New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes"
VOL. XXXIV TUESDAY, JULY 1, 1958 No. 12

JOINT FAMILY HOMES: THE POSITION AFTER DIVORCE.

III.—The Application of the Principles to the Facts of the Case.

IN our earlier article, we indicated that, in *Henson* v. *Henson* (to be reported), Shorland J. found that the basis from which the approach to the exercise of the power contained in s. 11 of the Joint Family Homes Act 1950 (as enacted by s. 11 of the Joint Family Homes Amendment Act 1951) must proceed is that there has been a settlement on husband and wife which has resulted in each acquiring equal undivided legal title, and that the statute contemplates that the settlement and respective titles enure so long as one of them uses the property exclusively or principally for his or her principal home, and that the Court must exercise the power contained in s. 11 of the Act by the application of principles which are in line with and similar to the principles governing the exercise of the power contained in s. 37 of the Divorce and Matrimonial Causes Act 1928.

In *Henson* v. *Henson*, the husband had obtained a decree absolute on the grounds of the subsistence in full force and effect for the statutory period of an agreement for separation. There was no evidence that the separation was caused by wrongful act or conduct of either party, and in the result neither party was in the category of guilty party.

His Honour said that the feature that neither party was a "guilty party" was much canvassed in *Coutts* v. *Coutts* [1948] N.Z.L.R. 591; [1948] G.L.R. 147. In that case, a majority of the Court of Appeal expressed the view that the power to vary under s. 37 should be exercised only where it is shown that the unvaried continuance of the settlement has been rendered unjust by the divorce or the conduct which occasioned the divorce. In *Preston* v. *Preston* [1955] N.Z.L.R. 1251, North J., in delivering the judgment of the Court of Appeal had occasion to draw attention to the fact that *Coutts* v. *Coutts* is out of step with later English authority in that the latter makes it clear that the right to have the settlement reviewed arises if a decree of divorce or nullity is granted, whereupon the matter is open for reconsideration in the light of the principles applicable. His Honour continued:

> Where the section conditions the exercise of the power upon the making of a decree of divorce or nullity, a decree for judicial separation, an order for summary separation, or an order for maintenance or guardianship of children, to apply the principle laid down by *Coutts* v. *Coutts* would be to ignore the plain words of s. 11; and I make bold to sat that the principle laid down by *Coutts* v. *Coutts* can have no application in respect of s. 11 of the Joint Family Homes Act 1950.

His Honour observed that the principles governing the exercise of the power contained in s. 37 of the Divorce and Matrimonial Causes Act 1928 are collected and stated by the learned authors of *Rayden on Divorce*, 6th ed. 593, para. 50, in the following terms:

> "In the exercise of the jurisdiction conferred upon it by the statute the Court has regard to the relative contributions of the parties to the marriage in and to the property which is subject to the settlements, to their respective incomes and pecuniary prospects; to the effect of the divorce which has been decreed upon the material situations of each of the parties and of the children of the marriage; and in some respects also the conduct of the parties must be taken into account. The Court has regard not only to the rights and liabilities of the matrimonial person wronged and the wrongdoer inter se, but also to the interests of society and public morality. The main object of the variation is to make proper provision for the injured spouse and the children of the marriage, and prima facie settlements should not be interfered with further than is necessary for that purpose."

The paragraph proceeds with a further statement of principles applicable to special cases or special features which, the learned Judge said, need not be included in the present citation which is intended to indicate no more than the broad general principles applicable to all cases. Most of the principles stated are to be found in the judgment of the Judge Ordinary (Sir J. P. Wilde) in the leading case of *March* v. *March and Palumbo* (1867) L.R. 1 P. & D. 440; but others have been added by later judicial decisions.

Returning to the point that the present case was one in which neither party was in the category of guilty party, the learned Judge said that there nevertheless is in most of such cases one party who is entitled to receive from the other maintenance and support:

> Rights and liabilities inter se have arisen, and, if, in applying the principles above stated to a case such as the present, there is substituted for "the person wronged" and "the injured spouse" the words "the party entitled to receive maintenance and support," and for "the wrongdoer" the words "the party bound to provide maintenance and support"; and, in such a case, the words "and in some respects also the conduct of the parties must be taken into account" are deleted, I am of opinion that, as so modified, the principles stated are the principles which should govern the exercise of the power contained in s. 11 where neither party is either wronged or wrongdoer, and conduct is fairly comparable, but nonetheless rights and obligations in respect of maintenance and support inter se have arisen.

Applying these principles to the present case, His Honour found that the property in question was contributed to wholly by the husband, except for an indirect contribution of the value of about £100 from the wife. The wife had no income apart from small earn-

ings, and no assets other than her interest in the home. The husband was in fairly good financial circumstances and possessed of another dwellinghouse. The effect of divorce was, first, to confirm the mutual release from the duty of cohabitation which release arose under prior agreement for separation; secondly, to give to the wife a right to receive and to impose upon the husband an obligation to provide maintenance and support for the wife and their daughter; and, thirdly, to give each party the right to remarry. There was, however, no suggestion that the wife intends to remarry. His Honour did not think that the former husband could succeed in his application for the cancellation of the joint family home certificate. On this point, he said:

> Bearing in mind that the main object of any variation which is to be made must be to make proper provision for the party entitled to receive maintenance and support, and the children of the marriage, and that prima facie the settlement should not be interfered with further than is necessary for that purpose, I am clearly of opinion that no case for cancellation of registration of the joint family home certificate and restoration of the property to the husband has been established, and that neither the interests of society nor public morality point in that direction.
>
> If the property were sold and the proceeds distributed, the wife and daughter of the marriage would require to find another home. The husband could no doubt pay the higher maintenance that the wife would require and be entitled to receive if she were required to pay rent. The wife's share of the proceeds of sale would not enable her to purchase another home. So long as the wife and daughter continue in occupation of the home the husband's share therein is discharging some portion of the obligation which rests upon him to provide maintenance and support for the wife and daughter. The husband's financial position is such that he does not require the moneys represented by his share in the property. The interests of the daughter point in the direction of the wife and daughter being enabled to continue living in the family home. The fair conclusion thus far appears to be that not only should the order for possession which the husband seeks be refused, but the wife should have an order for exclusive possession at least until the further order of the Court.

It is inherent in any order on these lines, or indeed in any order which leaves the property settled as a joint family home, that the survivor of the husband and the wife will upon the death of the other acquire the whole property, and the learned Judge said that this feature must not be overlooked. He continued:

> The settlement of property in terms of trusts for life and ultimate disposal of the capital is a not uncommon feature of a marriage settlement. It would seem to follow that the principles evolved by judicial decisions for modification of marriage settlements upon divorce or nullity, which I am following in the present case, are not likely to lead to a result in respect of ultimate acquisition of the joint family home which does violence to principles of common justice and fair play.
>
> If the wife dies first the husband will acquire the property. If the children are then still children he alone will be their guardian. Furthermore, he will have provided maintenance and support in the meantime and will have been denied what originally was intended—namely, an equal right to possession. Such a result does not appear to me unfair.
>
> If the husband dies first, the wife will acquire the property; but in so far as the obligation to provide for the wife and daughter will not cease with his death—and he after all gave the wife an interest in the property which carried with it the right to acquire the whole by survivorship if he died first—such result does not appear to be unfair provided the wife does not remarry and thereby confer much of the benefit received from her former husband upon a second husband.

The judgment then proceeded to discuss the principles applied in having regard to "the effect of the divorce . . . upon the material situation of each of the parties." These have always had regard to the fact that each of the parties is by reason of divorce free to remarry. On this aspect of the case, His Honour said:

> The question of what effect, if any, remarriage (of which there is no present suggestion) should have, can be left for consideration and decision if and when it arises by limiting the order to be made at present until the further order of the Court, and reserving liberty to apply.
>
> Leaving aside considerations of remarriage, which can be dealt with if and when they arise, it appears to me that to take from the wife the right to acquire the whole property in the event of her surviving her husband is to take a contingent asset which she now possesses. She is at least not a wrongdoer, and as between herself and her husband she has rights, and he is under obligations; and, in such situation, to take from her to give to him when what has supervened cannot be said to be any more her fault than his, appears to me unjust.
>
> In the result, I am content that the principles discussed and applied will not fail to reach justice when applied to s. 11, because the subject-matter is one in which acquisition by survivorship is a feature.

The learned Judge said that he reached that conclusion the more readily because it was apparent that those principles when applied to a case different from the present, e.g., where a wife is divorced because of adultery, and has no rights to maintenance, and is perhaps living with the co-respondent, and the husband has the custody of children, no obligation to support the wife, and is of modest means, the application of the principles invoked must lead to very different results in seeking to make proper provision for the injured spouse and the children of the marriage.

In the result, the conclusion tentatively reached by the learned Judge that the wife should have an order for possession until the further order of the Court was not displaced by considerations of the effects of survivorship.

The applications of the husband for possession and cancellation of the Certificate of Registration were refused. The alternative application for sale and distribution of proceeds was adjourned for further consideration in the event of the remarriage of the wife or of both parties wishing a sale and distribution of proceeds.

An order was made granting the wife exclusive possession of the joint family home until the further order of the Court, liberty to apply being reserved to both parties.

In broad outline, the judgment in *Henson* v. *Henson* decides that, on the true construction of the Joint Family Homes Act 1950, when an application is made by one or other of the spouses for an order cancelling the joint family home certificate upon a decree for divorce or nullity, or upon judicial or summary separation, or upon the making of an order for maintenance or for the guardianship of children, the question of title or ownership must be determined in accordance with the legal or equitable rights of the parties. As the registration of a joint family home is in the nature of a post-nuptial settlement, principles similar to those governing the exercise of the powers contained in s. 37 of the Divorce and Matrimonial Causes Act 1928 must be applied to determine the respective legal and equitable rights of the parties arising from the registration of a joint family home.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Appeal from Milk Authority to Magistrates' Court—Refusal to grant Licence—Hearing de novo to determine merits—Magistrate entitled to substitute His Opinion for that of Milk Authority—Milk Act 1944, s. 71. Section 71 of the Milk Act 1944 expressly confers a right of appeal to a Magistrates' Court from a decision of a Milk Authority, an administrative body, in refusing to grant a licence under the statute. A Magistrate, in hearing such an appeal, must form an opinion of his own as to the merits of the matter, and he is entitled to substitute his opinion for that of the administrative body. (*Fulham Borough Council* v. *Santilli* [1933] 2 K.B. 357, and *Stepney Borough Council* v. *Joffe* [1949] 1 K.B. 599; [1949] 1 All E.R. 256, applied.) An appeal under s. 71 calls for a hearing afresh for the purpose of determining the merits of the matter, because there has been nothing in the nature of a formal hearing by the Board, there are no published reasons for its decision, and there is no record of the proceedings for examination on appeal. *Hammond* v. *Hutt Valley and Bays Metropolitan Milk Board.* (S.C. Wellington. 1958. February 14; March 10. Haslam J. C.A. Wellington. 1958. March 25; May 19. Gresson P. North J. Cleary J.)

Decision of Particular Tribunal declared by Statute to be Final and Conclusive—Statutory Provision giving General Right of Appeal within which Matters would fall except for Words of Prohibition—Appeal from Tribunal's Decision Excluded. The prima facie effect of a statutory provision making the decision of a particular tribunal or authority final and conclusive is to exclude any appeal from that decision under provisions which give a general right of appeal within which the particular matter would fall but for the words of prohibition. Decisions made without jurisdiction are not within the words of prohibition. (*Lyons* v. *Morris* (1889) 19 Q.B.D. 139 and *Waterhouse* v. *Gilbert* (1885) 15 Q.B.D. 569, followed. *Lascelles* v. *Marlborough Land Board* (1904) 23 N.Z.L.R. 651; 6 G.L.R. 311, and *Sainsbury* v. *Gisborne District Land Board* [1941] N.Z.L.R. 123; [1940] G.L.R. 8, distinguished.) *In re McCosh's Application.* (S.C. Gisborne. 1958. March 5; 23. Shorland J.)

Domestic Tribunal—New Zealand Racing Conference—Jurisdiction of Executive Committee to hear Charges under Rules of Racing against Person refusing Consent to be Bound by Those Rules or to submit to Committee's Jurisdiction—Rules of themselves not giving Jurisdiction—Hearsay Evidence admissible at Preliminary Inquiry to ascertain if Committee had Jurisdiction—Acts of Person charged with Racing Offence bringing Him within Purview of Rules of Racing. Certain charges in respect of matters in connection with racing having been preferred against the plaintiff, the executive committee of the New Zealand Racing Conference held a meeting to investigate those charges. Due notice thereof was given to the plaintiff and he attended the meeting with his counsel. Before the charges were investigated, the plaintiff's counsel submitted to the executive committee that it had no power or jurisdiction to deal with the plaintiff, that the plaintiff did not consent to be dealt with by that Committee or to be bound by the rules of racing, and that he had not voluntarily submitted to the committee's jurisdiction. The main evidence before the committee was hearsay. The executive committee, after consideration of the evidence before it, was of opinion that it had jurisdiction and proceeded to hear the charges. It found the plaintiff guilty on all the charges preferred against him, and disqualified him under the rules of racing for a period of five years. In an action claiming a declaration that the hearing and determination of the charges and the disqualification of the plaintiff were null and void upon the ground that the executive committee had neither power nor jurisdiction to hear and determine the charges and to disqualify or otherwise deal with him under the rules of racing, *Held*, 1. That R. 2 of the rules of racing, passed by the New Zealand Racing Conference (which declares that the rules should apply to all races and race-meetings and should apply and be binding on a number of persons or classes of persons therein described) was not in itself sufficient to give the executive Committee of the Conference jurisdiction to hear and determine the charges preferred against the plaintiff and to deal with him under the rules, the plaintiff never having agreed to become subject to them. 2. That the Committee, at the preliminary inquiry to determine whether it had jurisdiction, was bound to ascertain facts which would give it jurisdiction, but it was not bound to accept only that kind of evidence which is admissible in a Court of Law. 3. That, at such inquiry, the Committee, after hearing hearsay evidence, admitted it, and held on that evidence it had jurisdiction to hear the charges against the plaintiff; that there was nothing in the Rules of Racing which precluded it from so acting; and that such evidence was admissible under the general law relating to the investigation by domestic tribunals of matters which are properly referred to them. 4. That the Court could not review the Committee's findings of fact, and the facts as found gave the Committee jurisdiction to hear and determine the charges against the plaintiff and to hold that he had been guilty of acts which brought him within the purview of the Rules of Racing. 5. That, although the plaintiff had not consented to any adjudication by the Committee, or submitted to its jurisdiction, or consented to be bound by the Rules of Racing, he permitted himself so to act as to bring his actions within the purview of the Rules of Racing; and that he was accordingly bound by the Committee's decision. (*Stephen* v. *Naylor* (1937) 37 S.R. (N.S.W.) 127, applied.) *Caddigan* v. *Grigg.* (S.C. Wellington. 1958. April 28; May 29. Barrowclough C.J.)

BAILMENT.

Garage Proprietor towing Damaged Motor-car to Owner's Home—During Such Towage, Motor-car damaged by Fire—Garage Proprietor not Common Carrier of Wrecked Vehicles—Liability of Bailee for Reward—Fire not caused by Negligence of Bailee or Its Servants—Principles Applicable—Carriers Act 1948, s. 6 (1) (a). The defendant company carried on, inter alia, the business of a garage proprietor. It was instructed by the plaintiff to tow to the plaintiff's home his motor-car which had been damaged in an accident and was immobile. The defendant company sent its break-down truck; and, while the wrecked vehicle was being towed a distance of about eight miles, it caught fire and was further severely damaged. After the fire, the defendant company, having brought the burnt vehicle to its garage premises, left it on adjoining land, and while it was there two wheels and four tyres were removed by some person or persons unknown. The plaintiff claimed the sum of £175 being his estimate of the value of the vehicle in its damaged condition after the accident, but before the fire. The defendant admitted liability for the loss after the damaged vehicle was brought to its property, and its assessment of £20 for loss of tyres and two wheels is not contested by the plaintiff. In an action claiming, inter alia, the value of the motor-car after the accident, but before the fire, *Held*, 1. That the defendant company was not a common carrier of wrecked vehicles; and, as it was a private carrier for reward, its obligations were those of bailee for reward. (*Drinkrow* v. *Hammond and McIntyre* [1954] N.Z.L.R. 442, distinguished.) 2. That, on the facts, the defendant company had exercised such reasonable care that a prudent and careful man would have exercised in relation to his own property. (*Joseph Travers and Sons Ltd.* v. *Cooper* [1915] 1 K.B. 73 and *Brooks Wharf and Bull Wharf Ltd.* v. *Goodman Bros.* [1937] 1 K.B. 534; [1936] 3 All E.R. 696, followed.) *Semble*, That, as the defendant company undertook to deliver to the plaintiff a badly-damaged 1938 motor-vehicle, the only damages which could arise from any breach of contract by the defendant company would not exceed the normal value of the wrecked car as it stood on the roadside after the accident. (*Hadley* v. *Baxendale* (1854) 9 Exch. 341; 156 E.R. 145, followed.) *McPherson* v. *Newton King Limited.* (M.C. Hawera. 1958. May 26. Yortt S.M.)

CRIMINAL LAW.

Appeal against Conviction—New Trial—Order for New Trial in Court's Discretion—Application by Appellant, if New Trial should be ordered, for Conviction to Stand and Abandonment of Appeal, not Maintainable—Criminal Appeal Act 1945, s. 4. There is cast on the Court of Appeal by s. 4 of the Criminal Appeal Act 1945 a duty to exercise a discretion whether it will direct an acquittal or order a new trial. This discretion must be exercised by the Court according to the view of what the situation called for. Consequently, in general, the Court of Appeal cannot entertain a request from the appellant's counsel that, if the Court was of opinion that the conviction should be quashed on any grounds raised but that a new trial should be ordered, the appellant preferred to accept his conviction and abandon his appeal. (*Kelly* v. *The King* (1923) 32 C.L.R. 509, referred to.) *So held*, by the Court of Appeal

dismissing an appeal against conviction under s. 166 of the Crimes Act 1908. *R.* v. *Burney.* (C.A. Wellington. 1958. June 6. Gresson P. North J. Cleary J.)

Duty to Provide Necessaries of Life—Negligence sufficient to support Charge, without Necessity of Showing Omission or neglect of Duty was wilful—Ignorance as to Necessity for Medical Aid, not resulting from Negligence constituting "lawful excuse"—Crimes Act 1908, s. 166. Negligence is sufficient to support a charge under s. 166 of the Crimes Act 1908 without the necessity of showing that the omission or neglect of duty was wilful, in the sense of being deliberate or intentional. It is sufficient if it is shown that the accused was negligent in the omission of the duty, once the necessary ingredients of the offence are established, criminal responsibility attaches unless the accused exculpates himself by showing there was "lawful excuse" for his omission or neglect of duty. Ignorance as to the necessity for medical aid not resulting from negligence would constitute "lawful excuse", but ignorance resulting from negligence does not exculpate as a "lawful excuse". The negligence to be shown must be of a high degree. *R.* v. *Storey* [1931] N.Z.L.R. 417; [1931] G.L.R. 105 is not to be treated as of general application, but is to be confined to facts where the statute itself defines the standard of case, as s. 171 of the Crimes Act 1908 did in that case. In the present case, the learned trial Judge's direction that ignorance did not exculpate as a "lawful excuse" if it was neglectful or inexcusable was a correct direction. *R.* v. *Burney.* (C.A. Wellington. 1958. June 6. Gresson P. North J. Cleary J.)

DEATHS BY ACCIDENTS COMPENSATION.

Principles of Assessment of Damages—Method of applying such Principles—Proper Deductions to be made—Deaths by Accidents Compensation Act 1952, s. 7 (1). Deaths by Accidents Compensation—Breach of Regulation by Deceased in Carrying out Carrying Contract—Contract valid in Formation—Dependants not seeking to enforce Contract and to use It for Its Evidentiary Value as to His Earnings—Cause of Action, for Benefit of Dependants, Unaffected by Any Such Breach by Deceased—Transport Licensing Regulations 1950 (S.R. 1954/161), Reg. 30 (1). The sole function of the jury in an action under the Deaths by Accidents Compensation Act 1952 is to assess the damages at an amount commensurate with the pecuniary benefits which the deceased's dependants might reasonably have been expected to derive from him if he had lived. In assessing that amount, a datum or basic figure is to be taken as the probable annual value of the contributions of the deceased to his dependants, in cash or otherwise, and turned into a lump sum by taking a certain number of years' purchase which is then to be taxed down, having due regard to uncertainties. From any lump sum calculated in this manner, allowance must be made for the contingency of premature death of the deceased or any of his dependants, for the possibility of the widow remarrying, for the hazards of disablement or failure or set-back in business, and generally for all the uncertainties of the future, including due allowance for the uncertainties affecting the deceased's business. Another method, after settling on the basic annual figure, is to apply to it as a multiplier such a number of years' purchase as will be thought to take into account all the doubts and uncertainties which point to a reduction in the sum to be awarded. There is no real yardstick by which the number of years' purchase can be measured. (*Donaldson* v. *Waikohu County* [1952] N.Z.L.R. 731; [1952] G.L.R. 373; *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] A.C. 610; [1951] 2 All E.R. 448; *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (1942) A.C. 601, 617; [1942] 1 All E.R. 657, 665, applied.) Whichever be the method adopted, the important factors are the "datum or basic" amount, the "multiplier" to arrive at the lump sum, and the allowance for uncertainties, whether this allowance be made in fixing the multiplier or by way of subsequent adjustments of the lump sum. Where the evidence in support of a claim was virtually confined to accountancy calculations, a Court called upon to review a jury's award can at least narrow the area in which differences of opinion and estimation are left to operate. *So held,* by the Court of Appeal, on an application of the foregoing principles, dismissing an appeal from the judgment of Shorland J. ordering a new trial, on the ground that the margin between the amount of the jury's verdict and any amount that could properly have been awarded was too great to allow the verdict to stand. Regulation 30 (1) of the Transport Licensing Regulations 1950 provides that it shall be a condition of every licence for a goods service that the licensee shall not drive or cause or permit any person employed by him or subject to his orders to drive any vehicle used under the authority of the licence so that (inter alia) the driver has not at least twenty-four consecutive hours for rest in any period of seven days. Regulation 34 provides that every person commits an offence against the Regulations who fails to comply with any condition, duty, or obligation imposed in any licence under the regulations. The deceased employed no labour, and he himself had driven his truck for seven days each week, for the purpose of fulfilling his milk contract which occupied him for about three-and-a-half hours each morning. Counsel for the defendant company at the trial, in the course of his address to the jury, contended that the jury should deduct from the earnings of the deceased all moneys earned by him on the seventh day, whereupon the learned Judge ruled that the jury was not obliged to deduct from the earnings of the deceased the cost of employing a man on that day, but that it was proper for it to take into consideration in the assessment of damages the possibility that the regulation would be enforced and his income thereby reduced. The defendant company cross-appealed, on the ground that there had been misdirection in that the learned Judge did not direct the jury that it should disregard the earnings of the deceased on the seventh day as being illegal, or, alternatively, that he did not direct the jury that the cost of employing labour for the seventh day should be deducted. *Held, also,* by the Court of Appeal, 1. That the Transport Licensing Regulations 1950 could not be construed as impliedly prohibiting contracts of cartage which were valid in their formation but were so performed as to contravene some provision of the regulations. (*St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267; [1956] 3 All E.R. 683, applied.) 2. That the deceased could have recovered the cartage charges under the contract with the dairy company, notwithstanding his breach of Reg. 30 (1) of the Regulations. 3. That, as the plaintiff did not in any way seek to enforce the contract in her action under the Deaths by Accidents Compensation Act 1952 and she did not have to make the illegal earnings part of the cause of action therein, but as she merely referred to such earnings in aid for their evidentiary value as to the earnings of the deceased, her cause of action, being distinct from any right possessed by the deceased, was free and unaffected by any illegality arising from the fact that the deceased in the performance of the contract infringed the regulation. (*Pigney* v. *Pointer's Transport Services Ltd.* [1957 1 W.L.R. 1121; [1957 2 All E.R. 807, applied. *Beresford* v. *Royal Insurance Co. Ltd.* [1938] A.C. 586; [1938] 2 All E.R. 602, distinguished.) Appeal from the judgment of Shorland J., dismissed. *LeBagge* v. *Buses Ltd.* (S.C. Hamilton. 1957. May 8. Shorland J. C.A. Wellington. 1958. April 2. Gresson P. North J. Cleary J.)

DIPLOMATIC IMMUNITY.

The Immunity of Diplomatic Agents, *108 Law Journal,* 243.

INSURANCE.

Waiver—Comprehensive Motor-car Policy—Proposal Form not disclosing Previous Car-accident—Insured, after Another Accident, Sent by Insurer to Assessor to complete Claim Form—Claim Form, disclosing Previous Accident, left with Assessor—Insurer ordering Repairs to Car—Claim Form later received by Insurer and Liability on Policy repudiated by It—Insurer attributed with Knowledge of Contents of Claim Form, irrespective of Date of Receipt thereof from Assessor. Where an insurance company instructs an insured to go to an assessor and there to complete a claim form, the company must be attributed with knowledge of what is contained in the claim form so completed pursuant to its own instructions, and whether it receives that claim form back from the assessor the next day, or the next week, or the next month, is a matter for arrangement between the company and its assessor. (*Evans* v. *Employers' Mutual Insurance Association Ltd.* [1936] 1 K.B. 505, applied.) S. insured his motor-car under a comprehensive policy with the insurance company, pursuant to a proposal which he signed on July 13, 1956. He was involved in an accident with the car on October 27, 1956, which was a Saturday, and, on the following Monday, he called at the company office to report the accident. He was then told to go to an assessor, and was supplied with a claim form and was instructed to give the assessor all the necessary particulars and there to complete the claim form, which he did on October 29, 1956. Thereafter, the assessor considered the question whether the best interests of the appellant would be served by treating the car as a total loss or by having it repaired. By November 8, 1956, it had been decided to have the car repaired. The repairs were completed early in December, 1956, and S. then took delivery of his car from the repairing firm and paid to that firm the amount of the franchise which he was to bear under the policy.

On February 15, 1957, the company repudiated any liability on the policy on the ground that a question in the proposal form of July 13, 1956, as to the accident experience of the respondent had been answered incorrectly, and that the inaccuracy of this answer was disclosed by the information given by the insured in completing his claim form on October 29, 1956. The claim form which was completed on October 29 was not forwarded by the assessor to the company until December 4, 1956. In an action by S. claiming the amount of the insurance under the policy, the Magistrate found in his favour. On appeal from that determiation, *Held*, That the company was attributable with the knowledge which the assessor had on October 29, 1956, of the insured having been involved in a previous accident; because the assessor, who was nominated by the company to receive the claim form, and whose duty it was to compare the forms, had actual knowledge of the discrepancy shown by the two forms; and, once the form had been completed and left with the assessor pursuant to the company's instruction, then the company could not thereafter say that it was not to be affected with knowledge of what was contained in that form until it happened, in fact, to come into its possession on December 4, 1956. (*Evans* v. *Employers' Mutual Insurance Association Ltd.* [1936] 1 K.B. 505, applied. *South British Insurance Co. Ltd.* v. *Irwin* [1954] N.Z.L.R. 562, distinguished.) *F.A.M.E. Insurance Co. Ltd.* v. *Spence*. (S.C. Auckland. 1958. June 12. Cleary J.)

LAND ACTS.

Land Settlement Board—Renewable Lease—Board's Refusal to Consent to Sale of Lessee's Interest therein on Ground of Undue Aggregation—Such Determination "final and conclusive" and not Appealable—Land Act 1948, ss. 18, 175 (3). Section 18 of the Land Act 1948 does not give a right of appeal from the refusal of the Land Settlement Board, on the ground of undue aggregation, of its consent to a transfer by way of sale of the lessee's interest in a renewable lease of Crown lands, as s. 175 (3), which makes such a determination "final and conclusive", is to be construed as a prohibition of any appeal from a decision of the Board made pursuant to the jurisdiction conferred by s. 175. (*Pretty* v. *Solly* (1859) 26 Beav. 606; 53 E.R. 1032, followed.) *In re McCosh's Application*. (S.C. Gisborne. 1958. March 5, 23. Shorland J.)

LICENSING.

Offences—After-hours Sale of Liquor—Barmen selling Liquor without Authority of Licensee during Prohibited Hours—Licensee's Want of Vigilance not, of Itself, implying Necessary Authority to render Licensee Vicariously liable—Licensing Act 1908, s. 190. During licensed hours, M., a porter barman, was authorized to sell liquor as barman, but the licensee had instructed all his employees that, at other times of the day, no one was authorized to sell even to lodgers. M. had the duty of cleaning the bar. If the bar had been locked, he obtained the keys of the bar from an upstairs room and returned them there. On a Sunday morning, the licensee went away to his seaside cottage, after he had instructed the maids to book in persons arriving for lodging, but no one was authorized to sell liquor to anyone. M. got the keys and entered the bar to clean it, and, while there, sold liquor. On charges against the licensee for opening the premises for sale, exposing liquor for sale, and selling liquor, during the time the premises were directed to be closed. *Held*, That M. had no express or implied authority to sell liquor when the premises were directed to be closed; and, although there may have been a want of vigilance on the licensee's part, that, of itself, did not imply the necessary authority to sell liquor so as to render the seller the alter ego of the licensee and to make the licensee vicariously liable for the act of his servant. *Kenning* v. *Forster* [1919] G.L.R. 69 and *Jull* v. *Treanor* (1896) 14 N.Z.L.R. 500, applied. *Police* v. *Tuohey*. (M.C. Whangarei. 1958. March 10. Herd S.M.)

Offences—Suffering Unlawful Game to be carried on in Licensed Premises—"Suffer"—Licensing Act 1908, s. 184. To "suffer" gambling to take place, in licensed premises, within the meaning of that word in s. 184 of the Licensing Act 1908, is passively to acquiesce in its taking place, and such passive acquiescence must amount to connivance and must be more than mere negligence or indifference on the part of the licensee or his servant. (*Bailey* v. *Pratt* (1902) 20 N.Z.L.R. 758; 4 G.L.R. 195, followed.) In the present case, it was held, on the facts, that the licensee's servants connived in the gambling which was taking place on his premises, as their acts amounted to more than mere negligence or carelessness; and such connivance had to be imputed to the licensee, who was convicted upon each charge. *Police* v. *Smith*. (M.C. Wellington. 1957. December 13, 19. Carson S.M.)

POST AND TELEGRAPH.

Damage to Telegraph Pole—Absolute Liability—Cow on Road causing Car driver to swerve and damage Telegraph Pole—Car driver not negligent, but his Action "caused damage" to Telegraph Pole, rendering him liable for Cost of Repairs thereto—Post and Telegraph Act 1928, s. 215. At about 8.15 p.m., the appellant was driving his car at about thirty-five miles per hour. As he came round a corner and started veering to his right, a cow which had been standing beside some trees at the side of the road ran across in front of the car. He first saw the cow on his right-hand side about twenty feet in front of him. He swerved to his left, ran off the road, and collided violently with a telegraph pole. The pole involved was a main-box pole and the cost of repairs, including new materials and labour charges, was £75 3s. 7d. There was no suggestion of any negligence, carelessness, or other misconduct on the part of the appellant. On a complaint under s. 218 of the Post and Telegraph Act 1928, the appellant, pursuant to s. 215 of that statute (as amended by s. 16 of the Post and Telegraph Amendment Act 1933), was ordered to pay the cost of the repairs. On appeal from that determination, *Held*, That the appellant's action in pulling his car too far to the side of the road was a contributing cause of the damage to the telegraph pole; and he, therefore, "caused damage" to the telegraph pole, within the meaning of s. 215 of the Post and Telegraph Act 1928, and was liable, in terms of that section, to make good the damage done by him. (*Barr* v. *Post and Telegraph Department* [1957] N.Z.L.R. 215 and *Smith Hogg and Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.* [1940] A.C. 997; [1940] 3 All E.R. 405, applied.) *McMahon* v. *Post and Telegraph Department*. (S.C. Hamilton. 1958. March 24; June 24. T. A. Gresson J.)

PRACTICE.

Appeals to Court of Appeal—Appeal in forma pauperis—Filing of Application for Leave so to appeal stopping Further Time running against Applicant, but Such Time not commencing to run de novo after Application dealt with—Prompt Application to be made without Application for Order Dispensing from giving Security—Court of Appeal Rules 1955, RR. 27, 34 (1) (2), 50. An application for leave to appeal as a poor person under R. 50 of the Court of Appeal Rules 1955 must be made to the Court of Appeal before the appeal is brought, and the filing of that application has the effect of stopping further time running against the appellant under R. 34 (1) while the application is pending; but time does not commence to run de novo after the application has been dealt with. A person qualified to appeal as a poor person should make prompt application accordingly, without applying for an order dispensing with security, which is appropriate only where the litigant is disqualified from appealing as a poor person. (*Franklin* v. *Franklin* [1935] N.Z.L.R. 200; [1935] G.L.R. 267, referred to.) *Semble*, If, after an appeal is brought, an application be made for an order under R. 34 (1) dispensing with security or for leave to appeal as a poor person under R. 50, the application should be made contemporaneously with the bringing of the appeal or very shortly afterwards, as otherwise the appellant may find himself obliged to give a fresh notice if he is within time to do so or to apply for special leave if he is not. In the present case, an order of the Court of Appeal, in making a fixture for the hearing of the appeal, made on an application for an extension of a stay of execution, could not prevent the subsequent operation of R. 34 (2), especially in view of the fact that the application to dispense with security was still pending on that date; no important public question was involved; and, accordingly, special leave to appeal could not be granted. *Yeatts* v. *Ruapekapeka Sawmill Co. Ltd. and Others*. (C.A. Wellington. 1958. May 19. Gresson P. North J. Cleary J.)

Appeals to Court of Appeal—Supreme Court dismissing Appeal from Magistrates' Court and refusing Leave to Appeal to Court of Appeal—No Concurrent Jurisdiction vested in Court of Appeal to give Such Leave—Judicature Act 1908, s. 67. Section 67 of the Judicature Act 1908 means that leave must be obtained from the Supreme Court whose determination is otherwise declared to be final. There is no concurrent jurisdiction vested in the Court of Appeal to grant leave pursuant to the provisions of s. 67. (Statement of Sir Michael Myers C.J. and MacGregor J. in *Herdman* v. *C. Dickinson and Co. Ltd.*

[1929] N.Z.L.R. 795, 796; [1929] G.L.R. 364, 365, approved. *Herdman* v. *C. Dickinson and Co. Ltd.* [1929] N.Z.L.R. 795, 801; [1929] G.L.R. 449, 452, referred to. *Lane* v. *Esdaile* [1891] A.C. 210 and *Rutherfurd* v. *Waite* [1923] G.L.R. 34, mentioned.) *Hardy* v. *Tennent et Ux.* (C.A. Wellington. 1958. March 27; April 21. Gresson P. North J. Cleary J.)

Mandamus—Inferior Tribunal declining Jurisdiction—Ground whereon Decision based to be examined—Inferior Tribunal misdirecting Itself in Formulation of Questions to be considered—Declining of Jurisdiction, though Visible Signs of Exercise of Jurisdiction. The question whether jurisdiction is declined by an inferior tribunal is not to be resolved by considering what was advanced before it in the form of evidence or argument, but by an examination of the ground on which its decision was eventually based. If the tribunal misdirected itself in formulating the questions it had to consider in determining the appeal, though there are present all the outward and visible signs of the jurisdiction having been exercised, it has declined jurisdiction, in that in substance it has precluded itself from a consideration of the proper question for determination before it. (*R.* v. *Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area* [1949] 2 K.B. 17; [1949] 1 All E.R. 656, and *R.* v. *Port of London Authority* [1919] 1 K.B. 176, followed. *Ex parte Hepburn, re Kearsley Shire Council* (1947) 47 S.R. (N.S.W.) 417, referred to.) *Hammond* v. *Hutt Valley and Bays Metropolitan Milk Board.* (S.C. Wellington. 1958. February 14; March 10. Haslam J. C.A. Wellington. 1958. March 25; May 19. Gresson P. North J. Cleary J.)

Third-party Procedure—Action claiming from Defendant Damages for Negligent Breach of Contract between them—Subject-matter of Action relating to Supervision of Performance of Sharemilking Agreement between Plaintiff and Sharemilker—Order giving leave to join Sharemilker as Third party—Third party's Right under Sharemilking Agreement to have matters between Plaintiff and Himself referred to Arbitration—Third-party Notice depriving Him of such Right—Discharge of Order granting Leave to issue Third-party Notice—Code of Civil Procedure, R. 93—Sharemilking Agreements Order 1951 (S.R. 1951/221), cls. 31, 43. Practice—Third-party Procedure—Ex parte Application for Leave to join Third Party—Utmost Good Faith required on Applicant's Part—Where such Good Faith not shown, Order discharged—Code of Civil Procedure, R. 400. In an action, A., as executrix of her deceased husband, alleged that, in 1954, the deceased entered into a contract with B., the defendant, whereunder B. contracted to manage and supervise a dairy farm owned by the deceased, which was to be farmed by a sharemilker; that B. negotiated a sharemilking agreement with C., but the actual agreement was made between the deceased and C., and that B. negligently failed to ensure that C. carried out many of the obligations imposed on him by the sharemilking agreement; and she claimed damages as against B. B. was not a party to the sharemilking agreement and had no rights against C. thereunder; but A. had agreed to assign all her rights under that agreement to B., in the event of her recovering any damages as against B. An order was made on an ex parte application by B. granting him leave to issue a third-party notice to C. On an application by C. for a discharge of that order, *Held*, 1. That, by virtue of the Sharemilking Agreements Order 1951, there were imported into the sharemilking agreement the provision for arbitration contained in cl. 43 of the Order, which covered any claim sought to be made by the deceased or A. or her assignee against C. in respect of the breaches alleged, and cl. 31 of the Order which imposed certain limitations on such claim. 2. That the fact that the Order applied, and that C. had a contractual right to have the matters in issue referred to arbitration, should have been disclosed to the Court on B.'s ex parte application for leave to issue the third-party notice to C. 3. That, as the utmost good faith required on the part of an applicant proceeding ex parte was not shown on the application for leave to issue a third-party notice, the order made should be discharged on that ground alone. (*Simpson* v. *Murphy* [1947] G.L.R. 411, followed.) 4. That C. was entitled to have the order discharged on its merits, as B. was not a party to the contract between the deceased and C.; and B., not as yet an assignee of the deceased's rights thereunder, had no rights against C. 5. That the fact that the subject-matter of issues which arose between A. and C. was being litigated in the Courts by A. and another party could not deprive C. of the right which he had under the sharemilking agreement to have those issues between himself and A. (or B. as A.'s assignee), if and when they arose, de termined by arbitration. (*W. Bruce Ltd.* v. *J. Strong* [1951] 2 K.B. 447; [1951] 1 All E.R. 1021, applied.) The order granting leave to B. to issue a third-party notice to C. was accordingly discharged. *Haddow* v. *New Zealand Insurance Co. Ltd.* (*Hoksbergen, Third Party*). (S.C. (In Chambers). Auckland. 1958. May 23, 30. Shorland J.)

TRUSTS AND TRUSTEES.

Jurisdiction—Realty—Application for Leave to sell—Contrary Intention expressed in Will or Trust Instrument—No Power to authorize Sale—Trustee Act 1956, s. 64. The power of the Court under s. 64 of the Trustee Act 1956 to authorize a sale or other transaction cannot be exercised where a contrary intention is expressed in the will or other trust instrument. The power given by that section is accordingly more limited than that given by the corresponding English section (s. 57 of the Trustee Act 1925 (U.K.)) and than that which was given by the earlier New Zealand provision (s. 81 of the Statutes Amendment Act 1936). (Under s. 81 of the Statutes Amendment Act 1936, the Court's jurisdiction was exercisable notwithstanding a prohibition in the trust instrument (*In re Fell* [1940] N.Z.L.R. 552; [1940] G.L.R. 361), but it is otherwise under s. 64 of the Trustee Act 1956.) *Semble*: 1. The validity of an order made under s. 64 may subsequently be questioned on the ground that the trust instrument expresses a contrary intention, and such an order will not necessarily protect a trustee in any subsequent litigation. 2. An order authorizing a sale may be made under s. 64 notwithstanding that the trust instrument gives a power of sale, if the last-mentioned power is exercisable in certain circumstances but not in those which have arisen. (*Municipal and General Securities Co.* v. *Lloyds Bank* [1950] Ch. 212; [1949] 2 All E.R. 937, doubted.) *In re Allison (deceased).* (S.C. Christchurch. 1958. April 21. F. B. Adams J.)

Powers of Trustees—Depreciation Reserve—Farming Business carried on by Trustee—Depreciation Reserve in Respect of Stock, Plant, and Farm Buildings—Trustee's Duty to decide whether to charge Depreciation and Quantum of Same—Proper Rate for Depreciation of Farm Buildings Matter of Evidence—Life-tenant's Right to Rents and Profits of Realty until Sold—Depreciation in Relation to City Buildings wherein No Business carried on. A trustee empowered or directed to carry on a business has a duty to decide in respect of each year's accounts of that business, having regard to the conflicting interests of his *cestuis que trust*, whether to charge depreciation, and, if so, how much should go to a depreciation reserve in respect of the stock, plant, and farm buildings with which that business has been carried on. There is no difference in principle between depreciation of buildings used in a business and depreciation on plant similarly used. The trustee may, if he thinks it proper, charge depreciation at a proper rate even in years in which such a charge instead of merely lessening income, will extinguish it altogether or turn it into a loss, or turn a loss into a larger loss, with such consequences, as to the amounts payable to various *cestuis que trust*, as these accountancy operations involve. (*Re Crabtree, Thomas* v. *Crabtree* (1911) 106 L.T. 49, and *Re Robertson* [1951] 3 D.L.R. 241 (affd. sub nom. *Chartered Trust Co.* v. *Robertson* [1953] 4 D.L.R. 225), followed. *In re Patterson, Guardian Trust and Executors Co. of New Zealand Ltd.* v. *Waddell* [1957] N.Z.L.R. 995, referred to.) The rate at which it is proper for depreciation of farm buildings to be charged is a question of evidence. (*Glasier* v. *Rolls* (1889) 42 Ch.D. 436, 453; *Re Robertson* [1951] 3 D.L.R. 241, 254; *In re Brough, Couper* v. *Brough* [1952] N.Z.L.R. 248, 254; [1952] G.L.R. 99, 103, followed.) Where real property and personal property are devised and bequeathed together as a residue with a direction for sale and conversion, the proceeds to form one fund settled upon persons in succession, the tenant for life of the proceeds is entitled to the rents and profits of the real property until sale, where the sale is properly postponed by the trustees. (*In re Searle, Searle* v. *Baker* [1902] 2 Ch. 829; *In re Darnley, Clifton* v. *Darnley* [1907] 1 Ch. 159; *In re Oliver, Wilson* v. *Oliver* [1908] 2 Ch. 74, followed.) Where no business is being carried on by the trustee in city buildings forming part of the realty of the trust, the trustee is not entitled to make a deduction from rents and profits and reserve it as capital in a depreciation account. *In re Hunter (deceased), New Zealand Insurance Co. Ltd.* v. *Hunter and Others.* (S.C. Auckland. 1958. May 23. Turner J.)

APPEALS FROM MAGISTRATES: PRINCIPLES APPLICABLE.

By D. W. McMullin.

With the passing of the Summary Jurisdiction Act 1952, the jurisdiction of Magistrates and Justices in relation to the summary trial of indictable offences was greatly extended and there is no doubt that the passing of that Act has led to an increase in the number of criminal cases dealt with in the Lower Court. While this has had the effect of reducing the number of cases which would otherwise have been referred to the Supreme Court for trial, it is a fair inference that it has also resulted in a number of appeals to the Supreme Court from convictions or sentences imposed by Magistrates in exercise of the increased jurisdiction conferred on them.

The Summary Proceedings Act 1957, which repealed both the Justices of the Peace Act 1927 and the Summary Jurisdiction Act 1952, has effected substantial changes in the principles and procedure to be applied by the Supreme Court in hearing appeals from the Magistrates' Court on criminal and quasi-criminal matters, and it is proposed in the course of this article to consider the provisions of the new Act and to compare them with the principles which were hitherto applicable on the hearing of such appeals.

The Magistrates' Court hears a large volume of cases involving considerable sums of money on matters involving contract, property, and tort.

In this article the following classes of appeals will be dealt with: General appeals against conviction, appeals against sentence, appeals by way of case stated, appeals against dismissal of informations pursuant to s. 42 of the Criminal Justice Act 1944, appeals from the decisions of Magistrates in civil cases, appeals from the decisions of Magistrates on the assessment of damages, appeals against the apportionment of liability, and appeals against the exercise of a Magistrate's discretion.

General Appeals.

The right of general appeal to the Supreme Court against conviction and sentence, or either conviction or sentence, was conferred by the Justices of the Peace Act 1927, s. 315 as reenacted by the Justices of the Peace Amendment Act 1952, s. 5. Section 325 of the principal Act gave the Supreme Court on the hearing of such appeal the right to make such order as it thought fit.

It has long been recognized that on appeals to the Supreme Court under that section the Supreme Court was free to decide the case on its own judgment, and its inquiry was not limited to a question whether the Magistrate's decision had been shown to be wrong. The appeal was in the nature of a complete retrial in which the prosecutor opened and assumed the burden of proof: *Watson* v. *Laidlaw* [1923] G.L.R. 7; *Clements* v. *McGee* [1929] N.Z.L.R. 905. Both of these cases were followed in *Larsen* v. *Aubrey* [1933] N.Z.L.R. 755, where Sir Michael Myers C.J. said:

> "A general appeal under the Justices of the Peace Act is not a rehearing in the sense in which a general appeal under the Magistrates' Courts Act, or an appeal from this Court to the Court of Appeal, may be said to be a rehearing. It is to all intents and purposes a retrial. The evidence is adduced on both sides, and the prosecutor or complainant as the case may be, has to begin: *Oliver* v. *Taylor* and *Canterbury Central Co-operative Dairy Co. Ltd.* v. *McKenzie*. The function of this Court is to decide the matter on the facts in evidence before it, and not inquire merely whether the Magistrate's decision has been shown to be wrong" (*ibid.*, 757).

The right to appeal against a conviction and sentence or either conviction or sentence is confirmed by s. 115 of the Summary Proceedings Act 1957 which came into force on April 1, 1958. Section 119 of the Summary Proceedings Act has, however, effected a marked change in the procedure applicable on the hearing of such appeals, and provides that the evidence on general appeals is not to be reheard except in certain special circumstances specifically stated in the section. The section provides:

> (1) All general appeals shall be by way of rehearing.
>
> (2) Where any question of fact is involved in any appeal, the evidence taken in the Magistrates' Court bearing on the question shall, unless the Supreme Court otherwise directs, be brought before the Supreme Court as follows:
>
> (a) As to any evidence given orally, by the production of a copy of any note made by the Magistrate or Justice or Justices or such other materials as the Supreme Court may deem expedient:
>
> (b) As to any evidence taken by affidavit and as to any exhibits, by the production of the affidavits and of such of the exhibits as may have been forwarded by the Registrar of the Court appealed from and by the production by the parties to the appeal of such exhibits as are in their custody:
>
> (c) As to any evidence taken under section thirty-one of this Act (which relates to taking the evidence of a defence witness at a distance) or under section thirty-two of this Act (which relates to taking the evidence of a person about to leave the country), or any statement admitted under section thirty-three of this Act (which relates to the admissibility of a statement made by a person who is seriously ill), by the production of a copy of that evidence or statement:
>
> Provided that the Supreme Court may in its discretion rehear the whole or any part of the evidence, and shall rehear the evidence of any witness if the Court has reason to believe that any note of the evidence of that witness made by the Magistrate or Justice or Justices is or may be incomplete in any material particular.
>
> (3) The Supreme Court shall have the same jurisdiction and authority as the Magistrate's Court, including powers as to amendment, and shall have full discretionary power to hear and receive further evidence, if that further evidence could not in the circumstances have reasonably been adduced at the hearing, and for that purpose shall have the same jurisdiction and authority to make any order under section thirty-one or section thirty-two of this Act as the Court from whose decision the appeal is made, or a Magistrate, had.

It is to be noted that although all general appeals shall be by way of "rehearing", the evidence is not to be reheard as was the practice under the repealed statute. The rehearing is a rehearing on the Magistrate's notes of evidence only. It is noteworthy, too, that the provisions of this section are very similar to the provisions of s. 76 of the Magistrates' Courts Act 1947 which also provides that all appeals from decisions of Magistrates' Courts shall be by way of rehearing. Indeed the marked similarity between the two sections can be seen from a reading of the provisions of s. 76 of the Magistrates' Courts Act 1947 and its comparison with s. 119 of the Summary Proceedings Act 1957 as set out above. Section 76 of the Magistrates' Courts Act provides:

(1) All appeals shall be by way of rehearing.

(2) Where any question of fact is involved in any appeal, the evidence taken in the Magistrates' Court bearing on the question shall, subject to any special order, be brought before the Supreme Court as follows:

(a) As to any evidence given orally, by the production of a copy of the Magistrate's note or such other materials as the Supreme Court may deem expedient:

(b) As to any evidence taken by affidavit and as to any exhibits, by the production of the affidavits and such of the exhibits as may have been forwarded by the Registrar of the Court appealed from and by the production by the parties to the appeal of such exhibits as are in their custody:

Provided that the Supreme Court may in its discretion rehear the whole or any part of the evidence.

(3) The Supreme Court shall have all the powers and duties as to amendment and otherwise of the Magistrates' Court, and shall have full discretionary power to receive further evidence upon questions of fact, either by oral evidence or by affidavit or by evidence taken before a Commissioner or Examiner.

Both sections prescribe that appeals shall be by way of rehearing; both provide that where any question of fact is involved in any appeal the evidence shall be brought before the Supreme Court on appeal as to oral evidence by production of the notes of evidence made by the Magistrate or Justice or Justices and as to evidence taken by affidavit and as to any exhibits by the production of such affidavits and exhibits as were produced in the Lower Court. Section 119 contains an additional provision to cover the production of defence evidence taken at a distance or evidence taken from a person about to leave the country or from a person who is seriously ill. That evidence is to be brought before the Supreme Court by the production of a copy of the evidence or statement. Both the sections under comparison confer a discretion on the Supreme Court on appeal to rehear the whole or any part of the evidence and to hear and receive further evidence and in the case of a general appeal under the Summary Proceedings Act 1957, s. 119 (2) (c) says that the Supreme Court on appeal shall rehear the evidence of any witness if the Court has reason to believe that any note of the evidence of that witness by the Magistrate or Justice or Justices is or may be incomplete in any material particular.

The essential feature in both cases, however, is that oral evidence will not ordinarily be heard on an appeal.

It is submitted that with the passing of the Summary Proceedings Act the principles to be applied in future to the determination of general appeals will be different from those which have been applied in the past. It is submitted that because of the similarity in the wording of the two sections the principles to be applied in the future on the hearing of general appeals by the Supreme Court will be the principles which are at present applicable to the hearing of appeals under s. 76 of the Magistrates' Courts Act. It will be convenient therefore, to examine the history of s. 76, Magistrates' Courts Act 1947 and to consider the principles which govern the Supreme Court in the hearing of appeals pursuant to it because in those principles will be found the principles to be applied on the hearing of general appeals under the Summary Proceedings Act 1957.

Section 76 of the Magistrates' Courts Act 1947 was substituted for the original section by s. 2 the Magistrates' Courts Amendment Act 1950. The original section as enacted in 1947 had changed the whole procedure of appeals from the Magistrates' Court as it had existed under the Magistrates' Courts Act 1928, and it provided that all appeals should be reheard completely, just as they were then reheard completely under the existing provisions of the Justices of the Peace Act 1927. Section 2 of the Magistrates' Courts Amendment Act 1950 abolished the right to a complete rehearing by way of retrial and instituted the present system of a rehearing on the notes.

When an appeal under the Magistrates' Courts Act 1947 comes before the Supreme Court for hearing the following questions may have to be decided:

(1) If a rehearing of the whole of the case is granted and the evidence is taken afresh in the Supreme Court, what principles should guide the Supreme Court sitting on appeal?

(2) If no rehearing is granted, but the "rehearing" proceeds on the basis of the notes of evidence taken by the Magistrate, what principles should guide the Supreme Court sitting on appeal?

(3) If one party applies for a complete retrial, by what principles should the Supreme Court be guided in deciding that application?

As to (1), it is submitted that if a rehearing of the evidence is ordered then the appellate Court can feel itself completely unfettered by the Magistrate's decision and free to arrive at its own findings and to make its own decision: *Gillard* v. *Cleaver Motors Ltd.* [1953] N.Z.L.R. 885.

As to (2), it is submitted that the Supreme Court on appeal can only decide the appeal subject to a number of limitations imposed on it by its very nature as an appellate Court.

It is settled law that, notwithstanding the fact that the appeal is an appeal by way of rehearing (but on the notes of evidence taken in the Court of first instance), the appellate Court is essentially a Court of appeal and is bound by the restrictions which that fact imposes. In *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243, the House of Lords had to consider an appeal from the Court of Appeal which had itself reversed the original finding of the trial Judge, Horridge J., in favour of the appellants, on the ground that the Court of Appeal considered that the evidence of the appellants was not creditworthy. Lord Atkin said:

> "The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial Judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognize the onus upon the appellant to satisfy it that the decision below is wrong: it must recognize the essential advantage of the trial Judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an Appellate Court can never recapture the initial advantage of the Judge who saw and believed" (*ibid.*, 255).

So too, Lord Sankey L.C. said:

> "What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below in such circumstances as the present It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the Court that his appeal

should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is the difference between the manner in which the Court of Appeal deals with a judgment after a trial before a Judge alone and a verdict after a trial before a Judge and jury. On an appeal against a judgment of a Judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the Judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the Judge saw the witnesses" (*ibid.*, 249).

Lord Wright said :

"Two principles are beyond controversy. First, it is clear that in an appeal of this character, that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right but must be convinced that it is wrong'. And secondly, the Court has no right to ignore what facts the Judge has founded on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities, as if there had been no oral hearing" (*ibid.*, 265).

While, however, an appellate Court on appeal from a case tried before a Judge alone, should not lightly differ from a finding of the trial Judge on a question of fact, a distinction has sometimes to be drawn between the perception of facts on the one hand and the evaluation of facts on the other. In *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370 ; 1 All E.R. 326, the House of Lords drew this distinction on an appeal which came before them. The appeal arose out of a patents case which came before Lloyd-Jacob J. in the first instance. The Court of Appeal reversed his decision and the appellant appealed to the House of Lords.

After referring to the fact that all appeals to the Court of Appeal were by way of rehearing, and that the Court had power to draw inferences of fact and to give any judgment or make any order which ought to have been made, Lord Simmonds said :

"This does not mean that an Appellate Court should lightly differ from the finding of a trial Judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence. A jury finds that the defendant has been negligent and that is an end of the matter unless its verdict can be upset according to well-established rules. A Judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an Appellate Tribunal in relation to a finding by a trial Judge. For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned Judge. But the statement of the proper function of the Appellate Court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem" (*ibid.*, 373).

The decision in the *Benmax* case has been comprehensively reviewed in an editorial article, "*Practice. Findings of Fact by Inferior Court*" (1955) 31 N.Z.L.J. 49.

In *Billy Higgs & Sons* v. *Baddeley* [1950] N.Z.L.R. 605, our Court of Appeal allowed an appeal from Smith J. who had found that the explanation given by the appellant as defendant in a negligence action was not sufficient to rebut the application of the doctrine of *res ipsa loquitur*. This was the well-known case of the driver who had been stung in the eye by a bee. There was no real dispute about the facts, nor was the credibility of witnesses in issue. The case turned on the inferences to be drawn from the relatively undisputed facts. Gresson J., giving the judgment of Northcroft J. and himself, referred to the dictum of Lord Halsbury L.C. in *Montgomerie and Co. Ltd.* v. *Wallace-James* [1904] A.C. 73,

"where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an Appellate Court".

He also cited Lord Wright in *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243 :

"in all such cases the Appellate Court is in as good a position to decide as the trial Judge".

As to (3), it is submitted that here again reference may usefully be made to the Magistrates' Courts Act 1947 and the cases decided under s. 76 of that Act. This section, which is set ont in the above, provides that the evidence taken in the Magistrates' Court shall, subject to any special order, be brought before the Supreme Court by the production of the notes of evidence made in the Lower Court "provided that the Supreme Court may in its discretion rehear the whole or any part of the evidence". Furthermore, the Supreme Court has full discretionary power to receive any further evidence upon any questions of fact. As mentioned above, s. 119 of the Summary Proceedings Act 1957 makes similar provisions but also provides that the Supreme Court shall rehear the evidence if it has reason to believe that any note made by the Magistrate of the evidence of any witness is incomplete in any material particular.

The apparent differences between s. 119 of the Summary Proceedings Act and its corresponding provision in the Magistrates' Courts Act are :

(a) Under the Summary Proceedings Act the Supreme Court must rehear the evidence of any witnesses if it has reason to believe that the note of evidence is or may be incomplete.

(b) The discretionary power to rehear any evidence under the Summary Proceedings Act seems to be limited to cases where the further evidence could not have been adduced at the original hearing.

In *Seagar* v. *Wellington City Corporation* [1951] N.Z.L.R. 1060, in speaking of the circumstances in which a rehearing of the evidence on an appeal under the Magistrates' Courts Act, should be granted, Cooke J. said :

". . . I do not think it is possible for this Court, by reading the learned Magistrate's notes, to ascertain whether his decision was right or wrong. It is clear on the authorities that, in that situation, the Court should take the exceptional course of ordering a rehearing" (*ibid.*, 1062).

In *Harper* v. *Hesketh* [1954] N.Z.L.R. 622, Gresson J. said the discretion to order a rehearing of the evidence

was one to be exercised sparingly. Nevertheless, in the particular circumstances of that case, the Judge did exercise his discretion in favour of a rehearing. *Harper* v. *Hesketh* was followed by Turner J. in *Tetau* v. *McPherson* [1956] N.Z.L.R. 34, but again, in the particular circumstances of the case, an order for a rehearing of the evidence was made. Turner J. said that his experience showed where one witness was to be recalled and questions might be put to him necessitatng the calling of another witness, the Court might reach the position where it is unjust not to recall all the witnesses. He therefore made an order for a complete rehearing: see also *Wilson* v. *Nisbett* [1953] N.Z.L.R. 884, to the same effect. It is respectfully submitted that where questions arise in the future whether rehearings of evidence are to be granted on the hearing of general appeals under the Summary Proceedings Act 1957, the principles laid down by the Magistrates' Courts Act and discussed above may well be followed.

Appeals Against Sentence.

Section 121 of the Summary Proceedings Act 1957 provides that on an appeal against conviction the Court may:

(a) Confirm the conviction; or

(b) Set it aside; or

(c) Amend it, and if the Court thinks fit, quash the sentence imposed and either impose any sentence (whether more or less severe) that the convicting Court could have imposed on the conviction as so amended.

Subsection (3) of the Act provides:

In the case of an appeal against sentence only the Court may:

(a) Confirm the sentence; or

(b) If the sentence (either in whole or in part) is one which the Court imposing it had no jurisdiction to impose, or is one which is clearly excessive or inadequate or inappropriate, or if the Supreme Court is satisfied that substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing sentence, or that those facts were not substantially as placed before or found by that Court, either:

(i) Quash the sentence and either pass such other sentence warranted in law (whether more or less severe) in substitution therefor as the Supreme Court thinks ought to have been passed or deal with the offender in any other way that the Court imposing sentence could have dealt with him on the conviction; or

(ii) Quash any invalid part of the sentence that is severable from the residue; or

(iii) Vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it.

The question may be asked how the powers now conferred on the Supreme Court on appeals against sentence compare with those formerly exercised by that Court.

The Supreme Court has always had power to interfere with a sentence imposed for want of jurisdiction, or which was clearly excessive or inadequate or inappropriate. These powers do not mean that the Supreme Court will not have regard to the sentence imposed by the Magistrates' Court and treat itself as free to impose any fresh sentence as may commend itself to it.

In the writer's submission, the new section really gives statutory effect to what has long been the function of an Appellate Court in considering appeals against sentence.

The general rule by which an appellate Court has been governed in the past when considering an appeal against sentence is that it should not alter the sentence originally imposed unless that sentence was manifestly excessive in view of the circumstances of the case, or it was wrong in principle. This principle was accepted by our Court of Appeal in *The King* v. *Brooks* [1950] N.Z.L.R. 658, and was the same principle as was acted on by the Court of Criminal Appeal in England. The Court has no jurisdiction to interfere with a sentence merely on the ground that members of the Court would have passed a somewhat different sentence had they been trying the appellant. As *Archbold's Criminal Pleading, Evidence, and Practice*, 33rd ed., 350, says:

> "In exercising its jurisdiction to review sentences the Court of Criminal Appeal does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. The sentence must be manifestly excessive in view of all the circumstances of the case or be wrong in principle before the Court will interfere."

It should be noted, however, that this principle has been derived from a number of cases in which appellate Courts have been called upon to review sentences which have been imposed by a Court of first instance after a full trial of the case, and where all the relevant circumstances have been traversed in the evidence presented. In such a case the appellate Court has not got the same advantages as the Court of first instance and its refusal to interfere with any sentence imposed is based so a large degree on that fact.

The reluctance to interfere with the sentence imposed is not so great where that sentence is imposed following upon a plea of guilty, in which case the Appellate Court is in as good a position as the primary tribunal to determine the propriety of the sentence. In *Preston* v. *Richardson* [1949] G.L.R. 391, Finlay J. considered all the authorities relating to appeals against sentence and reiterated the basic principle that an appellate Court ought not to assert any right to review a sentence merely because the members, had they been trying the case themselves, would have given a sentence whch was not quite so low or quite so high as that imposed, and that the Court would only interfere if the sentence appealed from was manifestly wrong or based on a wrong principle. His Honour demonstrated the extreme good sense of this rule when he said:

> "If every sentence were susceptible of ready revision on appeal, many detrimental consequences would result. I refer only to two. Judges would be committed to making variations without any intimate knowledge of many of the factors that necessarily contribute to the determination of the nature of the penalty which it is appropriate should be imposed: Magistrates could not function with confidence and so with efficiency" (*ibid.*, 392).

That the fundamental principle stated above gains its strength from the imposition of a sentence following upon a trial is borne out by His Honour's statement when he says:

> "Summarized therefore, it is desirable, and clear upon authority, that this Court shouid not interfere with a Magistrate's sentence following an open trial unless the sentence is not merely excessive, but manifestly so, or unless the Magistrate, in imposing it, has either proceeded upon wrong principles or undervalued or overestimated some of the material features of the evidence. I emphasize the words 'following an open trial' because in all the cases to which I have referred there was a trial and evidence was taken. In such circumstances the primary tribunal enjoys peculiar advantages which are denied to an appellate tribunal" (*ibid.*, 393).

Such weight is attached to the advantages of the Court before whom an appellant is tried that where

these are denied to the Court of first instance an Appellate Court, while reluctant to interfere with the sentence imposed, does not adhere to the principle of non-interference with the same degree of inflexibility. In *R.* v. *Sneasby* (1909) 11 Cr.App.R. 178, the Court of Criminal Appeal after hearing an appeal against sentence imposed upon a plea of guilty said :

> " We think we can reduce the sentence in this case. One is more reluctant to interfere when the Judge has heard the whole case, but here the appellant pleaded guilty."

In *Mansion House (Kawau) Ltd.* v. *Jebson* [1952] N.Z.L.R. 988, Stanton J. felt himself free to interfere with a sentence imposed upon a plea of guilty, and for that reason, coupled with the fact that he had heard evidence and the Magistrate had not, reduced a fine of £750 to £500.

The reluctance to interfere with a sentence is further reduced where the appellate Court for some reason is in possession of facts which put it in a better position to assess the appropriate penalty than the tribunal which imposed it : *Preston* v. *Richardson* [1949] G.L.R. 391. The appellate tribunal may be in a better position to assess the penalty than the primary tribunal where it has heard evidence which was not given before the Magistrate, or where matters are revealed to the Supreme Court which were unknown to the Magistrate. In *R.* v. *Ryle* (1915) 11 Cr.App.R. 312, it was proved to the Court of Criminal Appeal that the prisoner was a diabetic, a fact of which the primary tribunal was not apprised and the sentence impose was therefore reduced. In *Sorrenson* v. *Shipman* [1951] G.L.R. 329, another case involving an appeal from a sentence imposed by a Magistrate, Finlay J. said :

> " The sentence imposed was, as every sentence necessarily is, the product of a complex of interacting considerations. The assessment of the influence and effect of every such consideration is left by law to the judicial discretion of the Magistrate. It is his responsibility to determine the nature of the punishment ; so that, in effect, an appeal to this Court in such a case is an appeal to the discretion of an appellate Judge in respect of the discretion of the Magistrate. In such circumstances, even on a plea of guilty where, as I took occasion to observe in *Preston* v. *Richardson*, an Appellate Court is not so restrained in its attitude as it is when the sentence is imposed following upon an open trial, the Appellate Court will not interfere unless the sentence is manifestly excessive, or the Court appealed from has, if I may adapt the words of Barton A.C.J. in *Skinner* v. *The King* (1913) 16 C.L.R. 336, ' acted on a wrong principle or has clearly overlooked or undervalued or overestimated, or misunderstood, some salient feature ' in the case.
>
> " Such an attitude is in no sense an abdication of the function of an appellate tribunal, but merely a definition of the circumstances in which, on principle, it is entitled to interfere. Having regard to the dual purpose which punishment is designed to achieve (see *9 Halsbury's Laws of England*, 3rd ed., 255), it is obvious that in such a case as the present where the danger to the safety and lives of others is so deeply involved, a Magistrate must necessarily give particular consideration to that aspect of punishment which is designed to deter other members of the community from committing a similar offence. In this respect, punishment has been defined as ' an indispensable sacrifice to the common safety '.
>
> " As to what is necessary for that purpose, Magistrates are in a better position to form a proper opinion than is a Judge of this Court. They know from their daily experiences of the frequency of the offence or of the extent of any recurrence of frequency. If, therefore, a Magistrate concludes that the aspect of deterrence requires the imposition of a sentence of imprisonment, and there are no features which indicate that such a sentence is excessive, no question of wrong principle arises. Nor can it in such circumstances be said that the Magistrate has undervalued, or overestimated, or misunderstood any salient feature of the case. In that contingency this Court is not, it seems to me, justified in interfering with the nature of the sentence " (*ibid.*, 330).

Comparing then the provisions of the new section with the principles laid down and acted upon by the Courts in the past, we have in the writer's submission a statutory declaration that the Supreme Court on an appeal against sentence may interfere with the sentence imposed by the Magistrate in the following cases :

(a) If there was no jurisdiction to impose the particular sentence. Such a sentence was always one to be vacated.

(b) If the sentence imposed is clearly excessive or inadequate or inappropriate. This is no more and no less than the adoption of the rule as stated in the cases just referred to.

(c) If substantial facts relating to the offence or to the offender's character or personal history were not before the Lower Court or those facts were not substantially as placed before that Court. It is submitted that the statute is once again an adoption of the principles laid down or declared in *R.* v. *Ryle* (1915) 11 Cr.App.R. 312, and *Mansion House (Kawau) Ltd.* v. *Jebson* [1952] N.Z.L.R. 988, and *Preston* v. *Richardson* [1949] G.L.R. 391.

(To be concluded).

LEGAL LITERATURE.

Conduct and Etiquette at the Bar (2nd ed.), by W. W. BOULTON London : Butterworth & Co. (Publishers) Ltd. Price 15s.

Conduct and etiquette at the Bar has been for many generations a matter learnt in England mostly through the medium of pupillage : it has been a sort of code handed down by precept and word of mouth. Recently the Bar Council has taken a leading part in seeing to it that this code is not only known to all newcomers but obeyed as well, and by its rulings, published in its annual statements, has spread the code as widely as possible. In 1952, the Secretary of the Bar Council published his *Conduct and Etiquette at the Bar* as a completely new work and the second edition has now appeared, taking in all the new matter which has arisen in the last five years. It is a very useful guide to have at hand, particularly for Queen's Counsel and those practising as barristers only and those who contemplate starting in practice as such. Members of the Bar will find of current interest what the writer has to say about advertising, touting, and publicity, particularly what is etiquette regarding broadcasting appearances. Solicitors will also find it useful to know the rules relating to the relations between counsel and solicitors, the rules governing briefs and pleadings, and the rules as to counsel's fees.

THE WORK OF THE NEW ZEALAND LAW SOCIETY.

By D. I. GLEDHILL.

In the twenty-one years that I have spent as secretary of the New Zealand Law Society, I have had frequent inquiries concerning the purposes and activities of the Society. While it should not be necessary to instruct members of the profession in such matters, I think it is appropriate at this stage, on the eve of my retirement, to reflect on the significance of the organization in relation to practitioners and the general public.

The Society was incorporated nearly ninety years ago by the New Zealand Law Society's Act 1869, but it was not until after the passing of the Law Practitioners and New Zealand Law Society Acts Amendment Act 1896 that the Law Society really began to function as such. In its earliest beginnings it was more a conference of District Law Societies than an active incorporated society. From the outset, the Council of the Law Society comprised district representatives, theoretically appointed in the same way as they are today, but in practice district representation was largely by proxy, with Wellington nominees in many cases acting on behalf of District Societies. In 1935, the system of direct representation was provided for by statute on a compulsory basis and each district elected a given number of representatives to the Council, which, in its turn, elected the executive officers—the President, Vice-Presidents, and Hon. Treasurer.

The Council meets three times a year, but there is also in Wellington a standing Executive Committee consisting of the President and Vice-Presidents and three Wellington members. Any member of the Council may attend and vote at Committee meetings, but it is not required that Council members should be notified of pending Committee meetings. In addition to the Executive Committee, the Council has nine other standing committees charged with the supervision of the activities of the Law Society.

The list of Presidents of the Law Society contains names that have been almost household words in the profession. The first was Mr W. S. Reid, one of the earliest Solicitor-Generals in New Zealand, and his successors include Mr F. H. D. Bell K.C., later Sir Francis Dillon Bell, Member of the Legislative Council, Attorney-General, and, in 1925, Prime Minister; Mr C. P. Skerrett K.C., later Sir Charles Skerrett, Chief Justice from 1926 to 1929; Sir Alexander Gray K.C.; Mr C. H. Treadwell; Mr H. F. O'Leary K.C., afterwards Sir Humphrey O'Leary, Chief Justice from 1946 to 1953; Mr P. B. Cooke M.C., K.C., later Mr Justice Cooke; Sir William Cunningham, and Mr T. P. Cleary, now Mr Justice Cleary, Member of the Court of Appeal.

The purposes for which the Law Society was established are set out in the Law Practitioners Act 1955, s. 114 (1) as follows:

> "To promote and encourage proper conduct among the members of the legal profession; to suppress illegal, dishonourable, or improper practices; to preserve and maintain the integrity and status of the legal profession; to provide opportunities for the acquisition and diffusion of legal knowledge; to consider and suggest amendments of the law; to provide means for the amicable settlement of professional differences; and generally to protect the interests of the legal profession and the interests of the public in relation to legal matters."

In the fulfilment of these varied objects the Council has formulated a code of practice, conduct, and ethics for the guidance and protection of its members and the general public, and has also provided the machinery, through the Disciplinary Committee, constituted under s. 33 of the Act, for the maintenance of the requisite standards.

Similarly the interests of the public are safeguarded in respect of the control of trust moneys imposed by Parts V and VI of the Act, which deal with Solicitors' Trust Funds and the Solicitors' Fidelity Guarantee Fund, which provide indemnities for misappropriated moneys. The Guarantee Fund, which is held in trust by the Law Society for the reimbursement of those suffering pecuniary loss by reason of misappropriation, was creased in 1930 and is maintained out of annual contributions from all practising members.

One of the more important functions of the Law Society, which is probably little known outside the profession, concerns the watching brief the Society holds in the matter of pending legislation. The Society maintains a constant vigilance in respect of projected enactments by the Legislature with reference to the interests of profession and public alike. While the Society, as such, has no political views, and holds itself aloof from anything in the nature of policy legislation, it devotes the closest attention to the points of law involved in the proposals of the Legislature. All Bills are subjected to the closest scrutiny during the times when Parliament is in session; and the Council of the Law Society makes the most of every opportunity of previous consultation in matters of legal procedure or practice afforded by the Government in respect of proposed legislation. The efforts of the Law Society in this direction are complementary to the work of the Government-sponsored Law Revision Committee on which the Law Society has a statutory representation. To this Committee are referred anomalies and problems that reveal themselves in the general law, and thorough examination and inquiry follow where such action is deemed necessary.

Although no joint Government-Law Society legal aid of the kind operating in the United Kingdom exists in New Zealand, it is the policy of the Law Society that full consideration should at all times be given to the needs of indigent persons appearing in Court. Statutory provision is made for the Courts to assign counsel to accused persons whose circumstances render legal costs prohibitive; but, in addition, it can safely be said that, as a result of Law Society policy, there are few legal offices that have not in the course of their business voluntarily assisted impecunious persons requiring legal advice.

In the educational sphere, also, the Law Society plays an important part through its representation on the Council of Legal Education, and contributes also to the Rules of Procedure of the Court of Appeal and the Supreme Court, which are the responsibility of the Rules Committee on which the Society has two representatives associated with the Judges.

TOWN AND COUNTRY PLANNING APPEALS.

McCardle *v.* Whangarei County.

Town and Country Planning Appeal Board. Whangarei. 1958. April 22.

Undisclosed District Scheme—Definition—Scheme in Course of Preparation pursuant to Resolution of Council, but not become Operative or Publicly Notified and Resolution of Council Adopting so much of Scheme affected by Detrimental Work—Mandatory Requirement founding Council's Jurisdiction to refuse Approval of Subdivision—Town and Country Planning Amendment Act 1957, s. 2 (2).

Appeal by the owner of a block of land containing 4½ acres situate on the Whangarei Heads Road lying between that road and the foreshore of Whangarei Harbour.

The appellant had prepared a scheme for the subdivision of this land into residential sites and a scheme plan No. 6941 was submitted to the Chief Surveyor on August 1, 1957 and referred by him to the respondent for consideration. On November 8, 1957 the respondent passed a resolution declining approval of the subdivision in terms of s. 38 (2) of the Town and Country Planning Act 1953.

This decision was conveyed to the appellant by letter dated November 11, 1957. The appellant then filed this appeal.

At the conclusion of the hearing of evidence, counsel for the appellant challenged the jurisdiction of the Board to determine the appeal, on the grounds that the respondent could not invoke s. 38 and reject the appellant's scheme of subdivision, because, as at November 8, 1957, it had no jurisdiction to do so, as at that point of time it had no "undisclosed district scheme" as required by the Act.

The judgment of the Board was delivered by

REID S.M. (Chairman). This Board when interpreting the term "undisclosed district scheme" in *Cassidy* v. *Manukau County* (*1 Town and Country Planning Appeals*, 2) held, inter alia, following *Wong* v. *Northcote Borough* [1952] N.Z.L.R. 417, that this meant the scheme which a local authority was required under the Act to prepare, but, if none had been prepared, the scheme which would come into existence when that requirement was fulfilled. That decision has been acted upon and followed, but the enactment of s. 2 (2) of the Town and Country Planning Amendment Act 1957 altered the position.

The amending Act came into force on November 1, 1957.

By virtue of that amendment, the essential requirements of an undisclosed district scheme now are:

1. That it is a district scheme or a section or part of a district scheme which is in course of preparation *pursuant to a resolution of the Council in that behalf* but which has not become operative or been publicly notified *and*
2. *That so much of the scheme as is or might be affected by the detrimental work has been adopted for the time being by resolution of the Council* in committee or otherwise etc.

The minute book of the respondent was produced in evidence and the only resolutions relating to town planning were shown to be as follows:

1. March 8, 1957 "That the Council proceed with the preparations of a district scheme for the Whangarei County as required by the Town and Country Planning Act 1953."
2. November 8, 1957. A resolution adopting the Planning Committee's report—that report being in the following terms:

   The Town Planning Officer reported as follows:

   The land in question is not particularly desirable for building purposes, due to its swampy nature. It lies outside the urban zone boundaries already provisionally determined by the Council and can hardly be considered in terms of a 'seaside' subdivision. The surrounding land is predominantly rural in character and a subdivision such as this would not, I feel, be in the interest of the public as a whole.

   I must recommend therefore that the application to subdivide be declined in terms of s. 38 (2) of the Town and Country Planning Act 1953."

   After careful consideration your Committee recommends that this subdivision be declined. The proposed subdivision of land as shown on Scheme Plan No. 6941 is not in conformity with town and country planning principles likely to be embodied in the Council's undisclosed district scheme, as defined in s. 38 of the Town and Country Planning Act 1953, for the County which includes (inter alia) the area within which the said land is situated and on such grounds approval of the subdivisional plan be refused.

   On the motion of Crs. Hosking and Podjursky, it was decided that the Planning Committee's report be adopted.
3. March 14, 1958. A resolution adopting a motion passed in committee defining the extent of urban development permissible in the County adjacent to the Borough of Whangarei as delineated on a plan submitted.
4. March 25, 1958. Resolution adopting a Draft Code of Ordinances.

It is clear, therefore, that as at November 8, 1957, the Council, by virtue of the resolution of March 8, 1957, had "a district scheme in course of preparation pursuant to a resolution of the Council in that behalf"; but it is equally clear that it had not by resolution adopted for the time being any part of the scheme affected by the detrimental work: that resolution was not passed until March 14, 1958.

Mr Packwood for the respondent conceded difficulty in answering Mr Smytheman's submissions, but suggested that the resolution of November 8, 1957, by reason of the reference to "urban zone boundaries already provisionally determined by Council," might by implication be read as a resolution adopting part of the scheme.

The Board is not prepared to accept this. Statutory requirements couched in clear and unequivocal terms cannot be complied with by vague implication.

The Board holds that when the respondent refused its approval of the proposed subdivision, it purported to do so under the authority of s. 38 of the Act; but, as at the date of its decision the Council did not have an undisclosed district scheme, as defined by the Act, it had no jurisdiction to refuse its approval.

The Board declines jurisdiction, and having done so makes no comment on the merits.

No order as to costs.

Appeal allowed.

Watson *v.* Wairoa Borough.

Town and Country Planning Appeal Board. Wairoa. 1957. December 16.

Maori Land—Land zoned as "Rural"—Consent sought to Sale of Undivided Interest to Market-gardener Lessee of Two-acre Maori-Freehold Section whereon he resided—Confirmation by Maori Land Court dependent on Approval to Proposed Subdivision—Proposed District Scheme not detrimentally affected—Departure from its Provisions without Alteration in Zoning—Town and Country Planning Act 1953, s. 38 (1) (c).

Appeal by the lessee of a block of Maori-freehold land, known as Putaka 13A, containing 2 ac. 3 ro. 16 pp., fronting on to Mitchell Road.

The appellant built a house on part of the property where he resided with his wife and family. He carried on the combined occupations of a fruit and vegetable retailer and market gardener and used the land in question for market gardening. One of the joint owners of an undivided share or interest of about 2 ro. in this land agreed to sell her share to the appellant, and entered into an agreement for sale and purchase. Application was made to the Maori Land Court for confirmation of this agreement and for partition of the land but these applications had in accordance with the policy of the Maori Land Court been deferred until the approval of the Council to the proposed subdivision had been given.

The appellant applied to the Council for approval of the subdivision, but this was refused.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, the Board finds:

1. That the Council has a proposed district scheme that has been publicly notified, but the time for lodging objections has not yet expired.
2. That under that scheme the land in question is zoned as "rural".

Although there was some conflict of evidence on the question, the Board is satisfied that the land has some actual or potential value for food production.

It is being worked as a market garden at present.

3. That water, sewerage and electric power are available to the property.

4. That the Council's proposed district scheme makes adequate provision for the foreseeable population needs of the Borough for many years in the areas already zoned as "residential" in the scheme plan and the appellant has failed to make out any case for altering the zoning of this area from "rural" to "residential".

5. That in the special circumstances of this case, the Council's proposed district scheme will not be detrimentally affected by a departure from its provisions without making any alteration in the zoning.

The Board allows the appeal in that it directs the Council to approve a plan for the subdivision of the land into two allotments by severing from the main block such portion thereof as the Maori Land Court may partition in favour of Waioeka Tainakore Paraone alias Waioeka Mahaki alias Mrs Brown, the vendor, under the agreement for sale and purchase.

This decision is not to be construed as approving of any further subdivision of the land in question. No order as to costs.

Appeal allowed.

Ballantyne *v.* Hawke's Bay County.

Town and Country Planning Appeal Board. Napier. 1958. March 27.

Subdivision—Residential Sites—Area zoned as "Rural"—Lot Areas from One Acre to Five Acres—Proposed Subdivision not planned for Orderly Development outwards from City or Borough—Subdivision a "detrimental work"—Town and Country Planning Act 1953, s. 38 (1) (c).

The appellant was a farmer carrying on business as such at Whareraugi about seven miles from Napier. He applied to the respondent Council for its approval of a proposed subdivision of part of his property containing 74 ac. 1 ro. 10 pp. into 19 residential sites varying from 2 acres up to 5 acres.

The Council refused its consent under s. 38 (1) (c) of the Act on the grounds that the land in question was in an area zoned as rural under its undisclosed district scheme for this part of the Hawke's Bay County and therefore the proposed subdivision would not be in conformity with the town and country planning principles likely to be embodied in the undisclosed district scheme. Under that scheme rural land could not be subdivided into areas of less than five acres.

This appeal followed.

At the hearing the appellant put in an alternative plan for the subdivision of this land into 29 residential sites ranging in size from one acre to 5 acres.

Judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel and having viewed the locality the Board finds:—

1. That the land in question is on the Whareraugi Hills and at one time before the 1931 earthquake it was on the coast line with low cliffs fronting on to the foreshore of the inner harbour but it has now lost that character by reason of the raising of the bed of the inner harbour.

2. That in Napier there are virtually no hillside residential sites available to those seeking to establish homes on high ground commanding views. It was urged on behalf of the appellant that the proposed subdivision would provide such sites and would go towards satisfying an existing demand.

3. That the land is light in character suitable only for grazing and it has no actual or potential value for the production of food by way of intensive cultivation.

4. That although in the foreseeable future it can be anticipated that the Whareraugi Hills will be used for residential purposes there are other hill sites adjoining the Borough of Taradale and on the Poraite Hills nearer Napier equally if not more suitable than the appellant's land for extra-urban residential development.

These sites would lend themselves more readily to the provision of essential services and other amenities.

5. That it is a recognized principle of town and country planning that urban development should be planned to provide for orderly development outwards from city or borough perimeters and in planning for this area the Council intends to adhere to that principle and to maintain the rural zoning of this country area for as long a possible.

In refusing its approval of the appellant's proposed subdivision the Council has acted under s. 38 (1) (c) of the Act and claims that the proposed subdivision is a detrimental work in that it is not in conformity with the town and country planning principles likely to be embodied in its undisclosed district scheme for the area.

The Board is in accord with that view and the appeal is accordingly disallowed.

The decision being given on an issue of town and country planning principles the Board does not propose to comment on the merits or demerits of either of the plans submitted by the appellant.

No order as to costs.

Appeal disallowed.

Wood *v.* Horowhenua County.

Town and Country Planning Appeal Board. Wellington. 1958. March 21.

Building Permit—Dairy or Tearoom with Residential Quarters Near Beach and adjoining Public Parking Area—Area zoned as "Residential"—Tearoom adding to, not detracting from, Amenities of Locality—Permit granted—Use of Site for Tearoom to be Conditional Use only—Town and Country Planning Act 1953, s. 38 (2).

The appellant was the lessee of a property on the Waikanae Beach, being Lot 59 on Deposited Plan No. 7203 Waimea Road, Waikanae Beach. He applied to the respondent Council for a permit to erect a tearoom or dairy combined with residential quarters on this property but his applications were declined under s. 38 of the Act on the grounds that the proposed building would be a detrimental work within the meaning of s. 38 of the Act as the property in question was in an area zoned as residential. This appeal followed.

Judgment of the Board was delivered by

REID S.M. (Chairman). After hearing evidence adduced and the submissions of counsel the Board finds:—

1. The appellant's property has a frontage to Waimea Road and its western boundary adjoins a public parking area created by the Council. Dressing sheds are also erected on this area. A high macrocarpa hedge divides the two properties.

2. That this parking area and the beach at this point are extensively used by motorists both during the week, at weekends and on public holidays. The nearest commercial zone is three-quarters of a mile away in Rauparaha Street though there is a small general store on a motor-camp site about three chains from the appellant's property.

3. By reason of the proximity of the car park and dressing sheds to this property it cannot be considered as a desirable residential site.

4. That the use that is obviously made by the public of the parking area indicates that a tearoom in the immediate vicinity would not detract from but would rather add to the amenities of the locality.

The appeal is allowed.

The Board directs that a building permit for a tearoom with residential facilities is to be issued to the appellant.

The Board does not propose to alter the zoning. The use of the site for the purposes of a tearoom is to be a conditional use only. The site is not to be used for any other commercial purpose without the authority of the respondent Council.

No order as to costs.

Appeal allowed.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Life of a Lawyer.—A contributor, picking up during a rare moment of idleness and curiosity a carefully covered exercise book marked "Social Studies," owned and edited by his son, now in Standard 3, found in the section headed "How People Earn Their Living in our District" a succinct exposition on "The Lawyer":

> "A Lawyer go's to work at about 8 to 9 o'clock in the morning, and comes home at about 6 o'clock. If he has some special thing he may not be home until 11 at night. Most men have their own Lawyers, because if a carpenter built a house and a big wind came and blew it down the man who owned the house would go to his Lawyer and he would fix up his worrys. A Lawyer not like other men does not get paid by a ferm. The other people he works for pay him. If he does not work—No pay."

This statement, even if over-simplified, seems a reasonably accurate summation of the position, even if the final conclusion is open to challenge.

Social Notes from All Over.—A recent issue of the *Evening Post* includes in its "Personal Column" a reference to two named and described persons charged with breaking and entering and remanded to a later date. This has caused some speculation whether it illustrates some implementation of the policy of the Justice Department that those who are associated with crime should not be given an inferiority complex through loss of social prestige. The movements, even by the Lyttleton Ferry, of merchant adventurers keep the public well-informed through this column of the inner workings of the commercial world; and, in principle, there seems no reason why the movements of transgressors should be confined to such publicity as is afforded by the Court hearing and its finding.

Without Interruption.—"Escrow" in the *Solicitors' Journal* (10/5/58) relates an anecdote of Sir W. Grant, a former Master of the Rolls, said to be not only the most silent but the most patient of Judges. He had listened contentedly for two days to argument upon the meaning of an Act of Parliament, and when counsel had finished he said: "Gentlemen, the Act on which the pleading has been founded is repealed." This is an essay into quiet retribution that Stanton J. might well have enjoyed.

The Flaws of Legal Aid.—In April, the Lord Chancellor, asked to consider in the House of Lords a legally aided case in which Mr Justice Roxburgh had said that there had been systematic fabrication of evidence by the plaintiff, said he had done so, and found that The Law Society's committee had acted entirely properly and correctly throughout. Both the defendants and counsel and solicitor acting for the plaintiff had known that the question of false evidence and faked exhibits would be strongly raised, but the defendants had not exercised their right to approach The Law Society for discharge of the legal aid certificate; indeed, they had made an offer to settle the claim. The plaintiff's advisers had rightly considered it their duty to continue to represent him. Dealing with the frequent criticism that the opponent in a case where legal aid had been provided often had to bear the whole costs himself, the Lord Chancellor went on to say that he was still unable to commend any method under which that position could be alleviated. In a population of 50 million people there were bound to be liars, and, if a scheme was created to help people to establish their legal rights, it was impossible entirely to avoid dealing with those liars. The law had created an admirable system for detecting liars when the matter came into court: the difficulty was to find a system which would detect them at an earlier stage. That, however, was a problem which he would have constantly in mind.

This Happy Breed.—Scriblex notes that Lord Evershed M.R. has suggested in *Racecourse Betting Control Board* v. *Young* (*Inspector of Taxes*) [1958] 2 All E.R. 385, 390, that the operation of totalisators and the improvement of breeds of horses were closely linked. "If it is indeed' permissible to cite from the work of a living historian, Professor Brogan, I cite this passage from *An Introduction to American Politics*, p. 153:

> "For although it is well known that the object of horse-racing is to improve the breeds of racehorses so that they may run faster in other races, this activity has historically been associated with wagers upon the success of the endeavours."

Yet if the purposes are closely linked it does not follow that they are the same." This may be true enough, but what we should like to know—if only from time to time—is what the "other" races are in which the improved racehorses are to run faster.

The Case of the Closeted Lady.—What may be known to mnemonically-minded law students as the case of the closeted lady is now reported under *Sayers* v. *Harlow Urban District Council* [1958] 2 All E.R. 342. It will be recalled that the plaintiff, having paid her penny, found herself locked in the cubicle of a public lavatory. The door had no handle, the attendant was elsewhere. After trying for some ten to fifteen minutes to attract attention, she endeavoured with the assistance of the seat and the cistern-pipe to hoist herself over the seven-foot door, but decided that the feat was beyond her acrobatic attainments. In her downward retreat, she placed weight on the toilet-roll, fell, and injured herself. The Court of Appeal (Evershed M.R., Morris and Ormerod L.JJ.) refused to accept the proposition that she had voluntarily embarked upon a dangerous manoeuvre; but the Master of the Rolls gravely observed—on this all-too-serious topic—"The toilet roll, true to its mechanical requirement, rotated, and that unfortunately disturbed her equilibrium." What also would have disturbed her, even if only subsequently, was the Court's finding, that, in the extrication process from her alpine position, she had been careless in placing faith and weight on the rotating roll, and, for that failure, must be held to be 25 per cent. at fault, and her damages reduced accordingly. Many a New Zealand jury has set a lower percentage for a graver sin.

MR A. L. TOMPKINS, Q.C.

The First Silk from a Provincial Centre.

The first barrister in New Zealand practising outside the four main metropolitan centres to exchange the stuff gown for silk, Mr A. L. Tompkins, of Hamilton, was called to the Inner Bar at a function in the Supreme Court in the Waikato provincial capital on June 9. Mr Justice Turner presided at the sitting of the Court, and the motion for the admission of Mr Tompkins was supported by three other Queen's Counsel—the Attorney-General, the Hon. H. G. R. Mason, Mr L. P. Leary, of Auckland, and Mr R. Hardie Boys, of Wellington.

Others present included the Parliamentary member for the district, Dame Hilda Ross and a large representation of the profession in Hamilton. A notable feature was the number of country practitioners who came from widely-scattered centres to honour the occasion. Among the new Queen's Counsel's family who witnessed his admission were his sons, Messrs Roger and David Tompkins, who are themselves barristers and solicitors.

Mr Tompkins, from his place with the Outer Bar, informed the Court that he had received from the Attorney-General the Commission of his appointment as a Queen's Counsel. This he read and presented to His Honour who then invited him to read and sign the traditional declaration. The document having been subscribed and witnessed, Mr Justice Turner handed to Mr Tompkins the Patent of Appointment, signed by the Governor-General, and the new Queen's Counsel then, at the invitation of His Honour, took his seat within the Bar, with the customary obeisance to the Bench, his fellow Queen's Counsel, and the Outer Bar. Mr Justice Turner, congratulating Mr Tompkins on his appointment in the name of Bench and Bar said he had been very happy indeed to have the pleasure of calling him to take his place at the Inner Bar, and he was sure that Mr Tompkins's pride would be shared by all his professional brothers.

Mr Tompkins, said His Honour, was the first Queen's Counsel to be appointed outside the four largest cities and the ceremony comprised a recognition of the work and able service given to the public for which the Hamilton Bar had become known.

"The fact that you have been called to this distinguished office marks you as one of the leaders in your profession", said His Honour, addressing Mr Tompkins. "The Letters Patent of Queen's Counsel are not given to all who are ambitious enough to apply for them. A combination of professional skill, resolution and courage, industry and application and, above all, integrity, is required in a Queen's Counsel. These qualities are to be found combined in you".

Mr Tompkins could feel honoured that so many local and visiting counsel had attended the function, and was entitled particularly to appreciate the attendance of the Attorney-General and Messrs Leary and Hardie Boys, as might also the members of the Hamilton Bar and the public.

Mr Tompkins was born at Feilding sixty-three years ago, and was educated at Hamilton High School and Auckland University College, where he graduated LL.B. He commenced practice with Mr C. B. Wake in Hamilton in 1922 and has practised continuously in that city since. In spite of the demands of a wide practice, with the emphasis on employers' liability and motor-accident cases, Mr Tompkins found time for service in the councils of the profession. He served from 1940 to 1942 as president of the Hamilton District Law Society and as a member of the Council of the New Zealand Law Society, and in 1952 he represented the Law Society at the International Bar Conference in Madrid. His public activities include a term of four-and-a-half years on the Hamilton City Council and a close association with the Anglican Diocese of Waikato and the Board of Governors of the Waikato Diocesan Girls' School.

The family connection with the firm of Tompkins and Wake, from which he has now of necessity withdrawn, will be maintained by his two sons.

Rules Committee, 1958-1960.—Pursuant to s. 2 of the Judicature Amendment Act 1930, the Rt. Hon. the Chief Justice has appointed Mr Justice K. M. Gresson, Mr Justice Hutchison, Mr Justice McGregor, Mr Justice Shorland, and Messrs A. M. Cousins, W. E. Leicester, and F. C. Spratt to be members of the Rules Committee, each to hold office until December 31, 1960. The permanent members are the Rt. Hon. the Chief Justice (Sir Harold Barrowclough, K.C.M.G.) and the Hon. the Attorney-General (Mr H. G. R. Mason Q.C.).

"**Knowingly.**"—"We think that the clear meaning of the section [s. 4 Explosive Substances Act 1883 (U.K.)] is that the person must not only knowingly have in his possession the substance but must know that it is an explosive substance. It seems that it is an ingredient in the offence that he knew it to be an explosive substance. If, of course, evidence is given that the man had the substance in his possession, and evidence of circumstances which give rise to a reasonable suspicion that he had not got it for a lawful object, the jury are then entitled to infer that he knew it was an explosive substance. We think that the proper direction to give to a jury in this case is that they must first be satisfied that he had the substance in his possession; secondly, that they must be satisfied that it was in his possession under circumstances such as to give rise to a reasonable suspicion that he had it in his possession for an unlawful object; and then that, if they are so satisfied, they can infer that the man knew it was an explosive substance. It is not necessary to show that he had any particular chemical knowledge. What he had in his possession may be gelignite, dynamite or gunpowder, but, if he had it in his possession under such circumstances as to give rise to a suspicion that he had it for something other than a lawful object, it is only a short step for the jury, taking into account all the circumstances, to consider that he knew quite well he had it in his possession for an unlawful purpose"—Lord Goddard C.J. in *R.* v. *Hallam* [1957] 1 Q.B. 569, 572; [1957] 1 All E.R. 665, 666.