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THE LAW REFORM ACT, 1944.

II.

IN our last issue we dealt with ss. 2, 3, and 4 of the Law Reform Act, 1944. Therein, we endeavoured to show the changes in common-law rules which those sections have made. With the same object in view, we now proceed to consider the remaining sections of the statute.

RULE AGAINST PERPETUITIES NOT TO APPLY TO SUPERANNUATION FUNDS.

The rule against perpetuities is that, in order to be validly created, an interest in property, if not vested at creation, must vest, if it vest at all, within the period allowed by law for the vesting of future interests—*namely, not later than twenty-one years after the* termination of a life or lives in being at the date of the creation of the interest. Every future interest that does not vest within the legal period is void *ab initio.**

This rule has been modified by s. 5 of the Law Reform Act, 1944, by rendering it inapplicable to superannuation funds. The section is as follows :—

5. *The rule of law relating to perpetuities shall not apply and shall be deemed never to have applied to the trusts of any fund of which the main purpose or one of the main purposes is the provision of retiring-allowances or pensions on retirement to persons employed in the undertaking or combination of undertakings in connection with which the fund is established, if the fund is a superannuation fund within the meaning of the Land and Income Tax Act, 1923, or if the fund is such that the Commissioner of Taxes allows deductions to be made under section eighty-two of that Act of the whole or any part of the amounts set aside or paid by the employer as or to the fund.*

The reason for the modification is that many firms in the Dominion have superannuation or pension funds to which the employees contribute, and which the firm subsidizes, so arranged as to continue until the firm's dissolution. Such a scheme may be void as infringing the rule against perpetuities : *cf. Ashworth* v. *Drummond,* [1914] 2 Ch. 90. While the creators of some of these pension schemes have, in the past, taken a risk in this regard, others have made provision for the continuance of the scheme until the death of the last survivor of the existing issue of some named person.

* *1 Garrow's Law of Property,* 2nd Ed. 333 ; and, generally, see *25 Halsbury's Laws of England,* 2nd Ed. 86 *et seq.*

As will be noted, the section is retrospective ; and it validates all such existing schemes as come within its ambit, as well as any future creations of superannuation schemes of the like nature.

The section applies to two kinds of superannuation funds :—

(*a*) Every superannuation fund coming within the following definition in s. 2 of the Land and Income Tax Act, 1923, which, so far as material, is as follows :—

> "Superannuation fund" [after enumerating Government and Local Authorities Superannuation Funds] includes any superannuation fund established for the benefit of the employees of any employer and approved for the time being by the Commissioner for the purposes of this Act.

(*b*) Every superannuation fund in respect of which the Commissioner of Taxes allows deductions to be made under s. 82 of the Land and Income Tax Act, 1923, of the whole or part of the amounts set aside or paid by the employer as or to the fund, that is a fund to provide individual personal benefits, pensions, or retiring allowances to the employees of that employer. It is necessary, before the Commissioner allows the deductions authorized by the section, that he must be satisfied that the rights of the employees to obtain those benefits have been fully secured. As to the nature of such deductions, see *Cunningham and Dowland's Taxation Laws of New Zealand,* 2nd Ed. 114, 115.

Thus, in a New Zealand setting, and within the limits prescribed, there is reproduced s. 1 of the Superannuation and Other Trust Funds (Validation) Act, 1927 (17 & 18 Geo. 5, c. 41), as to which see *25 Halsbury's Laws of England,* 2nd Ed. 111 (*a*), 112.

VALIDATION OF CERTAIN GIFTS VOID FOR REMOTENESS.

Section 6 of the Law Reform Act, 1944, modifies the rule against perpetuities in respect of the vesting of capital or income which would otherwise be "void for remoteness," to use the expression commonly used to indicate an offending against the rule.

The new section is as follows :—

6. (*1*) *Where in a will, settlement, or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift*

over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift, is, or but for this section would be, rendered void for remoteness, the will, settlement, or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument.

(2) This section applies to any instrument executed after the passing of this Act and to any testamentary appointment (whether made in exercise of a general or special power), devise, or bequest contained in the will of a person dying after such passing, whether the will is made before or after such passing.

(3) This section applies without prejudice to any provision whereby the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement, or other instrument is attained.

By reproducing s. 163 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), the section puts the law on this point in New Zealand on all fours with that in Great Britain.

The new section operates only in respect of two classes of documents: (*a*) Any instrument *executed* after December 5, 1944; and (*b*) Any will, whether executed before or after December 5, 1944, of a testator who *dies after* that date. (Subs. 2).

In brief, the effect of the section is that in any such designated instrument or will, the age of twenty-one years will be substituted for the specified age, exceeding twenty-one years, of the beneficiary or members of the class who take, if the greater age would infringe the rule against perpetuities; and the limitations (if otherwise valid) will take effect as so altered. The section operates only in respect of the vesting of a gift or devise, which, on its creation, would have infringed against the rule against perpetuities; and, which, without the operation of the section, would accordingly have been void *ab initio*.

It must be observed that if property is made to vest on (say) attainment of the age of twenty-five years or marriage, the substitution of twenty-one years for the twenty-five years is not to interfere with the sooner vesting on marriage before that age. (Subs. 3).

To take an example of the effect of the section: If, to instance a void limitation, there is a devise "to the first unborn son of A. to attain twenty-five," the first son who reaches the age of twenty-one will take under the devise, and any further interests which are limited to take effect after his death, and which are themselves not an infringement of the rule against perpetuities, will arise in the normal course of events. But if there should be a devise "to the first son of A. to attain twenty-five years," and if when the testator dies, A. is also dead having left a son or sons, the limitation is valid independently of the new section for the son who takes is a life in being. But he cannot claim the interest as soon as he reaches the age of twenty-one years: he must wait until he is twenty-five years of age.†

† *Cheshire's Modern Real Property*, 5th Ed. 490.

The detailed effect of the section must be gathered from a careful consideration of the rule against perpetuities applied to the instrument or will under particular notice: as to which see 25 *Halsbury's Laws of England*, 2nd Ed., p. 86 *et seq.* The other available text-books on the law of property or of wills, in their references to s. 163 of the Law of Property Act, 1925 (which this section reproduces), are not helpful. Strangely enough, there has been a dearth of cases; and, consequently, there is no authority to give some certainty of construction to the language used.

Wills in Contemplation of Marriage.

Section 18 of the Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), in force in New Zealand, is as follows :—

18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the statute of distributions).

(Thus, a subsequent valid marriage effects a complete revocation of a will made before the marriage, even if the will is executed on the same day as the marriage but before its solemnization.)

This section, as to revocation by marriage, has been modified by s. 7 of the Law Reform Act, 1944, as follows :—

7. *(1) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section eighteen of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnization of the marriage contemplated.*

(2) This section only applies to wills made after the passing of this Act.

Formerly a will was, by virtue of s. 18, revoked by marriage, though made in contemplation of marriage: *In the Goods of Cadywold*, (1858) 1 Sw. and Tr. 34, 164 E.R. 617; *Marston* v. *Roe d. Fox*, (1838) 8 Ad. and El. 14, 112 E.R. 742; and *Israell* v. *Rodon*, (1839) 2 Moo. P.C. 51, 12 E.R. 922. But s. 7 of the Law Reform Act, 1944, alters this in New Zealand wills made after December 5, 1944.

The first thing to be noted about the section is that it does not revoke s. 18 of the Wills Act, 1837. It modifies it in the same terms as are used in s. 177 of the Law of Property Act, 1925 (15 Geo. 5, c. 20). Even so, the modification applies only to wills made after December 5, 1944 (subs. (2)). In s. 18, "will" includes "codicil," and it applies to a soldier's will: *In re Wardrop*, [1917] P. 54.

To come within the protection of s. 7 of the Law Reform Act, 1944, a will must be made after December 5, 1944, and it must be expressed to be made in contemplation of a marriage: *Pilot* v. *Gainforth*, [1931] P. 103. Moreover, in order that it may not be revoked by the subsequent marriage, it must contain an express reference to that particular marriage; and, further, it must be followed by the solemnization of that marriage *Sallis* v. *Jones*, [1936] P. 43.

It may, therefore, be well, in drafting wills, where the protection of the new section is desired, to make alternate provisions in case the contemplated marriage should not take place, or to provide for the will taking effect only in the event of that marriage.§

§ A useful precedent may be found in *18 Encyclopaedia of Forms and Precedents*, 2nd Ed. 542.

SUMMARY OF RECENT JUDGMENTS.

In re HOLMES (DECEASED), CUNINGHAM v. HOLMES AND OTHERS.

SUPREME COURT. Christchurch. 1944. December 7, 19. NORTHCROFT, J.

Will—Devises and Bequests—Specific Legacy to Executor—Whether entitled to Priority on Deficiency.

Executors and Administrators—Deficiency—Competition between Annuitants, General Legatees, and Residuary Legatees—Method of Administration.

In case of a deficiency, a specific legacy to an executor has no priority, but is subject to abatement with other legacies including legacies of annuities.

Skrimshire v. *Melbourne Benevolent Asylum,* (1894) 20 V.L.R. 13, applied.

Allen v. *Edmonds,* (1886) 12 V.L.R. 789, not followed.

Where on a deficiency there is competition between annuitants, other general legatees and residuary legatees, the Court endeavours within the purpose of the testator to maintain equality among legatees.

In re Bradberry, National Provincial Bank, Ltd. v. *Bradberry,* [1943] Ch. 35, [1942] 2 All E.R. 629, referred to.

In the present case, an order was made that there should be a valuation of the annuities upon the actuarial basis prescribed by the "Carlisle Table" as at the date of the order, and the method of administration was indicated as follows :—

To the values of the several annuities thus found, the amount of arrears should be added. There would then be a notional division of the estate among the executor as legatee and the annuitants. The estate, as realized, should be divided. The executor would be entitled to pay himself the proportion attributable to his legacy, and he should then pay the balance into an annuity fund for each of the three annuitants. The annuity funds for the several annuitants should be applied both as to income and capital to make good the incapacity of the income of the unrealized assets to satisfy the annuities. Upon the death of any annuitant, such portion of the annuity fund as was set aside for the annuitant should be divided in the same way as prescribed for the proceeds of the assets as realized, excepting that the funds for annuitants would then be retained only for survivors.

Counsel: *K. M. Gresson,* for the plaintiff; *C. S. Thomas,* for testator's widow; *Hensley,* for Elizabeth Paterson; *Perry,* for Kathleen McMaster; *T. A. Gresson,* for fourteen other defendants.

Solicitors: *K. M. Gresson,* Christchurch, for the plaintiff; *Thomas and Thompson,* Christchurch, for the widow; *Wilding and Acland,* Christchurch, for Mrs. McMaster; *A. T. Bell,* Christchurch, for Elizabeth Paterson; *Wynn Williams, Brown, and Gresson,* Christchurch, for residuary legatees.

McKERROW v. McKERROW.

SUPREME COURT. Christchurch. 1944. November 24. NORTHCROFT, J.

Divorce and Matrimonial Causes—Practice—Petition on Ground of Three Years' Separation—Answer praying Relief on Ground of Desertion—Petitioner asking Leave to withdraw Petition—Order to be made—Divorce and Matrimonial Causes Act, 1928, s. 20.

In cases of a petition in divorce where the respondent in his or her answer alleges any matter entitling either husband or wife to any relief under the Divorce and Matrimonial Causes Act, 1928, the cross-charges of which answer it is intended to pursue, and the petitioner has decided not to prosecute the suit, an order should be made to stay the proceedings on the petition but not to dismiss it.

In substance, the result in such circumstances will be that the petitioner will not be allowed to proceed on his petition except by leave; and, when the matter is brought before the Court, the petition and the cross-prayer can be determined together by the Judge at the trial of the suit.

Volkers v. *Volkers (Wingate cited),* [1935] P. 33, applied.

Counsel: *E. S. Bowie,* for the respondent; *Hobbs,* for the petitioner.

PACIFIC STEEL, LIMITED v. MINISTER OF PUBLIC WORKS AND MINISTER OF INDUSTRIES AND COMMERCE.

SUPREME COURT. Wellington. 1944. October 19. MYERS, C.J.

Public Works Acts—Compensation—Compensation Court—Jurisdiction—Practice—Discovery—Commission to take Evidence Abroad—Constitution of Court—Whether within Purview of Arbitration Acts or a Special Tribunal—Jurisdiction—Whether Compensation Court or Supreme Court may Order Discovery, or Commission to take Evidence or Further Particulars of Claim before Actual Hearing—Discretion as to taking or receiving of Evidence—Public Works Act, 1928, ss. 52, 71, 75—Code of Civil Procedure, RR. 172, 177.

A Compensation Court constituted under the Public Works Act, 1928, is a special tribunal, which is outside the category of arbitration tribunals and is governed exclusively by its own code, the provisions in that statute governing its powers and procedure being comprehensive.

Therefore, a proceeding in the Compensation Court is not an arbitration, and the Supreme Court has no power to make an order for the issue of a commission for the examination of witnesses in connection with a compensation claim to be heard by the Compensation Court; or an order for discovery of relevant documents and papers.

Racecourse Betting Control Board v. *Secretary of State for Air,* [1944] 1 All E.R. 60, and *In re Skene's Award,* (1904) 24 N.Z.L.R. 591, 7 G.L.R. 153, applied.

Clifford v. *Minister of Lands,* (1903) 23 N.Z.L.R. 508, referred to.

Such a Compensation Court, until the hearing of the claim for compensation has commenced, has no power to order further particulars of the claim to be given under s. 52 of the said Act, discovery of relevant documents and papers, or the issue of a commission for the examination of witnesses abroad; but it may do so once it has been convened by the President under s. 71 of the Public Works Act, 1928, and has commenced its sitting for the purpose of hearing the claim.

The Compensation Court has power to order the examination of witnesses to be taken abroad by virtue of s. 75 (3) of the Public Works Act, 1928, coupled with RR. 172 and 177 *et seq.* of the Code of Civil Procedure; but s. 75 (4) of the statute has reference not to the mode in which evidence may be given, but to the nature of the evidence to be received.

The method of taking evidence and the nature of the evidence to be received are both matters entirely within the discretion of the Compensation Court and are not subject to the approval of any other Court.

Counsel: *Sim,* K.C., and *Hadfield,* for the claimant; *Cornish,* K.C., Solicitor-General, for the respondent.

Solicitors: *Perry, Finch and Hudson,* Timaru; Crown Law Office, Wellington.

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

SUPREME COURT. Auckland. 1944. October 12, 13; December 15. NORTHCROFT, J.

Public Revenue—Death Duties (Estate Duty)—Deduction of Debt in computing Final Balance of Estate—Guarantee by Deceased of Overdraft of Company in which he held Shares—Demand by Bank for Same after Deceased's Death—Whether a "debt incurred by deceased otherwise than for full consideration in money or money's worth wholly for his own use and benefit"—Death Duties Act, 1921, s. 9 (1) (2) (a).

In 1919, B. and another, entered into a joint and several guarantee with a bank, to procure advances to M. Company with a liability of £50,000, to facilitate the purchase by B. and his co-guarantor of the shares in the company. After the account had been in credit, in November, 1933, the company's overdraft limit was extended and in December, 1933, the guarantee involved in this case was given for £45,000, the overdraft then standing at £44,928.

B. died on January 9, 1934, holding 23,646 of the company's 50,000 shares. On June 9 following an order was made that his estate be administered by the appellant company under Part IV of the Administration Act, 1908. On May 8, 1934, the bank

made a demand on the appellant company for the payment of £44,404 under the guarantee, and this demand was rejected. Subsequently, the bank's proof of debt for £45,906 was admitted. On October 18, the M. company went into liquidation, as a result of which the bank recovered from the liquidator £13,451 and realization of securities amounting to £4,995.

The appellant claimed to deduct the said sum of £45,906 from the dutiable estate of the deceased as a debt for which an allowance should be made under s. 9 (3) of the Death Duties Act, 1921. The Commissioner of Stamp Duties disallowed the said claim on the ground that the said debt was incurred by the deceased "otherwise than for full consideration in money or money's worth wholly for the said deceased's benefit," and, pursuant to s. 9 (2) (*a*) of the statute, disallowed the claim.

On a case stated on appeal from such determination,

Held, That the said debt fell precisely within the language of the said s. 9 (2) of the Death Duties Act, 1921, so as to prevent its being allowed in computing the final balance of the estate.

Observations on the ambiguity of s. 9 (2), and its possible interpretation in either of two ways.

Attorney-General v. *Duke of Richmond and Gordon*, [1909] A.C. 466, distinguished.

In re Baroness Bateman, [1925] 2 K.B. 429, and *New Zealand Insurance Co., Ltd.* v. *Commissioner of Stamps*, [1938] N.Z.L.R. 87, G.L.R. 36, referred to.

Counsel: *Richmond*, for the appellant; *V. R. S. Meredith*, and *Rosen*, for the respondent.

Solicitors: *Russell, McVeagh, and Co.*, Auckland, for the appellant; *Crown Law Office*, Wellington, for the respondent.

GIFT BY WILL OF A MOTOR CAR.

Whether included in Term "Effects."

By Bruce Sinclair-Lockhart, LL.M.

The modern spiral of rising costs relentlessly upward by war-time inflationary pressure has furnished the testator with a more potent reason for the explicit and exact disposal of any motor-car he may own by his last will and testament.

The import of the word "effects" when used by the draftsman of a will can be very far-reaching in its scope and unless the collocation of testimentary phrases points to an opposite intention, "effects" can include any motor-car owned by the testator at the time of his death.

In Roland Burrows' new encyclopaedic work *Words and Phrases Judicially Defined*, Volume 2, at p. 176 *et seq.*, it is stated:

> The principle of construction to be gathered from the cases is that *prima facie* the word "effects" is sufficient to carry the entire personal estate not otherwise disposed of by the will, unless the testator, by the terms of the will, shows that a different and narrower construction was intended.

The learned author there cites the following dictum of Mann, J., reported in *Re Tormey, Tormey* v. *Tormey*, [1935] V.L.R. 300, 301:

> I feel no difficulty about the word "effects" being sufficient to cover a motor-car, even apart from authorities.

However, in that decision the context raised an inference to the contrary and prevented the deceased's motor-car, its tools, and equipment from passing to the beneficiary of his "effects."

In the case of *In re White, White* v. *White*, [1916] 1 Ch. 172, a specific bequest of "furniture and all other articles of personal, domestic, or household use" to the testator's two daughters was construed as extending to, *inter alia*, the motor-car of the testator and its accessories.

The Court held in *Re Ashburnham, Gaby* v. *Ashburnham*, (1912) 107 L.T. 601, that the contextual expression "All my furniture and household effects" was adequate evidence of the testator's intention to bequeath his motor-car purchased since the date of the will.

In *In re Sim (deceased)*, [1917] N.Z.L.R. 169, Sim, J., considered a motor-car belonging to the deceased passed, first, under the term "household effects" and, secondly, under the term "farming effects" to his widow in each instance.

In virtue of the *ejusdem generis* rule, *Re Taylor, Barber* v. *Smith*, (1919) 147 L.T. Jo. 253, limited the meaning of a general bequest to the exclusion of a motor-car. In contradistinction, Eve, J., held that motor-cars passed under a gift by will of "household furniture and effects": see *In re Howe, Ferniehough* v. *Wilkinson*, [1908] W.N. 223.

A gift of "all my furniture and effects of every kind" on certain land was involved in *Ashton* v. *Just*, (1927) G.L.R. 40, and Reed, J., concluded that a Ford truck would come within this description.

In *In re Rankin, Martin* v. *Martin*, [1938] V.L.R. 339, *Re Tormey* (*supra*) was distinguished on the facts; and it was held that a bequest of the "contents of the house" turned on the precise language of the will and included the motor-car of the testatrix kept in a garage on the property where the house stood.

It appears from *In re McLuckie*, [1943] V.L.R. 137, that the testatrix there made a bequest of "all my furniture and personal belongings," and, referring to her motor-car, Mann, C.J., did not doubt that it was included amongst her personal belongings and passed under the bequest.

The specific legatees of "all my carriages" were held entitled to the proceeds of the sale of the testatrix's motor-car: *Re Sivewright, Law* v. *Fenwick*, (1922) 128 L.T. 416, where a motor-car was construed by the learned Judge, in ordinary parlance, to be a carriage. But, it is submitted, the description "carriage" is inappropriate and authority can be cited for or against the inclusion of a motor-car in such description, if, by chance, a will made possibly many years ago should now call for interpretation.

It is suggested, therefore, that a solicitor taking instructions for the preparation of a will should always ascertain by direct inquiry, if need be, the intention of the testator regarding the disposal of any motor-car belonging to him.

To rely upon general words to state the bequest can invite uncertainty and dispute, and it may well be the ceiling price of cars will be raised rather than reduced before pacific normality returns.

The principle, *expressio unius est exclusio alterius*, appears pertinent and to summarise this topic. Where there is a motor-car to be considered, an express gift is the only safe method for the draftsman to adopt to exclude a bequest by implication, which may prove difficult to decide. Further and finally, it may be added that the necessary accessories and equipment of a motor-car deserve mention in the bequest as well.

THE LAW REVISION COMMITTEE.

Parliamentary Appreciation.

The voluntary work of the representatives of the profession on the New Zealand Law Revision Committee is highly creditable, both to themselves and those whom they represent. Furthermore, the detailed consideration given to the Law Reform Act, 1944, in the JOURNAL's leading columns in this and in the previous issue, brings to mind the fact that each of the topics on which the common law has been altered or modified was, it is worthy of note, the fruit of a written suggestion made to the Committee by a practitioner. The fact that last year's statutes contains also the Frustrated Contracts Act, 1944, which reproduces the parallel English statute and makes for uniformity in our law, and the Administration Amendment Act, 1944, which modernizes the now-repealed Statute of Distributions, is further evidence of the care and attention given to reform of the law by the Committee, with the assistance of their fellow-lawyers.

It is interesting, therefore, to record that when the Law Reform Bill, 1944, was before the House of Representatives for its second reading, the learned Attorney-General, the Hon. H. G. R. Mason, told the House that all the clauses in the Bill had been considered most carefully by the Law Revision Committee; that the members found that all the clauses would be useful, and would be helpful, and conducive to doing justice and to securing the proper disposition of property.

Mr. T. C. Webb (Kaipara) joined with Mr. C. G. E. Harker (Waipawa) and Mr. J. T. Watts (Riccarton) in paying a tribute both to the Attorney-General himself and to the Law Revision Committee for the work they had done in bringing the law up to date. He continued:

> I think that it should be known, as the honourable member for Waipawa has pointed out, and as I should like to repeat, that the members of the Law Revision Committee give their time and skill gratis, and we are indebted to them for that valuable work. *This Bill is simply an illustration of the fact* that the Attorney-General, and the lawyers generally, realize that the law is a living science, and not a dead letter.

Mr. C. G. E. Harker (Waipawa), speaking earlier on the second reading of the Administration Amendment Bill, said that he appreciated the fact that very considerable consideration and thought had been given to the measure, not only in the drafting of it originally, but by the Law Revision Committee, a body that gives a lot of gratuitous service throughout the country. "Indeed," he added, "it is a service that is given so unobtrusively as to pass, I think, most frequently, entirely unnoticed." (Mr. Algie (Parnell) "And unacknowledged.") Continuing, Mr. Harker said: "It is a service that is of very great value indeed to the community: and it is given so unobtrusively, and given on such intricate matters, that it escapes not only acknowledgment, but even recognition."

Speaking on the second reading of the Frustrated Contracts Bill, 1944, Mr. Oram (Manawatu) also referred to the Law Revision Committee's having given freely of its time and knowledge to give advice and assistance on the Bill.

The Law Revision Committee now has left behind it its war-time compulsory recess. It is functioning as it did before hostilities commenced. It is always glad to receive suggestions for law reform from members of the profession, whose representations in the past have resulted in considerable augmentation of the improvements in the law that have appeared on the statute-book since the Committee began to function.

Members of the profession can, therefore, be very helpful in bringing suggested reforms to the notice of the Law Revision Committee, which may be addressed in the care of the Justice Department, Wellington. The work of law reform is a co-operative effort in which every practitioner, on coming to some phase of our law which can be the subject of improvement, may assist by at once bringing the matter to the Committee's notice.

RELEASE OF PERSONAL REPRESENTATIVES.

Indemnity by Beneficiaries Against Contingent Liabilities.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

It is customary and prudent for the legal personal representative, when he has completed administration of a deceased person's estate and distributed the assets or proceeds to the beneficiaries, to obtain from them a release in the form of a deed. The effect of such a release is to prevent the beneficiaries from suing him in respect of his administration, unless and until the deed has been set aside by the Court in proper proceedings: *Long* v. Murray, [1934] G.L.R. 487.

The recitals in an instrument of release (where the trusts have been intercepted) may disclose the element of *sale* or *gift*, in which case *ad valorem* conveyance duty or gift duty may be payable. Usually, however, as in the following precedent, the only duty payable is, deed not otherwise charged duty, amounting to 15s., under s. 168 of the Stamp Duties Act, 1923.

In the following precedent one parcel of land was mortgaged by the testator and the legal personal representatives have sold it *cum onere*. To protect themselves against the so-called "contingent liability" under the mortgage, they have obtained a joint and several covenant of indemnity from the beneficiaries; of course they themselves still remain personally liable to the extent of the value of the assets which they have distributed to the beneficiaries. Thus, in *Scottish Equitable Life Assurance Society* v. *Beatty*, (1889) 29 L.R. Ir. 290, executors distributed the personal

estate among the legatees without providing for a mortgage against the real estate, which afterwards proved insufficient to meet the mortgage debt; it was held that the executors were personally liable to the mortgagees for such deficiency to the extent of the assets so distributed.

The so-called "contingent liability" is actually a real liability, because deceased was, and his legal personal representatives remain, the principal debtors under the mortgage: *Nelson Diocesan Trust Board* v. *Hamilton*, [1926] N.Z.L.R. 342, 348. And presumably the mortgagee could have obtained an order of the Court restraining the distribution of the estate, until the mortgage debt had been discharged: a creditor whose debt is merely contingent has not this right; *14 Halsbury's Laws of England*, 2nd Ed. 331, para. 616.

From a practical point of view, however, the liability is contingent, for in normal circumstances the mortgage debt will be fully discharged by the purchaser or his successors in title, when deceased's estate and his executors will automatically become discharged from all further liability under the mortgage. For the purposes of death duty a liability of this nature is treated in practice as contingent: see ss. 9 (2) (*d*) and 9 (3) of the Death Duties Act, 1921. If the legal personal representatives are called upon to pay under the mortgage, they have a statutory right of reimbursement from the purchaser: s. 88 of the Land Transfer Act, 1915, and s. 57 of Property Law Act, 1908; but this right would probably prove valueless.

Sometimes the legal personal representative persuades the mortgagee to release him and the estate assets from all further liability, there being substituted therefor the personal covenant of the purchaser; this completely exonerates the legal personal representative. Unfortunately, however, many mortgagees are not willing to give up the benefit of deceased's covenant.

As a third course the legal personal representative may sell the land on a free of encumbrance basis, the purchaser finding his own finance, the mortgage to be paid off out of the proceeds of the sale. But as every solicitor and land agent knows, it is often far easier to sell a parcel of land subject to a mortgage than free of one.

Most legal personal representatives solve these little problems of administration in a practical, commonsense way and (as in the following precedent) with the good will and co-operation of the beneficiaries.

CONVEYANCING PRECEDENT.

DEED RELEASING LEGAL PERSONAL REPRESENTATIVES: INDEMNITY BY BENEFICIARIES AGAINST CONTINGENT LIABILITIES.

THIS DEED made the day of 1943 BETWEEN A.B. of C.D. of E.F. of G.H. of (hereinafter called the beneficiaries of the first part) and I.J. of and K.L. of (hereinafter called the trustees of the other part) WHEREAS M.O. late of who died on the day of 1942 by his last will dated appointed the trustees to be the executors and trustees of his last will and thereby GAVE DEVISED AND BEQUEATHED all his real and personal estate to convert the same into money and out of the proceeds of such conversion to pay his just debts funeral and testamentary expenses and all duty payable to the Crown and to stand possessed of the balance of such proceeds UPON TRUST for the beneficiaries as tenants in common in equal shares absolutely AND WHEREAS probate of the said will was granted by the Supreme Court of New Zealand at to the trustees on the day of 1942 AND WHEREAS the trustees have sold the real estate belonging to the testator at the date of his death and have called in and converted into money all other assets in the said estate AND WHEREAS upon the sale of one piece of land owned by the testator at the date of his death the trustees have sold the same subject to memorandum of mortgage registered number securing the repayment of the principal sum of and interest thereon to one of AND WHEREAS except for the hereinbefore recited contingent liability all of the debts liabilities and duties in respect of the estate of the testator which have come to the knowledge of the trustees have been fully discharged AND WHEREAS the beneficiaries have requested the trustees to distribute the estate of the testator which the trustees have agreed to do upon receiving the indemnities hereinafter contained AND WHEREAS the statement hereunto annexed is a proper and correct statement of all moneys received and disbursed by the trustees in or about the administration of the said estate and such statement has been submitted to the beneficiaries who after carefully examining the same have signed the same in token of their approval NOW THIS DEED WITNESSETH AS FOLLOWS:—

1. That in pursuance of the premises and in consideration of the payments made to the beneficiaries in terms of and in accordance with the said statement (the receipt of which payments by the several beneficiaries is hereby acknowledged) the beneficiaries and each of them HEREBY RELEASE AND DISCHARGE the trustees their and each of their executors and administrators from the said real and personal estate of the testator and every part thereof and from all actions proceedings claims accounts and demands in respect thereof or otherwise in relation to the premises.

2. That in further pursuance of the said agreement and for the consideration aforesaid the beneficiaries hereby jointly and severally covenant with the trustees and their and each of their executors and administrators that the said beneficiaries respectively and their respective executors and administrators will henceforth keep indemnified the trustees and their executors and administrators from and against all actions proceedings claims accounts and demands in respect of the contingent liability to the said (the mortgagee) and all other liabilities if any of the testator.

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

N.B.—(1) All signatures to be attested in accordance with s. 26 of the Property Law Act, 1908.

(2) This deed is accompanied by a statement of receipts and payments.

CORRESPONDENCE.

Service of Divorce Papers on Naval Respondent.

The Editor,

NEW ZEALAND LAW JOURNAL.

SIR,—

At page 260 of your issue of December 5, 1944, is printed a form of certificate stated to be settled by the Registrar of the Supreme Court at Wellington in which the Commanding Officer of a warship is made to certify, in clause 1, that he has served the respondent on a date to be filled in. In clauses 2, 3, and 4 he is made to certify that "at the same time and place" he did various other things. What is the gallant process-server, and what are persons reading the document, when completed, to understand by the references to "the same . . . place"?

Yours faithfully,

INQUIRER.

[The "time" of service is all-important in this affidavit; and, since service is sworn to, the place of service is of no importance at all. Our correspondent overlooks the fact that, for reasons of security, the whereabouts of the ship, or even the name of the ship, in which the respondent is serving, cannot be disclosed. The "place" need not be stated in the jurat, for the same reason: see Evidence Emergency Regulations, 1941 (Serial No. 1941/114), Reg. 4.—ED.]

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Multiplicity of Judgments.—The volume of the New Zealand Law Reports for 1944 contains reports of twenty cases heard by either our Court of Appeal or our Supreme Court sitting in Wellington as a full Court. In only four of those twenty cases did the Judges join in delivering a single judgment of the Court. In the other sixteen cases the greatest number of separate judgments that could have been delivered was seventy. In point of fact the number of separate judgments actually delivered in those sixteen cases was just twelve short of that maximum; it was fifty-eight. Of these fifty-eight judgments twelve were dissents; but, as there were only three cases in which there were more dissenting Judges than one, it is simplest, and probably fairest, to disregard entirely these minority judgments and to deal only with the majority judgments in the sixteen cases under discussion. In those sixteen cases fifty-eight majority Judges produced forty-six separate judgments! Scriblex has no hesitation in asserting that this multiplicity of judgments is undesirable. Not only does it add unnecessarily to the labours of the working practitioner (and therefore to the cost of advising and litigation) but it tends to confuse rather than to clarify the law. It would be of great advantage to the public and the profession if the Judges were to endeavour to effect a substantial reduction in the number of separate judgments delivered in the Full Court and Court of Appeal. The optimum, of course, is the single judgment of the Court; but, obviously, this result is not always possible: for, after all, a Judge has a right to dissent from the conclusion of the majority, and, in such a case, it is only right that he should record his reasons in a separate judgment. And even when the Judges of the Court, or the majority of the Judges of the Court, find themselves in agreement as to their conclusion it may not always be possible for them to agree upon a single statement of their reasons. But in *most* of such cases it *ought* to be possible for a single judgment to be agreed upon, and it is hard to understand why there should be such difficulty as seems to exist at present in the way of adoption of that course.

Lord Chancellor Quotes Shakespeare.—The English Finance Act, 1894, exempts from death duties the estates of "common seamen, marines or soldiers who are slain or die in the service of Her Majesty." The exemption can be traced back to a statute of William and Mary, passed in 1694, but its correct interpretation was first the subject of judicial consideration in the recent Scottish case on appeal to the House of Lords: *Blyth* v. *Lord Advocate,* [1944] 2 All E.R. 375. There the question was whether a member of the Home Guard, killed by an accidental explosion of a hand grenade while undergoing a course of instruction, came within the exemption. At the time of his death the deceased was acting as a Company Commander but this was a mere appointment, there being at that time no commissions in the Home Guard. The majority of the Court of Session came to the conclusion that no one was a soldier within the exemption unless he belonged to the Regular Forces; but in the House of Lords the Attorney-General felt constrained to admit that this was not the true position, though he contended nevertheless that the exemption applied only to "wholetime soldiers." The House of Lords was unanimous in holding that members of the Home Guard were soldiers and that they ceased to be *common* soldiers only if they held a commission or rank—and that a mere appointment without commission or rank was not enough to deprive the holder of the right to be called a common soldier. On this point Viscount Simon, L.C., quoted Shakespeare:

> The epithet "common" is, I think, introduced merely to exclude higher ranks; thus in Shakespeare's Henry V, when the King, on the night before Agincourt, is touring the battlefield *in disguise* and comes upon Pistol, the following conversation ensues:
>
> Pistol: "Qui va la?"
> King Henry: "A friend."
> Pistol: "Discuss unto me; art thou officer?
> Or art thou base, common, and popular?"

None can dispute that Lord Simon's quotation is a particularly apt one. But is the Lord Chancellor right in saying that King Henry V was *in disguise* when he toured the battlefield on the night before Agincourt? It is true that the King borrowed a cloak from Sir Thomas Erpingham, but this seems to have been quite in the ordinary course of things and not for any purpose of disguise. It is true, also, that various of the King's men failed to recognize him; but might this not have been due simply to the fact that it was night? The opening chorus to the scene seems to make it clear that the purpose of the King's tour of his camp was to give encouragement to his men—a task which would be embarrassed rather than assisted by disguise. Would H. F. von Haast, or some other Shakesperian scholar, care to express his views upon the point?

The Obliging Usher.—Counsel, briefed for the plaintiff in a straightforward action for specific performance of a contract for sale of a city property, was instructed that the agreement which was the foundation of the claim had not been stamped. The agreement was set out in the statement of claim and admitted in the statement of defence, and it seemed unlikely that any question would be raised at the trial. But, still, counsel familiarized himself with the law as to the admissibility of an unstamped document on a solicitor's personal undertaking to stamp it, and some half-hour before the case began, he took into Court, with book-marker in the appropriate place, a leading English text-book on stamp duties, and then went to the consulting-room for a final conference with the briefing solicitor and his client. There he was told that the money for the stamp duty had been found and that the agreement had been stamped that morning. Opening his case and reading the agreement to the Court without any qualms, counsel was surprised, to say the least, to be asked by Myers, C.J., whether the agreement was stamped. He was, of course, able to reply in the affirmative, but he was puzzled as to why the Court had made inquiry on the subject—for Judges, when they raise stamp-duty questions, do not usually do so in advance of the putting in of the original documents. The explanation lay in the uninvited activities of an obliging Court usher. Seeing the text-book on counsel's table, the usher had obtained a copy from the Judges' library and had put it on the Bench—with a mark at the page marked in counsel's copy!

THE LATE SIR WALTER STRINGER.

"A Consummate Judge," 1914–1927.

The death, at Christchurch, on December 7, of the Hon. Sir Walter Stringer, at the age of eighty-nine years, brought to an end a lifetime of service in the profession of the law. He resigned from the Supreme Court Bench on November 3, 1927, on his attainment of the judicial age-limit. He held the office of Judge for nearly fourteen years, as he commenced his judicial duties on February 19, 1914. He was created Knight Bachelor in 1928.

On December 12, at the Supreme Court, Wellington, a large gathering of members of the profession met to honour the memory of the former Judge. The Chief Justice, the Rt. Hon. Sir Michael Myers, presided, and, with him on the Bench, were Mr. Justice Blair and Mr. Justice Smith.

The Chief Justice's Tribute.

Addressing the gathering, the Chief Justice said: "It is so many years since Sir Walter Stringer retired from office as one of His Majesty's Judges that to many of you he may be little more than a name; but those of you who knew him, especially those who had the privilege of practising before him whether in this Court or the Court of Appeal, will share the deep regret that the members of the Bench feel at his demise which happened a few days ago. Since he retired there has arisen an entirely new generation of Judges, none of whom had the privilege of sitting with him as a colleague; but some of us had not only the privilege of practising before him as a judge, but also the pleasure—and a very real pleasure it always was—of appearing as junior counsel with him when he was at the Bar. I myself had that pleasure in several important cases, the first of which was as long ago as 1901.

"At that time Mr. Stringer, as he then was, had been for several years Crown Prosecutor in Christchurch, an office which he continued to hold until he was appointed to the Bench in 1914. In that office he displayed that infinite fairness and impartiality, that courtly urbanity, which characterized him throughout his whole career as both advocate and Judge—qualities which earned for him the respect, the esteem, and the admiration of the general public as well as of his brethren in the profession. The remarkable combination that he possessed of the qualities that make the advocate secured for him from the outset of his career great success in the practice of his profession and he rapidly became one of the Dominion's leaders of the Bar. That was evidenced by the fact that in 1907 when the patent of King's Counsel was created he was one of the ten original grantees of the patent. Incidentally it may be said that he was the last survivor of that eminent group.

"An advocate of the first rank, a sound lawyer, a dignified, equable, just, and if I may adopt a phrase recently applied in England to another in similar circumstances, a consummate Judge, and above all a great gentleman, he has left memories of which his family, who mourn his loss, and to whom we offer our respectful sympathy, may well be proud—memories of a delightful personality which will be cherished also by us of the Bench and you of the Bar as well as by his host of friends throughout the length and breadth of the Dominion."

The Attorney-General.

The Attorney-General, the Hon. H. G. R. Mason, then addressed their Honours. He said that the late Mr. Justice Stringer would always be recalled as one of the best Judges our country has known. Such was the harmonious development of his nature that it would be hard to mention any quality to be desired in a Judge with which he was not eminently gifted. These qualities had enabled him at the Bar to render great service to the State in both civil and criminal matters. The instances were many in which the Crown had been indebted to the great knowledge and profound common sense which he brought to the guidance of its affairs. When issues appeared obscure or difficult the surest confidence was always felt in his advice. As one of the early Judges of the Arbitration Court, he did much to establish and secure public confidence in that Court.

"But it is as a Judge of the Supreme Court that we shall best remember him," Mr. Mason continued: "He had a fine quality of urbanity that endeared him to the Bar, and facilitated the submission to him of any matter relevant to the question in hand. Eminently humane, as a Judge he exercised always such clemency as was possible. His very sound knowledge of the law was matched by an equally sure perception of fact. Seldom, if ever, was he wrong in either his facts or his law. With strong common sense and an almost infallible instinct for the merits of a question, he fulfilled the office of Judge according to the high traditions of that office, in which he won universal confidence, esteem and affection."

The New Zealand Law Society.

The President of the New Zealand Law Society, Mr. H. F. O'Leary, K.C., in a feeling tribute to the late Sir Walter Stringer, said that the members of the legal profession throughout the Dominion associated themselves with their Honours in this public tribute to the memory of the late Sir Walter Stringer, and, through the speaker, expressed their regret at his passing and extended their sympathy to his relations. The President proceeded: "It is fitting that I should take this opportunity of recording the profession's admiration and regard for the late Sir Walter, as an advocate and as a Judge—the spheres in which he so faithfully and so long served his generation and his country.

"There are but few now practising who can speak of him from personal knowledge as a member of the profession; but those of us who can, remember him as a most competent counsel—always prepared on the facts, well equipped and fortified on the law—and at the same time scrupulous, courteous, and chivalrous to his opponents (to all, whether with him or against him).

"He carried on to the Bench these same qualities and characteristics with the result that he early earned the typical confidence of suitors, the public, the profession—indeed, it can be said he had the respect and confidence of every shade of opinion. To us, in particular, he endeared himself by his patient attention and kind consideration extended to the youngest equally with the seniors of the profession."

Mr. O'Leary went on to say that Sir Walter Stringer's work in the Compensation Court, and later as chairman of the War Pensions Appeal Board, brought him into contact with those who had fallen victims to the stress and strain of industrial and military life; and for these he had a genuine and whole-hearted sympathy which he never failed to extend to and help them with.

In conclusion, the speaker said: "He was indeed a model Judge and to his Judicial attributes were added a winning personality, charming and vital. And he has left behind him no resentments, no emnity. There will always be the memory of his pleasant, courteous, kindly nature."

In Christchurch.

At a large gathering of practitioners in the Supreme Court at Christchurch, on December 12, His Honour, Mr. Justice Northcroft, said that they were met to do honour to the memory of Sir Walter Stringer. The span of his long life embraced almost the complete history of this Province of Canterbury. That long life had been enriched by high qualities of character.

"As a young man the late Sir Walter Stringer engaged in the manly sports and the friendly associations proper to youth," the learned Judge proceeded.

"Later, at his chosen profession of the law, he toiled earnestly and skilfully and always fairly. As Crown Prosecutor for this district his work was marked by a careful concern to see justice done fairly and impartially. He was ever scrupulous in his sense of fairness as a prosecutor. It was not my privilege to be associated with him at that time; but I believe that the courtesy, candour, and fair dealing which it has been my pleasure to find prevailing in this Court spring in no small measure from his high standards. His professional advancement continued upon his appointment as one of His Majesty's Counsel. As a King's Counsel, he had increased opportunities to help his younger brethren of the Bar and to helpfulness he was always impelled by his kindly and friendly disposition.

"My own most active period as counsel occurred when he was the Senior Resident Judge at Auckland. I practised much in his Court. He was always courteous and patient. The activity and clarity of his mind made it a pleasure to present a case to him. In his judicial expressions, his clear thinking was matched by equally clear statement. Above all, he brought to his work as a Judge those virtues with which he had ennobled his work at the Bar. To counsel, especially to the juniors, he was kindly and helpful. To litigants he was ever impartial. He was rarely moved to anger or indignation, and then only when he thought his Court was being used as an instrument of oppression. He had an instinct for fair play and was moved to see justice done not only because it was his duty so to do, but because his very instinct was for justice.

"Throughout his life and strenuous career as advocate and then as Judge he maintained a keen regard for his fellow-man. That sympathetic regard for others, and especially for those in trouble, made him an admirable adjudicator upon problems of pensions for those disabled by their service in the last war.

"It was here in Christchurch that he lived as a young man. It was in this Court that he gradually won to the highest place. It was here in Christchurch that he spent much of his retirement. I trust, therefore, that the presence of so large a gathering here in Christchurch and in this Court may be a source of comfort to his family."

The President of the Canterbury District Law Society, Mr. R. L. Ronaldson, expressed the wish of the members of the Canterbury District Law Society to be associated with His Honour in this tribute to the late Sir Walter Stringer. The President then said:

"Sir Walter Stringer practised in this Court for thirty-five years with great distinction and during that time he earned the high esteem and affection of his fellow-practitioners by whom during his latter years at the Bar he was acknowledged as Leader. He was a man of great personal charm—he was always friendly, helpful, and considerate. In particular he took great pains to assist and encourage the young practitioner. These qualities he always maintained notwithstanding the increasing volume and responsibility of his exacting work. His was an unusually clear mind, and he expressed himself with simplicity, clarity, and brevity. He had a strong sense of justice and his characteristic fairness was recognized and appreciated by all associated with him. In his work as Crown Prosecutor, an appointment that he held for over twenty years, this sense of fairness was particularly apparent. His outstanding fairness and kindliness were a great example to his fellow-practitioners. As he was admired, so he was emulated. The strong spirit of fairness now existing at the Bar in Christchurch is due largely to his early example.

"He was in his ninetieth year. He had but a brief illness. He had a long active and successful life. He had served his profession and his fellow-men faithfully and well. He had adorned the Supreme Court Bench. He had been honoured by many but he had in addition—what he himself would have prized most—the deep affection and regard of all who were privileged to be associated with him."

Auckland Tributes.

There was a large gathering at the Supreme Court, Auckland, on December 13, to honour the memory of the late Sir Walter Stringer. His Honour, Mr. Justice Fair presided. With him on the Bench were their Honours Mr. Justice Callan and Mr. Justice Finlay, and the Hon. Sir John Reed.

Addressing the assembled members of the Bar, Mr. Justice Fair said that they had gathered together to express their sorrow at the death, in the fullness of his years, of their late friend and brother, Sir Thomas Walter Stringer.

His Honour said that the late Sir Walter Stringer, commencing practice in Christchurch as a barrister and solicitor in 1879, quickly attained a leading place at the Bar, and in 1893 his eminence was recognized by his appointment as Crown Solicitor at Christchurch. Thereafter, he became a recognized leader, and received the honour of appointment as a King's Counsel in 1907. For over twenty years he constantly appeared as leading counsel before one of the greatest of our Judges, Sir John Denniston. "It was a very happy conjunction of two brilliant intellects, both learned in the law and inspired by the same fearless search for the truth, and the same desire to do right to all manner of men. In 1911 he became President of the Arbitration Court, an office which he filled with distinction and complete success. In 1914 he became a Judge of this Court and of the Court of Appeal. Thereafter to appear before

him and to experience the open-minded, alert, and truly judicial mind that he applied to the problems he had to consider was a genuine pleasure. To read his judgments, which ignored or brushed aside pettifogging objections and went straight to the heart of the matter, was an intellectual pleasure, which many of them had enjoyed, and from which they had derived great advantage," His Honour continued.

" For more than six years before his retirement from the Bench in 1927, Sir Walter Stringer was senior resident Judge in this Court, and in constant association with every phase of the legal life of the city and district. You, Mr. President, and a great many of those present to-day, will no doubt remember the high regard and deep affection shown by the great gathering of the profession that assembled in his honour when the time came for his retirement.

" Happily, his great ability was not lost to his country then, for he served thereafter with distinction for thirteen years as Chairman of the War Pensions Appeal Board, retiring only in 1940.

" To the responsible offices which he held he brought, in addition to a ripe experience, knowledge of principle and acute intellect, qualities of patience, industry, and unfailing courtesy. In all, too, he showed the same sympathetic understanding of the difficulties of others, and the same wide knowledge of human nature. Other men have shown capacity equal to his in the conduct of similar offices. But to few, indeed, is it given to possess the same clear intellect coupled with an understanding and serenity that won for him the warm friendship of all who had to do with him. There was associated with his great ability, too, a rare charm and a natural modesty and freedom from egotism that are rare indeed. He was in himself proof that there has been transplanted to our country those high qualities that characterize an English gentleman. It may truly be said of him that he touched nothing he did not adorn.

" For twenty years he made Auckland his home. His cheerful figure, and his carriage—active and erect as a soldier at the age of eighty-seven—were well known in the streets of this city. They have been missing during the last two years during which he has been residing in the South Island. But he will retain his place in our memories for a long time, and will remain in our recollection not only by reason of his fine record of public service, but as proof that work and life may be pleasant and cheerful even in this vale of grief and tears. Both Bench and Bar will long hold his memory in affectionate regard.

" To his children and grandchildren we tender our deep sympathy in their sorrow at the loss of a personality so charming and so loved."

Mr. A. Milliken, President of the Auckland District Law Society, said that the assembled members of the profession were anxious to join in the tribute to the memory of Sir Walter Stringer, a man who made such a profound and lasting appeal to their affections.

" It is proper on occasions like these that we should remind ourselves of and publicly state the importance of high judicial office ; and we should arrest our attention and in retrospect review the life of one of the most dearly-loved and highly-honoured holders of such office," the President proceeded.

" In the year 1855, five years after John Robert Godley had founded the Province of Canterbury, Sir Walter was born in the then small town of Christchurch. He grew up and was educated there in the days when (as he said when addressing the Canterbury Club in this city in 1937), Cathedral Square was a mere water-filled quarry where school-boys used to swim, the roads were unmetalled and overgrown with grass, and bullock teams ploughed their way through the streets.

" In his younger days, Sir Walter was a great athlete and for four years he represented his province in Rugby. He played tennis and golf and, in later years, he was a keen fisherman. Those of us who spent our boyhood in Christchurch can well remember hearing our elders talk of Walter Stringer, and we heard it stated what a capable and charming young man he was and we heard it prophesied that he would go a long way in the law ; and, Your Honours, to-day we know how well those prophesies have been fulfilled. The first milestone on the road to success was passed, as Your Honour has said, in 1893, when Sir Walter was made Crown Solicitor in Christchurch. His Honour was a past president of the Canterbury District Law Society and he continued the practice of his profession, until he was appointed to the Judiciary.

" We, in this district, considered ourselves singularly fortunate when in 1921 His Honour came to Auckland to be Senior Resident Judge. By his unfailing courtesy and his dignity, his sound judgment and human understanding, he quickly won the respect and admiration of all members of the profession. To His Honour, law was merely the hand-maiden of justice. Justice was the end, and law was only the instrument by which that end was attained ; and we will always remember him as he progressed on life's journey dispensing even-handed justice with unruffled calm. Many of us here to-day, Your Honours, were admitted to the profession by Sir Walter, and we cherish happy recollections of that day. We cherish happy recollections of the kindly smile, the friendly handshake, and the encouraging words he uttered as we set forth on our careers.

" We well remember, Your Honours, when he stepped down from the Bench in 1927, but retirement was not for him. His great ability was recognized, and he was sought to be Chairman of the War Pensions Appeal Board. In that most important office his consideration for, and his sympathy with, the disabled soldier found full expression and earned for him the approbation of everybody.

" We are aware, too, that in 1928 his great services to the cause of justice were rewarded by a Knighthood. In 1940 His Honour retired, and even at the great age he then was, he could frequently be seen at the Eden Park Rugby football ground, keenly interested in the game he played so well during his youth. His homeward steps led him back to the city of his birth, the city he had known in the pioneer days, and a city which rightly claimed him as one of her greatest sons. And so, Your Honours, his journey has ended there, and brought to a close a lifetime devoted to the law, a lifetime characterized by outstanding ability in the forensic forum, sound judgment tempered with mercy, and a benign serenity which won the affection of every one.

" Now, to his family we wish to express our deepest sympathy in their sad bereavement."

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 31.—S. TO McC.

Rural Land—Productive Capacity—Returns of Butterfat and Wool.

Appeal involving a property of 119 acres situated near Te Puke. It was purchased by the appellant in April, 1943, for £4,165. Since then he had expended on it a sum of £137 17s. 6d. on what, judged by the schedule supplied, seemed to be permanent improvements. In April, 1944, the appellant gave an option over the property to a returned serviceman at £38 an acre. This price, however, included a three-cow milking plant, a separator, and a heater valued by the Crown, without challenge, at £60.

The Committee fixed the basic value of the property at £3,774. The sale price of the land, if the value of the chattels be excluded, was £4,462. The difference between the proposed selling price and the basic value as fixed by the Committee was, therefore, £688.

The Court said: "This difference in the basic value represents a difference of only about £31 as between the annual productive capacity upon which the Committee must have based its finding and the annual productive capacity necessary to support the price at which the option was given. It is not surprising, therefore, that the witnesses differed but little in their descriptions of the property and in their estimates of its quality and productive capacity. In point of fact they differed so little in any of these material respects that it is extremely difficult to reconcile the somewhat condemnatory tone of the report of the Committee with any of the evidence, even the evidence of Mr. D., the Crown Valuer, on which the report purports to rely.

"To begin with, there is not a wide divergence of opinion between any of the witnesses as to the quality of the pasture. Mr. D. defines 24 acres as being 'rough with scrub and fern,' whereas Mr. S. and Mr. T., who supported him, estimated this area as containing 19 acres. For the rest, Mr. D. says that an area of 70 acres carries good permanent pasture. Of these 70 acres 40 acres consist of river flats which Mr. D. variously defines as 'fairly strong country' and as 'good country.' The remaining portion of this 70-acre area he describes as 'easier foothills,' The residue of the area other than the 70 acres and the 24 acres of scrub country he describes as 'carrying fair permanent pasture.' Messrs. S. and T. say that, including the 40 acres of flat rich drained swamp, there are 50 acres of good pasture, whilst the residue, other than the 19 acres, in their opinion carries fair pasture.

"Having regard to the measure of agreement thus disclosed, it is not surprising that the witnesses are substantially agreed as to the carrying-capacity of the property. Mr. S. said as to that, 'I think the Crown made a fair estimate of what the farm would carry.' The appellant holds a somewhat higher opinion of the carrying-capacity, as indeed does Mr. T. Even they, however, do not differ very widely, for they do not suggest that the place can carry more than 60 cows and 100 ewes or, as Mr. T. puts it, '60 cows and 100 to 150 sheep.' Mr. D., the sole witness for the Crown, defined the carrying-capacity as 55 cows and 100 four and five year ewes, as well as replacement stock.

"In view of the concurrence between Mr. S. and Mr. D. as to the carrying-capacity, the Court accepts their testimony and finds that the property will carry 55 milking cows, 100 ewes, and replacement stock, in addition to the necessary bulls, rams, and pigs.

"The only differences of opinion, substantially speaking between Mr. D., on the one hand, and the witnesses for the appellant, on the other, had relation to, first, the production that can be expected from the cows; secondly, the weight of wool which can be expected from the sheep; and, thirdly, as to the number of lambs that should be available for sale annually.

"As to the butterfat, the margin of difference is not by any means considerable. Having regard to the necessity for running sheep on the property, Mr. D. thought that 230 lb. of butterfat per cow would be a reasonable production, his view being that where sheep are run on the same property as dairy cows the production from the latter is depreciated somewhat. Mr. S., on the other hand, thought that the sheep, in this instance at any rate, would, instead of being a detriment, be in fact a benefit, and he thought that 245 lb. of butterfat per cow could be produced.

"Having regard to the high quality of the 40-acre area and the somewhat lower, but nevertheless good, quality of the area of the farm which lies outside the area which is broken and in scrub and fern, the probabilities are that a return in accordance with Mr. S.'s anticipation can reasonably be expected. This anticipation is supported by the returns which other similar properties are producing in the district and is confirmed by the demonstrated carrying-capacity of the property since the appellant acquired it.

"It is not without significance that the property did, in fact, produce 11,360 lb. of butterfat in the 1939–40 season and 11,045 lb. of butterfat in the 1940–41 season. The returns fell to 9,116 lb. of butterfat in the season immediately preceding Mr. S.'s purchase. It is not known how many cows produced these returns nor what quantity of manure was used upon the property during the respective periods. It is in evidence, however, that the place had been, during those seasons, as one of the witnesses phrased it, 'pretty neglected.' It remained so up to the time that the appellant bought it.

"If, in what appears to have been a progressively neglected condition, the property would produce the returns mentioned, it is not improbable that it will produce very considerably more if farmed by an average efficient farmer. The Court therefore accepts the basis that the 55 cows will produce an average of 245 lb. of butterfat per cow.

"As to the wool, there was a similar difference of opinion as between the witnesses. Mr. D. expects a yield of 7 lb. of wool per sheep, whereas Mr. S. expects a yield of 8 lb. Having regard to the fact that a small number of sheep on a dairy-farm are, generally speaking, better fed and in better condition than sheep running in considerable numbers on large properties, it is not improbable that the sheep upon this property will give the higher yield and the Court is prepared to and does accept the basis of a yield of 8 lb. of wool per sheep.

"The final difference of opinion between the witnesses had relation to the number of lambs which can reasonably be expected to be available for sale annually. Mr. D. calculated his return on a basis of 95 per cent. of the number of ewes. Mr. S. and the other witnesses calculated on the basis of 105 per cent. Here again experience in the district appears to demonstrate that a return of 105 per cent. is not unusual under the conditions here pertaining. It seems but fair, therefore, to accept a return at that rate as the proper basis of calculation.

"The Court is desirous of recording that, whilst it was impressed with the evidence of Mr. D. and with the candour and comprehension which inspired his testimony, yet it cannot but feel that his anticipations were a little conservative having regard to the admitted quality of the property.

"The net increase in income, after allowing all proper deductions on that account, is more than sufficient to justify the basic value of the property being raised from £3,774, as fixed by the Committee, to the proposed sale price. The basic value of the property is therefore declared to be the sum for which the appellant is prepared to sell his land—namely, £4,462. Consent to the sale of the land at that sum is given."

No. 32.—B. to W.

Urban Land—Value of Suburban Residence only in Dispute—Value to Willing Buyer in Condition of Property Market at Material Date—Depreciation—Diminishing Balance Scale unacceptable.

Appeal concerning the value of a large two-storied residence. The land was freehold and was situated at a corner of St. Stephen's Avenue, Parnell, Auckland. The residence commended magnificent harbour views. The house was stoutly built by skilled tradesmen some thirty-eight or thirty-nine years ago and had been extremely well maintained. Furthermore, it had been equipped from time to time with amenities of that type commonly termed "modern."

The value of the land and the improvements upon it other than the house was settled by the agreement of all parties at £2,010. This left the value of the house only to be determined by the Court. As to this, the opinions of highly qualified experts differed widely.

The Court said: "Mr. J. valued it as to 4,522 square feet, being the aggregate of the areas of the ground and upper floors, at 16s. a square foot. What he defined as the semi basement containing 562 square feet he valued at 10s. per square foot—*i.e.*, £281. The exterior stairway running from the top floor to the ground floor he valled at £11, thus making his total valuation of the building £3,909. In fixing the monetary basis of his calculation, Mr. J. allowed for depreciation, so that he assesses the present value at £3,909.

"Mr. W. assessed the present value of the building at £4,102. To achieve this result he valued the ground floor at 30s. per square foot and the first floor at 24s. per square foot. To the aggregate of the values thus determined he added the value of the basement at 8s. a square foot, and the value of the foundations at 1s. 6d. a square foot. Mr. W. also allowed architect's fees at £331. From the total value thus calculated he deducted depreciation over a period of thirty-nine years at 1½ per cent. per annum. This deduction was, however, calculated on a diminishing balance scale.

"It is appropriate to comment at this point that the Court is not prepared to accept the diminishing balance scale as a proper method of calculating depreciation. It is not the system in general use in New Zealand and has the effect, as was pointed out by Mr. C., of writing off 63 per cent. only of the original cost of this building at the expiration of what is assumed by general agreement to be the full life of the building. Mr. W.'s calculations call for some readjustment in consequence, but in view of the conclusion reached by the Court, the necessity for such a readjustment does not arise.

"Mr. F. assessed the value of the building as at December, 1942, at 30s. per square foot. He made his calculation at this rate on the areas of both the ground and the upper floor and on the area of the basement. By this method of calculation Mr. F. attributed to the building a replacement value as at December, 1942, of £7,620. Against this he allowed depreciation on the usual scale at 1½ per cent. per annum for thirty-four years, leaving the total value of the building as at the latter date at £4,572. As an alternative, Mr. F. suggested that the building might be treated as of an overall value of 27s. 6d. per square foot, in which case, after allowing depreciation on the scale and at the rate above mentioned, the building would appear to have been worth £4,194 as at December, 1942.

"It was not made clear why Mr. F. was prepared to countenance an assessment at 27s. 6d. a square foot when he thought the true basis 30s. It may, however, have been designed to show that the sale price could be justified even on a lower basis of cost than that to which he testified.

"That Mr. W. and Mr. F. should differ so widely, in fact to the extent of 6s. per square foot, as to the value of the upper floor which contains an area of 2,133 square feet and as to 22s. per square foot in respect of the area of the basement, is a significant feature of the appellant's case. Such a divergence is suggestive of error on the part of one or, possibly, on the part of both. One may have fixed an excessive initial figure, or both may have based their calculations on unstable data.

"On the other hand, Mr. C., who was called for the Crown, spoke with an extensive and exhaustive knowledge of the cost of building prior to and after the crucial date. He fixed the replacement value of the building at 24s. per square foot on the aggregate area of the two floors. This, after allowing depreciation over the period of thirty-eight years at 1¼ per cent., gave Mr. C. a net replacement value as at December 15, 1942, of £2,875. Mr. C., in arriving at his basis of 24s. a square foot, worked upon an initial figure of 28s. per square foot. This he reduced by 2s. a square foot, to allow for obsolescence, and another 2s. per square foot to allow for the abnormally large area of the rooms and internal spaces. In his calculation he allowed for the basement.

"It is noticeable that neither Mr. W. nor Mr. F. made any allowance for obsolescence. Their reason for not doing so was that as at December, 1942, there was a market for buildings of this type. Some buyers, they said, were not deterred by obsolescence in such a building as this, whilst some might even prefer a building of this type in that it contains what to-day would be regarded as exceptionally large rooms, unusually high ceilings, and very large halls.

"The Committee, in a long and very carefully written decision, reached the conclusion that Mr. C.'s assessment of value was the more correct. It therefore adopted his basis of 24s. for the main floors and verandas, but added £225 for the value of the basement at 8s. a square foot. Having regard to the excellent standard of upkeep maintained and improvement adopted, the Committee calculated the depreciation over a period of thirty-four years only at 1¼ per cent.

"After careful consideration of the whole of the evidence the Court feels itself driven, as was the Committee, to the conclusion that the assessment of Mr. C. is, in the main, the more correct. In doing that it is not unmindful of the eminence and integrity of the professional witnesses called for the appellant. These gentlemen, however, appear to have been concerned during the material period involved with commercial buildings of considerable magnitude rather than with domestic buildings. Their experience of the cost of the latter at or about the crucial point of time appears, in consequence, to be neither as comprehensive nor as intimate as the knowledge of Mr. C. who has made a careful inquiry into and an analysis of the cost of all dwellings erected during 1942 in Auckland City and suburbs.

"Mr. J.'s testimony as to value was frankly dependent upon his own opinion, unsupported by proof. Its probative value is therefore small when brought into contrast with evidence which is reinforced by data and example.

"It is essential, however, that sight should not be lost of the fact that what has to be found in terms of the Act is the value to the owner of the property on December 15, 1942. An assessment of the replacement value determines what the intrinsic value of a building was at that date, but is not conclusive as to the price which, under the circumstances at that date pertaining, an average willing buyer would be prepared to pay. Mr. C. expressed the view that the market for this property was at that date limited to buyers for reconversion purposes. At the same time he conceded that there was a market for that purpose.

"It is probable that buyers purchasing for reconversion would be better informed as to values and less likely to pay a sum in excess of the true value than buyers purchasing for personal residential purposes. The latter are doubtless more swayed by predeliction as to site and other considerations of the kind and are probably not so well informed in any event.

"Whilst, therefore, in entire agreement with the Committee that the intrinsic value of the property as a whole was £5,325 as at December, 1942, nevertheless we think that something in addition should be allowed to cover the sum which an average willing buyer would, at that date, be prepared to pay over and above a price determined by a close inquiry by persons having a full knowledge of costs. The determination of what sum should be allowed on this account is necessarily, in such a case as this, a matter of considerable doubt. The Court has, however, reached the conclusion that it would be just and proper to assess the value of the property as a whole as at the crucial date at £5,500.

"The basic value is fixed at that sum, and consent is given to the sale at that figure accordingly. To the £5,500 will have to be added the agreed value of the chattels, £124, making the total consideration for land and chattels, £5,624".

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. Infants and Children.—*Child Welfare—Order made on Complaint—Whether appealable.*

QUESTION: Is there a right of appeal against orders made on complaints under the Child Welfare Act, 1925?

ANSWER: An appeal does not lie unless expressly given by statute: *31 Halsbury's Laws of England*, 2nd Ed. 504, para. 645. The Child Welfare Act does not mention anything expressly about appeals, but s. 39 provides that subject to that Act, "all the provisions of the Justices of the Peace Act, 1908, with respect to complaints and orders shall, so far as applicable, apply to complaints and orders made under this Act." It will be noted that *all* the provisions relating to complaints and orders apply to proceedings under the Child Welfare Act, *not* merely some of those provisions. Section 122 of the Justices of the Peace Act, 1927, provides for a right of rehearing in respect to a complaint; s. 303 of that statute confers a right of appeal on a point of law by way of a case stated; and s. 315 gives a right of general appeal in respect of any complaint.

The position is different from that obtaining in *R.* v. *Stock*, (1838) 7 L.J.M.C. 93, where it was contended that, because a notice had to be given according to the form given in the particular statute, that statute was to be considered as incorporated in the statute under which the notice had been given. It was held in that case that there was only an implied power of appeal and that that was not sufficient. The Child Welfare Act, however, does incorporate all the provisions of the Justice of the Peace Act relating to complaints and as the latter statute confers a right of appeal in respect of complaints it follows that there is a right of appeal in respect of complaints under the Child Welfare Act: *cf. Scottish Widows' Fund Life Assurance Society* v. *Blennerhassett*, [1912] A.C. 281, 285, 286.

2. Trustees.—*Trustee purporting to Delegate future Trusteeships—Effect of Same.*

QUESTION: A. is executor and trustee under many instruments, *inter vivos* as well as testamentary. He purposes to go abroad and to remain abroad for a considerable period. He desires to delegate his functions as trustee in his partner. He anticipates that during his absence he will be appointed to more trusteeships and desires to delegate any such future ones also. Can he do this?

ANSWER: It is confidently submitted that he cannot delegate *future* trusteeships. Apart from s. 103 of the Trustee Act, 1908, the old maxim, *Delegatus non potest delegare*, operates. It is submitted that the words "vested in such trustee" in s. 103 must be confined to powers, &c., *presently* vested in the trustee at the date of the instrument of delegation. There are no words of futurity in those words: see also article in (1943) *93 Law Journal* (London), 13.

OBITUARY.

Mr. J. J. Sullivan, Auckland.

When engaged in a case in the Supreme Court on December 13, 1944, Mr. Jeremiah James Sullivan, one of Auckland's best-known barristers, collapsed and died. A witness who had been questioned by Mr. Sullivan had left the witness-box, and Mr. Sullivan had just sat down, when he collapsed over the table. Medical aid was summoned, but Mr. Sullivan was dead.

Mr. Sullivan was born in County Cork, Ireland, and studied law there in the Chambers of his uncle, who was a King's Counsel, before coming to New Zealand about forty years ago. He continued his studies at Victoria University College, Wellington, where he was a gold medallist in oratory. For nine years he was in the Civil Service, being engaged in the Defence Department in the care of wills during the last war, after having volunteered for service and being rejected as medically unfit. He was later a member of the legal branch of the Public Trust Office, and, later, of the staff of Messrs. Brown and Dean, Wellington, where he qualified.

In 1918 Mr. Sullivan commenced private practice in Auckland and soon established himself by his work in criminal cases, and as a counsel in connection with arbitration and workers compensation matters. At the time of his death he was in partnership with Mr. W. R. Teape.

Mr. Sullivan was devoted to the study of Irish affairs and was deeply read in Irish history, having a genuine love for the outstanding characters of his own country. He was indeed a great Irishman. He contributed articles to many papers on Irish affairs, and had collected a rare library of Irish books. All through life and right up to the time of his death he was ever ready to defend his native land. He was also a student of historical Maori matters.

Mr. Sullivan was legal adviser to many trades-unions. From 1938 to 1941 he was a member of the Auckland City Council. He is survived by his wife and one son.

St. Michael's Church, Remuera, was filled to the doors on December 16, when Requiem Mass was celebrated. His Lordship Bishop Liston presided in the sanctuary. The Supreme Court Bench was represented by Mr. Justice Callan, The Hon. Sir Alexander Herdman, retired Judge of the Supreme Court, and Mr. A. H. Johnstone, K.C., Vice-President of the New Zealand Law Society, were also present. The Mayor, Mr. Allum, accompanied by the Town Clerk, Mr. T. M. Ashby, and other members of the Auckland City Council, attended the church and at the graveside.

The Auckland Law Society was represented by the President, Mr. A. Milliken, while a large number of practitioners also attended.

The band of the Auckland Waterside Workers, for whom Mr. Sullivan had acted for many years, led the funeral procession as it moved off from the church. The band was also at the graveside.

RULES AND REGULATIONS.

Public Service Remuneration Order, 1944. (Finance Act, 1938.) No. 1944/171.

War Damage Regulations, 1941, Amendment No. 4. (War Damage Act, 1941.) No. 1944/172.

Earthquake and War Damage Regulations, 1944. (Earthquake and War Damage Act, 1944.) No. 1944/173.

Control of Prices Emergency Regulations, 1939, Amendment No. 5. (Emergency Regulations Act, 1939.) No. 1944/174.

Maintenance Orders (Military Forces) Emergency Regulations, 1940, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1944/175.

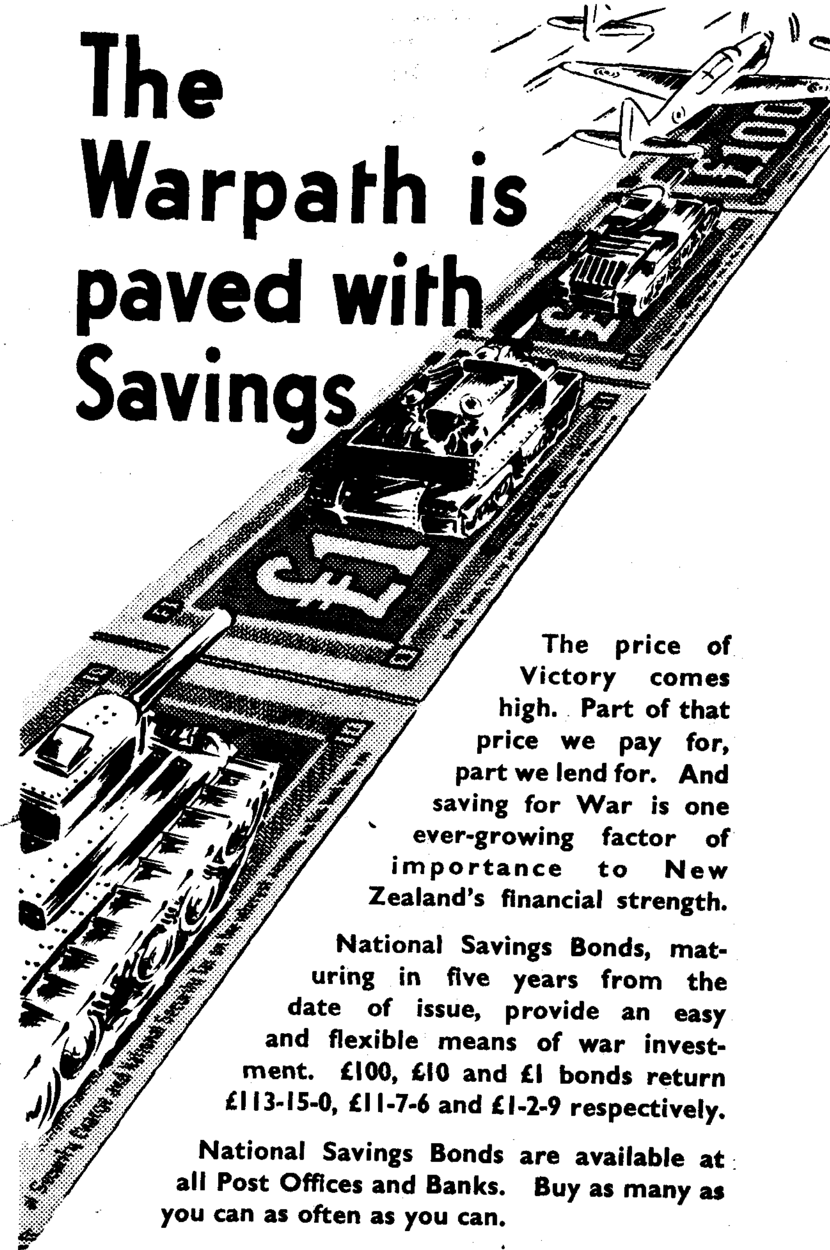
Dogs Registration Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/176.

Post Office Savings-bank Regulations, 1944. (Post and Telegraph Act, 1928.) No. 1944/177.

Social Security (Domestic Assistance) Regulations, 1944. (Social Security Act, 1938.) No. 1944/178.

Social Security (Hospital Benefits for Out-patients) Regulations, 1941, Amendment No. 1. (Social Security Act, 1938.) No. 1944/179.

Heavy Motor-vehicles Regulations, 1940, Amendment No. 2. (Public Works Act, 1928, and the Motor-vehicles Act, 1924.) No. 1944/180.



NATIONAL SAVINGS Bonds

A Trustee Investment

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