Mutual mistake is not the same as common mistake. Mutual mistake is where the parties misunderstand each other — where they are at cross purposes. The judge held that this case involved mutual mistake, i.e., by the banker and the payee that the cheque was valid when it was not. Assuming, however, that the Judge is referring to the *doctrine* of mutual mistake it is difficult to see where the parties actually misunderstood each other or where they were at cross purposes. It would seem, rather, that the mistake was about the same thing, i.e. the validity of the cheque and that the judge might have meant that it was common mistake where the fundamental assumption on which the agreement was based was proved to be false.

Unilateral mistake is where only one of the parties is mistaken. This argument was not presented in the Supreme Court. The mistake on the part of the bank was when it did not notify the teller that the cheque had been countermanded and then proceeded to pay out on the cheque as if it was valid. The judge found that " notice to the bank was notice to all its employees" and this is the same type of situation as in *Curtice* v. *London City and Midland Bank* [1908] 1 K.B. 293 where it was owing to the negligence of the bank officials that notice of the customer's desire to stop the cheque was not received in time. There is no question that payment by the bank in this case was a mistake. What, then, was the position of the defendant, the payee? The magistrate did not find fraud on the part of the payee and the judge accepted this. However, it is suggested that the payee's actions were as close to fraud as they were to mistake. He knew that the drawer of the cheque did not want him to cash the cheque; he knew that it was going to be stopped and he still attempted to have the cheque cashed as soon as the bank opened. It was only due to negligence on the part of the bank that the cheque was, in fact, cashed. In short, the actions of the payee cannot be seen in the light of any moral rectitude and the "reasonable person" in the full knowledge of the circumstances might well have complied with the wishes of the drawer of the cheque and not presented it until the question of the broken-down van was settled.

There are three separate kinds of mistake in contract law which must be distinguished from each other. Should *Anderson* v. *Southland Savings Bank* go to the Court of Appeal it should be instructive to see the way in which they approach the whole question.

M. J. B. Arthur.

CRIMINAL LAW

Crimes — attempts

The decision of the Court of Appeal in *R.* v. *Donnelly* [1970] N.Z.L.R. 980 has been the subject of much discussion. Donnelly was acquitted of attempting to receive stolen goods, when the

goods in question had been repossessed by the police, on the ground that what he intended to do would not have been an offence had he accomplished it. This decision was recently approved and applied in *R.* v. *Smith* [1973] 2 W.L.R. 942, affirmed by the House of Lords in *Haughton* v. *Smith* [1974] 2 W.L.R. 1, where the van and goods which Smith attempted to receive were already in the custody of the police.

The question raised in *Donnelly* has been the subject of a report by the Criminal Law Reform Committee entitled "The Law relating to the Frustration of Attempts by Impossibility", January 1973. The Committee concluded that no change was needed in the general law of attempts, despite difficulties encountered in the interpretation of section 72 (1) Crimes Act 1961 as to the difference between "factual" and "legal" impossibility; but it recommended an amendment to sections 258 and 261 "that everyone who receives anything that he believes to have been obtained by crime commits the offence of receiving unless when he receives it he believes that it has been restored to its owner." (p. 22)

Crimes — theft; obtaining credit fraudulently

Two recent English decisions are helpful in interpreting sections 220 and 247 Crimes Act 1961.

In *R.* v. *Feely* [1973] 2 W.R.L. 201 the defendant, a branch manager, had borrowed money from his employers, leaving an IOU, although this was contrary to a company directive. The company at the time owed him a larger sum and he had every intention of repaying the money. The Court of Appeal held that "dishonestly" in section 1 (1) Theft Act 1968 (U.K.), which corresponds to "fraudulently" in section 220 (1) Crimes Act 1961, is to be read with its ordinary meaning and it is for the jury to decide whether or not the defendant has acted "dishonestly". The Court doubted the decisions in *R.* v. *Williams* [1953] 1 Q.B. 660 and *R.* v. *Cockburn* [1968] 1 W.L.R. 281 and held that an act to which no fraud or moral obloquy attaches ought not to be considered as theft.

In *D.P.P.* v. *Ray* [1973] 3 W.L.R. 359 the defendant and friends had ordered a meal intending to pay for it; had then changed their minds but continued to sit in the restaurant until the waiter left when they ran out. The House of Lords, reversing the decision of the Divisional Court of the Queen's Bench Division *sub. nom. Ray* v. *Sempers* [1973] 1 W.L.R. 317, held that his conduct was a continuing representation of his present intention to pay and therefore constituted a "deception" under section 15 (4) and 16 (1) Theft Act 1968 (U.K.).

Crimes — threatening to kill or do grievous bodily harm

In *R.* v. *Lloyd* [1973] 2 N.Z.L.R. 486 the Court of Appeal, interpreting section 306 (a) of the Crimes Act 1961, held that the threat "to kill or do grievous bodily harm to any person" need not be made to the person threatened. Sections 306 (a) and 306 (b) are to be construed in the same way and such an interpretation of section 306 (b) is supported by convictions in

R. v. *Syme* (1911) 6 Cr. App. Rep. 257 and *R.* v. *Solanke* [1970] 1 W.L.R. 1 under a provision very similar to section 306 (b). The decision in *R.* v. *Millhouse* [1965] N.Z.L.R. 893 was accordingly overruled.

Crimes — unlawful assembly

One section of the decision in *Kamara* v. *D.P.P.* [1973] 3 W.L.R. 198 will be of interest in New Zealand at the present time, namely that dealing with "unlawful assembly". In dismissing the appeal of some students who had occupied a building, the House of Lords held that to establish the offence of unlawfully assembling in such a manner as to disturb the public peace it was not necessary that fear should be engendered in persons beyond the building — the essential element is the presence or likely presence of innocent third parties. This decision may be of assistance in interpreting the words "persons in the neighbourhood of the assembly" as they appear in section 86 (1) Crimes Act 1961.

Crimes — defences of automatism and insanity

In *R.* v. *Quick* [1973] 3 W.L.R. 26 the arguments for and development of a defence of automatism were reviewed, the New Zealand decision in *R.* v. *Cottle* [1958] N.Z.L.R. 999 being applied. Quick had pleaded the defence of automatism, calling medical evidence that his taking insulin, a quantity of alcohol and little food had induced a condition of hypoglycaemia; but the trial judge refused to allow this defence to go to the jury. On appeal, it was held that "a malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease" so as to bring the condition within that "disease of the mind" necessary under the *McNaughton* rules for a defence of insanity, and that in such cases the defence of automatism should be allowed to go to the jury.

Crimes — defence of autrefois convict

The circumstances in which a plea of previous conviction under section 359 (1) Crimes Act 1961 will succeed were discussed in *Police* v. *Lee* [1973] 1 N.Z.L.R. 13. Lee had been charged on three counts (a) that he had in his possession lysergide for the purpose of selling [under section 5 (1) (e) Narcotics Act 1965], (b) that he had in his possession lysergide [under section 6 (1)] and (c) that he had in his possession a pipe for using cannabis [under section 7 (1) (b)]. He pleaded guilty to (b) and (c), electing trial by jury on (a). He was then sentenced on (b) to three months' imprisonment; and when he was later found guilty on (a) he pleaded successfully that, under section 359 (1) Crimes Act 1961, his previous conviction under (b) was a bar to his indictment on (a) since (a) was substantially the same offence as (b), with but a statement of intention added.

Crimes — defence of lack of mens rea

The question of the importance of considering mens rea in construing statutes imposing strict liability was again discussed in *Labour Dept.* v. *Green* [1973] 1 N.Z.L.R. 412. The appellant, because of convictions for criminal offences in England, was a prohibited immigrant under the section 5 (1) (a) Immigration Act 1964. It was argued in his defence that he had not known of the provision which designated him as such and that there was therefore an absence of mens rea on his part. McMullin J. held, explaining *Sione* v. *Labour Dept.* [1972] N.Z.L.R. 278, that it was the appellant's intention to land in New Zealand and his landing there which constituted the mens rea; to plead his ignorance of the law could be no excuse. The term "unlawfully" in this context McMullin J. held to mean no more that "in breach of the Immigration Act" and to give no indication of the need or otherwise for mens reas as an ingredient of the offence.

A similar warning against confusing a lack of mens rea with ignorance of the law was given in *Police* v. *Taggart* [1973] 1 N.Z.L.R. 732. The defendant had administered a statutory poison not knowing it was one. Woodhouse J. held that there was no lack of mens rea — supposing that mens rea were a necessary ingredient of his offence — since he had administered the poison intentionally; there was simply ignorance of the law.

Criminal Offences — Police Offences Act 1927, s. 48

In *Police* v. *Drummond* [1973] 2 N.Z.L.R. 263 the Court of Appeal held that to be "obscene" under section 48 Police Offences Act 1927, language used in a public place does not have to have a tendency to deprave or corrupt but should simply be calculated to offend those who hear it, this being the ordinary and natural meaning of the word. It may be noted that a similar application of the ordinary and popular meaning was given to "indecent performance" in section 124 (1) (c) Crimes Act 1961 in *R.* v. *Dunn* [1973] 2 N.Z.L.R. 481 where it was held that it was not necessary to show that the performance tended to deprave or corrupt.

Criminal Offences — Police Offences Act 1927, s. 34

In *Police* v. *Lee* [1973] 1 N.Z.L.R. 470 Moller J. held that section 34 Police Offences Act 1927 ("incites disorder, violence or lawlessness") is to be read subject to the maxim *noscitur a sociis* and that to justify a conviction under this section any disorder that is the subject of incitement must at least be coloured with elements of violence and/or lawlessness.

M. A. Mulgan.