New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

VOL. XX. TUESDAY, MAY 9, 1944 No. 8

IN DIVORCE: SOME RECENT IMPORTANT JUDGMENTS.

II.—Restitution of Conjugal Rights.

RULE 6 of the Divorce and Matrimonial Causes Rules, 1943, is as follows:—

> Where, in a petition by a husband, a dissolution of marriage or judicial separation is sought on the ground that the respondent has failed to comply with a decree for restitution of conjugal rights, the affidavit filed therewith shall show that at the time of the service of such decree, either by notice endorsed thereon or by separate notice in writing, the respondent was informed by the petitioner of the home to which she might return and, further, that non-compliance with such decree would constitute a ground upon which a petition for dissolution of marriage or judicial separation might be based.

The nature of the "home" referred to in this rule was the subject of a recent judgment by Mr. Justice Northcroft, in which he dealt with two undefended divorce petitions founded on non-compliance with a decree for restitution of conjugal rights: *Turner* v. *Turner* and *Kay* v. *Kay*.

To take *Turner's* case first. The decree for restitution of conjugal rights was made on November 4, 1943. Pursuant to R. 6, when served upon the petitioner it contained a notice to this effect:

> that the home to which you are required to return to cohabitation with the petitioner and render to him conjugal rights is at No. 174 Strickland Street, Spreydon, Christchurch.

In his evidence in support of this petition, the petitioner explained that two days after the decree he left Christchurch to go to the West Coast of the South Island. He had been ill, and went to his parents' home there for convalescence. Although he owned the house in Strickland Street and had kept it available for his wife during the period up to the hearing of the suit for restitution of conjugal rights, he said that it had, unknown to him, been let by his agent before the decree for restitution was made. The decree was served upon the respondent on November 12. As the petitioner had left Christchurch two days after the decree had been granted, at the time the decree was served the petitioner not only was not living at the "home to which you are required to return" (as stated in the notice to his wife), but he was in fact living somewhere in Westland, and the house was not even available but was in the possession of tenants. The decree was to be complied with within twenty-one days of service. The petitioner arranged with one Hayes to call at the house in Strickland Street occasionally during the period affected by the decree to see if there were any appearance of, or any word from, the respondent. The petitioner returned from the West Coast and went to live at the lodginghouse of Mr. Hayes on December 1—that is to say, at a date almost coinciding with the expiry of the period prescribed by the decree served upon the respondent.

Since the hearing, counsel for the petitioner informed the learned trial Judge that the petitioner believed the respondent would not comply with the order for restitution of conjugal rights, and, in view of his lack of means, he decided not to furnish the house at Strickland Street until he knew whether the respondent intended to return to cohabitation following the service of the decree. Counsel stated also that if, during the period fixed for compliance, any communication had come from the respondent that she intended to return to cohabitation, Hayes was to notify the petitioner's solicitors, who were in turn to notify the petitioner, who would then return to Christchurch and take steps to establish a home. Although this was not sworn to by the petitioner, His Honour considered it, on the assumption that it could be proved. Furthermore, since the hearing, the petitioner filed an affidavit sworn by the respondent in which she says that, since the date of service of the decree for restitution, she has neither returned to cohabitation nor rendered conjugal rights; and she added, "and that I do not intend to return to the petitioner and render him conjugal rights." She says that when the decree was served she resided with her parents at Wellington, and did not make any effort to comply with the decree and return to the Strickland Street address mentioned in the decree.

In *Kay's* case, the decree for restitution of conjugal rights was made on November 11, 1943, and required compliance within fourteen days of service. The decree was served upon the respondent on the day on which it was made. The decree as served contained a notice that

> the home of the petitioner to which the respondent is required to return is situated at 44 Mersey Street, St. Albans, Christchurch.

The address at Mersey Street was a house in which the petitioner and respondent had lived before the separa-

tion, and which was owned jointly by husband and wife. When the decree was made and served, the petitioner was living at a different address in Christchurch with his sister, and tenants were in the house in Mersey Street. The petitioner said he was unable to live in the house at Mersey Street, but he had a furnished room there and served notice on the tenants to quit. The learned Judge said he gathered that the petitioner had not occupied the furnished room at all, but had said he visited the house three times a week inquiring whether his wife had been there; and he was told the tenants had seen nothing of her. After the expiry of the period fixed by the decree for restitution of conjugal rights, there was an interview between husband and wife for the purpose of discussing custody of the child of the marriage, at which the respondent informed the petitioner that she had no intention of returning to live with him. His Honour, in the course of his judgment, said:

> This case and the other case, *Turner* v. *Turner*, were before me on a day upon which a number of undefended divorces were being heard and a newspaper report showed that I had expressed a doubt upon the right of the petitioners to decrees for dissolution. In consequence the respondent wrote a letter to the petitioner as follows:—
>
> > "I have been told that some question has cropped up as to whether I made any move to come back to you after the Judge made an order for me to do so. I received the order on the 13th of November, I think. I took no notice of the order at all and did not go near the Mersey Street house. I have no intention whatever of going back to you."

In both these cases, then, it seemed to Mr. Justice Northcroft that a difficulty arose from the fact that R. 6 required the petitioner to inform the respondent of "*the home to which she might return*," and that in both cases the "home" referred to in the notice was not really a home at all. He proceeded:

> I appreciate that restitution proceedings under the Divorce Act involve some degree of artificiality. I hesitate to increase it by saying that what has happened in these cases entitles the petitioners to a divorce. The essence of the decree for restitution is the requiring of a return to the petitioner to his home—to the place where he lives and where marital relations can be resumed. In these present cases, the required words were employed in the papers served upon the respondents; but they did no more than indicate addresses at which they could leave word of their intentions. If this were the purpose of the decree then they would, more sensibly, require a notice to be filed by the wife of her willingness to be reconciled to the husband, failing which she could be divorced.

A somewhat similar position arose in *Moffett* v. *Moffett*, (1922) 39 N.S.W. W.N. 159, excepting that the suit for dissolution was defended. In accordance with the practice in New South Wales, the decree for restitution contained a notice of the home to which the wife was to return. The wife went but found that her husband was living at a boardinghouse a few miles away. In those circumstances Mr. Justice Gordon held that the place notified was not then the home of the husband and that the service of the decree in such circumstances was a nullity.

The same matter arose later before Mr. Justice Boyce in *Summers* v. *Summers*, (1935) 52 N.S.W. W.N. 60, where a "home" had been named in the decree as at a place at which the petitioner had never lived. His Honour cited the observations made in that case, and applied them to the cases before him. He then said:

> I desire to guard against any appearance of requiring the petitioner in all cases to obtain and furnish a house. Each case must be determined upon its own facts. In some cases, it may be that the financial or other circumstances of the husband make this impracticable. In such cases, his home or his intended marital home may be an hotel or lodginghouse or even a room in an apartment house. If the place notified to the wife is really his home, and, as well as being appropriate to his circumstances, is one at which he can reasonably require his wife to rejoin him, then the objection I raise here would not prevail.

In argument both counsel pressed the fact that respondents not only did not go to the addresses stated in the decrees, but had gone out of their way to make it clear they did not intend to return to their husbands. Upon this topic His Honour referred to the following observations of Mr. Justice Bonney in *Green* v. *Green*, (1940) 57 N.S.W. W.N. 235;

> Now it must not be forgotten that as a matter of proper interpretation of the Act, this consequence of disobedience of the Court's decree is in nature of a sanction or punishment, replacing attachment under the old law. The Courts have realized that in some cases that which was intended as a sanction, might be accepted as a welcome deliverance from a marriage which one or both desired to terminate; and that, possibly by arrangement between them, one might sue the other for restitution of conjugal rights, not with the hope that the decree might be obeyed and the other spouse brought back into the matrimonial fold, but in order that both might, by a misuse of the right of action and the subsequent procedure, employ the outward forms of the action and remedy, for the purpose of securing what is to all intents and purposes a divorce by contract or mere mutual concurrence.

Again in *Annson* v. *Annson* (1942) 59 N.S.W. W.N. 178, Mr. Justice Bonney said:—

> The primary purpose of the Court in making a decree for restitution of conjugal rights is to bring about the restoration of the home. In former days, before non-compliance with such a decree had the effect which has been given to non-compliance by modern legislation, the exercise of the jurisdiction was a question of enforcing the right of a spouse to the conjugal society of the other spouse. But even though the Court was merely enforcing a private right, it was a private right which concerned the general public interest in the maintenance of the marriage state, and in the purposes for which the institution of marriage existed.
>
> Modern legislation, under which non-compliance forms a ground for judicial separation or dissolution of the marriage status, brings the question of public interest more vitally into the picture. It is because of the place which public interest occupies in divorce legislation generally that the Courts now require that the petitioning party must really and genuinely desire the relief which he claims; and the same considerations of public interest would seem to demand that this form of remedy should not be treated by the Courts as a mere formal and easy road to dissolution of marriage, but should be held to be a remedy which is only available to those, as far as husbands are concerned, who are in a position to say "There was a home available and ready for my wife, I wrote and asked her to rejoin me, but she has not done so, so I now appeal to the Court, in the hope that a judicial pronouncement based on a proper consideration of the facts which I place before the Court, will have more success."
>
> I have often stressed in this Court the vital interest of the public in general in the maintenance of the home life of its constituent members, and it is unnecessary for me to elaborate further what has so often been pointed out by the superior Courts of this land, namely, that the public interest in the maintenance of home life demands that the Divorce Court, particularly in undefended cases, should be ever on its guard against the extension of the remedies which the Act provides to cases which do not fall properly within the terms and ambit of the legislation.

With these observations, His Honour agreed. In view of the submissions that these petitions were undefended and the wives were, at least, not unwilling to assist the petitioners to succeed, these observations were directly in point. The learned Judge thought that they fairly stated the duty of the Court and commend

themselves to him for application in the *Turner* and *Kay* cases, and in both cases he refused the petitions for dissolution of marriage.

His Honour concluded by saying that in *Moffett* v. *Moffett*, (1922) 39 N.S.W. W.N. 159, and in *Summers* v. *Summers*, (1935) 52 N.S.W. W.N. 60, the service of the decrees for restitution was treated as a nullity. Subject to any challenge which might be made should either of the wives in the *Turner* or *Kay* cases change her mind and decide to oppose the divorce, His Honour held that the petitioners were at liberty to make a further service of the decrees for restitution, as was done in *Moffett* v. *Moffett* and as was directed in *Summers* v. *Summers*.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Wellington.
1943.
December 7.
1944.
March 24.
Smith, J.

TAYLOR v. SHORTLAND.

War Emergency Legislation—Oil Fuel Emergency Regulations—Oil Fuel—Powers of Controller—Coupons transferable by Delivery—Demand for Names of Persons handing over Coupons—Whether Controller entitled to such Information—"Other information"—Oil Fuel Emergency Regulations, 1939 (Serial No. 1939/133), Reg. 5 (h).

Regulation 5 (*h*) of the Oil Fuel Emergency Regulations, 1939, does not authorize the Oil Fuel Controller to require any person to furnish information concerning the transfer of coupons before they are surrendered on the purchase of oil fuel, because they are not, until then, related to oil fuel or the possession or use of it or dealing with it; and the Controller's power to require, under Reg. 5 (*h*), such "other information" as he may deem necessary, is limited accordingly.

Counsel: *W. H. Cunningham*, for the appellant; *Macandrew*, for the respondent.

Solicitors: *Luke, Cunningham, and Clere*, Wellington, for the appellant; *Fell, Putnam, and Macandrew*, Wellington, for the respondent.

COURT OF ARBITRATION.
Wellington.
1944.
February 23; March 24.
Tyndall, J.

GRIEVE v. WILLIAM CABLE AND COMPANY, LIMITED.

Master and Servant—Apprentices—Contract of Apprenticeship—General Orders—Contracts of Apprenticeship to which s. 4 of the Apprentices Amendment Act, 1925, relates—Apprentices Amendment Act, 1925, s. 4 (1) (2).

Subsection (1) of s. 4 of the Apprentices Amendment Act, 1925, is not general in its application but is limited to the contracts referred to in subs. (2) of that section.

SUPREME COURT.
Christchurch.
1944.
February 24;
March 3, 30.
Northcroft, J.

TURNER v. TURNER: KAY v. KAY.

Divorce and Matrimonial Causes—Restitution of Conjugal Rights—Husband's Petition—"Home" to which Respondent required to return—Place stated in Decree not Petitioner's Real Home—Wife not using Address given and having no intention of returning—Service of Decree of Restitution a Nullity—Divorce and Matrimonial Causes Act, 1925, s. 10 (h)*—Matrimonial Causes Rules, 1943, R. 8.*

The "home" to which, pursuant to R. 6 of the Matrimonial Causes Rules, 1943, a respondent wife, in a divorce based on the ground of failure to comply with the decree for restitution of conjugal rights, is required to return to co-habitation with the petitioner must be really the petitioner's home appropriate to his financial and other circumstances—it might be an hotel room, or lodgings or even a room in an apartment house, but it must be one in which he can reasonably require a wife to rejoin him. The notice to return is insufficient if it merely indicates an address at which the respondent could leave word of his or her intentions.

Therefore, where, in one case, the husband petitioner had left his home and was living in another province, and, unknown to him, his home had been let by an agent and was in the possession of tenants, and, where in another case, the husband petitioner was living elsewhere than at his home which he had let, retaining therein a furnished room which he did not occupy and visiting the home three times a week to inquire whether his wife had been there,

Held, refusing the petition in each case, That the home indicated in the petition was not really a "home" within the meaning of that word in R. 6 of the Matrimonial Causes Rules, 1943, and the service of the decree for restitution was a nullity.

Moffett v. *Moffett*, (1922) 39 N.S.W. W.N. 159, and *Summers* v. *Summers*, (1935) 52 N.S.W. W.N. 60, applied.

Held, further, That the fact that in each case the respondent had not gone to the address stated in the decree but had made it clear that she did not intend to return to her husband did not justify the Court in granting the husband a decree for dissolution as the public interest in the maintenance of home-life makes it the primary purpose of the Court, in making a decree for restitution, to bring about the restoration of the home, and not to treat this form of remedy as a mere formal and easy road to dissolution of marriage.

Green v. *Green*, (1940) 57 N.S.W. W.N. 235, and *Annson* v. *Annson*, (1942) 59 N.S.W. W.N. 178, applied.

Held also, That, subject to any challenge that might be made should either of the respondents change her mind and decide to oppose the divorce, the petitioner was at liberty to make a further service of the decree for restitution.

Moffett v. *Moffett*, (1922) 39 N.S.W. W.N. 159, and *Summers* v. *Summers*, (1935) 52 N.S.W. W.N. 60, referred to.

Counsel: *Walton*, for Turner; *Brassington*, for Kay.

Solicitors: *Duncan, Cotterill, and Co.*, Christchurch, for Turner; *Brassington and Gough*, Christchurch, for Kay.

SUPREME COURT.
Wellington.
1944.
February 24;
March 13.
Johnston, J.

WELLINGTON HARBOUR BOARD v. SAMUELS AND KELLY, LIMITED.

By-law—Harbour Board—Loss of Goods by Board's Negligence—Acting as Warehouseman or Wharfinger—By-laws limiting Liability for Loss of Goods in its Custody—Reasonableness—Validity—Ultra vires—*Harbours Act, 1923, ss. 166* (g)*, 226.*

The decision in *Otago Harbour Board* v. *John Lysaght, Ltd.*, (1901) 20 N.Z.L.R. 541, 4 G.L.R. 91—*viz.*, that the relationship between a Harbour Board acting as a warehouseman or wharfinger and charging therefor and a consignee of goods placed in its custody is not contractual, and that, therefore, such a Harbour Board, while having the liability of a bailee for reward, cannot by a by-law contract out of liability for loss occasioned by its negligence—has not been affected by the subsequent passing of the Harbours Amendment Act, 1910, which by s. 45 empowered a Harbour Board to carry on the business of a wharfinger or a warehouse keeper.

United States and Australian Steam-ship Co. v. *Lyons*, [1921] N.Z.L.R. 585, G.L.R. 475, referred to.

That decision, however, does not affect the by-laws of a Harbour Board by which it limits its liability (including liability for negligence) for loss of goods in its custody to a standard value, unless a declaration had been made and accepted of a value exceeding that standard.

By-laws Nos. 253 and 253A of the Wellington Harbour Board to that effect are reasonable and valid, and cover loss arising from negligence.

Orchard v. *Connaught Club, Ltd.*, (1930) 46 T.L.R. 214; *Pratt* v. *South Eastern Railway Co.*, [1897] 1 Q.B. 718; *Gibaud* v. *Great Eastern Railway Co.*, [1921] 2 K.B. 426; and *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Co.*, [1909] A.C. 369, applied.

Kruse v. *Johnson*, [1898] 2 Q.B. 91, referred to.

The case is reported on the foregoing points only.

Counsel: *J. F. B. Stevenson*, for the appellant; *Spratt*, for the respondent.

Solicitors: *Izard, Weston, Stevenson, and Castle*, Wellington, for the appellant; *Morison, Spratt, Morison, and Taylor*, Wellington, for the respondent.

SUPREME COURT. New Plymouth. 1944. February 25; April 3. *Finlay*, J.

JOHNSON v. JOHNSON.

Divorce and Matrimonial Causes—Desertion—Internment—Wife's Petition—Husband German National not domiciled in New Zealand—Desertion of Wife before his Internment as Enemy Alien during part of Three Years' Period—Animus deserendi *during Internment—Continuance of Desertion during Internment—Domicil—Whether Wife entitled to Decree—Divorce and Matrimonial Causes Act, 1928, ss. 10, 12 (3)—Divorce and Matrimonial Causes Amendment Act, 1930, s. 3.*

The respondent husband, a German national, who had not acquired domicil in New Zealand, married the petitioner there in 1939. In 1940, he abandoned his wife with the intention of forsaking her. Having become an enemy alien in September, 1939, he was interned in 1941, and continued so interned at the time of the hearing of the wife's petition for dissolution on the ground of three years' desertion.

Held, 1. That, on the facts, the respondent, before his internment not only abandoned the petitioner with the intention of forsaking her, but he intended, and did by his conduct cause her against her wish and desire, to live separate and apart, and had deserted her early in the month of November, 1940.

Jackson v. *Jackson*, [1924] P. 19; *Bain* v. *Bain*, [1923] V.L.R. 421; *Biddle* v. *Biddle*, [1921] G.L.R. 632; *Purdy* v. *Purdy* [1939] 3 All E.R. 779; and *Cohen* v. *Cohen*, [1940] A.C. 631, followed.

Williams v. *Williams*, (1804) 33 L.J. P.M. & A. 172, referred to.

2. That, as the evidence was conclusive that, after his internment, the respondent had never in fact abandoned the *animus deserendi* to which he first gave effect in 1940, the desertion begun in November, 1940, despite the respondent's internment, had continued uninterruptedly since then to the date of the hearing of the petition, a period in excess of the statutory period.

Astrope v. *Astrope*, (1859) 29 L.J. P. & M. 27, and *Drew* v. *Drew*, (1888) 13 P.D. 97, applied.

Williams v. *Williams*, [1939] P. 365, [1939] 3 All E.R. 825, and *M.* v. *M.*, [1944] N.Z.L.R., 277 distinguished.

3. That the petitioner was entitled to a decree, as she had satisfied the conditions set out in s. 12 of the Divorce and Matrimonial Causes Act, 1928, as amended by s. 3 of the Divorce and Matrimonial Causes Amendment Act, 1930.

Counsel: *Tonkin*, for the petitioner.

Solicitors: *O'Dea and O'Dea*, Hawera, for the petitioner.

SUPREME COURT. Wellington. 1944. March 7, 15. *Smith*, J.

BRAMLEY v. BRAMLEY AND HARRISON.

Divorce and Matrimonial Causes—Practice—Decree Absolute—Costs—Order on Decree Nisi *for Costs in excess of Amount comprised in Order for Security—Non-compliance by Party obtaining Decree* Nisi*—Application to make or stay Decree Absolute—Discretion of Court—Divorce and Matrimonial Causes Act, 1928, s. 26.*

The failure of a party in a divorce suit, where a decree *nisi* has been obtained, to obey an order for the payment of costs brings such party into contempt in that respect, but the Court has a discretion on that party's application for a decree absolute to stay it until payment of such costs.

Dimery v. *Dimery*, [1934] N.Z.L.R. 732, G.L.R. 610; *Gower* v. *Gower*, [1938] P., 106, [1938] 2 All E.R. 283; and *Leavis* v. *Leavis*, [1921] P. 299, applied.

Where a suit in which a wife is charged with adultery has gone to trial and the husband has obtained a decree *nisi*, the fact that he has not complied with an order for costs in excess of the amount comprised in the order for security is not a sufficient ground for withholding the decree absolute until the additional costs have been paid.

Molloy v. *Molloy and Burg*, [1929] S.A.S.R. 80, applied.

Counsel: *Pope*, in support of motion; *Sievwright*, to oppose.

Solicitors: *Perry, Perry, and Pope*, Wellington, for the petitioner; *A. B. Sievwright*, Wellington, for the respondent.

DEFERRED MAINTENANCE EXPENDITURE.

The Scheme Explained.

As a result of war conditions and consequent shortage of labour and materials, farmers and businessmen have been unable to effect usual repairs and maintenance, and are to some extent being assessed for taxation on fictitious profits. The Government recently made an announcement through the press stating that estimated deferred maintenance will now be allowed as a tax deduction.

The following are the essential points :—

1. The scheme first operates for the income year ended March 31, 1944, and applies to maintenance and repairs which any taxpayer has been obliged to postpone.

2. The scheme applies only if the estimated repairs and maintenance is not less than £100.

3. A taxpayer or his agent must obtain a special form from the Commissioner of Taxes (addressing the application to the Commissioner of Taxes, P.O. Box 1703, Wellington). *When applying for a form the taxpayer must state the amount of deferred maintenance which is to be claimed.*

4. Deposits in respect of the income year ended March 31, 1944, must be paid not later than June 1, 1944, or within one month of the taxpayer's balance date. Future deposits must be made within the taxpayer's income year.

5. Returns for the year ended March 31, 1944, should include a deduction for any deferred maintenance deposited in accordance with the procedure outlined.

6. Taxpayers may apply for refunds of deposits at any time not less than twelve months from the date of the deposit. Such refunds will be assessed as income of the year in which the refund is made, but will normally be offset by expenditure actually incurred.

7. The legislative authority for allowing deductions of deferred maintenance will be provided later.

"FOUND" ON PREMISES.

What Constitutes the Offence.

Section 54 of The Police Offences Act, 1927, which may be taken as an example, makes it an offence for a person to be found on property without lawful excuse, but not under circumstances disclosing a criminal intent.

The first question must be: What constitutes being "found"? A further question is: Can a person be successfully prosecuted who, although not actually "found" on premises in the circumstances stated above, nevertheless admits he has been on premises in such circumstances?

Of course the answer to this second question hinges on the word "found." The material words of the section are "is found at any time in or on any building"; and it becomes necessary to consider at least some of the relevant authorities.

In *Davis* v. *Sly*, (1910) 26 T.L.R. 460, it was held that a person may be "found" on premises within the meaning of s. 11 of the Betting Act, 1853 (Gt. Brit.), although he only comes thereon after the Police have entered the premises. But the power of arrest given to the Police by that section is limited to the arrest of persons found on the premises for the purpose of betting.

Thomas v. *Powell*, (1893) 57 J.P. 329, covered the meaning to be given to the words in the Licensing Act (Gt. Brit.) "found on premises." The facts were that Powell was seen to go into licensed premises, and, three minutes afterwards, he came out with a bottle. Bruce, J., said:

> In my opinion, it is enough to satisfy these words if the person has been detected or seen, or clearly ascertained to have been, on the premises at the time alleged. I think there was sufficient certainty of his being there, and, therefore, that the magistrates were wrong in refusing to convict.

Kennedy, J., said:

> I cannot see any other intelligent meaning to put on these words except to hold that the fact of seeing the respondent going in, and then coming out, was equivalent to his being found on the premises in question.

Martin v. *McIntyre*, (1910) 47 Sc.L.R. 645, was a case covering the interpretation of s. 25 of the Glasgow Police (Further Powers) Act, 1892, which enacted: "Every known or reputed thief . . . who is found in or on any space, or in any street . . . may be apprehended . . ." It was held (*a*) that a person found on a tramcar passing along a street was "found" in a "street" in the sense of the Act; and (*b*) that "found" in a street did not mean apprehended therein; and that accordingly it was sufficient if the accused were seen therein in such circumstances as to infer an intention to commit crime.

So far as the present inquiry is concerned, the most appropriate authority is *Thomas* v. *Powell* (*supra*). If then a person has been detected or seen, or clearly ascertained to have been on the premises, such person has brought himself within the words of the statute. Each case depends on its own facts; but, if there were evidence available demonstrating clearly that a person had been on premises in the circumstances considered, even although he was not actually discovered there, then a prosecution would (in the absence of any lawful excuse on the part of the defendant) be successful.

Reference must also be made to s. 72 (2) of the Justices of the Peace Act, 1927. If an accused admits the charge, then he must be convicted—*i.e.*, in the absence of "sufficient cause" why he should not be convicted.

Returning now to the second question formulated, it will be seen that it contemplates an admission by the accused of his being on premises in the circumstances detailed. A prisoner may be convicted on his confession alone: *R.* v. *Falkner and Bond*, (1822) Russ. & Ry. 481, 168 E.R. 908; *R.* v. *White*, (1823) Russ. & Ry. 508, 168 E.R. 922; *R.* v. *Tippet*, (1823) Russ. & Ry. 509, 168 E.R. 923. Even though a confession has been retracted, it is open to a jury to disbelieve the retraction: *R.* v. *Davidson*, (1934) 25 Cr. App. R. 21. Therefore, it appears that the admission alone established at least a *prima facie* against a person accused of an offence under s. 54, and would, in the absence of proof of any lawful excuse on his part, justify a conviction.

There, however, remains a further point to be considered: "A prisoner is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence": *9 Halsbury's Laws of England*, 2nd Ed. 155, para. 213.

Now, one of the essential elements of our selected case is that of being "found" on premises. We have seen what "found" means. If, however, it should transpire that the accused was not "found" on the premises as that term has been interpreted, then, notwithstanding his admission, he should not be convicted. He has shown sufficient cause why he should not be convicted. In pleading "guilty," in such circumstances, it should be pointed out, the defendant clearly did not appreciate one of the essential elements of the offence—that of being "found"; and so he cannot be regarded as having admitted the offence.

In such a case, what course should the Court adopt? In *R.* v. *Baker*, (1912) 7 Cr. App. R. 217, it was held that where a prisoner's plea should not have been accepted, the prisoner should be sent for trial: and see *R.* v. *Ingleson*, [1915] 1 K.B. 512, in which *R.* v. *Baker* was followed.

The proper course in a summary proceeding would be that when it was ascertained the defendant was not "found" on the premises, notwithstanding his plea of guilty, the defendant should be instructed to withdraw his plea and the prosecution should then proceed to prove its case, as though the plea had been one of "not guilty."

To recapitulate: The word "found" (on the authorities) means not only actually discovered, but also "ascertained to be or to have been" on certain premises; and if it appears that, notwithstanding a plea of "guilty," the defendant was not "found," he should be instructed to reverse his plea, and the prosecution directed to proceed to prove its case.

TRANSMISSION UNDER THE LAND TRANSFER ACT.

By E. C. ADAMS, LL.M.

(*Concluded from p. 80.*)

Special as to Estates and Interests Owned by Natives and to European Freehold Interests in Native Land.—Section 2 of the Native Land Act, 1931, defines a Native as a person belonging to the aboriginal race of New Zealand, and includes a half-caste and a person intermediate in blood between half-castes and persons of pure descent from that race.

The Native Land Court and not the Supreme Court has exclusive jurisdiction to grant administration of the estates of Natives, as defined above. The writer has encountered a case in practice where a Native, having by usage a European name, died and the Supreme Court in ignorance of the fact that he was a Native granted administration of his estate. The District Land Registrar, on becoming cognizant of the facts, declined to register a transmission on the strength of such administration, which, of course, was a nullity. A few Natives have pursuant to Native Land Acts (now repealed) become Europeanized; unless the Europeanization has been revoked, the Supreme Court has jurisdiction to grant administration in their estates, but as regards their estates in *Native* land as defined in the Native Land Act, 1931, the legal estate (subject to registration) can pass only by virtue of a succession order made by the Native Land Court: *In re Grace*, [1916] G.L.R. 136.

The legal estate of a deceased Native in *Native* land does not vest in his executor or administrator or executor (because Native land is not liable for such Native's debts), but (subject to registration if the land is under the Land Transfer Act, and nearly all Native land is now under the Land Transfer Act) vests in his successor under a succession order duly made by the Native Land Court. The legal estate of a deceased Native in European land—*i.e.*, land which is not Native land as defined—subject to registration of a transmission in the usual manner, vests in his legal personal representative under administration granted by the Native Land Court. The Native Land Court has also jurisdiction to make succession orders declaring the persons entitled to succeed to the estates and interests of Natives in land other than Native land (s. 27 (2) of the Native Land Act, 1931) and subject to registration under the Land Transfer Act, the legal estate passes by virtue of such succession orders, *except where administration of the Native's estate has previously been granted by the Native Land Court*: where administration has been so granted, the succession orders affecting European land are *subject to the title of the administrator or executor* (s. 190 of the Native Land Act, 1931) and thus affect only the equitable or beneficial estate.

The Legislature has recently conferred on the Native Land Court authority to make succession orders affecting the beneficial freehold interests of Europeans in Native lands; such orders may be registered and *have the same effect as succession orders made in respect of the interest of a Native in Native land*: s. 3 of the Native Purposes Act, 1943.

It is also necessary to consider the jurisdiction of the Native Land Court to grant personalty orders. Section 184 (1) of the Native Land Act, 1931, provides that in the case of intestate estates of deceased Natives the Court, in lieu of granting letters of administration, may make an order vesting the personal estate or any part thereof in the person found by the Court to be beneficially entitled thereto. Thus, subject to registration, the registered estates and interests in leaseholds and mortgages may vest by virtue of personalty orders duly made by the Native Land Court.

The Precedents appended hereto.—Appended hereto are three precedents, which will not be found in the precedent books.

Precedent No. 1 covers the case of an executor under probate granted in another part of the British Empire, applying for transmission after his probate has been resealed by the Supreme Court of New Zealand. The declaration in support is made under the Statutory Declarations Act, 1835, before a notary and is not liable to stamp duty in New Zealand, because the only statutory declaration which the Stamp Duties Act, 1923, catches are those made under the Justices of the Peace Act, 1927.

Alternatively the executor could have appointed an attorney in New Zealand to have administration granted in New Zealand to such attorney. Administration would then have been granted to such attorney in New Zealand, who would in due course have applied to have transmission registered in his favour. Such attorney would be full administrator, as regards the claims of other persons, exactly as if he had obtained administration in his own right: the principal could not intervene, until administration had been granted in New Zealand in his own favour. Of course, on the death of the principal, fresh letters of administration would have to be granted by the Supreme Court of New Zealand: *In re Rendell, Wood* v. *Rendell*, [1901] 1 Ch. 230, and *Chambers* v. *Bicknell*, (1843) 2 Hare 536, 67 E.R. 222.

Precedent No. 2 is application for transmission by the survivor of two joint tenants, both resident in New South Wales outside the jurisdiction. The customary way to satisfy the District Land Registrar as to the *factum* of death is to produce the official death certificate. If this cannot be obtained, then the survivor must satisfy the District Land Registrar by the best available evidence as to the death of the other joint tenant. It was held in *Ex parte Chinn*, (1914) 16 G.L.R. 471, that the Supreme Court has no original jurisdiction to make an order that a person shall be presumed to be dead except as the foundation of an application for probate of the will or administration of the property and effects of a person believed to be dead, and if one of several joint tenants of land under the Land Transfer Act is believed to be dead the surviving joint tenants may apply to the District Land Registrar for transmission of his estate to him and if he refuses they may summon him before the Court to uphold the grounds of his refusal: there is also the right of appeal to the Registrar General of Land whose decision is binding on the Registrar but not on the applicant: s. 204 of the Land Transfer Act, 1915.

As to the principles to be applied as to presumption of death, see *In re Montgomery, Australian Mutual Provident Society* v. *Public Trustee*, [1940] N.Z.L.R. 950, G.L.R. 569. It may be noted in passing that probate or letters of administration are only *prima facie* evidence of death: *In re Robertson*, [1926] G.L.R. 59.

The third precedent deals with an application by an administrator *de bonis non*. The original executor has died without having fully administered deceased's estate. Apparently probate has not been granted in the original executor's estate: if it had, his executor would represent the original executor and be entitled to apply by transmission accordingly.

PRECEDENT NO. 1.

APPLICATION FOR TRANSMISSION TO DISTRICT LAND REGISTRAR: BY EXECUTOR UNDER FOREIGN PROBATE.

IN THE MATTER of the Land Transfer Act 1915
AND
IN THE MATTER of the estate of A.B. formerly of New Zealand but late of in the State of Queensland wife of C.D. of aforesaid labourer deceased.

I C.D. of in the State of Queensland Australia labourer do solemnly and sincerely declare:—

1. That I am the executor of the will of the above-named A.B. deceased by virtue of probate granted to me by the Supreme Court of Queensland at Brisbane on the day of 194 which probate was duly resealed by the Supreme Court of New Zealand at on the day of 194 .

2. That the said A.B. was at the time of her death the registered proprietor of an estate in fee-simple in ALL THAT piece of land [*Set out here area and official description of land*] and being all the land comprised and described in Certificate of Title Register Book Volume Folio : Registry SUBJECT to the fencing covenant contained in transfer No. and to memorandum of mortgage registered number to E.F. therein described securing the principal interest and other moneys therein mentioned.

3. That the said A.B. was at the time of her death the registered proprietor of the above-described lands as the sole beneficial owner thereof and not as the administrator executrix or trustee of any other person or persons whomsoever.

4. I DO HEREBY APPLY to be registered as the proprietor of the said estate and interest in respect of which the said A.B. was registered as proprietor at the time of her death as set forth above in clause 2 hereof.

5. I DO VERILY BELIEVE that I am entitled by virtue of the said probate to be registered as the proprietor of the said estate and interest above described subject as aforesaid.

6. To the best of my knowledge information and belief and except as above set forth no person holds or is entitled to any estate or interest at law or in equity affecting the said land of which the said deceased was the registered proprietor other than myself.

AND I MAKE THIS SOLEMN declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1835.

DECLARED at this day of 194 before me— } by the said C.D. } C.D.

E.F.

[L.S.] Notary Public at in the State of Queensland.

Correct for the purposes of the Land Transfer Act.
G.H.,
Solicitor for applicant.

[*N.B.—To be accompanied by the usual notarial certificate.*]

PRECEDENT NO. 2.

APPLICATION FOR TRANSMISSION: BY SURVIVOR OF TWO JOINT TENANTS BOTH RESIDENT OUTSIDE THE JURISDICTION.

IN THE MATTER of the lands comprised in Certificate of Title Volume Folio Registry.

I A.B. of Sydney New South Wales company director do solemnly and sincerely declare:—

1. That I this declarant and C.D. of Sydney aforesaid company director are registered as the proprietors of an estate in fee-simple as joint tenants in ALL THAT piece of land situate in the Provincial District of containing more or less being [*Set out here official description of land and reference to Register-book and encumbrances, if any*].

2. That the said C.D. died at Woollahra New South Wales on the day of one thousand nine hundred and forty-two as is evidenced by the certificate of death hereunto annexed and marked "A."

3. That C.D. named in the said certificate of title and C.D. named in the certificate of death were one and the same person.

4. That by right of survivorship I am entitled to be registered as the sole proprietor of an estate in fee-simple in the said lands AND I do hereby apply to be so registered.

5. That no other person has any estate or interest at law or in equity affecting the said lands.

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1835.

DECLARED by the said A.B. at Sydney this day of 194 before me— } A.B.

E.F.

[L.S.] Notary Public, Sydney, N.S.W.

Correct for the purposes of the Land Transfer Act.
G.H.,
Solicitor for applicant, Napier.

[*N.B.—To be accompanied by usual notarial certificate, and official certificate of death of the deceased.*]

PRECEDENT NO. 3.

TRANSMISSION TO ADMINISTRATOR DE BONIS NON.

Stamp duty 3s.

IN THE MATTER of the Land Transfer Act 1915
AND
IN THE MATTER of the estate of A.B. late of Hastings in the Provincial District of Hawke's Bay carpenter deceased.

I C.D. of Napier company manager do solemnly and sincerely declare and say as follows:—

1. That E.F. of Napier draper was the executor of the will of the above-named deceased probate whereof was granted to him by the Supreme Court of New Zealand at Napier on the day of one thousand nine hundred and sixteen.

2. That the said E.F. died leaving portion of the estate of the said deceased unadministered.

3. That letters of administration *de bonis non* with will annexed of the estate of the said A.B. deceased was granted to me by the Supreme Court of New Zealand at Napier on the day of one thousand nine hundred and forty-three.

4. That as such executor as aforesaid the said E.F. was registered as proprietor of an estate in fee-simple in all that piece of land situate in the Provincial District of Hawke's Bay and Borough of Napier containing more or less being [*Set out here official description of land and reference to register-book and encumbrances, if any*].

5. That except as herein disclosed no person has any estate or interest at law or in equity affecting the estate and interest of the said A.B. deceased in the said land in respect of which I hereby apply to be registered as proprietor in accordance with this application other than the beneficiaries under the said will.

6. That I verily believe that I am entitled to be registered as proprietor of the said estate and interest of the said deceased in the said land.

AND I HEREBY APPLY to be so registered.

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the same to be true and by virtue of the Justices of the Peace Act 1927.

DECLARED at Napier aforesaid this day of 194 before me— } C.D.

G.H.,
A solicitor of the Supreme Court of New Zealand.

CORRECT for the purposes of the Land Transfer Act.
G.H.,
Solicitor for the applicant, Napier.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Legislation by Cyclostyle.—Of the methods of bureaucracy and officialdom there is much to be learned from a perusal of the facts stated in a recent judgment of Stilwell, S.M., in *Factory Controller* v. *Blackmore* (Wellington, February 3). One learns first that there is, apparently, a division of a Government Department which is such a shrinking violet that it adopts the nomenclature of disguise. For Stilwell, S.M., says :

> It is common ground that the Standards Institute is a division of the Department of Industries and Commerce.

One learns next that we have laws the terms of which are to be found neither in our Statutes, nor in our Statutory Regulations, nor in the *New Zealand Gazette*. One learns that we have a law branded with the outrageous title of the " Males Outer Clothing Manufacture Control Notice, 1942," but that one cannot ascertain the law from the terms of the notice but must go therefor to the so-called " Standards Institute." For the control notice prohibits the manufacture of clothing except in accordance with " the said specification," and provides that " the said specification " means :

> the New Zealand Emergency Standard Specification entitled " Simplified Practice for the Manufacture of Mens, Youths, and Boys Outer Clothing " issued by the New Zealand Standards Institute under the authority of the Minister of Industries and Commerce bearing date October, 1942, and numbered N.Z.S.S.E. 92 (S.P.) and includes any amendment thereof that may hereafter be issued or any specification that may hereafter be issued in substitution therefor.

Why not—any lawyer or any reasonable citizen might ask—set out the terms of the specification in the gazetted control notice ? One learns officialdom's answer—and what an answer !—from the judgment of Stilwell, S.M. :

> The reason advanced for not including the specification in the control notice was to facilitate amendments from time to time as experience and war exigencies might dictate and thereby avoid frequent re-gazetting as amendments became necessary or desirable.

And, proceeding from bad to worse, one also learns from the judgment, how, as proving a subsequent amendment to the specification, " a cyclostyled form was put in bearing date the month of March, 1943, originating no doubt from the Standards Institute purporting to be an amendment of cl. 5 of the said specification," but with " nothing on its face or from the evidence to indicate or establish on whose authority, whether original or delegated, it is issued and in pursuance of what legislative authority." When laws are kept out of the *Gazette* and claimed to be amendable by cyclostyle it is high time something was done about it. The " Standards Institute " should be made to revise its standards—and at once.

Uncommon Common Sense.—" Bottle, 15s. ; half-bottle, 7s. 9d. ; 10oz. flasks, 6s. ; 5oz. flasks, 3s. 7d. ; miniatures, 2s. 3d. ; draught bottle, 14s. 6d. ; per measured nips, 11d., with soda 3d. extra." Thus, in relation to sales by retail of Australian whisky in the district of Rockhampton, ran the language of a Commonwealth Price Regulation Order. A prosecution having been brought in respect of the sale of a 26oz. bottle at £3, it was contended that the order was invalid on the grounds of vagueness or uncertainty as " bottle " was not a measure of quantity. This view found favour with the Magistrate, but has been unanimously rejected by five Judges of the High Court : *Bendixen* v. *Coleman*, 17 Aus. L.J. 333. As happens so often, and so unnecessarily, in our own Court of Appeal, each of the five Judges seems to have thought a statement of his own reasons in his own words essential to the validity of the decision. The words which make the most robust appeal are those of Rich, J. :

> As to the word " bottle " that is a word in the vernacular which needs no proof. Moreover buyer and seller were well acquainted with trade usage and . . . both parties recognized what was demanded and what was sold. This is a case where technicalities should not run riot and where common sense—which is not common—should prevail.

A Knightly Thrust.—Shortly after Darling, J., had been made a Privy Councillor there appeared before him as counsel Sir Albion Richardson, an " utter " barrister upon whom the honour of knighthood had just been conferred. Darling, J., addressed him as Mr. Richardson and continued to do so until his associate whispered a correction in his ear. The Judge at once apologized, saying : " You see, Sir Albion, things have altered very greatly since my young days at the Bar. Then it was not usual to confer knighthoods on junior barristers but only on law officers and others of the highest eminence." " And your Lordship will also recollect," replied Sir Albion, " that in your young days at the Bar it was not customary for puisne Judges to be made Privy Councillors." Darling, J., took this richly deserved retort in the best of part, describing it as " a knightly thrust."

The English High Court.—Prompted, apparently, by the arrears and mounting numbers of petitions for divorce, a Government Bill has been introduced into the House of Commons increasing the maximum number of puisne Judges of the High Court. Presumably the Bill will have passed both Houses by now. Prior to the introduction of the measure the maximum number of puisne Judges was twenty-nine—nineteen in the King's Bench Division, six in the Chancery Division, and four in the Probate, Divorce, and Admiralty Division. Now the maximum is to be thirty-two. Subject to a minimum of fifteen puisnes in the King's Bench Division, five in the Chancery Division, and three in the Probate, Divorce, and Admiralty Division, each puisne is to be attached to such Division as the Lord Chancellor may direct. The Lord Chancellor is given power to transfer a Judge from one Division to another ; but the Lord Chief Justice must approve every transfer from the King's Bench Division, and every transfer from the Probate, Divorce, and Admiralty Division must be approved by the President of that Division. Speaking to the Bill on its second reading in the Commons, the Attorney-General (Sir Donald Somervell, K.C.) said that it was proposed to appoint to the Probate, Divorce, and Admiralty Division two, or possibly three, more Judges who would be available to assist in the trial of divorce cases in the Assize towns and also to assist with work in London.

Submissions—Not Opinions.—In arguing a client's case it is entirely improper for counsel to express to the Court his opinion on any matter arising. The duty, *and the right*, of counsel is confined to stating his submissions. The rule is admirably stated in a paper

entitled "The Ethics of Advocacy" which Lord Macmillan, when at the Bar, once read to the Royal Philosophical Society of Glasgow:

> In pleading a case an advocate is not stating his own opinions. *It is no part of his business, and he has no right to do so.* What it is his business to do is to present to the Court all that can be said on behalf of his client's case. . . . *His personal opinion either of his client or of his client's case is of no consequence.* It is the business of the Judge or the jury to form their opinion of his client and his client's case.

All counsel of experience know this rule, yet it is surprising how often one hears counsel during the course of an argument, and particularly in reply to questions from the Bench, depart from the language of "I submit" and slip carelessly into the language of "I think." On most occasions the breach is obviously inadvertent and the Court, so viewing the matter, fails to correct counsel. This is perhaps understandable enough, but there are other occasions when the absence of judicial reprimand is indeed remarkable. For instance, some time ago our Court of Appeal, on an appeal in a case where the jury had found for one party but the trial Judge had ordered judgment to be entered, *non obstante*, for the other, allowed an experienced counsel, who had argued in support of the judgment appealed from, to say, and repeat, that his "unofficial view" was that the Court of Appeal should order a new trial.

Initials Astray.—A practitioner in North Otago vouches for this one: Shortly before his elevation to the Supreme Court Bench W. C. MacGregor, K.C., appeared for the Railway Department in an action heard in a country Court. The combination of initials proving too much for the compositor, the report of the local evening newspaper stated: "Mr. MacGregor, W.C., appeared for the Crown." Immediately the paper appeared this report was gleefully shown to MacGregor by his colleagues; but, quick as lightning came the comment of the future Judge: "I have a plain action for libel and the proper Court to hear it would be the Privy Council."

OBITUARY.

JESSIE RAINS PASSES ON.

At her home in Auckland, in the presence of her children, on the seventeenth day of April last, Jessie Rains passed on to eternal rest.

The New Zealand Law Society and the Auckland and Wellington District Law Societies were all represented at her funeral. The pall-bearers were: Mr. V. R. Meredith, Mr. W. C. Hewitt, Dr. R. J. McElroy, Mr. C. Mason (Deputy Registrar of the Supreme Court at Auckland), and Mr. W. Good (Secretary of the Auckland Law Society). Mr. Meredith represented the New Zealand Law Society and the Wellington District Law Society.

Although it is now six years since Jessie Rains replaced her last book in its customary place in the Wellington Law Library, many of the practitioners still remember her at her daily tasks. The memory is a vivid and happy one.

She joined the library staff during the last war and no one regretted the innovation of having a woman in the library, though many were quite sure no woman would ever remember where the books should go; yet she quickly learnt. She had the capacity of making friends of all of us, and, indeed, it was a privilege to enjoy her friendship. She exuded happiness and goodwill in spite of the many vicissitudes that fate dealt her, and only a few knew anything of the trials of her life beyond the library. Her work was her principal interest with us; but after that during the winter mornings when we were waiting for 10.30 and the Courts to begin, we could see her with her back to the fireplace capping tale on tale—always a good companion. Judges, Counsel, old and young, all looked to her for help. She was an especial champion of the younger generation, always finding hope when the jury was out, even if the case appeared hopeless and the Judge seemed to have done his best in the interests of justice, which was just what the young Counsel did not want. She applauded his victories and must have heartened many a young man in his early struggles at the Bar.

She stood in awe of no one. The most austere Judge, the busiest Silk, the juriest stuff gown were all just friends whom it was a pleasure to Jessie Rains to help. Maybe she had a few special friends who round that fireplace would hear the latest legal gossip, learn from her what was going to win the Cup, and why it didn't, and who was going to be the next Judge, and, later, why he was not appointed.

When she left us a few years ago we all went up to say goodbye to her and to wish her good luck. She then knew, if she had not realized it before, how affectionately she was regarded by the Wellington Bar, and in her turn she loved them all, and it is very comforting to know that in the Law Library she spent her happiest days and in return she gave full measure in loyal service.

She was missed when she retired, but now that she has irrevocably passed from us we shall remember her for the cheerfulness of her presence and the kindness of her heart, and her ever readiness to come to the aid of any in distress.

To her children, to whom she was passionately devoted, all will extend their heartfelt sympathy.

—C. A. L. T.

The appointment of Mrs. Rains as Assistant Librarian to the late Mr. Harrison, in place of Mr. Moschini was made in 1915, during my Presidency of the Wellington District Law Society. I have a clear recollection of the interview between the late Mr. O. R. Beere and myself and Mrs. Rains in the Library. It is hard to say which was the more nervous, the prospective appointee or the appointors. However, the ice was soon broken, and we resolved to try the experiment of a lone woman in a den of lawyers.

As the Society was Mr. Harrison's child, to which he gave all his love and labour, so, when he passed away, Mrs. Rains became our adopted mother and won and retained the affection of us all.

—H. v. H.

RULES AND REGULATIONS.

Egg Rationing Permit. (Rationing Emergency Regulations, 1942.) No. 1944/49.

Notice is given of the reprinting of the regulation as under:—

National Service Emergency Regulations, 1940 (Reprint). (Emergency Regulations Act, 1939.) No. 1944/50.

Invercargill Licensing Trust Act Commencement Order, 1944. (Invercargill Licensing Trust Act, 1944.) No. 1944/51.

Secondary Schools Bursaries Regulations, 1943. (Education Act, 1914.) No. 1944/52.

Education (Scholarships to Maori Pupils) Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/53.

Opossum Regulations 1934, Amendment No. 5. (Animals Protection and Game Act, 1921–22.) No. 1944/54.

Electricity Control Order, 1943, Amendment No. 2. (Supply Control Emergency Regulations, 1939, and the Electricity Emergency Regulations, 1939.) No. 1944/55.

Defence Areas (Farming) Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/56.

Government Service (Accrued Annual Leave) Emergency Regulations 1944. (Emergency Regulations Act, 1939.) No. 1944/57.

LAND AND INCOME TAX PRACTICE.

Notes on Payment of Social Security Contribution.

A.—Payment of Social Security Charge and National Security Tax on Income other than Salary or Wages.

The provisions covering payments of social security charge and national security tax on income other than salary or wages are contained in Reg. 19 of the Social Security Contribution Regulations, 1939 (Serial No. 1939/13). The principal points are summarized thus:—

(i) Payments may be made to any authorized officer at any money-order branch of the Post Office, or forwarded direct to the Commissioner of Taxes, Wellington C.3.

(ii) Every declaration of income other than salary or wages made pursuant to the regulations must be accompanied by not less than one-quarter of the combined charge payable in respect of the income disclosed in the declaration.

(iii) A person may pay in whole or in part any one or more of the second and subsequent instalments of the charge due.

The following notes may assist those practitioners who furnish declarations and pay instalments on account of several clients.

1. In order to save exchange on cheques drawn on a bank out of Wellington, Hutt City, and Petone, the total amount of charge payable may be deposited to the Public Account at any branch of the Bank of New Zealand, but in such cases the *small (Ty. 30A) portion of the Bank Receipt must be forwarded to the Commissioner of Taxes, Wellington, with a covering letter*, stating clearly that the payment is on account of social security charge and national security tax and containing full details of the payment. An official receipt is issued by the Department in the usual manner.

2. If payment of social security charge and national security tax, and income-tax or land-tax is being made by bank receipt (according to the procedure outlined in the previous paragraph), at the same time, it is preferable to make a separate lodgment to the Public Account in respect of the total social security charge and national security tax as distinct from the total land or income tax, and forward two bank receipts to the Department. The reason for this is that the proceeds of social security charge and national security tax are not credited to the Consolidated Fund, and if social security contribution and land or income tax are covered by one bank receipt, the Department is put to the inconvenience of "splitting" the bank receipt into correct proportions payable to the Consolidated Fund and other appropriate Government Funds. A large number of such "split" receipts obviously delays the issue of a final receipt to the payer. The same principle applies to social security contribution and land or income tax covered by one cheque. The advantages of payment to the Public Account from an audit point of view are obvious, and eliminates altogether the question of apportionment of bank exchanges, and outstanding cheques paid from the Trust Account.

3. **Payments on Basis of Declarations.**—The issue of receipts will be greatly facilitated if practitioners who make payments of social security contribution to the Commissioner of Taxes on behalf of several clients enclose a covering letter showing:—

(*a*) The full Christian and surnames of each person on whose behalf payment is made.

(*b*) The locality address of each person.

(*c*) The amount of chargeable income shown on the declaration (final or provisional) upon which the payment is based.

(*d*) The amount of instalment being paid on behalf of each person.

(*e*) The last receipt number—the actual receipt or full details of the preceding instalment *must* be enclosed, or another declaration must be attached if the receipt or details for the preceding instalment are not available.

(*f*) A separate covering letter for each client is not necessary.

The following specimen letter (appended below)* has been suggested by an officer of the Department as one which meets the requirements, and solicitors are asked to consider its use, if possible, when forwarding payments and declarations during May.

It will be observed that the final column has not been used when paying the first (May) instalment. When receipts are issued by the Department, the receipt numbers could be entered on to the office copy of the letter, and when paying the next instalment in August the same form of draft could be used with appropriate adjustments to the income and amount of instalment of Arthur Smith, and quoting the last (May) receipt numbers in all cases. If this is done it would not be necessary to forward the last receipt to the Department.

4. **Payments of Social Security Contribution on Basis of Notices issued by Department or arising from Correspondence.**—The Department requests that such payments be clearly identified, either by—

(*a*) Forwarding the relative notice of assessment or request for payment. (N.B.—Many notices of assessment have a detachable portion. The complete notice should be enclosed with the payment—the Department will return the assessment portion with the official receipt.)

(*b*) Or, if a notice of assessment or arrears notice has not been issued, by quoting any references shown in correspondence as a result of which the payment is being made, bearing in mind that if a payment on account of arrears is being forwarded during an instalment month, the first assumption, in the absence of specific directions, would be that the remittance is in respect of a current instalment.

5. **Payment of Second and Subsequent Current Instalments.**—The form of covering letter as given herein is suggested. It is safer, however, to include the last receipt itself if there is any kind of adjustment necessary—*e.g.*, an amended income following a provisional declaration, or an amended amount of income consequent upon an adjustment of some kind.

*** Re Social Security Contribution.**

I enclose the (Ty.) portion of a bank receipt in respect of a lodgment of £223 15s. made to the Public Account—(Bank of New Zealand, Hamilton)—on account of the following. Would you kindly issue recepits care of my address, as above.

May, 1944, Instalment.

Surname.	Full Christian Name.	Address.	Income declared.		Instalment herewith.			Last Receipt No.
			£		£	s.	d.	
Jones	John Wm. ..	Te Awamutu	1,000	(Final) ..	31	5	0	
Robinson ..	Robert ..	Morrinsville	400	(Final) ..	12	10	0	
Smith	Arthur.. ..	Te Mawhai	800	(Prov.) ..	25	0	0	
Brown	Estate Alfred	Hamilton ..	40	(Acc.) ..	5	0	0	Paid in full.
Brown	Estate Alfred	Hamilton ..	1,200	(To death) ..	150	0	0	Paid in full.
					£223	15	0	

The relative declarations are attached, together with income-tax returns, except an income-tax return in the name of our client Mr. A. Smith, whose balance date is May 31.

Yours faithfully, . . .

6. **Provisional Declarations.**—The law is contained in Reg. 16 of the Social Security Contribution Regulations, 1939 (Serial No. 1939/13). Notes thereon are—

(i) If it is not possible to furnish a final declaration of income derived during the year ended March 31, 1944, or if a taxpayer has adopted a balance date other than March 31 (say June 30), a provisional declaration must be furnished on or before May 31, and at least one quarterly instalment of charge computed on the basis of the income shown in the declaration must be paid.

(ii) Such a declaration should be clearly marked "Provisional," and the income should be the same amount as the income as shown in the final declaration for the preceding year, and *not an estimated amount.*

(iii) Immediately the final income for the year is known, a further declaration clearly marked "Amended" should be completed and, if there is a greater income, the charge recomputed and the difference in the amount of instalments which have already fallen due must be paid forthwith.

As "amended" declarations for increased incomes are completed, it is recommended that payment of any additional charge due be effected at a money-order office, and an official receipt obtained immediately. If for any reason an "amended" declaration is forwarded to the Commissioner of Taxes, *all* receipts covering payment of instalments on the provisional declaration must be attached to the declaration, and the correct amount of additional charge enclosed.

If, on the other hand, the amended income is smaller than the provisional income, the payment due in the next instalment month will be adjusted by a receiving officer at any money-order office, or by the Commissioner of Taxes, but all receipts for instalments paid to date must be presented at the money-order office, or forwarded to the Department with the amended declaration in order that an adjustment may be effected.

7. **Payment of Charge where Total Income other than Salary or Wages does not exceed £2.**—Where the total *annual amount* of charge payable does not exceed 5s., it may be more convenient to affix social security stamps to the value of the total amount of charge payable, to the declaration of income other than salary or wages and forward the declaration to the Commissioner of Taxes or to a money-order office in order that the social security stamps may be cancelled. This method does not provide an official receipt, but most solicitors would be able to devise some method of providing an office voucher for audit purposes.

8. **Credit Letters** are sometimes issued by the Department, and must be surrendered when a claim is made to have the credit taken into account.

9. **Registration Fee.**—If remittances are being forwarded in payment of the registration fee, it is advisable to make a clear distinction by referring to "Registration Fee" and not "Social Security Contribution."

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. Practice.—*Action in Supreme Court—Not set down for current Session—Early Hearing desired—Procedure.*

QUESTION: My client is the owner of a house, and is entitled to possession; but the tenants refuse to quit. It is essential, and particularly so in the circumstances prevailing in the case, that he be able to bring proceedings by way of writ of summons in the Supreme Court, and obtain an early hearing during the current session of the Court. Could you advise as to the procedure for obtaining a hearing without waiting for the next session of the Court?

ANSWER: Under R. 250A of the Code of Civil Procedure, if a Judge is satisfied that the exigencies of the case so require, he may at any time, on the application of any party, order that any action (except a jury action), although not set down, shall be tried at such time as the Judge thinks proper.

The application is by way of notice of motion, with supporting affidavit, and these documents may be filed at the same time as the writ of summons is issued. The copy of notice of motion can then be served on the defendant at the time of service of the copy of writ of summons.

2. Land Transfer.—*Subdivision—Proposed Transfer of Lot, without Road Frontage, to One of Two Tenants in Common of Adjoining Land.*

QUESTION: A. owns two Lots in physical contiguity: one Lot has a road frontage, the other has not. A. proposes to sell the Lot without the road frontage to B., who together with C., owns the adjoining land as tenants in common in equal shares. Both the tenements are under the Land Transfer Act, and they are both within a county. Can the proposed transfer from A. to B. be registered?

ANSWER: *Ex facie* this transfer is prevented by the main enacting part of s. 125 of the Public Works Act, 1928. It is true that the proviso to this section states: "Provided that this subsection shall not apply with respect to the sale of land to the owner of adjoining land." In subs. (9) "owner" is defined as *the* owner. It is submitted that in order to obtain the benefit of this provision the ownership of both tenements must be identical. This opinion appears to follow from the Court of Appeal ruling, *In re the Land Transfer Act*, 1885, *and the Public Works Act*, 1903, (1905) 25 N.Z.L.R. 385, where it was held, *inter alia*, that an allotment had not a frontage to a road of statutory width within the meaning of the Public Works Act, 1903, merely because there was granted with it an undivided share in an adjoining strip of land which had a frontage to such a road: see reply to Question No. XI, *ibid.*

But, if the Lot which A. proposes to sell to B. is not required by B. for the purpose of a dwellinghouse, then the County Council by resolution may take the sale out of the prohibition imposed by the main enacting part of s. 125 of the Public Works Act, 1928: see the proviso thereto. On such a resolution being endorsed on the transfer under the seal of the County Council the District Land Registrar would be bound to register the transfer from A. to B., if otherwise in order.

3. Death Duty.—*Marriage Settlement—Corpus contributed by Deceased's late Father and Husband—Deceased's Life Interest and Special Power of Appointment—Liability to Duty.*

QUESTION: By marriage articles dated 1887, A.B., father of C.D., and E.F., husband of C.D., each contributed £2,000 to the corpus of the settlement, C.D. herself not contributing anything. There is a life interest to E.F., and, after his death, life interest to C.D. Subject to these two life interests the trustees are directed to hold the trust funds "on trust for such one or more of the issue of the said intended marriage at such age or time or respective ages and times and if more than one in such shares and with such future or executory or other trusts for the benefit of the said issue or some or one of them and with such provisions for their respective maintenance education and advancement at the discretion of such person or persons and upon such conditions with such restrictions and in such manner as the said C.D. and E.F. shall by any deed or deeds jointly appoint and in default of such appointment and so far as no such appointment shall extend then as the survivor of them

the said C.D. and E.F. shall in like manner or by will or codicil and whether married or sole after the decease of him or her first dying shall appoint AND in default of any appointment and so far as no appointment shall extend IN TRUST for all the children or any the child of the said intended marriage who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry under that age and if more than one in equal shares as tenants in common." A.B. and E.F. have been dead for very many years. C.D. and E.F. made no joint appointment by deed. By will C.D. exercised the power of appointment in favour of two adult daughters of the marriage. C.D. is now dead. The corpus of the settlement is now represented by various mortgages and local-body debentures. In respect of the funds of the marriage settlement what is the liability for death duty *re* C.D. deceased and what will be the likely requirements of the Stamp Office? C.D. also owns property in her own right and, of course, it is proposed to file death-duty accounts *re* her estate.

ANSWER: The corpus of the marriage settlement will not be liable to death duty on death of C.D., because—

(1) She did not contribute the corpus or any part thereof and therefore s. 5 (1) (*g*) does not apply; *Angus* v. *Commissioner of Stamp Duties* (*N.S.W.*), (1930) 44 C.L.R. 211; *cf. Adamson* v. *Attorney-General*, [1933] A.C. 257.

(2) She had a special and not a general power of appointment over the corpus, and therefore s. 5 (1) (*h*) does not apply.

As, however, deceased at date of death was the life-tenant under the settlement all arrears (if any) of income, and *apportionments* of income duly apportioned to date of death, must be brought to account under s. 5 (1) (*a*). The Stamp Department will probably require production of the original marriage settlement or a duly authenticated copy thereof and a balance-sheet of the assets of the trust as at date of C.D.'s death. As to apportionments to which the estate of the life-tenant is entitled, see, for example, *Adam's Law of Death and Gift Duties in New Zealand*, 262, and *Re Henderson, Public Trustee* v. *Reddie*, [1940] Ch. 368, [1940] 1 All E.R. 623.

---

4. Public Works.—*Compensation Claim—Discovery of Documents.*

QUESTION: In a claim for compensation in the Compensation Court under the Public Works Act, 1928, is there any authority or procedure enabling an application to be made to the Court before the hearing of the claim for an order for discovery of documents? Would R. 161 of the Code of Civil Procedure, dealing with discovery in respect of actions in the Supreme Court, apply?

ANSWER: In a recent application for such an order, heard at Wellington, the Chief Justice dismissed the application on the ground that there is no jurisdiction to order discovery before the hearing of the claim.

---

5. Company.—*Change of Name—Private Company—Procedure.*

QUESTION: I am acting for a small private company registered under the Companies Act: because it has recently changed its shareholders, the present shareholders desire to change the company's name, provided it will not be expensive. Will an application to the Court be necessary? Please state procedure.

ANSWER: Before the coming into operation of the Companies Act, 1933, an application to the Supreme Court was necessary. Under the present Act, however, a simpler procedure has been provided for: the Registrar may change its name after the company has passed the necessary resolution, and the expense ought not to be much. The Registrar will require a statutory declaration as to the reason for the desired change, and whether the change would be likely to mislead the public or to prejudice its creditors: see *Morison's Company Law*, 2nd Ed. 11, and *Supplement No. 2* thereto p. 4, where the procedure is set out.

---

6. Divorce.—*Intended Petitioner Soldier serving Overseas—Proceedings by Attorney—Sufficiency of Reason.*

QUESTION: A soldier, who is overseas, is desirous of filing a divorce petition. He has an attorney in New Zealand, who has power under the power of attorney to bring such proceedings on his behalf. Is it possible for the divorce petition to be signed and the supporting affidavit made by the attorney?

ANSWER: Leave has been granted in cases for an attorney to sign a petition in divorce and make the supporting affidavit, where the petitioner was a prisoner of war, but in these cases it has been impossible, or practically impossible, for the petitioner to sign the petition. However, in the present instance, it is possible to obtain the soldier's signature to a petition. A number of cases have been heard in the Courts, where the soldiers have signed overseas. Delay in obtaining the necessary signature overseas would hardly constitute sufficient reason in support of an application for leave for the attorney to sign.