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" *Deeds of eternal fame*
Were done, but infinite ; for wide was spread
That war and various ; sometimes on firm ground
A standing fight, then soaring on main wing
Tormented all the air ; all air seemed then
Conflicting fire."

—MILTON, *Paradise Lost.*

VOL. XVII. TUESDAY, JULY 22, 1941 No. 13

PROBATE AND ADMINISTRATION: DEATHS ON WAR SERVICE.

UP to the present time there has been nothing to assist applicants for probate or letters of administration arising out of the will or intestacy of any person who has died out of New Zealand during the course of hostilities and whose death cannot be proved in the ordinary way. This is particularly true of those members of the armed forces who have been reported "Missing, believed killed." Even to a greater extent than in the war of 1914–18 have these cases arisen, especially with regard to members of the Royal Air Force. Now, however, the position has been met to a limited extent by the recent gazetting of the Registration of Deaths Emergency Regulations, 1941 (Serial No. 1941/115).

In order that the effect of these regulations may be easily understood, it is necessary to trace the course of similar legislation which was in force during the war of 1914–18, and the grants of probate or letters of administration in respect of deceased members of our Expeditionary Forces.

Under s. 33 (1) of the Expeditionary Forces Act, 1915, any Court could in any proceeding accept as sufficient evidence in proof of death in any place out of New Zealand of any person who had left New Zealand as a member of an Expeditionary Force and in proof of the date or approximate date of his death, a certificate under the hand of the Minister of Defence expressed to be given in pursuance of the statute and on the face of official intimation received by him. Judicial notice might be taken of the signature of the Minister of Defence to any such certificate. Under subs. (2) any Court might accept as sufficient in any proceeding, in proof of the fact that any person other than one who had left New Zealand as a member of an Expeditionary Force had died out of New Zealand while on active military or naval service, the sworn testimony of any person, by affidavit or otherwise, that on the face of official intimation received by him he believed that such death had occurred.

The Expeditionary Forces Act, 1915, came into force on October 11, 1915 ; and on March 1, 1916, Chapman, J., in *In re J. W. Jameson*, [1916] N.Z.L.R. 526, granted probate of the will of a soldier who was on active service in Gallipoli. On June 3, 1915, he was reported by the Minister of Defence as missing since May 8. On September 28, the United States Embassy, Constantinople, reported that his name "does not appear in our list of British prisoners of war in Turkey," and no further communication from the Embassy was received. On January 28, 1916, the Prime Minister informed the testator's mother that the Court of Inquiry, sitting at Alexandria (a body specially charged with the duty of inquiring into such matters), reported that he was dead. In granting probate, the learned Judge said :

> As the British Army is now withdrawn from Gallipoli, and the list of New Zealand prisoners in Turkey is a very small one, I think this evidence, coupled with the fact that the testator wrote regularly to his mother but has not been heard of for many months, should be accepted.

In April, 1916, in *In re Tothill*, [1916] N.Z.L.R. 527, application was made for letters of administration of the estate of a soldier who (as appeared from an affidavit in support) went into action with his company in Gallipoli on August 6, 1915, was wounded during a retreat, but was not again heard of. The applicant filed in Court a certificate dated March 13, 1916, on the form provided by the Defence Department, certifying on the authority of the Adjutant-General that the intestate soldier, identifying him by his number, rank, and unit, previously reported missing, was now reported on February 2, 1916, by the Court of Inquiry "Believed to have been killed." In granting the administration Denniston, J., said :

> The only feature in which the case of *In re Jameson* (*supra*) in which Mr. Justice Chapman granted probate, differs from the present case is that there is no evidence that Tothill's name did not appear in the list of British prisoners of war in Turkey. It must, however, I think, be taken that inquiries

on this point and as to any further means of information must have been made by the Board of Inquiry, which it may reasonably be presumed sat at Alexandria, I think, therefore, I may grant the administration asked for.

In July, 1916, in *In re Norman C. Harris*, [1916] N.Z.L.R. 967, a motion for administration with the will annexed, Mr. Justice Denniston refused to accept an affidavit in which the applicant stated "she was informed and verily believed that the said Norman Charles Harris was killed at Gallipoli on or about the 9th day of August, 1915." She went on to state the grounds for her belief: first, she had received a telegram from the Minister of Defence stating that her son "previously reported wounded now since died of wounds result of Court of Inquiry," and, secondly, she set out a letter received by her from the Director of Base Records in which the official Army form received from the front contained, *inter alia*, these particulars, "Wounded Anzac Cove, 9/8/15. Since died of wounds (Finding of Board). Proceedings of Board of Inquiries convened by order of N.Z.Mounted Brigade. Headquarters held at Anzac, 14/12/15."

The learned Judge said:

> In this application for administration the applicant swears that she "is informed and verily believes" that the person as to whose estate the application is made was killed in action on the day named. The grounds of that belief are stated in the applicant's affidavit, and must be such as would justify the grant of the application. The practice in such cases requires, however, that the applicant or some other person must swear to the fact of the death and not merely to his or her belief. If the applicant hesitates to swear to the fact, it becomes necessary to lay the evidence before the Court, and by motion, take its direction upon the fact. If the Court be satisfied that the evidence leads up to a reasonable presumption of the death, it will grant probate or administration as the case may be, and will give permission to the applicant to swear that the person died on or after the last date given of his existence: see *Tristram and Coote's Probate Practice*, 15th Ed. 211.

On August 7, 1916, the War Legislation Amendment Act, 1916, was passed; and by s. 18 (1) provision was made for the registration of the deaths out of New Zealand of members of the New Zealand Expeditionary Forces and others. By subs. (1) the Registrar-General, appointed under the Births and Deaths Registration Act, 1908, was empowered to compile a register containing, so far as practicable, certain prescribed particulars with respect to all persons who were proved to the satisfaction of the Registrar-General to have died while out of New Zealand on service in some capacity in connection with the then present war, and who at the time of their death were domiciled in New Zealand. Such register was to contain, *inter alia*, particulars concerning the person whose death was registered, as to the source of information from which the cause of death, date and place of death, place of burial, &c. were obtained, and as to such other matters as might from time to time be prescribed. Under subs. (3) the Registrar-General was empowered to accept, in proof of death, a certificate under the hand of an officer of the Defence Forces or of any other person authorized in that behalf by the Minister of Defence or to accept such other proof of death, and of the several particulars required to be registered, as he deemed sufficient. It was further provided by subs. (4) that a certified copy of any entry in the register so compiled, made or given and purporting to be signed by the Registrar-General, should be received in any Court of Justice as *prima facie* evidence of the fact of the death to which the same related.

Following this legislation, the case of *In re J. E. Hamblyn*, [1918] N.Z.L.R. 372, came before Sir Robert Stout, C.J. The affidavit to lead grant of probate stated that the deceased died in France on or about July 27, 1917, and that as to his death, the Public Trustee, who made the affidavit, relied upon the Registrar-General's certificate. This stated: "Died in France on 27th July, 1917. Missing, believed killed. Decision of Court of Inquiry." This was the only proof submitted to the Court. The learned Chief Justice, after remarking that there was no statement from the family of the deceased, who lived in Taranaki, as to inquiries made regarding his death, or as to inquiries made as to whether he might be a prisoner of war, &c., said:

> In my opinion the bald statement, "Missing, believed killed. Decision of Court of Inquiry," is not of itself sufficient. The time that has elapsed since the alleged death is about eight months. Possibly this proof of death might be helped by other evidence, but standing alone, it is not sufficient. Probate on the present material is therefore refused.

A similar certificate was given by the Registrar-General in *Re Eastwood*, [1918] G.L.R. 486, but, in this instance it stated "Reported missing on 23rd June, 1918, and is since reported to have died as a prisoner of War in Germany (London Cable, 30/10/17)." This certificate, said Cooper, J., went no further than a statement that the testator was "reported" to have died as a prisoner of war. After reference to the insufficiency of the certificate in *Hamblyn's* case (*supra*) His Honour said the application for probate must be supported by further evidence before it could be granted.

In July, 1918, the Judges assembled at the sitting of the Court of Appeal considered a memorandum by Mr. Justice Edwards before whom an application for probate had come, and conferred with him as to whether evidence of death should be held sufficient. As a result, a judgment of the Full Court, consisting of Sir Robert Stout, C.J., and Edwards, Chapman, Hosking, Stringer, and Herdman, JJ., was delivered by Chapman, J.: *In re Edmondston*, [1918] N.Z.L.R. 608.

The certificate of the Registrar-General relied on was dated January 30, 1918. It certified that a testator, a member of the New Zealand Expeditionary Force, was "Missing, believed killed in France on 12th October, 1917—Decision of Court of Inquiry." Attached to the papers was a letter from the testator's father, dated April 28, from which it appeared that the testator wrote regularly to him but had not been heard of for over six months, the last letter being dated five days before the reported date of death. It was stated that this could be verified by affidavit, if necessary. The case differed in this respect from *In re Hamblyn* (*supra*).

The judgment stated that the Judges did not accept a finding certified in this form without more as proof of death. The judgment then referred to the cases of *In re J. W. Jameson* and *In re Tothill*, in which such certificate was acted on, were governed by the peculiar circumstances of the landing at the Gallipoli Peninsula, which negatived the idea that the men were prisoners of war, as the Expeditionary Force was entrenched on steep hill faces and was unable to penetrate the enemy lines. In these circumstances only a very few stragglers became prisoners in the hands of the Turks.

Their Honours went on to say that the conditions in France were different. Many members of the New

Zealand Force got within the enemy lines and were taken prisoner. In cases like this, they said, the Court ought not hastily to act on the mere certificate, as the missing man may have been taken to a hospital within the enemy lines and may not have recovered sufficiently ever to give his name. It was understood that when the name was known, the Germans forwarded it to a neutral authority representing Great Britain.

Their Honours emphasized the fact that the element of time becomes, in circumstances like those obtaining on the Western Front during the last war, of growing importance.

In *Edmondston's* case, as six months had elapsed from the date of the certificate and the testator had then already been missing for some months, their Honours thought that probate should be granted upon an affidavit showing that nothing more had been heard of him, either by his family or by the authorities.

It should be mentioned, in parenthesis, that the Court seems to have overlooked the fact that under s. 33 (1) of the Expeditionary Forces Act, 1915, then in force, judicial notice might be taken of a certificate under the signature of the Minister of Defence in proof of death, but under the War Legislation Amendment Act the Registrar-General was authorized merely to provide for the registration of deaths out of New Zealand of members of the New Zealand Expeditionary Force; and, consequently, the certificate by the Registrar-General which seems to have been accepted by the Court was given without Legislative authority, though it was not necessarily inadmissible.

Section 18 of the War Legislation Amendment Act, 1916, was repealed, and was re-enacted as s. 33 of the Births and Deaths Registration Act, 1924, and is still in force. It is obvious, however, that it is not applicable to conditions arising out of the present war as it related solely to "the war with Germany," which was the war of 1914–18, and is, to all intents and purposes, spent.

Since the commencement of the present war the first provision made concerning the deaths of members of the Expeditionary Force, or domiciled New Zealanders, who have died out of New Zealand in some capacity while on war service, was the Registration of Deaths Emergency Regulations, 1940 (Serial No. 1940/87) which, merely for registration purposes, provided that:

2. The Registrar-General shall compile a register containing so far as practicable, particulars with respect to all persons who are proved to the satisfaction of the Registrar-General to have died while out of New Zealand on service in some capacity in connection with any war in which His Majesty is now or may hereafter be engaged and who at the time of their deaths were domiciled in New Zealand.
3. The said register shall be in the same form as the register established by section 33 of the Births and Deaths Registration Act, 1924, and the provisions of subsections (2) to (5), both inclusive, of the said s. 33 shall apply, *mutatis mutandis* to the register established by these regulations.
4. These regulations do not apply to members of the New Zealand Naval Forces.

Since these regulations came into force, probate has been granted where, in addition to the certificate of the Registrar-General, more information has been supplied. For instance, where a member of the New Zealand Expeditionary Force was killed in action in Libya, the supporting affidavit by deceased's father referred to letters sent to the next-of-kin by the Minister of Defence and Base Records, while several clauses stated that the deponent had not received any further mail from his son since the date he was reported to have been killed, and that before that date he had been a regular correspondent. The conditions in which this probate was granted show that the Court followed, in the conditions of the present war, the rule laid down in *Edmondston's* case.

In cases where probate has so far been granted in relation to pilot-officers and air-gunners, who have died as the result of operations in England, an English certificate of death has been available.

Before considering the new regulations in detail, it is well to recall that the ordinary proof of death, when application for probate or administration is made, in civilian cases, is governed by R. 518 of the Code of Civil Procedure, which says that paras. 1 and 2 of Form 34 must be used. The deponent's means of knowledge of the fact of death must in all cases be shown. Where the Registrar-General's certificate of death is used, the deponent swears that the person named in that certificate is identical with the person in respect of whom probate or administration is sought. Under s. 14 (3) of the Public Trust Office Act, 1908, in applications for administration of the estates of persons domiciled in New Zealand, who have died in New Zealand or elsewhere, or who had property in New Zealand, the Public Trustee, if he thinks fit to apply therefor, is entitled to administration; and no other proof of death and intestacy is required than an affidavit that, after due inquiries, the Public Trustee is satisfied that such person died intestate, and, by s. 44 of the Public Trust Office Amendment Act, 1921–22, these provisions are applied to applications by the Public Trustee for probate.

The new regulations—the Registration of Deaths Emergency Regulations, 1941 (Serial No. 1941/115)—came into force on July 17. They revoke the Registration of Deaths Emergency Regulations, 1940 (Serial No. 1940/87), *supra*, and contain appropriate savings clauses in respect thereof.

By Reg. 3, it is provided that:

> The Registrar-General shall compile a register, to be known as the War Deaths Register, containing, so far as practicable, particulars with respect to all persons who are proved to the satisfaction of the Registrar-General to have died while out of New Zealand on service in some capacity in connection with any war in which His Majesty is now or may hereafter be engaged, and who at the time of their deaths were domiciled in New Zealand, but not including members of the New Zealand Naval Forces to whom section 3 of the Births and Deaths Registration Amendment Act, 1930, applies.

The exception in Reg. 3 of Members of the New Zealand Naval Forces arises from the fact that s. 3 of the Births and Deaths Registration Amendment Act, 1930, provides as follows:

(1) If any member of the New Zealand Naval Forces dies while serving with such Forces outside New Zealand his death may, notwithstanding anything contained in the principal Act, be registered under that Act by the Registrar of Births and Deaths at Wellington.

(2) In proof of such death the Registrar may accept a certificate under the hand of an officer of the New Zealand Naval Forces, or of any other person authorized in that behalf by the Minister of Defence or may accept such other proof of death and of the several particulars required to be registered under the principal Act as he deems sufficient.

The Court, in an application for probate of the will of a member of the crew of the *Achilles* killed in the action of the River Plate, accepted as proof of death a certificate by the Registrar-General of an entry in the

register made pursuant to the above section, and an affidavit by one of the senior officers of that ship present at the battle as to knowledge of the testator's death.

The War Deaths Register, according to Reg. 4, is to contain particulars (so far as may be ascertained) with respect of each person whose death is registered, as to the name and sex, rank or rating, official number, and the capacity in which he was serving in connection with the war, and all the other particulars which were specified in s. 33 of the Births and Deaths Registration Act, 1924, to which reference has already been made.

Regulation 5 provides as follows :

> For the purposes of the War Deaths Register the Registrar-General may accept in proof of the death of any person the fact that the Supreme Court has granted probate or administration or has granted leave to swear to the death, or may accept a certificate signed by an officer of His Majesty's Forces or by any other person authorized in that behalf by the Minister of Defence, or may accept such other proof of death, and of the several particulars required to be registered as aforesaid, as he deems sufficient.

(*Cf.* s. 33 (3) of the Births and Deaths Registration Act, 1924, replacing s. 18 of the War Legislation Amendment Act, 1916.)

So far, the regulations do not carry the matter any further than the legislation passed during the last war up to the time of the judgment in *Edmondston's* case. There is, of course, the extension of the provisions to include the deaths of " all persons who are proved to the satisfaction of the Registrar-General to have died while out of New Zealand on service in some capacity," and not necessarily in the Navy, Army, or Air Force, in connection with the present or any future war in which His Majesty is or may be engaged. And, it would seem, the Registrar-General's certificate of death in relation to any such person has the same *prima facie* value, in respect of an application for probate or letters of administration as the usual death certificate of a civilian who has died in New Zealand in peace time, as Reg. 14 (1) says that a certificate of entry in the War Deaths Register, and every certificate in form A. in the Schedule to the Regulations, if purported to be signed by the Registrar-General, is receivable in any Court as *prima facie* evidence of the fact of the death to which it relates, and of the particulars set out in the certificate : see s. 48 of the Births and Deaths Registration Act, 1924.

A new feature is introduced by the present regulations. This is the provision made for what is termed the " Provisional War Deaths Register," and, here again, according to Reg. 14 (2),

> Every certified copy of any entry in the Provisional War Deaths Register and every certificate in form B. in the Schedule hereto in respect of any such entry shall, if it purports to be signed by the Registrar-General, be received in any Court as *prima facie* evidence of the fact that the person to whom the entry relates is missing and believed to have been killed and of the particulars set out in the copy or certificate, as the case may be.

As Regulation 14 makes apposite the judgment of the Full Court in *Edmondston's* case, in relation to certificates of entries in both Registers, it may be well to consider now the purpose and contents of the Provisional War Deaths Register. Regulation 6 is as follows :—

> The Registrar-General shall compile a register, to be known as the Provisional War Deaths Register, in respect of all persons who, while they are domiciled in New Zealand but are out of New Zealand on service in some capacity in connection with any war in which His Majesty is now or may hereafter be engaged, are officially reported to be missing and believed killed, but whose deaths have not been proved to the satisfaction of the Registrar-General.

The Provisional War Deaths Register, with respect to each person who is entered therein as missing and believed killed, is to contain particulars (so far as may be ascertained) as to the name and sex of the missing person ; the force or unit in which he was serving when he became missing, his rank or rating, and his official number, or (if he was not a member of the forces) the capacity in which he was serving in connection with the war ; his occupation, age, &c. ; the date when and the place where he became missing ; the finding of any Court of Inquiry ; the circumstances in which he became missing and all other relevant circumstances ; and the source of the information from which the aforesaid particulars are obtained.

For the purposes of the Provisional War Deaths Register, Reg. 8 provides that the Registrar-General may accept in proof of any fact or particulars a certificate signed by an officer of His Majesty's Forces or by any other person authorized in that behalf by the Minister of Defence, or such other evidence as he deems sufficient.

Where the death of any person in respect of whom an entry has been made in the Provisional War Deaths Register is registered (whether in the War Deaths Register or otherwise) the fact of that registration shall be noted in the appropriate entry in the Provisional War Deaths Register ; and where any person in respect of whom an entry has been made in the Provisional War Deaths Register is subsequently proved to the satisfaction of the Registrar-General to be alive, that fact shall be noted in the entry (Regs. 9 and 10).

From the foregoing regulations, it would appear that, when the Registrar-General is not sufficiently satisfied of proof of death to justify an entry in the War Deaths Register, he may accept such evidence as he deems sufficient to make an entry in the War Deaths Provisional Register. It would seem that the Court would not accept a certificate of entry in either Register as being in itself sufficient evidence in proof of death. As Reg. 14 (2) indicates, any such certificate can only be *prima facie* evidence. As we have suggested, the cases in the last war-period become directly in point ; and, in *Edmondston's* case, their Honours did not accept a certificate of death on a finding, " Missing believed killed in France on 12th October, 1917—Decision of Court of Inquiry," without more, as proof of death. And, in effect, it is the same kind of certificate that is contemplated by the creation of the War Deaths Provisional Register.

In the conditions of the present war, the circumstances in which death can occur are so varied, and the possible proof depends on so many different factors, that many applications for probate or administration must necessarily depend for verification of death, additional to the Registrar-General's certificate, on their own particular facts or inferences. In these, we may be sure that applicants will put before the Court everything relevant to the presumption of death to supplement the Registrar-General's certificate, which, as the regulations themselves declare, can, at most, only be *prima facie* evidence in every case of death on service out of New Zealand in some capacity in connection with the war.

SUMMARY OF RECENT JUDGMENTS.

JUDICIAL COMMITTEE.
1940.
December 2, 4;
1941.
April 8.
Viscount Simon, L.C.
Viscount Maugham.
Lord Thankerton.
Lord Wright.
Lord Porter.

DILLON v. PUBLIC TRUSTEE AND OTHERS, *In re* **DILLON (DECEASED).**

Family Protection—Husband and Wife—Bona fide *Contract for Valuable Consideration to Devise Lands to others by Will—Whether Husband can Contract out of Obligation to make Provision for future Wife—Whether Estate devised or bequeathed pursuant to such Contract subject to the Statute—Family Protection Act, 1908, s. 33.*

In principle the Family Protection Act, 1908, affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken.

A contract for valuable consideration to make a will in stipulated terms in favour of a particular person gives the latter not the right to receive the whole value of the interest which the testator agreed to bequeath or devise, but that value less the extent to which it may be reduced by a redistribution due to the application of the statute, the legatee or devisee being regarded not as a creditor of the testator's estate, but as a beneficiary under the will and subject to the provisions of the statute.

Hammersley v. *De Biel*, (1845) 12 Cl. & F. 45, 8 E.R. 1312, and *Coverdale* v. *Eastwood*, (1872) L.R. Eq. 121, discussed and considered as affected by the provisions of the Family Protection Act, 1908.

Appeal from the judgment of the Court of Appeal (Myers, C. J., and Ostler and Smith, JJ.) [1939] N.Z.L.R. 550, allowed, and judgment of Northcroft, J. [1938] N.Z.L.R. 693, restored with variation.

Counsel: *H. E. Salt*, for the appellant; *J. H. Stamp*, for the Public Trustee, and *T. W. B. Ramsay*, for the other respondents, the children of the testator's first marriage.

Solicitors: *Wray, Smith, and Halford*, London, for the appellants; *Mackrell, Maton, Godlee, and Quincey*, London, for the Public Trustee, and *Ashurst, Morris, Crisp, and Co.*, London, for the other respondents.

Case Annotation: Hammersley v. *De Biel*, E. and E. Digest, Vol. 24, p. 621, para. 6512; *Coverdale* v. *Eastwood*, *ibid.*, Vol. 40, p. 475, para. 228.

COURT OF APPEAL.
Wellington.
1941.
June 18, 19, 20;
July 3.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

DUNCAN v. GRAHAM AND ANOTHER.

Justices—Jurisdiction—Information in respect of one Offence—Evidence disclosing another Offence—Whether Magistrate may Substitute and Convict on latter Offence—Practice—Quashing Conviction—Motion to Quash not Certiorari—Justices of the Peace Act, 1927, ss. 79, 80—Licensing Act, 1908, ss. 190, 195—Code of Civil Procedure, R. 466A.

The proper procedure for the purpose of quashing a conviction is a motion to quash, not a statement of claim under R. 466A or a rule *nisi*.

Nothing in the Justices of the Peace Act, 1927, authorizes the substitution for one offence of another entirely different offence which the accused person has not been called upon to answer.

Therefore, where an accused person was charged on an information under s. 54 of the Justices of the Peace Act, 1927, with aiding, assisting, counselling, and procuring the commission of the offence by an unlicensed person of selling liquor contrary to s. 195 of the Licensing Act, 1908, and the Stipendiary Magistrate—owing to his not having made the substituted charge sufficiently explicit—had not given the accused an opportunity of answering the offence of selling at an unauthorized place in breach of the said s. 195, which the Magistrate thought that the evidence might disclose, convicted the accused of the latter offence, it was held by the Court of Appeal that the conviction must be quashed.

Ex parte Glasheen, (1898) 19 N.S.W.L.R. 141, applied.

Parr v. *Surgenor*, [1923] N.Z.L.R. 1229; [1924] G.L.R. 190, explained and distinguished.

Ex parte Hopkins, (1891) 61 L.J.Q.B. 240; *Reg.* v. *Hughes*, (1879) 4 Q.B.D. 614; and *New Zealand Sheep-farmers Agency, Ltd.* v. *Mosley and Hill*, [1932] N.Z.L.R. 949, G.L.R. 589, referred to.

Counsel: *Cooke*, K.C., and *Cleary*, for the plaintiff; *Weston*, K.C., and *Birks*, for the first defendant.

Solicitors: *J. J. and Denis McGrath*, Wellington, for the plaintiff; *Luke, Cunningham, and Clere*, Wellington, for the first defendant.

Case Annotation: Ex parte Hopkins, E. and E. Digest, Vol. 16, p. 253, para. 541; *R.* v. *Hughes*, *ibid.*, Vol. 33, p. 336, para. 476.

SUPREME COURT.
Wellington.
1941.
June 10, 27.
Smith, J.

In re **REID (AN INFANT), REID v. REID.**

Infants and Children—Custody—Evidence—Appeal from Magistrate's Order—Correct Procedure on Appeal—Whether Motion for Directions thereon can be entertained—When Supreme Court should consider making Order for Rehearing or calling additional Evidence—Relaxation of strict Rule as to onus of Proof where paramount consideration Child's Interest—Procedure under the Magistrates' Courts Act, 1928, relating to appeals, explained—Guardianship of Infants Act, 1926, s. 7 (2)—Magistrates' Courts Act, 1928, ss. 164, 166—Code of Civil Procedure, R. 604.

Rule 604 of the Supreme Court Code of Civil Procedure cannot be applied until a substantive case, in respect of which the rule is invoked, is otherwise validly before the Court.

A motion asking for directions as to the correct procedure on appeal from an order of a Stipendiary Magistrate to the Supreme Court under s. 7 (2) of the Guardianship of Infants Act, 1926, cannot, therefore, be entertained.

Fieldhouse v. *Oppenheimer and Co.*, (1915) 17 G.L.R. 793, referred to.

The conditions of s. 164 of the Magistrates' Courts Act, 1928, apply only to an appeal whereof the subject-matter of the litigation consists of a pecuniary claim.

An appeal from the decision of a Magistrate on the question of the custody of a child under Part I of the Infants Act, 1908, must be brought by way of case stated under s. 166 of the Magistrates' Courts Act, 1928

Before making an order on an application for either a rehearing or leave to call additional evidence, the Court, in the absence of agreement between the parties should wait until the case on appeal has been opened and proceeded with to such an extent as will enable the Court to form a balanced view on the question.

Where the custody of the child is in issue, as the paramount consideration is the child's welfare, the Court should not be bound by the strict rule in an appeal on a pecuniary dispute, that the appellant must demonstrate that the Magistrate was wrong, but, if at any state of the appeal the interests of the child require it, should take additional evidence or rehear the whole case.

Counsel: *Sim*, K.C., and *Kemp*, for the appellant; *Pope*, for the respondent.

Solicitors: *Izard, Weston, Stevenson, and Castle*, Wellington, for the appellants; *Perry, Perry, and Pope*, Wellington, for the respondent.

COURT OF APPEAL.
Wellington.
1941.
June 10, 11, 27.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

THE KING
v.
BURTON AND OTHERS.

Criminal Law—Practice—Autrefois Convict—*War Emergency Legislation—Public Safety Regulations*—"*No person shall be punished twice for the same offence*"—*Conducting or Attempting to Conduct Prohibited Meeting—Police Offences—Wilful Obstruction of Police Constable in Execution of his Duty—Test for ascertaining whether two Offences* "*the same*" *or different—Emergency Regulations Act, 1940, s. 9 (2)—Emergency Regulations, 1940 (Serial No. 1940/26) Reg. 3—Police Offences Act, 1927, s. 77.*

The test under s. 9 (2) of the Emergency Regulations Act, 1939, as to whether an offence for which a person is punishable independently of that statute is the "same offence" as that with which he is charged under that statute or the Emergency Regulations made thereunder, is not whether the facts relied upon by the Crown are the same in respect of the two charges, but whether the offence in respect of which the accused has been convicted or acquitted, as the case may be, on the first charge, is the same, or practically and in substance the same, as that with which he is subsequently charged.

The offence under s. 77 of the Police Offences Act, 1927, of wilfully obstructing a Police constable in the execution of his duty is not "the same offence" as that of conducting, or attempting to conduct, a meeting prohibited by the Superintendent of Police under the provisions of Reg. 3 of the Public Safety Emergency Regulations, 1940, although both offences have reference to the same meeting and the element of the attempt to conduct the meeting is the underlying element in the case of each charge.

R. v. *Barron*, [1914] 2 K.B. 570; *R.* v. *Holland*, (1914) 33 N.Z.L.R. 931, 16 G.L.R. 520; *R.* v. *Young*, (1914) 33 N.Z.L.R. 1191; 17 G.L.R. 41; *R.* v. *Kendrick and Smith*, (1931) 144 L.T. 748; and *Kite* v. *Brown*, [1940] 4 All E.R. 193, applied.

Burton v. *Power*, [1940] N.Z.L.R. 305, G.L.R. 192, and *Young* v. *Cassells*, (1914) 33 N.Z.L.R. 852, 16 G.L.R. 391, referred to.

Counsel: *Parry*, for the prisoners; *Weston*, K.C., (for *W. H. Cunningham*, on war service) and *Birks*, for the Crown.

Solicitors: *Buddle, Anderson, Kirkcaldie, and Parry*, Wellington, for the prisoners; *Luke, Cunningham, and Clere*, Wellington, for the Crown.

Case Annotation: *R.* v. *Barron*, E. and E. Digest, Vol. 15, p. 753, para. 8127; *R.* v. *Kendrick and Smith*, *ibid.*, Supp. Vol. 14, para. 3608a.

SUPREME COURT.
New Plymouth.
1941.
May 27, 28;
June 25.
Myers, C.J.

PALMER v. HUNT.

Practice—Evidence—Extraordinary Remedies—Whether on Hearing Party entitled as of Right to call viva voce *Evidence—Code of Civil Procedure, RR. 467, 470, 471.*

The rules contained in Chapter II of Part VII (Extraordinary Remedies) of the Code of Civil Procedure comprise, so far as they go, a subcode in themselves.

A party is not entitled as of right to call witnesses to give evidence *viva voce*.

If no arrangement to the contrary is made between the parties, the matter must be disposed of upon the affidavits filed in accordance with the rules, unless, perhaps, the Court sees fit to allow oral evidence to be given.

The case is reported on this point of practice only.

Counsel: *Macallan*, for the plaintiff; *Croker*, for the defendants.

Solicitors: *Govett, Quilliam, Hutchen, and Macallan*, New Plymouth, for the plaintiff; *L. E. Sowry*, New Plymouth, for the defendant.

SUPREME COURT.
Napier.
1941.
May 23;
June 17.
Smith, J.

MINISTER OF LANDS
v.
NATIVE TRUSTEE AND ANOTHER.

Rating—Systems of Rating—Swamp Drainage—Special Rate—"*Make and levy*"*—Annually recurring Rate—*"*Levied year by year*"*—Rates in respect of Native Land—Method of Recovery from Owner in his own right, Recovery from Beneficial Owner—When Rate* "*levied*"*—*"*As soon as it is convenient after the rate is levied*"*—*"*Not later than two years thereafter*"*—Swamp Drainage Amendment Act, 1928, s. 2 (1)—Rating Act, 1925, ss. 61, 65, 108 (1), (2).*

The words "make and levy" in the phrase "the Minister of Lands may from time to time make and levy a special rate," &c., in s. 2 (1) of the Swamp Drainage Amendment Act, 1928, mean "make and impose."

The words "may be levied" in the phrase "every such rate shall be an annually recurring rate, and may be levied year by year without further proceeding by the Minister" in the second sentence of the said subsection refer not to the imposition of the rate, but to its collection by the officers duly appointed for the purpose.

An annually recurring special rate becomes due on the date fixed for its payment. Thereafter it may be levied and collected by the proper ministerial officer, making a demand pursuant to ss. 61 and 65 of the Rating Act, 1925, and pursuing the remedies provided by the Act.

Oborn and Clarke v. *Auckland City Corporation*, [1935] N.Z.L.R. 1, G.L.R. 126, applied.

Where it is sought to recover rates which are due in respect of Native land from an owner of that land in his own right, the rate which is due by such an owner is levied for the purposes of s. 108 (2) of the Rating Act, 1925, when it is demanded as required by ss. 61 and 65 of that Act. If the demand is not met, the claim for rates must be lodged not later than two years after the demand as required by the said subsection.

In re Hurimoana 1B2 Block, [1937] N.Z.L.R. 859, G.L.R. 516, referred to.

Where it is sought to recover rates which are due on Native land from the beneficial owners thereof, these rates are for the purpose of the said subsection *levied* when the demand is made on the trustee and it is unnecessary to make a demand upon the beneficial owners individually. If the trustee fails to pay within nine months, claims for rates may then be lodged but they may not be lodged after the expiration of two years from the demand on the trustee. The words "as soon as convenient" in the subsection must be construed to permit of the lapse of the period of nine months in order to permit of the creation by the statute of the debt due by the beneficial owners which will support the charging-order.

In re Hurimoana 1B2 Block, [1937] N.Z.L.R. 859, G.L.R. 516, referred to.

Counsel: *L. W. Willis*, for the plaintiff; *Hallett*, for the first defendant; *Bate*, for the second defendant.

Solicitors: *Kennedy, Lusk, Morling, and Willis*, Napier, for the plaintiff; *Hallett and O'Dowd*, Hastings, for the first defendant; *Simpson and Bate*, Hastings, for the second defendant.

SUPREME COURT. Auckland. 1941. June 20, 24. *Ostler*, J.

ALLEY v. ALFRED BUCKLAND AND SONS, LIMITED, AND ANOTHER.

Deaths by Accidents Compensation—Evidence—Assessment of Damages—"Gain" to any Person for whose Benefit the Action is brought—"Gain" to the estate of the Deceased Person—"Gain"—Whether to be taken into Account on Assessment of Damages—Evidence or Cross-Examination as to such gain Inadmissible—Deaths by Accidents Compensation Act, 1908, s. 5—Law Reform Act, 1936, s. 7.

In s. 7 of the Law Reform Act, 1936, the word "gain" in the phrase "any gain . . . to any person for whose benefit the action [under the Deaths by Accidents Compensation Act, 1908] is brought, that is consequent on the death of the deceased person" includes any gain (or profit) whatsoever from the estate of the deceased to any dependent for whose benefit such an action is brought.

In assessing the damages in such an action no such gain can be taken into account.

All evidence as to such gain is irrelevant and inadmissible and a dependent may not be asked any question in cross-examination relating thereto.

Semble, That the word "gain" in the phrase "any gain . . . to the estate of the deceased person" in s. 7 of the statute refers only to insurance moneys, or to sums of money such as friendly society benefits, payable to the estate of the deceased upon his death.

Carling v. *Lebbon*, [1927] 2 K.B. 108, referred to.

Counsel: *Meredith* and *Smith*, for the plaintiff; *West*, for the defendants.

Solicitors: *Meredith, Meredith, and Kerr*, Auckland, as agents for *Clendon and Vollemaere*, Thames, for the plaintiff; *Jackson, Russell, Tunks, and West*, Auckland, for the defendants.

Case Annotation: Carling v. *Lebbon*, E. and E. Digest, Vol. 36, p. 141, para. 944.

SUPREME COURT. New Plymouth. 1941. May 29; June 25. *Myers*, C.J.

TIPPINS v. McINTYRE.

Child Welfare—Appeal—Order—Whether Appeal lies from Order committing Child to care of the Child Welfare Superintendent—Child Welfare Act, 1925, ss. 13, 39 (1).

An appeal does not lie from an order made under the Child Welfare Act, 1925, s. 39 (1) of which imports only the special provisions of the Justices of the Peace Act, 1908 (now the Justices of the Peace Act, 1927), under the title, "Complaints or Orders," and not those relating to appeals.

The King v. *Rix*, [1931] N.Z.L.R. 984, G.L.R. 582, referred to.

Counsel: *Ewart*, for the appellant; *Macallan*, for the respondent.

Solicitors: *G. L. Ewart*, New Plymouth, for the appellant; *Govett, Quilliam, Hutchen, and Macallan*, New Plymouth, for the respondent.

ROAD TRAFFIC AND WAR EMERGENCY REGULATIONS.

III. The Regulations Relating to Rationing of Oil Fuel.

By R. T. DIXON.

PRIVATE CARS.

The subject of oil-fuel rationing so far as it affects private-car owners was mentioned briefly in the first article of this series (*ante*, p. 114). The rationing in such case is made effective through a coupon system which is authorized by the Oil Fuel Regulations, 1939, Amendment No. 1 (Serial No. 1939/170) as amended by Amendment No. 3 (Serial No. 1940/34) and by Amendment No. 4 (Serial No. 1940/71).

It does not appear that trafficking in coupons is forbidden, but the combined effect of Reg. 35 in Amendment No. 1 and Reg. 43 in Amendment No. 3 is to make it an offence for a person, not being the owner of a motor-vehicle, to tender a coupon for the purpose of obtaining oil fuel. Note also that within seven days of the sale or other disposal of a motor-vehicle, the person who parts with possession must forward the unused coupons to the Post Office where the vehicle is then registered (Reg. 4 of Amendment No. 3). When a motor-vehicle is the subject of an oil-fuel license as explained below, then, by direction of the controller under Reg. 35 in Amendment No. 1, coupons are not in general issued for that vehicle.

COMMERCIAL MOTOR-VEHICLES.

For motor-vehicles used in commercial transport inclusive of business cars, oil-fuel supplies are obtained under a licensing system which is described in the Oil Fuel Emergency Regulations, 1939 (Serial No. 1939/133). Note that the latter "shall be read together with and deemed part of the Supply Control Emergency Regulations, 1939" (Serial No. 1939/131) and that they are amended by Amendments No. 1 (Serial No. 1939/170), No. 2 (Serial No. 1939/251), No. 3 (Serial No. 1940/34) and No. 4 (Serial No. 1940/71).

For convenience, the reference henceforth to a regulation by number alone will be understood to apply to a regulation of the Oil Fuel Emergency Regulations, 1939 (Serial No. 1939/133).

Two types of oil-fuel license are available, namely a consumer's license under which supplies are obtainable only from a named vendor and which is available until revoked, and a special license by which the fuel may be obtained from any vendor but which is for only a specified term as fixed in the license (*vide* Regs. 13 and 14).

The special license is issued principally to users who cover considerable territory, such as commercial travellers. It is also the type of license issued to a private-car owner who manages to convince the reluctant authorities that he has a worthy cause for the issue of petrol additional to the supplies available through his coupons.

When fuel is obtained under authority of a special license it is the duty of the licensee (Reg. 16) and the vendor (Reg. 23) to see that the date and the amount of supply are entered on the license under the signature of the vendor or his agent.

A difficult problem under the regulations and one which has resulted in several contested prosecutions is that of retaining a check on the proper authorization of the large supplies of motor-spirits disposed of by the suppliers through petrol pumps and otherwise. The methods of exercising this check are to require all coupon sales to be accounted for by coupons and to require the vendor to keep three types of record—*i.e.*, Vendor's Stock Schedule (Reg. 24), a Vendor's Issue Schedule (Reg. 25) and a card for each consumer's license for which the vendor has been appointed supplier. These are checked from time to time by the Post Office. The Vendor's Stock Schedule is designed to show the quantities of oil fuel supplied by the oil companies to the vendor each month together with the balance carried forward from the previous month. The Vendor's Issue Schedule records the quantities of fuel supplied to the holders of both types of consumer's licenses and is verified by the signatures of the licensees. Thus the vendors should through the Vendors' Stock Schedule have a complete record of all oil fuel supplied to them and by means of the Vendors' Issue Schedule and coupons they should be able to account for all issues from their stock. In the case of *Police* v. *McDonald*, [1940] M.C.R. 74, Mr. A. M. Goulding, S.M., refused to convict a vendor who was unable to account for sixty-eight gallons of motor-spirit through the above records. The Magistrate considered that the mere proof of a shortage is not sufficient to obtain a conviction under Reg. 20, but that the prosecutor must prove that the vendor has disposed of the fuel in an unauthorized manner.

Another case of interest, not reported, is that of *Police* v. *Fitzgerald Bros., Ltd.*, heard at Wellington on October 11, 1940. In this case the defendant firm was prosecuted for a breach, *inter alia*, of Reg. 10 (1) of the Supply Control Emergency Regulations, 1939 (Serial No. 1939/131). An employee of the firm caused a false entry to be made by a customer in the Vendor's Issue Schedule in order to conceal sales of motor-spirit for which the firm could not account. The prosecution was taken against the firm under the above regulation for making a false statement with intent to deceive. Mr. J. L. Stout, S.M., in dismissing the charge, quoted *O. F. Nelson and Co., Ltd.* v. *Police*, [1932] N.Z.L.R. 337 and *Pearks, Gunston and Tee, Ltd.* v. *Ward*, [1902] 2 K.B. 1, in support of his contention that the words used in the regulation make *mens rea* an essential ingredient in the offence, and that, in the lack of a contrary intent expressed in the regulation, a company cannot be convicted of such an offence.

Regulations 29 to 33 contain provisions concerning the importation of motor-spirit and the movement of vessels carrying it to New Zealand and thus the check on it by the Oil Fuel Controller is exercisable from the time the fuel approaches this country.

It is understood that while the definition of "oil fuel" in Reg. 2 is very wide in scope, the provisions of the regulations have been applied, so far, only in the case of motor-spirit and power kerosene.

LONDON LETTER.

By Air Mail. Somewhere in England,
June 15, 1941.

My dear EnZ-ers,

It appears to have been stated in Germany that the rendering of assistance by the United States to Great Britain in the form of protecting by American convoys the supply of goods and munitions of war would be an act of warfare. Whether that is so or not seems in present circumstances to be little more than a verbal subtlety. More correctly, perhaps, it would be so grave a breach of neutrality that Germany would be entitled to answer it by a declaration of war. Whether she will do so will shortly be seen, because in his stirring speech this week, President Roosevelt has promised all measures necessary for the delivery of the goods. That must lead to a clash of arms, but it does not follow that Germany will give America the emotional fillip of a gage formally flung down. For the rest, the President's speech was an unfaltering declaration of support for the cause of democracy, and a clear warning to Americans that war will cross the Atlantic, whether they like it or not. It will not be long before they welcome it, as we did, as the lesser evil.

Tears for Lawyers.—The damage which the Inns of Court have suffered in recent raids has been very heavy. Of Gray's Inn there is very little left. The Library, the Chapel, and the sixteenth century Hall—smallest and loveliest of the four Halls—are destroyed. In the Temple the damage is almost past counting. Brick Court and Pump Court are no more. Inner Temple Hall and the Cloisters are wrecks. Worst of all, at any rate to the layman, is the gutting of the Temple Church, built in the 12th century. The recumbent effigies of the Knights Templars, when the inferno above them abated, gazed upwards through a gaping roof. They in their time wielded their swords against the devil as they saw him, and we in our day take up their cause—Christianity against paganism, light against darkness, freedom against servitude, civilization against barbarism. It is a pity the Germans cannot understand that such senseless destruction only strengthens our determination in that cause.

The Lord Advocate.—Many lawyers and, of course, all Scots were interested to see that the Lord Advocate (in the person of the Solicitor-General for Scotland) appeared in a Scots appeal in the House of Lords last week, though he represented neither appellant nor respondent (*Times*, May 27). We read that the Lord Advocate said, through his distinguished junior, that he appeared to answer questions and give explanations

which the House might ask or desire, but that he did not wish his appearance to be taken as a precedent. No doubt due notice will be taken of this observation. At the same time, we know of nothing to prevent the House from asking the Scots Law Officers, either of them, to come and listen to appeals in which the help that they can give may be valuable. There are certainly precedents in the matter of the appearance of the English Attorney-General. The Crown was no party to the historic appeal of *Moore* v. *Attorney-General of the Free State*, [1935] A.C. 484. A glance at the report shows that the present Lord Chief Justice and the Junior Counsel to the Treasury of that time (now Mr. Justice Lewis) appeared "by invitation to assist the Board." Their assistance took the form of a concise argument which, if successful, would have made the appeal from the Free State at all events competent.

The Requisitioning of Ships by the United States.—The decision of the United States to requisition foreign ships lying idle in American ports appears to be an interesting variation of what is known in International Law as the right of angary. That was originally a right claimed by belligerents who had not sufficient vessels to "lay an embargo on and seize neutral merchantmen in their harbours and to compel them *and their crews* to transport troops, munitions and provisions to certain places on payment of freight in advance" (Oppenheim, *International Law*, 6th Ed., II, s. 364). Arising in the Middle Ages, and much resorted to by Louis XIV of France, the right fell into disuse in the eighteenth century, and on its subsequent revival took a somewhat different form. It became "a right for belligerents to destroy or use, in case of necessity, for the purpose of offence and defence, neutral property on their territory, or in enemy territory, or on the open sea" (*ibid.*, s. 365). But it did not extend to compelling neutral individuals to render service, and it seems that compensation must be paid for any damage done in the exercise of the right, and generally the neutral owner must be fully indemnified. In the World War the United States, in March, 1918, after her entry into the war, exercised the right by seizing a number of Dutch vessels lying in American harbours, but the Dutch crews were not compelled to continue to serve, though many of them did so voluntarily. America is not a belligerent in the present war, but the present requisitioning of foreign ships makes her non-belligerency more difficult to maintain.

Nuptial Rice.—Truly Parliament is a wonderful institution. The sonorous periods of Coke—*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima*—in the Fourth Institute seem necessary to do it justice. And Blackstone, in the First Book on his *Commentaries*, adds that "all mischief and grievances, operations and remedies that transcend the ordinary course of the law, are within reach of this extraordinary tribunal." Even so it is; for the other day the House, turning from matters of moment to the realm and to the world, heard Captain Plugge ask the Parliamentary Secretary to the Minister of Food whether he was aware that rice was still used at weddings, and whether he would make the practice illegal. Of course, Parliament had already made it illegal (and had quite understandably forgotten the fact) by the Rice (Control) Order, 1941 (S.R. & O., 1941, No. 501), which provides that except under and in accordance with the terms of a licence or other authority granted by or on behalf of the Minister, no person shall use any rice except for a permitted purpose. The use of rice at weddings, said Major Lloyd George, is not a permitted purpose. So there goes by the board for the duration a custom deep rooted in the folklore of fertility—unless the Minister grants a licence. I have no doubt the Paper Controller frowns on the use of confetti; all old boots are wanted for digging in the garden, and need coupons for their replacement if they are thrown away; so it looks as though the perils of matrimony have—*pro tanto* and *pro tempore*—diminished. There should be a moral here for those able to apply it.

Yours as ever,
APTERYX.

PRACTICE NOTES.

Remedies in Revenue Matters.

By W. J. SIM, K.C.

(*Concluded from p. 120.*)

It is proposed in this article to complete the discussion on procedure in gift and death duty appeals by a consideration of two subsidiary matters—namely (*a*) the Court's power to draw inferences on the case stated, and (*b*) the method of valuation of assets which form the subject-matter of the gift *inter vivos* or part of the deceased estate, and appeals from the Commissioner's valuation.

In re Nichol (deceased), [1931] N.Z.L.R. 718, shows that the Court's power to draw inferences may be limited. In that case the specific questions stated for the determination of the Court were as to whether certain lands given by a testator in his lifetime formed part of the dutiable estate of the deceased. It involved a consideration of s. 5 (1) (*c*) of the Death Duties Act and a determination as to whether the donor of gifts of land had parted with possession and enjoyment of the lands not less than three years before his death, and had henceforth retained such possession and enjoyment to the entire exclusion of the deceased or of any benefit to him by contract or otherwise. The facts and issues were set out at very great length in the case stated but no order was made by the Supreme Court for the determination of any disputed question of fact under subsection (3) of s. 5 of the Act. The parties had, however, agreed that each of them should be at liberty to produce to the Court such evidence as they thought fit upon one particular issue, namely whether certain payments made by the donor to the donee as set out in certain paragraphs of the case were

paid and received by the donee by way of rent. The position that then arose was summarized and dealt with by Mr. Justice Smith, at p. 744, as follows :—

> The present position is that the questions in issue must be determined upon the facts set out in the case stated, together with the Court's finding of fact upon the issue put to it regarding rent. The Court's power to draw inferences is limited to inferences from those facts. As was said by Lord President (Lord Dunedin) in *Lord Advocate* v. *Stewart* with regard to the power of the Court to draw inferences from a joint minute of admissions. "This seems to me to exclude all references except such as fall to be drawn from the terms of the admissions themselves."

It would appear then from this statement of the law that if either the statement in the case of facts as facts, or the agreement relating to the proof of facts and such proof, was inadequate, a serious gap could arise in the presentation of the case for the appellant or respondent according to which party assumed the burden of proof. The case does not appear to be in the position of a jury trial where the issues submitted to the jury are inadequate to dispose of all questions of fact calling for determination before judgment, and the Court has inherent power to decide any further question of fact that may be necessary. The Court is limited to the facts stated, the facts it decides pursuant to the agreement of the parties and inferences arising from either of these premises. How far such limitations would operate in practice in any particular case must remain in doubt until the latter arises. They are mentioned here in order to bring them to notice.

With regard to the valuation of assets, the Death Duties Act, 1921, has three relevant sections—namely, ss. 6 (2), 70, and 71. Section 6 (2) defines the *time* at which valuation shall take place in the case of death duties, and provides that all property comprised within the estate shall be valued as at the date of the death of the deceased, save where by s. 5 of the Act it is provided that the local situation of any such property shall be determined as at any other date, the value of that property shall be determined as at the same date. It is clear that no event occurring after the date fixed for valuation can affect the valuation. The authorities on the point were summarized by Ostler, J., in *Commissioner of Stamps* v. *Shrimpton* as follows :—

> In my opinion the contention of the respondent is correct. It has always been understood that the value of a deceased's assets for death duty purposes is their value at the date of his death unaffected by any subsequent event or consideration which would either increase or decrease that value. That was held to be the case nearly forty years ago under our Act of 1881 in *In re Estate of Jackson (deceased)*, (1901) 19 N.Z.L.R. 566, and so far as I know that has remained the law ever since, as it is in Australia, or at any rate in Victoria: See *Weldon* v. *Union Trustee Co. of Australia Ltd.*, (1925) 36 C.L.R. 165. That principle is enshrined in clear terms in s. 6 (2) of our present Act (No. 21 of 1921), where it is provided that the property of the deceased for death duty purposes "shall be valued as at the date of the death of the deceased." In *Beamish* v. *Commissioner of Stamp Duties*, [1937] N.Z.L.R. 217, it was held that the value of a debt due to a deceased for death duty purposes is no more than the value of the debtor's assets (administered if necessary in bankruptcy) at the date of the death of the deceased. That is a corollary of the decision of the Court of Appeal in *Dobel* v. *Commissioner of Stamps*, (1904) 23 N.Z.L.R. 1003. In *Beamish's* case (at p. 221) I said: "It is most important to keep in mind that the valuation of the debts . . . must be made at the date of the testator's death, and nothing that has occurred since to increase the value of the debt can be taken into account." As a general statement of the law I think that proposition is correct, and I adhere to it. The principle of *Beamish's* case has since been applied to cases in which a mortgage debt has been reduced by the Court of Review under the Mortgagors and Lessees Rehabilitation Act, 1936, after the date of the death of the deceased: see *Cotton* v. *Commissioner of Stamp Duties*, [1938] N.Z.L.R. 698, and *Schaeffer* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 603. But in both cases the date of the death of the deceased was after the coming into operation of the Mortgagors and Lessees Rehabilitation Act, 1936, and at the date of his death mortgage debts due to him were irrecoverable excepting under the conditions prescribed by the Act, and the mortgagor had acquired a statutory right to have the mortgage debt adjusted. The value of the debt in those cases at the date of the death of the deceased was therefore not its face value even if the mortgagor was able to pay in full, but the value to which the Court of Review might thereafter reduce the mortgage.

The case in question involved a consideration of a mortgage debt which subsequent to the testator's death was substantially reduced by a consent order in the Court of Review, and the view held by Mr. Justice Ostler was confirmed by the Court of Appeal. The argument to the contrary was that the order of the Court of Review was retrospective in its express terms to the date of death, and this being made pursuant to the authority of the Act was unassailable in any other Court as provided by s. 28 of the Mortgagors and Lessees Rehabilitation Act, 1936. The case is not yet reported.

Section 70 of the Death Duties Act, 1921, makes express provision for the valuation of *land* for the purpose of assessing both death and gift duty. Such valuation may take place either by agreement between the Commissioner and the administrator in the case of death duty, or between the Commissioner and the donor in the case of gift duty, or in either case by a valuation made on the requisition of the Commissioner by the Valuer-General in accordance with the Valuation of Land Act, 1908, as at the date at which the value of that land is to be determined for the purpose of the assessment of the duty. "Land" in this connection has the same meaning as in the Valuation of Land Act, 1908, and the term "value" means capital value as defined by that Act. The section is supplemented by s. 6 of the Death Duties Amendment Act, 1925, which provides that where any property that is within the meaning of the term "land" in its proper legal sense is excluded from s. 70 of the principal Act, the value of such property for the purposes of the principal Act shall be ascertained in manner provided by s. 71, that is to say the procedure for the valuation of "other property" shall be followed. The point of procedure which requires emphasis in this connection is that any agreement or valuation arrived at as provided by s. 70 is declared final and conclusive but subject to the right of appeal *provided by the section*. This right is to appeal within one month (from the receipt of notice of the valuation) to a Magistrates' Court in accordance with the Valuation of Land Amendment Act, 1908, and all the provisions of that Act are made to apply to any such appeal. This is one of the occasions when the matter cannot be reopened, if the valuation has taken place in manner provided by the section. The valuation, however, is made final and conclusive subject to the right of appeal, and this right of appeal is given only to the persons to whom the notice of valuation is given. These nominated persons do not include the Commissioner, the Valuer-General's special valuation being final as far as the revenue authorities are concerned. It is not proposed to enter here into a discussion on the principles affecting the valuation of land, the purpose of the article being to outline the general structure of the Act governing the procedure to enforce rights. The authorities on the principles of valuation itself will be found carefully collected and discussed in

Adam's Law of Death and Gift Duties in New Zealand, 182.

The valuation of property other than land is governed by s. 71 of the Act and is to be ascertained by the Commissioner *in such manner as he thinks fit*, and there is a proviso to the section that in ascertaining the value of shares in a company no account shall be taken by the Commissioner of the effect upon such value of any restrictive provisions as to the alienation or transfer of such shares contained in the memorandum or articles of association of the company. This section does not make any valuation pursuant to it final and conclusive, and the ordinary right of appeal by way of case stated under s. 62, applies. Instances of such appeals against the Commissioner's valuation are numerous, typical cases being *Beamish* v. *Commissioner of Stamps*, [1937] N.Z.L.R. 217 (value of a debt due to the estate); *Bisley* v. *Commissioner of Stamps*, [1932] N.Z.L.R. 1371 (value of growing crops of apples); *In re Gilmer (deceased)*, *Public Trustee* v. *Commissioner of Stamps*, [1929] N.Z.L.R. 61 (value of goodwill of hotel business). The principles of the valuation of property other than land can, as with land itself, give rise to varied and difficult questions, which is worthy of a treatise on the subject. Mr. Adams in his book on death duties has given exhaustive attention to the subject (pp. 185–193 and pp. 259–262). The important procedural consideration is that both in the case of land under s. 70 and of property other than land under s. 71, the Commissioner is subject to appeal and the valuation and the principles underlying it become open to review; but a difference exists in that the valuation of land under s. 70 is made conclusive, and therefore *Luttrell's case* which approved of the principle of recovery within three years of duty paid in excess (under s. 74) can have no application when s. 70 has been strictly followed; whereas the authority could be invoked in the case of other property if an appeal has not already taken place by way of case stated.

SEVENTY YEARS A LAW CLERK.

A Difficult Record to Beat.

In a recent issue there appeared (*ante*, p. 139) a note on Mr. H. F. Tilley's fifty years as a law clerk. This seemed a notable record for this country. But Mr. Thomas Jenkins Hill, managing clerk to Messrs. Lane, Neave, and Wanklyn, Christchurch, has a record that seems unbeatable.

Having matriculated at Christ's College, Mr. Hill entered the employ of Mr. R. D. Thomas on December 7, 1871. He entered the employ of Messrs. Holmes and Loughrey, the original predecessors of the present firm of Messrs. Lane, Neave, and Wanklyn, as managing clerk on March 7, 1884. He has served in that office as managing clerk from that date down to the present time. He has altogether served under eight different principals: Messrs. R. D. Thomas, Thomas and Bruges, Holmes and Loughrey, Loughrey and Lane, Lane and Neave, and Lane, Neave, and Wanklyn, and Mr. E. E. England since he has been partner in the firm.

Mr. Hill has therefore been in the same office as managing clerk for over 57 years, and he will have completed seventy years as a law clerk on December 7 of this year.

OBITUARY.

Mr. M. H. Hampson, Rotorua.

Mr. M. H. Hampson, who died at Rotorua on June 12, had long maintained a fine reputation at the Bar. In particular he was an authority on Native land law, and on matters generally affecting the Native race. His death at the age of fifty-four came shortly after his return from Great Britain, where he had appeared before the Judicial Committee of His Majesty's Privy Council as leading counsel for the appellant in the appeal of Te Heuheu Tukino and the Aotea District Maori Land Board, concerning the rights of the Maoris under the Treaty of Waitangi, and, as the Lord Chancellor said in delivering the opinion of the Board, their Lordships were indebted to Mr. Hampson for his "full and able argument." Mr. Hampson had had various experiences of war-time England, and had met the leading figures in the legal world during his six months' stay in London awaiting the hearing of the appeal.

The late Mr. Hampson was born in Auckland and educated at Prince Albert College, and he completed his law degree at the Auckland University College. In his university days he took a prominent part in college activities. He represented Auckland at the New Zealand University Tournament in debating and athletics, and he was a member of the college first fifteen and cricket eleven.

In 1908, Mr. Hampson went to Rotorua and entered into partnership with the late Mr. Frank Rhodes in the firm of Messrs. Rhodes and Hampson. After Mr. Rhodes retired Mr. Hampson practised on his own account in Rotorua, forming branch partnerships in the Bay of Plenty, Waikato, and Auckland. At the time of his death he was practising in Rotorua, in partnership with Mr. R. B. G. Chadwick.

Before the Rotorua Borough Council was formed he was prominently associated with the Chamber of Commerce, then the only representative Public Body in Rotorua. Owing to his activities, extended over several years, he was responsible for the passing of the Rotorua Town Lands Act, 1920, whereby the right to freehold town lands was attained.

Mr. Hampson was Vice-President of the Hamilton District Law Society and had been a member of its Council for some years.

After his university days Mr. Hampson's sporting and civic activities were applied to a wider field. He captained a Rotorua cricket team which played an English touring eleven and he was associated with the Rotorua Cricket Association, St. Michael's Football Club, the Rotorua Racing Club, the Hunt Club, the Rotorua Tennis Club, St. Michael's Tennis Club, of which he was the founder, and the local Golf Club and Rotary Club, as well as many other district societies. His versatility was shown in the fact that he was for many years choir-master at St. Michael's Church, in the affairs of which he had taken a prominent part generally.

Mr. Hampson is survived by his wife, eight children, and one grandchild.

The high esteem in which Mr. Hampson was held was shown by the large and representative attendance at St. Michael's Church and at his funeral, many of those present having come from long distances. His

coffin was draped with two mats which had been laid upon it by the Ngati-Tuwharetoa Maoris as a tribute to the deceased's interest in the Native race. The Auckland District Law Society was represented by Mr. H. P. Richmond, and the Hamilton District Law Society by Mr. G. T. Bell, of Matamata.

RECENT ENGLISH CASES.

CHARITIES.

Religious Purposes—Absolute Discretion of Trustee—"Educational or Charitable or Religious Purposes for Roman Catholics in the British Empire."

A bequest "for the furtherance of educational or charitable or religious purposes" is a valid charitable bequest.

Re WARD: PUBLIC TRUSTEE *v.* WARD, **[1941] 2 All E.R. 125. C.A.**

As to religious purposes: see HALSBURY, Hailsham edn., vol. 4, pp. 118–122, pars. 155–160; and for cases: see DIGEST, vol. 8, pp. 248–254, Nos. 74–160.

COMPULSORY PURCHASE.

Local Authority—Land Required for Housing—Assessment of Compensation—Compensation for Disturbance of Business—Notice to Treat—Variance in Description of Property—Separate Notices to Treat as to Land and Minerals—Award of One Sum—Lands Clauses Consolidation Act, 1845 (c. 18), ss. 6, 9, 16–68—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2 (1), (2), (6).

Where land is compulsorily acquired, and by reason of its suitability for purposes other than that to which it is being put the value is higher than the value of the land in its present use, compensation for disturbance is not payable unless the difference in values is less than the loss caused by disturbance.

HORN *v.* SUNDERLAND CORPORATION, **[1941] 1 All E.R. 480. C.A.**

As to compensation for compulsory purchase of land: see HALSBURY, Hailsham edn., vol. 6, pp. 46–48, pars. 44, 45; and for cases: see DIGEST, vol. 11, pp. 291–294, Nos. 2184–2225.

EMERGENCY LEGISLATION.

Landlord and Tenant—Lease Granted in 1937 Assigned after Outbreak of War — Whether Assignment Constituted New Contract of Tenancy — Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (1), (2).

The assignment of a lease and the payment of rent by the assignee to the landlord does not constitute a new contract of tenancy entitling the landlord to levy execution without leave under the Courts (Emergency Powers) Act, 1939.

HUMBERSTONE ESTATES LTD. *v.* ALLEN AND ANOTHER, **[1941] 2 All E.R. 190. C.A.**

As to relief under the Courts (Emergency Powers) Acts: see HALSBURY'S COMPLETE STATUTES OF ENGLAND, vol. 32, pp. 946–950.

MISTAKE.

Rectification—Evidence of Mistake—Annuity Granted Without Sufficient Reference to Deduction of Tax—Grantor Paying Annuity in Full for 30 Years.

In order to obtain rectification of an agreement it is not sufficient to show that one of the parties had for many years acted in accordance with the agreement in the form to which it is sought to rectify it; but the intention of the parties at the time the agreement was made must be proved.

FREDENSEN *v.* ROTHSCHILD, **[1941] 1 All E.R. 430. Ch.D.**

As to evidence on which rectification will be granted: see HALSBURY, Hailsham edn., vol. 23, pp. 157–160, pars. 227–232; and for cases: see DIGEST, vol. 35, pp. 137–144, Nos. 355–422.

TRUSTS.

Rule in *Re Chesterfield's Trusts*—Applicable only to Personalty.

The rule is complementary to that in Howe *v.* Lord Dartmouth, (1802) 7 Ves. 137. *That rule only applies to personal estate, and the rule in* Re Chesterfield's Trusts, (1883) 24 Ch.D. 643, *should not apply to realty.*

Re WOODHOUSE: PUBLIC TRUSTEE *v.* WOODHOUSE, **[1941] 2 All E.R. 265. Ch.D.**

As to rights in reversionary and wasting property: see HALSBURY, Hailsham Ed., vol. 33, pp. 117–121, pars. 207, 208; and for cases: see DIGEST, vol. 20, pp. 368–170, Nos. 1062–1074.

WORKMEN'S COMPENSATION.

Alternative Remedies—Election between two Remedies—Receipt of Compensation—Father Acting as Son's Agent—Request for Payments of Compensation to Son—Workmen's Compensation Act, 1925 (c. 80), s. 29 (1).

In an action for damages for personal injuries suffered by the plaintiff in the course of his employment, the plaintiff was debarred from his common law remedy because of s. 29 of the Workmen's Compensation Act, 1925, in spite of the fact that the plaintiff did not know that he had an option, and that he thought he could take the Workmen's Compensation payments on account.

As to alternative remedies: see HALSBURY, Hailsham Ed., vol. 34, pp. 961–969, pars. 1318–1328; and for cases: see DIGEST, vol. 34, pp. 490–492, Nos. 4063–4071; see also *Willis's Workmen's Compensation*, 33rd Ed., pp. 521–527.

As to transmission machinery: see HALSBURY, Hailsham Ed., vol. 14, pp. 594, 595, par. 1130; and for cases: see DIGEST, vol. 24, pp. 908–911, Nos. 62–81.

RULES AND REGULATIONS.

Labour Legislation Emergency Regulations, 1940. Biscuit Industry Labour Legislation Suspension Order, 1941. No. 1941/99.

Labour Legislation Emergency Regulations, 1940. Cheese-factories Labour Legislation Suspension Order, 1941. No. 1941/100.

Rabbit Nuisance Act, 1928. Rabbit Destruction (Meringa Rabbit District) Regulations, 1941. No. 1941/101.

Supply Control Emergency Regulations, 1939. Southland and Otago Silver-beech Marketing Notice, 1940. Amendment No. 1. No. 1941/102.

National Service Emergency Regulations, 1940. Cheese Industry (Registration of Employment) Order, 1941. No. 1941/103.

Marketing Act, 1936. Meat Marketing Order, 1941. No. 1941/104.

Mining Act, 1926. Mining Regulations, 1926. Amendment No. 8. No. 1941/105.

Control of Prices Emergency Regulations, 1939. Revoking Price Order No. 1 (sacks). No. 1941/106.

Control of Prices Emergency Regulations, 1939. Price Order No. 40 (eggs). No. 1941/107.

Board of Trade Act, 1919. Board of Trade (Return of Bread) Regulations, 1941. No. 1941/108.

Industrial Efficiency Act, 1936. Industrial Efficiency (Fish) Regulations, 1941. No. 1941/109.

Labour Legislation Emergency Regulations, 1941 (No. 2). Biscuit Industry Labour Legislation Suspension Order, 1941 (No. 2). No. 1941/110.

Emergency Regulations Act, 1939. Export Prohibition Emergency Regulations, 1939. Amendment No. 1. No. 1941/111.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices District Regulations, 1941. Amendment No. 1. No. 1941/112.

Emergency Regulations Act, 1939. Evidence Emergency Regulations, 1941. No. 1941/114.

Emergency Regulations Act, 1939. Registration of Deaths Emergency Regulations, 1941. No. 1941/115.

Health Act, 1920, and the Drainage and Plumbing Regulations, 1923. Drainage and Plumbing Extension Notice, 1941, No. 1. No. 1941/116.

Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934. Egg Marketing Regulations, 1940. Amendment No. 1. No. 1941/117.

Emergency Regulations Act, 1939. War Service Badges Emergency Regulations, 1941. No. 1941/118.

Emergency Regulations Act, 1939. Uniforms and Badges Emergency Regulations, 1941. No. 1941/119.