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SOLDIERS', SAILORS', AND AIRMEN'S WILLS.

WE have previously dealt with this subject. In the article which appears in Vol. 16 of the JOURNAL, at p. 148, we considered the law as it stood in 1940, and principles on which wills that came within s. 11 of the Wills Act, 1837, were admitted to probate. We propose now to continue consideration of the same subject, with reference to the decisions which have been given during the present war. A comparison with the old cases shows that the extension of the scope of hostilities, and the conditions of modern war, have greatly extended the law as it developed through the Napoleonic Wars, the Crimean War, the Boer War, and the Great War of 1914–18.

The first case to come before the Courts in the present war period was *In re Gibson*, [1941] P. 118*n*, [1941] 2 All E.R. 91, in which probate of a will purporting to be a "soldier's will" was refused. The deceased was killed in an air raid on October 4, 1940, when his house was demolished by a bomb. He was in the Army Dental Corps, and, at the time of his death, was living in his own house in a town in England. Henn Collins, J., said that the deceased had never been parted from civil surroundings; and if he acceded to the motion for probate of his will, every Home Guard would be entitled to the privileges given by s. 11 of the Wills Act. He added:—

> I can understand the privilege being extended to a man mobilized for service abroad or told to go to a certain place for embarkation, but a soldier who is carrying out peace-time duties, although he is under military authority, is no more a fighting soldier because he is in the Army, than an ordinary civilian, who, in the circumstances of the present war, may be said to be in the front line of the fighting. The foundation of the rule is that a man is parted from civil surroundings, and the deceased never was.

Before leaving this case, we draw attention to the most recent application made in England relative to s. 11. As reported in the *Law Times Journal*, Vol. 196, p. 166 (November 6, 1943), Lord Merriman, P., refused to admit to probate as a soldier's will instructions given by a Home Guard to his solicitor. The deceased was accidentally shot dead on August 1, 1941, while giving musketry instruction to recruits. The executor put forward a will properly executed and attested on May 29, 1940. The deceased had sent other instructions to his solicitor on July 25, 1941, and these were sought to be admitted to probate as a "soldier's will." His Lordship pronounced for the will of May 29, 1940, and held that the testator was not a soldier in such circumstances as to render the instructions to his solicitor admissible as a "soldier's will." (It should, we think, be noted that s. 11 requires that the "soldier" should be "in actual military service" at the time of making his will, and not at the time of his decease. It may well be that if a Home Guard, on duty during an air-raid, scratched his testamentary dispositions on his steel helmet, and was killed during the course of that raid, the decision might well be contrary to that given by Lord Merrivale, P., or by Henn Collins, J.)

In New Zealand, a member of the Home Guard is a member of the Defence Forces, and Regs. 3, 6, and 9 of the Soldiers' Wills Emergency Regulations, 1939 (Serial No. 1939/276), apply to him. He is in the position of a "part-time" soldier, and in addition to the privileges granted him by those regulations, we think that if his testamentary dispositions were made in a form otherwise invalid while he was on duty, and he was killed in the course of duty, the privilege of s. 11 of the Wills Act, 1837, would be extended to him.

In *In re Spark*, [1941] P. 115, [1941] 2 All E.R. 782, the deceased, a Territorial, was mobilized on September 1, 1939. He saw a solicitor on the same day, and gave instructions for a will; but this will, made in accordance with the ordinary provisions of the Wills Act, was never executed. When he was in camp, on August 5, 1940, he said to another soldier: "I wish my wife to have all I have in case I get killed." These words were sufficient to satisfy the necessary testamentary qualifications of a will, if, at the time he uttered them, he was a soldier "in actual military service" in terms of s. 11 of the Wills Act, and he was then in a position to obtain the benefit of the privilege conferred by that section. On August 7, 1940, enemy aircraft dropped bombs on the camp where he was stationed, he was severely injured, and, as the result of his wounds he died on the following day.

The learned Judge, Hodson, J., referred to some of the old cases which lay emphasis on the reason for the soldier's privilege being given by s. 11, that reason being that a soldier *in expeditione* or in actual military service, is usually *inops concilii* in that he has not usually the opportunity of obtaining legal advice. Here, the soldier had every opportunity, while on leave and otherwise, of obtaining such advice, as he was in England and in touch with his solicitor. But the learned Judge said that that consideration did not really assist very much in deciding whether a soldier

is in actual military service. He remarked that some of the cases—to which reference was made in our article in 1940—indicate that importance should be attached to the actual orders received by the soldier at a particular moment. For instance, it had been held in several of those cases that a soldier in England during the last war, who was under orders to go overseas, was in actual military service, the inference being that if a soldier had not been under orders to proceed overseas, the Court might have had considerable difficulty in allowing that the privilege would lie. The learned Judge then went on to extend the rule under present conditions of warfare. He said:

> It is quite clear that in this war the extent of military operations has been very much enlarged, in depth and in height, and circumstances are different now from those which existed in earlier wars. The scope of military operations is very much larger, and it seems to me that a soldier who is in camp (even though he is in England and not under orders to proceed overseas) is thereby a mark for enemy action, and is in a position in which he is "in actual military service" within the meaning of the section, just as if he were engaged with the enemy in circumstances which no doubt were envisaged by those responsible for the drafting of the Wills Act, 1837.

It was held that the will, in the form indicated, was entitled to be admitted to probate as having been made when the soldier was "in actual military service," he being killed by a direct enemy attack made on his camp within a day or two after making a statement that was relied upon as a valid soldier's will.

The most comprehensive judgment on the topic under notice given in England under present war-conditions, is *In re Rippon*, [1943] P. 61, [1943] 1 All E.R. 676. The deceased was a Territorial officer before the outbreak of the present war, and he was mobilized on August 25, 1939. On receiving, by telephone, orders to rejoin his battery stationed in England, he sat down and wrote the testamentary document before the Court. It was not properly attested. He then left home, served for a period in England, then in France, and, after Dunkirk, was posted as missing; and the War Office afterwards certified that he had been killed in action on, or shortly after, May 30, 1940. It may be noted that no state of war existed at the time when the deceased wrote the document of which probate was sought. In reply to an inquiry by Pilcher, J., the War Office certified that the deceased was called out for service and ordered to rejoin his unit because the Secretary of State for War was satisfied that his services were urgently required for ensuring preparedness for the defence of the realm against external danger; that the Territorial Army was embodied on September 1, 1939; that it and the regular army were mobilized on the day following; and that the deceased, on August 25, 1939, was not "on active service" within the meaning of s. 189 (1) of the Army Act.

The learned Judge, after considering the relevant decisions, and distinguishing the meanings of "in actual military service," and "on active service," said that it was common knowledge that the international situation was, on August 25, 1939, extremely critical, and the situation which prevailed during the last week of August, 1939, was totally different from any which existed in Great Britain during the Napoleonic Wars. The words "external danger" connote "invasion" or "aerial bombardment." Attributing to the words of s. 11, "in actual military service," their ordinary and natural meaning, His Lordship had little hesitation in saying that an officer in command of a battery, who is ordered to rejoin his battery immediately, because the competent military authority considers his presence with his battery is urgently required to ensure preparedness against aerial attack or invasion, is "in actual military service." Moreover, there was nothing in any case, in which the meaning of those words had been considered, which precluded him from so finding. He concluded:

> In my opinion, whether or not a soldier is "in actual military service" so as to enable him to make a privileged will, must depend on the facts of each case and the circumstances which exist at the time. In the present instance, I think that Major Rippon was ordered, on August 25, 1939, to take up duties which constituted him, when performing such duties, "a soldier in actual military service," and having made his will after he received such orders, he was, in my opinion, on the authority of the decisions of Sir F. H. Jeune in *In the Goods of Hiscock*, [1901] P. 78, and in *Gattward* v. *Knee*, [1902] P. 99, at the time when he made his will "in actual military service."

The will was, therefore, a privileged will, valid under s. 11 of the Wills Act, 1837; and administration with the will annexed was granted to the applicant.

We now come to a recent consideration of the words "in actual military service" with reference to events nearer home: *In re Rumble* (p. 28, *post*). On November 6, 1940, the deceased was called up for service with the New Zealand Territorial Force, and attested in December, 1940. He was called up in the Seventh Ballot for overseas service; and on May 20, 1942, he executed a will in the ordinary way, appointing the Public Trustee his executor. He entered Trentham Military Camp on May 29, 1942. In a letter-card addressed to the Public Trustee on June 25, he said he had decided to change his will and leave all he possessed to his future wife, and that any previous will should be cancelled. He also wrote to the young lady referred to and told her that he had written to the Public Trustee and changed his will which now left her everything he possessed. On July 1, he died at Trentham Camp by his own hand.

The Public Trustee applied for probate of the will of May 20, 1942; and in his application disclosed the existence of the letter-card and letter, and said that two solicitors had advised the young lady that the documents did not constitute a "soldier's will," valid under s. 11 of the Wills Act, 1837. The learned Chief Justice minuted the papers to the effect that a memorandum should be submitted as to the validity or otherwise of the letter and letter-card as a "soldier's will." Counsel for the Public Trustee accordingly set forth in a memorandum the relevant cases, and submitted, in view of the decision in *In re Spark* (*supra*), that the Court might hold that, at the time when the deceased wrote the letter-card and letter, he was a soldier "in actual military service." At the suggestion of His Honour, the matter was argued before him, all the parties concerned being represented.

In the course of his interesting judgment, the learned Chief Justice said it had been properly admitted by counsel that the letter-card and letter constituted a valid soldier's will, if the deceased was, at the time when they were written, a "soldier in actual military service," within the meaning of s. 11 of the Wills Act, 1837. His Honour agreed that since the decision in *Drummond* v. *Parish*, (1843) 3 Curt. 522, 163 E.R. 812, the authorities showed an increasingly liberal interpretation of the words "in actual military service," this being necessitated by the change in the methods of

waging war, the enlargement of the scope of operational warfare, the dangers of bombardment from the air as well as the sea, the possibilities of invasion in ways never previously contemplated, and the necessity of having large forces available and mobilized to defend the country against any such bombardment or invasion. After considering the reported decisions, including *In re Spark*, *In re Gibson*, *and In re Rippon* all *cit. supra*, decided during the present war, the learned Chief Justice said that it remained to examine the facts of the case before him to see whether it came within the decision of Sir Francis Jeune in *In the Goods of Hiscock* (*supra*), or of Hodson, J., in *In re Spark*, or of Pilcher, J., in *In re Rippon*. He then went on to examine the facts, and the regulations relative to the calling up of men for the Territorial Force and for overseas service. He said:

> It is necessary to consider New Zealand's position in June, 1942, relative to the war. On January 7, 1942, consequent no doubt upon the entry of Japan into the war the Governor-General by Proclamation called out "for military service for purposes of defence in New Zealand" as from January 10, 1942, certain parts of the Defence Forces, and the forces so called out included the Territorial Force: *1942 New Zealand Gazette*, 43. During part of the year 1942—and this position obtained during the month of June—it was considered by the authorities that the Dominion was in peril of bombardment by Japanese forces from both the air and the sea, and of invasion by either air-borne or sea-borne forces. Precautions were taken to meet such perils. Camps were established, the coasts manned, and other necessary precautions were taken. The country had to be prepared to meet potential hostilities; and the Territorial Force was called up by Proclamation in January, 1942, "for military service for purposes of defending New Zealand." In other words, the men were called into camp for the purpose of meeting threatening hostilities and of undergoing the training necessary for that purpose. New Zealand was in peril of attack and in a state of defence: *In re Taylor*, [1933] 1 I.R. 709, 720. Any camp in which soldiers were established, whether already trained or in the course of being trained, was a military objective; and if, while the deceased was in camp at any time up to his death, he had been killed by a bomb dropped from hostile aircraft, can it be doubted that he would have been regarded for the purposes of s. 11 of the Wills Act as a soldier in actual military service? In the event of invasion or other hostilities, he was liable so long as he was in camp to be required at a moment's notice to go to any place in New Zealand, which it might have been necessary to defend.

In those circumstances, His Honour concluded, while the position might have been altogether different but for the entry of Japan into the war, he thought that the deceased while he was in camp at Trentham was a soldier *in expeditione*, or "in actual military service" within the meaning of s. 11 of the Wills Act, as interpreted by modern authority, and that the letter-card and letter referred to constituted a valid soldier's will.

His Honour accordingly withheld probate of the will of May 20, 1942. It is, therefore, left to the young lady mentioned in the letter-card and letter, or to the Public Trustee on her behalf, to apply for administration with will annexed. When this application is made, the question may arise as to whether the will of May 20, 1942, was validly revoked by the soldier's will consisting of the letter-card and letter. This interesting question was considered in Vol. 17 of the JOURNAL at p. 157, in relation to our legislation and emergency regulations.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1943.
September 15;
December 10.
Myers, C.J.
Blair, J.
Smith, J.
Johnston, J.
Fair, J.

In re **PATERSON (DECEASED), RENNICK v. GUARDIAN TRUST AND OTHERS.**

Trusts and Trustees—Will—Devises and Bequests—Income-tax—Social Security—Annuities bequeathed "free of duty and income-tax"—Method of calculating Income-tax payable by Trustee—Annuitant with other Income resident out of New Zealand—Rate of Tax increased by Addition of other Income—Whether Exemption confined to Impositions in New Zealand—Whether Annuities to be paid free of Social Security Charge and National Security Tax—Land and Income Tax Act, 1923, ss. 72, 73—Social Security Act, 1938, ss. 109, 118, 127—Finance Act, 1940, ss. 16, 17.

The testator by his will bequeathed "free of duty and income-tax" four annuities to named annuitants of whom to his knowledge at the date of his will and at the date of his death two were living in England, one in New South Wales, and one in the United States of America. In calculating the New Zealand income-tax to be paid by the trustee of the will the following circumstances arose:—

(*a*) An annuity alone was not subject to tax in New Zealand, but became so subject owing to the addition of annuitants' other income in New Zealand.

(*b*) An annuity was subject to tax and increased tax owing to the fact that the annuitant was not resident in New Zealand.

(*c*) An annuity alone was subject to tax in New Zealand, but the rate was increased by the addition of other income of the annuitant in New Zealand and by the additional income of the annuitant's husband in New Zealand.

The Court was asked to determine the following questions arising on the interpretation of the said will and the codicils thereto, and set out on originating summons:—

1. How should the trustee under the said will calculate the New Zealand income-tax which must be paid by the trustee under the direction contained in the said will in respect of the annuities bequeathed by the said will and codicils.

2. Whether the said direction entitles each of the annuitants as are resident outside the Dominion of New Zealand and are liable for income-tax in their respective countries of residence to payment by the trustee of both New Zealand income-tax and foreign income-tax on their respective annuities.

3. Whether the said direction entitles such of the annuitants as are liable to pay social security charge and national security tax to payment by the trustee of such social security charge and national security tax on their respective annuities.

Upon appeal from the judgment of *Kennedy*, J.,

Held, *per totam Curiam* (reversing *Kennedy*, J.'s, answer to Question 2), 1. That, on the construction of the whole will, the answer to the question should be that the trustee must pay not only the New Zealand income-tax but also other income-tax (if any) payable in England on the annuities of the annuitants resident there, payable in New South Wales on the annuity of the annuitant resident there, and payable in the United States of America on the annuity of the annuitant resident there.

In re Scott, *Scott* v. *Scott*, [1915] 1 Ch. 592; *In re Norbury*, *Norbury* v. *Fahland*, [1939] Ch. 528, [1939] 2 All E.R. 625; and *In re Hirst*, *Public Trustee* v. *Hirst*, [1941] 3 All E.R. 466, 166 L.T. 199, referred to.

In re Frazer, *Frazer* v. *Hughes*, [1941] Ch. 326, [1941] 2 All E.R. 155, distinguished.

2. (Affirming *Kennedy*, J., on Question 3) That the answer to Question 3 should be that the said annuities should be paid free of social security charge and national security tax.

de Romero v. *Read*, (1932) 32 N.S.W. S.R. 607; *Morris Leventhal* v. *David Jones, Ltd.*, [1930] A.C. 259, affg. (1928) 29 N.S.W. S.R. 70; and *In re Reckitt*, *Reckitt* v. *Reckitt*, [1932] 2 Ch. 144; *In re Hirst*, *Public Trustee* v. *Hirst*, [1941] 3 All E.R. 466, 166 L.T. 199; *In re Richards*, *Richards* v. *Richards*, [1935] N.Z.L.R. 909, G.L.R. 766; *In re Turnbull*, *Skipper* v. *Wade*, [1905] 1 Ch. 726, 732; and *In re King*, *Barclay's Bank* v. *King*, [1942] Ch. 413, 419, [1942] 2 All E.R. 182, 186, applied,

Held, by *Myers*, C.J., *Blair*, and *Smith*, JJ. (reversing *Kennedy*, J.) (*Johnston* and *Fair*, JJ., dissenting and agreeing with the answer given to Question 1 by *Kennedy*, J.), That the answer to Question 1 should be as follows: That, on the assumption that the annuity and also the other income of the annuitant is unearned income and with reference only to the income-tax levied under the Land and Income Tax Act, 1923, and its amendments, the amount of tax payable by the trustee under the will in respect of each annuity bequeathed in the said will or in any codicil thereto "free of duty and income-tax" is such proportion of the amount of such income-tax assessed in respect of the annuitant's total income, as the assessable income derived each year from the trustee by the annuitant bears to the annuitant's total assessable income after subtracting therefrom the special exemptions of £200 and £50 referred to in s. 74 of the Land and Income Tax Act, 1923, and its amendments.

Questions whether "income-tax" *simpliciter* includes social security charge and national security tax, and as to the effect of the change by the annuitant of his residence from one country to another after the testator's death, considered.

Ward and Co., Ltd. v. *The Commissioner of Taxation*, [1923] A.C. 145, N.Z.P.C.C. 625, applied.

In re Bowring, Wemble v. *Bowring*, [1918] W.N. 265; *In re Pettit, Le Fevre* v. *Pettit*, [1922] 2 Ch. 765; and *Richmond's Trustees* v. *Richmond*, [1935] S.C. (Ct. of Sess.) 585, distinguished.

Counsel: *Brash*, for the appellant; *A. C. Stephens*, for the first respondent; *Hay*, for the third respondent.

Solicitors: *Brash and Thompson*, Dunedin, for the appellant and second respondent; *Mondy, Stephens, Monro, and Caudwell*, Dunedin, for the first respondent; *Mazengarb, Hay, and Macalister*, Wellington, for the third respondent.

SUPREME COURT. Auckland. 1943. October 18; December 3. *Fair*, J.

COTTER v. MAHOOD.

War Emergency Legislation—United States Forces Emergency Regulations—"Misconduct in relation to . . . any United States force"—Whether confined to Persons or applicable also to Equipment, &c.—United States Forces Emergency Regulations, 1943 (Serial No. 1943/56), Reg. 14 (e).

Regulation 14 (*e*) of the United States Forces Emergency Regulations, 1943, made pursuant to the Emergency Regulations Act, 1939, applies to misconduct in relation not only to persons, but also to the equipment or property of the United States Government for the use of the United States Forces.

Counsel: *Robinson*, for the appellant; *Cleal*, for the respondent.

Solicitors: *M. Robinson*, Auckland, for the appellant; *V. R. S. Meredith*, Crown Solicitor, Auckland, for the respondent.

SUPREME COURT. Wellington. 1943. November 8; December 21. *Myers*, C.J.

STAPLES v. LOMAS.

Vendor and Purchaser—Sale of Land—Damages—House Property—"Vacant possession" to be given and taken on or before certain Date—Whether Vendor's Obligation absolute or conditional—Tenant's refusal to vacate in reliance on Fair Rents Act, 1936—Sale not completed—Vendor's doing best to make a good Title—Measure of intending Purchaser's Damages.

The plaintiff made an offer in writing to purchase L.'s house, which offer contained the following provisions:—

"Vacant possession shall be given and taken on or before 19th December, 1942 . . . You to give notice forthwith in writing to the existing occupants to vacate the premises and hand outside door-keys to me or to [his solicitors] as soon as possible. I am prepared to take possession earlier than 19th December if occupier sees a house to suit him."

The offer was accepted. The sum of £50 was paid in part payment of the purchase-money. The balance was to be paid on the date of vacant possession being given. The tenant honestly intended to vacate the premises, but being unable to find other suitable accommodation he took advantage of the Fair Rents Act, 1936. The plaintiff, relying on the tenant's statement of his intention to vacate, on entering into the said contract, sold his own house and agreed to give vacant possession the same day upon which he was to obtain vacant possession of defendant's house. The sale from the plaintiff was not completed owing to the tenant's refusal to vacate the premises.

The plaintiff sued the defendant in the Magistrates' Court for damages for breach of agreement and the action was removed into the Supreme Court.

Held, 1. That the obligation of the vendor was absolute, and not conditional upon the tenant quitting the premises.

2. That there had been a breach of contract by the vendor who had failed to make a good title.

3. That the vendor, having done his best to make a good title, the measure of damages was limited to the amount of the deposit (which had already been repaid to the plaintiff) and his expenses in investigating the title.

Bain v. *Fothergill*, (1874) L.R. 7 H.L. 158; *Fleming* v. *Munro*, (1908) 27 N.Z.L.R. 796; *Day* v. *Singleton*, [1899] 2 Ch. 320; and *Munro* v. *Pedersen*, [1921] N.Z.L.R. 115, G.L.R. 76, applied.

Counsel: *A. J. Mazengarb*, for the plaintiff; *J. Mason*, for the defendant.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiff; *J. Mason*, Napier, for the defendant.

SUPREME COURT. Wellington. 1943. November 11; December 21. *Myers*, C.J.

In re **RUMBLE (DECEASED).**

Probate and Administration—Soldier's Will—Actual Military Service—Member of Territorial Force called out in January, 1942, "for military service for purposes of defence in New Zealand"—Will was made by him in Camp on June 30, 1942—Whether then "on actual military service"—Distinction between that expression and "on active service"—Soldier's Wills Emergency Regulations, 1939 (Serial No. 1939/276) Reg. 6—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 11—Defence Act, 1909, s. 2—National Service Emergency Regulations, 1940, Amendment No. 12 (Serial No. 1942/188), Reg. 3—Defence Emergency Regulations, 1941 (Serial No. 1941/130), Reg. 8—Expeditionary Forces Emergency Regulations, 1940 (Serial No. 1940/1), Reg. 13.

A member of the Territorial Forces, which, by Governor-General's Proclamation (under the Defence Emergency Regulations, 1941) had been called out for military service for purposes of defence in New Zealand, who was in camp and made a soldier's will while New Zealand was still in peril of attack, was a soldier "in actual military service" within the meaning of those words in s. 11 of the Wills Act, 1837.

In re Goods of Hiscock, [1901] P. 78; *In re Spark*, [1941] P. 115, [1941] 2 All E.R. 782; *In re Rippon*, [1943] P. 61, [1943] 1 All E.R. 676; *Gattward* v. *Knee*, [1902] P. 99; and *In re Taylor*, [1933] I.R. 709, applied.

In re Gibson, [1941] P. 118*n*, [1941] 2 All E.R. 91, and *In re Grey*, [1922] P. 140, distinguished.

Drummond v. *Parish*, (1843) 3 Curt. 522, 163 E.R. 812, and *In re Booth*, [1926] P. 118, referred to.

Counsel: *Carrad*, in support of motion for probate of will of May 20, 1942; *Cleary*, for Thelma McDonald, sole legatee under the "soldier's will"; *Hay*, for the father, mother, brothers, and sisters of the deceased, beneficiaries under the will of May 20, 1942.

Solicitors: *Public Trust Office Solicitor*, Wellington.

COMPENSATION COURT. Dunedin. 1943. October 19, 20, 21. *O'Regan*, J.

WELSH v. OCEAN BEACH FREEZING COMPANY, LIMITED.

Workers' Compensation—Delay in commencing Action—Worker sending Case to his Union—No Action by Union—No reasonable Cause for Delay in issuing Writ—"Reasonable cause"—Workers' Compensation Act, 1922, s. 27 (1) (4).

A worker, injured by accident on January 26, 1942, who was aware of the period of limitation provided by the Workers' Compensation Act, 1922, and was attending to his ordinary business, remitted his case to the union of which he was a member. The union did not concern itself in any way with it. The writ was issued on July 14, 1943.

Held, That the plaintiff had no reasonable cause for the delay, and the action was out of time.

Counsel: *Prain*, for the plaintiff; *H. J. Macalister*, for the defendant.

Solicitors: *J. C. Prain*, Invercargill, for the plaintiff; *Macalister Bros.*, Invercargill, for the defendant.

MORTGAGES BY TRUSTEES.

Qualified Personal Covenants.

A trustee, or person in a similar position, may frequently have power to raise money on the security of the trust property. The power may be conferred by the trust instrument, or by statute—*e.g.*, the Administration Act, 1908, ss. 5, 64 (*a*); the Bankruptcy Act, 1908, s. 63 (*i*); or the Trustee Act, 1908, s. 91. In such a case, the mortgaged property is put forward as the substantial security, and the trustee-mortgagor, as is observed in a footnote on page 158 of *10 Encyclopaedia of Forms and Precedents*, 2nd Ed., "will (unless beneficially interested in the property) rarely be willing to covenant personally for payment of the debt." In fact, in that volume every precedent of a mortgage by trustees, executors, or administrators not merely omits any covenant for payment, but contains an express provision exonerating the borrowers from personal liability.

On the other hand, at the present time lenders and their advisers attach considerable importance to the remedy conferred by a covenant for payment, and the recent case of *Hope* v. *Public Trustee*, [1943] N.Z.L.R. 398, shews that they are justified. In that case trust lands were overtaken by the financial depression, prior mortgagees had sold the lands, leaving no surplus for the puisne mortgagee, and but for the personal covenant the latter would have lost her whole investment. It may well be that a trustee seeking to borrow without such a covenant might find great difficulty in raising a loan.

One solution is to put forward a beneficiary who, being interested, is willing to covenant, and whose personal liability is acceptable to the lender. But if the beneficiaries are under age, or not acceptable to the lender, or for other reasons, this solution will not or may not be available. Moreover there is, under the Land Transfer Act, the technical inconvenience that in strictness only a person with an interest in the land to be mortgaged ought to be a party to the registered instrument: *Nixon* v. *Fetzer*, (1910) 13 G.L.R. 481. It is understood however that in practice the District Land Registrars do not enforce this principle with any great strictness; at any rate, in the common case where the land is vested in a wife, and the personal liability of the husband is also required, no objection is raised to the simple course of preparing a mortgage with joint and several covenants by wife and husband. There would seem to be no practical reason for distinguishing cases where the matrimonial tie does not exist, and insisting in such cases that the covenants be given by a collateral deed off the title.

Where no other covenanting party can be found, and a covenant for payment is insisted on, there is a middle course: that of qualifying the liability. The value of a qualified covenant may not indeed be very great; the footnote already quoted, relating to a mortgage by executors, goes on to say: "There is no advantage in inserting a covenant by them as executors only, as such covenant will not enable the mortgagee to prove against the estate for the debt: *Farhall* v. *Farhall, Ex parte London and County Banking Co.*, (1871) L.R. 7 Ch. 123." The cases show, however, that the framing of the qualifying words is a task requiring considerable care, lest they fail altogether of their intended effect.

Where it appeared from the mortgage that the borrowers were trustees, and they covenanted jointly and severally "as such trustees, but not so as to create any personal liability on the part of them or either of them," the effect of the qualification would, if valid, have been not merely to limit but to destroy the covenant; there was a repugnancy between the covenant and what was in effect its proviso; and according to the regular rule of interpretation the covenant was consequently held good and the proviso of no effect: *Watling* v. *Lewis*, [1911] 1 Ch. 414. So in an earlier case, *Furnivall* v. *Coombes*, (1843) 5 Man. & G. 736, 134 E.R. 756, certain persons had entered into a covenant that they and their successors, churchwardens and overseers of the parish, would pay certain moneys, the covenant being followed by a proviso shortly to the effect that nothing in the document should extend to any personal covenant of the said persons in their private capacity, but should be binding and obligatory upon churchwardens and overseers of the parish for the time being as such churchwardens and overseers. The covenanting parties were held liable as if the proviso had not been there.

On the other hand, a covenant to pay "out of the moneys which should come to his hands as such trustee as aforesaid" was sufficient to protect the mortgagor against absolute personal liability: *Mathew* v. *Blackmore*, (1857) 1 H. & N. 762, 156 E.R. 1409. In this case the form of judgment to be entered in an action on the covenant was not adverted to. From *Gordon* v. *Campbell*, (1842) 1 Bell Sc. App. 428, a decision on Scots law, approved in a dictum in the English case of *In re Robinson's Settlement*, [1912] 1 Ch. 717, it would seem that the judgment should be one that would bind the mortgagor in respect of the trust fund in hand at the date of issue of the writ. That a covenant to pay may be limited in this manner by English as well as Scots law appears from the preliminary observations in the judgment of Lord Cairns in *Muir* v. *City of Glasgow Bank*, [1879] 4 App. Cas. 337.

In the case of *Hope* v. *Public Trustee* (*supra*) the mortgagor was the Public Trustee, borrowing as executor, who gave a covenant to repay the principal sum and to pay interest, with the addition that "the Public Trustee shall be liable hereunder only to the extent of the estate effects and credits of the estate of J. S. for the time being in his hands." This clause is, it is submitted, capable of bearing the meaning that the Public Trustee was to be under a personal liability, but a limited one; between the covenant and the limitation there would be no total incompatibility; and on the authority of *Mathew* v. *Blackmore* the terms of the mortgage could in law receive their face value. That however was not the construction placed on the document; the judgment says: "I think that the intended meaning of the clause—and the real meaning—is merely that the Public Trustee was to have no personal liability and that there was no liability attaching to the Public Trust Office" (with a further interpretation to be referred to hereafter). This finding necessarily brings the case within *Furnivall* v. *Coombes* and *Watling* v. *Lewis*. Conformably with the finding, when in the event judgment went for the plaintiff there was no direction that execution should be limited

de bonis testatoris, or in any other way than *de bonis propriis*.

Seeing that what the executor borrowed was actually used to pay death duties and debts, he was entitled to an indemnity out of the estate; and the mortgagee would have been entitled, had she sought that relief, to be put in his place by subrogation—subject indeed to certain special features of the case not material to the present discussion. The right of subrogation in such cases is declared by *Re Johnson*, (1880) 15 Ch.D. 548. A claim based on subrogation would of course have involved establishing the right of indemnity, and this would have required proof that the money borrowed had been properly applied (this was where the mortgagee failed in *Farhall's* case). Subrogation however was not the remedy the mortgagee sought; her action was against the borrower personally on his personal covenant, and it succeeded.

It was not suggested that the clause already quoted amounted to anything in the way of an equitable mortgage over assets in the estate other than the land mortgaged. Although no particular form of words is necessary to create an equitable charge, and intention to do so must no doubt appear, and it would be somewhat difficult to spell a charge out of a qualification of a personal covenant, the whole intention of which is to declare what rights the mortgagee shall not have, not what she shall have. Moreover, an equitable charge over other property than the mortgaged land would be, to say the least, irregular and out of place in a Land Transfer security.

The judgment goes on, after the passage already quoted, to give a further explanation of the exonerating clause, using these words: "that is to say, the plaintiff would not be entitled to recover more from the Public Trustee than he could recover from Swinson's estate under his right of indemnity." A later passage reads: "If in his" (the mortgagor's) "administration of the estate under Part IV" (of the Administration Act 1908) "no funds come into his hands from which his right of indemnity could be satisfied, then he would have a complete answer by reason of the clause in the mortgage to a claim by the plaintiff against him personally." But if, as had already been held, and was to be held by the terms of the judgment directed to be entered, the qualification meant that the Public Trustee was to have no personal liability, it was incompatible with the covenant and had no effect at all. If the mortgagee's rights were effectively thus restricted, the judgment would have been correspondingly restricted.

The real difficulty is to reconcile the case with *Mathew* v. *Blackmore* and *In re Robinson's Settlement*. Once it is accepted that the form of exonerating words is not to be classed with the forms approved in those cases, the terms of the judgment directed to be entered cannot be questioned. The lesson to be drawn is that an executor, administrator, or trustee who, in covenanting for payment, seeks to limit his liability, incurs a grave risk if he departs from the forms that have been held to have the effect of limiting, without negativing, his personal liability. How much care is needed is shown by the decisions that trustees who covenant "as such trustees" are held to full personal liability (*Watling* v. *Lewis*), whilst those who covenant "as such trustees but not otherwise" successfully limit their liability (*In re Robinson's Settlement*). A convenient reference to the qualifications that do not wholly contradict the covenant, and are thus allowed to have their ostensible effect, appears in *2 Key and Elphinstone's Conveyancing Precedents*, 14th Ed. 31, footnote (*n*).

WAR CRIMINALS AND THE NEUTRALS.

The Position in International Law.

By H. A. Munro.

Rumours that Goering and his fellow-gangsters hold estates and fortunes in neutral countries revive problems which remained unsolved when the unlooked-for end of the last war allowed the Kaiser's flight to Holland. Napoleon was held in custody while the Allies proclaimed that "Bonaparte has placed himself out of the pale of civil and social relations, and, as the general enemy and disturber of the world, he is abandoned to public justice," but a hundred years later the chief criminal had fled when the Prime Minister's Statement of Policy and Aims declared that "the Kaiser must be prosecuted. The war was a crime. . . . Is there to be no punishment? . . . The men responsible for this outrage on the human race must not be let off because their heads were crowned when they perpetrated the deed." Seven months later Mr. Lloyd George said that the Allies had decided that the Kaiser and other war criminals should be tried in London before an Inter-Allied Tribunal. He continued: "They will get a fair trial, all of them, an absolutely fair trial. It is due to the honour of the Allied countries that the trial should be fair. . . . Our object is to make these things impossible for the future." When it was suggested that the Kaiser should not be tried in London, Mr. Lloyd George replied: "What right have we to assume that a neutral country would choose to be the scene of a prosecution of that kind? . . . The Kaiser would never have been subject to trial if it had been left to the neutral countries."

The trouble was, however, that Holland would not surrender the imperial refugee; his crimes were not recognized in Dutch law. British interest cooled-off, and in June, 1920, Mr. Lloyd George said that he did not think that the Kaiser was worth any more bloodshed, and that it was not desirable to use force. Eventually the subject was dropped with a final statement that "no useful purpose would be served by a trial *in contumaciam*—that is, without the person incriminated being present, and without the possibility of carrying into effect the punishment . . . if he were found guilty." Here is material for those who feel cynical about Government declarations that the criminals of this war will be tried, but it is to be hoped that history has taught us a lesson, and "this time," as the Russian, Ilya Ehrenburg, recently wrote, "not

only the diplomats, but the peoples, raise the question of punishment. People who speak of forgetting would be classified not as humanitarians, but as hypocrites."

THE UNITED NATIONS' NOTES TO THE NEUTRALS.

It might be supposed that the only way in which refugee criminals could be recaptured would be by procedure under Extradition Treaties, but that the issues go deeper than a technical matter of extradition has been made plain in the recent Notes to Neutrals by Great Britain, the United States, and the Soviet Union.

On July 30, 1943, President Roosevelt said at a Washington Press conference:

> "On October 7, 1942, I stated that it was the intention of this Government that the successful close of the war shall include the provision for the surrender to the United Nations of the war criminals. The wheels of justice have turned constantly since those statements were issued, and are still turning. There are now rumours that Mussolini and his Fascist gang may attempt to take refuge in neutral territory. One day Hitler and his gang, and Tojo and his gang, will be trying to escape from their countries. I find it difficult to believe that any neutral country would give asylum or extend protection to any of them. I can only say that the United States would regard action by a neutral government in according asylum to the Axis leaders or their tools as inconsistent with the principles for which the United Nations are fighting, and that the United States Government hopes that no neutral government will permit its territory to be used as a place of refuge, or otherwise assist such persons in any effort to escape their just deserts."

This statement, which was officially transmitted to the Argentine, Portugal, Spain, Sweden, Switzerland, Turkey, and the Vatican, was followed by an announcement in London that a British Note was being sent to those countries.

The declaration of the Soviet Government, addressed to Sweden and Turkey, was almost identical with the British Note, which was as follows:

> "In view of the developments in Italy, and the possibility that Mussolini and other prominent Fascists and persons guilty of war crimes may attempt to take refuge in neutral territory, H.M. Government feel obliged to call upon all neutral countries to refuse asylum to any such persons, and to declare that they will regard any shelter, assistance, or protection given to such persons as a violation of the principles for which the United Nations are fighting, and which they are determined to carry into effect by every means in their power." The determination of the United Nations to secure possession of the criminals is further evidenced by the statements made after the Moscow Conference that "the three Allied Powers will pursue them to the uttermost ends of the earth, and will deliver them to the accusers in order that justice may be done."

The British and United States' Notes differed in their terms, and the former concentrated on the Italian position, but the verbal differences are probably immaterial, although they may have caused doubts among neutral diplomats. A more important point is that the Notes do not define what is meant by "war crimes," but it is to be observed that this concerted warning from the three greatest Powers among the United Nations is based, not on extradition, but on a broad conception of the duty of civilized States to refuse hiding-places to the enemies of mankind. No attempt has been made to dictate to the neutrals, or to infringe the privileges of sovereignty, but they are asked to recognize that, in sheltering murderers and despoilers, they would be violating the highest principles of the law of nations. On August 1, 1943, Berlin radio declared that the Allied notes constituted "an open violation of the fundamental principles of neutrality," and that "the right of asylum is one of the rights of sovereignty," but, as was pointed out by the Swiss paper *Volksrecht* on August 2, 1943 (quoted by the *Manchester Guardian*), "those who acknowledged neither tolerance nor rights of sanctuary, and who flooded other countries with refugees, perhaps secretly hoping thereby to weaken the internal strength of those countries, cannot simply expect the traditional right of sanctuary to be exercised on their behalf. Each country's individual interests give it the right to treat 'undesirable aliens' as such."

IS THERE A RIGHT OF ASYLUM IN NEUTRAL COUNTRIES?

While a practice has long existed for States to afford refuge to foreigners who reach their frontiers, there is in International Law no absolute right of asylum. Every State is sovereign, and entitled to decide for itself in its absolute discretion whether it will admit aliens to its territories, and how long it will allow them to stay there. A fugitive who tries to take refuge is not entitled to enter or remain if the State decides to eject him, *1 Oppenheim's International Law*, 5th Ed., p. 537; and *Musgrove* v. *Chun Teeong Toy*; [1891] A.C. 272. In another English case (*R.* v. *Home Secretary, Ex parte Duke of Chateau-Thierry*, [1917] 1 K.B. 922, 924), Sir F. E. Smith, Attorney-General (as he then was), said in argument:

> "Every country which extends its hospitality to an alien can terminate the hospitality, and can do so by sending the alien back to his own country."

It is, however, clear that no State has a right to invade the rights of another State by dispatching agents over the border to seize a refugee; this is illustrated by the case of Jacob-Salomon, who escaped from Nazi Germany to Switzerland, but was seized and deported by Germans. For once in his career Hitler accepted legal procedure by submitting to a Swiss request for arbitration, but at an early point in the proceedings Germany admitted that she had no case, and handed Salomon over. It would, however, have been completely within the rights of Switzerland to deliver a refugee to Germany, and the legal position is not affected by the fact that many States, particularly Great Britain and Switzerland, have an age-long and valuable tradition of granting refuge to the persecuted; it is recorded that some of the Parliamentary leaders who signed the death warrant of Charles I found safety in Switzerland, and that the demand by Charles II for their surrender was met by a blunt refusal.

THE LORD CHANCELLOR'S STATEMENT.

Lord Simon thus based himself on established law when he stated on behalf of the British Government on October 7, 1942, that

> "there is not, as many people suppose, any private right, recognized in International Law, called the right of asylum. That is to say, the fugitive—the criminal—who manages to get over the border into some other country, is not thereby by International Law entitled to stay there. It is quite another question to ask whether the country to which he has fled will be willing to give him up, and no doubt a country is obliged to give a fugitive up only if the case falls within an existing extradition treaty, which defines the relations between the country which has got him and the country which wants him. . . . It is perfectly competent for the country which receives the criminal, whether there is an extradition treaty or not, if that country thinks that it will be fulfilling its duty to the world, or if its conception of public policy requires it, or justifies it, to hand the criminal over."

Whatever the nature of the replies from the neutrals, the United Nations have proclaimed that their participation in the war is based on clear principles of justice; this principle the neutrals are expected to recognize, by refusing to treat Axis refugees as persons entitled to the privileges of asylum and safety.

(To be concluded.)

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

(*Continued from p. 9.*)

Use of Supreme Court District Boundaries to Determine Venue.—The following letter from the Rules Committee was circulated to the District Societies in September:—

At a meeting of the Rules Committee, held on 17th September, a proposal was received to amend the provisions of the Code of Civil Procedure that make the boundaries of Supreme Court districts an element in deciding where a statement of defence is to be filed and where a trial is to be held; and in lieu of the present requirements to provide that the office of the Court for filing statement of defence and the place of trial be, in the general case, where Rule 4 and Rules 6 or 7 apply, those most convenient of access from the residence of the defendant; and in the particular case dealt with by Rule 9, those most convenient of access from the residence of the plaintiff.

It was resolved that the New Zealand Law Society be asked to inform the Committee of the views of the profession on the proposal.

Replies had been received from nine Societies, four only favouring the amendment.

The matter was discussed at length, members being generally of opinion that any possible difficulties might be overcome by alterations to the existing boundaries of Supreme Court districts although it was recognized that here again a great deal of dislocation would be caused.

It was decided to inform the Rules Committee that the Council had no recommendation to make.

Death Duties Act, 1921, s. 84 (5).—The Otago Society wrote as follows:—

The Council has directed me to draw your attention to what appears to be an unintentional omission from Section 84, Sub-section 5, of the Death Duties Act, 1921. In Section 84, Sub-section 2, it is noted that provision is made for the exemption in respect of Estate Duty to extend to a lineal descendant of the deceased. There is no corresponding exemption under Sub-section 5, which deals with the instance of the Succession Duty, although there does not appear to be any logical reason why any distinction should be made. In fact, it would be reasonable to assume that a lineal descendant should have the benefit of the exemption rather than a lineal ancestor.

Would you please place this matter before your Council for consideration and representation to the proper authority.

Members were of opinion that there appeared to be an omission and decided to refer it to the Government for the necessary action.

Translation of Native Processes.—The Taranaki Society wrote as follows:—

I enclose a memorandum which has been prepared by one of our members, and which I have been directed to submit to the New Zealand Society for its consideration and any action which it deems necessary to take.

Enclosure:

In various statutes we find a provision that summonses, etc., for service on members of the Maori race shall be translated, *e.g.*, section 265 of the Justices of the Peace Act, 1927, section 4 of the Magistrates' Courts Act, 1928, and Rule 17 of the Imprisonment for Debt Limitation Act, 1908. These have mostly been brought forward in consolidations and are a relic of the time when Court proceedings were not known or appreciated by the Native, and the reason was no doubt that the Native might not understand what Court proceedings are being taken against him and with a transaction he might not at a later date claim that he did not realize what was happening.

It is difficult to follow Rule 17 of the Imprisonment for Debt Limitation Act, 1908, which provides that a judgment summons for a "Maori or foreign defendant" shall be accompanied by a translation unless the Court is satisfied at the hearing that the defendant has a sufficient knowledge of the English language. These rules are silent as to the need for translation of the judgment summons order and the warrant of commitment, and in most districts it has been the custom to translate the judgment summons, the judgment summons order, but not the warrant. Latterly some ambitious Clerks of Court have insisted on the warrant also being translated. The only authority for this is the general rule that the judgment summons procedure is a branch of the work of the Magistrate's Court and so section 4 of The Magistrates' Courts Act applies and all proceedings must be translated. If this is so, one wonders why Rule 17 was inserted.

In the Magistrates' Court the provision has in recent years caused expense, delay, and vexation. The expense is that of paying 5s. for every process to be translated, with the exception of those for which no official form is provided, when the charge is 10s., or more. A summons for possession of a house, for example, is one case where there is no officially translated form and the interpreter translates the whole form each time. With freezing works and other factories mainly manned by Maoris during the war period there are many of these processes. With an ordinary debt going through to the warrant stage there is now an expense of £1, with the bother of sending papers to the interpreter four times. The delay is considerable when one remembers that in many districts there are not now licensed interpreters, for example, in the whole of Taranaki there is only one man earning a living as an interpreter and Native agent. The delay is also of moment in judgment summons procedure when one remembers that there is only one year in which to enforce the order. With the time taken in having the order drawn up and served by the Court, in getting it translated and the order served and then the further delay while the warrant is being translated a considerable part of the year is taken up through Court procedure, and often the warrant expires before it has been executed. As for vexation, it is somewhat insulting to attach a translation to a summons on a Native who has matriculated and does not speak Maori, and he resents it. It is no use endeavouring to explain that it is the law; he always insists that he does not want translation and will not pay for it.

Nor is the Maori who is convicted for riding a cycle without a light at night happy to know that in addition to a 10s. fine and 10s. Court fees he must pay a 5s. translation which the pakeha who was with him is not called to pay. As a matter of fact, informants have been known to call Maoris by their European nicknames to permit the summonses for these trivial offences to be issued without translation.

The question is whether any great injustice would be done to the Natives if the provision for the translation were abolished. When the Magistrates' Courts Act was consolidated in 1928 it was reported that the first drafts of the Bill contained no provision for translation, but the interpreters found this out and immediately raised such a clamour that the old provision was reinserted. It is useless, therefore, to go to interpreters and ask them whether translations of four different processes are necessary to collect a grocer's bill for £1. Undoubtedly the interpreter would answer that the Maori does need a translation. Whether he would go to the extent of saying that the Maori does not recognize a summons or a judgment summons I very much doubt.

One other way to consider the matter is whether in other branches of life the Native is afforded the same protection. For example, we often issue summons against Natives for money due under hire-purchase agreements, and while the actual agreements are not translated the summons claiming a simple and direct sum of money must be. In the one case in the last twenty years in Taranaki where a Native jury tried an accused the Judge permitted the jury to hear the evidence in English only. The intricate provisions of social security and of income-tax law and regulations are all issued in English, and it has never been suggested that they should have translations published.

The most recent cause for dissatisfaction has been the provision in the Matrimonial Causes Rules, 1943, of section 18, which provides that the provisions of Rule 588 of the Supreme Court Code shall apply to Natives. This means that if a divorce is applied for against a half-caste Maori the papers must be laboriously and expensively translated by an interpreter. It is quite true that when the half-caste was married there was no mention of an interpreter, and I do not think that even an interpreter would suggest that a Native could receive divorce papers without knowing what they were about and that the consultation of a solicitor was called for.

There has for many years been compulsory education in New Zealand, and that education is purely in the English language. Provided there were a safeguard, it is submitted that the benefit to the interpreters is not a sufficient reason for continuing provisions that were no doubt necessary in 1843, when the Natives had not been to compulsory European schools, but are not necessary in 1943, when there are practically no Natives in a province like Taranaki who

do not speak English, and, in any case, even if they do not there are none who do not understand what a summons is when they receive it. The suggestion of the writer is that on each relative document there should be inserted in Maori a short description of what it is, with the instruction that if it is not understood the relative Court would have a translation made free of charge to the defendant. For example, a summons would have on it in Maori:—

"This is a summons against you. If you do not understand it the Clerk of the Court at will have it translated for you free of charge."

Then it would be the duty of the plaintiff, if the Native did apply, to have the process translated and no further steps in the action could be taken until this were done.

The Hawke's Bay Society wrote strongly supporting the suggestion made by Taranaki. Other Societies also agreed with the proposal.

The Nelson Society was of opinion that at the present time the majority of Maoris could read English and would probably refuse to pay for an unnecessary translation.

It was suggested that if desired an endorsement could be made on each document that a translation could be obtained from the Registrar of the Court.

On the motion of the Vice-President it was decided to call the attention of the Minister of Justice to the fact that it was considered that a translation of Maori processes was costly and burdensome to the Native and no longer necessary.

Legal Education.—The Taranaki Society wrote as follows:—

The Council of this Society has resolved, as a remit to the New Zealand Society:—

That this Society considers that the time has arrived when *Latin*, as a compulsory subject, should be removed from the syllabus for the examination of solicitors. Attention is drawn to the fact that Latin as a compulsory subject, for examination purposes, has been abandoned by every other profession; that a pass in this subject normally requires six years' continuous study, and that this renders it practically impossible in ordinary circumstances for a serviceman to obtain a pass on his return. In this Society's opinion *English* should be made a compulsory subject in lieu of Latin.

The Hawke's Bay Society wrote stating that its Council refrained from expressing an opinion as to the question of Latin, but held the view that English should be made a compulsory subject.

Mr. Horner stated that academic bodies were reviewing their curriculum and that the legal profession were probably the only profession retaining Latin as a compulsory subject. It was thought by Taranaki that unless Latin was omitted from the course, a serious difficulty would have to be faced by returning servicemen. The opinion of Taranaki was that if the subject could not be withdrawn altogether it should not be made compulsory for returning servicemen to pass an examination in Latin. Mr. Horner moved that it be a recommendation to the Council of Legal Education that in view of the changing conditions Latin be made an optional subject and not compulsory.

Attention was drawn to the fact that the University had a statutory right to deal with all cases of hardship with respect to ex-servicemen and that, if necessary, certain subjects could be omitted.

The motion was put to the meeting but was lost on votes.

Claims against the United States Government and Members of their Forces.—The Secretary reported that as representations had been made to the Australian Government with respect to this question she had been in communication with the South Australian Society with a view to ascertaining the result of the representations. In reply, a copy of the statutory rules (Serial No. 1943/193) had been forwarded which made provision that any person resident in Australia having a claim against a member of a visiting Force should be entitled to make against the Commonwealth a claim for a like amount as if the member of the Forces had been a member of the Defence Force of the Commonwealth. As this procedure appeared to be a possible solution of the problem, the President and the Secretary waited on the Attorney-General and Law Draftsman and discussed the matter with them.

The Secretary had in the meantime written to the Law Council of Australia to ascertain, if possible, what arrangement was agreed upon between the two Governments.

On the day of the meeting the following letter was received from the Attorney-General:—

I have considered this very important subject and the representations contained in your letter of November 3, and also in the enclosures.

The Australian regulation could hardly have been promulgated unless the Commonwealth Government had first negotiated some agreement for indemnity with the United States Government. Very possibly when you receive a reply from the Australian Law Council to your communication by air this point will be elucidated.

I will confer with my colleague, the Right Hon. the Minister for External Affairs, in the meantime, and I trust I shall be in a position to write you more fully at an early date.

It was decided to await the reply from the Australian Council before taking any further action.

Deceased Persons Estates: Scale of Charges.—The following letter was received from the Auckland Society:—

Recently a local practitioner approached my Council regarding the appropriate basis for the computation of charges for administering an estate comprising both New Zealand and foreign assets.

My Council pointed out to him that the New Zealand Law Society's report on this question, and reproduced in *Ferguson's Conveyancing Charges*, 3rd Ed. 44, expressly stated that the scale therein contained was to act merely as a guide to practitioners and not as a hard and fast rule applicable to the work involved in every individual estate; and while my Council thought it desirable that the scale should wherever possible be used, it emphasized the directory rather than the mandatory nature of the scale.

It is noted, however, that the scale takes no account of the difference between succession to foreign estates, movable or immovable, or the distinction between principal and ancillary administration, or the separate administration of immovable property situated elsewhere than where the deceased was domiciled. See generally *2 Halsbury's Laws of England*, 2nd Ed. 240–250.

Short of the practitioner rendering an itemized bill of costs, and in attempting to apply the New Zealand Law Society's guide to an estate including foreign assets, my Council is of opinion that to use the aggregate of the domiciliary and the foreign assets as a basis for calculation of the fee, and to add extra charges for attendances incidental to the power of attorney and exemplification of probate, with the foreign agent's costs as a disbursement, lead to overlapping. This is the method which the above practitioner suggested should be adopted, but it is clear to my Council that this involves some degree of duplication.

Members of the Council who reported on this matter were agreed on the question of this duplication above mentioned, and considered that if a New Zealand practitioner claimed to calculate his fee on the basis of the aggregate of the New Zealand and foreign assets he must make some allowance for the saving of work on his part by that done through his agent in the foreign jurisdiction. At this point there was a minor divergence of opinion between the members who made the report; on the one hand it was thought that the practitioner should calculate his fee on the basis of the New Zealand assets only, with extra charges for the power of attorney, exemplification, instruction of foreign agents, supervision of foreign administration, and incidental. On the other hand it was equally agreed that it would be unreasonable to charge the full scale on both New Zealand and foreign assets with agency charges in addition, and if a practitioner relied on this latter method, then a reduction should be made appropriate to such saving. The executor's solicitor was considered to be entitled to reasonable charges for the extra work of extracting the exemplification, preparing the power of attorney, and other services relating to the foreign assets.

Doubtless in many instances there would be little difference between the results of the two methods.

In these circumstances I am directed to refer the matter to your Society with a request that a ruling be made thereon.

It was decided to refer the matter to the Conveyancing Committee for consideration and report.

Land Sales.—The Otago Society had asked that steps be taken with a view to overcoming the delay due to the Lands Sales Committees holding up the sealing of orders for fourteen days despite the fact that the price had been approved and that there was no question of an appeal.

It was reported that some delay in dealing with applications was being experienced in Auckland. The Auckland members were appointed a Committee to discuss the question with the appropriate authorities with a view to having the applications disposed of expeditiously.

(To be concluded.)

CORRESPONDENCE.

Administrative Law.

The Editor,
NEW ZEALAND LAW JOURNAL.
SIR,—

Your learned leader writer in your issue of December 21 refers to "administrative lawlessness," but what is often called "Administrative Law" may be put into practice in accordance with the leading principles on which the Courts themselves act, and seems to be a necessity in these days when the functions of the State have been so greatly extended. In this connection I would like to draw the attention of your readers to the remarks of Lord Wright of Durley in *Legal Essays and Addresses* (Cambridge University Press, 1939), at p. 194, reading as follows:—

> "But conversely it is not true that the Judges have a monopoly of judicial functions. There is now well established a system of what is often called administrative law. The effect of this in a large area of affairs is to remove decisions as to rights and duties from the province or supervision of the Judges. This is due to the growth of statutory functions, duties, and rights which has followed from the regulation by the state of industries, of trade, of modes of conduct in many departments, and also from ameliorative social legislation, such as Health Insurance, Unemployment Insurance, and Old-age Pensions and so forth, all of which lead to disputes. These questions are in the main wholly unsuited to decision by the ordinary process of law, partly because of the immense number of cases to be decided and partly because there are technical questions which can be easily decided by those who are expert in the matter, but which, if dealt with according to ordinary procedure of law, would require long and elaborate explanations to lay-judges. Thus we have delegated jurisdiction, just as we have delegated legislative powers, expressly given in either case by Act of Parliament. This system has been criticized as a sort of new despotism, leaving the subject at the mercy of the Executive, and inconsistent with the division of the powers of legislative, executive, and judiciary, which has been said to be an essential of a good constitution. But new problems require new remedies. What was adapted to the old individualistic system of life is not suited to the more complex conditions produced by modern social legislation. In truth the modern system of administrative law in its proper place has worked well. If it created abuses, modes of remedying them could be devised."

A recent work on the subject is *Concerning English Administrative Law*, by Sir Cecil Thomas Carr (Oxford University Press, 1941). I have not yet been able to procure a copy, but I extract the following from a review of the book in the *Cambridge Law Journal* (1943), at p. 220:—

> "Sir Cecil Carr speaks with the intimate knowledge of a great expert on the topic, and with a full and sympathetic appreciation of all the arguments for and against administrative law: his balanced and careful judgments on these arguments make the book all the more valuable because during the last two generations we have been passing through a transitional period from what may be called Dicey's point of view of administrative law as an almost unqualified evil to the view that, be its dangers what they may, Government at the present day, whether in peace or war, is impossible without it. As Sir Cecil says (p. 37) its justifications are the limit of the time of the legislature, the limit of its aptitude and the need of some weapon for coping with emergencies whether they arise in time of peace or of war."

Wellington, January 31, 1944.

Yours faithfully,
W. J. HUNTER.

THE MEANDERINGS OF A METROPOLITAN MAGISTRATE.

A whim-wham, "a ridiculous notion from the Icelandic *Hevima* (to have the eyes wandering)", is the only name for the 62 page booklet, *Singapore to Shoreditch**, that comes to us from Mr. F. O. Langley, the well known contributor to *Punch*, sometime, as "Inner Templar," the writer of this JOURNAL'S *London Letter*, sometime Attorney-General at Singapore, now Metropolitan Magistrate of the East End.

The tale concerns the trial of a Chinese coolie, Chi Lin, newly-arrived in England, on a charge of "using insulting behaviour whereby a breach of the peace might have been occasioned." There had been a brawl in which the Chinese, a fish porter, and a Russian interpreter had been concerned outside a 'pub' from which the porter was carried to hospital unconscious. Some one in Canton had called Chi Lin who was a true blooded Chinese, an English bastard; and he told by his English friend, a Foreign Devil, of the London tribunal that heard the appeal of any British subject in the Empire, had gone from Singapore to Hongkong and then made his way across country to Europe to seek the justice of the King and fit himself to fight the Japanese. In an argument outside the 'pub' after drinks, contrasting British and Chinese communities, the Russian broke in with his advocacy of Communism. The porter was referred to as a foreign devil, some one else as a bastard. That term of endearment was meant for the Russian, but Chi Lin took the epithet for himself. *Hinc illae lacrimae.*

At least that is the plot so far as this reader could disentangle it from the meanderings of Chi Lin from Singapore to London, and to and from the dock in the course of several adjournments, and the meanderings of the learned Magistrate, often entirely irrelevant but then most amusing, about the eminent Lord of the Privy Council, who appeared before him, about his own court, the Old Street Police Court, the Police, Alien Officers, Interpreters, Court Missionaries, his predecessors (Sir Charles Biron and Sir William Clarke Hall), and Cockneys (including the gentlemen summoned as to arrears due under a maintenance order to his wife who, detained in hospital' sent that lady with this apology for his absence: "mi Worship, i would of come but i bin in bed 3 weeks with an abbess"); Fascists, and Communist Riots; Solicitors and Counsel—their tactics, and their failure to play the game according to the rules expected by the crowd at the back of the Court, which has a fixed idea that the sole and whole genius of the English bar is to tie people into knots—the kind of recognizance by which the Magistrate satisfied all parties concerned; and the final declaration of the fish porter when Chi Lin told him he was going to the "Big Top Court" in Downing Street, that "There ain't no bigger topper Court than Old Street in these 'ere parts."

One can picture Mr. Langley enjoying the penning of this little masterpiece of Suspense, Contemplation, Reminiscence, Wisdom, and Humour. The reader who wishes to enjoy it also must peruse it when he has plenty of time to spare and let his thoughts meander along with the meditations from the Bench, pausing to take in the significance of what British justice means in the furtherest corners of the Empire, which Mr. Wendall Wilkie would liquidate according to schedule, of how an East End Magistrate must be a sort of father to his delinquents and the congregation of his Court, understanding them, playing the game with them, and serving their British and sporting spirit in spite of all their failings. In short, the Magistrate must be a "sport" himself.

Counsel can extract from the brochure some useful points as to how to handle interpreters, especially those who, after ten minutes' excited conversation with the foreigner interpreted, declares that he simply said "Yes" or "No."

There is a word of advice to witnesses also, even when "the assuming and appreciative poor" cannot entirely refrain from buying a (barrister) dog and then doing the barking themselves.

If you take your time over the book and don't think you are going to get anywhere, you will find in the long run that you have had a great many laughs on the way and learned much about how justice is and should be done in the King's Court which is also that of the people.

The last pages may perhaps take your largest laugh. What the joke is you must find out for yourselves. It concerns a Beak and a nightingale. —H. v. H.

* *Singapore to Shoreditch.* A Sentimental Traveller from China in the Dock. By F. O. Langley, Metropolitan Magistrate of the East End. London: Frederick Muller, Ltd.

LAND AND INCOME TAX PRACTICE.

Deductions against Salary or Wages.

In a case, *F.* v. *Commissioner of Taxes*, heard in December last by Mr. J. H. Luxford, S.M., the assessment of the Commissioner disallowing a claim for deduction from assessable income was upheld. The deduction claimed was the cost of evening meals by a watersider who was required at short notice to work overtime at night. The point at issue was whether the cost of such meals constituted "an expenditure or loss exclusively incurred in the production of the assessable income," within s. 80 (2) of the Land and Income Tax Act, 1923.

A waterside worker's ordinary working-hours were between 8 a.m. and 5 p.m., but he was obliged to work overtime when called upon. On the days on which he was required to work overtime, he was not notified in time to inform his wife that he would not be home for his evening meal, with the result that the food prepared for him was wasted and he had to pay for a hot meal at a city restaurant. The expenditure was reasonably incurred to enable him to carry out his duties as a waterside worker, and would not have been incurred unless he had been called upon to work overtime, and the distance between his place of work precluded his having his evening meal at home as his travelling-time would have exceeded the time allowed for that meal.

The appellant had claimed, as a deduction from his assessable income, the cost of 174 meals purchased on such occasions during the tax year, but this was disallowed by the Commissioner of Taxes; the learned Magistrate held, dismissing the appeal, that, as the appellant was not engaged in the course of his employment when he consumed his evening meal, the cost of the meals claimed as a deduction, was not "an expenditure exclusively incurred" in the production of the part of his income derived by way of overtime wages, within the meaning of those words as used in s. 80 (2) of the Land and Income Tax Act, 1923.

In his judgment, Mr. Luxford referred to and reviewed the facts in *Ricketts* v. *Colquhoun*, [1926] A.C. 1, 10 Tax Cas. 118, of which a brief summary of this case is given in (1943) 19 N.Z.L.J. 181. With particular reference to the cost of meals claimed as a deduction in *Ricketts* v. *Colquhoun*, Mr. Luxford quoted the Lord Chancellor as saying: "A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work so that he must find board and lodging from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance."

The learned Magistrate proceeded: "It is true that there is a variation of language in the English and New Zealand enactments, but one principle laid down in *Ricketts* v. *Colquhoun* is applicable to both—namely, the right of a taxpayer whose income is derived from salary or wages to deduct from his assessable income an expenditure incurred in respect of his employment does not arise unless the expenditure is an integral part of the employment. Consequently the taxpayer in order to make the deduction must prove that the expenditure was incurred in respect of something done or used in the course of his employment.

"In the present case, the appellant was not engaged in the course of his employment when he consumed his evening meal and therefore has not qualified for the right to deduct the cost thereof from his assessable income.

"Mr. Fawcett referred to a number of awards in which it is provided that when a worker is required to work overtime after 5 p.m. the employer is required either to provide an evening meal or to pay a specified sum to the worker to defray the cost of such meal. He contended that the employer would be allowed to deduct the cost of the meal when calculating his assessable income and that the worker would not have to include the value of the meal in his income. Therefore by analogy, a worker, who has to defray the cost of an evening meal which he is required to have by reason of working overtime, should be entitled to deduct the expenditure when calculating his assessable income. This contention is invalid for two reasons—namely, (1) the expenditure incurred by the employer is tantamount to the payment of wages, and is deductible; and (2) the benefit accruing to the worker is taxable by virtue of s. 79 (1) (*b*), which enacts that assessable income shall be deemed to include "all salaries, wages, or allowances (whether in cash or otherwise) . . . in respect of or in relation to the employment or service of the taxpayer." It may be, as Mr. Fawcett says, that meals provided by an employer or money paid in lieu of meals are not shown in the recipient's returns of income-tax, but it would seem clear that they should be.

"It has been pointed out from time to time, even by the House of Lords, that the non-allowance of certain items of expenditure is unreasonable, but the Commissioner of Taxes is bound to administer the Act strictly in accordance with its provisions. That is the position in the present case."

Mr. Luxford's judgment is particularly interesting when the present case is compared with *South African Income Tax Case No. 507* (October, 1941) which is reported in *South African Tax Cases*. A summary of the report is as follows:—

The appellant was a professional man, and conducted certain university examinations at a place in another town. He sought to deduct from the fee paid to him for his services as examiner the cost of travelling for the return journey and subsistence expenses while away from his normal place of residence. The Commissioner disallowed the claim. It was held that the expenses being of a private or domestic nature they could not be deducted in the determination of appellant's taxable income.

The circumstances are not uncommon, and from the taxpayer's point of view it seems reasonable that he ought to be assessed for taxation on the "net profit" from any income from such sources, *i.e.*, the gross fee, director's fee, or salary, less travelling and other expenses which he must inevitably lay out before he is in a position to earn the fee. In view of the regularity with which similar claims are made in New Zealand, it is interesting to observe the following extracts from the judgment of Dr. Manfred Nathan, K.C.:—

"The appellant contended that it was a *sine qua non* for the purposes of his duties as an examiner that he should proceed to the place where the examinations were held and be present in person to conduct the examinations. He said that, therefore, the refusal of the Commissioner to allow these expenses were unjust and inequitable. The place at which the examinations were held was not his place of business, which was where he resided.

"In our opinion, however, the place where the examinations were held was the appellant's place of business for the purposes of this item of income.

"It seems clear to us that the expenses of his maintenance, both on the train and at the place where the examinations were held, are not deductible in terms of s. 12 (*a*) of Act No. 40 of 1925. Whether a taxpayer travels or not, he has to maintain himself—that is, he has to be provided with food and lodging, and such expenditure, being of a private or domestic nature, cannot be deducted in arriving at his income for taxation purposes.

"The case, from the point of view of the appellant, is hard, but it appears to us, that notwithstanding the sympathy we feel for him, we are definitely precluded by authority from coming to his assistance."

Dr. Nathan went on to refer to *Ricketts* v. *Colquhoun*, [1926] A.C. 1, 10 Tax Cas. 118, and also *Nolder* v. *Waters*—discussed on p. 181 of last year's JOURNAL—and concluded his judgment by stating:

"It appears to us that the principle to be followed in this case is really indistinguishable from the principles stated in the case of *Ricketts* v. *Colquhoun*. The necessity of attendance and the distance of residence from the scene of operations appear to make no difference. The expenses are incurred before and after the discharge of the appellant's functions as examiner, and not during the discharge of these duties, and we cannot see how these expenses are deductible on any principle of income-tax law, more especially in view of the express prohibitions laid down by the Act.

"We regret, therefore, that we cannot come to the assistance of the appellant."

Dr. Nathan makes no secret of the fact that his judgment is harsh, from the appellant's point of view. In this connection the opening paragraphs of an article "Interpretation of the Income-tax Acts" appearing in the Tax Supplement to the English *Accountant*, September 18, 1943, are worthy of attention. The quotation is as follows:—

"The Income-tax Acts, elaborate and detailed as they are, contain curiously little in the way of exact definition of the terms used and it has been the task of the Courts over a period of one hundred years to expound and define practically every important expression, so that now in great measure, a settled interpretation has been given to each. The expressions used in the Income-tax Act of 1842, are essentially the same as those

used in the Income-tax Act of 1918, which consolidated the previous enactments. Periodically one hears a demand for the complete rewriting of the Income-tax Acts in simple or popular language, and the impossibility of constructing a web of definition of such new language which will sufficiently cover all circumstances would raise a set of new problems which might keep the judiciary busy for many years and certainly upset the now generally accepted and understood interpretations.

"The first general principle of interpretation is that expressed in the well-known dictum of Lord Cairns in *Partington* v. *Attorney-General*, (1869) L.R. 4 H.L. 100: 'As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute'."

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. Income-tax.—*Husband and Wife—Share-milking Agreement—Whether Partnership Return required.*

QUESTION: A husband and wife enter into a sharemilking agreement with the owner of a farm. In effect, the terms of the agreement are that the husband and wife contract to perform certain duties in consideration for a share of the profits made by the farm-owner. Should the husband and wife furnish a partnership return, or should each make a separate return for income-tax purposes? Will the aggregation provisions apply if the husband and wife take equal shares, amounting to more than £200?

ANSWER: Unless there is a deed of partnership between them, it would seem that the husband and wife are not carrying on a business (of farming or contracting) in partnership by reason of their agreement with the farm owner. They would be assessed under the provisions of s. 101 (1) (*c*) of the Land and Income Tax Act, 1923, and not under s. 101 (2). Each is required to furnish a separate return—a partnership return is not required. If the income of both husband and wife exceeds £200, the aggregation provisions apply.

2. Gift Duty.—*Gift for the Purpose of Maintaining a Grandchild at Oxford University.*

QUESTION: A., domiciled in New Zealand, makes a gift out of his income of £600 to B., his grandchild, for the purpose of assisting with B.'s maintenance at Oxford University. Is the gift exempt from gift duty? A. pays the £600 from his bank account in England.

ANSWER: The gift is liable to gift duty in New Zealand (s. 41 of the Death Duties Act, 1921) unless the Commissioner exempts it under s. 44 (*b*), *ibid.*, as to which see *Adams's Law of Death and Gift Duties in New Zealand*, 161, 162.

It was held in *Garland* v. *Commissioner of Stamp Duties*, [1919] N.Z.L.R. 729, G.L.R. 346, that the purpose of exemption in our taxation Acts, such as the Death Duties Act, is to benefit our own people and not those outside New Zealand. Therefore the domicil of B. might possibly be deemed relevant.

NOTE.—Section 4 (2), which states that the determination of the Commissioner that a gift is not entitled to exemption under this section, shall be final and conclusive. Generally speaking, the determination of the Commissioner under this section will not be upset by the Court: *Simmons* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 330, G.L.R. 253.

3. Destitute Persons.—*Separation Order—Whether may be made by Consent—Maintenance Order—Resumption of Cohabitation—Whether Cancellation of Order effected.*

QUESTION: Is there jurisdiction to make a separation order by consent only? Does resumption of cohabitation cancel or annul a maintenance order?

ANSWER: A separation order may not be made merely by consent: *Joss* v. *Joss*, [1924] S.A.S.R. 161; and see *Harriman* v. *Harriman*, (1909) 78 L.J. (P.) 62, and *Keast* v. *Keast*, [1934] N.Z.L.R. 316, G.L.R. 292. Resumption of cohabitation does not itself annul a maintenance order, which remains in order until discharged: see *Matthews* v. *Matthews*, [1912] 3 K.B. 91; *McLachlan* v. *McLachlan*, [1935] S.A.S.R. 253; *Jones* v. *Jones*, [1924] P. 203.

4. Stamp Duty.—*Lease—Consideration payable by Promissory Notes—Stamp Duty.*

QUESTION: By deed of lease A. leases to B. a parcel of land for the term of one year from June 1, 1943, "in consideration of the yearly rental of £600, payable by B. handing over to A. two promissory notes, each for £300." One P.N. is for six months from June 1, 1943, and the other twelve months from the same date. Both promissory notes are endorsed by C. What is the stamp duty payable on the lease?

ANSWER: It is submitted that the consideration £600 is not rent but a premium; payment does not depend on the continuance of the lease. Premium was defined by Edwards, J., in *Syme* v. *Commissioner of Stamps*, (1910) 29 N.Z.L.R. 975, 978, as "a sum of money paid as the consideration, or part of the consideration, for a lease which under the contract is made payable independently of the continuance of the terms granted by the lease and to which the incidents of the rent reserved by the lease do not attach." The fact that the consideration in the lease itself is called rent, does not make it rent. If (as it appears) it is not a true rent, then it is assessed, as if it were a conveyance on sale, and therefore it would appear that the correct duty is £6 12s. and not £2 2s.: see s. 120 of the Stamp Duties Act, 1923.

RULES AND REGULATIONS.

Revocation of the Alienage Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1944/6.

Naturalization Regulations, 1929, Amendment No. 5. (British Nationality and Status of Aliens (in New Zealand) Act, 1928.) No. 1944/7.

Industrial Man-power Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/8.

Economic Stabilization Emergency Regulations, 1942, Amendment No. 3. (Emergency Regulations Act, 1939.) No. 1944/9.

Army Superannuation Order, 1944, (Finance Act (No. 2), 1939.) No. 1944/10.

Shipping Survey and Deck Cargo Emergency Regulations, 1943, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1944/11.

Fertilizer Control Order, 1943, Amendment No. 1. (Primary Industries Emergency Regulations, 1939.) No. 1944/12.