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COMPANY LAW: CONFIRMATION OF REDUCTION OF CAPITAL.

FOLLOWING the judgment of Mr. Justice Fair in *In re Taupo Totara Timber Co., Ltd.*, delivered in December of last year, an article under the above title appeared in this place, *ante*, p. 14. It will there be seen that the learned Judge, in exercising the discretion conferred upon the Court by s. 69 of the Companies Act, 1933, refused to make an order confirming the proposed reduction of the company's capital by way of repayment, in respect of which all formalities had been complied with. His Honour dismissed the application on the ground that the proposed reduction would have the result of reducing the company's capital below what might be required to meet a possible contingent claim of another forestry company, which, in its capacity as a member of the public, had opposed the application. The reversal of this judgment by the Court of Appeal renders the present article necessary.

The objecting company was the New Zealand Forest Products, Ltd., which owned an adjoining forest which might be damaged by a fire hazard created by a light railway operated by the applicant company; and its objection was made on the ground that the proposed reduction of capital might so reduce the Taupo Company's assets that it could not meet a liability for damages as the result of a successful action by the objecting company against it, arising from the destruction by fire of the Forest Products Company's forest.

The possibility of such contingent damage was deduced by the learned Judge from the facts detailed in his judgment which appear in the article referred to, *ante*, pp. 14, 15. These were summarized by the Court of Appeal as follows:

> If the proposed reduction in capital is confirmed, the capital of the company will be reduced to £155,960. An analysis of the balance-sheet for the year ending April 30, 1942, however, shows that even after the £34,203 is repaid to shareholders, it will still have assets, available for the payment of any claims which may arise against it, of approximately £276,000. The tramway or railway of the Taupo Totara Timber Co., Ltd., runs for a distance of fifty miles to its milling site at Mokai. Immediately adjoining or adjacent to the railway reserve is land aggregating 130,000 acres belonging to New Zealand Forest Products, Ltd., taken over at a cost of £3,750,000. The practice has obtained of the New Zealand Forest Products, Ltd., and its predecessor in title, New Zealand Perpetual Forests, Ltd., maintaining a firebreak of a chain along the railway reserve. This is still maintained in New Zealand Forest Products, Ltd. The railway reserve varies from 2 to 5 chains in width, and formerly the New Zealand Perpetual Forests, Ltd., burnt the growth along the track and maintained a jigger patrol for fire-protection purposes. The jigger patrol was discontinued in October, 1940, by New Zealand Forest Products, Ltd., but the Taupo Totara Timber Co., Ltd., now maintains a patrol. That company did not continue properly to clear away inflammable growth upon the track, and in the year 1942 a number of incipient spark fires were reported on the reserve or in its vicinity. There had, in earlier years, always been such fires. No fire of any magnitude is, however, deposed to. The engines used are of obsolete type, burning wood and coal fuel, and the grades are steep. Although the clearance of the track has not been properly maintained, appreciable improvements have been made affecting the spark-arrester and the ashpans. We agree that the engine in its usual running and even with great care is a real and very frequent source of danger during the summer months. There is no doubt that if a serious fire did occur, great difficulty might be experienced in controlling it, and the position is aggravated by the fact that New Zealand Forest Products, Ltd., is, by reason of shortage of manpower due to the war, in an unfavourable position to provide adequate fire guards to combat a fire should it arise.

The Taupo Company appealed from the dismissal of its application for confirmation of the reduction of capital, and the appeal was heard by the Court of Appeal in June last. For the reasons appearing in the judgment of the Court, delivered by Mr. Justice Kennedy, on August 27, it was held, allowing the appeal, that, in the proper exercise of the discretion given by s. 69 of the Companies Act, 1933, the proposed reduction should have been confirmed, and the application should not have been dismissed.

After defining the function of an appellate Court where the appeal is from the exercise of discretion, and following *Evans* v. *Bartlam*, [1937] A.C. 473, [1937] 2 All E.R. 646, and *Charles Osenton and Co.* v. *Johnston*, [1942] A.C. 130, [1941] 2 All E.R. 245, the Court of Appeal, to apply Lord Simon's words in the latter case, at p. 138, 250, reached the conclusion that there had been a wrongful exercise of discretion in the Court of first instance, in that no sufficient weight had been given to the relevant considerations such as those urged before them on behalf of the appellant company.

In coming to its conclusion, it must be pointed out, the Court of Appeal had material before it which was not available to the learned Judge in the Court below. After summarizing the material facts, as above, their Honours said that Mr. Justice Fair dealt with the matter in December, 1942, and had before him the evidence of conditions obtaining up to that time, and of necessity formed a conclusion based upon that evidence. He had dealt with future possibilities. The Court of Appeal, however, had the benefit of considering proba-

bilities in the light of the subsequent requirements of the law. The Forest (Fire-Prevention) Regulations, 1940, Amendment No. 1 (Serial No. 1943/31), came into force on February 24, 1943. It provides that the owner of a tramway adjoining or within an exotic forest in a fire district is not to use any steam locomotive engine upon such tramway during the period from August 1 in any one year to April 1 of the following year unless a fire patrol with adequate fire-extinguishing equipment is provided to follow the engine not earlier than ten minutes nor later than thirty minutes after the passing of the engine. Under the same regulations a forest officer may serve a notice in writing on the owner or other person having control and management of land which is used for or for the purposes of any tramway, and which adjoins or is within an exotic forest in a fire district, requiring the owner or such other person forthwith to take proper steps for the removal of inflammable debris, growth, or material, or otherwise for rendering the same safe and generally for the prevention of fires.

Their Honours went on to say that it may reasonably be expected that the conditions obtaining up to May, 1941, being the date on which the indemnity given by Perpetual Forests Company to the Taupo Company was cancelled, would be maintained without increase of fire hazard. It is, they added, an improbable coincidence that, in the circumstances, there should exist liability by the appellant company for great damage to the forest of the Forest Products Company and that so great a part of the assets of the appellant company should be destroyed that it could not meet its liability. They considered that such a concurrence of destruction by fire of the assets of both companies is not probable, and that damage to a considerable extent was not in December, 1942, nor is it likely in the future to be, an imminent risk, although of course it might occur. Their Honours agreed with the learned Judge that a claim is reasonably possible; but, for the reasons which they expressed, they did not think it was reasonably probable that the objecting company will suffer loss through the reduction of capital. They did not think that, in all the circumstances, it could be said that the objecting company was in peril of suffering irrecoverable loss because of the way the Taupo Company conducts its business and consequent upon the proposed reduction. The Forest Products Company might suffer damage; but their Honours differed from the learned Judge in the Court below by thinking it did not appear that that company was in imminent peril of suffering loss through the inability of the Taupo Company to pay damages, for which it might be legally responsible. The judgment proceeds:

> The Companies Act, 1933, makes provision for the ascertainment of creditors and for their claims being paid or secured. New Zealand Forest Products, Ltd., is not a creditor of the Taupo Totara Timber Co., Ltd. There is no express provision in the statute for the investigation of merely possible claims against the company by reason of future tortious actions. While, in a matter of discretion, the absence of a reported case may not be conclusive, for in such a matter decisions are merely indications, it is a fact that no case resembling this has been brought to our notice. Normally then, persons who are not creditors may not object, and, as a general rule, once it appears that there are not creditors, the reduction is sanctioned, unless it appears that the sanction should be refused out of regard for those who may be induced to take shares in the company or because the Court does not consider that the reduction is fair and equitable as between different classes of shareholders.

After pointing out that the principle of limited liability is adopted and recognized by the Legislature, and the Court protects those who may be misled in dealing with the company, their Honours said that there was no evidence in this case that the company was granted a license to run a tramway on condition that its capital should be of a certain amount. Moreover, there is not any general provision that associations engaged in certain hazardous undertakings should not have the benefit of limited liability unless their capital is of an amount large enough to meet potential claims. Had the company actually lost capital equivalent to that of the proposed reduction, it might still have continued its business. The company might also have effected its purpose of reducing its capital by a reconstruction as in *Re Bernicia Steamship, Ltd.*, (1900) 81 L.T. 816, and, if that course had been adopted, the Forest Products Company could make no claim in the voluntary liquidation of the company, since it would not be a creditor and would not have any claim in the liquidation for a tort which had not been committed. The reconstruction would be a matter to be determined by the shareholders alone.

It will be remembered that in his judgment, Mr. Justice Fair applied to the Taupo Company's application for confirmation of reduction of capital the Court of Appeal judgment in *In re Levin and Co., Ltd.*, [1936] N.Z.L.R. 558, relative to the confirmation of an alteration of the objects of a company, in respect of principles which require the Court to see that the interests of members of the public who may be affected by the alteration will not be prejudiced. In *Levin and Co.'s* case, the Court of Appeal refused to confirm an alteration in the objects of the company when, if the alteration had been made, members of the public, dealing with the company, might be misled as to their rights against it, unless its name was changed. In *Taupo Totara Timber Co.'s* case, the Court of Appeal distinguished its earlier decision, which their Honours did not think could be extended to apply to a case where there is no question of the public being misled, and where the claim arises in tort through the company's merely continuing operations in no wise affected by the reduction.

Their Honours, after referring to *British and American Trustee and Finance Corporation, Ltd.* v. *Couper* [1894] A.C. 399, and *Poole* v. *National Bank of China, Ltd.*, [1907] A.C. 229, in relation to the consideration which is to be given to matters which may affect the public, and the protection given by the statute, and to the observations of Salmond, J., in *In re R. O. Clark, Ltd.*, [1921] N.Z.L.R. 533, 535, [1921] G.L.R. 534, 535, on the same topic, said:

> The discretion conferred by s. 69 is a wide one and it may be that in a proper case, although it may be rare, the Court will exercise its discretion out of regard for the public interest in respect of future creditors, and, in particular, to prevent a proposed reduction of capital, which, in the circumstances, manifests a dishonest or perhaps even an unfair disregard of the interest of persons in imminent danger of suffering loss thereby, although the tort, which they have every reason to fear, may not yet have been committed. Upon our view of the facts, this is not such an exceptional case.

Although the facts in each case of application for confirmation by the Court of reduction of capital may differ, the broad general principle emerges from the Court of Appeal's judgment that the Court, in exercising the discretion conferred on it by s. 69 of the Companies Act, 1933, is guided by the intention of the Legislature as expressed in the statute: Where there are no creditors, persons who are not creditors usually have no ground for objection as members of the public.

But an objection by members of the public, who are potential creditors, may be upheld in a proper case out of regard for the public interest, particularly to prevent a proposed reduction of capital, which, in the circumstances, manifests a dishonest or even an unfair disregard of their interests if they are in imminent danger of suffering loss by such reduction, although the tort itself, which they have every reason to fear, may not have been committed. This is, however, a rare exception to the rule that, once it appears that there are no present creditors, the Court's discretion should be exercised to grant the application, unless it is satisfied that the confirmation should be refused out of regard for those members of the public who may be induced to take shares in the company, or out of regard for different classes of shareholders if it appears that the reduction of capital would not be fair and equitable between them.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1943.
June 23, 24, 25;
July 23.
Myers, C.J.
Kennedy, J.
Callan, J.
Northcroft, J.

CHAMBERS AND OTHERS v. COMMISSIONER OF STAMP DUTIES AND OTHERS.

Mortgage—Mortgagors and Tenants Relief Acts—Gift—Consideration—Estoppel—Capitalization of Interest—"Further advances"—"Accept"—Mortgage from Son to Mother securing Principal Sum, "further advances," and Interest at higher Rate with Provision for acceptance of reduced Rate on punctual Payment—Mother intending to forgive Arrears of Interest from Time to Time, writing off, transferring Arrears to Loan Account, rendering Accounts for Interest at Lower Rate than provided for in Mortgage—Mother's Account Books bringing forward Remissions and her Accounts rendered to Mortgagor indicating complete forgiveness, and her Accounts at the time of her Death showing no Arrears—Whether mere Expression of Intention to make Gift or a complete Gift—Period of Limitation Applicable—Whether Transfer of Arrears to Loan Account made Amounts so Transferred Simple Contract Debts—Whether Mortgagee's Conduct supplied consideration or created Estoppel in respect of Mortgagor's Failure to resort to Procedure provided by Mortgagors and Lessees Rehabilitation Act, 1936—Whether Interest Capitalized became "further advances"—Whether Penal or Lower Rate of Interest chargeable on Arrears—Judicature Act, 1908, ss. 7, 9, 92—Mortgagors and Lessees Rehabilitation Act, 1936, s. 29—Civil Procedure Act, 1833 (3 and 4 Wm. IV, c. 42), s. 3.

A mother held a mortgage of land from her son to secure a named principal sum, "further advances," and interest with the usual provision for acceptance of interest at a reduced rate on prompt payment. The mortgagor fell into arrears with his interest from time to time. The mortgagee, with the intention of forgiving or remitting the interest in arrear, took the steps hereinafter specified; and both mortgagee and mortgagor in consequence believed that all arrears up to a certain date (hereinafter referred to as "the said arrears") had been legally and effectively forgiven.

There were two classes of remission. In the first class, the mortgagee agreed to remit interest due or to write it off. Sometimes she capitalized it and later wrote it off. Each instance of remission in this class was in the nature of forgiveness of money due for interest under the mortgage. The second class of remissions comprised those where she rendered her account for interest at a rate less than the amount provided for in the mortgage or agreed for a certain period to take interest at a lower rate. Repeatedly, through many years of bookkeeping, she made remissions and brought forward the remissions into later years. Her account books and the accounts she rendered the mortgagor indicated a complete forgiveness, and writing-off from time to time; her accounts at her death in 1941 showed none of the said arrears in arrear, and the course of business necessarily postulated the existence of the remissions shown in the accounts. Some of the said arrears were transferred to a loan and suspense account. In 1937, mortgagee and mortgagor executed a memorandum of reduction of mortgage debt by which the principal sum secured was reduced, the term extended and the rate of interest reduced to 4 per cent. No reference was made therein to arrears of interest. The mortgagor, believing that all arrears of interest prior to the said memorandum of reduction had been effectively forgiven, made no application under the Mortgagors and Lessees Rehabilitation Act, 1936, for the adjustment of his liabilities thereunder; and the said legislation was never the subject of discussion between the mortgagee and the mortgagor in connection with any particular remission under the said mortgage.

On the death of the mortgagee, the Commissioner of Stamp Duties, having claimed that the said arrears of interest had not been legally forgiven but remained owing at law to the mortgagee at her death and were an asset in her estate, the proceedings were taken in the present case by consent against the Commissioner and the executors of the will of the mortgagee; and, subsequently, the beneficiaries under the said will (other than the mortgagor) were added by consent.

In an action asking for a declaration as to the plaintiff's indebtedness,

Held, That (except for one sum which *Blair*, J., held had been legally forgiven as evidenced by writing in the hand of the deceased so as to satisfy the provisions of s. 92 of the Judicature Act, 1908) all the said arrears of interest were due to the mortgagee at her death, but at the lower rate and not at the penal rate as claimed by the Commissioner.

Held, also (the decision on this point not being challenged by the Commissioner in the Court of Appeal), That once a mortgagee "accepts" interest—to use the word in the common form of agreement—at the lower rate after the stipulated date, such acceptance waives his right to claim afterwards an addition to it at the higher rate.

On appeal from that judgment,

Held, by the Court of Appeal, 1. That the actions of the mortgagee amounted to nothing more than the expression of her intention to make a gift of the said arrears of interest to the mortgagee; but that the gift had never been completed, and therefore, that the said arrears of interest with the exception of interest proved to have been capitalized was part of the mortgagee's estate.

2. That, as regards written acknowledgments of remissions signed by the mortgagee's husband, who was her co-mortgagee and agent, relied upon as a contract to accept part of a debt for the whole and operative as a discharge of the debt under s. 92 of the Judicature Act, 1908, no written authority from her to him to give any such acknowledgments had been produced, and, therefore, s. 92 did not apply.

[NOTE.—This submission was not repeated for the mortgagor in the Court of Appeal, but the Court in its judgment expressed its agreement with the learned Judge in its rejection and with the reasons he gave therefor.]

3. That, as all the said arrears first became due within twenty years before the mortgagee's death, the period of limitation was twenty years and the debt was not statute-barred, as s. 3 of the Civil Procedure Act, 1833 (3 and 4 Will. IV, c. 42), applied.

Paget v. *Foley*, (1836) 2 Bing. N.C. 679, 132 E.R. 261, and *Hunter* v. *Nockolds*, (1850) 1 M. & G. 640, 41 E.R. 1413, applied.

4. That arrears of interest transferred to loan account were not thereby made simple contract debts, in respect of which the appropriate period of limitation would be six years.

5. That there was no conduct of the mortgagee of such a nature that the mortgagor's failure to resort to the procedure provided by the Mortgagors and Lessees Rehabilitation Act, 1936, either supplied consideration or created an estoppel.

Edwards v. *Walters* [1896] 2 Ch. 157, applied.

Yeomans v. *Williams*, (1865) L.R. 1 Eq. 184; *Taylor* v. *Manners*, (1865) L.R. 1 Ch. 48; and *Gray* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 23, [1938] G.L.R. 634, referred to.

Coles v. *Topham*, [1939] G.L.R. 485, and *Lewis* v. *Levy*, (1876) 2 V.L.R. (Eq.) 110, distinguished.

6. That the arrears of interest proved to have been capitalized became "further advances" under the mortgage, and therefore were included in the memorandum of reduction and thereby legally remitted.

Observations as to the position of mortgagees and mortgagors who made voluntary adjustments without resorting to

the procedure provided by the Mortgagors and Lessees Rehabilitation Act, 1936.

The Court of Appeal accordingly affirmed the judgment of *Blair*, J., [1943] N.Z.L.R. 511, with a variation as to the effect of capitalization of interest (a point not raised in the Court below).

Counsel: *Sim*, K.C, and *Tripe*, for the appellant; *Broad*, for the respondent, Commissioner of Stamp Duties; *Harker*, for the other respondents.

Solicitors: *Hadfield, Peacock, and Tripe*, Wellington, for the appellant; *Crown Law Office*, Wellington, for the respondent, Commissioner of Stamp Duties; *Carlile, McLean, Scannell, and Wood*, Napier, for the respondent executors, and for the respondent J. M. Chambers; *Duncan and Hanna*, Wellington, for the respondent E. M. Nelson; *Lee, Mackie, Harker, and McKay*, Hastings, for the respondent, H. N. Swinburne.

SUPREME COURT.
Palmerston North.
1943.
February 10;
July 23.
Blair, J.

METCALFE v. McINTOSH.

Workers' Compensation—Accident arising out of and in the Course of Employment—Worker's Death resulting from contravention of Employer's Orders while acting for Purposes of and in Connection with Employer's Business—Whether Compensation payable—Jurisdiction—Claim by Widow of deceased Worker for Compensation preceded by Claim for Damages in Supreme Court—Judgment for Plaintiff reversed by Court of Appeal—Judgment of latter Court delivered by two Judges, but Application for Compensation not dealt with—Action for Compensation heard by consent of both Parties by one of the Judges of the same Division of the Court of Appeal—Whether any irregularity in Procedure—If so, whether effectually Waived—Workers' Compensation Act, 1922, ss. 3, 52—Statutes Amendment Act, 1940, s. 61.

The plaintiff, the widow of a worker who was killed as the result of an accident that occurred during log-hauling operations, brought an action on behalf of herself and her children under the Deaths by Accidents Compensation Act, 1908, against the defendant; and obtained a verdict in her favour from the jury. A motion by defendant for a nonsuit or for judgment for the defendant or for a new trial were disposed of in favour of the plaintiff. On appeal to the Court of Appeal, the judgment for plaintiff was set aside and judgment given in favour of the defendant. The hearing of the appeal took place on September 22 and 23, 1942, and the judgment was delivered on December 18, 1942, by a bare quorum of two Judges of the Division competent to deliver the judgment of that Court; but there was not a quorum then to have dealt with the plaintiff's application for compensation under s. 52 of the Workers' Compensation Act, 1922, which came before *Blair*, J., at the Circuit Sittings of the Supreme Court at Palmerston North in February, 1943. As the learned Judge who had tried the action for damages could not conveniently act, counsel for both parties requested that *Blair*, J., who had been a member of the Court of Appeal which had dealt with the appeal in the action for damages, should hear and adjudicate upon the widow's application for compensation.

Held, That, in the circumstances, the request and consent of both parties constituted a waiver of all irregularities, if there were any such, and that the matter of the assessment of compensation might validly proceed.

Quaere, Whether the Court of Appeal was *functus officio*, and in the absence of consent what the right procedure would have been.

The facts of the accident were that the deceased worker, who was employed by a sawmiller, got into the cab of the wagon used for the removal of logs to the sawmill, for the purpose of putting in the wagon's clutch, thus causing the winch to haul in the rope. For some reason the rope did not move, which meant that the clutch of the winch had either not been put in or had slipped out of engagement. The deceased then, without stopping the wagon-engine or putting its gears into neutral, left the cab of the wagon for the purpose of putting the clutch into engagement. To do that, he stepped on to the tray of the wagon for the purpose of reaching the clutch from that position, and his trousers were caught by a revolving portion of the winch. He was ultimately dragged into the winch, and received injuries from which he died. The deceased's employer had instructed him and warned him against engaging the clutch attached to the winch while the engine of the motor-wagon was running in gear. It was the deceased's disobedience of that order, coupled with the risky method he adopted in getting to the clutch-lever, that was the decisive point against him in the Court of Appeal on the matter of contributory negligence.

Held, That, so far as the claim for compensation was concerned, s. 61 of the Statutes Amendment Act, 1940, applied, and the plaintiff was entitled to compensation; as the deceased's death was deemed to have arisen out of and in the course of his employment, notwithstanding that, at the time when the accident happened, he was acting in contravention of the orders given him by his employer, and such act was done by the deceased for the purposes of and in connection with his employer's trade or business.

Wilsons and Clyde Coal Co. v. *M'Ferrin*, [1926] A.C. 377, 19 B.W.C.C. 1, applied.

Kerr (*or McAulay*) v. *James Dunlop and Co., Ltd.* (*ibid.*), distinguished.

Barnes v. *Nunnery Colliery Co., Ltd.*, [1912] A.C. 44, 5 B.W.C.C. 195, referred to.

Counsel: *Dowling*, for the plaintiff; *McGregor*, for the defendant.

Solicitors: *A. E. Lawry*, Napier, for the plaintiff; *Lloyd and Lloyd*, Dannevirke, for the defendant.

SUPREME COURT.
Wellington.
1943.
May 19;
August 9.
Myers, C.J.

PUBLIC TRUSTEE v. GRAHAM.

Rent Restriction—Public Health—Closing-order—Dwellinghouse Tenancy to be subject to Determination on Month's Notice—Effect of Fair Rents Act, 1936—Health Act, 1920, ss. 40, 46—Fair Rents Act, 1936, s. 14—Fair Rents Amendment Act, 1942, s. 2.

The plaintiff was the owner and the defendant the tenant of a dwellinghouse under a tenancy determinable at the will of either party by one month's notice in writing. On April 8, 1942, the Wellington City Council served a closing-order in respect of the premises. A notice to quit, dated October 8, 1942, was served on the defendant requiring him to deliver up possession at the expiration of the calendar month commencing November 2, 1942. The Fair Rents Amendment Act, 1942, was passed on October 26, 1942. The defendant remained continuously in possession and paid rent throughout, but from December 2, 1942, the receipts given to the landlord were expressed to be without prejudice to the notice to quit. In December, 1942, on a summons for possession, an order was made for possession forthwith to be suspended until February 16, 1943, so long as rent was paid as and when it fell due. Some time after the order for possession was made, the defendant caused the work specified in the order to be done and paid the cost thereof, and the City Council thereupon determined the closing-order and informed the plaintiff accordingly. The defendant then made an application under s. 14 of the Fair Rents Act, 1936, and the Stipendiary Magistrate made an order discharging the order for possession. The plaintiff, on March 29, 1943, commenced an action in the Supreme Court for possession.

Held, dismissing the said action, That under the particular circumstances of the case, the premises were on March 29, 1943, a dwellinghouse to which the Fair Rents Act, 1936, applied.

Arthur v. *Burgess*, [1941] N.Z.L.R. 486, *sub. nom. Arthur* v. *Goulding*, [1941] G.L.R. 221; *Bydder* v. *Bethune*, [1937] N.Z.L.R. 704, G.L.R. 438, aff. on app. [1938] N.Z.L.R. 1, [1937] G.L.R. 665; *Morgan* v. *Kenyon*, (1913) 110 L.T. 197, 78 J.P. 66; *Blake* v. *Smith*, [1921] 2 K.B. 685; *Blick* v. *Nesbit*, [1924] N.Z.L.R. 97, [1923] G.L.R. 610; and *Remon* v. *City of London Real Property Co.*, [1921] 1 K.B. 49, referred to.

Counsel: *D. R. Wood*, for the plaintiff; *N. A. Foden*, for the defendant and Inspector of Factories.

Solicitors: *District Solicitor*, Public Trust Office, Wellington, for the plaintiff; *Crown Law Office*, Wellington, for the defendants.

JUSTICE, AND THE APPEARANCE OF JUSTICE.

A Luncheon Talk.*

By H. P. RICHMOND.

I am not going to speak to you about any branch of the law. Rather I am going to ask you to leave in spirit your seats on the Bench to sit a while with counsel and their clients and watch Judges, Magistrates, and Justices at work. And, where I later speak of Judges, you will understand this includes all who hold judicial positions.

You will have seen that the title of my talk to-day is "Justice, and the Appearance of Justice." It is to help you to see what is meant by that title that I have asked you to sit with me in the body of the Court. Perhaps you have sat there, some of you, as litigants. If so, I am very sure you have watched for every indication from the Bench as to what impression your case, or that of your adversary, is making on the judicial mind.

It may be that the presiding Judge maintains an attitude so dispassionate and open-minded that you are startled to find that at the end of the case he can give an immediate decision fully justified by a few concise observations. If the decision is against you, your counsel probably then says to you: "Well the Old Bird gave us a fair run"; and if you are at all reasonable you go away satisfied that on the facts before him the Judge *was* right.

On the other hand, it may be that, even at an early stage, the Judge appears to be against you. Very likely it is just that you should lose, but you do not appreciate that fact. And when judgment rightly goes against you, you feel sore and go off muttering, it may be, "He was against us from the start. Our witnesses never had a chance."

In the first case the Court not only does justice, but gives the appearance of justice. In the second case, justice was done, but the appearance of justice was lacking.

The importance of this double duty of the Courts has long been recognized; and the title of this talk springs from my half-memory of words written some years ago by some great English Judge, and repeated more than once by New Zealand Judges.

In our Empire, the administration of justice is such that it has long been one of the strongest pillars in the edifice of the State. This is because the community is, generally speaking, satisfied with the way in which the Courts work. This means something far more than that the law is being correctly administered. The interpretation of statutes, of contracts, of testamentary documents, and so on—these are things beyond the understanding of most people. But the litigant has his own ways of judging whether he is getting "a fair run," and if he is satisfied about that—if there is the appearance of justice—he will bear an adverse decision without discontent or bitterness.

I have myself practised for forty years. All counsel of experience realize how much more is expected of men in judicial office than knowledge of the law and sound judgment on the facts. We know how much patience is required in dealing with stupid, biased, and, as it may turn out, untruthful witnesses. We know, too, how much patience is required in dealing with counsel who may come insufficiently prepared, or may be over-zealous, over-persistent, and perhaps annoyingly dogmatic.

I have spoken of witnesses. I imagine none of you, who have not practised in the Courts, realizes how much a case may be affected by an early indication from the Judge that he considers a witness unreliable. The witness may have much of truth and importance to tell. If there are counsel in the case, they can generally sift his story pretty well. The counsel who calls the witness knows the evidence he is to give and the order in which he wants it given. The patient Judge will let the evidence come out, and only interrupt to make sure he has understood or to disallow clearly irrelevant or inadmissible statements. He knows that the other counsel is likely to have information on which to cross-examine and a plan for his cross-examination. So he listens—and not till all this is done does he put those often vital and disconcerting questions which have arisen in his mind and about which he must be satisfied.

You must remember, too, that a man in a judicial position may unwittingly exercise over a witness an authority and indeed a fear that will make the witness gulp out, to anything approaching a leading question, the answer that the question seems to suggest. It must require almost superhuman self-control to enable a keen-minded and zealous Judge not to intervene as he sees some vital fact apparently not touched on, or some subtle test of integrity apparently overlooked. But speaking as counsel, I would beg of you in such a position to bide your time. The early interpolation of some comment or some question may do irretrievable harm. It may disclose to a dishonest witness the trap into which he is falling, or it may confuse a witness who is slow-minded but honest, and so destroy the whole pattern in which the evidence could best be displayed and tested. Let me read you a passage from that very readable story, *Tragedy at Law*, by Cyril Hare, pp. 208, 209.

The author is describing a murder trial. The task confronting counsel for the accused is almost hopeless, and his only chance of securing an acquittal is by putting into the minds of the jury a doubt whether one of the Crown witnesses did not herself have both the motive and the opportunity for the crime. His cross-examination of this witness is proceeding on subtle and cautious lines and with considerable success when the presiding Judge intervenes with a direct question to the witness.

> "And Mr. Pettigrew, sick at heart, went on. The art of cross-examination is pre-eminently the art of timing. The question that would be deadly if asked at its proper place in the sequence falls completely flat if interjected out of its turn. That was what had happened here. Moreover, the Judge's interposition had forewarned the witness what was coming. She had time to brace herself to meet the blow, and when it came she met it with perfect composure."

* To the Auckland Justices' Association: June, 1943.

I have said that the judicial position requires almost superhuman control. There is a searchlight playing on the Bench which brings into abnormal prominence every word and gesture of its occupant. A gesture of impatience or unbelief from your common man means little—but from your Judge it assumes a real importance and affects the whole atmosphere. As against any strong indication of belief in one side or the other it is extraordinarily hard to struggle, because the morale of one side suffers acutely and witnesses, and counsel, too, find it hard to present a case which under other circumstances might have succeeded.

Let me say that we who practice at the bar of Courts know the strains and irritations imposed on those who occupy the Bench. We wonder often at their patience and impartiality. And I think I may say that we honour and esteem those before whom we practise, even more for their care in maintaining and making apparent at all times this complete impartiality than for their deep learning in the law.

I trust I have not been too serious. If I have, my excuse is the importance which long years of practice have taught me to attach to my subject. Now just one short anecdote to conclude with. Perhaps in the future some of you may be witnesses, and, if so, this little tale may prove invaluable.

Very many years ago I was counsel for one of the parties in an action before Mr. Justice Stringer. Mr. J. F. W. Dickson was counsel for the other party. One matter in dispute was the value of certain land. This land was situated close to a very small bush township which, for the purpose of my story, I will call Rimunui. To establish the value of this land Mr. Dickson called as a witness a resident of Rimunui and I, in the ordinary course of cross-examination, proceeded to test his experience as a valuer. He was instantly indignant at his qualifications being questioned. He was calmed down by Judge and counsel, but some further questions as to his experience were met by an angry and argumentative refusal to answer. Mr. Dickson, feeling that some explanation was needed, rose to his feet and said, smilingly, "I should perhaps explain, Your Honour, that the witness is a J.P. at Rimunui—and the only J.P."

"Ah! Witness," said His Honour, smiling also, "I think I know just how you feel. But you must realize that, though you are entitled to sit on the Bench at Rimunui, you are not entitled to sit on the Bar in Auckland."

CONTINGENT LIABILITIES IN A DECEASED PERSON'S ESTATE.

The Duty of Personal Representatives.

By E. C. Adams, LL.M.

Contingent liabilities attaching to a deceased person's estate often cause delay in the distribution of the assets and postponement to the final winding-up of the estate, usually to the extreme exasperation of the beneficiaries, who, if laymen, seldom appreciate the reasons and need for the delay.

The general rule is that when a legal personal representative distributes a deceased person's estate without providing for a liability, continuing or contingent, he commits *devastavit* and incurs a personal liability to the creditors to the extent of the value of the assets distributed: *14 Halsbury's Laws of England*, 2nd Ed. 331; *Taylor* v. *Taylor*, (1870) L.R. 10 Eq. 477; *Re Bewley's Estates, Jefferys* v. *Jefferys*, (1871) 24 L.T. 177; *Clarkson* v. *McLean*, (1918) 42 O.L.R. 1 (Canada); and *Union Bank (Liquidators)* v. *Kiver*, (1891) 8 S.C. 146 (South Africa). A subsidiary rule is that the creditors can also follow the assets into the hands of the beneficiaries, whether or not the legal personal representative can claim the protection conferred by the statutory provision hereinafter mentioned, or the benefit of a Court order, or raise the plea of *plene administravit*—*e.g.*, *Law* v. *Burke*, [1922] N.Z.L.R. 939. It is to be observed, however, that a creditor whose claim against the estate is merely contingent cannot restrain the distribution of the assets or get a fund set aside, until it has ripened into an actual debt due by the estate: *14 Halsbury's Laws of England*, 2nd Ed. 332.

Contingent liability may arise under—

(*a*) Leaseholds vested in deceased at date of death or at any time before his death: *14 Halsbury's Laws of England*, 2nd Ed. 408; *Commissioner of Stamp Duties (N.S.W.)* v. *Brasch*, (1937) 57 C.L.R. 69, 78, 86, 87.

(*b*) Shares not fully paid up owned by deceased in companies, and thus liable to calls: see, for example, s. 166 of the Companies Act, 1933.

(*c*) Obligation, arising under guarantee or suretyship or quasi-suretyship, entered into by deceased before he died—*e.g.*, where deceased, originally mortgagor, has sold the mortgaged property during his lifetime, remaining personally liable for the mortgage debt with a right of indemnity from his purchaser—*e.g.*, *Nelson Diocesan Trust Board* v. *Hamilton*, [1926] N.Z.L.R. 342, G.L.R. 193.

Three cases may usefully be taken as illustrating the executor's or administrator's personal liability for contingent debts.

In *Clarkson* v. *McLean*, (1918) 42 O.L.R. 1, shares in a company passed to the administrators of M.'s estate and were by them transferred to the next-of-kin. The shares were subject to a statutory liability. Other assets exceeding in value the amount of the liability on the shares were handed over to the next-of-kin and the whole estate thus distributed. It was held that the administrators had committed *devastavit* and were thus personally liable.

Re Troughton, Rent and General Collecting and Estate Co. v. *Troughton*, (1894) 71 L.T. 427, discloses an ingenious but happily unsuccessful attempt by the administratrix, who was also residuary legatee, to get rid of the liability on calls on shares not fully paid up. After deceased's death the company made a call, and, when she knew that the call had been made, she

transferred all the estate property to L. (who also knew of the liability for calls) *except the shares*, in consideration of L. indemnifying her against all liabilities and to provide her with board, lodging, and wearing apparel, and amenities suitable to her social position and on her death " to provide a decent funeral and decorously bury her body in the grave " belonging to her. At p. 428, Kekewich, J., said :

> Mrs. Troughton was the legal personal representative and also residuary legatee of her deceased husband. As legal personal representative she was bound to administer the estate according to law. As residuary legatee she took what was left after due administration and no more—that is to say, the whole of the estate, less the debts, and in the word " debts " for the present purpose must be included liabilities which sooner or later might have to be discharged. Except in due course of administration she could not part with any part of the estate without making proper provision for those debts.

Accordingly the Court held that the assets transferred to L. were liable for the calls. In reading this case, whilst not refraining from hoping that in due course the lady was decorously buried with her ancestors, one must be filled with feelings of admiration for our system of jurisprudence, which is strong enough and sensible enough to prevent creditors being defeated by colourable transactions of this nature.

Re Bewley's Estates, Jefferys v. *Jefferys*, (1871) 24 L.T. 177, is a very hard case. Testator had owned certain shares subject to a liability for calls, but before his death had entered into an arrangement by which on payment of a certain sum he was released from further liability. The executors relying on the release paid out legacies. The company was afterwards ordered to be wound up, and the said arrangement was ultimately upset by the House of Lords. It was held that the executors were personally liable to refund the amount paid to the legatees, to meet the calls made upon the estate in respect of the shares, " because the release was worth nothing, the House of Lords having so determined." This case perhaps will diminish somewhat our feelings of admiration for our system of Equity jurisprudence, although it was decided by that celebrated Equity Judge, Lord Romilly, M.R.

To ameliorate the legal personal representative's position as regards leaseholds, there is s. 82 of the Statutes Amendment Act, 1936, based on s. 26 of the Trustee Act, 1925 (Imp.), the previous English provision being known as Lord St. Leonard's Act (22 and 23 Vict., c. 35) : the effect of the section is summarized in *14 Halsbury's Laws of England*, 2nd Ed. 331, para. 616, as follows :—

> In the case of leaseholds the following statutory protection is given to the representative. Where a personal representative or trustee liable as such for (1) any rent, covenant, or agreement reserved by or contained in any lease ; or (2) any rent, covenant, or agreement payable under or contained in any grant made in consideration of a rent-charge ; or (3) any indemnity given in respect of any such rent, covenant, or agreement as aforesaid, satisfies all liabilities under the lease or grant which may have accrued, and been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property to a purchaser, legatee, devisee, or other person entitled to call for a conveyance thereof. Thereafter he may distribute the residuary real and personal estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid), to or amongst the persons entitled, without appropriating any part, or any further part, as the case may be, of the estate of the deceased or of the trust estate to meet any future liability under the lease or grant, and, notwithstanding such distribution, he will not be personally liable in respect of any subsequent claim under the lease or grant : but the right of the lessor to follow the assets is not to be prejudiced.

It is to be observed that when the section applies no Court order is required, and it applies to the Public Trustee.

It is further to be observed that when the section applies no fund is to be set aside except when the lessee or grantee has agreed to lay out a fixed and ascertained sum on the property demised or granted.

The object of the section is to enable an executor or administrator to distribute the assets without appropriating any part to meet any future liability under the lease. It is true that the lessor or those claiming under him can still follow the assets, but the legal personal representative, after having assigned the lease to a purchaser, legatee, devisee, or other person entitled to a conveyance thereof, is no longer personally liable : *In re Lawley, Jackson* v. *Leighton*, [1911] 2 Ch. 530, 533, in which it was held that Lord St. Leonard's Act did not apply where a person was paid a sum of money to take over the lease.

As regards the legal personal representative's liability for leaseholds, where the above statutory provision is not applicable, the Court in its general equitable jurisdiction in an administration action may direct the administration of and application of the assets, and the legal personal representative carrying out the directions of the Court will be completely exonerated from all liability, provided he keeps back nothing which ought to be disclosed to the Court : *Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 638 ; *Williams on Executors*, 12th Ed. 876. It was held in *Re Nixon, Gray* v. *Bell* (*supra*), to the facts of which Lord St. Leonard's Act was not applicable, that there was no necessity to set aside a fund for indemnity for the protection of the executors, except where there was privity of estate between the executors and the lessor. For the form of order, see *Re Sales, Powsland* v. *Roberts*, (1920) 64 Sol. J. 308.

The principle of *Re Nixon, Gray* v. *Ball* (*supra*), was later applied to shares in a company liable to calls : *Re King, Mellor* v. *South Australian Land, Mortgage, and Agency Co.*, [1907] 1 Ch. 72, the effect of which is summed up in *Williams on Executors* (*loc. cit.*) as follows :—

> So too where there is a possible future claim for calls on shares the Court will order distribution of the estate without directing the retention of assets to meet the claim, and such order will completely exonerate the executors from all liability, but, *semble*, the order can only be made in proceedings in which administration is asked for.

But where the legal personal representative enters into possession of a deceased person's leaseholds and remains in possession thereof, his liabilities and the extent thereof are explained at length in a most illuminating judgment by Dixon, J., in *Commissioner of Stamp Duties* (*N.S.W.*) v. *Brasch*, (1937) 57 C.L.R. 69, 86, 87. He can obtain no protection from the statute, but must set aside a fund or assets sufficient to meet all possible liabilities ; on his application the Court will direct an inquiry as to the amount of such fund : *In re Bennett, Midland Bank Executor and Trustee Co., Ltd.* v. *Fletcher*, (1943) 195 *Law Times* Jo. 104, following *In re Owers, Public Trustee* v. *Death*, [1941] Ch. 389, [1941] 2 All E.R. 589 ; and see, also, (1943) 83 Sol. Jo. 102.

In *In re Pharazyn*, (1897) 15 N.Z.L.R. 709, it was held that, if an executor does transfer to the legatee shares subject to calls, he is entitled to an indemnity from the legatee. In the facts, as set out in the first following precedent, such an indemnity would be valueless, for the legatee of the shares is an infant. To prevent delay in transferring the other assets to the respective beneficiaries, the executor has taken the sensible and business-like course of purchasing, in consideration of a small premium, an indemnity from a well recognized insurance company.

For estate-duty purposes no allowance can be made in the first instance for contingent debts. But, if contingent debts should become payable at any time within three years of death, an allowance will be made therefor (subject to the condition that no action for the recovery of any refund shall be commenced except within three years after the payment of the duty paid in excess), provided that, if it is a debt incurred by deceased, it has been incurred for full consideration in money or money's worth wholly for his own use and benefit, and provided also that, if it is a debt in respect whereof there is a right of reimbursement, allowance can be made only to the extent to which such reimbursement cannot be obtained: s. 9 of the Death Duties Act, 1921. Thus usually no allowance can be made in the assessment of estate duty for obligations arising under guarantee or suretyship.

In the second following precedent the executor, having found a purchaser for deceased's equity of redemption and being desirous of distributing deceased's assets and of being released from all further liability under the mortgage, has arranged with the mortgagee accordingly, who has accepted the substituted personal liability of the purchaser and his wife.

PRECEDENT No. 1.

Insurance Company Indemnifying Executor against Liability for Calls on Shares.

[STAMP DUTY 15s.]

THIS DEED made this day of 1943 BETWEEN INSURANCE COMPANY LIMITED a company duly incorporated under the Companies Act 1933 and having its Head Office in (hereinafter referred to as "the said company") of the one part and A.B. of Napier sheepfarmer of the other part.

WHEREAS the said A.B. is executor of the will of C.D. late of Wellington in New Zealand retired grocer deceased (hereinafter referred to as "the said deceased") AND WHEREAS an asset of the estate of the said deceased is fifty-nine (59) ordinary shares of two pounds ten shillings (£2 10s.) each paid up to ten shillings (10s.) per share in the ASSOCIATION LIMITED (hereinafter referred to as "the said association") such shares being numbered to inclusive AND WHEREAS the said deceased by his said will gave and bequeathed such shares to one E.F. (hereinafter referred to as "the beneficiary") AND WHEREAS the said A.B. now holds and intends to continue to hold the said shares upon trust for the beneficiary until she attains the age of twenty-one (21) years when the said A.B. intends to transfer the said shares to the beneficiary AND WHEREAS the said A.B. is desirous of distributing the remaining assets of the estate of the said deceased to the several persons beneficially entitled thereto disregarding the contingent liability in respect of future calls upon the said shares and has requested the said company to indemnify him against liability in respect of such calls which the said company has agreed to do NOW THIS DEED WITNESSETH that in consideration of the sum of two pounds two shillings (£2 2s.) paid by the said A.B. to the said company (receipt whereof is hereby acknowledged) the said company hereby covenants with the said A.B. that it will indemnify the said A.B. and at all times hereafter keep the said A.B. harmless and indemnified against all and any call or calls upon or in respect of the said shares which shall be made upon the said A.B. as a member of or as a contributory upon the winding-up of the said association or as the personal representative of the said deceased as a member of or as a contributory upon the winding-up of the said association PROVIDED ALWAYS that the said company shall be under no liability hereunder in respect of or arising out of any such call or calls for which the said A.B. would not have been liable had the said A.B. transferred such shares prior to the day of 1956 unless at any time prior to that date the said A.B. shall have been prevented by the winding-up of the said association and/or by any rule of law or statutory provision and/or by his duties and obligations as executor or trustee and/or by any other proper or reasonable cause from transferring the same AND the said A.B. HEREBY COVENANTS WITH the said company that the said company shall have a lien on the said shares so long as it shall remain liable hereunder to secure its liability hereunder.

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

The common seal of the Insurance Company Limited was hereunto set affixed and impressed by order of the Board of Directors thereof this day of 1943 in the presence of— [SEAL]

..... } Directors.
.....

..... General Manager.

Signed by the said A.B. in the presence of— } A. B.

PRECEDENT No. 2.

Substitution of Purchaser's for Estate's Liability on Sale of Equity of Redemption by Executor.

[STAMP DUTY 15s.]

THIS DEED made the day of 1943 between A.B. of Hastings sheepfarmer and C.D. of Hastings married woman (hereinafter called "the covenantors") of the first part THE STATE ADVANCES CORPORATION OF NEW ZEALAND (hereinafter called "the mortgagee") of the second part AND COMPANY LIMITED a duly incorporated company having its registered office at and carrying on business in New Zealand as a trustee in accordance with the powers conferred on it by the Act of the third part WHEREAS E.F. late of Hastings sheepfarmer but now deceased was registered as a proprietor of an estate in freehold in all that parcel of land containing [*Set out here area and official description of land*] SUBJECT TO memorandum of mortgage registered No. to the Mortgage Corporation of New Zealand AND WHEREAS the said memorandum of mortgage No. is now vested in the mortgagee AND WHEREAS the said E.F. died on the day of 1941 and his estate is being administered by the said Company Limited as trustee AND WHEREAS the said Company Limited as trustee desires to transfer the said property to the covenantor A.B. for valuable consideration AND WHEREAS the mortgagee has been requested to consent to the distribution of the assets in the estate of the said E.F. without making any provision therein for meeting the liabilities under the said memorandum of mortgage No. and to release Company Limited as trustee and the assets in the estate of the said E.F. from all liability in respect of the said memorandum of mortgage No. which the mortgagee has agreed to do for the consideration hereinafter appearing AND WHEREAS the mortgagee has been requested to consent to the transfer of the said land to the covenantor A.B. subject to the said memorandum of mortgage No. which the mortgagee has agreed to do for the consideration hereinafter appearing NOW THIS DEED WITNESSETH that in consideration of the consent of the mortgagee to the transfer of the mortgaged land and in consideration of the mortgagee releasing the Company Limited and the assets in the estate of E.F. from all liability in respect of the said memorandum of mortgage No. the covenantors do jointly and severally hereby covenant with the mortgagee that they will punctually pay perform observe and keep all and singular the covenants conditions and agreements on the part of the original mortgagor in the said memorandum of mortgage No. contained expressed and implied and will be liable in respect thereof in the same manner as if they had executed the said mortgage as original mortgagors and the covenantors HEREBY FURTHER COVENANT with the mortgagee that they will repair at their own cost and to the satisfaction of the mortgagee not less than eighty (80) chains of fencing on the said lands annually for the next five years from the date hereof AND IN CONSIDERATION of the premises the mortgagee DOTH HEREBY

RELEASE the Company Limited and the assets in the estate of the said E.F. from all liability whatsoever in respect of or arising out of the said memorandum of mortgage No.
and DOTH HEREBY CONSENT to the distribution of the assets of the estate of the said E.F. without making any provision for any liability in respect of the aforesaid memorandum of mortgage No.
IN WITNESS WHEREOF these presents have been executed the day and year firstly hereinbefore written.

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

SIGNED by the said C.D. as covenantor in the presence of— } C.D.

THE COMMON SEAL OF THE STATE ADVANCES CORPORATION OF NEW ZEALAND, ETC. } [SEAL.]

LAND AND INCOME TAX PRACTICE.

Deceased Taxpayers: Trustees' First Taxation Returns.

The following notes may be helpful to practitioners who are, or who act for, the trustees in the estate of a recently deceased taxpayer:—

Summary of statutory provisions.—Section 21, Land and Income Tax Act, 1923, requires an executor or administrator to make the same returns in respect of all income derived or land owned by the deceased taxpayer in his lifetime which the taxpayer would have been required to furnish. This section empowers the Commissioner to require an administrator to furnish such further returns as may be necessary, and also empowers the Commissioner to make assessments upon the administrator in the same manner in which the taxpayer might have been assessed.

Section 101 provides that co-trustees or administrators are jointly assessable for income-tax and are jointly and severally liable for the tax so assessed.

Section 64 provides for the liability of trustees in respect of returns of land and land-tax.

Section 102 (*a*) provides for the assessment of the trustees as agent for the beneficiaries in respect of income derived by the trustees in so far as it is also income to the receipt of which the beneficiaries are entitled in possession during the same income year.

The meaning of the phrase "entitled in possession to the receipt of income during the same income year" has been enlarged by the amendments incorporated in s. 27 of the Land and Income Tax Amendment Act, 1939, and s. 7 of the Land and Income Tax Amendment Act, 1941, under which the distribution of income held in trust for the maintenance and education of children, income which a beneficiary is entitled to receive subject to a condition or obligation for the maintenance or support of another person, and income where a trustee has a discretionary power to apply the estate income for the benefit of specified beneficiaries are now assessed.

Any income of the estate not assessable under s. 102 (*a*) is subject to an assessment under s. 102 (*b*), which provides that no personal or other special exemptions are allowable.

Paragraph (*c*) provides that a trustee shall make separate returns of income derived by him as a trustee.

Section 28 of the Land and Income Tax Amendment Act, 1939, provides for the assessment of income accrued to the date of death which is received subsequently.

For social security charge and national security tax purposes, the relevant provisions affecting trustees are: Section 124, Social Security Act, 1938, as amended by s. 20 of the Social Security Amendment Act, 1939, and s. 24 of the Finance Act, 1941. Briefly, these sections provide for the payment by the trustees of social security charge and national security tax on all estate income; with the exception that the charge is not payable if the beneficiary himself is not chargeable in respect of his share of the estate income—*e.g.*, if the beneficiary is not ordinarily resident in New Zealand, or is under sixteen years of age. Subsection 5 of s. 124 provides that a trustee paying an annuity is liable for payment of the combined charge thereon, notwithstanding that a portion of the annuity may be paid out of the capital of the estate.

The Commissioner requires that on the death of a taxpayer the following returns and information should be furnished:—

A. *Land-tax.*—Returns of land in excess of £500 unimproved value held by the deceased as at March 31 of each year prior to the date of death. Instructions are contained in land-tax return forms.

B. *Income-tax.*—The trustee should ascertain whether a return of income derived during the year ended March 31 preceding the date of death has been furnished.

The trustee should forward a copy of the will, together with a note as to the date of death, and the full names and addresses of the executors. A copy of the will is not required if its provisions can be conveniently summarized. The Department requires verbatim extracts as to the trustees' duties and powers pertaining to the disposal of income to be held in trust or applied for the maintenance or support of any beneficiaries.

Return of income from the end of the taxpayer's income year preceding the date of death, to the date of death—this return should include:—

(*a*) All salaries and wages *earned* during the period covered by the return, irrespective of the date of payment.
(*b*) All fees actually declared to be payable during the period, but not directors' fees declared payable after death.
(*c*) All dividends *declared payable* during the period.
(*d*) All *interest, rent, annuities, superannuation, and rents *actually received* during the period, but not income from these sources which was payable to but not actually received by the taxpayer.
(* See exception, under para. C.)
(*e*) All business, professional, and farming income *earned* during the period ended on the date of death. In connection with this income the principal points to note are that closing stock, including livestock, must be shown at probate values, and not (in the case of livestock) at standard values; and fixed annual charges such as rent, interest, rates, insurance, and depreciation may be apportioned on a day-to-day basis. Other non-fixed expenses—*e.g.*, repairs, petty expenses, wages, travelling-expenses *incurred* during the period over which the income is earned—are deductible, irrespective of the actual date of payment.

If a taxpayer has not made a claim for depreciation during his lifetime, upon assets in respect of which he could have claimed depreciation had he observed the requirements as to keeping proper accounts, the Commissioner is prepared to allow in the return to the date of death an amount equal to the accumulated depreciation to which the taxpayer would have been entitled at scale rates for the period during which the asset was in fact assessable income, but not exceeding the difference between the cost price and the probate value of each of such assets.

Dairy bonuses and wool retention moneys are included in the return of income derived prior to the date of death. Where such moneys are received by the trustees subsequent to the date of death the Commissioner will reopen an assessment already made and include such income as the income of the deceased.

A deceased taxpayer who was formerly a "proprietary" shareholder in a proprietary company cannot derive any proprietary income unless he was a proprietary shareholder at March 31. Proprietary income is not apportionable as between the deceased taxpayer and his estate over the company's income year—if the taxpayer was a shareholder at March 31, and the company balances at, say, June 30, the whole of the proprietary income must be shown in the return to the date of death.

Aggregation of incomes, on death of husband or wife, in circumstances where the provisions of s. 13 of the Land and Income Tax Amendment Act have application. Where a husband dies, the income derived by his wife up to the date of his death must be aggregated with the assessable income derived by the husband up to the same date, provided each of such incomes exceeds £200. A return of the wife's income to the date of her husband's death is therefore necessary. The same procedure does not apply where a wife dies. In this case the income derived by her to the date of her death must be aggregated with the income derived by her husband during the whole income year (not the income derived by the husband during the period to the date of his wife's death), provided each of such incomes exceeds £200. In these cases it is necessary to wait until the expiry of the husband's income year before a final aggregate assessment can be made.

C. *Income accrued to the Date of Death, which is received subsequently.*—Amounts received by the trustees in any income year which do not represent assessable or non-assessable income derived by the deceased person during his lifetime, but which would have been included in his assessable or non-assessable income if he had been alive when such amounts were received, are declared by s. 28 of the Land and Income Tax Amendment Act, 1939, to be *income* derived by the trustees, notwithstanding that such amounts may be apportioned by the trustee, partly to the *capital* of the estate and partly to *income*.

The manner in which such income is to be assessed is determined by reference to s. 102 (*a*) and (*b*). Seeing that any sums credited to *capital* in the trustees' accounts cannot be said to be "*income* to which the beneficiaries are entitled to receive during the income year," it follows that such amounts must be assessed under the provisions of s. 102 (*b*)—*i.e.*, without exemption. For example, a taxpayer is a mortgagee, entitled to receive £100 interest per annum payable on September 30 and March 31 of each year. He receives the £50 payable on September 30, and dies on December 31. His trustees receive £50 on March 31. The usual accountancy principles require the £50 to be apportioned, £25 as to *capital*, and £25 as to *income*. Section 28 declares that the whole £50 is *income* for taxation purposes. As the beneficiaries would not be entitled to receive, as income, the capital portion (for the trustees' purposes) the amount is assessable under s. 102 (*b*). The assessment of the remaining £25 depends upon whether the beneficiaries are in fact entitled to receive the income during the income year.

Section 28 does not apply where the estate is left for charitable purposes, or where the will contains an express provision that amounts received after the date of death by the trustees are not to be apportioned as between capital and income.

All interest, rent, directors' fees, annuities, superannuation, *payable to but not actually received by the deceased taxpayer during his lifetime* will be included in the return of income derived after the date of death, and shown separately under the appropriate heading on the form "Trustees' Statement" which is available for the use of trustees. It should be noted that directors' fees declared payable at a shareholder's meeting after the date of death of a director do not form part of the income derived by the taxpayer, but constitute income accrued to the date of death and received by the trustees.

Dividends declared payable after the date of death cannot form part of the income derived by the taxpayer. If the dividend is in respect of a period during which the taxpayer was alive, then any amount apportionable by the trustees to capital represents non-assessable income accrued to the date of death, and such amounts must be shown against item (2) under trustees' income on the Trustees' Statement form.

If the trustees' accounts are kept on a strictly double-entry basis, and the principles as to apportionment are correctly followed, the total amount apportioned to capital will represent the amount to be included as item (2) under Trustees' Income on the Trustees' Statement form.

(* In practice, the Commissioner regards interest which may be uplifted with the capital sum at any time—*e.g.*, a Post Office Savings-bank account or an account with a stock firm—as accruing from day to day, and the amount accrued to the date of death, but not actually received, is assessable as the income of the deceased taxpayer. If, in the above example, the capital sum had been held by a stock firm at current account, the income to the date of death would be £75.)

Against income accrued to the date of death, which is received subsequently, the trustees may claim those expenses which can properly be regarded as exclusively incurred in the production of the income concerned, during the period of accrual. Fixed annual charges—*i.e.*, rent, interest, rates, insurance, and depreciation—may be apportioned on a day-to-day basis. Where a trustee furnishes returns of (1) income derived by the taxpayer in his lifetime, (2) accrued income to the date of death, and (3) income from the date of death to the end of the income year, the fixed annual charges against each particular source of income will be apportioned, (1) over the period to the date of receipt of payment by the deceased, (2) the period in which income not received by the deceased was accruing to the date of death, and (3) from the date of death to the end of the income year. In the case of accrued rents, from more than one property, the fixed charges against each property are to be separately apportioned.

The Commissioner will issue a separate provisional assessment upon the amount of accrued income, which is an asset in the estate for death-duty purposes, to enable the trustees to present to the Stamps Department a certificate of a debt due to the Commissioner of Taxes at the date of death. This provisional assessment is subject to readjustment in the year in which the accrued income is actually received.

The attention of trustees is directed to the notes on relief from payment of social security charge and national security tax available under the provisions of s. 4 of the Finance Act (No. 3), 1940, on p. 73, *ante*. An application for any such relief should be forwarded with the first returns furnished by the trustees.

[The writer of these articles will be pleased to receive suggestions for notes on any subject concerning practice regarding land-tax, income-tax, social security charge, or national security tax. These should, in the first instance, be addressed to the Editor, NEW ZEALAND LAW JOURNAL.]

COUNCIL OF LEGAL EDUCATION.

Present System Criticized.

The place of law subjects in the University of New Zealand, and various aspects of the control of the law curriculum by the University Senate and the Council of Legal Education, were discussed by Mr. A. C. Brassington, lecturer in International Law at Canterbury University College, in an address given to University students in Christchurch recently, says the *Press* (Christchurch).

Mr. Brassington said that, in his opinion, the views of practising solicitors were inadequately represented on the Council of Legal Education. Although in theory the council was well constituted to supervize the law course, in practice the ordinary rank and file of the legal profession had never been represented on it. Of the two representatives appointed by the New Zealand Law Society, one was a King's Counsel who practised only as a barrister; the other representative, said Mr. Brassington, practised chiefly as a barrister, and both men were already members of the University Senate. No member of the Council of Legal Education resided in the South Island, and the Council was "all head and no body." It was an example of elaborate planning come to grief, said Mr. Brassington, and its continued existence in its present form was to be deplored.

Asked to comment on Mr. Brassington's remarks, the Dean of the Faculty of Law at Canterbury College (Mr. K. M. Gresson) said that it was to be expected that the recent appointment of Mr. Justice Callan would greatly strengthen the Council of Legal Education, a body which had never functioned satisfactorily.

"The Council has not now, and never has had represented on it, the viewpoint and opinions of the ordinary legal practitioner," said Mr. Gresson. "That two professors of law should be the appointees of the University is natural and proper, but that the two appointees of the Law Society should be members of the University Senate results in the council having too academic an outlook. In my opinion, if provision were to be made for meetings from time to time of the four deans of the respective faculties of law at the four University Colleges, two of whom are now and always have been persons engaged in active practice, there would be no need for a Council of Legal Education at all."

[Correspondents have also written to the JOURNAL, following the comments of "Scriblex" in a recent issue, suggesting that the Council of Legal Education should be strengthened by the addition of the Deans of the Law Faculty of Otago University and of Canterbury University College, both of whom are practising solicitors carrying on the teaching of law in circumstances different from those with which the two professors are familiar. It should be pointed out that Messrs. A. H. Johnstone, K.C., and W. H. Cocker are the appointees of the New Zealand Law Society. The additional appointments that are suggested would be made by the Senate of the University of New Zealand, and, if the Deans of the Faculties of Law cannot be co-opted by that body, an amendment of the statute would be necessary.—ED.]

IN YOUR ARMCHAIR—AND MINE.

By SORIBLEX.

Course for Law Students.—The Council of the Law Institute of Victoria is considering proposals for including in the course of study for law students, solicitors' bookkeeping and the keeping of trust accounts, and the law of taxation. If the Council's proposals are adopted, representations will be made to the Victoria Council of Legal Education that these subjects be included in the law course, or that some tutorial scheme be adopted whereby law students may be able to obtain a knowledge of such subjects. For a few years a knowledge of elementary bookkeeping was required of law students in New Zealand, but the requirement was dropped when the course was lengthened by prescribing a number of subjects of academic flavour. The law of taxation has never been part of the law course in our country. Taxation, in all its aspects, is now of such importance to so many of the public that the profession can hardly allow this situation to continue much longer.

Jewish Judges.—In the last *London Letter* published in this *Journal* it was pointed out that Cohen, J., the new Judge of the Chancery Division, is a Jew, and it was said that this appointment inevitably recalled that of Sir George Jessel, M.R., the first Jew to be appointed to the English Bench, and that of Lord Reading, the first Jew to become Lord Chief Justice of England. Can any reader state with authority the names of any other Jews who have been appointed to the English Bench? It has sometimes been asserted that the present Lord Chancellor (Viscount Simon) is a Jew; but this is definitely not so. Nor was Lord Herschell, who twice held the Lord Chancellorship. His father was born a Jew in Prussian Poland but, as a young man, exchanged the Jewish faith for Christianity, becoming a Nonconformist minister in London.

Questions in Cross-examination.—"When did you leave off beating your wife?" Every law clerk knows this vintage example of the type of question which may not be asked in cross-examination. Derek Walker-Smith's *Life of Lord Darling* gives a graphic account of the sensational Pemberton Billing case tried before Darling, J., in 1918. Pemberton Billing, it will be remembered, was prosecuted for criminal libel in respect of a paragraph in his paper *Vigilante* commenting on persons promoting and taking part in a private performance of Oscar Wilde's *Salome*. The prosecutors were represented by three counsel, the leader of whom was Hume-Williams, K.C. Billing was unrepresented by counsel and among his witnesses he called Lord Alfred Douglas, whose close association with Wilde had been disclosed to the world some twenty years or so earlier, when Wilde had prosecuted Lord Queensbury for criminal libel. Cross-examining Lord Alfred Douglas, Hume-Williams asked: "When did you cease to approve of sodomy?" "When did I cease to approve of sodomy?" "Yes, that was the question." "I do not think that is a fair question. It is like asking, When did you leave off beating your wife? It is simply a catch question." The witness, it will be observed, was able to look after himself; but it is somewhat surprising that the Judge should have permitted the question. Darling, J., during his long period of judicial office tried many *causes célèbres*; but his prestige gained nothing from his conduct of the Pemberton Billing case, with its recurrent clashes, its incredible scenes, and its not infrequent uproar.

Rushworth Petition *re* **Mareo Trial.**—On the petition of H. M. Rushworth, of Auckland, praying for an inquiry into certain aspects of the Mareo trial, the Statutes Revision Committee of the House of Representatives reported that it had no recommendation to make, and this recommendation was adopted by the House. The decision of the Committee and of the House may be correct, but the Prime Minister seems to have made a surprising statement in the House when speaking to the report of the Committee. According to *The Dominion* (Wellington) he said: "Mareo twice refused to go into the witness-box, and surely it was his duty to make things plain." In making this comment the Prime Minister was applying a test which is certainly, and fortunately, not known to our criminal law.

The Agents and the Nice People.—Smith, J., prior to his appointment to the Bench, was senior partner in the firm of Morison, Smith, and Morison of the capital city. The firm's office had been in Woodward Street, but new premises were taken in Bible House, in Ballance Street. Just prior to the move an affidavit had been drafted for swearing by a certain Anglican cleric, who had been a padre in the last war and whose vocabulary had been improved in consequence. When the affidavit was ready for swearing the firm was in its new offices. The chief common-law clerk telephoned the cleric to ask him to call to swear the affidavit and told him that the firm had changed its offices to Bible House. "What, the hell," the cleric exclaimed, "are the agents of the devil doing in with those nice people?"

Miscellany from Overseas.—Replying to the recent message of greetings from the English Bar Council in which deep sympathy was expressed in the terrible brutalities inflicted on the population in occupied territory by the German forces, the Soviet Bar refers to the bringing closer of the hour of final victory when "lawyers of all freedom loving countries will be able to take part in restoring legal norms destroyed by Hitlerism in all occupied countries and in merciless punishment of those guilty of these atrocious misdeeds." . . . Farwell, J., who died last April, was a son of Farwell, L.J., and a grandson of Wickens, V.-C. In 1933 he made a final order in an action which had been commenced before his grandfather in 1873. . . . The Birmingham Law Society has recently conducted an investigation the results of which show that the earnings of members in practice are only just over half what they were before the war.

From My Note-book.—"In the present case the society was formed for the purpose, and the purpose only, of maintaining a choir in order to promote the practice and performance of choral works. It is not suggested that the ten gentlemen who constitute the society get amusement or anything else out of it.": Macnaghten, J., holding the Royal Choral Society to be a charity for purposes of income-tax exemption.

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. Destitute Persons.—*Maintenance Order—Resumption of Cohabitation—Whether Order thereby cancelled—Separation Order—Whether Consent Order possible.*

QUESTION: Two matters have arisen in our office, and we would like to have some guidance on them. (*a*) Where the parties to a separation order resume cohabitation, is the maintenance order cancelled or annulled *ipso facto*? (*b*) If parties agree upon a separation order, has the Court jurisdiction to make such a consent order?

ANSWER: (*a*) The maintenance order, which remains in force until discharged, is not cancelled or annulled by the mere fact of cohabitation, and application for cancellation must be made to the Court: see *Matthews* v. *Matthews*, [1912] 3 K.B. 91; *McLachlan* v. *McLachlan*, [1935] S.A.S.R. 253; and *Jones* v. *Jones*, [1924] P. 203.

(*b*) A separation order may not be made by mutual consent: see *Keast* v. *Keast*, [1934] N.Z.L.R. 316, G.L.R. 292; and *Harriman* v. *Harriman*, (1909) 78 L.J. (P.) 62. The Court must, in all cases, be satisfied that there exists a statutory ground for the making of the order.

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2. Income-tax.—*Contributor to Company Superannuation Fund—Withdrawal of Amount on Retirement in lieu of Annual Payment—Whether Assessable.*

QUESTION: A client has been contributing to a company superannuation fund for many years and is now about to retire. He considers waiving his right to superannuation on the usual terms, and desires to draw the full sum to which he is entitled, in lieu of annual payments during his lifetime. If he leaves this sum on deposit with the company and draws it by instalments, plus interest on deposit, to what extent are the instalments subject to taxation?

ANSWER: Capital payments made out of a superannuation fund do not constitute assessable income in the hands of the recipient. Moneys paid out of a superannuation fund to the members of the fund are not regarded as payments in respect of service or employment within the meaning of s. 79 (1) (*b*) of the Land and Income Tax Act, 1923. The fact that the capital sum has not been drawn in a lump sum, but is left on deposit with the company and is drawn by instalments does not alter the position—the instalments are instalments of capital.

The interest accruing on the capital deposit is, of course, income from an investment, and is assessable.

3. Power of Attorney.—*Power to Mortgage Land—Whether including Power to renew Mortgage.*

QUESTION: A. is the attorney of B. The power gives A. express power to mortgage land, but is silent as to renewing of mortgages. The power is not in the universal form. A. desires to renew an existing mortgage of land, which in the first place was executed by B. himself. It would be expensive and highly inconvenient to pay off the mortgage and get another one from another mortgagee. Can A. execute the necessary renewal or extension of the term?

ANSWER: In the circumstances outlined, it is submitted that A. can execute the renewal: see *Cornford* v. *Gower*, [1936] N.Z.L.R. 1, G.L.R. 14.

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4. Stamp Duty.—*Lease—Endorsement of Ratification and Confirmation.*

QUESTION: A. and B., trustees, execute a memorandum of lease dated June 1, 1943, to C., for a term of four years from March 31, 1943. Subsequently there is endorsed on the lease an instrument of confirmation and ratification, executed by D. and E., the beneficiaries under the trust: the ratification and confirmation is attested by E., a solicitor, who adds his occupation and address. What stamp duty, if any, is the confirmation and ratification liable to?

ANSWER: Although a mere consent is not liable to stamp duty—*Goodall's Conveyancing in New Zealand*, 95—a formal confirmation and ratification appears to be on a different footing.

In the leading English case, *Reg.* v. *Morton*, (1873) 42 L.J.M.C. 58, 61, it is stated: An instrument "must be treated as a deed if it confers any right or passes an interest, or is a confirmation of an act which confers a right or passes an interest" or gives a title or authority"; see also *10 Halsbury's Laws of England*, 2nd Ed. 163, para. 199. The lease itself when registered will be a deed: s. 35 of the Land Transfer Act, 1915, and a legal lease can be created only by deed. It would be reasonable to suppose therefore that the Courts would construe a ratification and confirmation of a deed as a deed also, if attested with the statutory formalities.

For stamp-duty purposes the instrument of ratification and confirmation is a separate instrument from the lease itself: s. 60 of the Stamp Duties Act, 1923, and *Prudential Assurance Co., Ltd.* v. *Commissioners of Inland Revenue*, [1935] K.B. 101.

The appropriate duty on the confirmation and ratification appears to be 15s. under s. 168 of the Stamp Duties Act, 1923.

RULES AND REGULATIONS.

Rotorua Trout-fishing Regulations, 1939, Amendment No. 1. (Fisheries Act, 1908.) No. 1943/137.

Servicemen's Powers of Attorney Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/138.

Trout-fishing (Waimate) Regulations, 1937, Amendment No. 3. (Fisheries Act, 1908.) No. 1943/139.

Trout-fishing (Waitaki) Regulations, 1937, Amendment No. 5. (Fisheries Act, 1908.) No. 1943/140.

Shipping Survey and Deck Cargo Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/141.

Age-benefits and Invalids' Benefits (Reciprocity with Australia) Act Commencement Order, 1943. (Age-benefits and Invalids' Benefits (Reciprocity with Australia) Act, 1943.) No. 1943/142.

Electoral Regulations, 1928, Amendment No. 3. (Electoral Act, 1927.) No. 1943/143.

Revocation of the Social Security and Pensions Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1943/144.

Dentists Employment Order, 1943. (Industrial Man-power Emergency Regulations, 1942.) No. 1943/145.

War Injuries to Civilians Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/146.

Aliens Emergency Regulations, 1940, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1943/147.

Electoral (Members of the Forces) Regulations, 1941, Amendment No. 1. (Electoral Amendment Act, 1940.) No. 1943/148.

Quarantine (Armed Forces) Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/149.

Hairdressers (Health) Regulations Extension Notice, 1943, No. 3. (Health Act, 1920.) No. 1943/150.

United States Emergency Regulations, 1943, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/151.