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THE NEW LAW OF DESCENT OF INTESTATE ESTATES.

II.

IN our last issue, we considered the new rules as to the descent and distribution of the property of intestate persons, who die, or have died, after 1944. In doing so, we referred to the general application of the Administration Amendment Act, 1944, to intestate and partially intestate estates. And, in tabular form, we set out the position of the relatives of the intestate who may, in certain circumstances succeed, and the nature of their succession.

THE STATUTORY TRUSTS.

The statutory trusts which form part of the scheme of the new rules of descent of an intestate's property, where such intestate has died, or dies, after 1944, are contained in s. 7 of the Administration Amendment Act, 1944. These statutory trusts come into operation only where the statute directs that the intestate's estate, or a specified part of that estate, is to be held on such trusts.

It has already been said (*ante*, p. 31), that the statutory trusts apply as regards three classes, or primary stocks of relatives of the intestate—namely, issue, brothers and sisters, and uncles and aunts. We now proceed to show the application of the statutory trusts made by s. 7 to these several classes. In doing so, we shall mention, in passing, the other relatives, who, as they take absolutely when they succeed, are not concerned in the statutory trusts at all.

Issue of Intestate: Under the statutory trusts for issue, the property descending to the issue of the intestate must be held in trust, in equal shares, if more than one, for all or any children of the intestate who are alive at his death and who *either* attain the age of twenty-one years *or* marry, whichever event is the earlier. If any child of the intestate dies before him, but leaves issue (grandchildren, &c., of the intestate) who are alive at the intestate's death, or are then *en ventre sa mere*, the share of the deceased child of the intestate is held in trust for his issue on the *per stirpes* principle, to vest as soon as each of them respectively attains the age of twenty-one years or marries under that age. Such descendants of a deceased child take, through all degrees, according to their stocks of descent, or families, in equal shares, and, if more than one, the share his, her, or their parent would have taken if he or she had lived to attain an absolutely vested interest in the intestate's property.

The foregoing applies whether or not the intestate leaves a surviving spouse, there being then merely the difference in the proportion taken by the intestate's issue attaining a vested interest in the estate (subject to the share taken by a surviving spouse, if any), on the statutory trusts: two-thirds of the balance of the residue after the surviving spouse's share has been deducted, where a spouse survives the intestate; or the whole estate, if no spouse so survives.*

If the trusts in favour of the issue† of the intestate fail, then the portion of the estate of the intestate held on the statutory trusts (the amount depending on the survival or non-survival of the intestate's spouse), and all statutory accumulations, if any, go, devolve, and are held under the provisions of the statute as if the intestate had died without leaving issue at his death: s. 7 (2) (*a*).

Surviving Spouse: If the statutory trusts for issue fail, the surviving spouse takes one-half of the share of the estate held on the statutory trusts (in addition to her absolutely vested interest in the personal chattels, the sum of £1,000, and one-third of the residue), if the intestate was survived by a parent or parents; or she takes the whole of the estate if no parent survives the intestate. She is not directly concerned with the statutory trusts.

Parents: On failure of the statutory trusts for issue of the intestate, as above, the surviving parents of the intestate take as set out in the table of descent (*ante*, p. 30), absolutely, the amount depending on the survival or non-survival of the intestate's spouse; and the statutory trusts have no application to them or either of them.

Brothers and Sisters: If the intestate is not survived by a spouse or parent, and is either not survived by any issue or none of the issue surviving him becomes indefeasibly entitled under the statutory trusts, then the brothers and sisters of the intestate (of the whole or of the half blood) and their issue take in equal shares on the statutory trusts the whole of the residuary estate.

The statutory trusts for brothers and sisters of the intestate, and their issue, correspond in every way

* ERRATUM: Owing to the repetition of a line in Section 1 of the Table of Descent on p. 30, *ante*, this table should be corrected as follows:—
Issue:
• *Two-thirds* of residue absolutely (s. 6 (1) (*a*) (i)).

† The word "issue," wherever used herein includes children, and the direct descendants of children.

to the statutory trusts for the intestate's issue, explained above, as if those trusts were repeated with the substitution of references to brothers and sisters for references to the intestate's children. Consequently, the statutory trusts for brothers and sisters may wholly fail if no brother or sister and no issue of a deceased brother or sister attains an absolutely vested interest.

Grandparents : If no issue, spouse, parent, brother or sister, or issue of brother or sister, of the intestate, takes absolutely, then the grandparents of the intestate living at the intestate's death take absolutely. The statutory trusts have no application to grandparents.

Uncles and Aunts : If the statutory trusts already detailed wholly fail, and no spouse, parent, or grandparent takes absolutely, then the whole estate is held on the statutory trusts for the uncles and aunts of the intestate (of the whole or half blood) being brothers or sisters of a parent of the intestate. These trusts, again, correspond in every way to the statutory trusts for the issue of the intestate, as if such trusts were repeated with the substitution of references to uncles and aunts for references to children.

We again draw attention to the fact that "no issue shall take whose parent is living at the death of the intestate, and is thus himself capable of taking": s. 7 (1) (*a*). This refers to a "parent" who is alive and married at the intestate's death, and so immediately takes an indefeasibly vested interest. It includes, in addition to the intestate's issue, remoter relatives and their issue, so that a living person married at the intestate's death, and entitled under the statutory trusts cannot be supplanted by his own issue taking an absolutely vested interest.

From the foregoing it will be seen that the period of absolute vesting is contingent on the members of a class presently entitled on the statutory trusts attaining the age of twenty-one years or marrying under that age. If the property so held on the statutory trusts does not vest in any member of that class or his issue, then the next class of relatives, entitled as above set out, comes in. Consequently, the period of vesting may not be reached until nearly twenty-one years after the death of the intestate *plus* the period of gestation in the case of any one contingently entitled being *en ventre sa mere* at the date of the intestate's death.

The statutory trusts may successively fail in respect of two or more classes of relatives or primary stocks. In such an event the question of death duties may become important, owing to the changing incidence of payment of duty, and differences in rates of duty. On the death of the intestate, the Commissioner of Stamp Duties will assume who is going to survive, and it may reasonably be expected that he will consider that all children alive at the death of the intestate, or the issue of deceased children, will survive to take an indefeasible vested interest under the statutory trusts, except, possibly, in cases where it is proved that any of the children at the date of the death of the intestate is in mortal danger: see s. 21 (1) of the Death Duties Act, 1921. But the final assessment of duty may not be determined for over twenty-one years after the death of the intestate. On failure of an earlier class, and changing relationships holding on the statutory trusts, and attaining an indefeasibly vested interest, the succession duty should be re-assessed by the Commissioner on the basis of the actual event, and as at the date of the death of the intestate: s. 21 (3). As regards estate duty, s. 14 applies the provisions of s. 21 in respect of contingencies: this will be of importance where the surviving spouse becomes absolutely entitled to an increased share of the residuary estate on the failure of issue or parents of the intestate to attain an indefeasible interest; and s. 13 gives a liberal deduction to the interest acquired by the widow of the intestate: see, generally, hereon, *Adams's Law of Death Duties in New Zealand*, 97, 98, 122–126.

On the other hand, it may be mentioned that the provisions of the Administration Amendment Act, 1944, affect payment of death duty on successive estates. Any person taking an interest in the estate of an intestate person who died before 1945 had a vested interest from the date of the intestate's death; and, if he subsequently died, death duties (if any) were payable on that interest in his own estate. The interest of a person entitled under the statutory trusts to share in the estate of an intestate dying after 1944 is contingent only; and, on the death of that person before attaining the age of twenty-one years or marrying under that age, such interest is not liable for death duties in his estate. As to death duties in respect of successive estates, see (1941) 17 NEW ZEALAND LAW JOURNAL, 133.

THE SUCCESSION OF ILLEGITIMATES.

An illegitimate person is *nullius filius*, and, therefore, at common law he can succeed neither to realty nor to personalty; and he can have no heirs except such as claim lineal descent from himself, since, as he has no legal ancestor, he cannot have collateral relatives: *2 Blackstone Comm.* 247, 249.

(*a*) *Legitimated Persons.*

By virtue of the Legitimacy Act, 1939, if the parents of an illegitimate marry, or have married, one another, the effect of such marriage is to legitimate the illegitimate person from the date of his birth, and that is the case whether or not the illegitimate person was living at the date of the marriage, and whether or not his parents were domiciled in New Zealand at the time of their marriage or at the time of his birth: s. 3. Every person *claiming through or under a legitimated person*, or by virtue of having been married or related to a legitimated person, is entitled to the same estates, rights, and interests, as if the legitimated person had been born in wedlock; but nothing in the Legitimation Act, 1939, may affect any estate, right, or interest in any real or personal property to which any person has become absolutely entitled, whether beneficially or otherwise, before the marriage of the parents of the legitimated person, or before September 22, 1939 (the date of the passing of the statute), whichever event later happens: s. 4. For the purposes of the statute, the term "legitimated person" means any person deemed by the statute to be legitimated.

As regards the right of succession to a legitimated person who dies intestate, it appears from the Legitimation Act, 1939, that the same persons are entitled to take the same interests in his estate as would have been entitled if he had been born legitimate. If an illegitimate person dies *before* the subsequent marriage of his parents, his children and remoter issue are entitled to share in the estate of a person who dies intestate after such marriage where they would have been so entitled if he had been born legitimate.

(*b*) *Illegitimates.*

Section 8 of the Administration Amendment Act, 1944, is as follows :—

For the purposes of the foregoing provisions of this Act the relationship of a mother to her illegitimate child and of an illegitimate child to its mother shall be deemed to be a legitimate relationship, whether or not the child is a legitimated person:

Provided that this section shall not apply in any case where the child has been adopted, whether in New Zealand or elsewhere.

The marginal note to s. 8 reads: "Right of illegitimate child and mother of illegitimate child to succeed on intestacy"; but the terms of the section must surely give it a much wider effect than the marginal note indicates. The section commences with the words "For the purposes of the foregoing provisions of this Act," and must therefore apply in all cases where the distribution of an estate under ss. 6 (descent and succession) and 7 (statutory trusts) may be affected by the statutory declaration in s. 8 of the status of legitimacy of an illegitimate child of a woman, whether or not such child or mother actually becomes entitled, or may, under the statutory trusts become entitled, to share under the intestacy. Cases where s. 8 may come into operation include, for instance, the following cases of illegitimate relationship:—

(*a*) Where a daughter or remoter female descendant of the intestate has an illegitimate child at the time of the intestate's death.

(*b*) Where the mother of the intestate has an illegitimate child, who or whose issue could share under the statutory trusts in favour of brothers and sisters of the intestate and their issue.

(*c*) Where a parent of the intestate was illegitimate and the mother of such parent could, as grandmother of the intestate, share in the estate, or her other children (illegitimate as well as legitimate) or their issue could share under the statutory trusts in favour of uncles and aunts and their issue.

(*d*) Where a sister or an aunt or a female descendant of either of them has an illegitimate child who or whose issue could share under the statutory trusts.

In applying s. 8 it must be remembered that the persons who take under an intestacy must be alive (or *en ventre sa mere*) at the intestate's death. In the ordinary case of legitimate relationship, if a woman, who is alive at the intestate's death, has a child or children then living, the mother takes immediately a vested share by reason of her marriage, and her children cannot take any interest in the estate.

If, however, a daughter of the intestate, who is alive at the intestate's death and could, on attaining the age of twenty-one years or on marrying under that age, take on the statutory trusts, has an illegitimate child living at the intestate's death, such child cannot take under the statutory trusts even if the mother (the intestate's daughter) dies unmarried before attaining the age of twenty-one years; because, under s. 7 (1) (*a*), the issue of such a daughter can take only if such daughter predeceased her parent.

Presumably the position is the same where, in a case to which the statutory trusts in favour of issue apply, a granddaughter (whose parent predeceased the intestate) and her illegitimate child are alive at the intestate's death, and the granddaughter dies unmarried under twenty-one years, since s. 7 (1) (*a*) provides for "the issue of any child of the intestate"

"to take through all degrees, according to their stocks, in equal shares if more than one, the share which their *parent would have taken if living at the death of the intestate and so capable of taking.*"

Section 8, for the purposes of our explanation, may be summarized as follows:—

(*a*) If the mother of an illegitimate unadopted child dies intestate after 1944, the illegitimate child, or his issue if he be dead, is entitled, whether or not there is legitimate issue, to any interest in his mother's estate to which he or his issue would have been entitled under the statutory trusts if he had been born legitimate.

(*b*) An illegitimate unadopted child or his or her issue succeeds under the statutory trusts, equally *per stirpes* with the legitimate issue, if any, of the mother of such child, to the share of the estate of an intestate third person, which his mother would have taken if living at the death of that intestate.

(*c*) If a mother survives her unadopted illegitimate child, who dies intestate after 1944, she is entitled to any interest to which she would have succeeded had the child been born legitimate and she had been his sole surviving parent.

The next matters to be considered are the effect of adoption on succession, *bona vacantia* and their destination and possible distribution, the administrator's power of sale, and claims under the Family Protection Act, 1908, against an intestate or partially intestate estate.

SUMMARY OF RECENT JUDGMENTS.

In re LAWSON.

SUPREME COURT. Auckland. 1944. November 17, December 4. FAIR, J.

Criminal Law—Sentence—Date from which Sentence of Imprisonment begins to run—Grand Jury finding True Bill at one Supreme Court Sittings against a Prisoner tried and convicted at the following Sittings—"Convicted"—"Any sittings"—Prisons Act, 1908, s. 34.

In the sentence in s. 34 of the Prisons Act, 1908, "all sentences of imprisonment on any offenders convicted at any sittings of the Supreme Court shall date from the first day of holding such sittings," the word "convicted" has its usual meaning of found guilty; the word "sittings" is used as a singular noun, not a plural.

R. v. *Crago*, [1917] N.Z.L.R. 863, G.L.R. 607, and *R.* v. *Batchelor*, [1935] N.Z.L.R. 1016, G.L.R. 735, applied.

At a sittings of the Supreme Court commencing on May 2, the grand jury on that day returned a true bill in respect of a charge against the prisoner. In consequence of the decision of certain questions of law applicable to the trial of the said charge, which had been reserved for consideration by the Court of Appeal, not having been given before the conclusion of such sittings, the prisoner was not arraigned during them, but was arraigned on August 9 at the sittings commencing on July 25. He was found guilty, and the sentence of imprisonment was, on appeal, subsequently reduced to a term of six months.

On an application heard on November 17 for a rule *nisi* for *habeas corpus* for the prisoner's discharge from custody,

Held, That the prisoner's conviction dated from July 25 and not from May 2; and that, therefore, the prisoner's term of imprisonment had not expired.

Counsel: *E. O. Williams*, for the prisoner; *G. S. R. Meredith*, for the Crown.

Solicitors: *Walklate and Williams*, Auckland, for the prisoner; *V. R. S. Meredith*, Auckland, for the Crown.

KING v. FRAZER.

SUPREME COURT. Wellington. 1944. November 14, 17. JOHNSTON, J.

Transport Licensing—Appeal—Application invited from Discharged Sericemen for ten Taxicab-service Licenses—In Selection from nineteen Applicants, preference given by Licensing Authority to those who had been Overseas—Whether Power to discriminate—Appeal of unsuccessful Applicant whose Failure to obtain License occasioned by such Discrimination—Transport Appeal Authority declining Jurisdiction because of Effects following upon its Exercise—Whether Words " upon the ground of lack of Jurisdiction " applied—Right of Appeal of one of a Class of Applicants, not the Holder of a License, against a Decision to grant a License to Another Person—Whether Mandamus proper Remedy—Power of Transport Appeal Authority to Order Reconsideration—Transport Licensing Act, 1931, ss. 25, 26, 28, 29—Transport Licenses Emergency Regulations, 1942, Amendment No. 1 (Serial No. 1943/175), Reg. 9.

A Licensing Authority decided to increase by ten the number of taxicab-service licenses operating in a city and invited applications from discharged servicemen thereby complying with Reg. 9 of the Transport Licenses Emergency Regulations, 1942, Amendment No. 1 (Serial No. 1943/175), which provided that in considering applications for licenses the Licensing Authority should take into account, in addition to all other relevant considerations, the desirability in the public interest of re-establishing in civil life discharged servicemen; but it made no discrimination between discharged servicemen who had been overseas, and those who had not.

The plaintiff was a discharged serviceman who had not been overseas. Including him, there were nineteen applicants. The Licensing Authority, giving preference to applicants who had been overseas, granted taxicab-service licenses to ten of the applicants, all of whom had been overseas.

The plaintiff, who was not one of the ten successful applicants appealed to the Transport Appeal Authority under s. 12 of the Transport Licensing Amendment Act, 1936, which found that the making of the said discrimination was the cause of plaintiff's failure to obtain a license; but it declined jurisdiction on the ground that while the said s. 12 gave an applicant a right of appeal against a decision refusing to grant him a license, it did not give him a right of appeal against a decision to grant a license to another person, unless he himself was already the holder of a license, and claimed to be affected by the decision to grant a license to another person. As no vacant licenses existed, and, as the appellant did not suggest that the number of licenses could properly be increased, the appeal, in so far as it related to the refusal of his own application, was dismissed. In so far as the appeal related to the grant of licenses to other persons, it was held that an appeal did not lie, because the appellant had not the required status.

On a motion for a writ of mandamus commanding the Transport Appeal Authority to hear and determine plaintiff's appeal,

Held, 1. That the Transport Licenses Emergency Regulations, 1942, gave the Licensing Authority no right to give preference to discharged servicemen who had been overseas, over those who had not.

2. That jurisdiction could not be declined by the Transport Appeal Authority because of the effect following its decision that as this was the ground of refusal, there was "a lack of jurisdiction" within the meaning of that phrase in s. 12 of the Transport Licensing Amendment Act, 1936, justifying the intervention of the Court; and that mandamus was the proper remedy, and should issue.

Paterson's Freehold Gold-dredging Co., Ltd. v. *Harvey*, (1909) 28 N.Z.L.R. 1008, 12 G.L.R. 39; *Easson* v. *Ward*, (1904) 7 G.L.R. 398; and *The King* v. *Minister of Transport*, [1934] 1 K.B. 297, applied.

3. That by s. 56 of the Statutes Amendment Act, 1940, the Transport Licensing Authority had power to direct the Licensing Authority to reconsider the matter.

Semble, That an applicant of a class who has had his license refused is entitled to have competing successful applicants' licenses reviewed, if necessary, to the same extent as in an appeal by the holder of a license.

Counsel: *Hurley*, for the plaintiff; *A. E. Currie*, for the defendant.

Solicitors: *Martin and Hurley*, Wellington, for the plaintiff; *Crown Law Office*, Wellington, for the defendant.

GRAHAM v. ADAMS.

SUPREME COURT. Auckland. 1944. October 17. FAIR, J.

Licensing—Offences—Sale of Liquor by Unlicensed Persons—Liquor of " Intoxicating nature "—Whether Beverage producing a Mild Exhilaration but not a State of Intoxication is " of an " intoxicating nature "—Licensing Act, 1908, ss. 4, 195.

The words " of an intoxicating nature " used in the definition of " intoxicating liquor " or " liquor " in s. 4 of the Licensing Act, 1908, apply to all the beverages specified in that definition. Liquor is of " an intoxicating nature " within the meaning of the definition if it is such as to affect, to an extent appreciable in his conduct, the conduct of a person being fairly representative of a considerable section of the community and not so exceptional in conduct or physique as to make him an anomalous test.

Consequently, " Gold-band Lager Beer," containing 2·6 per cent. proof spirit and producing in such a person a mild exhilaration, but not a state of intoxication, is not " of an intoxicating " nature."

Counsel: *Johnstone*, K.C., and *Terry*, for the appellant; *G. S. R. Meredith*, for the respondent.

Solicitors: *V. R. S. Meredith*, Crown Solicitor, Auckland, for the respondent; *Nicholson, Gribbin, and Nicholson*, Auckland, for the appellant.

UNITED REPAIRING COMPANY, LIMITED v. GLOVER.

FULL COURT. Wellington. 1944. October 2, 3, 4, 19. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.

Industrial Conciliation and Arbitration Acts—Award—Forty-hour Week—Factories—Extension of Hours by General Order—Period of Operation extended by Interim Order—Expiry of existing Award—No Application by Factory Occupier before new Award made—Clause in new Award extending Factory-hours to Forty-four—Claim for Overtime over Forty Hours—Validity of Interim Order—" Specified period "—Industrial Conciliation and Arbitration Amendment Act, 1936, s. 20—Factories Amendment Act, 1936, s. 3.

On September 1, 1936, a general order, made by the Court of Arbitration under the powers conferred by s. 3 (5) of the Factories Amendment Act, 1936, extended the working-hours of the particular industry to forty-four in the factories to which it related. Its term was a year expiring on August 31, 1937. On the last mentioned date, the Court made an interim order extending the term of the previous order from September 1, 1937, in respect of each occupier until his application should be disposed of by the Court. On December 15, 1938, a new award in the industry was made under s. 20 of the Industrial Conciliation and Arbitration Amendment Act, 1936, which contained the following clause:—

" Pursuant to the provisions of section 3 of the Factories Amendment Act, 1936, the limits of hours fixed by subsection (1) of that section are hereby extended in the manner and to the extent set forth in this award in respect of every occupier of a factory bound by the provisions of this award."

The award was declared to continue in force until May 9, 1940. It continued in force after that date by virtue of s. 89 (1) (*d*) of the Industrial Conciliation and Arbitration Act, 1925, until a new award was made on June 30, 1941.

G. had claimed from the appellant company the sum of £86 1s. 6d. as overtime in respect of the weekly hours worked by him in excess of forty during a period of six years—namely, from November 13, 1937, to November 12, 1943.

It was held by a Magistrate that the various orders mentioned were invalid, and judgment was given for the claimant.

On appeal from that judgment,

Held, by a Full Court (*Myers*, C.J., and *Blair*, *Kennedy*, and *Callan*, JJ.), varying such judgment, 1. That from December 15, 1938, to May 9, 1940, there was a valid order under the extending powers conferred by s. 3 (5) of the Factories Amendment Act, 1936, extending the working-hours in the appellant company's factory to forty-four; and, the respondent could not claim overtime in respect of the four hours worked over forty hours per week during that period.

2. That, during the period from May 9, 1940, to June 30, 1941, when the new award came into force, there was no valid or effective extension order applicable to the appellant company's

factory in existence under s. 3 (5) of the Factories Amendment Act, 1936, extending the working-hours above forty per week; and the respondent was accordingly entitled to claim overtime in respect of hours worked during that period in excess of forty per week.

Semble, per *Myers*, C.J., an extension order under s. 3 (5) of the Factories Amendment Act, 1936, should not be included in an award, but should be the subject of a separate document.

In re Northern, &c., Boot Operatives' Award, (1936) 36 Bk. of Awards, 304, referred to.

Counsel: *Lisle Alderton*, for the appellant; *Tuck*, for the respondent.

Solicitors: *Lisle Alderton and Kingston*, Auckland, for the appellant; *Tuck and Bond*, Auckland, for the respondent.

In re SAWTELL, PUBLIC TRUSTEE v. ST. GEORGE'S CHURCH OF ENGLAND HOSPITAL AND OTHERS.

SUPREME COURT. Wellington. 1943. November 29. 1944. April 5. SMITH, J.

Will—Construction—Gift of Income to two Brothers and Sister equally during their Lives—On Death of each, his or her Share of Income to be divided equally between his or her Surviving Children per stirpes—*Gift over on Death of last of said Brothers and Sisters to their Children* per capita—*Death of Brother leaving Children and Sister unmarried—Implication of Cross-remainders during Life of Surviving Brother.*

Testator, after making certain dispositions, gave annuities to his wife, his father, and his sister, Lillian, during her spinsterhood; and directed that, after the death or second marriage of his wife, his estate should be converted into money and the proceeds held for his children; but, if (as was the case) he left no issue, he provided for the increase of the annuities to his father and his said sister. His will continued:

"And whatever balance of income if any there may then remain and the amount of the said annuities respectively as and when they any or either of them shall lapse shall be paid in equal shares to my brothers Leonard Sefton Sawtell of Wellington Stanley Thomas Sawtell of Wellington and my said sister Lillian Mary Sawtell On the death of any one and each of my said brothers and sister I direct that the share of income falling to him or her shall be divided in equal shares between any children that he or she may have and leave surviving *per stirpes* and not *per capita* When the last of my said three brothers and sister shall die." Then, after giving a legacy to a hospital, he directed his trustee "to distribute the whole of my then remaining estate between the children of my said brothers and sister *per capita* and not *per stirpes*."

The testator's father died in the testator's lifetime, the testator's widow died without leaving issue and without having married again. After the widow's death Lillian became entitled to her annuity and share in the balance of the income. Lillian died without leaving children, and by her will left all her estate to the St. George's Church of England Hospital (Incorporated), Christchurch. Testator's brother, Stanley Thomas Sawtell, was still living, and had children. Testator's brother, Leonard Sefton Sawtell, died leaving six children.

On an originating summons for the interpretation of the will,

Held, That the omission of a gift to the survivors of the three named original takers, including therein survivors by stocks was unintentional; that the testator intended that these survivors and not his next-of-kin should take the share of a deceased taker, dying childless before the period of distribution, in the amount of the legacies to his father and sister when they lapsed and in the balance of income [that cross-limitations should be implied between the three shares into which the balance of the income from the estate was divided], with the result that during the lifetime of Stanley Thomas Sawtell one-half thereof would go to him and the other half to the children *per stirpes* of the late Leonard Sefton Sawtell.

Pearce v. *Edmeades*, (1838) 3 Y. & C. Ex. 246, 160 E.R. 693; and *In re Tate, Williamson* v. *Gilpin*, [1914] 2 Ch. 182, applied.

In re Hobson, Barwick v. *Holt*, [1912] 1 Ch. 626, considered and distinguished.

In re Browne's Will Trusts, Landon v. *Brown*, [1915] 1 Ch. 690, distinguished.

In re Smith, Bishop v. *Blyth*, [1938] V.L.R. 59, distinguished.

In re Fox's Estate, Dawes v. *Druitt, Phoenix Assurance Co., Ltd.* v. *Fox*, [1937] 4 All E.R. 664; *Bignold* v. *Giles*, (1859) 4 Drew. 343, 62 E.R. 133; *Bryan* v. *Twigg*, (1867) L.R. 3 Ch. 183; *Re Bickerton's Settlement, Shaw* v. *Bickerton*, [1942] 1 All E.R. 217, and *In re Stanley's Settlement, Maddocks* v. *Andrews*, [1916] 2 Ch. 50, referred to.

Counsel: *D. R. White*, for the Public Trustee as executor of the will; *T. C. A. Hislop*, for the first defendant; *Leicester*, for the defendants of the second, third, and fourth parts; *S. A. Wiren*, for the defendant of the fifth part.

Solicitors: *Public Trust Office*, Wellington, for the Public Trustee; *Brandon, Ward, Hislop, and Powles*, Wellington, for the first defendant; *Leicester, Rainey, and McCarthy*, Wellington, for the second, third, and fourth parts; *Williams, Holmes, and Booker*, Christchurch, for the fifth part.

CRONIN v. CRONIN.

SUPREME COURT. Hamilton. 1944. August 3, 4; October 27; December 4. FINLAY, J.

Divorce and Matrimonial Causes—Separation as a ground of Divorce—Separation Order—" Wrongful act or conduct " of Petitioner causing Separation—Nature of Conduct required for Dismissal of Petition—Divorce and Matrimonial Causes Act, 1928, ss. 10 (j), 18.

In a suit for divorce by a husband on the ground that the petitioner and the respondent were parties to a separation order which was in full force and had been in full force for not less than three years, the respondent alleged that the separation was due to the wrongful act or conduct of the petitioner within s. 18 of the Divorce and Matrimonial Causes Act, 1928.

Held, That the husband's persistence in an intimate and clandestine association with a female clerk, which caused his wife acute distress of mind and which was the cause of the separation of husband and wife, even though the evidence fell short of establishing adultery between the husband and his employee, was wrongful conduct of the husband to which the separation was due under s. 18 of the Divorce and Matrimonial Causes Act, 1928, and entitled the respondent to the dismissal of the petition.

Schlager v. *Schlager*, [1924] N.Z.L.R. 1011, G.L.R. 613, and *Steadman* v. *Steadman*, [1926] G.L.R. 121, applied.

Newell v. *Newell*, (1909) 28 N.Z.L.R. 857, 11 G.L.R. 666, and *Chapman* v. *Chapman*, [1926] N.Z.L.R. 291, G.L.R. 171, referred to.

Counsel: *King*, for the petitioner; *Strang*, for the respondent.

Solicitors: *King and McCaw*, Hamilton, for the petitioner; *Strang and Taylor*, Hamilton, for the respondent.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF THE CITY OF WELLINGTON, INCORPORATED v. "TRUTH" (N.Z.) LIMITED AND CRISP.

SUPREME COURT. Wellington. 1944. November 30. MYERS, C.J.

Practice—Trial—Trial before Judge and Jury—Counsels' Addresses—Two Defendants—Identical Interests—One calling Evidence and the Other Cross-examining—Plaintiff's Right of General Reply—Test to be applied—Discretion of Presiding Judge—Code of Civil Procedure, R. 268.

Where, in a trial before a Judge and jury, there are two defendants with identical interests and counsel for one defendant calls evidence and counsel for the other defendant does not; whether or not such defendants have the right to two addresses, the Court has a discretion to allow each one to address, and in the order agreed upon between them; but plaintiff's counsel has the right of general reply.

Semble, Cross-examination of the witnesses called by counsel for one defendant by the counsel for the other defendant who calls none, is in a sense calling evidence by the latter.

Quaere, Whether the word "party" as used in R. 268 of the Code of Civil Procedure, which refers to the case where there is one defendant includes the plural?

Evans v. *Evans (No. 2)*, (1910) 30 N.Z.L.R. 291, *sub nom. Evans* v. *Evans*, 13 G.L.R. 288, applied.

Ryland v. *Jackson*, (1902) 18 T.L.R. 574; *Jeffree* v. *Jeffree*, (1910) 54 Sol. Jo. 655; and *R.* v. *Bruges and Goodman*, (1906) 9 G.L.R. 4, distinguished.

Bagshaw v. *Pimm*, [1900] P. 148, and *Palmer* v. *Maclear and McGrath*, (1858) 1 Sw. & Tr. 149, 164 E.R. 670, referred to.

Counsel: *O. C. Mazengarb*, for the plaintiff; *O'Leary*, K.C., and *J. H. Dunn*, for the defendant company; *G. G. G. Watson*, for the defendant, Crisp.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiff; *Alex. J. H., and Julia Dunn*, Wellington, for the defendants.

WESTON AND ANOTHER v. COMMISSIONER OF STAMP DUTIES.

SUPREME COURT. Wellington. 1944. December 4, 15. MYERS, C.J.

Public Revenue—Death Duties (Estate Duty)—Deed of Trust made by Deceased making Gift on Charitable Trust of Property—Life Interest reserved to Donor—Whether Part of Final Balance of Estate of Deceased Donor—Death Duties Act, 1921, s. 5 (1) (b), (j), *Finance Act, 1923, s. 11.*

Section 11 of the Finance Act, 1923, must be construed as if it were a proviso to s. 5 (1) (*b*) of the Death Duties Act, 1921, and does not exclude the operation of para. (*j*) of that subsection.

Consequently, the provisions of a deed of trust creating a gift and construed as reserving a life interest to the deceased but determinable as provided therein bring it within the ambit of s. 5 (1) (*j*) of the Death Duties Act, 1921.

Attorney-General v. *Heywood*, (1887) 19 Q.B.D. 326; *Riddiford* v. *Commissioner of Stamps*, (1913) 32 N.Z.L.R. 929, 15 G.L.R. 538; *Attorney-General* v. *Farrell*, [1931] 1 K.B. 81, applied.

Counsel: *Weston*, K.C., and *Hay*, for the appellant trustees; *Nicholson*, for New Plymouth High School Board; *Byrne*, for the respondent.

Solicitors: *Weston, Ball, and Grayling*, New Plymouth, for the appellants; *Crown Law Office*, Wellington, for the respondent.

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

SUPREME COURT. Wellington. 1944. December 4, 5, 15. MYERS, C.J.

Public Revenue—Death Duties (Succession Duty)—Charitable Trust—Income of Trust Fund directed to be paid to "British and Foreign Bible Society of New Zealand"—Such Income to to be expended in the Missionary Activities of that Society—Whether a "Charitable trust in New Zealand"—Whether Society domiciled in New Zealand—Death Duties Act, 1921, ss. 16 (1), 18—Finance Act, 1940, s. 27 (8).

Testatrix, by a codicil to her will, directed her trustees to hold one-half of the residue of her estate upon trust to invest the same and pay the income derived therefrom to "the British and Foreign Bible Society of New Zealand," and directed "such income to be expended in the missionary activities of that society," which was an incorporated society formed in New Zealand "for the sole object of encouraging wider circulation of the Holy Scriptures without note or comment according to the laws and regulations of the British and Foreign Bible Society." The main activity of the New Zealand Society is the raising of funds in New Zealand which the Dominion Council applied in the first instance to meeting its own administration costs and expenses and the costs of the activities in New Zealand, and, subject thereto, remitted all surplus funds to the parent society in London to be applied to the world-wide activities of that society.

On case stated on appeal from the determination of the Commissioner of Stamp Duties assessing succession duty on such income,

Held, That the gift of the income to the society was for its general purposes or activities; and, that, as the missionary activities of the society were not confined to New Zealand, the property given by the codicil upon trust to pay the income derived thereupon to the society was not exempt from succession duty by s. 18 of the Death Duties Act, 1921, as it was not "acquired and held on any charitable trust in New Zealand."

Commissioner of Stamps v. *McDoual*, (1909) 28 N.Z.L.R. 373, G.L.R. 504; *Garland* v. *Commissioner of Stamp Duties*, [1919] N.Z.L.R. 792, G.L.R. 346, and *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1927] N.Z.L.R. 714, G.L.R. 177, 380, distinguished.

Attorney-General v. *Delaney*, (1876) Ir. R. 10 C.L. 104; *Kenny* v. *Attorney-General*, (1883) 11 L.R. Ir. 253 and *Re Gwynne*, (1912) 5 D.L.R. 713, referred to.

Held, further, That the New Zealand Society was an autonomous body not merely the collecting agent for the parent Society, it was the "successor" within the meaning of s. 16 (1) of the Death Duties Act, 1921, and was domiciled in New Zealand; and, therefore, s. 27 (8) of the Finance Act, 1940 (imposing an extra 10 per cent. of the value of the succession when it exceeded £1,000 where the successor is domiciled out of New Zealand) did not apply.

Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd. v. *Commissioner of Stamp Duties*, [1927] N.Z.L.R. 714, G.L.R. 177, 380, applied.

Counsel: *Weston*, K.C., and *Hay*, for the appellants; *Byrne*, for the respondent.

Solicitors: *Weston, Ball, and Grayling*, New Plymouth, for the appellants; *Crown Law Office*, Wellington, for the respondent.

LONG AND OTHERS v. PUBLIC TRUSTEE AND OTHERS.

SUPREME COURT. Auckland. 1944. September 22; October 18. FAIR, J.

Practice—Interrogatories—Disclosure of Names of Witnesses of Interrogatee—Interrogatory otherwise admissible—Principles upon which Interrogatories should be considered—Facts and Circumstances sought to be elicited known to Interrogatee and not to Interrogator—Absence of such Knowledge not specified in Latter's Affidavit—Exercise of Discretion—Special Circumstances—Code of Civil Procedure, RR. 410, 422.

The general principle upon which interrogatories should be considered is whether they are necessary for disposing fairly of the case. The only restriction the Court will put upon the exercise of its discretion with regard to interrogatories is that the matter upon which it is sought to obtain information are relevant to the issue, and that the information is being asked for for the legitimate purpose of supporting the applicant's case in circumstances that will not result in their being unfairly used.

The fact that an interrogatory which is otherwise admissible will result in the disclosure of the names of the witnesses to be called by the party whom it is sought to interrogate is not a ground for disallowing it when it is proper.

Marriott v. *Chamberlain*, (1886) 17 Q.B.D. 154, applied.

Anderson v. *Strode*, (1885) N.Z.L.R. 4 S.C. 13, distinguished.

Potter v. *Metropolitan District Railway Co.*, (1873) 28 L.T. 231, and *Marskell* v. *Metropolitan District Railway Co.*, (1890) 7 T.L.R. 49, referred to.

Plaintiffs sued defendants, as the executors and beneficiaries under the will of a testator, alleging that he orally agreed with his wife on or shortly before the making of her will that he would make his will in specified terms in consideration of her making the will that she did; that her will remained unaltered at the time of her death, but that the testator, in breach of his said agreement as to the mutual wills, made new wills contrary to his agreement. The plaintiffs asked for a declaration that the testator's estate was held in trust for the plaintiffs, being the persons who would have benefited under such alleged oral agreement. The statement of claim in the action set out the terms of the alleged agreement. The defendants denied the existence of any such agreement. Both the testator and his wife were dead.

The defendants, other than the Public Trustee, issued a summons for leave to deliver, *inter alia*, the following interrogatories, in which the alterations made by the learned Judge are indicated:—

"1 (*d*). What persons were present when such agreement was made?

"1 (*e*). Is it contended that the words set out in paragraph 6 of the statement of claim were the actual words used in the making of such agreement? If not, what were the actual words used in the making of such agreement? By whom were they spoken and to whom were they spoken? What reply did the person to whom they were spoken make?

"2 (*f*). What persons were present on each such occasion ?

"2 (*g*). What were the actual words used on such occasion [which are relied on as constituting the agreement alleged in the statement of claim] by whom were they spoken, and to whom were they spoken ?*

"3 (*a*). Did either or any of the parties to the said agreement make any subsequent reference to such agreement [indicating an abandonment or modification of it ?].†

"3 (*f*). To whom was such reference made and in whose presence ?"

Held, 1. That, on the application of the principles laid down by the learned Judge, as above, the said interrogatories were allowing as altered.

2. That, although interrogatory 1 (*e*) asked for no more information than would have been known in normal circumstances to the parties making the agreement themselves and would not have been allowed if the defendants (interrogatees) had knowledge of the facts and circumstances under which the alleged oral agreement was made and if it were merely "fishing" to obtain the names of the plaintiffs' witnesses, it was directed to give the defendants information that would enable them to prepare for trial, assuming—as had been tacitly done in argument—that the defendants had no knowledge of any agreement as alleged, or of conversations to the effect of those relied on. Having regard to the state of the authorities, leave was given to the defendants under RR. 410 and 422 of the Code of Civil Procedure to apply again for leave to administer the said interrogatories, unless the plaintiffs were prepared to consent to an order upon the filing of an affidavit to the effect of the assumption at the argument.

Eade v. *Jacobs*, (1877) 3 Ex. D. 335, 37 L.T. 621, and *Attorney-General* v. *Gaskill*, (1882) 20 Ch.D. 519, doubted.

Griebart v. *Morris*, [1920] 1 K.B. 659; *Andrews* v. *McInnes*, [1935] N.Z.L.R. s. 6, G.L.R. 94; and *Anon.*, (1939) 88 L.J. Newsp. 3, applied.

Counsel: *North*, in support; *Gould*, to oppose.

Solicitors: *Morpeth, Gould, Wilson, and Dyson*, Auckland, for the plaintiffs; *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the defendants.

* The learned Judge deleted the word "actual" appearing in the question in the summons, and added the words in brackets.

† The learned Judge added the words in brackets.

A PRISONER-OF-WAR LAW SOCIETY.

The World's Most Enterprising Legal Association.

By Captain A. I. Cottrell of the Second N.Z.E.F.*

You might be interested to hear something of what I consider to be the livest, busiest, hardest-working, and most enterprising Law Society in the world to-day. It is called the Brunswick-Querum Law Society, which operates in Oflag 79 in Germany. There are probably many such Societies in other Camps; but, because this is, I believe, rather exceptional, I write of it.

The Society was first set up when the Camp was situated in Marisch Trubeau in Czechoslovakia. Here we lived in a large five-storey stone building which was before the war a training establishment for intending officers of the Czechoslovak Army. We were very crowded, but the countryside was beautiful as it was winter and there was a heavy carpet of snow on the ground. Even in time of war and through barbed wire, and knowing of the dreadful sufferings of these gallant Czechoslovak peoples, one was charmed by the little children with their muffs and gloves, wearing miniature skis on their feet, of the vehicles with sleds instead of wheels, and the horses with bells tinkling as they drew their loads along.

Soon after the Camp was established, Christmas, 1943, arrived, and we heralded it in with snow-fights and as much fun and celebration as we could. There were 2,000 of us there—all officers—and representing nearly every Allied nation. Most of us had been sent through from Italy, and many and varied were the tales one heard of experiences at the time of the Italian Armistice, of the ghastly train journey to Germany, packed worse than animals in cattle-trucks, of escapes and recaptures and other adventures of every kind. The majority were Englishmen; but there were also South Africans, Australians, New Zealanders, Americans, Free French, Greeks, Persians, and Indians. A large party of Russians worked round about and entertained us with their national songs from their bare bungalow in the evenings. We managed to smuggle them both food and cigarettes from our own supplies, and their gratitude was deep and very sincere.

It was a strange camp, for in addition to the central large building, as our numbers grew the barbed wire was extended round a part of a village bordering us, consisting of ordinary houses in which the senior officers lived.

One day, soon after we settled in, my attention was drawn to a notice on the central notice-board calling a meeting of all Barristers, Solicitors, Solicitors' Clerks, Law Students, or intending Law Students, for the following day, for the purpose of forming a Camp Law Society and arranging lectures and instruction for students.

I attended and was amazed to find approximately sixty officers present, of every nationality and even including a large bearded, turbaned, and fine-looking Sikh. The Chairman was a Liverpool Solicitor, Leslie Adams, a most charming, intelligent and delightful person. He submitted a draft constitution to the meeting and outlined a scheme of lectures both for qualified Barristers and Solicitors, and for Students, in addition to a most comprehensive system of private tutoring and instruction. All the necessary offices of Secretary, Treasurer, &c., were filled, the constitution approved, and the Society was born.

From that day onward, it prospered and grew until it became without question the most progressive and live body I have ever been associated with.

We had very few books in those days, but these were pooled and handled by a competent Librarian and allotted to students for certain hours each day. Com-

* The author of this article is a Christchurch practitioner, who was wounded at El Alamein, and, after fifteen months in Italian hospitals and twelve months in Camps in Germany, was repatriated on account of his wounds.

plete syllabuses were formulated for first year, intermediate, and final students. Requests for books were sent to other Camps, to England, Switzerland, and Turkey.

Inquiries were also forwarded to the English Law Society requesting the sending of exam. papers. In due course, group meetings of qualified men were held regularly to exchange knowledge and ideas for the benefit of ourselves, but primarily for the benefit of the students. In addition a confidential committee was established to advise and assist any officer in the Camp in connection with his own private worries, or in connection with legal matters concerning his family or affairs at home.

A room was allotted to the Society, and this was soon given a thoroughly legal atmosphere as photos of famous English Judges were obtained from books, framed, and hung on the walls, while legal maxims and quotations were colourfully printed, framed, and also hung.

In this room—" The Chambers " as it was called—we held a General Meeting every Friday afternoon. After dealing with any current business, an address of at least an hour's duration was always given. These addresses were meticulously prepared, and they will always remain a memory to me of the brightest spots of my prisoner-of-war existence.

In a mixed community, such as we lived in, there were always many outstanding personalities and we had our full share of them in the Law Society. So we heard tales of law in South Africa, India, Greece, New Zealand, England, and elsewhere. We had talks from Barristers and other legal specialists about experiences in their own spheres—we held moots, trials, debates, and discussions, &c. We invited the Doctors to discuss such questions as insanity, the Architects to discuss town-planning, the Accountants to discuss company-promotion, and so on.

Then, as more books arrived, so we expanded our activities. At the request of the Accountancy Society, Solicitors lectured and coached students on such subjects as Company Law and Bankruptcy; others went to assist officers studying Banking, Insurance, and Commerce.

In the middle of all this expansion at the beginning of May, 1944, without warning, the whole Camp, lock, stock, and barrel, was packed up, handcuffed, crowded into cattle-trucks and transported down through Germany to Brunswick. This move is however a long story in itself, and it is sufficient for me to say that never did I admire more the good humour of the Englishman or his ability to take every possible discomfort with a shrug and a smile. The Germans, too, were amazed as they found themselves outwitted at every single move by officers quite unmoved by their roaring, screaming, bullying behaviour.

Well, to return: we arrived at Brunswick Querum, and with us arrived all the archives and records of the Law Society. The Gestapo found many of them hard reading and eventually gave it up in disgust.

Here we were housed in an old Luftwaffe Camp and more crowded than ever. There were no rooms for education until other buildings were included and the Camp enlarged; but this did not stop the Law Society. They took over an air-raid shelter, made a table and blackboard out of bits of wood, and within a day or two were in full operation again. We worked under every imaginable kind of difficulty here, but the more the obstacles the harder every one worked. No words can amply express the help and consideration of the English Law Society. They forwarded all the latest books and decisions, they sent large numbers of their *Law Journals* and *Gazettes*, they had special exam. papers set for our Camp and forwarded, and generally encouraged and assisted the Society in every possible way.

At this stage the activities of the Society enlarged still further. Lectures were given to the whole Camp on such subjects as the history of Legal Customs, the various English Courts, &c. A complete mock trial was written by one of the members and greatly enjoyed by every one. Mr. Justice Cassells wrote especially for our Camp a series of eight papers on legal subjects of popular interest, and these were read to officers by his son, Major Cassells, who was a prominent member of the Society. Each one had to be read many times because of the crowds that came and the interest they evoked. Another member wrote *A Morning in a County Court*, which was most excellently performed by members of the Society and caused great interest and amusement Then, just before I left to be repatriated, the Law Society in conjunction with the Theatrical Society, performed Wooll, K.C.'s well-known play, *Libel*. This proved one of the theatrical successes of the year and ran for nearly two weeks, challenging Gilbert and Sullivan's *Iolanthe* in popularity. The parts of Counsel and the Judge were taken by English Barristers and every detail was perfect, even to the clothes and wigs (made from Red Cross string, and necessitating much work and patience).

These Camp activities were sidelines only; and all the time the coaching of students, the giving of lectures to qualified men, and the regular study of every new English Act and Amendment was proceeding. In May, seventeen students sat their finals, and some thirty-odd more their Intermediate exams. When I left in September last, more exam. papers were expected, and another big batch of officers and their tutors were working every moment of the day to prepare themselves to sit them. Examinations were properly held. The papers remained in the hands of the Germans and were only handed over in the exam. room, and were collected immediately afterwards and returned to England by the Red Cross.

And so, right in the heart of Germany, amidst all the discomforts and trials of prisoner-of-war life, these men toil on, doing a valuable, lasting, and grand work. They are both keeping themselves right up to date and giving the students a chance to go ahead and qualify themselves for the big job of becoming useful citizens again when this war is over.

All this made a lasting impression, for, to foster and maintain such a Society as this, men must be passionately devoted to their profession; and the Brunswick-Querum Law Society speaks volumes both for the Law itself and the men who practise it. May their day of release from these trying conditions be near at hand!

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. 35.—B. to H.

Rural Land—Earning-capacity—Estimate of Expectation of Annual Return by Reasonably Efficient Farmer—Suitability for Settlement of Discharged Servicemen.

Appeal involving two areas of farming-land. One was a composite area of 481 acres 3 roods 9 perches, whilst the other contains 198 acres 1 rood 18 perches. The appellant had agreed to sell the former (hereafter referred to as "the sold area") for £17,797 11s. 4d., whilst she agreed to lease the latter (hereafter called "the leased area") at an annual rental equal to interest at 4 per cent. on a sum of £6,999 14s. 8d., at which sum the lessee was given an optional right of purchase at any time during the subsistence of the lease.

Both areas had been farmed for many years by the appellant in conjunction with an area of 169 acres 3 roods 8 perches. All three areas have heretofore constituted one separate independent farm, and have been treated in all respects as such despite the fact that the appellant's husband had owned and had been contemporaneously farming extensive contiguous areas.

The areas subject to the appeal were situate approximately a mile from the Tirau Township and Railway-station and they enjoyed all the amenities usually available in suburban areas, except that there was no municipal water-supply. Even that, however, could be procured without, it was thought, much trouble or expense, as the township storage tank was situated high up on the sold area and well above the level of any of the farm buildings. The two areas, regarded as one farm, constituted an outstanding property in the Waikato and had long been regarded as something of what in evidence was called "a show place."

The Land Sales Committee fixed the basic value of the two areas agreed to be alienated at £18,500. This was a sum of £6,297 6s. below the aggregate sale price agreed upon, or approximately £10 an acre less than the appellant was, under the contract, willing to take for her land.

The Court said: "The Committee, in reaching its conclusions, however, relied in material respects upon information which was erroneous. This comment applied with particular force to the statement that no separate accounts were kept of the farming operations on the appellant's land and that, in consequence, the receipts credited to that farm had no firmer basis than estimation. This was conclusively proved to be incorrect.

"That evidence being dismissed from consideration, it becomes clear that the real contest before the Court, on the basis of the testimony of those witnesss, who are entitled to credence, is limited to the amount of the annual income which a reasonably efficient farmer could properly expect to earn from his farming operations on the two areas agreed to be alienated. On such a topic the income proved to have been actually earned from the area is a sound basis upon which to proceed to a conclusion.

"As to this, the evidence of Mr. R., a practising accountant from Auckland, is reasonably conclusive. He says that the books relating exclusively to the farming operations on the appellant's farm have been well and properly kept for many years. He says that except on one or two occasions over the last two or three years, and then not to any material extent, there has not been any transfer of stock from the appellant's land to that of her husband, and that in no other way has the income from the appellant's farming operations been inflated by any use of any of the adjoining areas. Mr. R. deducted 25 per cent. from the recorded profits of the appellant's undertaking to allow for the fact that the area of 169 acres 3 roods 8 perches was used in conjunction with the land now alienated to produce that income. An inspection of the property induces the Court to accept this assessment as proper and sufficient.

"In the result, it must be accepted as proved that during the last three years the appellant has earned an average annual sum of £1,077 0s. 8d. by the grazing and sale of cattle and an average annual profit of £2,761 from sheep and lambs.

"Mr. McG., the Crown witness, on the other hand, when giving evidence before the Committee, allowed only some £565 as the profit capable of being made from cattle. His estimate on the appeal proceedings was not materially greater. The difference in respect of sheep and lambs is not so easily ascertained. The source of the difference as to the profit from cattle lies in the fact that until this last season it was the practice of the appellant to grow swede turnips on a leased area of some 26 to 28 acres and to graze her young cattle from mid-June to early September upon the forage thus provided. The Crown witnesses attributed one-half, or approximately one-half, of the profits earned on cattle account to this practice.

"Mr. B., on the other hand, contends that, as he finds 1 acre of the area sold will give as much food crop as 2 or 3 acres of any of the land from time to time leased for cropping purposes and cropping on his wife's own land has in any event compensatory advantages, the difference in earning-capacity is immaterial, or nearly so. The effect upon income and, if it has an effect, then the measure of that effect, of the practice of cropping upon an outside area annually is one of the major questions the Court has to consider. That its effect, if any, must be taken into account against the profits disclosed by Mr. R. is obvious.

"These questions in issue may be summarized as follows :—

"(1) The earning-capacity from cattle if the property is assessed as an independent unit.

"(2) The earning-capacity from sheep under the above conditions.

"As to the first question, it cannot be gainsaid that the demonstrated carrying-capacity over many years is the best indication of the present carrying-capacity, and that more particularly as the land has been and is being well farmed and shows no sign of deterioration. This, however, necessitates a consideration of the effect of outside cropping.

"It is obvious that if swedes are to be grown on the farm and not off it, then some of the flat or rolling country will be selected for this purpose. This flat or rolling country is carrying and has carried a greater proportionate number of stock than the steeper country. If 4 ewes to the acre, plus cattle, is accepted as the carrying-capacity of the better area, then the loss of 25 acres for cropping purposes, irrespective of any run-off, will entail the loss of grazing for 100 ewes. Equally, if 150 head of cattle were grazed off the property, as it is admitted they were during the worst months of the year, then the profits must have been greater than if the stock had been limited to what the property would itself carry if provision had been made for that stock on the property itself.

"The determination of the difference in earning-capacity is difficult, more particularly as the appellant this last season did no outside cropping and has nevertheless carried through the year about the average number of breeding ewes and cattle. The financial consequences of this change in policy have, however, not had time to disclose themselves fully.

"It is nevertheless clear that the Crown witnesses, in attributing approximately one-half of the past annual average profits from cattle to the practice of providing outside grazing, have attributed too much to that factor. That there must be a reduction in the carrying-capacity is certain. As against this, however, there are compensating factors which it is unnecessary for present purposes to analyse and estimate in terms

of money. Taking a broad view of the whole position it is thought that a deduction of £200 from the annual average profits from cattle, as disclosed by Mr. R., will fairly represent the earning-capacity of the property so far as cattle are concerned if the land is farmed as an independent unit.

"The main differences between the witnesses for the respective parties in relation to the second question had relation to the number of sheep which could be carried and the weight of wool the sheep would produce.

"The Crown witnesses have assumed that the place will, with cattle, carry something less than 3½ sheep to the acre. This estimate conflicts with the evidence of Messrs. A. and M., two experienced farmers, who are farming adjoining properties. The latter is himself carrying, and habitually carries, 3½ sheep to the acre on his place and says that the appellant's property is of somewhat better quality, and so can carry another ½ sheep to the acre. He puts the carrying-capacity at 3½ to 4 ewes per acre, plus cattle. The former also habitually carries about 3½ sheep to the acre plus cattle on his place which he, in his turn, admits is not quite as good as appellant's farm.

"Mr. W., on land of a similar character—it, too, is not quite so good—is producing over 200 lb. of butterfat per acre and carrying more than the equivalent of 4 ewes to the acre. Allowing for the better quality (its superiority seems to be generally admitted) of appellant's property, he thinks it will carry 4 sheep to the acre.

"These estimates are based on long experience of somewhat similar adjoining land and on an intimate knowledge of the land in question. It looks, therefore, as if the Crown witnesses, with their necessarily much slighter knowledge of the property, have somewhat under-estimated its capacity. There is no doubt it is from 3½-to-4-ewe country with a tendency towards the higher figure.

"It is but fair to say that Mr. McG., who was called for the Crown, was somewhat grudgingly supplied by the appellant's son with information as to what the place had carried and was then carrying, and was not given the full information that was later made available to the Court. Mr. McG., was constrained to make the information thus economically communicated a major factor in his assessment. That some error should be disclosed in an assessment made under these circumstances is readily understandable. This Court is, however, concerned to do justice by finding the true facts, and the fact is that the carrying-capacity in sheep exceeds what Mr. McG. and Mr. B. were driven to conclude.

"There has been a similar under-estimation in the weight of wool the sheep can reasonably be expected to produce. The Crown witnesses allow 8½ lb. per sheep, but this conflicts with experience in the district where 10 lb. per sheep is confidently expected. It also conflicts with past production from the property itself as shown by the accounts. These show that about 9½ lb. per sheep have been produced.

"An increase on this account must be allowed on the amount assessed by the Crown. If against the annual sum by which the Court thinks Mr. McG.'s estimate of income should, on all accounts, be increased, a sum is allowed to cover costs including the cost of manure, lime, and seed which it was not, in the view he took, necessary for Mr. McG. to consider, it will be found that his net surplus of income should be increased by £130. This gives a basic value of £21,600 for the two areas.

"In its assessment the Court has allowed for the marked advantages from many points of view which the property enjoys by reason of its situation.

"It is necessary, however, to divide this total value between the area sold and the area leased. A fair apportionment would be to allot £15,600 to the area sold and £6,000 to the area leased. The basic value of those properties is therefore the sum of £15,600 in respect of the former and £6,000 in respect of the latter. The basic rent of the latter is fixed in terms of the contract on that basis.

"The Court cannot but conclude that these properties, suitable as they are in part for dairying, in part for mixed farming, and in part for grazing, are eminently suitable for the settlement of discharged servicemen. If they are not suitable, then it is difficult to imagine what properties are suitable. A recommendation to the Minister in this regard however is, at least primarily, the function of the Committee. The basic values are therefore declared to be as above and the proceedings are referred back to the Committee to consider the question of the suitability of the land for settlement by discharged servicemen and to take such action in that regard as its conclusion may require."

CORRESPONDENCE.

A System Prejudicial to the Interests of Justice.

THE EDITOR,
N.Z. LAW JOURNAL.

Sir,—

In August last a Select Committee of the House of Representatives, after a three-hour hearing, during which it heard evidence from me and other Magistrates and also representations from the Justice Department—recommended "for most favourable consideration" a Petition presented by me complaining of the practice of paying Magistrates for extra-judicial duties.

The Chairman of that Committee reporting to the House said: "It recognized the practice was a very old one but felt it was one that should be discontinued at the earliest possible moment . . . The Committee desires to see some very substantial improvements made in the general administration and conduct governing the Magistrates of the Dominion."

Since that time I have endeavoured by correspondence, and by interview to obtain from the Government a decision as to its intentions upon the Committee's recommendations for discontinuance of the dangerous and unjust practice the Government perpetuates.

The result of my efforts can be summarized as follows: The Rt. Hon. the Prime Minister assures me that he desires that the system be altered and the practice brought to an end. The Minister of Justice informs me he does not like the practice but does not find a solution. In the House, in August, he said: "The practice complained of is a very old one . . . It was a system one would wish to avoid . . . It is a practice that is hard to avoid."

When it has been proved to the satisfaction of a Government that a system is prejudicial to the administration of justice in that it savours of patronage or gives power to reward or punish—then surely the simple straightforward and courageous course in the public interest is to enact that no Magistrate shall receive any payment other than his judicial salary and reasonable travelling allowances.

Where is the Minister's difficulty? Is it because, in the words of the Minister in the House, "The point was expressly considered recently when such work was allotted and it was found it was not feasible to avoid it in certain instances at any rate"?

The instances referred to, I am informed, cover those cited before the Committee, namely, that a Magistrate holding then three paid positions was appointed to a fourth. His absence from magisterial duty was lengthened by months, during which time the work he would do is done by others.

It appears that the case is in this position. The Select Committee as the first Court for hearing pronounced in favour of the petition. Its decision is supported by Parliament itself, which adopted the decision.

In the meantime another Court—Cabinet—(the Prime Minister being then in England) without any hearing at all—has come to a different decision (about which it does not inform me), upon the ground of expediency and desirability. Is this right?

Parliament is the highest Court in the land. It can and does alter laws and remedy injustices—on occasions overnight.

It is now almost two years since I launched my first protest upon what I considered a dangerous practice.

It is surely not unreasonable to expect that if the Government rejects my representations and the finding of the Committee of the House it should say so. If it accepts them let it prove it by appropriate action.

I need hardly remind you that the New Zealand Law Society gave its unanimous support to my Petition. From time to time members of the profession have asked me how the matter stands. I therefore thought the above might be of interest.

Yours, etc.,
A. M. GOULDING.

Wellington,
February 28, 1945.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Roman Law Again.—If any member of the Council of Legal Education or of the University Senate should ever cast a surreptitious eye in the direction of this page, Scriblex would venture to suggest to him that he might read the observations on Roman Law appearing in an article on "The Study of Legal History," contributed by "Modernus" to the *Law Journal* (London) of July 22. "Modernus" points out that practically the only thing that can be said with confidence concerning the rules of Roman law, either in relation to the classical or pre-classical period, is that nothing can be said with confidence; and that solutions of legal problems which are arrived at by the purported application of the Roman law are suspect. He instances the well-known case of *Taylor* v. *Caldwell,* (1863) 3 B. & S. 826. There the Court thought it was following Roman law, but it has been since shown by Professor Buckland that, whatever may be said for the decision on other grounds, the Court failed to realize that the cited texts from Roman law had nothing to do with the case under consideration, and that in point of fact the decision would have been quite different in Roman law. "Modernus" concludes:

> I venture to think that the practising lawyer must write off Roman law as a dead loss, unless he is without that modesty which is becoming to those who have not spent a very long period of years in the study of that law.

The Judicial Consultation.—Lord Clare, Lord Chancellor of Ireland, used often to allow his favourite Newfoundland dog to sit beside him in Court. On one occasion, when Curran was arguing a case before him, the Chancellor seemed to be giving too much attention to his dog, and Curran, indignant, stopped speaking. "Why don't you proceed, Mr. Curran?" asked Lord Clare. "I thought your Lordships were in consultation," was the prompt reply.

Interference with Examination-in-chief of Accused.—When two prostitutes charged with larceny were recently tried before Judge McClure and a jury at the Central Criminal Court, London, the total number of questions asked by counsel for the prosecution and counsel for the defence was 847; but the Judge asked no fewer than 495. On only two occasions was defending counsel able to ask ten consecutive questions without interruption from the Bench. During the examination-in-chief of the accused, Cohen, her counsel asked ninety-nine questions, and the Judge seventy-nine. During the examination-in-chief of the accused, Gilson, her counsel asked fifty-one questions and the Judge fifty-seven. The Court of Criminal Appeal did not approve the Judge's conduct: *R.* v. *Gilson and Cohen,* (1944) 29 Cr. App. R. 174. Delivering the judgment of the Court, Wrottesley, J., said that the Court adhered to every word in *R.* v. *Cain,* (1936) 25 Cr. App. R. 204, and he went on to quote the following passage from the judgment in that case:—

> The Judge began by doing something of which no one could complain. It was a long case, and he had taken a careful note, and it was quite right, so long as counsel for the defence had no objection, that the Judge should put to the defendant when giving evidence the various allegations of the witnesses for the prosecution, in order that he might deal with them. So long as they were put colourlessly, no one could object. Indeed, counsel for the defence might have thought it assisted him in his task. There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that beginning in the way which I have described, the Judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before time had arrived for cross-examination, to cross-examine Chatt with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-examination from the Bench.

To this quotation from *Cain's* case Wrottesley, J., added:

> There is, however, this further to be said, that if a Judge finds it necessary to intervene in the course of the examination-in-chief with questions which may seem to the jury to suggest that the evidence of the witness, although given on oath, is not to be believed, it is also necessary that the Judge should remind a jury that the question of believing or not believing any particular witness is like all other matters of fact in a criminal trial, a question for them and not for him.

Qualifying a Privy Councillor.—The name of Sir Robert Collier as a member of the Judicial Committee will be frequently seen in reports of cases before the Privy Council about the last quarter of the last century. Collier was a lawyer of ability, but his appointment to the Judicial Committee nearly caused the defeat of the Government of the day. In 1871, an Act was passed creating four paid Judgeships of the Privy Council, it being declared that only Judges or ex-Judges of one of the Superior Courts at Westminster or the High Courts of Bengal, Madras, or Bombay should be eligible. It was arranged that two of the posts should be filled by Judges or ex-Judges of the Superior Courts at Westminster. Montague Smith, J., accepted one of these positions, but difficulty was experienced in filling the other. After it had been declined by both Willes, J., and Bramwell, B., the Lord Chancellor (Lord Hatherley) arranged with Collier, who was then the Attorney-General, that he would fill the post. To qualify Collier, Lord Hatherley had him appointed a Judge of the Common Pleas. Collier sat as such for a few days, retired, and was then promoted to the Judicial Committee. The procedure was trenchantly criticized by Cockburn, C.J., and Bovill, C.J., and angry debates took place in both Houses. The Government escaped defeat by twenty-seven votes in the Commons and by two in the Lords.

An Unwarranted Distinction.—When O. W. Holmes, J., of the Supreme Court of the United States, was Chief Justice of the Supreme Court of Massachussetts, the latter Court had to consider the validity of a statute enacting that the death sentence was to be carried out by electrocution: *Storti* v. *The Commonwealth,* (1901) 178 Mass. 549. The judgment of the Court upholding the validity of the statute was delivered by Holmes who put the position tersely and effectively as follows:—

> The suggestion that the punishment of death in order not to be unusual must be accomplished by motor rather than molecular motion seems to us a fancy unwarranted by the Constitution.

LAND AND INCOME TAX PRACTICE.

Trustees' Remuneration.—The proportion of trustees' remuneration which is incurred in the production of the income of the estate is allowable as a deduction. Where the income of the estate consists of both assessable and non-assessable income, the amount so allowable will be apportioned on an equitable basis between both classes of income. That proportion of the trustees' remuneration which can be related to the administration of the capital assets of the estate or to the distribution of the income is not allowable as a deduction.

In cases where a certain amount is bequeathed under a will to the trustees in consideration for their services, the question arises as to whether that sum is (*a*) in the nature of remuneration for services rendered, in which case, it would be an expense incurred and consequently an expense deductible in arriving at the estate income, or (*b*) an actual bequest and thus must be regarded as a distribution of the estate income. The deduction in (*a*) above would, of course, be subject to apportionment, if necessary, as between capital and revenue. No hard-and-fast answer can be given to this question, which is one of construction to be decided on the language used in the actual terms of the will.

A distinction can be drawn between a bequest to an executor " on his proving the will "—this would be a conditional legacy—and a commission for services rendered as executor, which would be regarded as remuneration for services.

Where the trustees obtain a Court order in respect of the remuneration payable, the amount so ordered would be assessable in the year it was actually payable, and this notwithstanding the fact that the services in respect of which the payment is made were performed over a period of years. In such circumstances the trustees would not be actually entitled to any remuneration until the Court order was obtained.

In the case of a taxpayer being given, by agreement, shares in a company which were valued at, say, £250, in consideration of his undertaking to act as trustee under a will, the value of those shares would be assessable as remuneration in accordance with s. 79 (1) (*b*) of the Land and Income Tax Act, 1923, in the year of receipt. Section 107 of the Act would have no application in these circumstances, and the value of the shares could not be apportioned over a period of years.

Social Security Charge and National Security Tax: Dividends from Non-resident Companies.—The Commissioner of Taxes states that dividends derived from Electrolytic Zinc Co., Ltd., are now chargeable with social security charge and national security tax in the hands of the shareholders for the year ended March 31, 1944, and future years.

Retiring-allowances.—The proviso to s. 79 (1) (*b*) of the Land and Income Tax Act, 1923, provides that any bonus, gratuity, or retiring-allowance paid in a lump sum in respect of the employment or service of a taxpayer on the occasion of his retirement is liable for taxation only to the extent of 5 per cent. of amount so paid. The section expressly prohibits lump sums paid to a director on his retirement in accordance with the company's articles of association and consequently these are assessable in full.

Retiring-allowances which are payable in instalments are assessable in full in the year of receipt (s. 79 (1) (*b*), Land and Income Tax Act, 1923).

Retiring-allowances made in the form of voluntary payments, whether made as lump-sum payments or made payable by instalments, will not be allowed as a deduction for taxation purposes.

In practice the Commissioner will allow a deduction in respect of pensions to ex-employees, wives of ex-employees, widows of ex-employees, and widows of deceased employees as being in the nature of a reasonable expense. All pensions coming within the above category will be assessable to the recipient. It should be noted, however, that in general no deduction will be allowed in respect of a pension paid to a retired director nor to the relatives of a retired director.

A lump-sum payment to a widow of a deceased or ex-employee is regarded as being in the nature of a charitable gift and is not permitted as a deduction. Such amounts would not, of course, be assessable to the recipient.

Lump-sum payments made in commutation of pensions are not allowable as deductions and the commutation for a lump sum of a right to receive a pension is not assessable to the recipient: see, also *Cunningham and Dowland's Taxation Laws of New Zealand*, 391, para. [449]; and *Hancock* v. *General Reversionary Interest and Investment Co., Ltd.*, ((1918) 7 Tax Cas. 358).

Foreign Insurance Companies: Land and Income Tax Act, 1923, s. 106.—Subsection (1) of s. 106 provides:—

" Where any person in New Zealand enters into a contract of insurance or guarantee against loss, damage, or risk of any kind whatever (not being a contract of life insurance) with any person or foreign company not carrying on business in New Zealand, such last-mentioned person or such company shall be liable to income-tax at a rate of five per centum of the amount of premium paid or payable by such first-mentioned person in respect of such contract."

1. These provisions do not apply to insurance premiums paid in respect of *bona fide* imports into New Zealand.

2. In the case of premiums paid to an insurance company in, say, London, but which has a branch office in New Zealand, no liability attaches under this section. The Act specifically states " person or company not carrying on business in New Zealand," and the establishment of a branch office in New Zealand is sufficient to take that particular company outside the scope of s. 106 in respect of premiums which may be paid direct to its head office or to any branch outside New Zealand.

3. A company insured its plant and staff under policies taken out with Lloyd's in London and was assessed under s. 106 in respect of the premiums so paid. Under the provisions of s. 130 of the Land and Income Tax Act, 1923, the company had the right to recover from Lloyd's the tax so paid by it as agent or to deduct the amount of the tax from any moneys in its hands belonging or payable to Lloyd's. The company failed to exercise this right and sought to claim as a deduction not only the premiums actually paid, but also the tax paid on behalf of Lloyd's. The Commissioner ruled that although the tax was paid as agent for Lloyd's, it was, nevertheless, income-tax within the meaning of s. 80 (1) (*g*) of the Land and Income Tax Act, 1923, and consequently was not allowable as a deduction.

The income-tax so paid and not recovered does not constitute additional premium and would not be treated as additional premium assessed under s. 106.

Housekeeper Exemption: Land and Income Tax Amendment Act, 1933, s. 3.—Subsection (1) defines a housekeeper as " a woman who is employed either in the home or elsewhere, to have the care and control of any child or children *in respect of whom the employer is entitled to a special exemption* " under s. 75 of the principal Act.

Every taxpayer (other than an absentee) who is a widow, a widower, or a divorced person shall be entitled to, in respect of a housekeeper as defined above, a special exemption of £50. If, however, the amount paid to the housekeeper during the income year is less than £50, then an exemption will be allowed only of the lesser amount.

Where a housekeeper is employed by the taxpayer during part only of the income year, then the exemption to which he is entitled shall be reduced by one-twelfth for every month or part of a month during which the housekeeper was not so employed.

The housekeeper exemption will not be allowed in addition to a child exemption where a child is under the age of eighteen years and is employed by the parent as a housekeeper. Although the ordinary definition of " woman " is an " adult human female," the housekeeper exemption will be permitted where a female person under the age of twenty-one is employed as a housekeeper, unless such housekeeper is a child of the taxpayer concerned and in respect of whom the ordinary child exemption is allowable.

The special exemption in respect of a housekeeper is not apportioned in the year in which the child of whom the housekeeper has the care and control becomes eighteen years of age. The special exemption in respect of the child is apportioned in accordance with s. 14 of the Land and Income Tax Amendment Act, 1929, but it is still " a special exemption under s. 75 of the principal Act " as defined by s. 3 of the Land and Income Tax Amendment Act, 1933, and the taxpayer is entitled to the full £50 exemption in respect of the housekeeper in that year.

If a child of a taxpayer is employed as a housekeeper, thus entitling the parent to claim the special housekeeper exemption for income-tax purposes, then it should be noted that the value of the keep of such child plus any wages received in cash will be liable to social security charge and national security tax.

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. Sale of Land.—*Subdivision of Land* de facto—*Lots separately occupied—Absence of Road Frontage—Proposed Sale of one Lot.*

QUESTION : A. owns under one Land Transfer title two contiguous house properties, which have been separately fenced and occupied for many years by monthly tenants. The land has no direct road or street frontage, but included in A.'s title is an undivided moiety in an adjoining strip of land which leads to a street. Both tenants use this strip as a common right-of-way. A. now proposes to sell to the tenant one house and yard thereto as occupied and fenced. Is the strip a sufficient road frontage for the purposes of the Public Works Act, 1928 ? If not, can A. transfer this house property to the tenant ?

ANSWER : The strip of land is not a sufficient road frontage for the purposes of the Public Works Act, 1928 : see *In re The Land Transfer Act, 1885, and The Public Works Act, 1903,* (1905) 25 N.Z.L.R. 385.

But that does not dispose of the point. The question does not state for how long the houses have been separately occupied. If they existed as two separate physical independent units of area before October, 1900 (the date of the first statutory requirement as to road frontage), A. can separately sell the house properties, for it appears to be clear law that these statutory provisions do not apply to subdivisions which existed in fact before that date. The object of the legislation commencing with the Public Works Amendment Act, 1900, is to prevent the creation of fresh slums : see *Plimmer* v. *District Land Registrar,* (1908) 27 N.Z.L.R. 1134; *Wellington City Corporation* v. *Compton,* [1916] N.Z.L.R. 779 ; and *Wellington City Corporation* v. *Public Trustee,* [1922] N.Z.L.R. 293.

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2. Stamp Duty.—*Land devised subject to Rent-charge—Debts in Estate paid—Procedure and Liability to Stamp Duty on Title being taken by Devisee.*

QUESTION : A. devised Blackacre, subject to the Land Transfer Act, to his son B., subject to a yearly rent-charge of £200 charged upon same and payable to C., his daughter. The executors E. and F. having paid all of A.'s debts now desire to confer title, complete administration, and obtain deed of release. Please state the instruments to be drawn and amount of stamp duty payable. E. and F. have already registered transmission in their favour.

ANSWER : E. and F. should first execute and register a memorandum of encumbrance in form F, Second Schedule, to the Land Transfer Act, 1915, in favour of C. Care should be taken to ensure that E. and F. do not render themselves personally liable. The mortgage set out in *Allan* v. *Dawson,* [1936] G.L.R. 307, could *mutatis mutandis* be used as a precedent. Then E. and F. should execute and register a transfer in favour of B., subject to the said memorandum of encumbrance.

The encumbrance will be liable to 5s. stamp duty and 1s. mortgagee indemnity fee, and the transfer to 15s., deed not otherwise charged duty. Although the transfer must be made subject to the memorandum of encumbrance, it will not thereby attract *ad valorem* duty : *Sutherland* v. *Minister of Stamp Duties,* [1921] N.Z.L.R. 154, 163, *Thompson* v. *Commissioner of Stamp Duties,* [1926] N.Z.L.R. 872, 877.

B. and C. should then execute the usual deed of release in favour of E. and F. Stamp duty, 15s.

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3. Mortgage.—*Mortgagee in Possession—Property let to Tenant of Mortgagee—Proposed Sale by Mortgagor—Refusal of Tenant to permit Inspection by Intending Purchaser—Remedy of Mortgagor.*

QUESTION : A., as mortgagee in possession of B., has created a monthly tenancy in favour of C., by virtue of his powers under s. 2 of the Property Law Amendment Act, 1932. B. can sell the mortgaged premises to D. and redeem, provided D. can obtain inspection of the dwellinghouse erected upon the mortgaged premises and ascertain their present state of repair. C. refuses to permit B. or his agent to show D. through the premises, claiming that A. is his lessor.

Is A. the mortgagee in possession, the lessor or is he merely an agent for B., the registered proprietor, as lessor ?

In coming to a decision we would refer you to *Garrow's Real Property in New Zealand,* 2nd Ed., 474, where the learned author says : "If the mortgagee has chosen to take possession and help himself, he then becomes a bailiff, without salary, &c." We suggest that "bailiff" as used here means an "agent" or "manager."

ANSWER : It does not appear that the mortgagor, *qua* mortgagor, has any rights against the mortgagee's tenant. A mortgagee in possession may let the mortgaged property even against the wishes of the mortgagor, and this seems clearly to indicate that he is not the agent of the mortgagor in the sense that the mortgagor has any right to intermeddle with the tenant. It would appear that statements to the effect that a mortgagee in possession is "a trustee" or "a bailiff without salary" refer to the mortgagee's obligations, and do not indicate any rights belonging to the mortgagor until he has actually redeemed.

Proceeding from this basis, the question does not appear to be covered by authority, and is admittedly one of considerable difficulty. There does, however, seem to be some obligation on the mortgagee to facilitate redemption by the mortgagor and it would seem that the Court would at least incline against a failure by the mortgagee to do so. It is suggested a suitable letter might be sent to the mortgagee asking his co-operation by appointing the proposed purchaser his agent to enter and view the state of repair of the premises ; as to the right to do so, see *Hill's Law of Landlord and Tenant,* 113. Non-co-operation in this direction would at least place the mortgagee in an invidious position in any subsequent action relating to the mortgage transaction, and any prudent mortgagee would hesitate before refusing to comply with such a request.

RULES AND REGULATIONS.

National Service Emergency Regulations, 1940. Amendment No. 16. (Emergency Regulations Act, 1939.) No. 1944/188.

Economic Stabilization Emergency Regulations, 1942, Amendment No. 5. (Emergency Regulations Act, 1939.) No. 1945/6.

Notice regarding Information concerning Patients in Hospital Institution. (Statutes Amendment Act, 1944.) No. 1945/7.

Fertilizer Control Order, 1944, Amendment No. 3. (Primary Industries Emergency Regulations, 1939.) No. 1945/8.

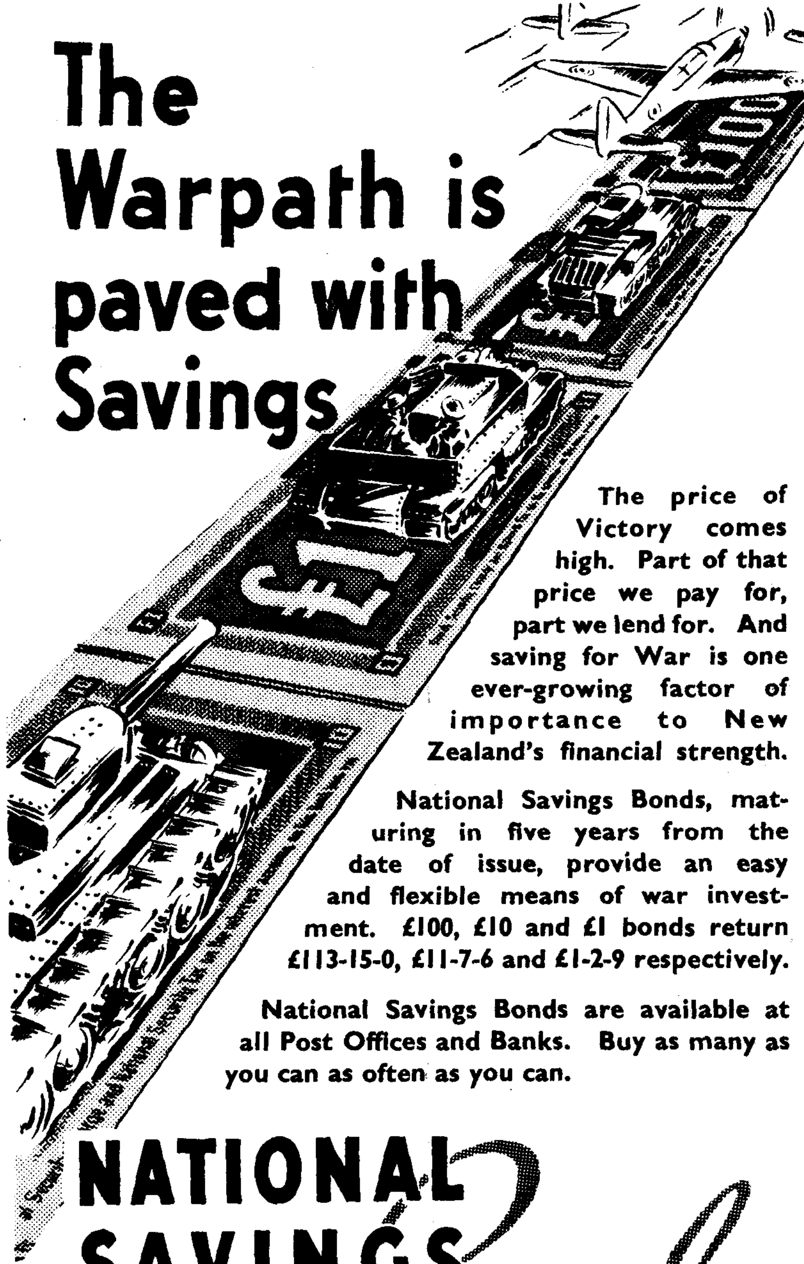
Board of Trade (Onion) Regulations, 1938, Amendment No. 3. (Board of Trade Act, 1919.) No. 1945/9.

Public Service Amending Regulations, 1945. (Public Service Act, 1912.) No. 1945/10.

Nurses and Midwives Regulations, 1938, Amendment No. 3. (Nurses and Midwives Registration Act, 1925.) No. 1945/11.

Niue Fruit Control Regulations, 1945. (Cook Islands Act, 1915.) No. 1945/12.

Meat Act Modification Emergency Regulations, 1945. (Emergency Regulations Act, 1930.) No. 1945/13.



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