate had no jurisdiction, but submitted that only the sentence should be quashed. McGregor J. found it unnecessary to deal with the question whether the whole conviction, or only the sentence, should be quashed, because he held that the Magistrate did have jurisdiction, and that therefore the submissions of both counsel on that question had no basis.

Before dealing with the reasoning by which His Honour reached this conclusion, it should be said that until the Criminal Justice Act 1954 came into force the legislation did not recognize a "sentence of borstal training". The relevant provisions of the Prevention of Crime (Borstal Institutions Establishment) Act 1924 empowered the Court to "make an order of detention in a borstal institution" for a term to be fixed by the Court within specified limits. The equivalent provisions of the Criminal Justice Act (which repealed the provisions of the 1924 Act) are different. Section 18 empowers the Court to "pass a sentence of borstal training". The Court does not fix the term. Under s. 20, the person so sentenced is detained until he is released on the recommendation of the Parole Board, but may not be detained for more than three years. Moreover, s. 55 (2) of the Criminal Justice Act expressly provides that an order for detention in a borstal institution made before the coming into force of the Act "shall continue to have effect according to the tenor thereof". All this is summarized in His Honour's judgment; and, at p. 264, he then says:

> The question, therefore, arises whether, to enable the Magistrate to exercise the power of extension contained in s. 29 (4) of the Act, the accused was "a person serving a sentence of borstal training". What in fact the accused was serving was an order for detention in a borstal institution, and such order continued to have effect according to the tenor thereof.

On a reading of the judgment up to this point, it seemed clear that the Crown's motion to quash must succeed either wholly or in part. But the judgment then quotes s. 2 (3) of the Criminal Justice Act 1954, which, so far as it is relevant to the *Myers* case, reads as follows:

> (3) Any reference in this Act to a previous sentence of borstal training shall be construed as including a reference to a previous order for detention in a borstal institution; . . . .

His Honour then says:

> It seems to me that the power of extension of the maximum term given to the Court by s. 29 (4) of the Act is prima facie a power of extension of a *previous* sentence of borstal training. Before there can be an extension there must be a previous sentence. But where this section refers to a previous sentence of borstal training it shall be construed by virtue of s. 2 (3) as referring to a previous order for detention in a borstal institution. So that here, the accused, being a person who is serving a sentence for detention in a borstal institution, is within the section in that she is a person who has been convicted of an offence punishable by imprisonment committed after the previous sentence was passed; and it seems to me she is also within the section, in that, being subject to a previous order for detention in a borstal institution, that is, by s. 2 (3), a reference to a previous sentence of borstal training. Therefore, it seems to me that the Court had power to pass a sentence extending the maximum term of detention in a borstal institution (which is, to my view, intended for the purposes of the Act to be equivalent to borstal training) for such period not exceeding one year as the Court thinks fit.

When this extract is analysed, it resolves itself into two simple propositions; and the flaw is found in the second one.

The first proposition is that, before there can be an extension, there must in fact be a previous sentence. It would be more precise to say that there must in fact be an existing sentence. There is no doubt that this is what His Honour meant; but the use of the word "previous" was unfortunate in this context. It appears to have led to an assumption that the word "previous" must be read into s. 29 (4); whereas it is the very absence of that word from the subsection that is significant.

The second proposition is that "where this section refers to a previous sentence" it must be construed, by virtue of s. 2 (3), as including a previous order for detention. This proposition is based on the assumption that s. 29 (4) "refers" to a previous sentence; but that assumption is not correct. Certainly a "sentence" must exist before it can be extended under the subsection, but the jurisdiction to extend it must be found in the words of the subsection. As there is no reference there, in any form of words, to a "previous" sentence, s. 2 (3) does not apply, and therefore s. 29 (4) does not

apply to a previous order for detention. What His Honour has done is to insert the word "previous" into the subsection, so as to make it refer to a "person who is serving a *previous* sentence of borstal training". With all respect, such a process is not construing the words of the subsection, but altering them. The alteration was not necessary to give meaning to the original words, which by themselves are plain and unambiguous and apply directly to sentences passed under the Act. "The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity", said Lord Bramwell in *Cowper Essex* v. *Acton Local Board*, (1889) 14 App. Cas. 153, 169; and there are many other authorities to the same effect.

It is not difficult to find the special function that s. 2 (3) has, in the Criminal Justice Act, of extending in certain cases the ordinary meaning of references to sentences of borstal training. It is relevant, for example, to s. 16 (4) (*a*), under which no Court may sentence anyone to detention in a detention centre if at any time previously he has been sentenced to borstal training; and to ss. 21 and 24, under which offenders qualify for corrective training or preventive detention when they have suffered certain previous convictions and sentences. It is not relevant to the expression "sentence of borstal training" unless the word "previous" appears before it in the text of the Act.

The part of the judgment quoted above also includes the general statement that in His Honour's view detention in a borstal institution is intended for the purposes of the Act to be equivalent to borstal training. It does not follow from the physical correspondence of borstal detention with borstal training that an order for detention is intended for the purposes of the Criminal Justice Act 1954 to be equivalent to a sentence of borstal training under that Act. His Honour had already pointed out the difference between them, and had referred to s. 55 (2), under which such an order is to continue to have effect according to its tenor. Also, his view is inconsistent with the special provisions of s. 55 (3), which expressly applies Part V of the Act (dealing with the release and subsequent supervision of offenders) to persons who at the coming into force of the Act were subject to orders for detention. Paragraph (*b*) of that subsection provides that in the application of Part V for the purposes of the subsection any reference *in that Part* to a sentence of borstal training is deemed to be a reference to an order for detention. Thus, the two are made equivalent for limited purposes only.

This raises another objection to the construction placed on s. 29 (4) of the Criminal Justice Act 1954 by His Honour. The judgment gives a retrospective operation to the subsection. It is a well-established rule of construction that no enactment is to be given a retrospective effect unless there is in the enactment a clear indication that it is to have that effect. There is no such indication in s. 29 (4), particularly when it is read in the light of s. 55 (2) and (3).

Sentences passed by a Magistrate in similar circumstances came before the Supreme Court in *In re Beale*, [1956] N.Z.L.R. 24. In that case counsel for the accused moved to quash three sentences on the ground that they were imposed without jurisdiction. The report does not state in detail the circumstances in which the sentences were passed. The judgment of Sir Harold Barrowclough C. J., however, quotes the entry relating to each case in the Criminal Record Book, which was as follows:

> Convicted and order made that the maximum term of corrective training to which defendant was sentenced on 30th March 1954 be extended for a period of one year.

As there was no such thing as corrective training until January 1, 1955 (when the Criminal Justice Act 1954 came into force), the only possible inference from this entry is that the Magistrate, by a similar misconstruction of s. 29 (4), based on the similar provisions of s. 2 (3) relating to corrective training, translated a sentence of reformative detention passed on March 3, 1954, into a sentence of corrective training, and then extended it. Counsel for the accused submitted that only the sentences should be quashed. Counsel for the Crown submitted that the convictions should be quashed. It was held that, because the sentences were imposed without jurisdiction, the convictions as a whole must be quashed. The judgment is concerned mainly with the question whether the sentences could be severed from the convictions; but on the preliminary question of the Magistrate's jurisdiction to impose a sentence of extension, the Chief Justice says:

> There can be no doubt that such a sentence was one which the learned Magistrate had no jurisdiction to impose, and [counsel for the Crown] admitted that he could not possibly support it.

This statement is the basis of the judgment, and is directly opposed to the view taken about two months later by McGregor J. in the *Myers* case. Although it is the only reference in the judgment to the question of jurisdiction, it is clear that there was no doubt in the mind of the Chief Justice that s. 29 (4) could not be used to extend a sentence of reformative detention. It is submitted that there is no room for doubt.

The result of these two cases is that Magistrates are left in the uncomfortable position of having two conflicting decisions of the Supreme Court on their powers to deal with cases of this kind under s. 29 (4). It is fortunate that not many more of them can occur. The majority of existing orders for detention in a borstal institution, and of existing sentences of reformative detention, under the earlier law will expire during the next year or two. In the meantime persons who escape are still liable to imprisonment under section 142 of the Crimes Act 1908.

Coke on Judicial Precedent.—"No man can be a compleat lawyer by universalitie of knowledge without experience in particular cases, nor by bare experience without universatitie of knowledge; he must be both speculative and active, for the science of the laws, I assure you must join hands with experience. *Experientia* (saith the great philosopher) *est cognitio singularium, ars vero universalium.* The learned sages of the law doe found their judgment upon legall reason and judiciall president.

"But it is safe for the client and for the councellor also (if he respects his conscience) to follow presidents formerly approved and allowed, and not to true to any new frame carved out of his owne invention, for *Nihil simul inventum et perfectum est.*

"Read these presidents (learned reader) and reape this faire and large field, the delectable and profitable fruits of reverend experience and knowledge; which you may doe with greater ease, for that more easily shall you learne by patterne than by precept; and they have been so painfully and diligently weeded, as it cannot be sayd, that in this fruitfull field, *Infoelix lolium aut steriles dominantur avenae.*—*Co. Entries, Preface.*

PAYMENT WITHOUT GRANT OF ADMINISTRATION.

To Next-of-kin of a Deceased Beneficiary.

By E. C. Adams, I.S.O., LL.M.

Explanatory Note.

The following short precedent will be found useful in practice: it may be compared with the precedent given in *Supplement No. 2 to the N.Z. Supplement to Forms and Precedents*, p. 48, being a declaration in support of transmission of shares or debentures without grant of Administration, pursuant to s. 6 of the Statutes Amendment Act 1941.

There are also statutory provisions authorizing payments to be made out of the estate of a deceased person without probate or letters of administration having been obtained, and s. 68 of the Estate and Gift Duties Act 1955 provides that notice of the payment shall be given in the prescribed form to the Commissioner, i.e., in practice the appropriate District Commissioner of Stamp Duties. Most of these statutory provisions now fix a limit of two hundred pounds; that is to say, if the particular asset concerned exceeds two hundred pounds, probate or letters of administration must be taken out.

By analogy, therefore, it may be laid down that the following precedent should not be used where the interest of the deceased beneficiary in the estate exceeds in value the sum of £200.

It remains to be pointed out that s. 31 of the Estate and Gift Duties Act 1955 provides that the estate of a deceased person shall not be exempt from estate duty merely because no grant of administration has been, need be, or can be made in New Zealand in respect of that estate, and all the provisions of that Act apply, so far as applicable, notwithstanding the fact that there is no "administrator", as that word is comprehensively defined in s. 2 of the Act. Moreover, s. 43 of the Administration Act 1952 empowers the Commissioner of Inland Revenue to apply to the Supreme Court for an order compelling any person intermeddling with the assets of a deceased person to deliver death duty accounts and pay the appropriate duty.

The duty on this deed is 15s., being a deed not otherwise chargeable, under the Stamp Duties Act 1954.

Precedent.

Deed of Indemnity to Trustee.

This Deed made the day of One thousand nine hundred and fifty-six Between A. B. of Wanganui, Solicitor (hereinafter with his executors administrators and assigns called "the Trustee") of the one part And C. D. of Wellington, Widow (hereinafter called "the Beneficiary") of the other part Whereas the Trustee is the Executor of the Estate of E. F. Late of the City of Wellington, Spinster, deceased And Whereas the said E. F. by her last Will gave and bequeathed unto the Beneficiary and her husband G. H. each the sum of Fifty pounds (£50) And Whereas the said G. H. having survived the said E. F. has died intestate before the date of this Deed And Whereas it is not intended to take out administration of the Estate of the said G. H. And Whereas the Beneficiary as next-of-kin of the said G. H. has applied to the Trustee for payment to her of the said legacy bequeathed to him which payment the Trustee has agreed to make upon the Beneficiary entering into this Deed:

Now This Deed Witnesseth:

That in pursuance of the premises and in consideration of the payment by the Trustee to the Beneficiary of the sum of Fifty pounds (£50) being the legacy bequeathed by the said E. F. to the said G. H. the beneficiary for herself and her executors administrators and assigns Doth Hereby Indemnify the Trustee against all claims demands costs actions and proceedings whatsoever and whensoever arising by reason of the payment to her of the said legacy.

In Witness whereof these presents have been executed the day and year first hereinbefore written.

Signed by the said C. D. in the presence of: } C. D.

Witness:

Occupation:

Address:

LEGAL LITERATURE.

Wily's Tenancy Act. Being the Tenancy Act 1955. By H. Jenner Wily S.M. Pp. xxi + 164. Wellington: Butterworth & Co. (Australia), Ltd. Price: 105s. post free.

This is, in effect, the fourth edition of Mr Wily's work on the tenancy legislation. It deals with the Tenancy Act 1955, which is a consolidating and amending statute. The amendments are of a fundamental nature, necessitating a completely new approach to, and treatment of, the subject-matter. Mr Wily, with his usual care, has rewritten the text of the previous editions so as to present a complete treatment of the legislation as it is now current, and he has illustrated it with the relevant New Zealand case-law, and, where directly applicable, the cases on the corresponding, but in many respects differing, English statute. The necessary enlargement of the new Table of Cases (as reported to October, 1955), when compared with that in the Third Edition (November, 1953), shows that the subject-matter of the new edition is a very "live" one. As tenancy law is a daily worry in almost every law office in the country, no practitioner or firm can afford to be without the new work, the merit and usefulness of which need no elaboration.

Who's Who in New Zealand. Edited by Frank A. Simpson, M.A., Dip. Jour., F.R.G.S. Pp. 235. Wellington: A. H. & A. W. Reed.

Lawyers find it necessary to maintain a series of local reference books not directly concerned with law; for them, the question is not whether their library should contain such compilations, but which of them should be procured. *Who's Who in New Zealand* is real value. Apart from the main content of the volume, which is recognized as the authority on contemporary New Zealand biography, the reference pages will often be consulted. A vast amount of official and other information, admirably presented and readily accessible, is contained in them.

TOWN AND COUNTRY PLANNING APPEALS.

Petone Borough *v.* Makara County.

Town and Country Planning Appeal Board. Wellington. 1953. March 7.

Land Rezoned—County rezoning Land adjoining Borough Boundary from "Rural" to "Residential"—Land remote from Urban Settlement—Recommendation that Local Government Commission include Area in Borough—Appeal by Borough—Land properly zoned as "residential"—Town and Country Planning Act 1953, s. 26 (1).

This was an appeal by the Petone Borough Council under s. 26 (1) of the Town and Country Planning Act 1953, against the decision by the Makara County Council upon an objection to its District Scheme rezoning certain land adjoining the Borough boundary from "Rural" to "Residential".

The land in question was remote from any urban settlement in the County, and the County Council included it along with the extensive hill farmland in this area of the County as part of the Rural Zone under its District Planning Scheme.

When the planning scheme was publicly notified for the statutory period of three months, the owner lodged an objection to the rural zoning of his land, claiming that as the land was close to residential areas in the Petone Borough across the County boundary, the zoning should be changed to residential. The Petone Borough Council opposed the objection by the owner because access and services which would have to come from the Borough would be too costly.

After hearing the objection by the owner and the evidence for the Petone Borough Council, the Makara County Council decided, "That the zoning be amended from 'rural' to 'residential'; and that a recommendation be made to the Local Government Commission that the land in question be excluded from the boundaries of the County of Makara and included in the boundaries of the Borough of Petone."

On an appeal by the Petone Borough Council against that decision upon the grounds that the major portion of the land was unsuitable for residential development, and that it would be entirely dependent upon the Petone Borough Council for access and services, the provision of which would be so costly as to be uneconomic,

Held, That the land in question was properly zoned as "residential".

Appeal dismissed.

Roycroft *v.* Papatoetoe Borough.

Town and Country Planning Appeal Board. Auckland. 1955. June 1.

Cinema Building—Refusal of Permit on Ground Proposed Building in Contravention of Undisclosed District Scheme—Area tentatively zoned as Commercial—Cinema a permitted Use in Commercial Area—Erection of Cinema not regarded as "detrimental work"—Appeal allowed—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal by A. L. Roycroft, under s. 38 of the Town and Country Planning Act 1953, against the decision of the Papatoetoe Borough Council refusing him a permit to build a cinema on the property situated on the south-east corner of Great South Road and Maxwell Avenue, Papatoetoe.

The appellant's grounds for appeal were that there was no operative district scheme applicable to the property; that the property should properly be zoned for commercial use, and that the proposed cinema would add greatly to the amenities of the district.

In the form of appeal, the grounds of the refusal were stated by the Council to be that the proposed building would be in contravention of the Council's undisclosed district scheme.

Although the respondent Council made a formal appearance by counsel at the hearing, it failed to file a written reply to the appeal or to supply the Board with any of the information or data it was required to supply by Reg. 27 of the Town and Country Planning Regulations 1954.

It appeared to the Board that the Council had failed to consider the application on its merits, but had refused the permit because some ratepayers had objected, and thus threw the onus of deciding the issue on the Appeal Board.

Two objectors to the original application appeared under s. 42 (2) of the Town and Country Planning Act 1953, and gave evidence in support of their objections.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). The Board finds that there is strong support from the residents in the district for the proposal to erect a cinema in Papatoetoe East; that the property under consideration is in an area which had been tentatively zoned as commercial; and that the evidence of the Town Clerk was that in plans previously prepared by the respondent Council this area was shown as commercial.

The Board is of the opinion that to zone this area as commercial would be consistent with town-and-country-planning principles, and that it would not be appropriately zoned as residential, and that a cinema was a permitted use in a commercial area.

Since the Council has only an undisclosed district scheme, the question at issue falls for consideration under s. 38 (1) (c) of the Town and Country Planning Act 1953. The Board is, therefore, called upon to determine whether the erection of a cinema would be a "detrimental work" in that it would detract from the amenities of the neighbourhood likely to be provided or preserved by or under the undisclosed district scheme.

The Board is of the opinion that the erection of a cinema in a commercial area cannot be regarded as a detrimental work.

The appeal is allowed.

On the question of costs: it is ordered that the Papatoetoe Borough pay to the appellant the sum of fifteen guineas as costs of the appeal.

Appeal allowed.

Sanders and Sons, Ltd. *v.* Mount Wellington Borough.

Town and Country Planning Appeal Board. Auckland. 1955. June 1.

Store and Office Building—Industrial Area—Refusal of Permission to Build to Road Boundary—Erection of Building "detrimental work" as detracting from Amenities of Neighbourhood—Undisclosed Scheme likely to provide for Setting-back of Buildings in Area Twenty-five Feet from Boundaries—Refusal of Permit justified—Right to apply again at End of Five Years for Review of Decision—Town and Country Planning Act 1953, s. 38.

Appeal by Robert Sanders and Sons, Ltd., under s. 38 of the Town and Country Planning Act 1953, against the decision of the Mount Wellington Borough Council refusing permission for the erection of office and store premises on their property in Harbour Road, Mount Wellington.

The appellant's grounds for appeal were that it had acquired the land for the purposes of its business which required the erection on part of the land of store and machinery buildings and office accommodation; that the land in question was valuable land and it was quite uneconomic to keep it vacant; that the appellant would be put to considerably greater expense and inconvenience if the appeal were not allowed; that the area in question was not a residential area, and there would be no detraction from the amenities of the neighbourhood by the erection of the said building.

The Council's refusal was on the grounds that the erection of this building on the site suggested by the appellant company would be a "detrimental work" within the meaning of s. 38, in that it would detract from the amenities of the neighbourhood likely to be provided or preserved by or under the Council's undisclosed district scheme. The Council's undisclosed scheme would provide for the setting-back of buildings in this area for 25 ft. from the road boundaries, whereas the existing building on the appellants' property was 20 ft. from the road boundary, and the application which had been refused was for the erection of a building covering the entire area between the existing building and the road boundary.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). The Board is of the opinion that, in general, the condition relating to the setting-back of buildings from the road boundary in an industrial area was reasonable

and proper, and in accordance with town-planning principles. The Board considers that it is difficult to foresee whether or not the area would in future become more fully occupied by industrial users.

The Board was informed that, after the appeal was filed, the appellant company applied to the respondent Council for permission to erect a temporary building up to the road boundary to meet its immediate requirements for office and store accommodation and this permission was granted, subject to the appellant company's entering into a bond of £1,000 to remove this temporary building within five years.

The Board is of the opinion that a condition requiring the setting-back of buildings from the road boundary is an amenity likely to be provided for under the Council's undisclosed scheme, and that the Council's present refusal of the permit sought is justified.

The appeal is disallowed; but the Board reserves to the appellant company the right at the expiration of five years to apply again to the Board for a review of this decision in the light of the circumstances that may then exist.

No order as to costs.

Appeal dismissed.

Rogers *v.* Hawkes Bay County.

Town and Country Planning Appeal Board. Napier. 1955. May 2.

Subdivision—Approved Residential Subdivision adjoining—Land unsuitable for Other than Residential Purposes—Non-conforming Area—No Potential Value for Purposes laid down as Predominant or Conditional for Rural Zones—Ribbon Development already existing—Proposed Subdivision making No Material Alteration to Existing Situation—Town and Country Planning Act 1953, s. 38.

Appeal by W. A. Rogers, under s. 38 of the Town and Country Planning Act 1953 against the decision of the Hawkes Bay County Council's refusing him permission to subdivide his property containing 1 ac. 1 ro. 20.2 pp. in Bay View (Petane) fronting on the Napier-Gisborne State Highway.

The appeal was also against the decision of the Minister of Lands, who, pursuant to s. 4 of the Land Subdivision in Counties Act 1946, as amended by s. 8 of the Land Subdivision in Counties Amendment Act 1953, had refused his approval of this scheme.

The appellant's grounds for appeal were that the Hawkes Bay County Council had approved of the subdivision of adjoining sections to the south of the appellant's property, and that the appellant's land was not suitable for any purpose other than residential purposes.

The Council replied that it had prohibited the subdivision under s. 38 of the Town and Country Planning Act 1953, the reasons being: (*a*) adherence to the principles of planning which discourage "ribbon development", and (*b*) that, although there are houses adjoining, the area had been regarded as non-conforming, and, as it abutted on a State Highway, the Council had not felt justified in permitting closer subdivision, which would increase the traffic hazard and create a precedent for extending the line of houses.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). The Board finds that there is already a dwellinghouse on one of the adjacent residential lots; that, under the County Council's proposed district scheme, this land is part of an area zoned as rural, but the particular locality is, in the main, a non-conforming area. To the north, along the State Highway, there are already some twenty or more residential sites, some of which have already been built on; and, to the south, further subdivision is impossible. It is clear that this particular area is, or will be, predominantly residential in character.

Furthermore, it was common ground that the area was a shingle bed and had no present or potential value for any of the purposes laid down as predominant or conditional uses of land in Rural Zones.

In respect of the Council's submission that to approve of this subdivision would be tantamount to approving "ribbon development", the Board takes the view that, in this immediate locality, a certain amount of "ribbon development" has already taken place; and that to allow the appellant's subdivision would not make any material alteration to an already-existing situation. The proposed subdivision would be in conformity with the situation already existing in this particular area.

The appeal against the County is allowed.

The Board considers that the Minister of Lands' refusal, pursuant to s. 4 of the Land Subdivision in Counties Act 1946, was little more than an administrative act, and it is questionable whether any appeal lies against him. If it does, this appeal also is allowed, but without prejudice to the Minister's rights under ss. 3 and 5 of the Land Subdivision in Counties Act 1946.

No order is made as to costs.

Appeal allowed.

Apperley *v.* Hawkes Bay County.

Town and Country Planning Appeal Board. Napier. 1955. May 2.

Subdivision—Land in County on Fringe of Borough—Neighbouring Land subdivided, sold, and built upon—Non-conforming Area—Part of Area zoned as Rural—Land not abutting on Main Highway—No Question of "Ribbon Development"—Immediate Locality predominantly Residential—Rural Potential lost—Town and Country Planning Act 1953, s. 38 (8).

Appeal by H. G. Apperley, under s. 38 (8) of the Town and Country Planning Act 1953, against the decision of the Hawkes Bay County Council refusing him permission to subdivide approximately two acres of his property on the Heretaunga Plains fronting on to the Hastings-Havelock North Main Highway.

The appellant's grounds for appeal were that there was very little land available for subdivision within the boundaries of the Borough, and, accordingly, it was desirable that land on the fringes of the Borough should be made available for that purpose; that the proposed subdivision was a natural and desirable use of the land in view of the existing subdivision of neighbouring land (including the subdivision of the appellant's own adjoining land which was recently approved); that the closeness of the amenities and facilities of the Borough of Hastings would benefit the land and make it desirable that it should be utilized by subdivision; that the land has a frontage to a side road and not a main road, and, therefore, did not tend to "ribbon development"; that the area of land comprised in the proposed subdivision was small.

In replying to the appeal, the Council stated that the area concerned abutted the Hastings-Havelock North Main Highway, and it was desired that "ribbon development" be minimized on this section; that there was no adequate provision for the disposal of sewage in this locality; and that the ground was productive, and it was the aim of the Council as much as possible to conserve the rich land surrounding Hastings.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). In the course of the hearing it was found that in October, 1953, a scheme plan was approved by the Minister of Lands, although objected to by the County Council, under which the area under consideration and land immediately adjoining was subdivided into eleven allotments. All these, with the exception of the land under consideration, have since been sold and in some cases have already been built upon. These had frontages on to the Hastings-Havelock North Main Highway.

The Board finds that the property in question forms part of the non-conforming area, being part of a larger area zoned as rural under the Council's proposed district scheme; and, accordingly, the Council acted consistently and properly in refusing this subdivision.

However, the property in question does not abut on to the Main Highway, but on to a side road (Norton Road) which formed the Borough boundary and thus there could be no question of "ribbon development", as that phrase was generally understood and interpreted, for the immediate locality is predominantly residential in character, is already provided with some of the amenities appropriate to a residential area, and Borough water is readily available. On the evidence, the locality is suitable for the installation of septic tanks and drainage.

The Board is well aware of the necessity for conserving wherever possible the land surrounding Hastings for the production of primary produce, but it takes the view that the property in question, forming, as it does, part of a small area already legally subdivided and occupied as residential, has lost its rural potential, and is predominantly residential in character.

The Board is of the opinion that to insist upon this small area, situate as it is, being zoned as rural would be to take an unrealistic view of the position.

The appeal is allowed. No order as to costs.

Appeal allowed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Marginal Note.—It was the lot of Scriblex recently to have to listen, on an application before the Licensing Authority, to an agricultural pundit proclaiming the potential productivity of some of this Dominion's marginal lands. This recalled one of the Fourth Leaders of the *Times* in which the writer asked what had become of "marginal"—the word itself is the sort of "etymological amphisbaena with which our language is invested"—and he pointed out that margin used to mean the edge or border of a surface, and—under the cosy and poetical sobriquet of "marge"—was once freely used to describe the bank or shore of a mere, tarn or torrent in which some sensitive young person contemplated the act of suicide. In its more mundane usage, it was one of the things which, to the great grief of registrars and deputy-registrars of the Supreme Court and Court of Appeal disappeared from documents in the early stages of the last war. It is also that part of a statute which the less energetic practitioner feels compelled to read. But should it be desirable that "marginal" be pressed into service further or better than that to which it is put by superphosphate experts, economists, and politicians, why not apply it to clients? A marginal client would be one who had not produced to his full capacity, or, in another sense, one of insufficient dependability to be come part of the assets of a firm but who drifted about from firm to firm as the mood took him. Here to-day, as it were, and gone tomorrow!

O'Connor L. J.—A most remarkable career in the law is referred to by R. E. Megarry in his excellent *Miscellany-at-Law—a Diversion for Lawyers and Others.* (1955). It is of Sir James O'Connor whose "legal wheel turned full circle. He was admitted a solicitor in Ireland in 1894, and, in 1900, having first ceased to be a solicitor, he was called to the Bar. His subsequent advancement was rapid. He took silk in 1908, became Solicitor-General for Ireland in 1914, Attorney-General for Ireland in 1917, a puisne judge of the Chancery Division in 1918, and later that year a Lord Justice of Appeal. In 1924, soon after the Irish Free State was established, the Court of Appeal was abolished, and Sir James was 'deemed to have retired'. In 1925 he was called to the Bar in England, and later in that year he added English silk to his Irish. He practised for a while in London, but in 1929 he had himself disbarred in England and Ireland, and dispatented. Later in the same year, his application for readmission as a solicitor in Ireland was granted subject to his undertaking not to exercise any personal right of audience. He died on December 29, 1931, once again a member of that branch of the law in which his career had begun." Referring to his use of the term "dispatented", the author says that "desilked" has mercifully yet to be used, while "stuffed" he thinks would be confusing.

The Fifth Juror.—A decision of Richardson J., in Sydney last month, while a source of satisfaction to opponents of the jury system, is regarded as a set-back to feminist endeavour and the advocates of betterment in family relations. The case was one in which a widow was suing a motorist for damages sustained as the result of her husband's death in an accident. It was being tried before a jury of four when the attention of the Bench was drawn to the fact that the wife of one of the jurors had been sitting in Court from the commencement of the case listening to the evidence. His Honour discharged the jury upon the ground that the juror overnight would discuss the case with his wife and this would mean that five jurors were in reality trying the case and not four. Human nature being what it was, he said, the juror might go into the jury room with a fixed intention, due to the overnight discussion, and thus lack an independent judgment which he should have when he went into the jury room to consider the verdict. Justice, observed Mr Justice Richardson, must appear to be done in all cases. It seems to Scriblex, however, that the position could equally well, and at less cost, have been met by declaring the case, *qua* the juryman in question, to be capital in nature and keeping him in custody until its conclusion.

A Touch of Understatement.—As we in this country think, trial by jury is the best method yet devised for dealing with serious criminal cases, and the jury is the best possible tribunal to decide whether a man is guilty or not guilty and, if he is guilty, of what he is guilty, subject to the direction in law of the Judge; but no one has ever suggested that a jury is composed of persons who are likely to be able to give at a moment's notice a logical explanation of how and why they arrived at their verdict.—Humphreys J. in *R.* v. *Larkin*, [1943] 1 All E.R. 217, 221.

The Meaning of Adultery.—In *Barnacle* v. *Barnacle* (*King's Proctor Showing Cause*), [1948] P. 257, Wallington J. says that he has met reasonably well-educated and well-informed business men of forty and upwards who honestly thought and said: "Adultery is having sexual connexion with a woman not your wife, who is not over fifty years of age; and it is not adultery if she is over fifty." Other instances of ignorance on the part of petitioners of the real meaning of the word "adultery" which have come to the notice of the King's Proctor are: "I did not think it was adultery during the daytime"; and "I thought it meant getting a girl into trouble"; and "I thought it meant drinking with men in public houses."

Possession Note.—At the bottom of his "bag of miscellaneous papers" and gathering the dust of two years' repose, Scriblex finds the following tidbit supplied to him from magisterial quarters. In support of an application under s. 29 of the Tenancy Act 1948, learned counsel has drafted:—

> 5. That since the granting of the order of possession by me of the said premises, my wife has had born to her a child aged two months.

Happily, the report continues, both law and medicine combined and gave her safe deliverance from all ejectment problems.

Capital Punishment Note.—"One requires some justification before deliberately killing people, and, while I dare say that there are a good many things to be said against capital punishment, the real point is that there is nothing whatever to be said for it." Gerald Gardiner Q.C. in *Capital Punishment as a Deterrent: and the Alternative* (Victor Gollancz, Ltd., 1955). That is a wide statement with which the Press would surely disagree. Without the prospect of a hanging, murder can degenerate into a very dull affair.

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: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

Gaming—"Picks" Competition Amendment to prevent Permitting "betting" on Licensed Premises—Licensing Act 1908, s. 185—Licensing Amendment Act 1955, s. 15.

QUESTION: We have been asked whether the judgment of Gresson J. in *McComish* v. *Alty*, [1955] N.Z.L.R. 172, that "Picks" competitions are not a lottery has since been affected by legislation. We cannot trace any appropriate amendment of the Gaming Act 1908. The Gaming Amendment Act 1955 seems to deal solely with totalizator dates, but we understand something was done about the "Picks".

ANSWER: The amendment the inquirer apparently has in mind affects only licensed premises. In *McComish* v. *Alty* (*supra*), the appellant was an hotelkeeper and was charged under three sections of the Gaming Act 1908. The first charge was under s. 36 (1) (*b*), but His Honour did not see any breach of this section in the appellant's allowing the money to be collected, and holding it for safe custody and distribution according to competitors' ability to forecast race results. Then s. 41 (*c*) provides that any person who manages or conducts, or assists in managing or conducting a lottery is liable to a penalty, but His Honour held that there was a basis of skill in the scheme sufficient to avoid the scope of this section also. Similarly, there was no "sweepstake" within the meaning of s. 44.

However, s. 15 of the Licensing Amendment Act 1955 now amends s. 185 of the Licensing Act 1908 by inserting therein after the word "gambling" the words "or betting", so that s. 185 now makes it an offence to permit betting on licensed premises. This is no doubt the legislation referred to in the question.

Q2.

CORRESPONDENCE.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Dear Sir,

Recently a youth of 14 years and 11 months appeared in the Children's Court at Invercargill on a number of charges of theft and other offences. According to the newspaper report, the prosecuting Police Officer, Senior Detective A. W. McDougall, said that it was a pity that after the property from the first three thefts had been returned by a certain priest, Father J. A. McCarthy, the priest had refused to disclose where he had got the stolen goods. The Police Officer went on to say that, if the Police had known the boy was responsible for the first three thefts, he would have been apprehended and his future attempts at crime curtailed. The presiding Magistrate, Mr Stewart Hardy, followed this up by saying that he had been disturbed by what Mr McDougall had said about Father McCarthy's action, which had, in part, encouraged the boy to continue on his career of crime and whatever the priest's motive had been, it seemed to have been a misguided one in which the boy's identity had been covered and he was able to continue his life of crime.

These remarks by a senior Police Officer and a learned Magistrate are astonishing to say the least.

Both of them should know that priests and ministers of religion receive confidences (just as lawyers do) in the course of their professional duties. It appears to me that both, in uttering their strictures, overlooked entirely the fact that the boy's father took him to the priest, and, therefore, the priest could not betray his confidence. If the strictures of Mr McDougall and the learned Magistrate are justified in the instance cited, it appears to me that there are many professional men who have been guilty of similar breaches of duty because they have observed the confidences reposed in them. The Police Officer and the learned Magistrate may have made similar remarks about the boy's own father, but, if they did, the newspaper report did not mention the fact.

There have been many policemen in history who have thought that their lot in endeavouring to apprehend criminals would be made easier if they could sit with a priest behind the confessional or obtain confessional confidences from priests.

Yours, etc.,

J. B. BERGIN.

Foxton,
May 8, 1956.

Construction, and Rectification.—"The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them; such facts may be proved by extrinsic evidence or appear in recitals: again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonize as far as possible all the parts: particular words may appear to have been used in a special sense, which may be a technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention: these matters may be established, as they generally are, by extrinsic evidence. The Court will thus reform or rewrite the clauses in order to give effect to the real intention. But that is not construction, but rectification." Lord Wright in *Inland Revenue Commissioners* v. *Raphael*, [1934] A.C. 96, 143.