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MONEY PAID UNDER MISTAKE OF LAW.

IT is well-settled law that money paid under a mistake of law, and paid voluntarily, with a full knowledge of the facts, is not, as a general rule, recoverable, although the payer finds he has paid in error what he was not legally bound to pay. "When people have a knowledge of all the facts, and take advice," said James, L.J., in *Rogers* v. *Ingram*, (1876) 3 Ch.D. 356, "and whether they get proper advice or not, and the business is settled, it is not for the good of mankind that the matter should be reopened." But the rule is not an absolute one, as we propose to show.

I.—Moneys Irrecoverable.

The expression "voluntary payment" does not mean a payment which a person wishes to make, but, at most, a payment to get rid of a liability, made with free exercise of the will, where no advantage is taken of the position of the person or the situation of his property. There are numerous cases of payment which have been held not to be "voluntary payments," as where payments are made not simply to get rid of a liability, but to procure something of which the persons paying are in urgent need, or to get rid of some constraint on their persons, or to get something to which they are entitled without such payment, or to get something done, which they are entitled to get done without that payment: *Kelly* v. *The King*, (1902) 27 V.L.R. 522, 532, approved in *The King* v. *Atkinson*, [1905] V.L.R. 698, 712.

Illustrations of the simple application of the general rule are that a person cannot maintain an action to recover money paid by him voluntarily in discharge of a debt which he afterwards finds was barred by the Statute of Limitations: *Bize* v. *Lickinson*, (1786) 1 T.R. 285, 287, 99 E.R. 1097, 1098; or a debt which was void by reason of his infancy: *Valentini* v. *Canali*, (1889) 24 Q.B.D. 166. In these instances it may be said that the payer was under a moral, though not a legal, duty to pay, and the rule promotes natural justice. But the rule extends to cases in which there was no moral consideration for the payment.

The question of the construction of an Act of Parliament or regulation and the liability under it, is one of law, and money paid voluntarily with a knowledge of the facts, though with a mistaken knowledge of the law, cannot be recovered; and an alteration of the law, whether by statute or by the decision of a higher tribunal—as when an erroneous decision of a Court is afterwards reversed on appeal—is no ground for recovery of money paid in accordance with such judgment in the mistaken belief that it is good law, and gives no right to reopen settled claims. As Williams, J., said in *Clutha County Council* v. *McDonald*, (1883) N.Z.L.R. 2 S.C. 257, 258, if a man pays money in ignorance of what his legal rights are, it does not matter whether the point of law of which he is ignorant is clear or doubtful. Authority shows that the mistake must be one of the general law, and it makes no difference whether the mistake be made through ignorance of a well-known rule of law or in the doubtful construction of a statute.

In *Henderson* v. *Folkstone Waterworks Co.*, (1885) 1 T.L.R. 329, where the plaintiff, rated in excess of what was subsequently declared by the House of Lords to be legal, sought to recover the excess demanded of him, and paid by him, on the ground that it was paid by compulsion and under the impression that he was bound in law to do so, a Divisional Court (Lord Coleridge, L.C.J., and A. L. Smith, J.) found as a fact that the payment was voluntary. In the course of his judgment, the learned Lord Chief Justice said:

> This is not the case when money paid under an error in law has been extracted or obtained by duress or any kind of compulsion could be recovered back. The law once ascertained to have been against the party who had thus by compulsion obtained payment of the money, it can be recovered back. A payment is voluntary and irrecoverable when, at the time when the money was paid, before a judicial decision to the contrary, the law was in favour of the payee, and there is no authority to show that it can be recovered back on account of a judicial decision reversing the former understanding of the law.

In *Henderson's* case it was pleaded that the payment was made in ignorance of the law. The learned Lord Chief Justice interposed:

> Of what law? I was ignorant of it before the decision of the House of Lords. I held the contrary, and two eminent Judges agreed with me. Can that be put as ignorance of law? Just see what consequences would follow if that wherever there has been a reversal of judgment all the money that has been paid under the previous notion of

> the law can be recovered back! Has that ever been held? Can it be that every reversal of a decision may give rise to hundreds of actions to recover back money previously paid?

On somewhat similar facts, Sir Charles Skerrett, C.J., in *Julian* v. *Auckland City Corporation*, [1927] N.Z.L.R. 453, also held that money paid voluntarily at a time when the law was in favour of the payee cannot be recovered if a subsequent judicial decision revises the former understanding of the law. There, certain rates were demanded from and paid by the plaintiff, and subsequently by a judgment of the Supreme Court, *Auckland City Corporation* v. *Turner and Stevenson's St. George Co., Ltd.*, [1926] N.Z.L.R. 734, it was decided that a Municipal Corporation was not entitled during the year for which a rate had been struck to increase the rateable value of a property then entered in the rate-book, and to charge rates upon the increased value. Before that judgment was delivered certain rates were demanded from the plaintiff and paid by him, and he subsequently alleged that this demand contravened the principles expressed in such judgment, and that he had been forced to pay a sum in excess of that which would have been payable if the demand had been made in accordance with the value of the property as appearing in the rate-book at the time of the entering of the rate; and he sued the Corporation to recover the excess so paid on the ground that payments made in compliance with a demand issued under statutory authority are not voluntary payments. The Corporation contended that it was purely a case of payment made under a mutual mistake of law, made with full knowledge of the facts, and there was no compulsion in the sense in which that word is understood in law, and that money paid under such circumstances could not be recovered.

The learned Chief Justice, in holding that the plaintiff could not succeed in view of that defence, said, at p. 408:

> I am of opinion that the plaintiff must fail on this ground. I decide it upon the simple proposition, which appears well established, that where money is paid at a time when the law is in favour of the payee it cannot be recovered by reason of a subsequent judicial decision reversing the former understanding of the law: see *Henderson* v. *Folkestone Waterworks Co.*, (1882) 1 T.L.R. 329. Moreover, the payment in this case was purely voluntary. It is not a compulsory payment because it was made under a demand by the Municipal Corporation, or under a threat that if the payment was not made legal proceedings would be instituted. It is clear that a threat of instituting legal proceedings does not prevent a payment from being voluntary if the claim is submitted to and payment made.

A more recent illustration of the application of the principle is found in *Sawyer* v. *Windsor Brace, Ltd.*, [1942] 2 All E.R. 669, where landlords made a refund of rent paid in advance after the passing of s. 13 of the Landlord and Tenant (War Damage) Amendment Act, 1941, after being threatened with proceedings by the tenant's solicitors, who had advised them that the section was retrospective. It was subsequently held in *London Fan and Motor Co., Ltd.* v. *Silverman*, [1942] 1 All E.R. 307, that the section was not retrospective, and the landlord sought to recover the sum repaid, as money paid under threat of legal proceedings. It was held by Croom-Johnston, J., that the suggestion that legal proceedings would be taken was insufficient to make the payment other than a voluntary one, since it was money paid under a mistake of law. The learned Judge said he need do no more than refer to the decision in *Marriot* v. *Hampton*, (1797) 7 Term Rep. 269, 101 E.R. 699, where Lord Kenyon said: "After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person." He added that observations in the judgment of the Court of Appeal in *Maskell* v. *Horner*, [1915] 3 K.B. 106, even though it is possible that they are *obiter*, and the statements in *Moore* v. *Fulham Vestry*, [1895] 1 Q.B. 199, are sufficient to show that the principle is still the same as that in *Marriot* v. *Hampton* (*supra*), that it is the interest of the public that there should be an end of litigation.

Where a municipality passed a by-law, which was invalid, and on the strength of it exacted license fees, and, upon the quashing of the by-law, those who had paid fees sought to recover them back, *Cushen* v. *City of Hamilton*, (1902) 4 D.L.R. 265, it was held that money paid to a Corporation under a claim of right, without fraud or imposition, for an illegal tax, license fee, or fine cannot without statutory aid be recovered back from the Corporation, either at law or in equity, even though such tax, license fee, or fine could not have been demanded or enforced.

A litigant, whose claim has been satisfied by payment into Court, cannot afterwards contend that the money was accepted under a mistake of law, on the ground that the law was not as then laid down, but subsequently enunciated in a higher Court: *Derrick* v. *Williams*, [1939] 2 All E.R. 559 (following on the reversal of *Rose* v. *Ford* in the House of Lords). The learned Master of the Rolls said, at p. 565, it would be an intolerable hardship on successful litigants if, in circumstances such as these, their opponents were entitled to harass them with further litigation because the then view of the law had turned out to be wrong; and he was unable, on principle, to accept any such proposition.

After a settlement under the pressure of process of law, neither the plaintiff nor the defendant in the proceedings can in general reopen them, because the settlement had proceeded on the basis of a mistake of law. It is plain from *Marriot* v. *Hampton* (*supra*), and the cases following it, that the defendant cannot recover back what he paid in error. The same principle applies if the plaintiffs have sued for an amount less than they were in law entitled to receive. It was attempted in *Moore* v. *Fulham Vestry* (*supra*) to show that the principle on which *Marriot* v. *Hampton*, and the cases following it, were decided was that of *res judicata*, but it was held that that was not so, since the principle on which those decisions rest is that it would be against public policy to allow a matter to be reopened after the law had been called in to effect a settlement and a payment had been made under pressure of the law. As Kennedy, J., said in *Ward and Co.* v. *Wallis*, [1900] 1 Q.B. 675, 678:

> Just as a defendant who has by mistake and without legal liability paid a sum of money under the pressure of legal process cannot, as a general rule, recover it back from the plaintiff, so neither in general can a plaintiff, who has given the defendant in an action credit for a sum on account and been paid, afterwards be allowed to reopen the matter either by suing afresh on the same cause of action, or by suing for the amount for which he wrongly gave credit as money had and received to his use.

In our next issue, we shall consider the circumstances in which it may be held that moneys paid in mistake of law are recoverable.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Wellington. 1943. March 8; June 21. *Myers*, C.J.

HOPE v. PUBLIC TRUSTEE.

Executors and Administrators—Insolvent Estate—Mortgage (subject to Prior Mortgage) by Public Trustee as Executor of Deceased Estate containing his Covenant to Pay Principal and Interest—Declaration therein that Public Trustee liable only to extent of Estate of Deceased from Time to Time in his Hands—Mortgaged Property sold by Prior Mortgagee—No balance—Public Trustee's Election to Administer Estate under Part IV of the Administration Act, 1908—Prior Mortgagee's Proof thereunder rejected on Ground of Delay—All proving Creditors subsequently paid in full—Sufficient left to pay Amount due under Mortgage—Whether Mortgagee a Creditor of Deceased—Administration Act, 1908, ss. 61, 62—Bankruptcy Act, 1908, s. 99.

Where under Part IV of the Administration Act, 1908, an order is made for the administration of the estate of a deceased person thereunder, the "administrator" who has incurred debts in the due course of administration for which he is personally responsible, retains his right of indemnity against the estate in priority to the claims of the creditors of the deceased.

Semble, This is also the case where the Public Trustee or Official Assignee, neither of whom is the "administrator," is appointed to administer under Part IV of the statute.

In re Rhoades, Ex parte Rhoades, [1899] 2 Q.B. 347, applied.

Where the Public Trustee, being such an administrator, files a certificate electing to administer under Part IV, he continues his administration of the estate, administering it in bankruptcy from the date of his election; and he can protect his indemnity as administrator out of the estate in his hands.

Plaintiff held a mortgage from the Public Trustee as executor of S. over properties in S.'s estate subject to prior mortgages, and in that mortgage the Public Trustee as such executor covenanted to repay the principal and interest thereon. It contained the declaration that the Public Trustee should be "liable only to the extent of the estate effects and credits of the estate [of S. deceased] for the time being in his hands." Owing to the economic depression the estate became apparently insolvent and the Public Trustee filed a certificate pursuant to s. 62 of the Administration Act, 1902, that he elected to administer under Part IV of that Act. A prior mortgagee sold the mortgaged property, realizing insufficient to pay the amount due to him. Misconceiving her position, plaintiff took the proceedings detailed in the judgment, to prove the debt due by the estate of S., but her proof was rejected on the ground of delay. The property market having revived, the Public Trustee, having paid all the debts on the estate had a surplus sufficient to pay the plaintiff the amount due under her mortgage.

In an action in which the plaintiff claimed from the Public Trustee the principal sum and arrears of interest due under the mortgage upon the Public Trustee's personal covenant in such mortgage,

Held, 1. That the plaintiff was not the creditor of S., the deceased person, whose estate the defendant had to administer under Part IV; and that she had no debt provable in that administration, but that her claim was against the Public Trustee who, in turn, had the right of indemnity against the estate of S. Hence s. 99 of the Bankruptcy Act, 1908, did not apply.

Farhall v. *Farhall, Ex parte London and County Banking Co.*, (1871) L.R. 7 Ch. 123; and *Re Millard, Ex parte Yates*, (1892) 72 L.T. 823, applied.

Eccles v. *Hall*, (1894) 13 N.Z.L.R. 433; *Belcher* v. *Dixon*, [1923] N.Z.L.R. 273, G.L.R. 81; *Re Duncan McCallum*, (1883) N.Z.L.R. S.C. 396; *Nathan* v. *Clarkson*, (1889) 7 N.Z.L.R. 602; *In re Kitson, Ex parte Thomas Sudgen and Son, Ltd.*, [1911] 2 K.B. 109; *In re Coote*, [1939] N.Z.L.R. 1008, G.L.R. 636; *In re Brooks, Official Assignee* v. *Brooks*, [1942] N.Z.L.R. 532, G.L.R. 314; *In re John McDougal*, [1927] N.Z.L.R. 587, G.L.R. 404; and *Ex parte Weldon, In re Lowther Broad*, (1893) 12 N.Z.L.R. 666, referred to.

2. That the defendant continued to remain administrator of the estate of S. and had funds in hand from which he could satisfy his claim to indemnity, if the plaintiff was entitled to recover her claim.

3. That the plaintiff was entitled to judgment for repayment of the principal sum and arrears of interest due under the plaintiff's mortgage.

Counsel: *S. A. Wiren*, for the plaintiff; *Cleary*, for the defendant.

Solicitors: *Luckie, Wiren, and Kennard*, Wellington, for the plaintiff; *Barnett and Cleary*, Wellington, for the defendant.

Case Annotation: In re Rhoades, Ex parte Rhoades, E. and E. Digest, Vol. 4, p. 505, para. 4549; *In re Kitson, Ex parte Thomas Sugden and Son, Ltd.*, *ibid.*, Vol. 4, p. 506, para. 4560.

SUPREME COURT. Wellington. 1943. June 14, 25. *Johnston*, J.

HADFIELD v. CHURCH.

War Emergency Legislation—Economic Stabilization Emergency Regulations—Landlord and Tenant—Lease containing Power to determine by Notice if Legislation passed whereby Rent liable to Reduction—Notice of Determination given by Lessor—Notices by Lessee to determine Fair Rent and for Leave of Court to be obtained by Lessor before his exercise of Power of Re-entry or of Determination—Position of Parties—Emergency Regulations Act, 1939, s. 3—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Regs. 15, 20, 24, 26—Debtors Emergency Regulations, 1940 (Serial No. 1940/162), Reg. 4 (1) (b), (2) (i).

A lease dated June 20, 1940, contained the following clause:

"12. In the event of any Act or legislation being passed during the term hereby granted whereby the rent payable hereunder shall become liable to be reduced the lessor, if he so desires, shall have the right on giving to the lessee written notice of such desire to terminate the lease hereby granted on the first day of June following the date of the coming into operation of such Act."

At the date of the lease the Emergency Regulations Act, 1939, was in force. The Economic Stabilization Emergency Regulations, 1942, made thereunder, came into force on December 15, 1942. On December 21, 1942, the lessee filed an application under the said regulations for determining the fair rent.

On February 22, 1943, the lessor gave notice that, in pursuance of cl. 12 of the lease, he desired to determine the lease on June 1, 1943.

On May 10, 1943, the lessee filed a notice under Reg. 4 (1) (*b*) of the Debtors Emergency Regulations, 1940, requiring the leave of the Court to be obtained by the lessor to exercise, under Reg. 4 (2) (*i*), any power of re-entry conferred by the lease or any power determining it.

On an originating summons for determination of the rights of the parties,

Held, 1. That the parties to cl. 12 of the lease were not, by reason of it, parties to an offence under Regs. 20 and 26 of the Economic Stabilization Emergency Regulations, 1942.

2. That cl. 12 did not prevent the lessee's making an application for reduction of rent, so as to bring it within the prohibition expressed by Reg. 24 of those regulations; and that regulation did not prevent the lessor from determining the lease as provided by the said clause.

Captain Cook Brewery, Ltd. v. *Ryan*, (1901) 19 N.Z.L.R. 595, 3 G.L.R. 273, and *Abbott* v. *L. D. Nathan and Co., Ltd.*, [1931] N.Z.L.R. 928, G.L.R. 544, applied.

3. That the lessor, by his notice, had effectively exercised his power to determine the said lease on the date of the notice.

4. That the lessee's application under the Debtors Emergency Regulations, 1940, was too late to bring into question the lessor's exercise of his power of determining the lease, but not too late to prevent the lessee's asking that, before the lessor exercised his power of re-entry, he should obtain the leave of the Court.

Counsel: *H. R. Cooper*, for the plaintiff; *Watterson*, for the defendant.

Solicitors: *Cooper, Rapley, and Rutherfurd*, Palmerston North, for the plaintiff; *Watterson and Foster*, Wellington, for the defendant.

THE RIGHTS OF ADOPTED CHILDREN.

The Effect of a Codicil confirming a Will.

The statutory provision which in New Zealand defines the status and rights of adopted children and which is now contained in s. 21 of the Infants Act, 1908, has been described in *Peddle* v. *Beattie*, [1933] N.Z.L.R. 696, 704, as "undoubtedly difficult to construe"; and it has proved a fruitful source of legal problems. Some, but by no means all, of the problems it creates, have been resolved by decisions of the Court. The section deems an adopted child to be for all purposes "a child born in lawful wedlock of the adopting parent." This is subject to certain limitations, one of which is that an adopted child shall not by such adoption

> acquire any right, title, or interest in any property which would devolve on any child of the adopting parent by virtue of any deed, will, or instrument prior to the date of such order of adoption unless it is expressly so stated in such deed, will, or instrument.

It has recently been held by the Court of Appeal—*In re Jackson, Holmes* v. *Public Trustee*, [1942] N.Z.L.R. 682—affirming the decision of the Supreme Court, that where property is given by will to the children of an adopting parent the property so given devolves by virtue of that will notwithstanding that such will is afterwards expressly confirmed by codicil and that, therefore, a child adopted by the adopting parent after the will was made but before the codicil acquires no interest in that property by virtue of the confirmation.

This decision is of more than ordinary academic and practical interest and appears to call for special reference not only because of its practical importance to the conveyancer, but also because what appears to be in its fundamentals a similar controversy has recently engaged the attention of the Courts in England. Some of the decisions in that controversy have been given since *Jackson's* case; but the controversy arose and certain decisions therein were given prior to that case, though apparently the reports of the last-mentioned decisions were not received in New Zealand in time to enable them to be considered and cited to the Court. As will be seen later, the controversy appears to indicate a divergence on certain points between judicial opinion in New Zealand, on the one hand, and judicial opinion in England, on the other, and in particular on the legal effect of a codicil which expressly confirms a will.

The case for the adopted child in *Jackson's* case would appear to rest, in the first place, on a submission that, apart altogether from the effect of the express confirmation of the will by the codicil, there was no will prior to the date of the adoption. The ground for this submission would appear to be that until the testator died there was no will by virtue of which property would devolve. True, the testator had, prior to the date of the order of adoption, executed a document which he intended should operate as his will after his death provided it was not revoked in the meantime, and which did in fact on his death operate as a will. It is customary to refer, during the testator's lifetime, to such a document as a will, and sometimes the context may show that a reference to a will means the will of a living person; but any such reference appears to be subject always to the tacit understanding that it is only a document which the maker intends should on his death operate as a will, provided it has not in the meantime been revoked. During his life nothing could or would devolve by it; it had no force or effect whatever during his life: *Lord Advocate* v. *Bogie*, [1894] A.C. 83, and *Beddington* v. *Baumann*, [1903] A.C. 13, 19.

If s. 21 (*a*) of the Infants Act, 1908, had prohibited an adopted child from acquiring any right or interest in property which would devolve on any child of the adopting parent by virtue of any will *made* or *executed* prior to the date of the order of adoption, a submission that the priority as between the will and the adoption is determined by reference to the date of testator's death would have been difficult to maintain. But the strength of the argument now under consideration in *Jackson's* case would appear to lie in the fact that s. 21 makes no specific reference to the question when the will was made or executed.

In *In re Horiana Kingi, Thompson* v. *Eruiti Tamahau Kingi*, [1937] N.Z.L.R. 1025, the learned Chief Justice says that

> the proviso, when it speaks of a deed, will, or instrument prior to the date of the order of adoption, must be referring to priority in date between the deed, will, or instrument and order of adoption.

This passage would not appear to exclude an argument that the priority in date as between the will and the order of adoption is determined by reference to the testator's death. As he goes on to add

> even if, in the case of a will, the proviso means the date of death and not the date of the will, the result in this case would be the same inasmuch as both were prior in date to the order of adoption,

he appears to imply that the matter was open to further judicial argument in a case where the adoption took place before the testator's death. It was not in issue in *Kingi's* case, since the adoption took place after the date of death and presumably the point was not argued. It was presumably for this reason that the Court was subsequently called upon to decide in *Beatty's* case, [1939] N.Z.L.R. 954, whether the adopted child in that case was entitled to share in the estate. The argument in that case is not reported, though it would appear from the judgment that the argument was that the words "prior to the date of the order of adoption" are referable in the case of a will to the devolution of the property at the date of testator's death. At any rate, *Beatty's* case necessarily involves the conclusion that when s. 21 (*a*) speaks of a will prior to the date of the order of adoption this priority is determined not by reference to the date the document became operative as a will—that is, the date of the testator's death—but by reference to the date on which the will was executed or made.

The decision in *Beatty's* case was not challenged in *Jackson's* case, and the decision of the Court of Appeal must now be regarded as authority for the proposition that when in s. 21 (*a*) reference is made to a will prior to the date of the order of adoption, the priority in

date is determined by reference to the date the will was *executed* or *made*.

Reference is made to this point because, in resolving the controversy, already referred to, that arose in England, a decision *In re Waring, Westminster Bank* v. *Awdry*, [1942] Ch. 309, [1942] 1 All E.R. 556, was given which, had the report been received in time to enable it to be considered, might have induced the appellant's counsel in *Jackson's* case to argue before the Court of Appeal that *Beatty's* case was wrongly decided and to cite such decision to reinforce his argument. In 1941 the Imperial Parliament passed the Finance Act, 1941, under which it was provided (s. 25) that

> any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income-tax or free of income-tax other than sur-tax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil . . . and (*b*) was made before September 3, 1939; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income-tax for which is ten shillings in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

In *Waring's* case (*supra*) the testator made his will on February 11, 1939, and died on August 3, 1940, and it was held that, since the will did not come into operation until testator's death, s. 25 of the Finance Act, 1941, did not apply to it. The decision was criticized by the author of the conveyancer article in *193 Law Times* (London), 215, where he said:

> It is not clear that this decision is in accordance with the intention of the draftsman . . . In ordinary parlance a person makes a will when he executes it.

It was therefore not surprising to find that an appeal was brought and that the decision was reversed by the Court of Appeal: [1942] Ch. 426, [1942] 2 All E.R. 250. But the ground for the decision of the Court of Appeal appears to be based on the fact that the statute referred to the provision being contained in a will and to it being "made" before the date mentioned in the statute. Substantially similar observations apply to *Rolfe* v. *Perry*, (1863) 3 DeG. J. & S. 481, 46 E.R. 722, and *In re Elcom, Layborn* v. *Grover-Wright*, [1894] 1 Ch. 303, cited in *Jackson's* case.

The case for the adopted child, in so far as it rests on the fact that the codicil expressly confirmed the will, appears to be that the confirmatory words of the codicil import therein the words of the will and, as the will contained in the codicil is the last expression of the testator's intention, it must be regarded as being substituted for the original will.

In *Jackson's* case, Mr. Justice Northcroft says: "that inasmuch as the rights of the adopted child are created by statute, the statute must be resorted to to ascertain the extent and limits of those rights." This is indisputable. But the only limitation on the right of an adopted child to share under a testamentary disposition in favour of the children of the adopting parent is one which excludes him from taking an interest in "property which would devolve on any child of the adopting parent by virtue of any deed, will, or instrument prior to the date of such order of adoption." In deciding whether property would so devolve, and, if so, what is the property that would so devolve, it seems clear that the provisions of the codicil would have to be considered. Had the words of the will been written out *in extenso* in the codicil, it would seem that the will thus contained in the codicil would supersede the original will: *In re Bryan*, [1907] P. 125, 128; *O'Leary* v. *Douglass*, (1878) 3 L.R. Ir. 323; *Jarman on Wills*, 7th Ed. 160. The formula "in all other respects I confirm my said will" is contained in the codicil, a formula which authorities appear to suggest is merely a short way of repeating the words of the original will: *In re Blackburn, Smiles* v. *Blackburn*, (1889) 43 Ch.D. 75; *Capron* v. *Capron*, (1874) L.R. 17 Eq. 288. Logically it would seem to follow that the words of the will are imported into the codicil by means of that formula and that the same result must follow. Once it is concluded that the property devolves by virtue of the codicil the conclusion appears to be inevitable that the adopted child is not barred since that will is made after the adoption.

In an old case, *Attorney-General* v. *Heartwell*, (1764) Amb. 451, 27 E.R. 298, it appears to have been held that for purposes of the Mortmain Act which invalidated certain testamentary gifts for charitable uses made after June 24, 1736, such a gift was made after that date on the ground that a codicil made after that date expressly confirmed a will made prior to that date: *cf. In re Moore, Long* v. *Moore*, [1907] 1 I.R. 315.

In *Elcom's* case, which is treated as indistinguishable in principle from *Jackson's* case, the codicil did not expressly confirm the will. Mr. Justice Chitty observed that the codicil "does not in terms confirm the will but . . . nothing turns on that circumstance"; and Lord Justice Lindley says of the testatrix that she "did not in terms republish her will; but that in my judgment is quite immaterial." These observations appear to be *obiter* and they appear to be open to the interpretation that what they meant was that the codicil operated in law to republish the will notwithstanding that there was no express confirmation. It was unnecessary to decide what the effect would have been had the testator in fact expressly confirmed the codicil. That question was not argued, and Lord Justice Lindley and Mr. Justice Chitty do not appear to have directed their minds to it.

The case for the adopted child on this ground, appears to be argumentatively impressive, and the decision of the Court may come as a surprise to many practitioners. A codicil which expressly confirms the will appears to be merely a conveyancer's device designed to avoid the necessity of actually re-writing the will *in extenso*. Whether the draftsman will give effect to what it is reasonable to assume is the testator's will at the time he wishes to re-state his testamentary intentions either by means of a codicil containing such alterations as may be necessary to give effect to the testator's intentions at that time and confirming the will in every other respect, or by formally revoking the existing will and re-writing a new will compounded of the terms of the old will, with such alterations and additions as the testator desires, depends in the main on the length of the existing document, the nature and extent of the alterations which the testator desires to make, the time available, and other circumstances: see *4 Davidson's Conveyancing Precedents*, 3rd Ed. 593; *18 Encyclopaedia of Forms and Precedents*, 2nd Ed. 646. If the testator merely wishes to make some additions or alterations to his existing will, but otherwise wishes the legal effect of his will to remain unchanged, there appears to be no necessity to republish the will and, *a fortiori*, no necessity expressly to confirm the will. A

codicil which does not refer to the will does not republish it: *In re Smith, Bilke* v. *Roper*, (1890) 45 Ch.D. 632. Even where the codicil does refer to the will, there are numerous examples in the Reports of codicils which do not expressly confirm the will. *Waring's* case, which has already been cited and will be cited again, is a case in point.

If the testator, in addition to such express additions or alterations as the codicil may contain, does in fact expressly confirm the will, it seems reasonable to infer that he intends the codicil to have the same effect as if he had revoked the existing will and executed a new will compounded of such of the provisions of the old will as remain and the alterations or additions the testator desires to make. The purpose of the confirmatory words, as commonly understood, is to save the draftsman, whether the testator himself or, as is generally the case where a codicil is prepared and the confirmatory words are used, his legal adviser, the labour, time, and possibly the expense of re-writing or re-typing an entirely new will. If this is not its purpose, what is the reason why in some cases the codicil does expressly confirm the will while in others the confirmatory words are left out? If it be the law, as was said in *In re Blackburn, Smiles* v. *Blackburn* (*supra*) and *Capron* v. *Capron* (*supra*), that a codicil which expressly confirms the will has the effect of repeating the will as if it had been then executed for the first time, an argument that the testator intended such a codicil to have that effect appears to have some force.

In the article in the *Law Times*, to which reference has already been made, the writer, after criticizing the decision of Mr. Justice Farwell in *Waring's* case, goes on to say that

> Should the decision be . . . reversed, subsequently made codicils may have an important bearing on this question. If a codicil does not confirm the will, it will of course not affect the position; where it does, it would seem clearly to bring s. 25 into operation . . . where the codicil contains a provision confirming a will it would seem that the will must be deemed to have been executed at the date of the codicil, and instead of being a document made before 3rd September, 1939, becomes one made after that date.

The relevant codicil in that case did not expressly confirm the will. Consequently when the Court of Appeal decided that the will was made before the date mentioned in the statute, the question what effect an express confirmation of the will by the codicil would have had did not arise; it was not argued, and the Court expressly left the question open. In the argument before the Court of Appeal reference is made to a decision of the Lancashire Palatine Court (*In re Tabb*) the only available report of which is contained in an article in the *1942 English Journal*, p. 94. In that case that Court held that for purposes of s. 25 of the Finance Act, 1941, the testamentary provision was made by a will bearing the date of the codicil on the ground that the execution of a codicil after September 3, 1939, operated as if a new will were made at the date of the codicil.

As seemed not unlikely, it was not long before the point left open in *Waring's* case fell to be decided by the High Court. In *Re Tredgold, Midland Bank Executor and Trustee Co., Ltd.* v. *Tredgold*, [1943] 1 All E.R. 120, the testator by his will dated March 23, 1936, gave an annuity free of all deductions including income-tax. By a codicil dated August 20, 1941, he made certain administrative additions not touching the annuity and added "In all other respects I confirm my said will." The Court (Simonds, J.) held that the direction to pay the annuity was contained in the codicil or in the will and codicil regarded as one document made at the date of the latter, and was therefore not made before September 3, 1939. The following passage from the judgment explains the reasons for the decision:—

> The important point for the purpose of the present case is that, whether or not the inference of republication of a will is to be drawn from a codicil, it is impossible to say that a provision, which is found in the will and in the will alone, can inferentially or notionally or by any means be imported into the codicil, unless the codicil itself contains words which express the testator's testamentary intentions.
>
> The last words which I have read state the real problem which I have to solve. If the effect of the confirmatory clause is the same as that of any constructive republication—that is, the will is to be construed and take effect as if it had been re-executed on the date of the codicil—it is clearly impossible to say that the provision is, for the purpose of the Finance Act, 1941, s. 25 (1), made not in the will but in the codicil. The provision was not in fact made by the codicil; the will was in fact made before September 3, 1939, however much it may, for certain purposes, be construed as if it had been re-executed at a later date. If, on the other hand, the true meaning of a confirmatory clause is that it is to be read as if the testator had written out anew in the codicil itself the words of his will with such alterations as were therein contained, it can, I think, be said that the provision is contained in the codicil, for the testator is there, in his codicil, expressing in shorthand his testamentary intentions. The codicil is the final expression of his whole will . . . The fact that he makes a codicil shows that he is reviewing the testamentary dispositions, and reviewing them in effect says: "This and this I want to alter: this and this I want to stand." He is there and then stating by reference to an existing and identifiable document his last and final wishes. He is, in fact, making his last will.

If the property in *Jackson's* case devolves on the children of the adopting parent by virtue of the original will notwithstanding the express confirmation of that will by the codicil, it is not easy to see on what legal principle it can be held that the provision for the annuity in *Tredgold's* case is contained not in the original will but in the codicil. The view taken in *Tredgold's* case of the effect of a confirmatory codicil does not appear to be in accord with the view taken in *Jackson's* case. Time may show which of these views is ultimately sustained, but unless and until it is otherwise settled by higher authority *Jackson's* case is clear authority that a confirmatory codicil does not operate to make property, which, if there were no such codicil, would devolve by virtue of the original will, devolve by virtue of such a codicil.

It will be in view that a codicil which expressly confirms the will *may* operate to make property devolve on the children of the adopting parent which would not devolve by virtue of the original will: *In re Reevse, Reeves* v. *Pawson*, [1928] Ch. 351. In such a case (*semble*) the adopted child would not be barred from acquiring an interest in that property.

A consideration of the problems that s. 21 creates and of the numerous decisions so far given to determine its effect seems to justify the conclusion that the law which defines the status and rights of adopted children is unsatisfactory. In some respects it appears to be uncertain; in others it appears to be anomalous. Suppose, for example, that in addition to a gift of his residuary estate the testator in *Jackson's* case had given to his daughter's children "all my interest in my present lease at No. 1 . . . Street," and that after the will was made but before the codicil the

testator acquired a renewal of the lease. There is in the case figured no specific reference in the codicil to the lease any more than there is to the residuary estate. Yet if the test for determining whether the adopted child takes any interest in the leasehold property is whether the natural child takes that property by virtue of the original will, it would seem that the adopted child would be entitled to an interest in the lease but not in the residuary estate, since on the authority of *In re Reeves, Reeves* v. *Pawson* (*supra*), it seems that the renewed lease would devolve not by virtue of the original will but by virtue of the codicil confirming that will.

The question of amending the law might well be referred to the Law Revision Committee, and the English Act may provide a better model than the legislation which is believed to have inspired the present statutory provisions.

"EVEN HOMER SOMETIMES NODS."

In the case of *Skelton* v. *Younghouse*, [1942] A.C. 571, [1942] 1 All E.R. 650, Viscount Maugham, in delivering judgment, refers to the judgment of the Privy Council delivered in the case of *Wright* v. *Morgan*, [1926] A.C. 788. The latter case was an appeal from the Court of Appeal in New Zealand and the judgment of their Lordships was delivered by Viscount Dunedin.

In referring to this judgment, Viscount Maugham (at pp. 576, 652, 653) considers a dictum contained therein and criticizes it in the following passage :—

> Without saying anything on the question whether an option to purchase contained in a will confers a vested interest before the option is exercised, and particularly if the option is only exercisable at an uncertain time, I may observe that the observation was of the nature of an *obiter dictum* and the point was never in fact argued before the Board. *In re Cousins* (30 Ch.D. 203) and other relevant cases on the point were neither cited nor considered.

I argued the case for the appellant before the Privy Council with the assistance of the present Sir Andrewes Uthwatt; and the present Chief Justice, Sir Michael Myers, argued the case for the respondent with Mr. J. H. Stamp as his Junior. I have my notes of the argument, and I find that, contrary to Viscount Maugham's statement, *In re Cousins* was cited and the very point which Viscount Maugham says was not considered was, on the contrary, placed in the forefront of the appellant's argument. Not only this, but the judgment of Mr. Justice Reed in the Court of first instance, which judgment was, of course, incorporated in and formed part of the record of the proceedings before their Lordships, and which was extensively referred to by counsel on either side, contains many references to the case of *In re Cousins* and a very searching analysis of what that case really decided.

It would almost appear as if the learned Viscount had simply turned to the report of the case of *Wright* v. *Morgan* in the Appeal Cases Reports for 1926, and had accepted the reporter's note of the argument as being a complete, accurate, and exhaustive report of all the cases cited and all the contentions advanced by counsel, which, of course, would be absurd.

I think that I read an article lately in some Law Journal (possibly the *Quarterly*) in which the author deplored what he considered was a tendency on the part of the Judiciary to differentiate previous decisions on insufficient grounds, and so to weaken the authority of the maxim *Stare decisis*. Lord Atkin's judgment in *Donoghue's* case was, if I remember rightly, quoted as an example.

If in one hundred year's time some unfortunate litigant, who has pinned his faith to Lord Dunedin's dictum in *Wright* v. *Morgan*, is to be met by the contemptuous rejoinder "Read what Viscount Maugham said about that in *Skelton* v. *Younghouse*," it is surely desirable that, in this contest between giants—real facts should be placed upon record.

—MAURICE J. GRESSON.

ROAD TRAFFIC AND THE WAR EMERGENCY REGULATIONS.

X.—Recent Regulations and Cases.

By R. T. DIXON.

Since the last article of this series (*ante*, p. 81) there have been many new Emergency Regulations governing road traffic. They are as follows, in chronological order, unless in amendment of the same regulations.

Transport Control Emergency Regulations, 1942, Amendment No. 1 (Serial No. 1943/36).—This amendment gives further powers to the Taxicab Control Committees, appointed under the principal regulations, and in particular enables the Committees to require taxicab proprietors to join up with a specified telephone system and to roster the drivers.

Transport Control Emergency Regulations, 1942, Amendment No. 2 (Serial No. 1943/93).—This further amendment strengthens the powers of the Minister under the regulations in that when a decision by a Control Committee is given pursuant to his directions (under Reg. 10 of the principal regulations), the Appeal Authority, in the event of an appeal, is required also to conform to the directions.

The failure to comply with these regulations is, by this amendment, made a ground for review of the operator's license under the Transport Licensing Act, 1931.

Motor-vehicles Registration Emergency Order, 1943 (Serial No. 1943/39).—This enables the Registrar of Motor-vehicles to waive the fee payable on re-registration of a motor-vehicle the registration of which has been cancelled, if such cancellation was due to the absence of the owner with the Armed Forces.

Goods-service Charges Tribunal Emergency Regulations, 1943 (Serial No. 1943/40).—These regulations are issued as part of the stabilization policy—*vide* Reg. 6 (2). The present powers of Licensing Authorities for fixing charges in goods-services are cancelled. Instead a Goods-service Charges Tribunal is set up with sole power to deal with such charges, there being no right of appeal against decisions of the Tribunal. In addition to its power to fix new charges the Tribunal is authorized to review existing charges under the transport licenses. The machinery of administration is vested in the Commissioner of Transport.

The Minister of Transport by Warrant (*1943 New Zealand Gazette*, 378) appointed the following as members of the Tribunal:—

The Hon. Sir Francis Frazer, Deputy Chairman of Executive Commission of Agriculture.
Mr. T. H. Langford, the No. 3 District Transport Licensing Authority, Christchurch.
Mr. A. C. A. Sexton, Solicitor of Auckland, and also Executive Member of the New Zealand Farmers' Union.
Mr. J. M. Simson, of the New Zealand Carriers' Federation.
Mr. R. A. Glen, Public Accountant, Wellington.

Motor-vehicles Registration Emergency Regulations, 1942, Amendment No. 1 (Serial No. 1943/48).—The purpose of these regulations is to authorize local authorities to dispose of abandoned motor-vehicles. If a motor-vehicle is apparently unregistered or unlicensed and abandoned by the owner, the respective local authority may seize possession of the vehicle, and, after holding it for one month and advertising, may sell the vehicle. Proceeds of the sale, after payment of costs, are payable to the former owner of the vehicle.

Passenger-service Time-tables Emergency Regulations, 1943 (Serial No. 1943/92).—These regulations are in amendment of the Transport Licensing Act, 1931, and authorize the Minister of Transport to issue directions to a Licensing Authority relating to the time-tables or frequency of service for a passenger-service. There is no right of appeal against a decision of a Licensing Authority given pursuant to such direction: *vide* Reg. 5.

Delivery Emergency Regulations, 1942, Amendment No. 3 (Serial No. 1943/94).—This order, while amending regulations dealing with zoning of deliveries of household commodities, has a direct bearing on the Transport (Goods) Emergency Regulations, 1943 (*vide ante*, p. 81). Among the exceptions from the latter regulations (which extend the scope of transport licensing to H-plate trucks used by the private trader) are trucks used for carrying "commodities" as defined by the Delivery Emergency Regulations, 1942. This Amendment No. 3 of the latter regulations consolidates former definitions of such commodities, and in doing so excludes coal, firewood, and wholesale deliveries of meat and groceries from the definition. The result is that deliveries of the latter are now brought within the scope of licensing under the Transport (Goods) Emergency Regulations, 1943.

In addition, the amendment provides that an official extract from the *New Zealand Gazette* describing a "scheme" for zoning or regulation of deliveries shall be *prima facie* evidence of the existence of the scheme and of the fact that all legal requirements relating to it have been fulfilled.

Exemptions from Transport (Goods) Emergency Regulations, 1943 (Ministerial Order in 1943 New Zealand Gazette, *p. 490).*—Concerning the respective regulations under which this order is issued, see the last explanation (*supra*). The order exempts from the regulations the carriage of goods on a trailer drawn by a tractor.

Decisions under Fuel Emergency Regulations, 1939 (Serial No. 1939/133).—There have recently been some interesting decisions in the Magistrates' Court under the Oil Fuel Emergency Regulations, 1939.

In *Police* v. *Bremner*, (1943) 3 M.C.D. 4, Mr. H. P. Lawry, S.M., held that as no penalty is prescribed by the latter regulations, the penalty provided by s. 9 of the Emergency Regulations Act, 1939, applies, and therefore the defendant has a right to elect to be tried by a jury. It appears that the Magistrate's attention was not drawn to the provisions of Reg. 10 of the Supply Control Emergency Regulations, 1939 (Serial No. 1939/131), as amended by Reg. 7 of the Amendment No. 1 (Serial No. 1940/121), and since amended by Reg. 8 of Amendment No. 2 (Serial No. 1943/66). These penalty provisions would appear to apply to oil fuel offences by reason of Reg. 1 (2) of the Oil Fuel Emergency Regulations, 1939 (Serial No. 1939/133), but in any case the prescribed penalties are such that the effect of the decision would remain. An interesting point is whether the words "on summary conviction" used in the amendment effected by Reg. 7 of Amendment No. 1 (*supra*) (Serial No. 1940/121) would do away with the right of trial by jury. The writer's view is that to negative such an important right, wording explicitly directed to that purpose would be required by the Court: see, in this connection, *R.* v. *Goldberg*, [1904] 2 K.B. 866.

Police v. *Greenslade*, (1943) 3 M.C.D. 9, supports previous decisions that petrol coupons are transferable and, as no appeal has been lodged against any of the Magistrate's decisions on this point, it seems that the position is now accepted by the Government.

Other cases relating to petrol coupons are on the question whether the Oil Fuel Controller or his delegatee may require of any person information concerning the source from which coupons were obtained. In one decision by Mr. Abernethy, S.M. (*Police* v. *Heads*) it has been held that there is such power under Reg. 5 of the regulations, but Mr. Goulding, S.M., has later held to the contrary (*Oil Fuel Controller* v. *Shortland*). As it is understood that an appeal is pending against the latter decision, further reference to these cases is held over for a later article.

In regard to informations under the Oil Fuel Emergency Regulations, 1939, two points of interest are as follows:—

In *Orr* v. *Bowater*, (1943) 3 M.C.D. 37, Mr. Coleman, S.M., decided that any person may lay an information for the breach of an emergency regulation.

By reason of Reg. 8 of the Supply Control Emergency Regulations, 1939, Amendment No. 2 (Serial No. 1943/66), read in conjunction with Reg. 1 (2) of the Oil Fuel Emergency Regulations, 1939 (Serial No. 1939/133), it would appear that prosecutions under the latter regulations are not bound by the maximum time-limit of six months fixed under s. 50 of the Justices of the Peace Act, 1927, for the laying of the informations.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Schemes to save Income-tax.—In the recent case of *Latilla* v. *Commissioners of Inland Revenue*, [1943] 1 All E.R. 266, the Lord Chancellor (Viscount Simon) made the following observations :—

> My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving their equivalent of such income without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship.

As applied to taxpayers, there is great weight in the Lord Chancellor's comments. But if, as would seem to be the case, his observations are intended to extend to solicitors and counsel, one would venture to differ. One would think that the matter would be satisfactorily tested in this way: Suppose a client comes to his legal adviser with a certain plan and asks for advice whether, if he orders his affairs in accordance with that plan, he will make an income-tax saving. Is the legal adviser to reply as follows ? : "I am sorry, but I cannot advise you on this matter ; nor could I draw the proposed documents for you. To do so would not be 'a discharge of the duties of good citizenship'." Again, suppose a client asks his legal adviser the more general question of how he can so order his affairs so as to save income-tax. Is the lawyer to say, "I am sorry, but it is not a matter upon which I can properly advise you ?" Is it not the first duty of a lawyer to advise his client as to what the law is and to give him all proper professional assistance for which he may ask ? Would a lawyer who declined to do this be properly discharging his professional duty to his client ?

The Imposing Monument.—The monument to Major Kemp which stands in the public gardens at Wanganui was the subject of litigation in our Courts some thirty years ago when the contractors sued Major Kemp's sister, Rora Hakaraia, for the balance of the contract price. The action was tried at Wanganui before Chapman, J., and a jury. The main defence was that the statue was no likeness and no work of art, and there was considerable evidence given by artists and others as to the merits of the sculpture. The jury answered issues in favour of the plaintiff; but Chapman, J., ordered a new trial on the ground that the verdict was against the weight of evidence. The contractors appealed to the Court of Appeal, but met an even worse fate in that Court, for judgment was directed to be entered in favour of the defendant. During the course of his argument before the Court of Appeal counsel for the contractors referred to the statue as "a very imposing one." "But, Mr. ," quietly observed Denniston, J., "surely that is the case made by the defendant ! "

Retiring Allowance to O'Regan, J.—In a Finance Bill provision is made for a superannuation allowance to O'Regan, J. If this presages the Judge's early retirement the profession will regret it, for he has acquitted himself with distinction in the performance of his office and has won the respect and affection of all who appear before him. The retiring allowance is at the rate of three twenty-fourths of his judicial salary increased by one twenty-fourth for each year of office in excess of five, but not exceeding six twenty-fourths of his salary. All will be glad to see this provision made for O'Regan, J. The existing provisions for the superannuation of Judges are far from satisfactory, and it is to be hoped that the present special provision will be the forerunner of a provision of general application liberalizing Judges' pensions.

De Mortuis.—There have been many complaints in Canada of the dilatoriness which accompanies the publication of judgments in the Supreme Court Reports —a Government series of reports subsidized by the Law Societies. A private series of reports does the job with exemplary promptitude. At the last annual meeting of the York County Law Association a member urged that steps be taken to ensure that judgments in the S.C.R. be published "in the lifetime of the litigants."

Magistrates and Reformative Detention.—In certain cases a Magistrate has jurisdiction to impose a sentence of reformative detention for any period not exceeding *three* years. No Supreme Court Judge ever sentences a person to reformative detention without first having a report from a Probation Officer ; but it would appear from the recent judgment of Myers, C.J., in *In re Moulin*, [1943] N.Z.L.R. 325, that the same care has not always been taken by some Magistrates. In *Moulin's* case, in respect of four separate charges, the Magistrate had imposed an aggregate of twelve months' imprisonment and twelve months' reformative detention. On appeal, the sentence of reformative detention was held invalid, because it had been imposed as the *sole* punishment for one of the charges and had been made to commence *in futuro* on the expiration of a term of imprisonment imposed on a *separate* charge ; and, as the sentence had been imposed by the Magistrate without his having before him a report from the Probation Officer, Myers, C.J., made some trenchant observations on the subject. He referred to, and quoted from, a memorandum of his own in the case of a prisoner, Rowe, in which, in May, 1941, he had directed attention to the matter and had said : "In dealing with the liberty of the subject in these cases Magistrates should exercise no less care than is exercised by the Judges of the Supreme Court." The Chief Justice then continued :

> I understand that a copy of my memorandum was sent to each Magistrate for his information. It is the duty of Magistrates to act upon pronouncements of this Court in matters of this kind, and it is surprising to find still an accused person being sentenced to a long term of reformative detention without a report from the Probation Officer.

LAND AND INCOME TAX PRACTICE.

Income derived by a New Zealand Resident from Overseas.—Dividends from Overseas and New Zealand Companies.

Income-tax.

All income derived by any person who is resident in New Zealand—*i.e.*, whose home is in New Zealand—at the time when he derives that income must be included in New Zealand taxation returns, whether the income is derived from New Zealand or from elsewhere: *vide* s. 84 (1), Land and Income Tax Act, 1923. Just what constitutes "income," or when income is "derived"—whether from this country or elsewhere—may cause difficulty when the receipt of moneys arises in an overseas country, and in cases of doubt reference should be made to the various publications which deal exhaustively with these points, and the further point as to what constitutes "residence" in New Zealand for taxation purposes.

Assuming that there is no doubt as to the application of the section, the question arises whether income derived from overseas is *assessable* or *non-assessable*. Dividends or other profits derived from shares or other rights of membership in companies in New Zealand, or in the British Dominions, or beyond the British Dominions, constitute *non-assessable* income. Income (other than dividends) not derived from New Zealand "shall be *exempt* from income-tax if and so far as the Commissioner is satisfied that it is derived from some other country *within the British Dominions* and that it is chargeable with income-tax in that country": s. 89. But, by virtue of s. 18 of the Land and Income Tax Amendment Act, 1939, such income exempt by the application of s. 89 is *non-assessable* income. Apart from the foregoing two classes of income, any income derived from overseas sources is assessable.

Notes.

(i) "Chargeable," in s. 89: The effect of the recent case of *Texas Co. (Aust.), Ltd.* v. *Commissioner of Taxation*, (1940) 2 A.I.T.R. 4, is that, in so far as New Zealand is concerned, any income *assessable* in another country is exempt (non-assessable) in New Zealand, even though there may not be any income-tax levied on that income in the other country by reason of concessional deductions or exemptions. Hence, a New Zealand resident who derives income (including salary or wages) from overseas (British Dominions) sources, which is assessable income in that country, should return that income as non-assessable in New Zealand.

(ii) "British Dominions" does not include protected territories and mandated territories, but the Irish Free State is included.

(iii) Foreign exchange: Income from overseas must be converted into New Zealand currency, even though not received in New Zealand. Exchange rates at time of payment should be used—*i.e.*, on demand selling rate, on New Zealand.

(iv) Foreign taxation: The question as to whether foreign taxation is deductible in arriving at the amount to be returned in New Zealand has not been finally decided in so far as income-tax assessments in New Zealand are concerned. However, on the basis of the principle laid down in *Amalgamated Dairies, Ltd.* v. *Commissioner of Taxes*, [1941] N.Z.L.R. 1110, G.L.R. 572, when the validity of an assessment for social security charge was at issue, the Commissioner holds that foreign taxation is not deductible, and the amount to be returned in New Zealand is the income derived in the overseas country, before deduction of taxation on that income, *plus* exchange to convert into New Zealand currency. It should be noted that in the case of *dividends* derived from the United Kingdom (only) the net amount of dividend payable to the shareholder, plus any recovery of United Kingdom income-tax, plus exchange is returnable in New Zealand.

(v) Income from securities, War Loan, or Stock issued "free of tax" in an overseas (British Dominions) country is assessable income in New Zealand—*i.e.*, it is not chargeable with income-tax overseas, and the provisions of s. 89 do not apply to give exemption in New Zealand.

(vi) United Kingdom Income-tax Relief: For the purposes of Dominion income-tax relief under the provisions of s. 27 of the Finance Act (United Kingdom), 1920, any person resident in New Zealand who has paid social security charge and national security tax on income derived from the United Kingdom may lodge a claim to the British authorities for Dominion income-tax relief. The Commissioner of Taxes will furnish the necessary certificates of payment for transmission to the United Kingdom authorities if written application is made. Applications should state the source and amount of income included in the social security declaration, in respect of which relief from United Kingdom income-tax is sought. A small fee is charged for each certificate.

(vii) Any income (other than dividends) from an overseas country which is not a British Dominion is assessable income in New Zealand.

Social Security Charge and National Security Tax.

Every person being of the age of sixteen years or upwards, who is for the time being ordinarily resident in New Zealand, is liable for payment of social security charge and national security tax on his chargeable income as defined in s. 127 of the Social Security Act, 1938, which includes all income assessable (from New Zealand or elsewhere) under the Land and Income Tax Act, 1923, and non-assessable income of the class referred to in s. 89 of the Income-tax Act. However, with particular reference to dividends, it should be noted that dividends derived by a company which is liable to social security charge and national security tax, and declared by the company at any time after March 31, 1939, are exempt from social security charge and national security tax in the hands of shareholders: s. 127 (6), Social Security Act, 1938.

In so far as dividends from overseas and resident companies are concerned, the position is as set out hereunder:—

The following is a list of non-resident companies which are deriving income from New Zealand (*dividends derived from these companies and declared on or after April 1, 1941*, are *exempt* from social security charge and national security tax in the hands of the shareholders):—

Albert (J.) and Sons, Ltd.
Amalgamated Wireless, Ltd.
Austral Bronze Co. Pty., Ltd.
Australasian Publishing Co., Ltd.
Australian Cellucotton Products Pty., Ltd.
Australian Glass Manufacturers Co. Pty., Ltd.
Australian Iron and Steel, Ltd.
Australian Radio Technical Services and Patents Co. Pty., Ltd.
Australian Window Glass Pty., Ltd.
Australian Wire Rope Works Pty., Ltd.
Ayers and James Pty., Ltd.
Baker and Perkins Pty., Ltd.
Bayly (J.) and Sons Pty., Ltd.
Bonkora Co. of Australia Pty., Ltd.
Borthwick (T.) and Co. (A'sia.), Ltd.
Briscoe and Co., Ltd.
Bristol, Myers, Co., Pty., Ltd.
British United Shoe Machinery Co., Ltd.
Broken Hill Pty., Ltd.
Bryant and May, Ltd.
Burns Philp, Ltd.
Burns Philp (South Seas), Ltd.
Burroughs Welcome Co. (Aust.), Ltd.
Cable and Wireless, Ltd.
Chubbs Australian Co., Ltd.
Clements Tonic Pty., Ltd.
Collins Bros. and Co., Ltd.
Colonial Sugar Co., Ltd.
Conlevlin Pty., Ltd.
Consumers Ammonia Co., Ltd.
Cooke (S.) Pty., Ltd.
Crown Crystal Glass Co., Ltd.
Dalgety and Co., Ltd.
Debenhams (Australia) Pty., Ltd.
Dickinson (John) and Co. (N.Z.), Ltd.
Dott and Co. Pty., Ltd.
Duly and Hansford, Ltd.
Dunlop Rubber Co. (N.Z.), Ltd.
Electrolytic Zinc Co., Ltd. (Ord. and Pref.).
Gollin and Co. Pty., Ltd.
Gordon and Gotch, Ltd.
G. P. Proprietary, Ltd.
Harding and Halden Pty., Ltd.
Harper (Robert) and Co., Ltd.
Hardy (Thos.) and Sons, Ltd.
Harrison Ramsay Pty., Ltd.
Haughton, Wm., and Co. Pty., Ltd.
Huddart Parker, Ltd.
Hume Pipe Co. (Aust.), Ltd.
Hume Steel, Ltd.
Ingersoll Rand (Aust.) Pty., Ltd.
J. and J. Cash Australian Weaving Co., Ltd.
Jantzen (Australia) Ltd.
Kauri Timber Co., Ltd.
Kiore Sheepfarming Co., Ltd.
Lazarus Rosenfeld Pty., Ltd.

Leeton Packing Co. Pty., Ltd.
Lysaght Bros. and Co. Pty., Ltd.
Massey Harris Co., Ltd.
Mauri Bros. and Thompson, Ltd.
McIlraith Industries Pty., Ltd.
Metters Ltd. (London).
Muir and Neil Pty., Ltd.
Nathan (Joseph) and Co., Ltd.
National Carbon Pty., Ltd.
National Discounts, Ltd.
National Mortgage and Agency Co., Ltd.
Nestle and Anglo-Swiss Condensed Milk Co. (A'sia.), Ltd.
New Zealand and Australian Land Co., Ltd.
New Zealand Loan and Mercantile Co., Ltd.
Noyes Bros. (Sydney), Ltd.
Ormonoid Roofing and Asphalts, Ltd.
Parbury, Henty, and Co. Pty., Ltd.
Paton and Baldwins, Ltd.
Pearson Soap Co., Ltd.
Penfold Wines Pty., Ltd.
Perkins (Sydney L.) Pty., Ltd.
Randerson (L.) Pty., Ltd.
Rylands Bros. (Australia) Pty., Ltd.
Sanders and Sons Pty., Ltd.
Seppelt (B.) and Sons, Ltd.
Sheldon Drug Co. Pty., Ltd.
Sterling Henry, Ltd.
Stewarts and Lloyds, Ltd.
Swift and Co. Pty., Ltd.
United Felt Hats Pty., Ltd.
Waters Trading Co., Ltd.
Westinghouse Brake (A'sia.) Pty., Ltd.
Whakatane Paper-mills, Ltd.

Banks.

Bank of Australasia.
Bank of New South Wales.
Bank of New Zealand.
Commercial Bank of Australia, Ltd.
National Bank of New Zealand, Ltd.
Union Bank of Australia, Ltd.

Insurance Companies (Non-life Insurance).

Alliance Assurance Co., Ltd.
Atlas Assurance Co., Ltd.
Australian Alliance Assurance Co.
British and Foreign Marine Insurance Co., Ltd.
British Traders Insurance Co., Ltd.
Canton Insurance Office, Ltd.
Commercial Union Assurance Co., Ltd.
Eagle Star Insurance Co., Ltd.
Excess Insurance Co., Ltd., of London.
*Farmers' Co-operative Insurance Association of New Zealand, Ltd.
Guardian Assurance Co., Ltd.
Hartford Fire Insurance Co., Ltd.
Insurance Office of Australia, Ltd.
Liverpool and London and Globe Insurance Co., Ltd.
London Assurance.
London and Lancashire Insurance Co., Ltd.
Marine Insurance Co., Ltd.
*Mercantile and General Insurance Co., Ltd.
National Employers' Mutual General Insurance Association, Ltd.
*National Insurance Co. of New Zealand, Ltd.
*New Zealand Insurance Co., Ltd.
*New Zealand Plate Glass Insurance Co.
North British and Mercantile Insurance Co., Ltd.
Northern Assurance Co., Ltd.
Norwich Union Fire Insurance Society, Ltd.
Pearl Assurance Co., Ltd.
Phoenix Assurance Co., Ltd.
*Pipemakers' Accident Insurance Society.
Queensland Insurance Co., Ltd.
Royal Exchange Assurance.
Royal Insurance Co., Ltd.
*South British Insurance Co., Ltd.
*Standard Insurance Co., Ltd.
Sun Insurance Office, Ltd.
Union Assurance Society, Ltd.
Union Insurance Society of Canton, Ltd.
United Insurance Co., Ltd.
Victoria Insurance Co., Ltd.
Yorkshire Insurance Co., Ltd.

* Dividends from the companies marked thus are exempt from charge in the hands of the shareholders if declared after March 31, 1939: s. 127 (6), Social Security Act, 1938.

Dividends derived from the following *life insurance companies* are not exempt from the charge by s. 127 (6) of the Social Security Act, 1938, or s. 2 (5) of the Social Security Amendment Act, 1940, and are accordingly liable in the hands of shareholders. Dividends from the following life insurance companies must be included in social security declarations:—

Australian Provincial Assurance, Ltd.
Dominion Life Assurance Office of New Zealand, Ltd.
F.A.M.E. Insurance Co., Ltd.
Maoriland Life Assurance Office, Ltd.
Mutual Life and Citizens' Assurance Co., Ltd.
Producers and Citizens' Co-operative Assurance Co., Ltd.
Provident Life Assurance Co., Ltd.
Prudential Assurance Co., Ltd.
Southern Cross Assurance Co., Ltd.

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.—*Sealing Fee payable—Moneys in Post Office subject to Instrument of Nomination.*

QUESTION: A. dies leaving no debts. His only assets are (*a*) a small cottage valued by the Valuer-General at £446; (*b*) moneys in the Post Office amounting to £852, in respect of which he has executed an instrument of nomination under s. 90 (*e*) of the Post and Telegraph Act, 1928, in favour of B., his son, who survives him. C., his widow, is his only beneficiary under his will. His funeral expenses amount to £25. How is A.'s estate assessed for death duty? Is sealing fee payable on the amount of his final balance for death-duty purposes?

ANSWER: The final balance for death duty is £446, *plus* £852, *less* funeral expenses—*i.e.*, £1,273. For death-duty purposes the value of C.'s succession is £421, which is exempt from all death duty. B.'s succession is £852, on which last sum succession and estate duty is payable at the respective rates of 1 and 3 per cent.

Sealing fee is payable only on the sum of £421, because the only property which passes by virtue of the administration is the house. The moneys in the Post Office Savings Bank pass not by the will, but by the instrument of nomination: *In re Will of William Johnson*, (1912) 32 N.Z.L.R. 166; *Bennet* v. *Slater*, [1899] 1 Q.B. 45. But they are made liable to death duty by s. 5 (1) (*g*) and s. 16 (1) (*f*) of the Death Duties Act, 1921: *Adamson* v. *Attorney-General*, [1933] A.C. 257; *In re Barnes, Ashenden* v. *Heath*, (1940) 56 T.L.R. 356. An instrument of nomination may be revoked at any time by the nominator before his death.

2. Property Law.—*Deed*—"*Deed*" *in New Zealand.*

QUESTION: Is every instrument (other than a testamentary one) a deed according to New Zealand law, if attested with the requirements of s. 26 of the Property Law Act, 1908?

ANSWER: No: see the leading English case, *R.* v. *Morton*, (1873) 28 L.T. 452, where there are enumerated certain documents which are not deeds although executed under seal—*e.g.*, certificates of admission to professions.

In *Domb* v. *Owler*, [1924] N.Z.L.R. 532, 538, G.L.R. 97, 100, Salmond, J., said: "The effect, therefore, of the Act, as I understand it, is that every instrument which is of such a

nature that if sealed and delivered it would have been a deed at common law is now a deed under the Property Law Act, if it is signed and attested in manner required by that Act." It is submitted that the above-cited dictum is too wide and ignores the fundamental distinction that, whereas in England *sealing is the act of the party executing the instrument*, in New Zealand the addition of the occupation and address as required by the statute is, at least ostensibly, the act of the witness. It is further submitted that a truer test is the one formulated by Edwards, J., in *Re Palmer*, [1919] G.L.R. 82, where it was held that a document renouncing an executorship, not being in the nature of a contract, or transferring any property, was not a deed. "In deciding when a doubt arises whether any unsealed document is a deed, regard must be had to the attendant circumstances, the nature and form of the document, and whether a deed was necessary to effect its purpose." The words "and whether a deed was necessary to effect its purpose" appear most important.

If the instrument confers a legal or equitable estate or interest in land, it is probably a deed, although it may purport to be only an agreement: *Mayor, &c., of Wellington* v. *Public Trustee*, [1921] N.Z.L.R. 1086, [1922] G.L.R. 84; *Rod* v. *Ryan*, (1931) 27 M.C.R. 149. Similarly, if there is no consideration, or if the instrument contains covenants. An instrument releasing a tort-feasor from all further liability in respect of an accident was held to be a deed in *Long* v. *Murray*, [1934] G.L.R. 487. On the other hand (in a stamp duty case), His Honour the Chief Justice declined to rule that an instrument conferring authority on a person to find a purchaser for a parcel of land was a deed: *Harper* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 18, [1941] G.L.R. 648.

An agreement for sale and purchase of property transferable by delivery merely would probably not be a deed, unless it was termed a deed in the instrument itself or unless it contained covenants.

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3. Death Duty.—*Compromise on Price for Goodwill on Dissolution of Partnership—Interest Value to be paid to Retiring Partner for Life—Corpus to be held for Benefit of other Partner's Children.*

QUESTION: A. and B., father and son respectively, are in partnership. A. retires and B. purchases his interest. They cannot agree as to the price to be paid to A. by B. for value of A.'s interest in the goodwill. A. asks for £500 cash, which B. refuses. Eventually as a compromise A. and B. agree in writing that B. shall pay A. interest on the sum of £500 for the term of A.'s life, and that on A.'s death the sum of £500 shall be held in trust for B.'s two children. For three years B. pays A. interest on the £500 and then dies. B.'s executor pays the £500 to A., who invests it on mortgage in his own name and that of B.'s wife jointly, and receives for his own use the interest earned by the mortgage until his death twelve years later. Is the principal sum of £500 secured by the mortgage an asset in A.'s estate for death-duty purposes? Would the £500 have been properly deductible in B.'s estate?

ANSWER: Yes; as regards A.'s estate for death-duty purposes, it comes under s. 5 (1) (*j*) and s. 16 (1) (*g*). The £500 has been settled by deceased within the meaning of these sections; in a sense it is a settlement which has been forced on A. by B., but that makes no difference: *Trustees, Executors, and Agency Co., Ltd.* v. *Commissioner of Stamps*, (1911) 30 N.Z.L.R. 137, 13 G.L.R. 403. Authorities which appear relevant are: *Riddiford* v. *Commissioner of Stamps*, (1913) 32 N.Z.L.R. 329, 15 G.L.R. 538; *Attorney-General* v. *Heywood*, [1887] 19 Q.B.D. 326; *Lord Advocate* v. *Wilson*, (1894) 21 R. (Ct. of Sess.) 997.

It is a settlement, for A., whilst retaining a life-interest or its equivalent in the sum obtained for goodwill, has effectually disposed of the corpus thereof by the declaration of trust.

The £500 would not be properly deductible in B.'s estate, for it was not a debt incurred wholly for his own sole use and benefit: s. 9 of the Death Duties Act, 1921, and *New Zealand Insurance Co., Ltd.* v. *Commissioner of Stamp Duties*, [1938] N.Z.L.R. 87, G.L.R. 36. It was incurred partly for the benefit of his children.

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4. Power of Attorney.—*Execution—Soldier on War Service—Member of N.Z.E.F. in Middle East.*

QUESTION: A client of ours, a member of the N.Z.E.F. in the Middle East, has omitted to leave an attorney in New Zealand to manage his affairs here. An appointment of an attorney is urgently required. How can the position be rectified? What will be the liability for stamp duty?

ANSWER: It appears to be the practice for the Legal Department of the Second N.Z.E.F. to prepare suitable powers of attorney in these cases. Alternatively, the soldier's solicitors in the Dominion could prepare the power and send it to the soldier for execution and attestation. The soldier will sign the power of attorney in the presence of a credible witness, for preference a member of the Legal Department of the N.Z.E.F. The witness will make the usual affidavit of execution before an officer authorized to administer oaths whilst serving outside New Zealand—*i.e.*, before an officer of the N.Z.E.F. not lower in rank than that of Major: Evidence Emergency Regulations, 1941 (Serial No. 1941/114).

Both the power of attorney and the affidavit are exempt from stamp duty: Stamp Duty Emergency Regulations, 1939 (Serial No. 1939/263), and s. 166 (*n*) of the Stamp Duties Act, 1923.

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5. Land Transfer.—*Subdivision of Land in a Borough—Certificate of Title limited as to Parcels—Whether new Survey required.*

QUESTION: My client, who owns a section in a borough (the certificate of title therefor being limited as to Parcels), purposes dividing it into two Lots—selling one to a purchaser, and retaining the other. As each Lot will have a legal road frontage of one chain, no question under the Public Works Act arises. Must my client go to the expense of a new survey?

ANSWER: The District Land Registrar cannot require a new survey: s. 14 of the Land Transfer (Compulsory Registration of Titles) Act, 1924. In the absence of a new survey the titles for each Lot will remain limited as to Parcels. A certificate of title limited as to Parcels, so far as the Land Registry is concerned, may be subdivided without a survey, just like an "old system" title, although a new survey is often desirable to avoid trouble in the future as to the correct boundaries. The Borough Council, however, before approving the subdivision under s. 332 of the Municipal Corporations Act, 1933, has authority to require a surveyor's plan, but also a discretion to dispense with such a plan, where the land is subdivided into not more than two Lots. In a case such as this the Council would probably be satisfied with a diagram on the transfer, its approval of the subdivision under seal being endorsed thereon.

RULES AND REGULATIONS.

Medical Supplies Notice, 1943, No. 1. (Medical Supplies Emergency Regulations, 1939.) No. 1943/103.

Fresh-water Fisheries (Southland) Regulations, 1941, Amendment No. 1. (Fisheries Act, 1908.) No. 1943/104.

Electric Water-heating Order, 1943. (Supply Control Emergency Regulations, 1939, and Electricity Emergency Regulations, 1939.) No. 1943/105.

Timber Emergency Regulations, 1939, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/106.

Industry Licensing (Fish Oil) Notice, 1943. (Industrial Efficiency Act, 1936.) No. 1943/107.

Employment Restriction Order No. 3. (Industrial Man-power Emergency Regulations, 1942.) No. 1943/108.

Slaughter of Pigs Control Order, 1943. (Primary Industries Emergency Regulations, 1939.) No. 1943/109.

Motor-spirits Prices Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/110.

Electrical Wiremen's Registration Regulations, 1940, Amendment No. 1. (Electrical Wiremen's Registration Act, 1925.) No. 1943/111.

Royal New Zealand Air Force Regulations, 1938, Amendment No. 8. (Air Force Act, 1937.) No. 1943/112.

Motor-vehicles (Special Types) Regulations (No. 2), 1937, Amentment No. 1. (Motor-vehicles Act, 1924.) No. 1943/113.

Transport Licensing Passenger Regulations, 1936, Amendment No. 4. (Transport Licensing Act, 1931.) No. 1943/114.