New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

" The essence of crime prevention is to make it natural, reasonable, and satisfying to live within the law."

—STATE OF NEW JERSEY JUVENILE DELINQUENCY COMMISSION REPORT.

VOL. XVII. TUESDAY, JUNE 3, 1941 No. 10

INCOME-TAX: INFANT BENEFICIARIES.

IN concluding his judgment in *Barling* v. *Commissioner of Taxes*, [1940] N.Z.L.R. 831, 838, Mr. Justice Ostler said that it was unnecessary to express any opinion on a further point which had been raised by the Commissioner—*viz.*, that, even if the bequest of interest to children on the presumptive shares was a vested gift, interest would not be assessable under s. 102 (*a*) of the Land and Income Tax Act, 1923, because the children were unable to give a valid receipt for such interest. His Honour added that the question whether a vested gift of interest to children is assessable under s. 102 (*a*) or s. 102 (*b*) could be determined when it arose. That question, which arose in *Doody* v. *Commissioner of Taxes*, has now been considered by Mr. Justice Smith. This decision is one of great importance to trustees who are concerned with the assessment of tax on the income of infant beneficiaries.

Section 102 of the Land and Income Tax Act, 1923, was amended by s. 27 of the Land and Income Tax Amendment Act, 1939, following the decision of Sir Michael Myers, C.J., in *Scott* v. *Commissioner of Taxes*, [1939] N.Z.L.R. 246; but the amendment was not considered in *Barling's* case in which the assessment was made before the coming into operation of such amendment.

In *Doody's* case, the appellants were the administrators of an intestate who was survived by a widow and two infant sons, aged eight and six years respectively; consequently, under the Administration Act, 1908, his estate was divisible into three parts of one-third each. For the income-years ended March 31, 1938 and 1939, following *Barling* v. *Commissioner of Taxes* (*supra*), the Commissioner assessed under s. 102 (*b*) of the Land and Income Tax Act, 1923, the income actually applied for the maintenance and education of the two children during each of the named income years, and allowed the exemptions permitted thereon. The Commissioner assessed the balance of the income not so applied under the first part of s. 102 (*b*): this assessment carried no exemption.

For the income-year ended March 31, 1940, the Commissioner assessed the income actually applied for the benefit of the two minors pursuant to the provisions of s. 27 (*b*) of the Land and Income Tax Amendment Act, 1939, which amended s. 102 (*b*) of the principal Act, and which had then come into force; and he assessed the balance of the income not applied for the benefit of the minors pursuant to the first part of s. 102 (*b*). The administrators objected to all the assessments. They claimed that each infant beneficiary had an indefeasible vested interest in the estate, both as to capital and income, and that the whole of the share of income whether applied for his benefit or not, should be assessed under the provisions of s. 102 (*a*).

Paragraphs (*a*) and (*b*) of s. 102 of the Land and Income Tax Act, 1923, with incorporation of the amendments affected by s. 27 (*b*) of the Amendment Act, 1939, now read as follows:

> (*a*) If and so far as the income of the trustee is also income derived by a beneficiary entitled in possession to the receipt thereof under the trust during the same income year, the trustee shall in respect thereof be deemed to be the agent of that beneficiary, and shall be assessable and liable for income-tax thereon accordingly, and all the provisions of this Act as to agents shall, so far as applicable, apply accordingly. [Where any income is derived by a beneficiary as aforesaid subject to a condition, obligation, or trust requiring him to maintain or support any other person (whether out of the income so derived or otherwise) and that beneficiary would, apart from that condition, obligation or trust, be entitled to a special exemption in respect of the maintenance and support provided by him for that other person, that beneficiary shall be assessed for income-tax and shall be entitled to the same special exemptions as if he were beneficially entitled to the income free from any such condition, obligation or trust.]
>
> (*b*) If and so far as the income of the trustee is not also income derived by any beneficiary as aforesaid, the trustee shall be assessable and liable for income-tax on that income in the same manner as if he was beneficially entitled thereto, save that the rate of tax shall be computed by reference to that income alone, and that [the trustee shall not be entitled to any deduction by way of special exemption:
>
> Provided that in any case where a trustee is required or is empowered at his discretion to pay or apply income derived by him to or for the benefit of specified beneficiaries or to or for the benefit of some one or more of a number of specified beneficiaries or of a special class of beneficiaries, a beneficiary in whose favour the trustee so pays or applies income shall be deemed to be entitled in possession to the receipt of the amount paid to him or applied for his benefit during the income year by the trustee under the trust.]

The Commissioner admitted that the shares of the infants in the intestate's estate were indefeasibly vested; and there was no doubt that the administrators who had paid the debts were now trustees of the intestate estate for the beneficiaries therein. As His Honour pointed out, the terms of the trust did not arise under any instrument; they were implied by law; and they arose from the fact that an infant cannot give his trustee a valid discharge for the capital or income of the trust property even though it be held absolutely for the infant. If the capital or income were paid over by the trustee to the infant's guardian, the guardian would become the trustee thereof for the infant; because, even where the guardian is appointed by will, he is a trustee and subject to the control of the Court. His Honour cited *Mathew* v. *Brise* (1851) 14 Beav. 341, 345; 51 E.R. 317, 319, an action for accounts, in which Sir John Romilly, M.R., said that the relation of guardian and ward is strictly that of trustee and *cestui que trust*. He referred to a dictum in *Duke of Beaufort* v. *Berty*, (1721) 1 P. Wms. 704, 705; 24 E.R. 579, of Lord Macclesfield, M.R., who was reported to have said with some warmth, "Guardians are but trustees . . . and a guardianship is most plainly a trust." The Master of the Rolls added that he considered that of all the property which a guardian gets into his possession in the character of a guardian, he is a trustee for the benefit of the ward.

Mr. Justice Smith concluded that as the infant could no more give a valid discharge to his guardian than to the first trustee of the property, the appellants held the corpus of each share upon trust absolutely for the beneficiary of that share, and upon trust to pay and transfer that share to each beneficiary upon his attaining the age of twenty-one years or to his personal representatives if he should die before attaining that age. Pending the arrival of the period of distribution, the property is held by the trustees with power to manage the same. That power includes, in His Honour's opinion, the authority to apply the income of the share of each infant towards his maintenance, education or benefit under the powers conferred by s. 113 of the Trustee Act, 1908. The terms of s. 113 (1) show that the section applies where property is held by trustees either absolutely or contingently, and the reference in subs. 2 to "the instrument (if any) under which the interest of the infant arises" shows that the section applies even where the trust does not arise under any instrument. In the result, the trustees may apply any income at their discretion, in any year, towards the infant's maintenance, education or benefit and must accumulate the residue of the income for the infant or his personal representatives if he should die before attaining twenty-one years of age.

The income of each infant beneficiary in the present case is clearly income derived by him within the meaning of the term "derived" in s. 90 of the Land and Income Tax Act, 1923, though it is, of course, also income derived by the trustee. The question for decision was whether the income so derived by each infant is derived by "a beneficiary entitled in possession to the receipt thereof under the trust during the same income year" within the meaning of those words in s. 102 (*a*). On this point His Honour said:

> In my opinion, such a beneficiary must be one who has not only a right to the income which is absolutely vested but one who is entitled to the actual receipt thereof under the terms of the trust during the income year in question. The language used indicates, I think, that the Legislature intended to confer the benefit of the exemptions permitted by s. 102 (*a*) only upon those beneficiaries who are entitled to receive their income under a trust in the same way as taxpayers are entitled to receive their salaries or wages.

The learned Judge said that the words "entitled in possession" may be ambiguous, and they have usually to be resolved by their context. He referred to *In re Yates's Trust* (1851) 21 L.J.Ch. 281, where the words used in a will were "before being *entitled in possession* to their respective shares under this my will." Parker, V.C., in referring to the italicized words, thought the words "entitled in possession" were not more ambiguous than the word "payable" (upon which *Hallifax* v. *Wilson*, (1809) 16 Ves. 168; 33 E.R. 947, turned). He thought that "payable" might be taken in two senses: one the literal signification, the other short of its full meaning, the latter being the sense in which it was construed in *Hallifax* v. *Wilson*. The words "entitled in possession" were open to the same observation: that is, they were capable of two meanings: one, the being in the actual possession of the subject; the other, in a subordinate sense short of its full meaning. Upon the settled necessity of vesting property at as early a period as possible, Sir James Parker decided that "entitled to possession" was in reality equivalent to "vested."

His Honour next referred to *West* v. *Miller*, (1868) 37 L.J. Ch. 423, 426, where Malins, V.C., said that in the construction of wills the words "entitled in possession," like the words "payable" or "receivable," were generally to be taken as equivalent to "vested." His Honour did not think that that construction could be applied in the construction of the Land and Income Tax Act, 1923, in the context of s. 102 (*a*). In his opinion, that context indicates that the phrase has the literal signification spoken of by Parker, V.C., in *In re Yates's Trust* (*supra*):

> The governing context lies in the words "the receipt thereof under the trust during the same income year." An infant who cannot demand the receipt of his income or sue for it but who must submit to the accumulation of any balance unexpended by the trustee on his behalf, cannot be said to be entitled in possession to the receipt of that income under the trust during the income year.

His Honour's view was implied in the view taken by Sir Robert Stout, C.J., and Hosking, J., with whom Herdman, Salmond, and Reed, JJ., agreed, in a Full Court in 1923, in *Dalrymple* v. *Commissioner of Taxes*, reported [1934] N.Z.L.R. 366*n*, which was an interpretation of s. 99 (*a*) of the Land and Income Tax Act, 1916 (with which s. 102 (*a*) of the Land and Income Tax Act, 1923, corresponds). Sir Robert Stout, C.J., said:

> The only question that the Court has to determine is this. Is this income so provided to be paid—to use the words of the statute—derived by a beneficiary entitled in possession to the receipt thereof under the trust during the same income year? That cannot be denied. The income was received by the trustee from the farm, and they distributed it as the deed provided, and they distributed it to the persons entitled to its possession. That being so, it is, in my opinion, clear that the provisions of the deed come within the very words of para. (*a*) of s. 99. If they do not come under para. (*a*), on what ground can it be said they do not come under it? The only thing that can be said has been said by counsel for the respondent, that the beneficiaries were not entitled in possession to the income. But they were entitled. Who else was entitled? They could have sued the trustees if the trustees had not paid them the income.

In the same case, Hosking, J., stated the position of the beneficiaries, and then said:

> From all this it appears to me that the income sought to be assessed is entirely within para. (*a*). The expression a beneficiary entitled in possession to the receipt of income under trust means to all lawyers that the beneficiary is

absolutely and immediately entitled to have his income paid to him as the owner thereof, although the actual receipt of it be obtainable only through the trustee.

His Honour Mr. Justice Smith, in commenting on these dicta, said that while the precise question before the Court in the present case was not before the Court in *Dalrymple's* case, he thought that the judgments of Sir Robert Stout, C.J., and Hosking, J., interpret s. 102 (*a*) in a manner with which His Honour himself was in respectful accord, and with an authority which was binding on him even if he were to hold a different opinion. Furthermore, this was the interpretation which stood when the Legislature enacted the amendments of the section in 1939 and His Honour thought it had received legislative approval. The amendment made by the Act of 1939 to para. (*a*) of s. 102 showed that the Legislature regarded para. (*a*) as applying to a beneficiary who received income in such a way as to enable him to apply it himself to the maintenance of another person.

In dismissing the appeal, His Honour said :

> In the present case, the infant beneficiaries are not entitled to demand or sue for their income and must submit to the accumulation of any unexpended balance until they attain the age of twenty-one years respectively. I am accordingly of opinion that the appellants are not entitled to claim the benefit of s. 102 (*a*) and that the assessments made by the Commissioner must stand.

There was no controversy in *Doody's* case about what was income, or whether it was income derived by the trustee. What was in controversy was whether or not it was also derived by a beneficiary entitled under the trust in possession to the receipt thereof, during the same income year. The taxpayer claimed that it was so derived by the beneficiary; and the point of that claim was that, if it succeeded, the beneficiary would have been entitled to the benefit of the deduction of £200 by way of special exemption conferred by s. 74 of the Land and Income Tax Act, 1923 (as amended), with the result that no tax would be payable if the beneficiary's income did not exceed £200.

Unless the same point is referred to the Court of Appeal, the decision settles a question that had long been agitating trustees (including the representatives of deceased estates) and their legal advisors; and it is curious that the point has not previously been decided by the Court. It was raised, as we have indicated, in *Barling's* case (*supra*), but the Court found it unnecessary to decide it. It is perhaps a permissible conjecture to say that the Court was unable to reach a conclusion favourable to the taxpayer.

In a case where the infant is absolutely entitled to the income, although it is in the possession of the trustee, that income is, nevertheless, clearly the infant's income, just as much as if he had actually received it. No other person has any beneficial interest in it. It can never be taken away from him. In law, it would seem that the possession of the trustee is the possession of the beneficiary. In *Doody's* case, if the beneficiary had been twenty-one years of age, the income would have been assessed to the trustee under s. 102 (*a*) as agent for the beneficiary; with the result that he would get the benefit of the special exemption. Why should it be any different because the beneficiary happens to be, say, twenty years old? The reason for allowing the exemption in the one case, while denying it in the other, is purely because of the rule that, though the income belongs absolutely to the infant, it remains in the hands of the trustee—not because of any trust to accumulate, but because the beneficiary is under twenty-one and cannot give a valid discharge to the trustee. Indeed, it would appear that, if the infant beneficiary in that case attained the age of twenty-one years on, say, March 31, his income for the year ending on that date would be assessable under s. 102 (*a*), whereas if he attained that age on April 1, his income for the year ending on the previous March 31 would be assessable under s. 102 (*b*); in other words, the personal exemption provision would apply in the one case but not in the other.

These results appear to be anomalous, and suggest that, in view of the construction of the section shown by *Doody's* case, the matter might well receive consideration by the Legislature.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
March 31;
April 30.
Myers, C.J.
Ostler, J.
Smith, J.

HOLE v. HOLE.

War Emergency Legislation—Courts Emergency Powers—Divorce and Matrimonial Causes—Alimony and Maintenance Order by Supreme Court for Maintenance in Divorce—Whether a "Judgment"—Writ of Attachment for Disobedience to such Order—"Execution on" or "Enforcement of" Judgment—Whether substantive Application under Regulations necessary for Leave of "the appropriate Court" or whether Application under R. 392 of Code of Civil Procedure suffices—Jurisdiction—Whether Court has Power to make Payment of Costs or Compensation a Condition Precedent to Contemnor's release from Prison—Court's power to make orders for Maintenance in Divorce by Consent of Parties—Courts Emergency Powers Regulations, 1939, Regs. 2, 4—Code of Civil Procedure, RR. 336, 392.

Appeal against two orders made by the Court in its divorce jurisdiction, subsequent to the judgment of *Blair*, J., reported [1940] N.Z.L.R. 722; the first, an order made on July 21, 1940, granting the respondent (the former wife) liberty to issue a writ of attachment against the appellant (the former husband) for his contempt of Court in disobeying an order for permanent maintenance made by consent on June 29, 1937; and the second, an order made on October 11, 1940, granting an order for the imprisonment of the appellant for one month subject to certain conditions for the appellant's release.

It had been held by *Blair*, J., that Reg. 4 (*a*) of the Courts Emergency Powers Regulations, 1939, which forbad any one, without the leave of the appropriate Court, "to proceed to execution on or otherwise to the enforcement of any judgment," did not apply to attachment proceedings.

On appeal from those orders,

Pope, for the appellant; *Leicester*, for the respondent.

Held, per totam Curiam, 1. That an order made by the Supreme Court for maintenance under the Divorce and Matrimonial Causes Act, 1928, is a "judgment" within the meaning of the Courts Emergency Powers Regulations, 1939.

In re A Company, [1915] 1 Ch. 520, and *Galbraith and McKenna* v. *McKenna and McKenna*, [1940] 4 All E.R. 303, applied.

Linton v. *Linton*, (1885) 15 Q.B.D. 239; *Re Otway, Ex parte Otway*, (1888) 58 L.T. 885; *Fenerty* v. *Fenerty*, (1907) 10 G.L.R.

6; *Eden* v. *Eden*, [1921] G.L.R. 504; and *Re Hedderwick, Morten* v. *Brinsley*, [1933] Ch. 669, referred to.

2. That a writ of attachment for contempt of Court in disobedience of such an order for maintenance is a proceeding "to execution on or otherwise to the enforcement of any judgment" within the meaning of the said regulations.

Bailey v. *Plant*, [1901] 1 K.B. 31; *Paterson's Tyre Service, Ltd.* v. *Evenden*, [1940] N.Z.L.R. 165, G.L.R. 79, and *Ingram* v *Ingram*, [1927] V.L.R. 335, applied.

3. That the "leave of the appropriate Court" is a condition precedent to the taking of any step by way of proceeding to execution or enforcement of such judgment.

Held, also, by *Myers*, C.J., and *Smith*, J. (*Ostler*, J., dissenting) That such leave should be obtained under a substantive application under the said regulations.

2. That a writ of attachment issued merely on an application for leave to issue it under R. 392 of the Code of Civil Procedure, no leave having been previously obtained under the said regulations is, therefore, invalid.

Hope v. *Carnegie*, (1868) L.R. 7 Eq. 254; *In re Holt* (*an Infant*), (1879) 11 Ch.D. 168; and *Taylor* v. *Roe*, [1893] W.N. 14, followed.

Per *Ostler*, J. (dissenting), That the granting of leave in the attachment proceedings constituted the "leave of the appropriate Court" within the said regulations, the learned trial Judge having treated the application under R. 392 as one also under the said regulations.

Held, further, *per totam Curiam*, That where a contemnor who has paid the arrears of maintenance owing to his wife in respect of which the writ of attachment was issued but not the costs, the Court has no power to order him to pay a sum of money as some recompense to his wife for the wrong done to her, or to make an order for his imprisonment conditioning his release upon the payment of such recompense.

Quaere, Whether the Court has power to make the payment of costs a condition precedent to the contemnor's release from prison.

Held, also, by Ostler and Smith, JJ., That the Supreme Court has power to make an order in divorce by consent for maintenance for the life of the wife.

Maidlow v. *Maidlow*, [1914] P. 245; *Smith* v. *Smith*, (1931) 47 T.L.R. 368; and *Hall* v. *Hall*, [1915] P. 105, applied.

Jackson v. *Mawby*, (1875) 1 Ch.D. 86; *Ayres* v. *Ayres*, (1901) 85 L.T. 648; *In re M.*, (1876) 46 L.J.Ch. 24; *Michelthwaite* v. *Fletcher*, (1879) 27 W.R. 793; *Rose* v. *Macdonald*, (1911) 30 N.Z.L.R. 741; and *Lodder* v. *Lodder*, [1924] N.Z.L.R. 355, referred to.

Rogers v. *Wood*, (1831) 2 B. & Ad. 245, 109 E.R. 1134, and *Farquharson* v. *Morgan*, (1894) 1 Q.B. 552, distinguished.

Solicitors: *Perry, Perry, and Pope*, Wellington, for the appellant; *Leicester, Rainey, and McCarthy*, Wellington, for the respondent.

Case Annotation: In re A Company, E. and E. Digest, Vol. 2, p. 152, para. 238; *Linton* v. *Linton*, *ibid.*, Vol. 27, p. 541, para. 5913; *Re Hedderwick, Morten* v. *Brinsley*, *ibid.*, Supp. Vol. 27, para. 4165a; *Bailey* v. *Plant*, *ibid.*, Vol. 5, p. 1035, para. 8467; *Hope* v. *Carnegie*, *ibid.*, Vol. 16, p. 67, para. 772; *Re Holt* (*an Infant*), *ibid.*, p. 57, para. 644; *Taylor* v. *Roe*, *ibid.*, p. 63, para. 710; *Maidlow* v. *Maidlow*, *ibid.*, p. 505, para. 5408; *Smith* v. *Smith*, *ibid.*, Supp. Vol. 27, para. 5410a; *Hall* v. *Hall*, *ibid.*, Vol. 27, p. 506, para. 5410; *Jackson* v. *Mawby*, *ibid.*, Vol. 5, p. 1023, para. 8350; *Ayres* v. *Ayres*, *ibid.*, Vol. 27, p. 545, para. 5955; *Re M.*, *ibid.*, Vol. 16, p. 87, para. 1089; *Michelthwaite* v. *Fletcher*, *ibid.*, Vol. 5, p. 1022, para. 8349; *Rogers* v. *Wood*, *ibid.*, Vol. 22, p. 126, para. 1025; *Farquharson* v. *Morgan*, *ibid.*, Vol. 16, p. 119, para. 170.

SUPREME COURT.
Wellington.
1941.
May 9.
Myers, C.J.

In re **NEW ZEALAND INVESTMENT TRUST, LIMITED.**

Company—Debentures—Compromise or Arrangement between Company and its Debenture Holders—"Arrangement"—Assets Insufficient to satisfy Debenture Holders' Debt—Unsecured Creditors Disregarded—Companies Act, 1933, s. 159.

The word "arrangement" in s. 159 of the Companies Act, 1933, is not limited to something analogous to "compromise."

In re Guardian Assurance Co., [1917] 1 Ch. 431, applied.

Where the assets of a company are insufficient to satisfy the debt of its debenture holders, the Court has power to disregard the unsecured creditors and to refrain from ordering a meeting of such creditors.

In re Tea Corporation, Ltd., [1904] 1 Ch. 12; *In re Brownfields Guild Pottery Society*, [1898] W.N. 80; *Re Oceanic Steam Navigation Co., Ltd.*, [1938] 3 All E.R. 740; and *In re City of Melbourne Bank, Ltd.* (*in liquidation*), (1897) 19 A.L.T. 80, applied.

Counsel: *Cleary* in support; *Spratt* for the Upper Ahaura Gold Dredging Co., Ltd. (in liquidation).

Solicitors: *Barnett and Cleary*, Wellington, for the New Zealand Investment Trust, Ltd.; *Alexander Jessep*, Wellington, for the Upper Ahaura Gold Dredging Co., Ltd. (in liquidation).

Case Annotation: In re Guardian Assurance Co., E. and E. Digest, Vol. 9, p. 657, para. 4377; *In re Tea Corporation, Ltd.*, *ibid.*, Vol. 10, p. 1057, para. 7395; *In re Brownfields Guild Pottery Society*, *ibid.*, p. 1056, para. 7389; *Re Oceanic Steam Navigation Co., Ltd.*, *ibid.*, Supp. Vol. 10, para. 7385a.

COMPENSATION COURT.
Dunedin.
1941.
May 1, 10.
O'Regan, J.

MELVIN v. STUART.

Workers' Compensation—Accident Arising out of and in the Course of Employment—Added Risk—Lorry-driver attending to repairs to Employer's Motor-car pursuant to express Instructions—Death at Railway-crossing through being struck by Train while so Engaged—Whether Statutory Breach an added unnecessary Risk—Workers' Compensation Act, 1922, s. 3, First Sched.—Government Railways Act, 1926, s. 29.

The deceased worker was employed as a lorry-driver. His employment included attending to running repairs to his employer's two trucks and his motor-car, as occasion arose. On the morning of his death, he was attending to repairs to the car under his employer's specific instructions. Before he had completed putting the car in order, the deceased drove it to a nearby sports-ground to inflate the tyres with a machine attached to one of his employer's trucks there. The deceased had difficulty in starting the car on his leaving the ground for his employer's garage; it stopped on the level railway-crossing over which he had to pass on his return; it was struck by a train, and he was killed.

It was contended that the deceased was employed as a lorry-driver only, and that even if he were employed to make repairs, in attempting to cross the railway line he committed a breach of s. 29 of the Government Railways Act, 1926, and hence added an unnecessary risk to his employment, so that the accident did not arise out of the employment.

C. J. L. White, for the plaintiff; *G. C. Cruickshank*, and *G. V. Murdoch*, for the defendant.

Held, That the accident occurred in the course of and arose out of the employment of the deceased for the reasons,

(1) That he was at the time obeying his employer's express instructions.

Vennell v. *Vallance*, (1902) 5 G.L.R. 46, 1 N.Z.W.C.C. 37, followed.

Dougherty v. *Milne*, (1912) 15 G.L.R. 270, 12 N.Z.W.C.C. 1, and *Public Trustee* v *Colonial Mutual Life Assurance Society, Ltd.*, [1922] N.Z.L.R. 925, G.L.R. 320, disapproved on this point.

(2) That s. 29 of the Railways Act, 1926, prohibiting, *inter alia*, the driving of any vehicle across a railway track when an engine, carriage or wagon is approaching within half a mile of the crossing, was irrelevant, as it was a prohibition enjoined on the public generally, and had no reference to the employment in following which the deceased met his death.

Dougherty v. *Milne*, (1912) 15 G.L.R. 270, 12 N.Z.W.C.C. 1; *Public Trustee* v. *Colonial Mutual Life Assurance Society, Ltd.*, [1922] N.Z.L.R. 925, G.L.R. 320; and *Millin* v. *Fowler*, [1926] N.Z.L.R. 372, G.L.R. 236, referred to.

Solicitors: *Stewart and Kelly*, Balclutha, for the plaintiff; *Cruickshank and Pryde*, Invercargill, for the defendant.

CONSCIENTIOUS OBJECTORS.

Provision of Alternative Service.

As the result of the amendment of the National Service Emergency Regulations, 1940 (Serial No. 1940/117), by Amendment No. 4 Serial (No. 1941/73), an anomalous—and to all right-minded people—a disturbing situation, has been overcome by the provision of the allotment to conscientious objectors of work of a civil nature and under civil control, of such a nature and upon such terms as to remuneration and conditions of service as the Minister of National Service may determine.

Under Regulation 21 (1) (*e*) of the National Service Emergency Regulations, 1940 (Serial No. 1940/117) it is established as a ground for a right of appeal against calling up for military service, that a man conscientiously objects to serving with the armed forces. Clause (2) provided that an appeal may be allowed on this ground if the Appeal Board is satisfied that the appellant has a genuine belief that it is wrong to engage in warfare in any circumstances. In particular, the Board could allow an appeal upon proof that the appellant had for a substantial period preceding the outbreak of the present war been a member of the Society of Friends or of the Christadelphian sect, and had during that time been actively associated with the body of which he was a member. In general, the Board had a discretion to accept active and genuine membership of any pacifist religious body as evidence of the appellant's convictions.

The National Service Regulations, while respecting conscientious objection to active military service, left it at that. The successful appellant was at liberty to carry on his ordinary avocation without any restriction, and without any obligation to do his part in his country's war-effort, even though that part may lie in non-military service. In effect, establishment to the satisfaction of an Appeal Board of conscientious objection gave to the objector a privileged position in the community. He had even greater immunity than a neutral, while he still retained the protection, advantages, and benefits attaching to his status as a British subject: he had the rights of a British subject, but was completely exempt from the responsibilities of a British subject, and this at a time when the Nation of which he claimed to be a member is fighting for its very existence. He could thrive under its flag; he obtained his "neutrality" by virtue of its legislation; and, in a total war, he stood aside while others gave their lives to assure him in his privileged position of pacific isolation.

Now, by virtue of Regulation 28A of the National Service Emergency Regulations, 1940, Amendment No. 4 (Serial No. 1941/73) if an Appeal Board is satisfied that the appellant holds a genuine belief that it is wrong to engage in warfare in any circumstances, it must allow the appeal; and in any other case where the Board is satisfied that the appellant holds a genuine belief that it is wrong to perform combatant duties in the Armed Forces, it must dismiss the appeal subject to the condition that the appellant may be employed only in non-combatant duties in the armed forces. In any other case, the Appeal Board must dismiss the appeal unconditionally. Regulation 21 (2), detailed above, is revoked; and, accordingly, proof of pre-war pacifist belief is not asked for. A genuine belief, *at the time of the appeal*, is substituted.

Where any such appeal has been allowed (whether before or after May 14, 1941, the date of the commencement of the regulation) the Minister of National Service may direct alternative civil employment of the person proved to hold a genuine belief that it is wrong to engage in warfare in any circumstances, even though the service be non-combatant in the Armed Forces. The Minister may direct his employment on work of a civil nature and under civil control of such a nature as the Minister thinks fit, or may direct that the appellant be allowed to continue in his existing employment or occupation upon or subject to such terms and conditions as the Minister thinks fit. For the purpose of giving effect to any direction given in relation to any appellant under the foregoing provisions the Minister may give such orders and directions as he thinks fit to the appellant or to any other person or class of persons.

If a man proves that he holds a genuine belief that it is wrong to perform combatant duties in the Armed Forces, he does not now escape his obligation to serve his country. The Appeal Board must direct that he be employed only in non-combatant duties in the Armed Forces, and machinery is provided to ensure that this shall be so.

There is indeed nothing objectionable in the taking of these extra powers by the State. The State has recognized that there are those who on religious grounds think it wrong to kill, and to resist force by force. It has established tribunals to test the *bona fides* of those who profess such objections; and it will respect the convictions of those who have satisfied the tribunal on the genuineness of their motives.

It may be pointed out in parentheses that there can be no logical place for conscientious objectors in a State which is at war. Modern life is so complex that we are all more than ever members one of another, and no man liveth unto himself alone. A conscientious objector who earns his living as a unit in the social fabric, and pays his taxes as a citizen, is supporting the war willy-nilly, whether he fights in it or not. If he follows his creed to its logical conclusion, he must needs go and live on an Antarctic ice-floe or an atoll in the South Seas.

But, in this, as in most matters, strict logic is impossible, and a compromise is reached whereby the Government respects the individual's integrity of conscience, while insisting on the performance of his duties as a member of the State in its struggle against evil and for its own existence. In return for liberty to render unto God the things which are God's, the conscientious objector must be prepared to give Caesar his due. This is the basis of the amendment to the National Service Regulations, 1940, which provides that all who, but for their appeals as conscientious objectors being allowed, would be liable for service in the Armed Forces, are to be liable for other duties as the Minister of National Service may direct.

There remains, however, the question: what is a conscientious objector? There is no need to question

the courage of genuine conscientious objectors who are prepared to do ambulance work or civil defence work of an equally dangerous nature. Nor is there need to waste words (if words could be found for them) on those who seek to save their skins by such a plea, and in whom cowardice has made consciences. But the Appeal Boards have a far more difficult problem. Ruling out self-interest, what sort of objection can be called conscientious ? The National Service Emergency Regulations speak only of those who have a genuine belief that it is wrong to engage in warfare in any circumstances, whether or not the cause be a just one. The ground for appeal is " conscientious objection to serving with the Armed Forces." (Reg. 21 (1) (*e*)).

Thomas Hobbes, in *The Leviathan* (Part II, ch. 29) said that a man's conscience and his judgment are the same thing. But mankind has never been satisfied with the materialist philosophy which he provided. We must go deeper, and since Greece is in all our minds, we may recall the words of Menander, that " Conscience is the God of all mankind." It is this religious note which is essential, and, without it, no objection can be conscientious within the meaning of the Regulations. Much has been heard, here and in England, of what are called " political conscientious objectors." This term is objectionable in itself. A man may, we suppose, have a political conscience ; he may on political grounds object to fighting. But his political objections are no part of that conscience which the State respects and has provided for by law. It is tempting to digress and expose the folly of those who on such grounds object to fighting against " people's governments." Unfortunately, peoples get the governments they deserve ; and governments which begin by benefiting a nation often end by exploiting it. But this is another matter, and *inter horrentia Martis* the political objector must put his scruples in his pocket.

We are glad to note that this view was taken by Mr. Justice Atkinson recently in *Newell* v. *Gillingham Corporation*, [1941] 1 All E.R. 553, 554. With the facts of that case we are not now concerned ; but his His Lordship said that the plaintiff was not a conscientious objector in the true sense ; he was a political conscientious objector. A true conscientious objector, the Judge added, which was what Parliament had in mind, was one who, on religious grounds, thought it wrong to kill or to resist force by force, and who based his attitude on his interpretation of the teachings of Christ. And His Lordship went on to point out that such a one did not neglect his other duties to his fellows.

The matter could not have been better put ; and the judgment should be widely and carefully read.

The State has thus made provision for those, who, on religious grounds, believe that to engage in warfare is in any circumstances wrong, or that it is wrong to perform combatant duties in the Armed Forces ; but it affords no protection for those who put forward pleas of personal expediency or political prejudice.

In past months, a disturbing feature of many appeals on allegedly conscientious grounds has been the apparent adhesion of groups of able bodied young men of military age to formulae obviously prepared by older persons having some influence over them. For instance, the Appeal Boards have been obliged to listen to too many repetitions of isolated Scriptural texts torn from their context or unrelated to one another, presented as grounds for individual conscientious belief. The fear of the Lord is the beginning of wisdom ; but it is merely the beginning. Arising therefrom a man has many obligations to his fellow-men, in justice and in charity ; for example, he has, with the fear of God, the explicit correlated duty to honour the King, and all that that implies. It is well, as the new regulations provide, that a genuine conscientious objection should receive the respect due to one of " the four essential human freedoms " (as President Roosevelt has it) ; but it is also well that the new Regulations can compel the conscientious objector to perform equivalent civic duties, and in a manner that can do no violence to his conscience.

Another duty remains. The regulations will be valueless, and the conscientious objector will become further entrenched in his position of privileged isolation, unless the Minister of National Service implements the work of the Appeal Boards by informing the public in general, and the conscientious objector whose appeal is allowed, in particular, what alternative service is being provided. Furthermore, it is in the public interest that the Minister should demonstrate without delay that such alternative service is in fact being performed ; and the penalties, if any, being imposed upon those who refuse to obey his direction.

ROAD TRAFFIC AND WAR EMERGENCY REGULATIONS.

I. The Regulations as they Affect the Private Car Owner.

By R. T. Dixon.

War has its lesser trials as well as its disasters, and among the former figure the War Emergency Regulations.

This article is intended to be of assistance to the practitioner whose immediate interest is road transport, and who desires to ascertain the effect of the Emergency Regulations on that subject ; those which concern principally the private-car owner, and, later, those which concern commercial transport operators.

Black-out Restrictions.

The most important of the Emergency Regulations are the recently issued Lighting Restrictions Emergency Regulations, 1941, Amendment No. 1 (Serial No. 1941/81), which came into force yesterday. The principal regulations (Serial No. 1941/18) relate to the appointment and powers of the Dominion Lighting Controller, and have little bearing on the subject of this article.

This Amendment, No. 1941/81, is divided into three parts. Part I relates chiefly to definitions, but Regulation 6 is noteworthy as it states that the Traffic Regulations, 1936 (Serial No. 1936/86) "shall be read subject to these regulations" inclusive of the principal regulations, but that "nothing herein shall be construed to authorize the driving of any vehicle without lights."

Part II applies only during a period of "emergency" —*e.g.*, a raid or bombardment. It provides for almost a complete black-out during the interval between the warning signal (intermittent) and the all-clear signal (continuous); but motor-vehicles may be operated provided that parking-lights and the tail-light are displayed and these are covered by material having a density corresponding to that of two sheets of newspaper. Neither of the head-lights may be used. It is obligatory that while a vehicle is in use at any time, day or night, the necessary material for obscuring the lights must be carried on the vehicle ready for the occurrence of an "emergency." During the "emergency" period no lights at all are permitted on a parked vehicle.

There are certain exceptions to meet the case of ambulances, fire-brigade vehicles and other vehicles in use on urgent public business.

Part III is the most important division of the Regulation as it applies on all occasions in certain areas (to be indicated by the erection of signs) during the hours of darkness, see Reg. 2 of the Traffic Regulations, 1936, *supra*; but not later than 6.30 a.m. or before 7 p.m. These areas are of two classes, one class being described as the Head-light Restriction Areas, and the other, the Parking-light Areas. The wording of the respective signs is appropriate to the area indicated.

Within the Head-light Restriction Areas, the motorist is required to operate the lights so that only one head-lamp, the one on the near or left side, is displayed, and that lamp is in a dipped position. An examination of the meaning of the latter term, as set out in Reg. 5, shows that the degree of dip of the lamp is to be at the rate of not less than 8 in. in 10 ft. which is more severe than the dipping called for in the Traffic Regulations: see Reg. 5 (5) of the Traffic Regulations 1936, Amendment No. 1 (Serial No. 1939/76).

Within the Parking-light Areas, which it is understood will comprise a limited number of important coastal streets, the display of head-lights is forbidden. Parking-lights, and of course a tail-light, are to be shown on a moving vehicle, and the speed is to be restricted to a maximum of twenty miles per hour. On a parked vehicle, no light is to be displayed; and it must be parked off the roadway. For consideration of the term "roadway," see *Candy* v. *Maxwell*, [1934] N.Z.L.R. 766, and the other cases mentioned in *Chalmers and Dixon's Road Traffic Laws of New Zealand*, 164.

The cyclist within a Parking-light Area must not display on the bicycle a light of a brightness exceeding that of a parking-lamp (*i.e.*, 7 watts maximum); and, if he desires to ride the bicycle, a tail-light must be fitted and displayed at the rear of the bicycle.

There are also certain limitations, within the above named areas, on the interior lamps of passenger-service vehicles.

In view of the similarity of black-out conditions in Great Britain to the conditions now applicable here in Parking-light Areas, the case of *Franklin* v. *Bristol Tramways and Carriage Co., Ltd.*, [1941] 1 All E.R. 188, is of interest. In this case, the Court of Appeal decided that a pedestrian, during a black-out has a special duty to take care of his own safety. If the lights on vehicles are dimmed in accordance with black-out requirements, then the pedestrian has an obligation to look out for the vehicles, more particularly for those which may be overtaking him.

It is suggested that in the case of accidents within Parking-light Areas this finding is likely to be followed by the Courts in this country; but it would appear to be unsafe to rely on the case when the accident has occurred in a Head-light Restriction Area. In the latter area the motor-vehicle displays a head-light although dipped, and this should be sufficient to show up a pedestrian on a road for a considerable distance to the front. Under those conditions it is suggested that the principles enunciated in *Cooper* v. *Symes*, [1929] G.L.R. 463, and in the other cases mentioned at the foot of p. 197 of *Road Traffic Laws of New Zealand*, would apply.

Petrol-rationing: Gas-producer Plants.

There follows a brief summary of other Emergency Regulations which affect the private motorist.

The coupon-rationing system for petrol is provided for in the Oil Fuel Emergency Regulations, 1939, Amendment No. 1 (Serial No. 1939/170). The Serial No. of the principal Regulations is 1939/133. Other amendments are No. 1939/251, No. 1940/34 and No. 1940/71. These are all to be deemed part of the Supply Control Emergency Regulations, 1939 (Serial No. 1939/131) by virtue of Reg. 1 (2) of the principal regulations (Serial No. 1939/133).

By the Transport Legislation Emergency Regulations, 1940 (Serial No. 1940/206), the Minister of Transport is given very wide powers in relation to road traffic and may even amend legislation; but such powers must be exercised for the purpose of securing public safety, or assisting the war effort.

The car driven by a gas-producer plant or other similar means, is not subject to mileage-tax (see s. 4 of the Motor-vehicles Amendment Act, 1934–35) by reason of the Substitute Fuel Emergency Regulations, 1940 (Serial No. 1940/241), which provide also for powers to exempt the vehicle from the dimensional restrictions contained in Reg. 12 of the Traffic Regulations, 1936.

The provisions for impressment of motor-vehicles for war and emergency purposes have not yet been applied to the private motorist, but are contained in the Motor-vehicle Impressment Emergency Regulations, 1939, Serial No. 1939/140, as amended by No. 1941/47.

In a later article it is proposed to deal with the Emergency Regulations affecting commercial road transport; and then a more detailed account will be given of some of the regulations mentioned earlier in this article.

(*To be continued.*)

LONDON LETTER.

Somewhere in England,
May 9, 1941.

My dear EnZers,—

Far from the scene of the Greek conflict we hear or wait to hear the voices that foretell the ultimate outcome of the grim struggle. Cape Town, London, Washington make a triangle on which the fate of freedom and civilization depend. It is the good fortune of the British Commonwealth of Nations that General Smuts, influenced in his early days by the freedom-loving University of Cambridge, should speak from South Africa with the authority of a great Imperial statesman. He sees that Hitler's gains in Europe hold in themselves, like Napoleon's, the seeds of collapse. "If Great Britain defeats invasion and keeps her life-lines of supply open, she will have broken Hitler and will recover all that she has lost temporarily." To Mr. Churchill, too, the life-lines of supply are critical for Great Britain, and most critical is the life-line of the Atlantic. As to that, in his broadcast speech last Sunday, he hailed "with indescribable relief," the "tremendous decision" of the President and people of the United States to patrol the Western waters and thus release British ships to concentrate nearer home their war on the German U-boats. And President Roosevelt is said to be facing the issue, as President Wilson did in 1917, in the critical days of the last war. "I want to do right," he said to his Cabinet in the fateful days, "whether it is popular or not." No doubt President Roosevelt thinks the same, though in a great freedom-loving country it is dangerous to be too far in advance of public opinion.

The Master of the Rolls.—Sir Wilfrid Greene has gone to the United States on the invitation of the Judges of the Supreme Court of the State of New York and the New York State Bar Association, in order to attend the celebration of the 250th anniversary of the foundation of the Court. Our friends in America could not have sought, nor we have sent, a more fitting representative. Sir Wilfrid has had a brilliant scholastic career. Going up to Christ Church from Westminster, he won the Craven and the Hertford, and was Vinerian Scholar and Chancellor's Latin Verse Prizeman before becoming a Fellow of All Souls. He served with distinction in the last war, established an outstanding practice at the Bar, and when he was raised to the Bench in 1935 he went straight to the Court of Appeal. This unusual step was fully justified, and two years later he became its head as Master of the Rolls. That position he has filled with distinction, and as he is now only 58 years of age, he will make great contributions to our jurisprudence, both where he is and in due time in the House of Lords. It was almost exactly a year ago that Sir Wilfrid went to Italy, to see whether personal contact could prevent the folly of Italy's entry into the war. In that he failed, but on his present more congenial mission he will earn golden opinions.

"Inner Templar's Gallant Son."—I am sure that your readers all hold in pleasant retrospect the "London Letter" of my predecessor, Mr. F. O. Langley, who would still be gladdening your hearts with his commentaries if he had not gone higher, as Metropolitan Magistrate at Bow Street. Here is some news of his only son, James Langley, who went to France with the British Expeditionary Force in September, 1939, and was in all the fighting in Belgium and in the retreat to Dunkirk. He was severely wounded in June when his battalion was covering the embarkation, and, as he was a stretcher case, he had unfortunately to be left behind. On October 18 his parents were advised that he was in hospital in occupied France badly wounded in the left arm, leg, and head. Conditions were apparently appalling, and he considers he owes his life to the kindness of French women who were allowed to bring food and water to the hospital. Notwithstanding the fact that he had recently had his arm amputated, he escaped at the end of last October into unoccupied France. After many adventures and difficulties, he reached Gibraltar early in March. He was awarded the Military Cross for his part in the fighting in France; and thus both he and his father, Major F. O. Langley, hold this decoration. You will all be glad to know that "Inner Templar," in spite of the blitzkreig, sits in his capacity as a London Metropolitan Magistrate four days per week.

Fires of London.—History has indeed repeated itself: as in 1666, so in 1941. In his *Diary*, under date September 2, 1666, writing of the Great Fire, Pepys says "the King commanded me to go to my Lord Mayor from him and command him to spare no houses but to pull down before the fire every way." He goes on to relate how the Duke of York bade him tell the Lord Mayor he could have more soldiers if he needed them. In 1941, buildings are being demolished by dynamite, not during the fire, but after it, and soldiers are called in to help.

My Lord Mayor was on the scene in 1666, though he cuts not so gallant a figure as the Lord Mayor of 1941. "At last met my Lord Mayor in Canning Street like a man spent with a handkerchief about his neck. To the King's message, he cried, like a fainting woman, 'Lord! What can I do? I am spent: people will not obey me. I have been pulling down houses: but the fire overtakes us faster than we can do it'."

The City fires of 1941, have given impetus to a great drive for recruiting fire watchers and fighters. In 1666, Pepys wrote: "So home at night and find there good hopes of saving our office: but great endeavours of watching all night and having men ready; and so we lodged them in the office and had drink and bread and cheese for them."

Earlier in the same year, the diary has a passage on the possibility of invasion which also has points of comparison with events of the present day. On June 29, 1666, Pepys wrote: "To the office, where I met with a letter from Dover, which tells me, and it come by express, that news is brought over by a gentleman from Callice, that the Dutch fleete 130 sail, are come upon the French coast; and that the country is bringing in pickeaxes and shovells, and wheelbarrows into Callice; that there are 6,000 men armed on board the Dutche fleet and will be followed by 1,000 more. That they pretend they are to come to Dover; and that thereupon the Governor of Dover Castle is getting the victualler's provision out of the town into the castle to secure it. But I do think this is a ridiculous conceit, but a little time will show."

A Young Offender.—We should libel our old friend Lord Dunedin, if we said that he was an old offender. An offender he certainly is, for he photographed without leave some lately bombed place or building, and that is an offence against the Control of Photography Order, 1939 (No. 1125). An offender Lord Dunedin may be; but old he certainly is not. It is true that he was born in 1849, was called to the Scots Bar in 1874, was Lord Justice General and President of the Court of Session in 1905, and a Lord of Appeal from 1913 to 1932. But these facts do not make him old. We all know that those whom the gods love never get old, but continue young until they die; and Lord Dunedin is certainly in the happy class of those beloved by the gods. He was at Harrow and Trinity, and always fond of England; and England, where all the gods reside, was fond of him. So in his retirement he came to live in Chelsea, where many of the immortals dwell. If any people have especial affections for Lord Dunedin, the motorists should be among them. He gave the historic cross-road decision in *Macandrew* v. *Tillard*, [1909] S.C. 78, which laid down as the common law a sovereign rule of safety at cross-roads. It is much to be regretted that it was never formally followed in England. Stable, J., I think, accepted it by implication in *Miller* v. *Liverpool, &c., Society*, [1940] 4 All E.R. 367.

Yours as ever,
APTERYX.

THE FAIR RENTS ACT, 1936.

Reported Decisions 1939–1940.

(*Concluded from p. 108.*)

SECTION 12 (1) OF THE FAIR RENTS ACT, 1936.

In *Meikle* v. *Layton*, (1939) 1 M.C.D. 144, the tenant's lease expired on May 3, 1938. On May 8, 1938, the plaintiff gave a notice under s. 12 (1) that she intended to commence proceedings for possession. Proceedings were duly commenced but were struck out for want of appearance. Fresh proceedings were commenced on February 27, 1939, without giving a new notice under s. 12 (1). It was contended for the plaintiff, that a notice under that section was not necessary where a tenancy had ended by effluxion of time; further, that in any case the notice given on May 8, 1938, was sufficient. In declining jurisdiction, the learned Magistrate said that the *obiter dictum* of Fair, J., in *Howie* v. *Dryden*, [1938] N.Z.L.R. 153, namely, that s. 12 (1) should apply where a tenant has not gone out of possession, to tenancies which have been determined by effluxion of time, correctly stated the position, and added:

> The subsection declares that the giving of the notice is a condition precedent to the right of a landlord to sue for possession. That is to say, the notice is effective only in respect of the particular action to which it refers. Once the action is disposed of, the notice is exhausted.

In this case a fresh plaint had been filed, and accordingly it would seem that the judgment is correct. If, however, the plaintiff had been nonsuited and had subsequently taken out a fresh summons under s. 106 (2) of the Magistrates' Courts Act, 1928, a new notice under s. 12 (1) of the Fair Rents Act, 1936, would not have been necessary.

SECTION 13 (1) OF THE FAIR RENTS ACT, 1936.

The practical effect of the judgment in *Moore* v. *Hendrickson*, (1939) 1 M.C.D. 295, has been modified by s. 7 (1) of the Fair Rents Amendment Act, 1939. Nevertheless, an important question of practice is still affected by the decision. The plaintiff had agreed to purchase the tenement for £800. He paid £200 by transferring a piece of land valued at that sum and agreed to pay the balance with interest by weekly instalments of £1 5s. He then gave the tenant notice to quit and when possession was refused, commenced proceedings. An order for possession was refused on the ground that s. 13 (1) precludes any person other than the contractual landlord from obtaining such an order. The learned Magistrate held that if an order is sought on the ground that an agreement for sale and purchase has been entered into, and that the premises are reasonably required by the purchaser for his own occupation as a dwellinghouse, the action must be commenced by the contractual landlord after he has given notice to quit. That part of the judgment is correct, but the dictum that a person who acquires the right to possession under an agreement for sale and purchase cannot maintain an action for possession if the tenement is subject to the Fair Rents Act, 1936, is open to serious doubt. It is based on the dictum of Greer, L.J., in *Lloyd* v. *Cook*, [1929] 1 K.B. 103, 136, concerning s. 5 (*d*) of the Increase of Rent and Mortgage (Restriction) Act, 1920. In effect, the Lord Justice said that if an order for possession were sought on the ground that the premises are reasonably required by the landlord for his own occupation as a dwellinghouse, the landlord is really the ex-landlord because the contractual tenancy has come to an end. Consequently the ex-landlord is not entitled to an order for possession unless he can bring the case within one of the specified grounds. The learned Magistrate has read this dictum to mean that the only person who can be a landlord under s. 13 (1) (*d*) is the person who let the tenement originally. This is a misconception of the dictum. The Lord Justice clearly meant that the word "landlord" means the person who was the landlord immediately prior to the commencement of the statutory tenancy. That is to say, once the statutory tenancy commences to run, the only person entitled to claim possession on the ground that he requires the premises for his own occupation as a dwellinghouse is the "ex-landlord." In *Moore* v. *Hendrickson*, the plaintiff agreed to buy subject to the existing contractual tenancy, and later determined it. The question of his right to do so was not raised. He was therefore the ex-landlord within the meaning of Greer, L.J.'s dictum.

In *Presbyterian Church Property Trustees* v. *Clark*, (1939) 1 M.C.D. 122, it was held that as the plaintiff

trustees were entitled to the immediate reversion of the tenement, if an order for possession were made, they were " landlords " within the meaning of s. 13 (*e*) of the Fair Rents Act, 1936: further, that as the beneficial owner of the tenement was the Presbyterian Church, which reasonably required it for occupation by a minister in its regular employment, the plaintiffs as the statutory body appointed to hold and administer the Church's property, were entitled to an order for possession.

In *Jensen* v. *Mulholland*, (1940) 1 M.C.D. 375, it was held that once the Court is satisfied that an agreement for sale and purchase of premises is *bona fide*, and that the purchaser under it is the person in whose favour an order for possession will operate, the fact that the agreement provides that if the purchaser be unable after reasonable efforts have been made to obtain possession, he may rescind the agreement, does not prevent an order for possession being made.

SECTION 14 OF THE FAIR RENTS ACT, 1936.

In *Williams* v. *Baker*, (1939) 1 M.C.D. 80, it was held that once a warrant had been executed there was no power to set it aside under s. 14. This decision was followed in *Doull* v. *Davenport, Ex parte Perrett*, (1939) 1 M.C.D. 186, where it was held that the filing of an application under s. 14 does not, of itself, operate as a stay of any proceedings under the original order. The judgment then referred to the procedure to be followed to obtain an *ex parte* order suspending execution of the warrant for possession until the substantive application has been heard and determined. The learned Magistrate made this important observation:

> If, in pursuance of that judgment [an order for possession] the bailiff receives a warrant, he is bound to execute it in terms of the warrant, and promptly. Failure to do so may involve the bailiff in serious consequences. For his own protection, he requires an order of the Court granted under s. 14, and mere notice that an application has been made to the Court is not of itself sufficient justification for the bailiff refraining from carrying out his duties.

In *Willis* v. *Mc Arthur*, (1939) 1 M.C.D. 353, the defendant applied under s. 14 for the discharge of an order for possession. The original order was made on the ground that the rent was in arrears, but was suspended so long as current rent and a weekly sum on account of the arrears were paid. The application was made on the ground that all arrears had been paid. In refusing the order, the learned Magistrate said:

> The Court granted a concession to the defendant by suspending the warrant for possession so long as he complied with certain specified conditions, including the condition that current rent be paid on due date. The plaintiff is entitled to a continuance of the right given him to apply for a warrant for possession if the defendant again falls into arrear but the defendant is also protected against any unreasonable or arbitrary action on the part of the plaintiff, as a further application under s. 14 may be made.

SECTION 20 OF THE FAIR RENTS ACT, 1936.

In *Hamilton* v. *Dimond*, (1940) 1 M.C.D. 544, it was held that the Court had power to order a rehearing of an application to fix the fair rent, as it was an originating application under the Magistrates' Courts Amendment Rules, 1940 (Serial No. 1940/142) and R. 44A (30) applied.

Discussing s. 20, Fair Rents Act, 1936, the learned Magistrate said that an application for a rehearing is not in any sense a proceeding to challenge, review, quash, or call in question the original judgment or order. The purpose of the application is to enable additional relevant facts to be brought before the Court of hearing. In other words, it is an attempt to perfect an otherwise incomplete record.

LEGAL LITERATURE.

Willis's Workmen's Compensation, 33rd Edition. By W. ADDINGTON WELLIS, C.B.E., and R. MARVEN EVERETT. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd.

The last previous edition of this notable work was published in 1939, since when a considerable number of cases have been decided and reported. These up to November, 1940, when the book went to press, have practically all been included, so far as they are of interest, or have a bearing on decisions in earlier cases. A " stop press " leaflet inserted in the present volume gives references to later decisions subsequent to that date.

It is thus clear that the learned authors of this work, which is practically indispensable to all concerned with the administration of the law relating to workers' compensation, or advising thereon—have done all that was humanly possible to bring the work up to date. No one using it need be caught " at a venture " in Court, or elsewhere, by an opponent's citation of a case not duly included, or noted in the work, with its relevant context.

Attention is called in the Preface to a number of decisions of interest in the House of Lords and in the Court of Appeal. These, however, would not appear to have involved any material alteration of existing accepted principles. Two or three cases may be referred to. In *Powell* v. *Great Western Railway Co.*, [1940] 1 All E.R. 87, a fireman employed by the railway company was being carried in the course of his employment in the cab of a locomotive, when a boy fired at it with an air gun and struck the fireman in the eye. It was held, by the Court of Appeal, that the fireman, being required by the obligations of his employment to be in a particular locality, was subject to the risks attending his presence in that locality, and that the accident arose out of his employment. Another interesting case of a novel type came up for decision by the House of Lords in *Dover Navigation Co.* v. *Craig*, [1940] A.C. 190. Proof that fever and malaria were caused to a seaman by a mosquito bite during a voyage to a mosquito-infested river in West Africa was held in that case to entitle the applicant to compensation, on the ground that the injury was suffered by accident arising out of and in the course of the seaman's employment.

The thirty-third edition of *Willis's Workmen's Compensation Acts* fully maintains the high standard of previous editions on this difficult and exacting branch of the law.

PRACTICE NOTES.

Remedies in Revenue Matters.

By W. J. Sim, K.C.

(*Continued from p. 95.*)

Section 72 of the Death Duties Act, 1921, was quoted at the end of the previous article as giving to the Commissioner the right to overtake and correct an assessment where, as the Act states, "Any duty payable has not been fully assessed and paid"; and such further assessment may be made at any time thereafter. This section was held in *Kirkcaldie* v. *Commissioner of Stamp Duties*, [1933] N.Z.L.R. 241, to permit a reopening of the Commissioner's valuation of an asset. The asset under review was stock in a company incorporated in England, having both English and New Zealand share registers, but the stock was registered in the English register. The Commissioner accepted evidence as to the market value of the stock in New Zealand at the date of the death, and death duties were assessed on that amount and paid. The executors had paid duty on the assessment of stock in England and applied to the Commissioner for a deduction from the New Zealand duty in accordance with s. 32 of the Act, whereupon it became manifest that the English market price as at the date of the death exceeded the New Zealand market price, and the Commissioner thereupon reopened the assessment. It was held that the section covered the occasion and the Commissioner's contention was upheld. The authority touches upon the vexed question of the method of valuation of shares in joint stock companies which will be further dealt with later when the principles affecting the valuation of assets is considered. The subject under consideration at the moment is the making of applications to the Court by or against the Commissioner, affecting assessments, not the merits of such applications when made.

Presumably the same right of objection to the assessment would arise in favour of the taxpayer, if the Commissioner sought to enforce a charge on any property under s. 78 of the Act. The procedure made available to the Commissioner for this purpose is originating summons. The assessment not being conclusive when the Commissioner sues for the duty, by similar reasoning the defendant should have an opportunity of questioning the assessment when enforcement takes place by Court process, short of an action.

The advantage of testing questions with the Commissioner by action has the advantage that the issues of fact are approached with none of the restrictions that hamper the taxpayer when the procedure by case stated is adopted. The apparent disadvantage is that the action process is more cumbersome and may cause delay. By long established practice the case stated procedure is recognized as the normal procedure. It is prescribed by s. 62 of the Act, as amended by s. 5 of the Death Duties Act, 1925, the salient features of which are—

(*a*) Any administrator dissatisfied in point of law or of fact with any assessment of death duty.

(*b*) Any donor dissatisfied in point of law or of fact with any assessment of gift duty.

(*c*) Within *twenty-one* days after the notice of assessment has been given to him may deliver to the Commissioner

(*d*) A notice in writing requiring him to state a case for the opinion of the Supreme Court.

(*e*) The Commissioner shall thereupon state and deliver a case accordingly setting forth the questions of law or of fact in issue.

(*f*) The appellant must within *fourteen* days after receiving the case transmit the same to the Registrar of the Supreme Court in such judicial district as *the appellant thinks fit*. The Registrar is then charged with the duty of setting the case down and giving notice to the parties.

(*g*) The Supreme Court has power to send the case back to the Commissioner for amendment.

The formulating of the facts and issues appearing in the case stated is made the responsibility of the Commissioner by the Act, but it is also very much the concern of the taxpayer, and in practice the draft is revised by both parties. According to subsection (2) the case stated must set forth the questions of law or fact in issue, and it has been held in Australia that the Court is confined to the decision of the Commissioner upon objections made by the taxpayer and is not entitled to deal with the assessment generally: *Perpetual Trustee Company, Limited* v. *Federal Commissioner of Taxation*, (1926) 32 A.L.R. 317. In practice the ground has usually been fully covered between the Commissioner and the taxpayer and the issues have become clear. Probably in an appropriate case, if an issue going to the root of the matter were omitted, the Court would order an amendment under subs. (5), but it may be noted that amendments were refused by the Court of Appeal in *Commissioner of Stamps* v. *Todd*, [1924] N.Z.L.R. 345, and *In re Nichol*, [1931] G.L.R. 309. In the former case it would appear that the appellant sought to entirely restate the case; in the latter, after the matter had been adjudicated upon in the Supreme Court without suggestion that the case required amendment, the Commissioner moved in the Court of Appeal that the case be sent back to him for amendment by the inclusion therein of the evidence of certain persons which had been taken on an inquiry before a Deputy-Commissioner under s. 64 of the Act. The Court of Appeal observed that there could be no doubt that it had the same power of amendment as the Supreme Court, and stated the grounds of the refusal of the application:

> But the Commissioner asks for power to amend in a particular way, that is to say, to include evidence as part of the case stated. From this evidence no doubt this Court would be asked to draw inferences. This evidence was in possession of the Crown before the case was stated for the Supreme Court, *and the case was settled as between the parties* as representing a clear cut question of law for the decision of that Court. We think that, as a matter of principle, when a case has been so stated and argued in the Supreme Court, and a judgment pronounced, it is in the highest degree undesirable for the Court of Appeal to send it back to the Commissioner to have it re-stated, and still more undesirable to send it back for the purpose of attaching a copy of evidence, from which this Court will be asked to draw inferences (*ibid.*, 310).

In England an appeal lies to the High Court from decisions of the Commissioner as to the amount of duty and as to the return of duty overpaid, but if the

value of the property in respect of which the dispute arises does not exceed £10,000 the appeal may be to the County Court. When the question in dispute is as to the value of any real or personal property, the appeal has to be made in accordance with Part I of the Finance Act, 1910: see *Hanson's Death Duties*, p. 16, and the relevant sections of the Finance Act, 1894; and as to appeals under s. 50 of the Succession Duty Act, 1853, see *Hanson*, p. 558. Under the Finance Act the procedure before the High Court is by petition. As a preliminary the appellant must deliver a written statement of the grounds of appeal, which must state specifically the several grounds upon which the appellant contends that the decision of the Commissioner is erroneous. The Commissioner is then given one month in which to notify the appellant or his solicitor, whether the decision is withdrawn or maintained wholly or in part. Within one month after the receipt of such notice the appellant may proceed by petition to the High Court, and he may not in his petition state, or at the hearing be allowed to rely upon, any grounds of appeal not specifically set forth in the statement of the grounds of appeal. Upon the filing of the petition and the serving of a copy upon the Commissioners, the matter shall be deemed completely at issue, and within seven days thereafter either the appellant or the Commissioners may set the petition down for hearing. This procedure is established by the Rules of the Supreme Court under the Finance Act, 1894, dated January 14, 1895: see *Hanson*, p. 563. The procedure appears preferable from the taxpayer's point of view to the New Zealand case stated, since once the appellant has made up his mind that the assessment is wrong, he is given the means of dominating the proceedings, whereas in New Zealand he must await Departmental delays. The English code, moreover, has summary and explicit directions on the subject of evidence, interlocutory processes, and so forth.

Reverting to the New Zealand procedure, the Commissioner is given wide powers by the Act to enable him to ascertain the facts. He may personally conduct an inquiry under s. 64 of the Act, during which he has all the powers conferred upon Commissions by the Commissions of Inquiry Act, 1908, or he may make application under s. 63 of the Act to a Magistrate to hold such inquiry. The form in which the facts are presented in the case stated is of considerable importance to the appellant by reason of s. 5 (4) of the Death Duties Amendment Act, 1925, which provides that the appellant may dispute any allegations of fact made by the Commissioner, *but in the absence of sufficient evidence adduced by the appellant to the contrary* all such allegations shall be presumed to be correct. The document is not merely a pleading, it contains allegations which are *prima facie* correct in favour of the Commissioner. In the Death Duties Appeal referred to in the opening sentence of this article, His Honour, the Chief Justice, observed to counsel for the Crown: "Why does the Commissioner not find the facts? He has power to do so." No doubt when a *bona fide* issue of fact appears, the Commissioner would state it as such and leave the sections of the Act relating to evidence to operate. Section 5 (3) of the 1925 Act is the important provision in this respect:

> If and so far as any such appeal relates to a question of fact, the Supreme Court may make such order as it thinks fit as to the trial of that issue and as to the reception of evidence by affidavit or otherwise.

It is, however, an issue which the parties themselves must face and in good time. The process is firstly to appreciate the issue, the kind of evidence required to substantiate it, and the manner in which this is to be brought before the Court. If, as does happen, the appellant and the respondent agree that the case may be supplemented by oral evidence at the hearing on any questions of fact, it is imperative to have the issues formulated in good time beforehand so that the parties will be fully prepared.

Instances of oral evidence being taken at the hearing are *In re Gilmer, Public Trustee* v. *Commissioner of Stamp Duties*, [1929] N.Z.L.R. 61, and *Beamish* v. *Commissioner of Stamp Duties*, [1937] N.Z.L.R. 217. The former case related to the valuation of hotel properties for death duty purposes, and particularly the question of the value of the licenses and the goodwill of the hotels as licensed houses. An order was made after the stating of the case that questions of fact should be determined on *viva voce* evidence. In *Beamish* v. *Commissioner of Stamp Duties*, [1937] N.Z.L.R. 217, the Court had to determine the value of a debt due by a beneficiary of the deceased testator to the estate, which necessarily involved a review of such beneficiary's whole financial position as at the relevant date. The shape in which the case came before the Court may be gathered from the opening paragraph of Mr. Justice Ostler's judgment:

> A case was duly stated purporting to set out the facts, but it was, of course, by no means a complete statement, as some of the questions of fact had not been agreed on. Both parties agreed to call evidence and leave it to the Court to find the facts, abiding by the facts so found. To this course I consented (*ibid.*, 218).

The point which may be emphasized is that at the time of the settling of the case stated the issues of fact require the same analysis as if pleadings in an action were being settled, and an understanding should be arrived at, at the same time, as to how matters are to be presented to the Court, or the Court's ruling obtained on the subject. The appellant requires this for his protection, and the Court itself may well object if unnecessary confusion or an unsatisfactory handling of the questions occurs at the hearing.

(*To be continued.*)

RULES AND REGULATIONS.

Emergency Regulations Act, 1939. Import Certificates Emergency Regulations, 1939. Amendment No. 1. No. 1941/74.

National Service Emergency Regulations, 1940. General Reserve Classification Order, 1941. No. 1941/75.

Emergency Regulations Act, 1939. Stamp Duties Emergency Regulations, 1939. Amendment No. 2. No. 1941/76.

Motor-vehicles Insurance (Third-party Risks) Act, 1928. Motor-vehicles Insurance (Third-party Risks) Regulations, 1939. Amendment No. 1. No. 1941/77.

Emergency Regulations Act, 1939. Heavy Motor-vehicle Emergency Regulations, 1941. No. 1941/78.

Emergency Regulations Act, 1939, and the Naval Defence Act, 1913. Shipping Control Emergency Regulations, 1939. Amendment No. 2. No. 1941/79.

Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934. Hop Marketing Regulations, 1939. Amendment No. 1. No. 1941/80.

Emergency Regulations, 1939. Lighting Restrictions Emergency Regulations, 1941. Amendment No. 1. No. 1941/81.