New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"The character of 'the reasonable man' at common law is not yet fully developed, but the Courts are busy year through, the long summer days excepted, in perfecting it. Not a day passes but some fresh quality is added, or some fresh example is given of his already delightful character. He is a man only of average intellect and intelligence, and not transcendentally wise. He is very human; he cannot foresee the unexpected; and, though he learns from past experience, he is not one of whom we may say contemptuously he is wise after the event."

—F. T. PIGGOTT.

VOL. XVIII. TUESDAY, DECEMBER 15, 1942 No. 23

PROBATE AND ADMINISTRATION: PROOF OF DEATH.

II.—DEATHS ON ACTIVE SERVICE.

THE effect of the Registration of Deaths Emergency Regulations, 1941 (Serial No. 1941/115), providing for the issue of certificates of death following receipt of a certificate of the Service Department concerned, and their application in respect of the grant of probate or administration of persons killed on war service were dealt with in *17 New Zealand Law Journal*, 145, where the existing authorities, mostly concerning deaths on active service during the war of 1914–1918 are considered. Then followed the judgment of Mr. Justice Blair—*In re Fuller*: *In re Lilburn*, [1941] N.Z.L.R. 618—where the above-mentioned regulations were referred to. Later, their Honours the Judges issued a Practice Note, which it may be well to reproduce here, as a reminder of the present requirements of the Court in respect of deaths on active service. It is as follows:—

1. On any application for probate or letters of administration based upon entries in the War Deaths Register in the form of the certificate (Form A) provided for by the Registration of Deaths Emergency Regulations, 1941, or based upon s. 3 of the Births and Deaths Registration Act, 1930 (relating to deaths of members of the Naval Forces), the applicant is required to place before the Court any confirmatory evidence of death that may be available (such as, for example, letters from fellow-soldiers or the commanding officer of the person alleged to be dead describing the circumstances of his death.

2. Where, on any application, it appears that no confirmatory evidence is available, but that the actual date of death (or, where operations have continued over a period of several days and the actual date cannot be stated), then the approximate date and the place or circumstances of death are stated in the War Deaths Register, probate or letters of administration will be granted. If, however, such particulars do not appear to be stated in the War Deaths Register, and satisfactory confirmatory evidence is not available, the application will be stood over to enable confirmatory evidence to be obtained. If, after the expiration of what the Judge considers in the circumstances of the particular case to be a reasonable period, it is found impossible to obtain confirmatory evidence, the Judge will further consider the case and decide whether probate or letters of administration should be granted on the material before the Court.

3. In all other cases each application must be dealt with according to its merits, but in general an order giving leave to swear death may be required before an application for probate or letters of administration is dealt with.

A recent Practice Note, which was issued since this article was in print, appears, *ante*, p. 257. In this, His Honour the Chief Justice, with the concurrence of the Judges resident in Wellington and Mr. Justice Northcroft, again drew attention to the irregularity of swearing death by testifying to the fact of death as being a matter of information and belief. It was there said:

If the applicant is advised that he cannot swear death, then the proper course is to apply for leave to swear death. If the applicant believes himself able to swear death, he should then follow strictly para. (2) of Form 31, or the corresponding prescribed forms of affidavit on application for letters of administration, and state the grounds of his being able so to depose, referring to and exhibiting the appropriate certificate, and letters or other confirmatory evidence. Paragraph (2) of the Form cannot be allowed to be departed from.

This in no way affects the Practice Note set out above. It merely points out a seemimgly common error resulting in non-compliance with R. 518 of the Code of Civil Procedure and the prescribed forms based on it. During the last War, a similar irregularity made its appearance. In *In re Norman C. Harris*, [1916] N.Z.L.R. 967, a motion for grant of letters of administration, where Denniston, J., said :—

> The practice in such cases requires 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 is satisfied that the evidence leads up to a reasonable presumption of the death, it will grant probate or letters of administration as the case may be, and will give permission to the applicant to swear that person died on or after the last date given of his existence.

In that case, the applicant gave as the grounds of his belief (*a*) a letter from the Minister of Defence informing the next-of-kin of the soldier's having died of wounds, and (*b*) a letter from the Director of Base Records setting out the official Army form in reference to the soldier, where it was stated that he died of wounds (finding of the Board of Inquiry). The learned Judge dismissed the application.

Where a soldier or airman has died in New Zealand, and his body has been buried, the applicant for probate or letters of administration has no difficulty in getting an affidavit, complying with R. 518 of the Code of Civil Procedure, in Form 31 for probate, or the corresponding form for application for letters of administration.

Where the body of a serviceman missing during training operations in New Zealand has not been recovered, application may be made under s. 3 of the Coroners Amendment Act, 1930, to which reference was made in our last issue, at p. 255. It may well be that, though the body has not been recovered, everything points to the loss of the missing person, but there is insufficient evidence obtainable from the naval, military, or air authorities. If the death could have occurred in New Zealand, valuable evidence may be obtained from an inquisition ; and that evidence can later be put on affidavit and used in support of an application for probate or letters of administration.

Presumption by the Registrar-General of the death of a sailor, soldier, or airman overseas is founded on a certificate by the proper authority concerned, though this in itself will be insufficient proof of death for probate purposes. All these authorities work under great difficulty, more so in this war than in the last. There is the additional difficulty of obtaining information where countries have been overrun, such as happened in Greece and Crete. Records may have been lost in the course of an evacuation, or even destroyed. The War Office, for instance, is very concerned as to the value of its certificate, and often delays presumption of death lest by premature decisions its certificate is cheapened. In the New Zealand Forces, an inquiry is held by the military authorities as soon as may be after a soldier has been reported missing, believed killed ; and instructions are given that a Court of Inquiry must not report the death of such a soldier unless it is manifestly clear that he has been killed.

Where a member of the naval or military forces has been killed overseas, and there is available a certified copy of the entry of his death in the War Deaths Register, this should be attached to the affidavit of the applicant for probate or letters of administration, who can then, in the second paragraph, swear that the testator or intestate person died on or about the day set out in such certificate, as he is able to depose from reading such certificate and from the affidavits of the named persons to be filed with the application. These affidavits should contain all the confirmatory evidence available, such as information that the testator or intestate person was a regular correspondent and that he had ceased corresponding, on a stated date ; the letters of his commanding officer or other person who saw him die or was present at his funeral, &c. In fine, everything in the nature of available evidence relative to the soldier's death should be placed before the Court by the affidavits of the appropriate persons able to swear to the facts or to produce the letters, &c.

The fact of the death of an airman on active service overseas is more difficult to establish. The presumption of death is usually founded by the authorities concerned on the lapse of time since the airman was reported missing, in the absence of any evidence as to the circumstances of his disappearance. Here, again, length of such lapse of time must vary in each individual case.

In the recent case, *Re Butler's Settlement Trusts, Lloyd's Bank* v. *Ford*, [1942] 2 All E.R. 1919, it was necessary to prove the death of Francis Butler, and for that purpose the following certificate issued by the Air Ministry on March 12, 1941, was produced :

> Record of this department that Pilot Officer Francis Butler, No. , R.A.F. Volunteer Reserve, was reported missing and must be presumed for official purposes to have lost his life as a result of air operations on June 19, 1940.

Bennett, J., held that this certificate was not sufficient evidence on which he could authorize the trustees to distribute the income on the footing that the appointee, Francis Butler, was dead. He ordered the question to stand over for further evidence. The certificate in this case was dated nine months after the airman was reported missing ; and the matter was before the Court in June, 1942. The learned Judge, who is not a member of the Probate Division, seems to have looked at the Air Ministry's certificate in a manner different from that of his brethren in that Division, as the certificate referred to an airman reported missing two years earlier ; but, like the Court here, he wanted confirmatory evidence of death.

The seeking from the Air Ministry in Great Britain of evidence relative to an airman's presumed death is discouraged in New Zealand. The manner in which the New Zealand Air Department obtains evidence of the fate of missing personnel is shown in an official instruction, which is, in part, as follows :—

> Lists of personnel missing as a result of air operations are compiled by the Air Ministry, London, and sent to the Wounded, Missing, and Relatives Department of the Joint British Red Cross and Order of St. John, 7 Belgrave Square, London S.W.1, who at once institute such further inquiry as is possible.
>
> The first step taken is to forward the names to the International Red Cross Committee at Geneva. This Committee has access to special information, since, according to the International Convention of 1929 dealing with the treatment of prisoners of war, each belligerent power is bound to set up an official bureau to give information about prisoners of war. The Red Cross Committee at Geneva not only receives reports from the bureaux in Germany and Italy, but makes

inquiries for names on the missing list. Similar arrangements are established with Japan, but, owing to communication difficulties, some time may elapse before information can be received from that country.

Any information received in this way through the International Red Cross is passed to the New Zealand High Commissioner in London, or to Air Ministry, and sent immediately by cable or wireless signal to Air Headquarters, Wellington. Meanwhile every effort is made to obtain from other sources information throwing light on the fate of missing individuals.

Relatives may therefore rest assured that, *without any application on their part*, every endeavour is constantly being made both abroad and at Home to trace missing personnel. Immediately any reliable advice is received it is conveyed to the next-of-kin.

Unless unquestionable evidence of death is available from a British source the Air Ministry is not prepared to classify the airman as dead, whatever be the evidence from other sources. It is considered essential to await supporting evidence, and, in the absence of such evidence, not to presume death officially until the lapse of time has shown that to be the only suitable course. When an airman has been officially presumed to be dead, all the relevant evidence is supplied by the Air Department to the Registrar-General, who will enter the casualty in the War Deaths Register or in the Provisional War Deaths Register, as the case may be, according to whether or not the evidence suggests with a probable degree of certainty that the airman has been killed. It is possible in such cases to obtain an affidavit through the Air Department setting out in detail the evidence supplied by it to the Registrar-General on which his Certificate of Death is based.

To summarize as far as possible the availability of evidence of death in respect of fatal casualties in the Air Force, it has already been shown that where the body has been recovered no difficulty arises in respect of casualties in New Zealand. Where the body has not been recovered, there is no difficulty in New Zealand, as an affidavit is obtainable from the Air Department setting out all available evidence. In respect of casualties occurring within the territorial area of Great Britain, similarly there should be no difficulty in proving death.

In respect of casualties outside New Zealand, in cases where the body has not been recovered, missing airmen may be classified as follows :—

(*a*) *Missing* : In this case no direct evidence of the fate of the airman is available. After lapse of time, usually six months, death is officially presumed. Here, there is no evidence of death, as the presumption is based on an arbitrary time-limit, the lapse of the period mentioned. Entries in these cases are made in the Provisional War Deaths Register.

(*b*) *Missing, believed killed* : Here, the evidence available strongly suggests, with almost certainty, that the airman has been killed ; but there is no confirmation from a British source. After reasonable lapse of time, the classification is amended to " presumed dead." In all such cases, the available evidence is supplied to the Registrar-General, who will make the entry in the War Deaths Register. All evidence that has been supplied to the Registrar-General may be obtained in affidavit form from the Air Department.

The Air Department has a staff of legal practitioners, until recently in general practice, who know the Court's requirements, and are available to solicitors acting for applicants for probate or administration. We suggest that such solicitors should make direct application for the required information and affidavits, as, for obvious reasons, they will find this course more satisfactory than if the application were made by relatives.

To repeat, the Practice Notes issued by their Honours the Judges will be complied with, in respect of the deaths of members of the naval, military, or air forces, if the applicant for probate or letters of administration has a certified copy of the entry of death in the War Deaths Register, and he swears to the death—not as a matter of information and belief, but directly—and swears that he is able to depose to that fact from reading such certificate and from reading the affidavits containing the confirmatory evidence he has obtained. There is no question of picking and choosing between various forms of confirmatory evidence : everything available should be put on affidavit. It has happened that an applicant has had better evidence than he placed before the Court, but has not made reference to it. The safest plan is, therefore, to put on affidavit everything the applicant has available in support of his application.

Finally, while this article is intended to indicate the sources from which any available confirmatory evidence may be obtained for the purpose of supporting an application to the Court for a grant of probate or administration, it must again be emphasized that the Rules of the Court must be strictly adhered to in respect of every motion, and that the granting or not of any such application must depend on its own circumstances, since the Court must have before it sufficient evidence to draw a practical inference of death. It is a good rule to test the evidence that is available in the light that no reasonable probability other than that of death is open. If the applicant's solicitor, after using every endeavour to obtain evidence to put before the Court, is not himself satisfied that such reasonable probability cannot be inferred from the facts available, he should apply to the Court for leave to swear death.

STUDENTS' SUPPLEMENT, 1942.

The *Students' Supplement*, which has been a feature of the JOURNAL for the past four years, should have formed part of this year's volume. The difficulties of the times hampered the Editors at every turn ; but, with commendable patience and persistence, they kept at their task. They achieved their desire of keeping intact the continuity of these annual supplements, but reached their goal a little late for inclusion in the JOURNAL this year. The material for the *Supplement* has come to hand since the going to press of the present number, which was necessarily in the printer's hands at an unusually early date. Its non-inclusion is not their fault.

It is, therefore, only fair to the students to explain that, in spite of all their difficulties, they have kept faith with their predecessors, the Editors and contributors of other years, some of whom have made the supreme sacrifice, while all the others are serving on the seas, on land fronts, and in the air, in widely scattered theatres of war. The *Students' Supplement*, for 1942, will, accordingly, appear as soon as possible in the coming year.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1942.
September 30;
November 20.
Myers, C.J.
Blair, J.
Kennedy, J.
Northcroft, J.

LOUISSON *v.* COMMISSIONER OF TAXES.

Public Revenue—Income-tax—Employee serving in New Zealand Armed Forces—No "arrangement" between Employer and Employee within Reg. 10 of the Occupational Re-establishment Emergency Regulations, 1940—Employer voluntarily making up Difference between Pay as his Employee and his Military Pay—Whether such Difference should be included in Employee's Assessable Income—Land and Income Tax Act, 1923, s. 79 (1) (b), (h)—Land and Income Tax Amendment Act, 1939, s. 4—Occupational Re-establishment Emergency Regulations, 1940 (Serial No. 1940/291), Reg. 10.

Where there is a contract of service between an employer and an employee immediately before the employee commences to render military service and there is no "arrangement" between the parties to the contract or the contract make no provision for any of the purposes specified in Reg. 10 of the Occupational Re-establishment Emergency Regulations, 1940, and the employer on his own volition decides to make gratuitous payments to members of the employer's staff enlisted or being called up for service with the New Zealand Expeditionary Force or for training with the Territorial Forces, of the difference between their pay as employees and their military pay for specified periods during their period of military service or any part thereof. Such payments, whether in a lump sum or periodical payments, are not assessable income of the employee either under para. (*b*) or para. (*h*) of s. 79 (1) of the Land and Income Tax Act, 1923.

Marshall v. *Glanvill*, [1917] 2 K.B. 87, applied.

Benyon v. *Thorpe*, (1928) 97 L.J.K.B. 705, *sub. nom. Benyon* v. *Thorpe*, 14 Tax Cas. 1; *Stedeford* v. *Beloc*, [1922] A.C. 388, 16 Tax Cas. 505; *Seymour* v. *Reed*, [1927] A.C. 554, 11 Tax Cas. 625; and *Louisson* v. *Commissioner of Taxes*, [1942] N.Z.L.R. 30, referred to.

Counsel: *Richmond*, for the appellant; *Broad*, for the respondent.

Solicitors: *Buddle, Richmond, and Buddle*, Auckland, for the appellant; *Crown Law Office*, Wellington, for the respondent.

COURT OF APPEAL.
Wellington.
1942.
September 29;
November 20.
Myers, C.J.
Blair, J.
Kennedy, J.
Northcroft, J.

AYLING *v.* UNION STEAM SHIP COMPANY, LIMITED.

Workers' Compensation—Accident Arising out of and in the Course of Employment—Wharf to which Public has right of Access—Wharf under Police Control by Virtue of the Shipping Safety Emergency Regulations, 1940—Waterside Worker under Contract of Service to commence Work on Steamship injured while walking along Wharf thereto—Workers' Compensation Act, 1922, s. 3.

The plaintiff, who was under a contract of service to commence work on a steamship moored at a quay in the port, having produced his waterside union ticket to be admitted by a Police officer to the wharves, which, in virtue of the Shipping Safety Emergency Regulations, 1940, were under Police control, was walking to the steamship when he was blown over by a heavy gale, and injured.

On a case stated by the Judge of the Compensation Court seeking the opinion of the Court of Appeal whether, on the facts stated, the accident arose out of and in the course of the plaintiff's employment with the defendant company,

Held, That, although the wharf was controlled by the Police, there was no difference in principle between it and an ordinary public street; and, therefore, the accident sustained by the plaintiff did not arise out of and in the course of his employment with the defendant company.

Charles R. Davidson and Co. v. *McRobb* (*or Officer*), [1918] A.C. 304, 10 B.W.C.C. 480, followed.

Spurr v. *Richardson and Co., Ltd.*, [1939] N.Z.L.R. 1014, G.L.R. 659, and *Forde* v. *Shaw, Savill, and Albion Co., Ltd.*, [1941] G.L.R. 231, approved.

John Stewart and Son (1912), Ltd. v. *Longhurst*, [1917] A.C. 249, 10 B.W.C.C. 266, distinguished.

Northumbrian Shipping Co., Ltd. v. *McCallum*, (1932) 10 L.J. K.B. 644, 25 B.W.C.C. 284, referred to.

Counsel: *F. W. Ongley*, for the plaintiff; *C. G. White*, for the defendant.

Solicitors: *Ongley, O'Donovan, and Arndt*, Wellington, for the plaintiff; *C. G. White*, Wellington, for the defendant.

SUPREME COURT.
Wanganui.
1942.
October 30;
November 26.
Johnston, J.

In re **A LEASE, WANGANUI CITY CORPORATION TO KNIGHT.**

Landlord and Tenant—Lease—Municipal Corporation—Relief against Forfeiture—Option of Renewal—Lessee's failure to give required Notice in Time—Lessee's only Default—Relief against Corporation's refusal to grant Renewal—Whether Relief applicable to Municipal Corporation as Lessor—Practice—Notice of Motion for Relief—Whether required where Corporation is Lessor—Property Law Amendment Act, 1928, s. 2—Municipal Corporations Act, 1933, s. 361.

The Supreme Court has power, under s. 2 of the Property Law Amendment Act, 1928, to grant relief to a lessee against the refusal of his lessor to grant him a renewal of a lease which contains a covenant for renewal, where the lessee's only default has been failure to give notice of his desire to renew as required by the lease. That applies to leases from Municipal Corporations.

In re a Lease, Aotea District Maori Land Board v. *Cockburn*, [1941] N.Z.L.R. 629, G.L.R. 384, followed.

In re a Lease, Kennedy to Kennedy, [1935] N.Z.L.R. 564, G.L.R. 539, referred to.

A motion for such relief, where the lessor is a Municipal Corporation, does not come within the ambit of s. 361 of the Municipal Corporations Act, 1933, so as to make necessary the notice required by that section.

Bradford Corporation v. *Myers*, [1916] A.C. 242; *Julian* v. *Auckland City Corporation*, [1927] N.Z.L.R. 453, G.L.R. 359; *Vincent* v. *Tauranga Electric-power Board*, [1933] N.Z.L.R. 702, G.L.R. 614; and *Broad* v. *Tauranga County*, [1928] N.Z.L.R. 702, G.L.R. 435, applied.

In re a Lease, Wellington City Corporation to Wilson, [1936] N.Z.L.R. s. 110; *In re Pukeweka Sawmills, Ltd.*, [1922] N.Z.L.R. 106, [1921] G.L.R. 465; *In re Auckland Piano Agency, Ltd.*, [1928] G.L.R. 249; and *Re Premier Tobacco Co., Ltd., Ex parte Chambers*, [1934] N.Z.L.R. 982, G.L.R. 770, referred to.

ROAD TRAFFIC AND THE WAR EMERGENCY REGULATIONS.

VIII. Recent Regulations.

By R. T. Dixon.

In recent weeks, the flow of emergency regulations relating to road transport has slackened, and this article records the issue of only two new Orders in Council and two Warrants since the last of this series, *ante*, 175.

1. The Lighting Restrictions Emergency Regulations 1941, Amendment No. 3 (Serial No. 1942/270). The purpose of this Order is principally to extend the time of restricted lighting, binding the drivers of motor-vehicles in Headlight Restriction Areas and Parking-light Areas.

Previously the restrictions in lights applied only during "hours of vehicle-lighting restrictions," defined in Amendment No. 1 (Serial No. 1941/81) as being those "hours of darkness" between 7 p.m. and 6.30 a.m. Amendment No. 3 now extends the application of the restrictions for the full "hours of darkness" as defined in Reg. 2 of the Traffic Regulations, 1936 (Serial No. 1936/86)—*i.e.*, half an hour after sunset to half an hour before sunrise, or any other time when there is not 150 ft. of visibility in daylight.

The other amendments are for the purpose of extending to members of visiting Forces the "blackout" concessions granted to His Majesty's Forces by the former regulation.

2. Substitute Fuels Emergency Regulations, 1940, Amendment No. 1 (Serial No. 1942/321). The amendment is designed to limit the possibility of fires or other damage arising from the use of gas-producers on motor-vehicles. The gas-producer must now be so constructed that it cannot drop any hot ash or clinker; and the latter debris, when removed, must be so disposed of that it is not likely to cause injury or damage.

3. Load Limitations for Tires (1942 N.Z. Gazette, p. 2768). This Warrant is issued pursuant to Reg. 4 of the Traffic Emergency Regulations, 1942 (No. 2) (Serial No. 1942/230). It is for the purpose of conserving tires by limiting the loads which may be carried on them. All types of motor-vehicles are affected.

4. Amendments to Goods Transport Control Districts and Committees and Taxicab Control Districts and Committees (1942 N.Z. Gazette, p. 2811). This amends the Warrant published in *1942 N.Z. Gazette*, p. 2173, pursuant to the Transport Control Emergency Regulations, 1942 (Serial No. 1942/190). The latter regulations were explained in the last article of this series, (*ante*, 175). It is sufficient to state here that they intensify the control over goods-services and taxicab services, in the interests of petrol and tire conservation.

BREAD AND GAMES.

An Echo from Egypt.

The following, which appeared under the above title as the leading article in the *Egyptian Mail* (Cairo) of September 19 last, has been sent to the Journal by its author, a well-known Auckland practitioner on duty in the Middle East:

"The practice of the father who, when asked for bread, tendered his child a stone has long been rightfully condemned, so we must hope that certain bakers, whose display of ingenuity exceeds their sense of morals, will not be allowed to foist their wares on unsuspecting fathers.

"For the mind which reasons that dates having stones, a few may advantageously be added to the dough seems prevalent in Egypt. The temptation is that—stones being free—the baker's 'dough' will gain by their addition. At a first view this seems a reasonable supposition, but is hard upon the customer.

"And certainly our daily bread of late seems to have seen vicissitudes. It is reported that one sample analysed was found to hold some seventeen per cent. of ashes, not to mention other foreign bodies—but it is explained that millet is extremely difficult to clean!

"A case found in the English Law Reports some years ago unfolds a sorry tale. A staid and venerable man entered a bakery and purchased a bath bun. Taking a breath, he bit, when—'crack'—one of his few remaining teeth encountered what in naval language would be termed a 'submerged object.' Sadly he surveyed the wreck—then interviewed his lawyer. Taking the bit between his teeth (the one or two still fit for duty) he demanded issue of a writ, and in due course the Judges had the task of fixing liability.

"Mangoes have been endowed with stones by nature (only yesterday we slipped on one deposited in Fuad Awal) but the Judges held that this did not apply to buns. They classified a bun stone as a foreign body—so the plaintiff was one up in the first round.

"The baker said his bakery was so respectable that it was quite impossible for stones to enter buns within its precincts, but the Judges said stones did not generate with spontaneity. This rocked him, but he still talked warily about the *animus probandi*—and submitted that the plaintiff could not prove how the stone reached the bun.

"That little game is not a new one, and each Judge had seen it tried before. They murmured '*Byrne* v. *Boadle*,' and explained that there were cases that did not need proof, and told how Mr. Byrne, knocked on the head by a flour barrel rolling from an upper floor, had got his verdict without need of proving how the barrel rolled. (Reports are silent as to whether Mr. Byrne 'rolled out the barrel' for his cronies on the night the damages were paid.)

"The upshot was the dear old gentleman succeeded, and (we hope) lived happy ever after. London bakers learned the truth of the old Bible story.

"The moral here, of course, is that be bakers' paths never so stony, they must learn that it is folly to adulterate. 'Ashes to ashes, dust to dust'—but nothing save clean wheat and maize in bread.

"The Government has rightly made it plain that it will take strong action, and may be relied upon to act with vigour—for it is essential that the people's bread supply be placed beyond suspicion. Whether the recent faults be with the bakers or the millers they cannot be tolerated.

"In the case of certain luxuries some laxity may not be of great consequence, but profiteering gentry must not be allowed to play their little games with bread."

VARIATION OF MORTGAGES.

Under the Land Transfer Act.

By E. C. ADAMS, LL.M.

The classical case on the variation of mortgages under the Land Transfer Act is *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489, G.L.R. 306: the illuminating judgment of the Court of Appeal, as delivered by the late Sir John Hosking, after argument by the Solicitor-General (Sir John Salmond), for the appellant, and of Mr. H. F. von Haast, for the respondent, demands our closest study and longest memories.

There are two methods of varying mortgages under the Land Transfer Act: (*a*) By the registration of a new mortgage in the Form "E" or "F," in the Second Schedule, as in *In re Goldstone's Mortgage* (*supra*); and (*b*) by the registration of the short form of variation as provided for in s. 104, and set out in the forms numbered 1, 2, or 3 in the Fifth Schedule.

The second method is now the more common, even when the mortgagee desires the mortgagor to enter into additional express covenants. Where, however, the ownership of the mortgaged property has changed in the meantime and it is desired to retain the personal liability of the original mortgagor, the first method seems preferable; if in such circumstances the short form authorized by s. 104 is adopted, the original mortgagor will be discharged, unless he consents thereto or joins in the covenants: *Nelson Diocesan Trust Board* v. *Hamilton*, [1926] N.Z.L.R. 342, G.L.R. 193; *Public Trustee* v. *Mortleman*, [1928] N.Z.L.R. 337, G.L.R. 216. Mr. A. E. Currie, in the first edition of his *Conveyancing Charges*, at p. 17, gives other instances where the short form under s. 104 is inadvisable; but the modern tendency appears to be to lean towards the modification of this form to meet the circumstances of each case and reasonable modifications are not now objected to by the Land Transfer Department, and this policy appears inferentially to have received judicial sanction.

It will be observed in *Goldstone's* case that in the meantime the ownership of the land had changed and the original mortgagor had died, and the Court of Appeal thought that the retention of the liability of his estate for the principal might be desired and the varying mortgage was expressed to be without prejudice to the power of sale and all other rights, powers, and remedies exercisable on default under the first mortgage. An instrument of variation may make a legal personal representative or trustee liable (*a*) only in his capacity as legal personal representative or trustee, in which case the covenant express or implied will be limited to the assets of the estate or trust, or (*b*) personally (*de bonis propriis*) to the exclusion of the liability of the estate or trust, or (*c*) both as legal personal representative or trustee *and* personally. (*a*) Above is the position usually intended to prevail. Where, therefore, the legal personal representative or a trustee executes a memorandum of mortgage by way of variation or the short form authorized by s. 104, the careful conveyancer will see that his liability is limited to the assets of the deceased or of the trust: the insertion of such a provision cannot now be objected to by the Land Transfer Department: s. 9 of the Land Transfer Amendment Act, 1939. In so limiting his liability care must be taken not to destroy altogether the express or implied covenant for repayment of the moneys lent. There is a very useful note on the limiting of the personal liability in *Goodall's Conveyancing in New Zealand* at pp. 318 and 319. In *Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd.* v. *Elworthy*, [1926] N.Z.L.R. 621, G.L.R. 124, and *Gower* v. *Cornford*, [1937] N.Z.L.R. 1176, G.L.R. 357 (both variations under s. 104 executed by the legal personal representative of a deceased mortgagor), it was unsuccessfully contended that the assets of the estate had not been made liable: in the latter case two Judges thought that the legal personal representative's liability extended also to his own property; but it was not necessary to decide that point, which is thus still *res integra*, but this case exemplifies the need for care in framing covenants executed by mortgagors in a representative or fiduciary capacity.

That an instrument in the form of the following precedent is permissible appears clear from the illustration given in *Goldstone's* case (*supra*):

> Suppose a mortgage for, say, £1,000 and it is agreed that the mortgagee shall lend a further £500 and that both sums shall be payable on a different date from that previously appointed for the payment of the £1,000. By an instrument of mortgage the mortgagor covenants to pay both sums on the new date and then charges the land to secure payment thereof in manner aforesaid. That, in our opinion, would be a valid mortgage. There is a new contract entered into and there is a new and distinct charge effected inasmuch as the liability to pay in accordance with the contract contained in the new mortgage is a different liability from that for which the charge in the first mortgage was created.

An increase or reduction in the rate of interest or an extension of the term may also be effected by a new mortgage:

> The whole purpose of s. 104 is not that of permitting the so-called variations of a mortgage but of enabling them to be effected by a short form whereas previously they could only have been effected by means of the extended form of mortgage.

What the following precedent effects is security for an additional £50 advanced and the charging of a parcel of land not included in the original mortgage. This could not have been achieved by a memorandum of variation in the short form authorized by s. 104, because an additional parcel had to be charged. An alternative and perhaps more usual procedure in the present circumstances would have been a memorandum of increase under s. 104 and a new mortgage over the third title, expressed to be collateral to the original mortgage as varied.

The only limit to the variation of a mortgage by another mortgage appears to be as indicated by the Court, in *Goldstone's* case (*supra*) at pp. 502, 309.

> If a variation of a registered mortgage was sought to be accomplished in respect of some matter which did not alter the liability to be secured so that there was no groundwork for the charge, then the instrument might well be held not to be a charge within the definition—that is, a charge on land to secure some payment or repayment.

Note the provision that the three titles or any portion thereof shall not be redeemable, until payment of the further advance of £50 as well as of the original principal

sum of £300. This appears unobjectionable, as the ownership of the lands has not changed in the meantime: but if it had, such a provision, it is thought, might be construed by the Courts as relieving the original mortgagor from all liability; it would go much further than the *conditional* postponement of the principal sum sanctioned by the Court in *Goldstone's* mortgage. Thus in *Paterson* v. *Irvine*, [1926] N.Z.L.R. 352, G.L.R. 301, a memorandum of variation merely increasing the rate of interest was held to discharge the original mortgagor and a guarantor who had given collateral security.

MEMORANDUM OF MORTGAGE, BY WAY OF FURTHER CHARGE; INCREASE OF PRINCIPAL SUM; AND SECURITY TAKEN OVER ADDITIONAL LAND.

WHEREAS A. B. of Wellington Builder (hereinafter referred to as "the mortgagor" which expression where the context so admits of or requires shall be deemed to extend to and include his executors administrators and assigns) is registered as the proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed herein FIRST in ALL THAT parcel of land [*set out here official description*] SECONDLY in ALL THAT parcel of land [*set out here official description*] SUBJECT as to both the aforesaid parcels of land to memorandum of mortgage registered No. (hereinafter referred to as "the principal mortgage") THIRDLY in ALL THAT parcel of land [*set out here official description of land*] AND WHEREAS the mortgagor is indebted to C. D. of Wellington solicitor (hereinafter referred to as "the mortgagee" which expression where the context so admits shall be deemed to extend to and include his executors administrators and assigns) in the sum of three hundred pounds (£300) secured by the principal mortgage upon the lands first and secondly above described and has requested the mortgagee to advance and lend to him a further sum of fifty pounds (£50) upon the security comprised in the principal mortgage as also upon the security of the lands thirdly above described which the mortgagee hath agreed to do upon the mortgagor executing these presents NOW THIS MEMORANDUM OF MORTGAGE WITNESSETH that in consideration of the sum of fifty pounds (£50) on the execution hereof paid by the mortgagee to the mortgagor (the receipt of which sum is hereby acknowledged) he the mortgagor DOTH HEREBY COVENANT with the mortgagee that he shall and will pay to the mortgagee not only the sum of three hundred pounds (£300) secured by the principal mortgage but also the further sum of fifty pounds (£50) hereby advanced at the times places and in manner as provided by the principal mortgage AND ALSO interest thereon respectively after the rates at the times and places and in manner appointed for payment of same respectively—the interest on the said further sum of fifty pounds (£50) being computed from the date hereof and the first payment of interest to be paid on the day of 19 and to be a proportionate one AND the mortgagor doth hereby further covenant and agree with the mortgagee that the parcels of land first secondly and thirdly above described shall stand charged with and be security for the mortgagee not only for the payment of the said further advance of fifty pounds (£50) but also for the payment of the moneys secured by the principal mortgage together with interest thereon respectively at the rates provided in the principal mortgage AND that the said lands shall not nor any portion thereof be redeemed or redeemable until payment to the mortgagee as well of the sum of fifty pounds (£50) now advanced as of the principal sum of three hundred pounds (£300) secured by the principal mortgage and interest thereon as hereinbefore mentioned AND that all future payments of interest on the said sum of fifty pounds (£50) shall be made on the half-yearly interest dates as provided in the principal mortgage AND it is hereby agreed and declared that the powers of sale on default of payment and all other powers contained or expressed or implied in the principal mortgage shall be herein implied and be incorporated herein as fully and effectually as if the same had been repeated and set forth at length herein and shall and may be exercised as well for raising and paying the sum of fifty pounds (£50) now advanced and lent and the interest thereon as also the principal and interest moneys secured by the principal mortgage AND FURTHER that all and singular the covenants agreements provisions and conditions expressed or implied in the principal mortgage shall likewise be herein fully implied and incorporated herein and shall have and take the like force and effect as though repeated and set forth at length herein.

AND for the better securing to the mortgagee the repayment in manner aforesaid of the principal interest and other moneys hereby and by the principal mortgage covenanted to be paid the mortgagor doth hereby mortgage to the mortgagee all his estate and interest in the parcels of land above described.

IN WITNESS whereof the mortgagor has hereunto subscribed his name this day of 19

SIGNED by the said A. B. as mortgagor in the presence of—

E. F.
Solicitor, Wellington.

IRRESPONSIBILITIES.

A learned and occasionally poetic contributor says he has just received instructions for a curious codicil. His client is suffering from an obscure malady which is mystifying the medical profession. He submits a precedent.*

This is a codicil
To my last Will and Testament. I give
Devise likewise bequeath unto my friend
And medical consultant Thomas Sawyer
One pound or one square foot perhaps whiche'er
He shall elect, to be cut off and severed
From near the lower costal region on
The side sinister of my poor and now
No longer useful body. Yet I'd wish
Unlike the luckless and unhappy Jew
Who found himself condemned to cut his spoils
Before he'd measured 'em (a really nasty
Bit of work that Portia woman whose
Meticulous insistence that the twentieth
Part of "one poor scruple" should suffice
To throw him into jeopardy) my legatee
Should not be put in peril or embarrassed
By such minute restriction in the taking
Of seizin and delivery of his meaty
And unconventional bequest. I hope
Of course that this long suffering piece of flesh
May yield to him solution and the answer
To all his puzzles and perplexities,
Fame and renown and more among his race,
Yea immortality itself, while I
Sharing the fate of that unhappy Jinn
Long sung in ancient Araby, can naught
Expect but immortality confined
Within a bottle.
Yet in all respects
I do confirm my will and to this paper
I have as my own act and deed now set
My hand accordingly.

.....

And we two independent witnesses
Of credit and renown herewith append
Each one his sev'ral signature, in faith
And solemn attestation of the fact
That we and each of us at the same time
Did see each other and our Testator
Sign on the dotted line.

—*R. J.*

* A will in rhyme has been admitted to probate, but the authorities are silent as to a will (or codicil) in blank verse.

LONDON LETTER.

Somewhere in England,
October 21, 1942.

My dear EnZ-ers,

The present defence of the Suez Canal by your gallant troops, in conjunction with other Empire forces reminds us that many treaties have regulated the use of the Canal. Its history covers nearly one hundred years; the making of it was one of the great achievements of the last century. It greatly lessened the length and trouble of the journey to India, and facilitated communication with that essential part of the British Empire even more than the invention of the telephone. The scheme of the Canal, as is well known, was French. The Compagnie Universelle du Canal Maritime de Suez, which was an Egyptian company, was formed in 1856 for the construction of the Canal, but the work was not completed and the Canal not opened until 1869. The greater part of the shares in the company were held by the Khedive of Egypt, and in 1875 Mr. Disraeli ventured on the bold stroke of purchasing the Khedive's shares. The purchase was a complete surprise, but it proved popular, since then Great Britain has been the predominating partner in the undertaking. The status of the Canal was regulated by the Convention of Constantinople of 1888, which was signed by a number of countries, including Great Britain and Germany. This was confirmed by the Anglo-French Convention of 1904.

The Neutralization of the Suez Canal.—The fundamental feature of the status of the Canal lies in the provision of the Convention of 1888, that it shall be open at all times to all vessels; that it can never be blockaded; that in time of war no hostilities may take place either within the Canal or within three miles of its ports; that is, the Canal is neutralized. The adherence of Great Britain to the Convention of 1888 was affirmed by the Anglo-French Convention of 1904. Then came the termination of the Sultan's suzerainty in Egypt and the virtual annulment of the existing treaties by the Great War. In 1922, Great Britain, in recognizing the independence of Egypt, reserved to herself the security of the communications of the British Empire in Egypt, and the defence of Egypt against foreign aggression. Moreover, the Convention of 1888 was revived by the peace treaties of Versailles in 1919 and of Lausanne in 1923—the treaty with Turkey. Thus many treaties have regulated the Suez Canal. At the time of Italy's attack on Abyssinia it was suggested that, as part of the policy of sanctions, the Canal should be closed to Italian ships, but this, apart from being unlawful, might have led to war, and the suggestion was not adopted. If it had been—but that is an "if" which would show how history might have been altered. War with Italy then might have brought in Germany, and the conflict which now involves the world might have been less disastrous. It is a vain speculation. The immediate issue is likely to be the holding of the Suez Canal by Great Britain with all that that means to her Imperial communications.

Blood Group Evidence in a Nullity Suit.—In the case of *Wilson* v. *Wilson, otherwise Jennings*, a suit for nullity on the ground that the wife was, at the time of the marriage, pregnant by another man, the petitioner called Dr. G. Roche Lynch to prove that the blood groups of the petitioner, the wife and the child showed that the petitioner could not be the father. This evidence was not contested and Mr. Justice Hodson had no hesitation in pronouncing a decree. The husband's group was OM, the wife's BM, and the baby's ABMN. Thus, the husband was excluded, for the baby had an A factor and an N factor which neither party to the marriage could have contributed, and which must therefore have come from another man. These factors are inherited directly from the parents—Mandelian dominants—and a child cannot have a factor that does not appear in either his father or his mother. The error lay in stating that the child's group was ABN. This would have excluded the husband just as did the baby's real group; but it also excluded the wife as the mother, which was by no means part of the petitioner's case! Strictly speaking, each one of us is either MM, NN, or MN, and each parent must transmit half of this double character to the child. So as the mother had the MM character, the child had to have an M in its group. Its N, with its A, came from the real father.

Whose is Sylvia?—In December last, Mr. Justice Croom-Johnson had before him, at the Manchester Assizes, a *habeas corpus* application with regard to a little girl of three and a half years of age; and as the case presented an unusual feature, and the learned Judge, having had the matter argued in Chambers, gave a full judgment in open Court, a note upon it may be useful. Sylvia's mother was at all material times unmarried; her father, who has always admitted the paternity, is a married man. The mother being in employment, and it not being possible for her to maintain the child, Sylvia was, within one month of her birth, handed over to the father and his wife on condition that the mother was to have reasonable access. It was agreed that the little girl was properly looked after and brought up, and that she was, to use the words of the Judge, "completely happy where she is." The parties—the father and his wife, and the mother—were by no means on unfriendly terms, and, until after the war began, the agreement as to access was kept to the satisfaction of the mother. Recently, however, transport difficulties made the necessary journey difficult, and the mother saw the child less often than before. This fact, in the Judge's view, was the reason why the mother applied to have Sylvia handed over to her. Mr. Justice Croom-Johnson, accepted the position that the mother of an illegitimate child has *prima facie* a right to its custody as against the putative father, and considering the cases on the matter, particularly *In re Carroll*, [1931] 1 K.B. 317, held that there was nothing to prevent an arrangement as to custody being made between the mother and the putative father. But the question of the child's custody having been brought before the Court, the jurisdiction was exercised, as it always is in these cases, with a view to the benefit of the child; and on this basis, the learned Judge decided that for the present Sylvia should remain with "the kind people who have brought her up all these years, and who, *ex concessis*, have done their best for her and made a really good job of it." Directions were given as to access by the mother, and she will, of course, be entitled to apply again for the custody of the child if circumstances should change. This is, we think, the first case in which the putative father of an illegitimate child has been given the custody when the mother claims it; it illustrates very clearly the fact that the Court's view as to what is best for the child at the time overrides all other questions.

Notice to Quit " on or before . . . "—In the case of *Perduzzi* v. *Cohen*, reported in the June number of our *County Court Reports* at p. 136, His Honour Judge David Davies, K.C., decided a point on the law of landlord and tenant which has been the subject of a good deal of discussion but which has, apparently, never before been the subject of express and deliberate decision. Stated in a sentence, it is that a notice to quit " on or before " a stated date is good if the notice is given by the landlord but bad if given by the tenant. In the case before the learned Judge the notice required the tenant to quit and deliver up possession " on or before " a stated date; the tenant contended that the words " or before " made the notice bad for ambiguity; apart from that it was admitted to be good. The tenant relied on *De Vries* v. *Sparks*, (1927) 43 T.L.R. 448, in which case a tenant, having agreed to give up possession on a payment being made by the landlord, signed a receipt for part of that payment " for giving up possession . . . on or before . . . " This was held not to be a notice to quit at all, Mr. Justice Salter adding that if the agreement were to be regarded as a notice to quit, " it was invalid . . . because the notice was not one to determine the tenancy on any fixed date, the words used being merely 'on or before . . . '" On the other hand, in *Hill* v. *Haster*, [1921] 3 K.B. 643, Lord Sterndale, M.R., sitting with Lord Justice Atkin as a Divisional Court of the King's Bench, obviously thought that a landlord's notice to his tenant to quit " on or before " a stated date was valid. The point in that case was not whether the notice to quit was valid but whether a notice to increase rent was good; the Divisional Court held that it was, and it could only have reached that decision if the notice to quit was valid. In *Perduzzi* v. *Cohen*, Judge David Davies, K.C., distinguished these two cases on the ground that one related to a notice by a tenant and the other to a notice by a landlord. He pointed out that notice to quit " on or before " a stated date given by a tenant is obviously ambiguous—" it tells the landlord that the premises will be vacant on the named date, but also that they may be vacant at any time before that, so that it is impossible for him to make arrangements with certainty . . . " This position does not arise when the notice is given by the landlord, for in that case the tenant can quit before the stated day at his convenience, but is entitled to stay until that day if he chooses. In other words, said the Judge, by using the words " on or before," the landlord made an offer to accept a surrender before the stated date; " this offer the tenant could accept if he wished; if he did not accept it, it would have no legal effect." A very useful decision, the reasoning underlying which will, I think, commend itself to the profession.

—APTERYX.

LEGAL LITERATURE.

The Centenary of " Stone."

The 1942 volume of *Stone's Justices' Manual* is the centenary edition of that famous work; for it was in 1842 that there first appeared *The Justices' Pocket Manual* by Samuel Stone, Solicitor, the Clerk to the Justices for the Borough of Leicester. The centenary volume has the signal, and well-earned, honour of a foreword contributed by the Lord Chancellor, Viscount Simon. We, like him, have had the privilege of comparing the first edition, which comprised 212 small pages, with an index of twenty pages and references to seventeen cases, and could properly be described as a " pocket " manual, with that for 1942—the seventy-fourth—with its 3,144 pages, 188 pages of index and references to some 1,400 statutes and about 8,750 cases. As Lord Simon observes, the contrast " illustrates very clearly the enormously increased range of duties and responsibilities discharged by Courts of summary jurisdiction "; Courts constituted for the most part of " the public-spirited men and women who compose our magisterial benches, and who, with the assistance of their learned clerk, administer summary justice." This system, which, as the Lord Chancellor points out, can be traced back to the reign of Edward III, and has no parallel in any other country in Europe, "is only possible because of the essential good sense and the respect for impartiality which we like to think are the characteristic of British tradition and practice." It is, indeed, the average citizen's appreciation of the fact that the principles of English law are rooted in common sense, and that the law is administered by persons who, to the best of their ability, " truly and indifferently minister justice," that accounts for the respect for Judges and Magistrates which is almost instinctive in this country.

Not only was the first edition, priced at 5s. 6d., described on its title-page as a pocket manual; its author obviously intended that it should remain in that category. In his preface he observes that the publications now in use are too voluminous, either to invite perusal or for convenient reference, and he invites suggestions which " without greatly increasing the size," might be calculated to enhance the practical utility of the work. What Mr. Stone would have said of the present edition of more than three thousand pages, we can only conjecture; no one can say that even the " thin " edition is a pocket volume, but there is none of it with which we could dispense. At the end of the 1842 edition is a very interesting " Supplement to the Catalogue of Law Books " published by Messrs. Shaw and Sons, including *Practical Instructions for the Making of Wills agreeably to the New Act, 1 Vict., c. 26* [the Wills Act, 1837], price 2s. 6d.; *The Whole Town and Country Practice of the Court for Relief of Insolvent Debtors, with full instructions to Creditors*, price 10s. 6d., and *The Law for Facilitating the Enclosure of Open and Arable Fields*, price 6s. And there is a very curious note to the advertisement of *The Practice of Country Attornies and their Agents in the Courts of Law at Westminster*, by John Frederick Archbold, Esq., Barrister-at-law, price 25s., which we cannot resist the temptation to quote. The note reads: " N.B.—This work treats of the Practice both of London and of Country Attornies, and has been revised and corrected by the Masters of the Courts; the Profession is respectfully informed that it is by Mr. ARCHBOLD himself, and *not* by Mr. THOMAS CHITTY." What lay behind that cryptic announcement we do not pretend to know. Legal authorship is one of the best

ways of perpetuating a name, and the names of "Archbold" and "Chitty" are as well known in the law nowadays as they were a hundred years ago; and, though he probably never imagined such a result when, in 1842, he produced his modest volume, Mr. Samuel Stone thereby immortalized himself for an indefinite period.

Between 1842 and 1898 there were thirty editions of *Stone*, a fact which testifies to its utility to those for whom it was designed, and to the steady development of the responsibilities laid upon the Justices of the Peace. Since 1890 the work has been published yearly, and its former title has, since that date, been *The Yearly Justices' Practice*, though it is, we think, probable that almost any lawyer or Magistrate, if referred to *The Yearly Justices' Practice*, would ask, "Don't you mean *Stone's Justices' Manual*?" The present editor, Mr. E. J. Hayward, Clerk to the Cardiff Justices, claims that he and his predecessors have endeavoured to maintain a high standard of accuracy in recording the relevant statutes and cases, and the practice relating to Courts of summary jurisdiction; and no one who has any acquaintance with *Stone* would hesitate to admit the claim. The amount of work involved in preparing each year's edition for the press must be very great; and in war-time, with many new Acts and vast numbers of Regulations and Orders affecting Courts of summary jurisdiction, it must be prodigious. For example, in the 1942 edition, twenty-one new statutes and about 150 cases have had to be incorporated. A work which has been in constant and universal use for a hundred years needs no commendation; *Stone's Justices' Manual* commences its second century secure in the esteem of the profession.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Death Duty.—*Farm transferred to Son by way of Gift subject to Benefit not availed of—Donor dying seven years after Gift—Liability to Death Duty.*

QUESTION: A., a farmer, in consideration of natural love and affection, transfers his farm and stock to his son. There is an arrangement between A. and his son that A. should be allowed to reside on the farm and crop same for his benefit for a period of five years after the date of the transfer. A. leaves the district and never takes advantage of this arrangement, and dies seven years after the transfer. Is the property liable to death duty on A.'s death, and if so is the value as date of transfer or of death, the property having considerably increased in value in the meantime?

ANSWER: The whole property is liable to death duty at its value at date of transfer—ss. 5 (1) (*c*), 6 (2), 16 (*i*), and 21 (6) of the Death Duties Act, 1921—because the donor reserved a benefit referable to the gift, and because the donee has not held the property for three years before the donor's death to the entire exclusion of a benefit to the donor by *contract* or otherwise—*cf.*, *Attorney-General* v. *Seccombe*, [1911] 2 K.B. 688, where there was no contractual benefit reserved. But the property would not be liable on A.'s death, if he died more than eight years after the date of the gift—*i.e.*, more than three years after the expiration of the benefit reserved.

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2. Death Duty.—*Settlement—Reservation of contingent benefit to Settlor for life—Liability of Settled Funds to Duty.*

QUESTION: A., forty years before his death, settled £20,000, the income to be paid to his wife during their joint lives and on her death the income to go to settlor, if he should survive her: on death of survivor corpus to go to settlor's children. A. recently died. His wife survives. Is the settlement liable to death duty on A.'s death, and, if so, how should succession duty be leviable?

ANSWER: Yes: under ss. 5 (1) (*c*) and (*j*) and 16 (1) (*g*) of the Death Duties Act, 1921. The fact that A. never enjoyed the contingent interest in the income reserved is immaterial: *Rabett* . *Commissioner of Stamp Duties*, [1929] A.C. 444, 449.

For succession duty purposes, the succession is split up between the wife and the children. The value of the wife's life interest as at date of A.'s death will be actuarily calculated and that sum deducted from the value of the corpus as at date of A.'s death will be the value of the children's succession.

For estate-duty purposes the Crown can take at its option the value as at date of settlement or of A.'s death, but for succession duty it is confined to the value as at date of A.'s death, because the question shows that the settlement was made before 1910: *Bullied* v. *Commissioner of Stamp Duties*, (1912) 31 N.Z.L.R. 273, 14 G.L.R. 414.

3. Stamp Duty.—*Order by Creditor on Debtor.*

QUESTION: The following letter is sent to the Clerk of a County Council:

"Please withhold from moneys payable to me in respect "of my contract for the road known as Road "the sum of £29 11s., being the amount of rates and Court "costs due to the County Council by me. This "assignment is made in consideration of your withdrawing "the summons issued against me for the recovery of rates."

What stamp duty, if any, is the letter liable to?

ANSWER: Although called an assignment, it is in fact merely evidence of an *agreement* to set-off and is therefore liable to 1s. 3d. under s. 154 of the Stamp Duties Act, 1923. To be an assignment or a conveyance (the latter being the term used in the Stamp Acts) there must be a transferor and a transferee: there is in this case neither a transferor nor a transferee, for the authority or order is in favour of the County Council itself by whom the moneys in respect of the road contract are payable. Nor is it a bill of exchange, for the fund from which the moneys are to be derived is indicated with certainty. Had the instrument in fact been what it purports to be—*i.e.*, an assignment—in favour of some third person, then it would have been liable to 5s. 6d. under s. 79 (*b*): *White* v. *Ensor*, (1892) 11 N.Z.L.R. 586.

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4. Death Duty.—*Ante-nuptial Marriage Settlement—Settlor dying Insolvent—Liability to Duty.*

QUESTION: A., in 1883, makes an ante-nuptial marriage settlement, by which he conveys certain lands to trustees, to hold to himself for life, then to his wife for life, with remainder in fee to the children of the marriage. A. dies in 1942, leaving children, his wife having predeceased him: his liabilities amount to £20,000, and his assets (excluding the settled lands) to £10,000. The settled lands in 1883 were valued at £5,000: their valuation in 1942 is £9,000. His estate is being administered by the Official Assignee in Bankruptcy, under Part iv of the Administration Act, 1908. Is A.'s estate liable to death duty? If so, upon what basis should it be assessed, and is the Official Assignee liable for same?

ANSWER: Yes. The settled lands are liable to estate and succession duty as on a value of £9,000: s. 5 (1) (*j*) and s. 16 (1) (*g*) of the Death Duties Act, 1921: *Riddiford* v. *Commissioner of Stamps*, (1913) 32 N.Z.L.R. 929; 15 G.L.R. 538.

The allowance for debts under s. 9 cannot extend beyond the value of the assets available to satisfy same: *In re Barnes*, [1938] 3 All E.R. 327; aff. on app. [1938] 4 All E.R. 870; *Edilson* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 536.

The Official Assignee is liable for the duty, which, being a debt due to the Crown, is entitled to priority; but he could recover same from the trustees of the settlement. Probably in practice the Crown would get the duty from the trustees of

the settlement, who are also liable to the Crown: ss. 24, 29, 30, and 31 of the Stamp Duties Act, 1921, and see *Adams's Law of Death and Gift Duties in New Zealand*, 128–133.

5. Gift Duty.—*Death Duty—Life Insurance Policy—Gift of fully-paid-up Policy—Liability to Gift and Death Duty.*

QUESTION: A., five years before his death, transferred his fully-paid-up life insurance policy to his son by way of gift. No moneys are payable under the policy until A.'s death. We have been asked to advise as to A.'s liability for gift duty, and the measure of same. Can you inform us as to the present position of A. in regard to such duty, and also the liability for death duty on A.'s death in respect of the transaction?

ANSWER: The gift is taxable for *gift* duty on its value as at date of assignment. Probably the Commissioner will accept the surrender value as at date of assignment. For the present rates of gift duty see the Finance Act, 1940; but five years ago the rates were as set out in the Finance Act, 1930.

The gift cannot be brought in for *death* duty in A.'s estate, because the gift was made more than three years before his death. Although life-insurance policies are often caught by s. 5 (1) (*g*) of the Death Duties Act, 1921, this one would not be: see *Attorney-General* v. *Dobree*, [1900] 1 Q.B. 452, and *Attorney-General* v. *Hawkins*, [1901] 1 K.B. 285, 287.

[*This answer replaces that given in as No. 4 on p. 262.*]

6. Workers' Compensation.—*Practice—Infant Plaintiff—Appointment of Guardian* ad litem*—Procedure on application.*

QUESTION: It is intended to bring an action in the Compensation Court for compensation, and the intended plaintiff is a minor. What is the procedure in that Court for the appointment of a guardian *ad litem*?

ANSWER: The procedure is by way of motion with supporting affidavit, the motion being made *ex parte*. Rule 1 of Chapter XIV of the Workers' Compensation Rules, 1939, makes provision for every application to the Court or to a Judge thereof to be made by motion in accordance with the Rules in that chapter.

7. Gift Duty.—*Death Duty—Land Transferred to Donor and Donee as Joint Tenants—Liability for Gift and Death Duty.*

QUESTION: A client of ours owned a house property (Government valuation: £850), and transferred it to himself and his daughter as joint tenants, no valuable consideration passing. Nine years after the transfer he died, leaving his daughter surviving him. At his death the Government valuation has increased to £1,000. What is the liability for gift and death duty? If liable to death duty, when should accounts be filed, before or after the daughter takes title by transmission?

ANSWER: The value of the gift is one-half of £850—*i.e.*, £425—because either joint tenant can sever the joint tenancy, *inter vivos*, and deal with his or her share. Therefore, no gift duty is payable, unless A. has made other gifts (within twelve months previously or subsequently) which, added to £425, exceed £500: *Adams's Law of Death and Gift Duties in New Zealand*, 152. For death-duty purposes, the house property is an asset in A.'s notional estate, but its value is at date of creation of joint tenancy—*i.e.*, £850—and not £1,000, the value as at date of death: *ibid.*, 48, 49.

The death-duty accounts should be filed and duty paid within three months of A.'s death to avoid payment of interest. Probably the District Land Registrar cannot decline to register transmission in favour of the daughter, merely because death-duty accounts have not been filed; but he will inform the Stamp Duties Department of the transmission. The death duty is a charge on the land, and the charge may be registered.

RULES AND REGULATIONS.

Fresh-water Fisheries Regulations, 1936, Amendment No. 4. (Fisheries Act, 1908.) No. 1942/327.

Stallions Regulations, 1939, Amendment No. 1. (Stallions Act, 1938.) No. 1942/328.

Acclimatization Society Membership Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/329.

Sawmill Registration Regulations, 1942. (Forests Act, 1921–22.) No. 1942/330.

Honey (1942–43 Season) Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1942/331.

Northern, Wellington, and Canterbury Electrical Apprentices Labour Legislation Suspension Order, 1941, Amendment No. 1. (Labour Legislation Emergency Regulations, 1940.) No. 1942/332.