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APPEAL TO THE COURT OF APPEAL, AND CROSS-APPEAL.

An appeal to the Court of Appeal from a judgment or order of the Supreme Court may proceed in three ways. First, the appellant, having given notice of appeal, the appeal proceeds to hearing and is heard; secondly, the appellant, having given notice of appeal, and the respondent notice of cross-appeal, the two appeals are heard; thirdly, after the appellant has given his notice of appeal and the respondent notice of cross-appeal, the appellant may withdraw his appeal and the respondent may elect to proceed with his cross-appeal or to rest on his judgment in the Court below. We propose to consider the third of these procedures in the light of the judgment of the Court of Appeal in the recent case of *Kain* v. *Kain* (to be reported), in its practice aspect.

The Court of Appeal's jurisdiction on these matters is given by R. 5 of the Court of Appeal Rules, which is as follows :—

> The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of first instance, together with full discretionary power to receive further evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an Examiner or Commission. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. On appeals from a judgment after trial, or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to give any judgment, and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal, or of any other proceedings in the Court, as may seem just.

The procedure, so far as a respondent is concerned, appears from R. 6, which is as follows :—

> It shall not under any circumstances be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he shall, within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Judicature Act, 1908, upon the Court of Appeal, but may in the discretion of the Court be ground for an adjournment of the appeal, or for a special order as to costs.

Under R. 5, the Court of Appeal has jurisdiction to vary in favour of the respondent the judgment appealed from, although the respondent has not given notice of cross-appeal; and, where that jurisdiction ought to be exercised, the Court will, to use Denniston, J.'s, words, "remould the judgment in order to do justice between the parties": *Attorney-General* v. *Williams*, (1914) 33 N.Z.L.R. 913, 920, 925. In that case no notice of cross-appeal was given, the appeal was heard, and the necessity for varying the judgment was argued by respondent's counsel.

If, however, a respondent has not given notice under R. 6 of his intention (to use the words of that rule) *upon the hearing of the appeal* to contend for variation of the decision of the Court below, and the appeal does not proceed to hearing—as upon withdrawal of the appeal and its consequent dismissal—the respondent has lost any right he might have had (if he had given such notice) to obtain a variation in his favour of the judgment which was the subject of the appeal; and the judgment of the Court below must stand. If no notice of cross-appeal has been given by the respondent under R. 6, and the appeal is withdrawn by the appellant, the Court's proper course is simply to dismiss the appeal with such costs as the Court might award. This is the substance of the judgments on this point of Sir Michael Myers, C.J., and Mr. Justice Smith in *Kain's* case. It follows from this, to use the words of the learned Chief Justice—

> If a respondent thinks the decision appealed from should be varied in his favour, he should be careful to give notice under R. 6; otherwise, if the appeal is withdrawn, he may lose any right to obtain a variation of the judgment.

The practice in circumstances in which a respondent has given notice of cross-appeal under R. 6 and the appellant withdraws or abandons his notice of appeal was settled by the Court of Appeal in *The Beeswing*,

(1884) 10 P.D. 18, 19, where it was held that the notice is to be treated as a cross-appeal to the extent that the respondent has the right to elect whether to persevere with or to withdraw the cross-appeal. In that case, it was also settled that if the respondent elects to adopt the former course, the appellant has the right to give a cross-notice stating that he intends to bring forward the subject-matter of his original notice of appeal on the hearing of the respondent's appeal.

We now come to the practice point actually decided in *Kain's* case, where notice of appeal and a notice by the respondent under R. 6 had been given. On the appeal being called, appellant's counsel said that he abandoned his appeal. There was thus no " hearing of the appeal." The appeal was formally dismissed, and the question of costs reserved. The respondent said he proposed to proceed with the cross-appeal. In so proceeding, respondent's counsel found it difficult to contend that the respondent could claim the relief mentioned in her notice of cross-appeal, and he argued that if such relief were not available to her, the decision of the Court below should be varied in her favour by granting her another form of relief. In his judgment the learned Chief Justice, with whom Smith, J., concurred, said :

> In the circumstances which exist here—that is to say, where the appeal is withdrawn, and the respondent, having given a cross-notice under R. 6, and stated the manner in which and the extent to which it is claimed that judgment should be varied in her favour, elects upon the withdrawal of the appeal nevertheless to proceed with the cross-appeal—she must be held bound by the notice given and should not be allowed to claim any variation outside the terms of the notice.

The practice is thus settled that, though a respondent need not give notice under R. 6 in order to obtain a variation in his favour of the decision of the Court of first instance, it is safer in all cases to do so, as, without such notice, he may lose his rights in respect of such variation if the appeal is withdrawn, and, by its consequent dismissal, does not come to hearing. On the other hand, if he gives notice under R. 6 he must be careful to specify the nature of the relief he seeks, since, if the appeal be withdrawn and he elects to proceed with his cross-appeal, he is bound by the manner in which and the extent to which in his cross-notice he claimed that the judgment should be varied in his favour ; and, consequently, he cannot be heard on any other form of variation.

Roll of Honour.

AIMERS, J. B., Lt., 2nd N.Z.E.F. (14th Light A.A. Regt.). (Messrs. Menteath, Ward, and Evans-Scott, Wellington.) Drowned in Mediterranean, while wounded, on hospital ship, December, 1941.

BLAIR, K. S., Flying Officer, N.Z.R.A.F. (Associate to the Hon. Mr. Justice Blair.) Killed as result of air accident, July, 1942.

CAMPBELL, D. M., Pilot Officer, R.A.F. (Messrs. Duncan and Hanna, Wellington.) Killed on air operations, May, 1941.

DOUGLAS, J. M., Sub.-Lt., Fleet Air Arm. (Messrs. Duncan and Hanna, Wellington.) Died from injuries received on active service, December, 1942.

HART, I. A., Major, 2nd N.Z.E.F. (Maori Battalion). (Messrs. Hart, Daniell, and Hart, Masterton.) Killed in action, Western Desert, November, 1942.

KIRKCALDIE, K., Flight Lt., R.A.F. (Sometime Associate to the Hon. Mr. Justice Macgregor, and Mr. Justice Fair.) Killed during air operations over France, June, 1940.

LAWRY, R. O., Flight Lt., R.A.F. (Mr. W. P. Rollings, Wellington.) Killed during air operations, April, 1940.

LAWSON, J. H., Sergt. Pilot, N.Z.R.A.F. (Messrs. Menteath, Ward, and Evans-Scott, Wellington.) Killed during air operations, March, 1943.

McILROY, R. J., Capt., 2nd N.Z.E.F. (N.Z.A.). (Associate to the Hon. Mr. Justice Kennedy.) Killed in action, Western Desert, July, 1942.

PHILLIPS, B. G., Pte., 2nd N.Z.E.F. (Messrs. Leicester, Rainey, and McCarthy, Wellington.) Killed in action, Western Desert, July, 1942.

NOTE.

The above list is supplied by the Secretary of the Wellington District Law Society, and is thought to be complete to date in respect of practitioners and law clerks formerly in that Society's District. No list, in respect of any other district, containing similar particulars is available in Wellington.

Practitioners and others, wherever they may be, are requested to supply, for inclusion in this Roll of Honour, the names of any solicitors or law clerks who have lost their lives while members of the Armed Forces during the present War. Such names should be accompanied by particulars of rank, unit, former office, and month of death.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1943.
March 22, 23;
May 14.
Myers, C.J.
Smith, J.
Fair, J.

KAIN v. KAIN.

Divorce and Matrimonial Causes—Restitution of Conjugal Rights—Husband and Wife—Decree obtained by Wife—Non-compliance by Husband—Order for Periodical Payments—Whether Court has Jurisdiction to make Order as to Matrimonial Home—Wife remaining in possession of Matrimonial Home, Furniture, and Effects owned by Husband—Right of Husband to apply for possession under s. 23 (2) of Married Women's Property Act, 1908—Failure to comply with Order for Restitution—Whether in such circumstances lis pendens and Contempt of Court—Whether Order for possession should be subject to condition of finding another Home for Wife—Divorce and Matrimonial Causes Act, 1928, s. 9—Married Women's Property Act, 1908, s. 23 (2).

Practice—Appeals to Court of Appeal—Jurisdiction—Appeal from Order of Supreme Court—Cross-notice by Respondent—Appeal withdrawn and dismissed—Respondent proceeding with Cross-appeal claiming variation outside Terms of such Notice—Whether allowable—Court of Appeal Rules, RR. 5, 6.

Where an order for periodical payments has been made following an order for restitution of conjugal rights, a husband is not in contempt of Court by reason of his failure to comply with the latter order; and he may apply for, and the Court has jurisdiction to make, under s. 23 of the Married Women's Property Act, 1908 (but not under the Divorce and Matrimonial Causes Act, 1928), an order for vacant possession of the matrimonial home and its contents owned by the husband. Such an order should not be subject to the condition that the husband should first find another home for the wife, if the periodical payments so ordered are sufficient to enable the wife to install herself in a furnished house.

Gaynor v. *Gaynor*, [1901] 1 I.R. 217; *In re Married Women's Property Act, 1882, Re Humphery*, [1917] 2 K.B. 72, and *Ver Mehr* v. *Ver Mehr*, [1921] P. 404, applied.

Allison v. *Allison*, [1927] P. 308, and *Northledge* v. *Northledge*, (1894) 70 L.T. 815, distinguished.

Barlee v. *Barlee*, (1822) 1 Add. 301, 162 E.R. 105; *Larkin* v. *Larkin*, (1854) 1 Sp. Ecc. & Ad. 274, 164 E.R. 159; *Weldon* v. *Weldon*, (1883) 9 P.D. 52; *The Queen* v. *Jackson*, [1891] 1 Q.B. 671; *Phillips* v. *Phillips*, (1888) 13 P.D. 220; *Wood* v. *Wood and White*, (1889) 14 P.D. 157; *Joseph* v. *Joseph*, [1909] P. 217; *Hill* v. *Hill*, [1916] W.N. 59; *Weldon* v. *Weldon*, (1883) 9 P.D. 52, (1884) 10 P.D. 72; *Tangye* v. *Tangye*, [1914] P. 201; and *Willmott* v. *Willmott*, (1921) 37 T.L.R. 429, referred to.

Dean v. *Dean*, [1923] P. 172, mentioned.

So held by the Court of Appeal, varying an order made by *Blair*, J., and dismissing an appeal against the judgment of Johnston, J.

The withdrawal of an appeal and its consequent dismissal by the Court of Appeal is not a hearing of that appeal.

The Court of Appeal has jurisdiction, under R. 5 of the Court of Appeal Rules, to vary a judgment in the respondent's favour when the appeal actually comes to hearing; and such power of variation may then be exercised even though the respondent has not given notice of cross-appeal.

Where, however, the respondent has given notice under R. 6 and stated therein the manner in which and the extent to which it is claimed that the judgment appealed from should be varied in his favour, and he elects upon the withdrawal of the appeal to proceed with his cross-appeal, he is bound by the notice given and is not allowed to claim any variation outside the terms of his notice.

Attorney-General v. *Williams*, (1914) 33 N.Z.L.R. 913, 16 G.L.R. 550, distinguished.

The Beeswing, (1884) 10 P.D. 18, referred to.

So held by the Court of Appeal (*Myers*, C.J., and *Smith*, J., *Fair*, J., dissenting) after withdrawal and dismissal of an appeal, and the respondent's proceeding with his cross-appeal but departing from the specific form of variation stated in his notice of cross-appeal.

Counsel: *G. G. G. Watson*, for the husband; *O. C. Mazengarb*, for the wife, in both appeals.

Solicitors: *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the husband; *Mazengarb, Hay, and Macalister*, Wellington, for the wife.

Case Annotation: *Gaynor* v. *Gaynor*, E. and E. Digest, Vol. 27, p. 259, note *e*; *In re Married Women's Property Act, 1882, Re Humphery, ibid.*, Vol. 27, p. 260, para. 2299; *Ver Mehr* v. *Ver Mehr, ibid.*, Vol. 27, p. 413, para. 4156; *Allison* v. *Allison, ibid.*, Supp. Vol. 27, p. 80, para. 5523a; *Northledge* v. *Northledge, ibid.*, Vol. 27, p. 548, para. 5996; *Barlee* v. *Barlee, ibid.*, Vol. 27, p. 276, para. 2463; *Weldon* v. *Weldon, ibid.*, Vol. 27, p. 273, para. 2428; *Phillips* v. *Phillips, ibid.*, Vol. 27, p. 260, para. 2296; *Wood* v. *Wood and White, ibid.*, Vol. 27, p. 260, para. 2297; *Joseph* v. *Joseph, ibid.*, Vol. 27, p. 260, para. 2298; *Hill* v. *Hill, ibid.*, Vol. 27, p. 260, para. 2291; *Tangye* v. *Tangye, ibid.*, Vol. 27, p. 513, para. 5515; *Willmott* v. *Willmott, ibid.*, Vol. 27, p. 548, para. 5999; *Dean* v. *Dean, ibid.*, Vol. 27, p. 494, 495, para. 5275; *The Beeswing, ibid.*, Vol. 41, p. 242, 243, para. 829; *The Queen* v. *Jackson, ibid.*, Vol. 27, p. 79, para. 611.

COURT OF APPEAL.
Wellington.
1943.
March 30;
May 7.
Myers, C.J.
Blair, J.
Smith, J.
Johnston, J.
Fair, J.

THE KING v. O'MEARA.

Criminal Law—Indictment—Amendment—Verdict—Counts of Breaking and Entering and of Theft—Alternative Counts of Breaking and Entering with Intent to Commit Crime of Theft—Acquittal on Breaking and Entering Count—Verdict on alternative Count of "Guilty of breaking and entering with intent to commit a crime therein. What crime was intended has not been definitely proved"—Effect of Verdict—Application for Amendment of Second Count—Whether Variance between Proof and Charge—Whether Amendment should be granted—Verdict to be entered—Crimes Act, 1908, ss. 276, 277, 339 (f) (v), *392.*

The indictment against the accused charged him with (*a*) breaking and entering a dwellinghouse by day and stealing therefrom £87; and, alternatively, (*b*) breaking and entering the dwellinghouse by day with intent to commit a crime therein—to wit, the crime of theft. The jury acquitted on the first count, and on the second count they found this verdict: "Guilty of breaking and entering with intent to commit a crime therein. What crime was intended has not been definitely proved."

Counsel for the Crown applied to amend the second count by deleting the words "to wit—the crime of theft." Counsel for the accused objected to the amendment, and the learned trial Judge stated a case for the opinion of the Court of Appeal, under ss. 392 and 442 of the Crimes Act, 1908, as to whether or not the proposed amendment to the second count should be made, and, if it should be made, upon what terms.

Held, per totam Curiam, that a verdict of "Not guilty" should be entered, for the reasons following:—

Per *Myers*, C.J., and *Blair*, *Johnston*, and *Fair*, JJ., That the result must be the same whether the count could be amended or not; the jury, by their verdict, meant that they were not satisfied that the evidence disclosed an intent to commit the crime of theft and that there was nothing in the evidence upon which a jury could reasonably find that there was an intent to commit any other crime.

R. v. *Borland*, (1907) 10 G.L.R. 241; *R.* v. *Pearson*, (1910) 4 Cr. App. Rep. 40; and *R.* v. *Wood*, (1911) 7 Cr. App. Rep. 56, applied.

Per *Smith*, J., 1. That no variance appeared to arise upon the proofs, as, while an intent to do damage to property might be inferred, the evidence was insufficient to establish an intent to do mischief to the value of £5 within s. 339 (*f*) (v) of the Crimes Act, 1908.

R. v. *Stone,* [1920] N.Z.L.R. 462, G.L.R. 357 ; *Reg.* v. *Looney,* (1897) 16 N.Z.L.R. 269 ; *R.* v. *Scully,* (1903) 23 N.Z.L.R. 380, 6 G.L.R. 248 ; *R.* v. *Sweeney,* (1905) 7 G.L.R. 529 ; and *R.* v. *Keane,* [1921] N.Z.L.R. 581, G.L.R. 310, considered.

R. v. *Skellon,* (1913) 33 N.Z.L.R. 102, 15 G.L.R. 671, distinguished.

R. v. *White,* [1921] N.Z.L.R. 581, G.L.R. 310, referred to.

2. That, as the issue of an intent to do mischief was not presented to the jury, and no observations were made upon it, the accused was thereby prejudiced at the trial; and that it would be oppressive to expose the accused to a fresh trial by any exercise of the power of amendment given by s. 392 (5) of the Crimes Act, 1908.

Counsel: *Solicitor-General* (*Cornish,* K.C.), for the Crown; *G. H. R. Skelton,* for the accused.

Solicitors: *Crown Law Office,* Wellington, for the Crown; *Skelton and Skelton,* Auckland, for the accused.

Case Annotation: R. v. *Pearson,* E. and E. Digest, Vol. 15, p. 958, para. 10, 683; *R.* v. *Wood, ibid.,* Vol. 15, p. 958, 959, para. 10, 696.

SUPREME COURT. Napier. 1943. March 1, 22. *Myers,* C.J.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. COMMISSIONER OF STAMP DUTIES.

Public Revenue—Death Duties (Estate Duty)—Estoppel—Three Dealings between Deceased and his Son and Daughter—Whether one Transaction—Assessment of Gift Duty thereon in Donor's Lifetime—Inquiry by Commissioner—Donor's refusal to give Evidence—On Donor's Death inclusion of Gifts in Dutiable Estate—Objection by Administration—Whether estopped from objecting—Death Duties Act, 1921, ss. 53, 5 (1) (c) (9), 39, 63.

On June 25, 1928, deceased handed a cheque for £4,000 on the Union Bank at Napier to two of his children, who, the next day, opened a joint account with the Union Bank at Napier by paying in their father's cheque for £4,000. On June 26, 1928, deceased handed to his same two children a further cheque for £6,000 which was paid by the children into the said joint account on June 27, 1928, and on that day the two children covenanted that in consideration of the said sum of £6,000 they would pay deceased during his life an annuity of £600. On the same day—*viz.,* June 27, 1928—deceased transferred to his said two children his interest as mortgagee under a mortgage securing £10,000 with interest at 6 per cent. The consideration for the said transfer was the sum of £10,000, which the said children duly paid to their father by drawing a cheque for £10,000 upon the said joint account, which was then closed.

Gift duty at the appropriate rate was paid to the Commissioner by the deceased upon the sum of £4,000 above referred to, and *ad valorem* stamp duty was paid on the said transfer. Subsequently, the Commissioner held that gift duty on all the foregoing transactions should be assessed on the basis that the payment by the donor to the donees on June 25, 1928, of £4,000, the payment by him to them on June 27, 1928, of £6,000, in consideration of an annuity of £600 for life, and the transfer by him to the donees on June 7, 1928, of a mortgage for £10,000 in consideration of £10,000 represented one transaction within the meaning of s. 39 (*f*) of the Death Duties Act, 1921, and that the annuity of £600 (still as part of the whole transaction) comprised a reservation of a benefit within the meaning of s. 49 of the statute.

Upon the deceased's objecting to the foregoing assessment, the Commissioner directed the Assistant Commissioner at Napier to hold an inquiry under s. 63 of the Death Duties Act, 1921, with a view to ascertaining the facts and circumstances surrounding the whole transaction, and when notice thereof was conveyed to deceased his objection was abandoned and gift duty as assessed by the Commissioner was duly paid.

Deceased died in June, 1938; and, in computing his dutiable estate, the Commissioner included the sum of £10,000 hereinbefore referred to pursuant to the provisions of s. 5 (1) (*c*) or alternatively pursuant to the provisions of s. 5 (1) (*j*) of the Death Duties Act, 1921. On objection being taken by appellant company to an assessment of duty based on the inclusion of the said sum of £10,000 in deceased's dutiable estate the Commissioner caused an inquiry pursuant to s. 63 of the statute to be held at Napier and subsequently found as a fact that the transactions above referred to of June 25, 26, and 27, 1928, were not in fact separate and independent but were interrelated and formed one transaction.

Held, on appeal from the Commissioner's determination, (1) That the evidence justified the Commissioner's finding that the transactions of June 25, 26, and 27, 1928, formed one transaction.

2. That the appellant was estopped from asserting that the three transactions in June, 1928, were separate and independent, as the question now in issue was the same as that in issue in October and November, 1928, and the Commissioner's position had been altered to his prejudice by the action of the deceased.

Commissioner of Stamps v. *Erskine,* [1916] N.Z.L.R. 937, G.L.R. 641, and *Gray* v. *Commissioner of Stamp Duties,* [1939] N.Z.L.R. 23, [1938] G.L.R. 634, distinguished.

Inland Revenue Commissioners v. *Duke of Westminster,* [1936] A.C. 1, referred to.

Counsel: *W. G. Wood,* for the appellant; *L. W. Willis,* for the respondent.

Solicitors: *Carlile, McLean, Scannell, and Wood,* Napier, for the appellant; *Crown Law Office,* Wellington, for the respondent.

Case Annotation: Inland Revenue Commissioners v. *Duke of Westminster,* E. & E. Digest Supp. Vol. 28, p. 135, para. 674mm.

SUPREME COURT. Wellington. 1943. May 18. *Myers,* C.J.

In re **MOULIN.**

Criminal Law—Summary Conviction—Reformative Detention—Jurisdiction—When Sole Punishment necessarily commencing in praesenti—*Commencing* in futuro *only when imposed as Part of Sentence for Particular Offence to commence on Expiration of Term of Imprisonment for that Offence—Crimes Amendment Act, 1910, ss. 4, 5—Statutes Amendment Act, 1937, s. 6.*

Where under s. 4 (1) (*b*) of the Crimes Amendment Act, 1910, the sole punishment is a period of reformative detention, the offender must be sentenced to be forthwith committed to prison to be there detained for reformative purposes. A period of reformative detention can only commence *in futuro* where it is imposed under s. 4 (1) (*a*) as part of the sentence in respect of a particular offence, to commence on the expiration of the term of imprisonment then imposed in respect of that offence.

Therefore, where a Magistrate imposed, in respect of an offence, a term of imprisonment with hard labour, and, in respect of another and entirely different offence, imposed as the sole punishment a term of reformative detention, to commence on the expiration of the term of imprisonment imposed in respect of the other first-named offence, the sentence was quashed so far as it consisted of a period of reformative detention.

Observations of the necessity for every Court to have before it a Probation Officer's report, before sentencing a person to a long term of imprisonment or of reformative detention, except where a sentence is fixed by law.

SUPREME COURT. Wellington. 1943. April 21; May 11. *Northcroft,* J.

WILLIAMS v. WAIRARAPA AUTOMOBILE ASSOCIATION MUTUAL INSURANCE COMPANY.

Insurance—Motor-vehicles (General)—Comprehensive Policy—Construction—Death of Assured in Motor-car by drowning in Flood-water—" Other convulsion of nature "—Ambiguity and Vagueness of exception.

A comprehensive private motor-vehicle policy exempted the company insuring from any liability in respect of any loss, damage, or liability occurring—

" (3) If such loss or damage to the said motor-vehicle or injury or damage caused by any motor-vehicle in connection with which indemnity is granted under this policy occur at the time of or during the continuance of or subsequent to: Earthquake, hurricane, volcanic eruption or other convulsion of nature . . . "

On an originating summons for the interpretation of the policy where the person insured was drowned in flood-water resulting from a heavy downpour of rain that caused the river to overflow its banks,

Held, That the expression "other convulsion of nature" did not apply.

Semble, The expression "other convulsion of nature" was too vague, indefinite, and ambiguous to have any effect in a policy of insurance.

Counsel: *G. G. G. Watson*, for the plaintiff; *Evans-Scott*, for the defendant.

Solicitors: *Major and Major*, Eketahuna, for the plaintiff; *Card and Lawson*, Featherston, for the defendant company.

POLICE COMMENTS TO COURT BEFORE SENTENCE.

How Far should they go ?

By J. MELTZER.

It is customary, after a person charged with an offence has been found guilty, to ask the Police officer prosecuting what he knows of the accused. Apart from the official record of previous convictions, the Police officer may sometimes make statements to the Court concerning the accused, which accused is given no opportunity of denying and which may affect the amount of the sentence.

In the case of *R.* v. *Campbell*, (1911) 6 Cr. App. Rep. 131, during the hearing of an appeal against the refusal of the Judge to grant leave to appeal by an applicant who had been convicted for obtaining money by false pretences, and was sentenced to three years' penal servitude, the Court was asked to give a ruling as to the propriety of the practice of Police officers giving hearsay evidence after conviction with a view to the increase of the sentence. In this case there had been one previous conviction but in addition to this the Court had been informed of a large number of other matters which had not been the subject of any charge. The Court did not interfere with the sentence, but said on the question of Police officers giving the Judge the result of their inquiries about prisoners,—

> At times, no doubt, Police officers on these occasions say more than they ought to say against prisoners. If the prisoner wishes to deny anything, he can, especially if he is represented by counsel, do so at the time. . . . If the prisoner challenges any statement it is the duty of the Judge to inquire into it. If the prisoner does not challenge the statements the Court may take them into consideration and no injustice is likely to be done.

This point arose again in the case of *R.* v. *Burton*, (1941) 28 Cr. App. Rep. 89. This was a case in which the appellant had been convicted of receiving stolen property knowing it to have been stolen, and had been sentenced to eighteen months' hard labour. He was employed by a railway company and had abused a confidence placed in him. The Police officer in charge of the case had told the Court "with perfect fairness that there was no previous conviction and nothing else which he thought it right to mention to the Court." A Police officer employed by the railway company was called and said: "The Police inquiries have proved definitely that the prisoner Burton has been responsible for the losses which have taken place owing to stealing on the railway."

In the opinion of the Court that was a most improper statement to make. Either the Police could prove it, in which case they should have prosecuted, or they could not prove it and it should not have been said. The sentence was reduced.

This point has recently been considered again by the Court of Criminal Appeal in England in the case of *R.* v. *Van Pelz*, [1943] 1 All E.R. 36. Both of the cases mentioned above were referred to in the judgment of the Lord Chief Justice, who said, *inter alia*—

> "The question which has exercised the mind of the Court is an important one. Police officers are always called, or nearly always called, to give the Court such assistance as it ought to have in considering the sentence to be passed on the convicted person.

His Lordship went on to say that he thought the Court should enlarge a little on the previous cases; and the points made by him may be summarized as follows :—

1. When a Police officer is called to give evidence about a man who has been convicted he should in general limit himself to such matters as previous convictions, if any, and antecedents of the prisoner including anything that has been ascertained about his home and upbringing in cases where the age of the person convicted makes this information material.
2. It is the duty of the Police officer to inform the Court also of any matters whether or not the subject of charges to be taken into consideration which he believes are not disputed by the prisoner and ought to be known by the Court.
3. Police officers should inform the Court of anything in the prisoner's favour which is known to them, such as periods of employment and good conduct.

The Court made it clear that they had no reason to believe that the Police did not make a practice of informing the Court of matters which are in the prisoner's favour. The Court also said that they were not attempting to lay down a rule in such exact terms as would cover every case for the simple reason that this would be impossible; it was hoped that their observations would be some guide to the right practice. They also made it clear that nothing they had said was intended to affect in the least degree the right of the Court to inquire into any matter in any individual case upon which the Court itself thinks it right to ask for information.

In *Van Pelz's* case, the female prisoner had cooperated with a man who had disappeared, in robbing another man of some jewellery and money. The offence took place at a gambling party and doped drink was used to enable the offence to be committed. She was found guilty and sentenced to fifteen months' imprisonment. After sentence, the Police officer was called, who gave the age of the woman and the main details of her life for some ten or twelve years. He then proceeded to say this:

> For many years past this woman has led a loose and immoral life, and she has associated consistently with convicted thieves in the West End of London. On her arrest she described herself as a property owner but that was not the case.

After describing how she made profits out of dealing with property the Police officer continued—

She is well known indeed as a prostitute who frequents the West End of London with a view to contacting men with money, and her activities in this direction have exercised the mind of the Police for a considerable time past. I have in my possession a letter which was written in April of this year to the Law Land Company who are owners of Harley House. The writer alleges that shortly before writing the letter he met this woman at the Mayfair Hotel and after he had bought her a number of drinks and entertained her to dinner she suggested that he should return with her to her flat for drinks. He was there for two hours during which time he says he was under the impression that a man was on the premises. Immediately after leaving he found that a sum of £60 was missing from his wallet. In conclusion this woman is undoubtedly an adventuress; she is regarded as a very dangerous woman indeed. She is completely unscrupulous and for many years past has lived entirely upon her wits.

It was the latter part of the Police officer's statement that was questioned. The Court of Appeal after making the observations already referred to, came to the conclusion that in this case the Police officer went further than he ought. In their view, however, the statement had probably not affected the mind of the Court in passing sentence, and they therefore did not think it right to interfere.

It can be said that the points made by the Court of Criminal Appeal, as summarized above, are, in the main, applicable to the practice in New Zealand Courts. If, in the lower Court, a Magistrate, after deciding to convict, asks the prosecutor "what he knows" of the accused, it is the custom, without comment, for the prosecutor to hand to the Magistrate a list of previous convictions. Some prosecutors were in the habit of reading these convictions to the Court, but that practice has been discontinued. The handing of the list to the Magistrate for silent perusal is in itself an indication that the accused is not being pilloried. A prosecutor may sometimes, when asked the usual question by the Magistrate, say "There is nothing I can say in the accused's favour." This is tantamount to indicating to the Court that the accused has a list; and no prosecutor would make use of this formula unless he was prepared to establish it.

As to the procedure in New Zealand, the following is said in *Luxford's Police Law in New Zealand*, 61 :—

The somewhat loose practice has developed of the Police Prosecutor handing to the Court a list of a defendant's previous convictions. If a Magistrate is presiding, he will see that the list is placed before the defendant to enable him to state whether it is correct or not. The safer and more prudent course in every case for a Police prosecutor to follow is to hand the list to the defendant or his counsel for perusal. If the defendant does not admit the correctness of the list, the prosecutor should not produce it unless he is able to call evidence to prove all or some of the convictions disclosed therein.

As far as the writer knows this practice is not adopted in the Magistrates' Courts in New Zealand.

Police prosecutors in New Zealand know that they must not make any statement to the Court that is not capable of proof. This applies equally when the Police furnish their reports to the Probation Officer, when an accused is coming up for trial or sentence in the Supreme Court. The practice in New Zealand is that nothing should be put into such reports as would not be capable of proof. Indeed, it may be noted that s. 6 of the Offenders Probation Act, 1920, provides that a copy of the Probation Officer's report shall on request be given to him before action is taken thereon by the Court and he may tender evidence on any matter referred to therein. The Probation Officer is therefore liable to cross-examination on anything included in his report.

Furthermore, it can be stated that rule 3 above is adopted by Police prosecutors in New Zealand, who consider it their duty to state what they know in favour of the accused, just as much as it is their duty to inform the Court of previous convictions.

DEED OF APPOINTMENT OF NEW TRUSTEES.

Renunciation of Powers of Variation by Settlor.

By E. C. Adams, LL.M.

Explanatory Note.

A.B. has made a settlement (which is a gift for the purposes of ss. 5 (1) (*b*), 5 (1) (*c*), and Part IV of the Death Duties Act, 1921). He has duly paid gift duty, but naturally desires to avoid the property comprised in the settlement being treated as part of his estate on his death for death duty.

He has already effectually disposed of all his beneficial interest in the property comprised in the settlement, but even though he may die more than three years after the settlement, the settlement will be caught for death duty on the principle of one or two rather awkward cases for taxpayers—*viz.*, (*a*) *Attorney-General of Alberta* v. *Cowan*, [1926] 1 D.L.R. 29 ; and (*b*) *Attorney-General* v. *Adamson*, [1933] A.C. 257.

As to (*a*) above, this Canadian case was referred to with approval by His Honour Mr. Justice Smith in *Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761, 793, G.L.R. 338, 349, but was disapproved by the majority of the Judges, and distinguished by one, in the Australian case, *Perpetual Trustee Co., Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*), (1941) 64 C.L.R. 492. The rule, which may be deduced from the Canadian case, is that where a donor effects a gift by simply declaring himself a trustee, the gift will be caught for death duty on the grounds that *possession* has not been assumed by the beneficiary to the absolute exclusion of the donor. It appears to the writer that this precise point is still *res integra* in New Zealand.

As to (*b*) above, cl. 8, as recited in the deed of renunciation in that case, is certainly caught by the principle of *Adamson's* case. That clause is recited as follows :—

AND WHEREAS by clause eight (8) of the said deed it was declared that the settlor might at his absolute discretion at any time or from time to time alter amend vary revoke cancel or annul any one or more of the powers provisions

conditions or stipulations therein contained or implied but so that no such alteration amendment variation cancellation or annulment should confer any benefit of any kind on the settlor.

This cl. 8, although not caught by s. 5 (1) (*j*), because the settlor cannot exercise the reserved powers in favour of himself, is caught by *Adamson's* case, because, if the settlement were to run its course with that clause still subsisting, the interests of the beneficiaries would not be *certain* until the donor died. On the question of the measure of value, *Adamson's* case was against the revenue, but both in England and New Zealand that point has been retrospectively remedied in favour of the Crown: see s. 27 of our Finance Act, 1937.

The execution of the following instrument of renunciation appears to remove all risk of the application of the above two cases on the settlor's death: he is safe, unless death overtakes him before the expiration of the period of three years from the date of the settlement.

To sum up, the authorities appear to show that, if a donor or settlor desires to play safe, he must get out of the picture and keep out: *Lang* v. *Webb*, (1912) 13 C.L.R. 503, 517.

The stamp duty payable on the instrument of renunciation is 15s.

PRECEDENT.

THIS DEED made the day of one thousand nine hundred and forty-three BETWEEN A.B. of (hereinafter referred to as "the settlor") of the one part AND C.D. and E.F. both of of the other part WHEREAS by deed poll under the hand of the settlor dated the day of one thousand nine hundred and forty-one he declared himself a trustee of certain company shares more particularly described in the said deed AND WHEREAS by clause seven (7) of the said deed the power of appointment of new trustees thereunder was vested in the settlor during his lifetime AND WHEREAS by clause eight (8) of the said deed it was declared that the settlor might at his absolute discretion at any time or from time to time alter amend vary revoke cancel or annul any one or more of the powers provisions conditions or stipulations therein contained or implied but so that no such alteration amendment variation cancellation or annulment should confer any benefit of any kind on the settlor AND WHEREAS the settlor is desirous of retiring and being discharged from the trusts powers authorities and discretions vested in him as such trustee as aforesaid and of appointing the said C.D. and E.F. to be the trustees of and under the said deed in his place and stead AND WHEREAS the settlor is also desirous of amending the said deed by providing that the trustee or the trustees for the time being under the said deed shall have the power of sale hereinafter set forth AND WHEREAS save as is hereinafter declared the settlor desires to release all and every the powers vested in him by clause eight (8) of the said deed NOW THIS DEED WITNESSETH that the settlor DOTH HEREBY RETIRE AND IS HEREBY DISCHARGED from his said trusteeship under the said deed AND THIS DEED FURTHER WITNESSETH that the settlor in pursuance of the powers vested in him by the said deed and by the Trustee Act 1908 and in pursuance of every other power him thereunto enabling DOTH HEREBY APPOINT the said C.D. and E.F. to be the trustees of and under the said deed in the place of and stead of him the settlor and the said C.D. and E.F. DO HEREBY accept the said appointment PROVIDED ALWAYS AND IT IS HEREBY DECLARED by the said settlor that the shares subject to the trust in the said deed shall vest in the said C.D. and E.F. as joint tenants upon the trusts and with under and subject to the provisions powers authorities and discretions declared and contained in the said deed of and concerning the same as hereby varied AND THIS DEED ALSO WITNESSETH that in pursuance of the powers conferred on him by the hereinbefore recited clause eight (8) of the said deed the settlor DOTH HEREBY DECLARE that the trustee or trustees for the time being under the said deed may at any time or times at their discretion sell any or all of the shares mentioned in the Schedule to the said deed and shall invest the proceeds thereof in any investment authorized by the said deed or by law with power at such discretion to vary and transpose the same from time to time for others of a like nature AND THIS DEED FURTHER WITNESSETH that save as hereinbefore declared the settlor HEREBY IRREVOCABLY SURRENDERS all and every the powers conferred on him by clause eight (8) of the said deed and releases disclaims and renounces the said powers and each of them and the settlor DOTH HEREBY IRREVOCABLY COVENANT with the said C.D. and E.F. and each of them that he the settlor shall not nor will from and after the execution of these presents exercise or attempt to exercise any of the said powers of alteration amendment variation revocation cancellation or annulment.

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written.

SIGNED by the said A.B. in the presence of— } A. B.
G. H.
Solicitor, Auckland.

SIGNED by the said C.D. in the presence of— } C. D.
G. H.
Solicitor, Auckland.

SIGNED by the said E.F. in the presence of— } E. F.
G. H.
Solicitor, Auckland.

CORRESPONDENCE.

Quiz Paper for Young Legal "Reds."

The Editor,
LAW JOURNAL.

SIR,

One gets a little tired of the lofty young men who from time to time in the columns of legal periodicals exhort us to study Engels and Marx. I feel like setting them an examination paper. Here it is!

1. The fundamental Hegelian doctrine of the triple dialectic in its application to history and life was inspired by Lessing's revival of the mystical theory of the Three World Ages. Discuss this.

2. The Abbé de St. Pierre believed that the Golden Age would arrive through "the perpetual and unlimited augmentation of the universal human reason." Discuss the aptness of Voltaire's suggested inscription for his statute:

Ce n' est là qu'un portrait l'original dirait quelque sottise.

3. Are cattle taken in withernam irrepleviable?

4. Is the modern dissatisfaction with material conditions merely a movement of spiritual disaffection with the social order? Give reasons.

All questions must be answered.

Time allowed: Thirty minutes.

Yours, etc.,
F. J. FOOT.

The late Sir Frederick Chapman.—Will any one in possession of letters from the late Sir Frederick R. Chapman, sometime Judge of the Supreme Court of New Zealand, kindly communicate with Mrs. S. Eichelbaum, 32 Fitzherbert Terrace, Wellington.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Rt. Hon. J. G. Coates.—There are many things that will stand long to the credit of that able, upright, and gallant man, the Rt. Hon. J. G. Coates, whose loss this country can ill afford. Among them is at least one that ought to, but does not, stand to the credit of all Prime Ministers. As Prime Minister he declined to regard the Supreme Court Bench as within the sphere of political patronage. Guided no doubt by his equally upright Attorney-General (F. J. Rolleston, of Timaru), he gave us Blair, J., and Smith, J.—the former perhaps the most human, and the latter perhaps the most loved, of all our Judges.

Contributory Negligence: The Proportional Rule.—In the recent case of *Sparks* v. *Edward Ash, Ltd.*, [1943] 1 All E.R. 1, Scott, L.J., revives the suggestion that the law of contributory negligence in road-accident cases should be amended by legislation so as to substitute the proportional rule which has been adopted in the Admiralty Court since 1911. Under this rule the loss is apportioned between plaintiff and defendant in accordance with the degree of blame attaching to each for causing the accident. The learned Lord Justice refers to the fact that, in 1939, a very strong Law Revision Committee, presided over by Lord Wright (with Goddard, L.J., as a member), devoted the whole of a closely reasoned report to the reform, urging its adoption very strongly, and says: "I venture to suggest that a Bill to carry that advice into effect would be non-contentious, and universally welcomed even during the war." It will be remembered that the Legal Conference held at Christchurch in 1938 approved the principle of *absolute* liability for personal injuries in motor-collision cases. In view of this, one would expect considerable contention on any proposal to apply the proportional rule to road-accident cases in this Dominion.

Maurice Healy, K.C.—A month or so ago there was gathered to his fathers Maurice Healy, K.C., a member of the Bars of Ireland and England, nephew, on his father's side, of Timothy Healy, K.C., and, on his mother's, of Serjeant Sullivan. Michael Healy's *The Old Munster Circuit*, published in 1939, is a most readable and most amusing book of legal reminiscences. Remarkable for its lack of egotism, it is packed with priceless stories of the Bench and Bar of Ireland. Many of the stories centre round the O'Briens. There were three of them—"Pether the Packer" (O'Brien, L.C.J.) "more memorable as a personality than as a lawyer"; William, the Judge of King's Bench, "who regarded the doctrine of fair play for prisoners as mere sentimentality"; and Ignatius, the Lord Chancellor, on whose appointment "the fable of the inflated frog came true." "Never was a Judge so pompous, or, for that very reason, so inefficient." There are good tales, too, of Moriarty, L.J., whose dying remark was rumoured to be "What won the 3.30?"; of Ronan, L.J., perhaps the finest lawyer then at the Irish Bar, who on his appointment as a Lord Justice "promptly distinguished himself by becoming the most impossible Judge we had ever known"; of Boyd, J., "beloved of all but not for his judicial qualities"; of Johnson, J., whose "difficulty was to get the facts right"; and of many other luminaries. But Healy has nothing but praise for the great Palles, C.B., who was appointed by Gladstone on Paddington Station while on his way to Windsor to surrender his seals of office. *The Old Munster Circuit* would be useful in assessing the weight to be given to many an Irish decision!

Appellate Judge v. Trial Judge.—When an appellate Court differs from the trial Judge it is at least doubtful whether respect for the Courts and for the administration of justice is enhanced by observations such as MacKinnon, L.J., was "tempted" to make in the recent case of *Knuffer* v. *London Express Newspaper, Ltd.*, [1942] 2 All E.R. 555. In an action for libel Stable, J., sitting, pursuant to Emergency Regulations, *without* a jury, had found for the plaintiff and awarded him £3,500 damages. On the appeal only two Lord Justices sat—MacKinnon and Goddard, L.JJ. They held that there was nothing to show that the words published referred to the plaintiff as an individual and they therefore allowed the appeal—and, incidentally, refused leave to appeal to the House of Lords. But both Lord Justices had observations to make about the *quantum* of Stable, J.'s, award. MacKinnon, L.J., said:

> *I am tempted to make some observations on this topic.* It is true that damages for defamation may be punitive, and need not be limited to any actual pecuniary loss which a victim can prove he has suffered. It is notorious, however, that juries have often awarded utterly extravagant sums in such cases. Under our present arrangements such cases are heard by a Judge alone, sitting without a jury. *I cannot think it is right for a Judge, when he has to assess the damages, to attempt to attune his mind to what he imagines would be the extravagant impulse of a jury. . . . I . . . think that to give him (the plaintiff) £3,500 was an extravagance that the most reckless jury would hardly have achieved, and one which should not have been committed by a Judge sitting alone.*

This *manner* of judicial correction would appear unnecessary at any time. Particularly is this so when the appellate Court consists of only two Judges and leave to appeal to a higher tribunal is being refused.

Caliban and Cabinet.—A Motueka friend has drawn attention to a report in a Wellington daily of a recent reading of *The Tempest* by the Shakespeare Society of that city. The report says that the highlight of the evening was the episode by "Cabinet, Stephens and Trincul," and it names O. C. Mazengarb and H. F. von Haast as having taken the first two of these parts. Of course the paper meant Caliban, Stephano and Trinculo. Our Motueka friend doubts whether any member of the Cabinet would take it as a compliment to be associated with Caliban. Shakespeare's cast describes him as "a deformed Savage"! But perhaps it was a different association of ideas that put the type astray. The Wellington practitioner named as taking the part of "Cabinet" has twice stood for Parliament and may again be a candidate at the next election!

LAND AND INCOME TAX PRACTICE.

Current Year's Income-tax Assessments.

During the reading of the Budget the Hon. the Minister of Finance announced that the rates of taxation on income derived during the year ended March 31, 1943, would be the same as for the income year ended March 31, 1942. Mention has already been made in these notes that there have not been any major alterations to the taxation legislation, and for the first time in recent years practitioners will be saved the task of absorbing the bewildering amendments which have made the work of checking notices of assessment one of considerable magnitude.

Special Exemptions (continued).

Children Exemption.—An exemption of £50 is allowable as a deduction from the assessable income of every individual taxpayer, other than an absentee, in respect of each of his children or grandchildren who at the end of the income year are under the age of eighteen years and are dependent upon him. The term children includes stepchildren.

The exemption is allowable at the Commissioner's discretion, for any child or grandchild over the age of eighteen years who is suffering from a *permanent* mental or physical infirmity and who is thereby permanently incapacitated from earning his or her own living. The Commissioner requires that a medical certificate be furnished in the year in which this exemption is first claimed.

A child "brought to New Zealand under any Government scheme and for the time being supported by any taxpayer in accordance with any such scheme shall be deemed to be a child of that taxpayer": s. 3, Land and Income Tax Amendment Act, 1940.

The full exemption of £50 is allowable in respect of the income year during which a child is born—or a child under eighteen years of age dies. Where a child attains his eighteenth birthday during the income year a proportionate amount of £50 is allowed for each complete month during which a child is under eighteen years of age.

An exemption is allowed in respect of an adopted child only where there is a *legal* adoption. The fact that a child (not the child or grandchild of the taxpayer) under eighteen years of age has been wholly dependent upon a taxpayer for a number of years does not entitle that taxpayer to an exemption. In order to obtain an exemption the taxpayer must satisfy the Commissioner that the adoption has been made under a Court order.

An exemption is not allowed in respect of an illegitimate child, unless the parents intermarry during the income year, in which case the full £50 is allowable.

Degree of dependence upon parents: The Commissioner has indicated that an exemption is allowed for children who are, at the end of the income year, under eighteen years of age, *and are dependent upon the taxpayer.* A claim was disallowed to the father of children who earned wages, where the father obtained a deduction for the wages and value of keep of the children—they were not deemed to be dependent children. Unless contrary evidence is shown, a child is deemed to be substantially dependent upon its father—thus where both parents had taxable income of approximately the same amount, the exemption was allowed to the father, even though the father's income was exempt by reason of his being a member of the special armed forces. Where a father and mother are separated, the Commissioner allows a children exemption to the parent upon whom the children were in fact substantially dependent—*e.g.*, a husband separated from his wife contributed £15 towards the support of three children: the exemption would be allowed to the mother, or, if she were not assessable with taxation, the exemption would not be allowed to the father. If, however, a child under eighteen years of age earns wages and is only partially dependent upon its parents, then an exemption would be allowed to the parent upon whom the child was partially dependent.

Where a taxpayer dies during the income year the full £50 exemption is allowed in the assessment of income derived to the date of death in respect of a child under eighteen years of age who was dependent upon the deceased taxpayer, even though the child was not "at the end of the income year" dependent upon the taxpayer. It may be that the deceased taxpayer's business is carried on by his widow, and if the widow derives taxable income a further £50 exemption cannot be allowed in respect of the same child. The practice is to allow the widow to elect whether the exemption is to be allowed in her assessment, or the assessment of the deceased taxpayer on income derived up to the date of death.

Dependent Relative Exemption.—"Every person, other than an absentee, shall be entitled to a deduction by way of special exemption from his assessable income of the amount (not exceeding in the aggregate fifty pounds in respect of any one relative) contributed by him during the income year towards the support of any relative.

"For the purposes of this section the term "relative" means a person proved to the satisfaction of the Commissioner to be a relation of the taxpayer by blood, marriage, or adoption (not being the wife, husband, child, stepchild, or grandchild of the taxpayer); and includes a former wife of the taxpayer; but does not include any person to whom or on whose behalf a monetary benefit is payable out of the Social Security Fund.

"Where claims are made under this section by two or more taxpayers for deductions by way of special exemption exceeding fifty pounds in the aggregate in respect of contributions towards the support of the same person the Commissioner shall not allow a greater exemption in the aggregate than fifty pounds, to be apportioned among the several taxpayers in such manner as the Commissioner thinks fit": *vide* s. 11, 1939 Amendment Act.

A child over eighteen years of age cannot be classed as a "dependent relative" of its father. The section does not impose any limitation to the degree of relationship by blood, marriage, or adoption, but the Commissioner would not allow a claim for an unreasonably remote relative.

A claim is not allowable in respect of a dependent relative who is in receipt of any monetary benefit from the Social Security Fund, including Universal Superannuation, but excluding medical, hospital, and other related benefits under Part III of the Social Security Act. Where a dependent relative commences to derive a monetary benefit during the income year, a claim is allowed to a taxpayer in respect of the amount contributed (maximum £50) prior to the date when the relative commenced to receive the benefit. The relative must be dependent for his or her support upon the contributions of the taxpayer—thus the fact that a taxpayer's former wife received income in her own right in excess of £50 did not debar a claim made by her former husband, but in circumstances where a former wife derived income in her own right to the extent that the amount contributed by her former husband was not necessary for her support, the claim made by the former husband was disallowed on the grounds that the former wife was not *dependent* upon the contributions of the taxpayer.

Payments made to a relative—*e.g.*, a widowed mother of the taxpayer—in respect of the taxpayer's board and lodging, cannot be claimed as contributions for her support. The fair value of benefits in kind—*e.g.*, board and lodging—supplied to a relative may, however, be claimed.

Housekeeper Exemption.—Every widowed or divorced taxpayer, other than an absentee, is allowed a maximum exemption of £50 from assessable income in respect of a housekeeper who is defined as "a woman who is employed either in the home or elsewhere, to have the care and control of any child or children in respect of whom the employer is entitled to a special exemption under section seventy-five of the principal Act" (a children's exemption).

It is important to note that the exemption is allowable to a widow, or widower, or divorced person who has dependent children under eighteen years of age.

The amount of exemption allowable is the aggregate of wages and value of free board and lodgings, or £50, whichever is the less. The maximum exemption allowable is reducible by $\frac{1}{12}$th for every month or part of a month of the income year during which a housekeeper was not employed by the taxpayer.

If a child under eighteen years of age is retained at home in the capacity of housekeeper—as defined above—the taxpayer could not obtain exemption for such child under the heading of housekeeper in addition to the exemption for dependent child. A point to note is that if a child is employed as a housekeeper, thus entitling the father to a housekeeper exemption, then the value of keep of the child (£1 per week) and any cash wages are liable for social security charge and national security tax as salary or wages.

Life Insurance, &c.—Every taxpayer, other than an absentee, is entitled to a special exemption of the amount actually paid during the income year as—

(*a*) Life insurance premiums payable on a policy on his own life, for *his own benefit*, or for the benefit of his wife and children. Premiums payable by the taxpayer for policies on the lives of his wife or children are *not* allowable. Premiums paid on any pure endowment policy effected after December 22, 1933, are *not* allowable. A pure

endowment policy is one which does not provide for the payment of a specified capital sum on the death of the assured.

The amount of premiums actually *paid* during an income year—*i.e.*, a year ending on March 31, is allowable. In determining what constitutes *payment*, the following rules are observed :—

(i) Payment to a foreign life insurance company is allowed.

(ii) Payment by ordinary borrowing from the insurance company during the currency of the policy will be allowed notwithstanding that no cash was actually paid.

(iii) Payment by means of half-premium loans (special policies) effected under the policy are not allowable. Under this policy, for the first few years, half-premium is paid in cash and half by loan. The accumulated premiums paid by way of loan under a half-premium policy will not be allowed as an exemption in the year in which the policy matures. If, however, such half-premiums are repaid during the currency of the policy, the amounts of premiums so repaid will be allowed as an exemption in the year in which repayment is effected.

(iv) Where the insured exercises the option of taking a reduction in premium in lieu of retaining a reversionary bonus, the portion of the premium so paid will not be allowed.

Where the terms of a policy are unusual, and there is any doubt as to whether the premium is allowable, a copy of the policy and full details of the method of payment should be referred to the Commissioner.

(*b*) Contributions to a superannuation fund which has been approved by the Commissioner are allowable as a special exemption. It is to be understood that the Department will allow superannuation contributions only in cases where the fund is approved—*i.e.*, where the rights of the contributor are fully protected and where the Commissioner is satisfied that the fund provides benefits upon death or retirement.

(*c*) Contributions to the insurance fund of a friendly society are allowable. The M.U.I.O.O.F. Friendly Society has an insurance scheme of the same nature as ordinary life insurance companies, and the full amount is allowable, subject to certification from the society.

(*d*) The full amount of contribution to the National Provident Fund is allowable.

The Act provides that the deductions by way of special exemption provided for as in (*a*) to (*d*) above shall not in any case exceed in the aggregate the sum of £150, or 15 per cent. of the assessable income of the taxpayer, whichever is the less.

LEGAL TEXT-BOOKS FOR PRISONERS OF WAR.

New Zealand Law Society's Appeal.

The Secretary of the New Zealand Law Society, at the request of the Society's Post-war Aid Committee, has circularized each District Law Society as follows :—

Following on the decision made by the Council of this Society at its Annual Meeting, the Wellington Post-war Aid Committee recently wrote to Mr. Dundas of the British Council at Cairo, asking him to be good enough to find room in the Library of the Council for such text-books as the Society might be able to send.

The Registrar of the University of New Zealand has also been asked to make the necessary arrangements with the British Council to enable students serving with the Forces in the Middle East to sit for their examinations at the rooms of the Library at Cairo.

I enclose a copy of letter sent by the Wellington Society to Wellington law clerks serving in the Middle East which may be of interest to you.

The Committee has also written a letter to the law clerks who are prisoners of war with a view to encouraging them to continue their studies and informing them that the Society is endeavouring to arrange through the University of New Zealand with the Joint Association of the Red Cross and St. John in London for the provision of such text-books as may be required and also for facilities to enable them to sit their examinations.

On inquiry from the Dean of the Law Faculty at the Victoria University College it was ascertained that the following was a list of the text-books prescribed by this college in law :—

Jurisprudence.
Salmond, *Jurisprudence*; Maine, *Ancient Law* (Everyman Ed.).

Roman Law.
Moyle, *Institutes of Justinian ;* Leage, *Roman Law ;* Maine, *Ancient Law.*

Constitutional Law.
Text-books, Dicey, *Law of Constitution ;* Keir and Lawson, *Cases in Constitutional Law.*
Reference Books: Hight and Bamford, *Constitutional History and Law of New Zealand*; *Report of Committee on Ministers' Powers* (Cmd. 4060).

International Law.
Text-book : Oppenheim, *International Law,* Vol. I.
Reference Books. Pitt-Cobbett, *Cases of International Law ;* Brierly, *The Law of Nations*; Oppenheim, *International Law,* Vol. II (6th Ed.).

Conflict of Laws.
Cheshire, *Private International Law ;* Adamson, *Statutes and Cases on Conflict of Laws.*

The Law of Property.
Garrow, *Law of Property* (2 vols.); Maitland, *Lectures in Equity.*

The Law of Contract.
Text-books: Anson, *Law of Contracts ;* Charlesworth, *Mercantile Law ;* Maitland, *Lectures in Equity.*
Reference Books: Salmond and Winfield, *Law of Contracts.*

The Law of Torts.
Salmond, *Torts.*

Criminal Law.
Text-book. Garrow, *The Crimes Act* (Annotated).
Reference Books. Kenny, *Outlines of Criminal Law*; Maunsell, *New Zealand Justices of the Peace and Police Court Practice.*

The Law of Trusts, Wills, and Administration.
Text-books: Garrow, *Law of Trusts ;* Maitland, *Lectures in Equity.*
Reference Book: Garrow, *Law of Wills.*

The Law of Evidence.
Phipson, *Law of Evidence ;* Cockle, *Cases and Statutes on Evidence.*

Practice and Procedure.
Stout and Sim, *Practice and Procedure of the Supreme Court of New Zealand ;* Wily and Cruickshank, *Magistrates' Court Practice ;* Sim, *The Divorce Act.*

Conveyancing.
For list of Statutes required in classes in this Department, see LL.B. Syllabus (New Zealand University Calendar).

Company Law and Law of Bankruptcy.
Text-books: Topham, *Company Law ;* Spratt, *Law of Bankruptcy.*

I shall be glad if you will kindly make an *urgent* appeal to your members asking them to forward to me copies of any of the above-mentioned books which they may be able to spare.

Yours faithfully,
D. I. GLEDHILL,
Acting Secretary.

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. Divorce and Matrimonial Causes.—*Three Years' Separation—Husband Prisoner of War—Attorney in New Zealand—Whether Attorney can institute Divorce Proceedings.*

QUESTION: Before he left New Zealand a married soldier entered into a deed of separation. He proceeded overseas, and while away executed a wide power of attorney without any express provisions relating to taking divorce proceedings. He is now a prisoner of war and the three-year period has expired. Can his attorney, on his behalf, institute divorce proceedings without any further requirement from the soldier? The attorney believes from his letters he desires this done. If any regulations govern the point *re* divorces, kindly quote same.

ANSWER: This is a matter on which counsel's opinion should be sought. It would, however, surely require more than a general power to authorize an attorney to do anything that would bring about a change of his principal's status, which would be the effect of a decree in divorce. Even if he had such explicit power, it is difficult to see how he could, of his own knowledge, make an affidavit that there has been no collusion or condonation by his principal. There are no regulations governing the point.

2. Law Practitioners.—*Incorporation of Legal Practice into Limited Company—Whether allowable.*

QUESTION: Is there any legal objection to incorporating the practice of a barrister and solicitor into a limited company either private or public?

The principle involved seems to have statutory recognition in the constitution of the Public Trustee and the various trustee companies. The profession of dentistry appears to have been so incorporated. It would appear necessary that such a company would be obliged to have a qualified solicitor employed to conduct or supervise the business of such a company. There do not appear to be any legal practices incorporated in New Zealand, and I wondered if there is any legal bar to such a course.

ANSWER: A company cannot be formed legally to carry on the business of law practitioners, or to derive profits from such a business. A corporate body is not capable of qualifying or being admitted and enrolled as a barrister or solicitor, nor could it be subject to disciplinary jurisdiction, and be suspended from practice or struck off the roll. An incorporated company is a separate entity, distinct from its members, even if they all be law practitioners. Hence, a company, one of whose objects is to carry on the business of law practitioners, cannot be registered under the Companies Act, 1933. The principle of the incorporation by statute of the Public Trustee and of trustee companies is different, none being authorized to conduct the business of law practitioners. A company cannot be registered as a dentist under the Dentists Act, 1936.

3. Social Security.—*Soldier's Allotment—Widowed Mother—Proportion taken into Account for Benefit Purposes.*

QUESTION: A client of ours is in receipt of an allotment from a member of the Forces of 4s. daily. What portion of this amount is taken into account as income for benefit purposes?

ANSWER: "Income" is defined by s. 10 of the Social Security Act, 1936, and may be stated briefly as all moneys and the value of all benefits received or derived by an applicant for his own use or advantage. If any of the above allotment is used for the beneficiary's own use or advantage, it would come within the definition of income and would require to be taken into account accordingly. However, if the beneficiary is a widowed mother, the provisions of s. 12 of the Finance Act, (No. 4), 1940, would apply, and only up to the first 2s. a day of the allotment would be charged as income in assessing any benefit to the widowed mother.

4. Death Duty.—*Life-insurance transferred to Donee conditional on Donee surviving Donor—Liability to Death Duty on Donor's Death.*

QUESTION: In 1937, our client, A., transferred a fully-paid-up life insurance policy on his life to trustees to hold the policy-moneys in trust for B., his wife, *should she survive him*, with a provision that if she did not survive him the moneys were to be held in trust for A., his executors, administrators, and assigns. A. died in 1942, survived by B. Are the life-insurance moneys liable to death duty?

ANSWER: Yes; they are liable under s. 5 (i) (*g*) and s. 16 (i) (*e*) and (*f*) of the Death Duties Act, 1921; see *Public Trustee* v. *Commissioner of Stamp Duties*, (1912) 31 N.Z.L.R. 1116, 15 G.L.R. 61; *Little* v. *Commissioner of Stamp Duties*, [1923] N.Z.L.R. 773, G.L.R. 316; *Adamson* v. *Attorney-General*, [1933] A.C. 257. The recent Australian decisions, *Union Trustee Co. of Australia, Ltd.* v. *Federal Commissioner of Taxation*, (1942) 65 C.L.R. 29, and *Perpetual Trustee Co., Ltd.* v. *Federal Commissioner of Taxation*, (1942) 65 C.L.R. 573, would not apply to New Zealand.

5. Workers' Compensation.—*Agreement between Employee and Employer—Stamp Duty payable.*

QUESTION: What stamp duty, if any, is payable on an agreement between an employer and employee for the settlement of a claim under the Workers' Compensation Act, 1922?

ANSWER: If by deed, 15s; if not by deed, 1s. 3d. As to a release being construed as a deed, see *Long* v. *Murray*, [1934] G.L.R. 487. Although s. 13 of the Stamp Duties Amendment Act, 1924, exempts from stamp duty a contract relating to the hire of services, the primary object of an agreement, such as is mentioned in the question, is the regulation of a statutory liability, and therefore on the principle of such cases as *Smith* v. *Cator*, (1819) 2 B. & Ald. 778, 106 E.R. 549, it is not entitled to the exemption.

RULES AND REGULATIONS.

Egg Rationing Order, 1943. (Rationing Emergency Regulations, 1942.) No. 1943/87.

Egg Rationing Permit, 1943. (Rationing Emergency Regulations, 1942.) No. 1943/88.

Building Emergency Regulations, 1939, Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1943/89.

War Deaths Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/90.

Patents, Designs, Trade-marks, and Copyright Emergency Regulations, 1940, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/91.

Passenger-service Time-table Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/92.

Transport Control Emergency Regulations, 1942, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1943/93.

Delivery Emergency Regulations, 1942, Amendment No. 3. (Emergency Regulations Act, 1939.) No. 1943/94.

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