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THE NEW LAW OF DESCENT OF INTESTATE ESTATES.

IV.

HAVING considered in recent issues the purpose and effect of the Administration Amendment Act, 1944, in providing a new law of descent and distribution of intestate or partially intestate estates of persons dying after 1944, we now propose to consider the further statutory authorities and powers that are necessary for the efficient control and administration of such estates but which are missing from the statute, and from our legislation generally. To do this, it is desirable, first, to indicate the main differences between our new statute and the corresponding English legislation on which it purports to be based.

DIFFERENCES IN CORRESPONDING ENGLISH LEGISLATION.

Our Administration Amendment Act, 1944, it seems, has been suggested by a perusal of the revolutionary Administration of Estates Act, 1925 (*8 Halsbury's Complete Statutes of England*, 306), which has application only to England and Wales. Much of it has not been adopted here; other provisions have been modified; and the general scheme of descent and distribution had been almost completely changed. Consequently, decisions of the Courts in England cannot be relied upon as of much value in interpreting our recent legislation.

The main difficulty facing anyone who wishes to use English authority to assist in construing sections of our statute is that the Administration of Estates Act, 1925, is part of a closely-knit series of statutes with which the name of the late Earl of Birkenhead, L.C., will always be associated. These statutes made considerable changes in the law of property and succession to property, and comprised the Law of Property Act, 1925, the Administration of Estates Act, 1925, the Trustee Act, 1925, the Land Charges Act, 1925, and the Land Registration Act, 1925. In most respects, our corresponding legislation is dissimilar.

(a) Realty and Personalty.

An example of the manner in which these English property statutes interlock is seen in their assimilation of real and personal estate as chattels for all purposes. Under the Law of Property Act, 1925, realty has become assimilated to personalty, in so far as the natures of immovable and moveable property permit. To link up with this change in English property law, the Administration of Estates Act, 1925, provided in s. 33 that on the death of a person intestate as to any real or personal estate, such estate is held by the administrator as to the realty upon trust for sale, and as to personalty upon trust to sell, call in, and convert into money such part thereof as shall not consist of money. The whole estate is thus dealt with as personalty.

Under our Administration Act, 1908, realty and personalty in the hands of an administrator do not change their nature in regard to descent and distribution; and real estate vests on the intestate's death in the administrator as realty, and is distributable accordingly notwithstanding that s. 5 provides that the real estate is assets in the administrator's hands for the payment of debts. Consequently, in the Administration Amendment Act, 1944, there is no provision for realty vesting in an administrator upon trust for sale, as in the corresponding English statute, as such a provision would run counter to the general scheme of the Administration Act, 1908.

The intestate real estate, as we have seen, in New Zealand, vests in the administrator and is held by him, as follows:—

(i) Where Part III of the Administration Act, 1908, applies, the distribution is according to such provisions of that Part as apply: *In re Yuill, Public Trustee* v. *Yuill*, [1925] N.Z.L.R. 196.

(ii) Where a person has died intestate before 1945, and Part III does not apply," upon trust for the person or persons, who, if such real estate were personal estate, would be entitled thereto": s. 11 (*b*): see *Berry* v. *Public Trustee*, (1890) 9 N.Z.L.R. 563; *In re Wilkins, Robinson* v. *Wilkins*, [1922] N.Z.L.R. 644, and *In re Balmforth, Public Trustee* v. *Richards*, [1934] N.Z.L.R. 190.

(iii) Where a person dies intestate after 1944, the real and personal estate is to be distributed or held by the administrator in the manner or held upon the trusts detailed in s. 6 of the Administration Amendment Act, 1944—that is to say, the real estate not disposed of by will is distributable as if it were intestate personal estate.

In New Zealand, for the reasons we have given, there is no statutory vesting of realty in the administrator upon trust for sale. There is a general power of sale conferred on the administrator by s. 4 (1) of the Amendment Act, 1944, as to both the intestate's real and personal estate, with power to postpone sale and conversion.

(b) Descent and Distribution.

Notwithstanding the marginal reference in our recent statute to s. 46 of the Administration of Estates Act, 1925, there is a wide divergence between the canons of distribution and descent set out in that section, and those detailed in s. 6 of the Administration Amendment Act, 1944. These differences may now be briefly indicated.

After the surviving spouse takes absolutely the personal chattels and £1,000 and interest charged on the residue :

(i) In England, the surviving spouse takes a *life interest* in the whole of the remainder of the estate if the intestate leaves no surviving issue ; and if issue survive him, then the surviving spouse takes a *life interest* in half that remainder ; or, if the statutory trusts for issue fail in the lifetime of the surviving spouse, the surviving spouse takes a *life interest* in the whole of the remainder for the residue of his or her life.

In New Zealand, the surviving spouse takes a third of the remainder *absolutely* if there are surviving issue ; or should there be no surviving issue or should the statutory trusts for issue fail so that no issue takes an indefeasibly vested interest, the surviving spouse takes two thirds of the remainder absolutely if parents (or a parent) of the intestate survive the intestate. (The remaining third goes to the parents (or parent) absolutely ; or the whole of the remainder to the spouse if no parent survives.)

(ii) In England, the surviving spouse takes no *proportionate* part of the capital of the remainder at any time. The surviving spouse takes *the whole* of the remainder absolutely in one set of circumstances *only*, that is to say, where the intestate leaves no issue taking a vested interest under the statutory trusts and no parent or grandparent survives the intestate, and all the intestate's (*a*) brothers and sisters of the whole or half blood and their issue, and (*b*) uncles and aunts of the whole or half blood and their issue, fail to take an indefeasibly vested interest under the statutory trusts.

In New Zealand, if the intestate leaves no issue who attains an indefeasibly vested interest, and no parent, then the surviving spouse takes the whole of the remainder *absolutely*.

(iii) In England, the brothers and sisters of the whole blood and their issue take on the statutory trusts, but if none of them takes an absolutely vested interest, then only do the brothers and sisters of the half-blood take under the statutory trusts. The position is the same as regards uncles and aunts.

In New Zealand, there is no preference of the whole over the half-blood in respect of brothers, sisters, uncles, and aunts of the intestate ; and the whole and half-blood relatives take equally. From this equal ranking of the whole and half-blood, some strange anomalies may result. For instance, if Y. is born of the illicit intercourse of A. and X. during the subsistence of the marriage of A. and B., and A. is subsequently divorced by B. because of that evidence of adultery, and marries X. : Y. may share as a half-brother in the intestate estate of Z., a child of the marriage of A. and B. ranking equally therein with A.'s other children of either his marriage with B. or of his marriage with X, or their respective issue. It is possible that if A. had only two children, Y. and Z., Y. might take the *whole* of the intestate estate of Z. (the child of B.).

(c) Legitimation and Illegitimacy.

Great care must be taken in considering the English or Scottish cases relating to the succession of legitimated persons or of illegitimates to interests in intestate estates. The Legitimacy Act, 1926 (*2 Halsbury's Complete Statutes of England*, 25) differs materially from our Legitimation Act, 1939.

Section 8 of the Administration Amendment Act, 1944, has a parallel in the English Legitimacy Act, 1926 (which gives to an illegitimate child and to the mother of an illegitimate child the right to succeed on the intestacy of the other, and which applies to descent and distribution of intestate estates of persons dying since 1925). It was unnecessary to make similar provision in our Legitimation Act, 1939, because of the wider provisions contained in our Administration Act, 1908, *viz.*, s. 50 (intestate estate of illegitimate man), s. 51 (intestate estate of illegitimate woman), and s. 52 (succession of illegitimate children of intestate woman to her estate should she leave no husband or legitimate children or their issue surviving). These provisions do not now apply to the estates of intestates who die after 1944. (In passing, it is noteworthy that the conflict between the provisions of s. 48 (1) (*a*) (*d*) of the Administration Act, 1908, which became law in 1885, and those of s. 50 (1) which was passed in 1879, has never been the subject of litigation.)

Section 8 of the Administration Amendment Act, 1944, goes considerably further than the English statutes and the provisions of ss. 50, 51, and 52 of the Administration Act, 1908, which s. 8 of the Amendment Act, 1944, replaces where the intestate dies after 1944 ; and it does not confine itself to the illegitimate, and his mother, though it takes away rights from illegitimate children who have been adopted. It includes the unadopted illegitimate child as the notionally legitimated child of his mother for all purposes of the descent and distribution of intestate estates and of the statutory trusts.

(d) Adopted Illegitimates.

The proviso to s. 8 of the Administration Amendment Act, 1944, negatives the operation of s. 8 where an illegitimate child has been adopted. It takes away from such a child all rights of succession derived through the natural parent. In effect, the proviso is a declaration that, where an illegitimate child has been adopted, he remains—for the purposes of this statute—illegitimate so far as his natural parent is concerned.

Accordingly, as the adopted child remains illegitimate in status *qua* his natural mother, the natural mother, her issue, and relatives cannot share in the child's estate ; even though no spouse or issue of the intestate child and neither his parents by adoption nor their relatives become entitled to the estate. In other words, the Crown will take the estate as *bona vacantia*.

An interesting problem presents itself in the not impossible case where an intestate's parent, being illegitimate, was adopted but predeceased the intestate; and grandparents are entitled to the estate under the statute. Would the parents of the intestate's parents by adoption be "grandparents" for the purposes of s. 6? Would the brothers and sisters of the intestate's parents by adoption be "uncles and aunts" of the intestate?

If a woman has an illegitimate child who is adopted, and a child of such woman's subsequent marriage dies intestate, the half-brother or half-sister so adopted will not be entitled to share in the estate, even though it must otherwise go to the Crown as *bona vacantia*.

The proviso to s. 8 has no parallel in any overseas statute relating to the descent and distribution of intestate estates. It stands alone in its draftsmanship; and also in its potentiality to cause considerable trouble and embarrassment to administrators and successors (or some of them).

Section 8 raises the question of the nature and extent of inquiry incumbent on the administrator as to the existence of any illegitimate children of any woman or women, who, if living at the death of the intestate, would have taken a share in the estate on the statutory trusts. It may be doubted if the terms of s. 74 of the Trustee Act, 1908, are altogether satisfactory in relation to possible illegitimates who may be entitled to take or share under the statutory trusts; but see hereon, *In re Dalton*, [1943] N.Z.L.R. 41.

Adopted Children.

In passing, it may be noted that the provisions of the Infants Act, 1908, as to the effect of an adoption order in respect of the rights of the adopted child to share in the intestate estate, or of other persons to share in the estate of an adopted child who has died intestate, lead to the opinion that the language used is vague and unsatisfactory; and the cases dealing with questions arising in consequence of adoptions have similarly not been helpful. For instance, the final words of s. 21 (1) (*c*) of the Infants Act, 1908, are "or otherwise than directly *through* such adopting parent." These words apparently mean "or otherwise than directly from the intestate estate of any such adopting parent." Such a meaning renders the words inapt in the context, which refers to the distribution of the intestate estate of "a *child of the adopting* parents." Except in the case of the distribution of the intestate estate of a descendant, spouse, or parent (including an adopting parent) of a child, such child could share in an intestate estate only *through* such parent. But s. 21 (1) (*c*) first negatives the right of the adopted child to share in the estate of a brother or sister by adoption, and then preserves the right of the adopted child to take directly *through* the adopting parent.

Paragraph (*c*) of s. 21 (1) deals with intestate succession to the estate of a "child of lawful wedlock of the adopting parent." Would an adopted child be entitled to share in the estate of an illegitimate child of his adopting mother, where s. 50 (3) or s. 51 (2) of the Administration Act, 1908, applies?

Both in the interests of good draftsmanship, and with the provisions of s. 8 of the Administration Amendment Act, 1944, in mind, perhaps the Law Revision Committee will give some needed attention to the Infants Act, 1908, with a view to its amendment.

Defects in the Statutory Trusts System.

It appears that the general opinion among practitioners engaged in estate work is that the worst defect in the Administration Amendment Act, 1944, is the failure to vest indefeasibly, at the intestate's death, the shares of all persons interested therein. In attempting to follow the corresponding English legislation, attention seems to have been centred on the acceptance or rejection of provisions of the Administration of Estates Act, 1925 (Eng.). The result is not a happy one, so far as the period of vesting is concerned. England is a country of large and ancient estates, marriage settlements, and the tying-up of property; and the traditional view is reflected in the legislation of 1925, which gives effect to the wishes of the electorate by creating, in respect of certain beneficiaries, a cast-iron statutory settlement of intestate estates.

Considerable difficulty will arise in the wholly different conditions of New Zealand life owing to the postponement of the vesting under the statutory trusts created by s. 7 of the Administration Amendment Act, 1944, and the lack of proper and sufficient powers in complementary legislation to offset the rigours of such postponement. The first impact of these difficulties comes with failure of the statutory trusts in favour of a class, and the necessary redistribution (or correction of a former distribution) of the estate or part of it.

Upon a redistribution of the estate, or of part of it, or on a correction of a provisional distribution already made, the estate (or the part of it) will often be found to vest in a person or persons long since dead. On such vesting, death duties will be re-assessed; but, while the taxing authority will, in some cases, be able to collect further death duties, *with interest*, in many other cases the administrator will be unable to obtain a refund of the death duties overpaid; or, if he is able to obtain a refund, it will be *without interest*—a "heads I win, tails you lose" situation which should delight the Minister of Finance.

Where, on the failure of the statutory trusts, the estate or portion of it vests in a deceased person, the assessment of death duties in that estate will also be re-opened, and possibly—or, in these days of intensive revenue-seeking, most probably—further duty will be payable, again—let it not be forgotten—*with interest*, up to, perhaps, twenty years. The personal representative of the deceased beneficiary may be dead; and, accordingly, a grant *de bonis non* will have to be obtained, though, in many cases, the estates will long since have been closed, and the records lost or destroyed.

Furthermore, in a case such as the one just outlined, the deceased beneficiary's estate may have been insufficient to meet the liabilities payable thereout. But, in the generality of cases, the creditors will not receive any benefit from the unexpected accretion of assets, for the Statute of Limitations will raise its grisly head to defeat their claims.

On a reassessment in the estate of a deceased beneficiary, the valuation of the accrued assets representing a portion of the intestate's estate will be made as at the death of that beneficiary, to ascertain the value then of the assets which fell in at the date of the determination or failure of the statutory trusts.

In administering estates where there are many contingent shares held on the statutory trusts, administrators will probably be reluctant to release *vested* shares of adults under those trusts, and will retain control until all the shares vest absolutely.

PROVISION FOR THE SURVIVING SPOUSE.

In giving the liberal benefits conferred by s. 6 on a surviving spouse, the authors of that section, no doubt unconsciously, concentrated their attention upon a *widow* as being such survivor. They may also have assumed that, when the intestate leaves a widow or widower and children, the surviving spouse would be the parent of the children, and that the relations between them would remain harmonious. Such loose thinking excludes, of course, the possibility of a second marriage, with the proverbial disharmony.

Another possibility in the mind of the section's authors may have been the thought that little harm could ensue from giving the surviving spouse the major part of the estate, because the children would eventually take that spouse's estate. But things do not always work out that way. Surviving spouses sometimes remarry, and there are children of the second marriage. The children of the first marriage are losers, even though, as so often happens, their intestate parent's estate was largely augmented by their efforts.

Even where every one is anxious to act justly, the new statute may cause injustice *in invitum*. Take the following case: A. is survived by his wife, B., and their infant children. He leaves his estate to his wife absolutely in the confident expectation that she will leave the estate to them. B. unfortunately dies intestate (after January 1, 1945), and the statutory trusts in favour of her issue fail. The widow's estate goes to *her* relatives exclusively, even though B. may have died many years before the termination of the statutory trusts upon the death of the last survivor of the children. Under the Administration Act, 1908, the children's shares would have vested at their mother's death, and, on the death of each child, his or her share would accrue to the others. On the death of the last survivor of the children, the paternal and maternal relatives in equal degree would have taken. If a statute could be concluded with a moral, it is clear that the Administration Amendment Act, 1944, would not have to go far to find one: BE SURE TO MAKE A WILL.

Consideration must also be given to the case where a surviving spouse takes the whole estate, and brothers and sisters of the intestate survive him. Here, the possibilities would provide a novelist with ample material.*

SEPARATED WIVES.

Section 16 (5) of the Law Reform Act, 1936, provides that, in every case of judicial separation, where the separated wife dies intestate any property which is acquired by or devolves upon her after the decree and so long as the separation continues, if she dies intestate, devolves as if her husband had then been dead.

To that provision, no reference has been made in the Administration Amendment Act, 1944. No doubt the Court will be asked, sooner or later, to determine whether it has been impliedly repealed by the new statute. The position could easily be made clear by an appropriate amendment.

"PERSONAL CHATTELS."

The definition of "personal chattels" in s. 2 of the Administration Act, 1944, has been given on p. 31, *ante*. It differs from the definition given to those words in s. 55 (1) (*x*) of the Administration of Estates Act, 1925 (Eng.). Though the definitions are, in the main, similar the difference is important.

It is strange that, so far as the Reports show, the Courts in England have not been called upon to show what chattels fall within the definition. The only case seems to be *In re Ogilby, Ogilby* v. *Wentworth-Stanley*, [1942] 1 All E.R. 524, and, if there have been others, they may have been, like that case, decided merely on a question of fact, and thus unreportable. Be that as it may, such abstension from litigation is unlikely to be the experience here.

The Court will almost certainly be asked, in a host of cases, to determine whether a particular chattel was of "household use" or "personal use," or whether it was used "principally for business purposes." One thing, however, is clear: a spouse may take, as "personal chattels," assets of very considerable value.

DIFFICULTIES FOR ADMINISTRATORS.

The general scheme of the statutory trusts created by s. 7 of the Administration Amendment Act, 1944, will, it may safely be predicted, considerably increase the reluctance of relatives and friends to accept appointment as administrators of intestate estates of persons dying since 1944. Before the new statute, they could forsee their duties continuing during the minority of an infant beneficiary; but, now, on the failure of the statutory trusts in respect of one class (issue), those trusts may come into force in respect of brothers and sisters (or their issue) or uncles and aunts (or their issue). The ordinary man in the street will quail at the possibilities, and may quite reasonably refuse to accept appointment as administrator. The Public Trustee should, therefore, rejoice in a rosy prospect of much increased business.

VALUATION DIFFICULTIES.

An opportunity for the exercise of the talents of valuers arises in respect of an estate where there is a surviving spouse, and a residue, which, after the deduction of the value of the personal chattels and payment of debts and administration expenses, is on the borderline of £1,000.

Section 6 (1) (*a*) of the Administration Amendment Act, 1944, *charges* the residue with the payment to the surviving spouse of the sum of £1,000 and interest. If, at the death of an intestate who leaves a spouse and issue, such residue can clearly be shown to be of the value of £1,000 or less, the question arises whether the surviving spouse could claim the whole of the residue, notwithstanding that, at the time of the payment of £1,000 and interest, the residue has increased in value and exceeds, in value, £1,000 and such interest.

It may also be asked whether, in the same circumstances, the administrator could appropriate

* A correspondent recounts some circumstances in the story of the "Cans and the Can'ts." The eldest Can't, with the help of his brothers and sisters, has built up a flourishing business. The Can'ts despised the Cans, though the eldest Can't married one of the Can girls, but they were both killed instantly in the same accident during their honeymoon. His wife was a few minutes younger than he; five fateful minutes. By virtue of s. 6 of the Property Law Amendment Act, 1927, the wife was deemed to have survived her husband, and so took his estate on his intestacy. Under *her* intestacy, the whole estate of the eldest Can't went to her brothers and sisters, who quickly installed themselves in the executive positions of the intestate husband's business, and the Can't family joined the ranks of the unemployed. To meet such a case, our correspondent suggests that there should be a statutory limit to the value of the surviving spouse's succession, with the balance devolving on the intestate's brothers and sisters and their issue.

the assets of residue in payment of the £1,000 and interest: see, in this regard, *Garrow's Law of Wills and Administration*, p. 640, as to the appropriation of assets to answer legacies, and p. 641, as to assets that may be appropriated.

In a concluding article, we propose to consider, *inter alia*, the present inadequacy of the powers conferred by statute on trustees, including administrators of intestate estates, with special reference to the management of infants' shares held on the statutory trusts.

SUMMARY OF RECENT JUDGMENTS.

JACKSON v. DE HAVILLAND AIRCRAFT COMPANY OF NEW ZEALAND, LIMITED.

COURT OF APPEAL. Wellington. 1944. September 26, 28, 29; October 2; December 14. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Inspection of Machinery—"Persons . . . in the vicinity" of Machinery, moving Parts of which insufficiently guarded—Phrase not limited to Workers, but includes and is limited to Persons rightfully in such Vicinity but not Trespassers—Right of Action conferred upon any such "Person" injured by Breach of Duty so to "guard"—Whether such Right of Action lost by Contributory Negligence of Person injured—Machine under Test and before being passed as fit for its Purpose—Whether "Machinery" within Purview of Statute—Inspection of Machinery Act, 1928, ss. 2, 16, 68.

The effect of s. 16 of the Inspection of Machinery Act, 1928, is to impose upon owners of "machinery," as defined by s. 2, the absolute duty of guarding such machinery for the protection not merely of persons working such machinery, but of all persons to whom it can be said the section is intended to afford protection, and to confer a right of action upon any such person who may be injured as a breach of that duty.

The phrase "persons . . . who may be in the vicinity thereof" in s. 16 is limited to persons who may be in the vicinity of the said machinery with the express or implied authority of the owner including in this category persons who are entitled to be there by virtue of some common law or statutory right or duty. All other persons are left to their ordinary common-law rights, if any.

Caswell v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152, [1939] 3 All E.R. 722, applied.

Bourke v. *Butterfield and Lewis, Ltd.*, (1926) 38 C.L.R. 354, and *Flower* v. *Ebbw Vale, Steel, Iron, and Coal Co., Ltd.*, [1936] A.C. 206, referred to.

So held, by the Court of Appeal, dismissing an appeal from the judgment of *Smith*, J. [1944] N.Z.L.R. 484.

No right of action is given by s. 16 of the Inspection of Machinery Act, 1928, to a mere trespasser, who has no right or authority to be in the vicinity of the machinery.

So held by *Myers*, C.J., *Blair*, *Kennedy*, and *Finlay*, JJ. (*Callan*, J., reserving his opinion as to whether there may not be cases—*e.g.*, an allurement to children of moving machinery—in which a trespasser may be within the section or have civil rights arising from it).

Semble (*a*), The right of action given by s. 16 may be lost by the contributory negligence of the person injured.

Caswell v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152, [1939] 3 All E.R. 722, referred to.

(*b*) The effect of s. 68 of the statute is to preserve intact all common-law rights of action, and does not prevent fresh rights arising under the Act itself.

Brady v. *Rowe*, [1922] G.L.R. 62, approved and applied.

Horne v. *Dalgety and Co., Ltd.*, (1913) 33 N.Z.L.R. 405, 15 G.L.R. 571, 16 G.L.R. 202, and *Public Trustee* v. *Higgins*, [1927] G.L.R. 334, referred to.

Quaere. Whether any machine under test, and before being passed as suitable for its purpose, is within the definition of "machinery" in s. 2 of the Inspection of Machinery Act, 1928?

Everrett v. *Schaake*, (1912) 4 D.L.R. 147, referred to.

Counsel: *Sim*, K.C., and *Mazengarb*, for the appellant; *Watson* and *Shorland*, for the respondent.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the appellant; *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the respondent.

SMITH v. MATHESON.

SUPREME COURT. Timaru. 1945. February 1, 14. NORTHCROFT, J.

Contract—Statute of Frauds—Illegality—Severance of Illegal Term—Memorandum of Terms agreed upon—Preparation of more formal Contract intended by Parties—Whether Memorandum complete and enforceable Contract—Names of Parties as Purchaser and Vendor—Written by Agent of Defendant at Head of Memorandum—Whether such Name sufficient "Signature"—Subsequent Correspondence between Parties varying Terms—Whether Defendant's Letter could be incorporated with Memorandum so as to make his Signature to such Letter a sufficient "Signature"—Whether Option given to Plaintiff to purchase could be abandoned by Plaintiff so as to prevent operation of s. 46 of Servicemen's Settlement and Land Sales Act, 1943—Statute of Frauds (29 Car. II, c. 3) s. 4—Sale of Goods Act, 1908, s. 6—Servicemen's Settlement and Land Sales Act, 1943, s. 46.

A memorandum of the terms of an agreement for the sale of a business and town section compiled by the business agent of the defendant was thus headed by such agent: "Thomas John Smith—Purchaser. Hector C. Matheson—Vendor." Both parties intended to have a more formal document prepared by a solicitor to embody their agreement. The plaintiff subsequently wrote to and signed a letter to the defendant proposing certain variations to which the defendant subsequently agreed.

The plaintiff claimed specific performance of the contract. The defence, in addition to a denial of all the allegations in the statement of claim, pleaded alternatively that the contract was induced by misrepresentation (which was found against him by the learned Judge) and that there was not compliance with the Statute of Frauds and the Sale of Goods Act, 1908.

Held, 1. That the fact that the drawing up of a formal document was intended by the parties did not prevent the agreement already reached from being recorded as a complete contract.

Chinnock v. *Marchioness of Ely*, (1865) 4 De G.J. & S. 638, 46 E.R. 1066, applied.

2. That the defendant's name at the head of the memorandum was not a sufficient "signature," but that the defendant's signature to the letter written by him to the plaintiff, which together with the plaintiff's letter to which it was a reply, might be read in conjunction with the said memorandum, so as to make the three documents one document was a sufficient memorandum signed by the defendant.

Long v. *Millar*, (1879) 4 C.P.D. 450, applied.

3. That the option to purchase at £1,000 the property on which the business was carried on was intended solely for the benefit of the plaintiff and conferred no benefit upon the defendant. It was a term severable from the contract and could be

abandoned by the plaintiff; and, with such abandonment the defendant's challenge to the legality of the contract under the Servicemen's Settlement and Land Sales Act, 1943, failed.

Hawkesworth v. *Turner*, (1930) 46 T.L.R. 389, distinguished.

The plaintiff was, therefore, entitled to a decree for specific performance of the contract, as amended, and excluding the option to purchase.

Counsel: *Calvert* and *Anderson*, for the plaintiff; *Thomas*, for the defendant.

Solicitors: *Brough, Calvert, and Barrowclough*, Dunedin, for the plaintiff; *Raymond, Raymond, and Tweedie*, Timaru, for the defendant.

CRUMP v. CRUMP.

SUPREME COURT. Hamilton. 1944. November 8. 1945. February 26; March 1. SMITH, J.

Divorce and Matrimonial Causes—Practice—Jurisdiction—Recission of Decree nisi *and Dismissal of Petition for Divorce—Restitution of Conjugal Rights—Order for Restitution not complied with—Decree* nisi *made on Petition founded thereon—Parties subsequently reconciled and resuming Conjugal Life—Application by Parties for Rescission of Decree for Restitution and Decree* nisi *and Dismissal of Petition in Divorce—Power of Court to rescind—Nature of Orders to be made—Matrimonial Causes Rules, R. 74—Code of Civil Procedure, R. 604.*

The Court has power, in a proper case, to rescind a decree *nisi* founded upon non-compliance with a decree for the restitution of conjugal rights, and to dismiss the petition in divorce, as where there has been a genuine reconciliation and resumption of cohabitation, since the matrimonial offence created by the failure to comply has been condoned.

Troward v. *Troward*, (1884) 32 W.R. 864; *Ousey* v. *Ousey and Atkinson*, (1875) 1 P.D. 56; and *Rutter* v. *Rutter* (*No. 2*), [1921] P. 421, applied.

The decree for restitution, which is complete in itself, constitutes an effective order to return whether or not the spouse obeys it. Such a decree should not be rescinded merely because the parties have resumed cohabitation; but an order may be made staying, with the consent of both parties, all further proceedings upon the decree for restitution.

Counsel: *W. J. King*, for the petitioner.

Solicitors: *King and McCaw*, Hamilton, for the petitioner.

ATTORNEY-GENERAL *Ex relatione* UNITED THEATRES, LIMITED AND ANOTHER v. LEVIN BOROUGH AND ANOTHER.

SUPREME COURT. Wellington. 1944. December 18, 20; 1945. February 21. MYERS, C.J.

Municipal Corporations—Powers—To "provide or pay to any Person such sums as it thinks fit for providing Musical Entertainments and Cinematograph Exhibitions"—Whether Colourable Transaction flouting Enactments specially passed to meet National Emergency—Whether within Power of Borough Council; and, if so, Valid—Municipal Corporations Act, 1933, s. 308 (1) (e).

Section 308 (1) (*e*) of the Municipal Corporations Act, 1933, contemplates a payment made by the Borough Council out of the borough's funds for the services rendered to the borough in providing musical entertainments or cinematograph exhibitions, and *not* a payment to the Council by a contractor for concessions granted by the Council to the contractor.

A colourable arrangement between a Borough Council and a cinematograph company for the administration and control of the entertainment business connected with a picture theatre (in terms the substance whereof is not that the Council pays the contractor for providing the entertainments, but the contractor pays the Council for a license or concession granted by the Council—*i.e.*, the exclusive right to exhibit pictures in the theatre for a period of seven years and the essence and reality of the transaction is that the contractors pay the Council a percentage of the gross proceeds with a minimum amount per annum guaranteed) is not within the provisions of s. 308 (1) (*e*) of the Municipal Corporations Act, 1933, and is *ultra vires* the Council.

Even if it were, within such provisions, as the main object of the arrangement was to enable the Council to obtain the substantial advantages of a lease without the detriment of the rent being subject to review under either the Servicemen's Settlement and Land Sales Act, 1943, or the Economic Stabilization Emergency Regulations, the Council would not be acting in good faith and reasonably and the arrangement would still be invalid.

Westminster Corporation v. *London and North Western Railway Co.*, [1905] A.C. 426; *Palmerston North-Kairanga River Board* v. *Palmerston North Borough*, [1916] N.Z.L.R. 1127, G.L.R. 717; and *Palmerston North City Corporation* v. *Manawatu-Oroua Electric-power Board*, [1934] N.Z.L.R. 1100, [1935] G.L.R. 20, applied.

Attorney-General v. *Wellington City Corporation*, [1924] N.Z.L.R. 818, G.L.R. 267, distinguished.

Tiki Paaka v. *Maclarn*, [1937] N.Z.L.R. 369, G.L.R. 78, 214, referred to.

Counsel: *Cleary* and *Harding*, for the plaintiffs; *Weston*, K.C., and *Beere*, for the defendants.

Solicitors: *Barnett and Cleary*, Wellington, for the plaintiffs; *O. and R. Beere*, Wellington, for the defendants.

SIMON v. MAHOOD.

SUPREME COURT. Auckland. 1945. February 28. CALLAN, J.

Gaming—Assisting in Conducting Common Gaming house—Croupier in Two-up School—Whether Croupier "assisting" in conducting Common Gaming-house—Gaming Act, 1908, s. 4 (1).

A person performing the functions of a croupier in the playing of "two-up" in a common gaming-house, "assists" in the conducting of such gaming-house although he himself may honesty believe that he is only a player.

Derby v. *Bloomfield and Dernbach*, (1904) 20 T.L.R. 143, followed.

Powell v. *Kingston Park Racecourse*, [1899] A.C. 143, distinguished.

Counsel: *Terry*, for the appellant; *G. S. R. Meredith*, for the respondent.

Solicitors: *Nicholson, Gribbin, Rogerson, and Nicholson*, Auckland, for the appellant; *Crown Law Office*, Auckland, for the respondent.

WILLIAMS v. BEECH.

SUPREME COURT. Blenheim. 1944. November 23, 24; December 12. 1945. February 19. SMITH, J.

Contract—Consideration—Sale of Land by Mortgagee through Registrar—Mortgagee agreeing to Mortgagor's free Use and Occupation for Life of One Acre—Agreement by Mortgagor to give up Possession after Sale before Transfer registered—Whether Valuable Consideration—Land Transfer Act, 1915, s. 115 (2).

Between the date on which the Registrar of the Supreme Court signed a transfer to a mortgagee of land, which she had bought in a sale through the Registrar, and the registration of the transfer, the mortgagee agreed with the mortgagor that if the latter gave the former immediate possession of the said land the mortgagor should, *inter alia*, be entitled during his lifetime to have the free use and occupation of one acre of the said land designated in the said agreement. Immediate possession was given by the mortgagor to the mortgagee.

In an action by the mortgagor against the mortgagee for damages for breach of the said agreement,

Held, 1. That the mortgagor had the right to reside on the land until the date of the registration of the transfer.

2. That the giving up by the mortgagor of what proved to be more than three weeks' lawful occupation constituted good consideration from the mortgagor for the agreement.

The case is reported on this point only.

Counsel: *Stewart Hardy*, for the plaintiff; *Harding* and *Gascoigne*, for the defendant.

Solicitors: *Stewart Hardy*, Wellington, for the plaintiff; *Smith and Gascoigne*, Blenheim, for the defendant.

THE LIABILITY OF LIFE INSURANCE POLICIES TO DEATH DUTY IN NEW ZEALAND

By E. C. ADAMS, LL.M.

In my book (*The Law of Death and Gift Duties in New Zealand*, 51), I state that insurance policies are exceedingly tricky things for death-duty purposes. The latest House of Lords decision dealing with this topic, *Barclays Bank, Ltd.* v. *Attorney-General*, [1944] 2 All E.R. 208, confirms and emphasizes that remark. In that case the House of Lords *unanimously* reversed a decision of the Divisional Court, which had been upheld by the Court of Appeal. Much misapprehension undoubtedly exists in New Zealand as to the liability of life insurance policies to death duty; but, when in England it is not until a case reaches the House of Lords that it is correctly decided, we more obscure and less learned folk in New Zealand may well delete the negative from a well-known maxim, and re-write it:—"*Ignorantia juris excusat.*"

For estate-duty purposes life insurance policies may come in under any of the following paragraphs of that titanic subsection with its numerous and far-reaching tentacles: s. 5 (1) of the Death Duties Act, 1921: namely, paragraphs (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) and (*j*). Various paragraphs of s. 16 render the same policies liable to succession duty, but they need not be discussed separately.

Before dealing with these paragraphs of s. 5 (1) seriatim, it may not be out of place to mention here that life insurance policies (including accident insurance policies) may be liable to both estate and succession duty, although deceased died insolvent. That liability arises by reason of the statutory provision in New Zealand protecting insurance moneys to a limit of £2,000, from the debts of deceased; and by the application of the principle of the English Court of Appeal case, *In re Barnes*, [1938] 2 K.B. 684, [1938] 3 All E.R. 327. The reader is referred to the New Zealand case *Edilson* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 536, where an accident insurance policy was held liable to death duty although deceased's estate was insolvent. It will be observed that a partial deduction is allowed in respect of deceased's funeral expenses, which are to be proportionately apportioned between the protected insurance moneys and the rest of the estate in accordance with the ruling of the late Sir John Salmond, J., in *Maitland* v. *Public Trustee*, [1924] N.Z.L.R. 840.

It may also be mentioned that, as life insurance policies are personal property, there applies by virtue of s. 7 of the statute, the maxim, *Mobilia sequuntur personam*, that is to say, if deceased died domiciled in New Zealand, the local situation of the moneys payable under the policy are immaterial, for they are to be deemed to be situated in New Zealand and liable to death duty accordingly. The New Zealand statutory provisions as to protection of policies, as discussed in the immediately preceding paragraph, have also been held by the Privy Council to apply to insurance moneys payable outside of New Zealand, where deceased died domiciled in New Zealand: *Public Trustee* v. *Lyon*, [1936] N.Z.L.R. 180.

Section 5 (1) (*a*) embraces what English writers on death-duty law term deceased's "*free* estate," in order to distinguish it from his notional estate for death-duty purposes: deceased's *free* estate is his actual transmissible estate. With reference to insurance policies it applies to moneys payable immediately or in the future under an insurance policy, to which policy any person becomes *beneficially* entitled, under the will or intestacy of the deceased.

With respect to insurance policies payable on deceased's death, little difficulty is experienced in practice: the gross amount payable by the insurance company must be returned for death-duty purposes: *In re Potter*, (1895) 13 N.Z.L.R. 642, *Tennant* v. *Lord Advocate*, [1939] A.C. 207, 213; [1939] 1 All E.R. 672, 675, where it is said:

> The policy must, if valued, be valued as a matured policy, and with reference to the solvency of the insurance company, with the result that the value of the policy will be the same as the value of the moneys payable thereunder.

Of course, if the policy has been mortgaged, a deduction is made for the amount of the mortgage, unless it is a debt for which no allowance can be made under s. 9.

The deceased may be the beneficial owner of a policy on another's life. For example, a policy under the Married Women's Property Act on H.'s life in favour of W., his wife. If W. predeceases H., the surrender value of the policy, as at date of W.'s death, must be brought to account in W.'s estate.

The principal difficulty in practice arises in connection with what are commonly known as "children's endowment policies"; usually these by reason of the rule laid down in the leading English case, *In re Engelbach's Estate, Tibbetts* v. *Engelbach*,[1924] 2 Ch. 348, beneficially belong to the parent or other person who entered into the contract with the insurance company, and more often than not they are omitted from the death-duty accounts as filed in the estate of the contracting party. As a general rule, unless the contracting party has made a valid declaration of trust in favour of the child nominee, or has made a valid absolute assignment of the policy *inter vivos*, the surrender value as at date of such party's death must be returned in his estate. In at least one Australian jurisdiction, the rule in *Engelbach's* case has by statute been abrogated with respect to child endowment policies issued by the A.M.P. Society; but that statute would not apply to A.M.P. policies issued in New Zealand, which are governed by New Zealand law. Section 16 of the Married Women's Property Act, 1908, creates a statutory exception to the rule in *Engelbach's* case. Thus, an insurance effected by a man on his own life and *expressed* to be for the benefit of his wife or of his children, or of his wife and children, or any of them, will enure for the benefit of his wife or children, as explained by His Honour the Chief Justice in *In re MacEwan, Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *MacEwan*, [1942] N.Z.L.R. 81, 85. Similarly, a married woman may effect an insurance on her life for the benefit of her husband or children. By s. 16 (1) a married woman may effect a policy on the life of her husband for her own use.

Section 5 (1) (*b*) of the Death Duties Act, 1921, catches gifts of insurance policies made by deceased within three years of death. Unless the gift could also be brought under para. (*j*) (dealing with settlements), the value for death-duty purposes would be the surrender value as at date of gift: s. 6 (2) of the statute. In England, on the other hand, the value would be the gross value as at date of deceased's death: *Re Payne, Poplett* v. *Attorney-General*, [1940] Ch. 576, [1940] 2 All E.R. 115.

Paragraph (c) of the same subsection applies to gifts made by deceased at any time in which deceased reserved a benefit referable to the gift. The other provisions of the paragraph dealing with assumption and retention of possession and enjoyment by the donee could scarcely apply to life insurance policies. By reason of the Privy Council case: *Commissioner of Stamp Duties of New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1943] A.C. 425, [1943] 1 All E.R. 525, *settled* policies could not be brought under this paragraph. An example of a life insurance policy caught by this paragraph would be a gift of a policy by way of absolute assignment to the donee, subject to a stipulation of some benefit to the donor or his estate: *e.g.*, subject to the condition that the donee should pay the donor's debts and funeral expenses: *Earl Grey* v. *Attorney-General*, [1900] A.C. 124. As under the preceding paragraph, the measure of value under para. (*c*) is at date of gift.

Paragraph (*d*) embraces any property comprised in a *donatio mortis causa* made by deceased at any time, if the property was situated in New Zealand or is deemed to be situated in New Zealand at the date of the gift. It has been held that life insurance policies can be the subject of a valid *donatio mortis causa*: *15 Halsbury's Laws of England*, 2nd Ed., p. 744, para. 1286. And the Supreme Court held in *Naylor* v. *Public Trustee*, [1934] G.L.R. 168, that where no policy has actually been issued the delivery of the receipt for the premium and the interim cover will suffice. It is submitted that accident insurance policies could also be subject to a valid *donatio mortis causa*.

Paragraph (*e*) deals with joint tenancies and would catch a case where deceased voluntarily transferred a life or accident policy to himself and another jointly. The value for death-duty purposes under para. (*e*) is the surrender value as at date of creation of the joint tenancy. But it might be more profitable for the Crown to bring the case under para. (*g*), see *infra*, where the measure of value would be one-half of the value of the policy immediately after deceased's death. Section 69 of the statute provides that where by reason of coincident provisions in the Act the same description of duty may be assessed and charged in different ways, it shall be assessed and charged in that manner which is estimated to produce the greatest amount of duty.

Paragraph (*f*) is the only paragraph dealing *expressly* with policies of assurance and it must be quoted verbatim:—

> (*f*) Any money payable under a policy of assurance effected by the deceased on his life, whether before or after the commencement of this Act, where the policy is wholly kept up by him for the benefit of a beneficiary (whether nominee or assignee), or a part of that money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit, if (in either case) the money so payable is property situated in New Zealand at the death of the deceased.

As paragraphs (*f*) and (*g*) are often confused with respect to insurance policies it is convenient to deal now also with the latter, which reads as follows:—

> (*g*) Any annuity or other interest purchased or provided by the deceased, whether before or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneffcial interest accruing or arising by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased.

First, it must be borne in mind that the scope of para. (*g*) cannot vary according to the character of the trust assets, although it was for a time thought—*e.g.*, see *dicta* in *Attorney-General* v. *Robinson*, [1901] 2 I.R. 67—that insurance policies were on a special footing, as the moneys thereunder are not usually payable until deceased's death: it was wrongly thought that, therefore, they *per se* constituted an interest accruing or arising on deceased's death.

It has been frequently held that the words "or other interest" in para. (*g*) include life insurance policies: *Public Trustee* v. *Commissioner of Stamps*, (1912) 31 N.Z.L.R. 1116; *Richardson* v. *Commissioners of Inland Revenue*, [1909] 2 I.R. 597; *Little* v. *Commissioner of Stamp Duties*, [1923] N.Z.L.R. 773; *Inland Revenue Commissioners* v. *Hamilton's Trustees*, [1942] S.C. (Ct. Sess.) 426, S.L.T. 220. It is also true, as pointed out in *Public Trustee* v. *Commissioner of Stamps, supra*, that paras. (*f*) and (*g*), with reference to insurance policies, to a certain extent overlap; but it is certainly not true, as stated in *Little* v. *Commissioner of Stamp Duties, supra*, that para. (*f*) is practically superseded by para. (*g*).

Paragraph (*f*) is of vital necessity to the Revenue; and if the Crown cannot bring a policy in under para. (*f*) it cannot bring it under para. (*g*), unless it is an interest contributed by deceased either by himself alone or in concert or by arrangement with any other person, and unless the principle of the House of Lords case, *Adamson* v. *Attorney-General*, [1933] A.C. 257 applies; that is definitely shown by *Inland Revenue Commissioners* v. *Hamilton's Trustees, supra*, and by that part of the speech of Lord Wright in *Barclays Bank, Ltd.* v. *Attorney-General*, [1944] 2 All E.R. 208, 210, where he says that if the Imperial provision corresponding to para. (*g*) applies, the Crown is only entitled to the charge in respect of the policy moneys limited to the value of an interest therein during the life of the present (the second) Viscount Devonport. Thus, also, in *Public Trustee* v. *Commissioner of Stamp Duties*, (1912) 31 N.Z.L.R. 1116. A. settled a fully-paid life insurance policy, upon his death to pay the income arising therefrom to his widow for life, *if she survived him*; it was only this life interest thus arising on A.'s death which the Court held was liable to death duty in A.'s estate under para. (*g*). And in *Inland Revenue Commissioners* v. *Hamilton's Trustees*, Lord Wark, [1942] S.L.T. 220, 224, *mutatis mutandis*, said:—

> It was not disputed in the argument in the present case that *s. 5 (1) (g)* may render subject to estate duty insurance policies and policy moneys which escape under *s. 5 (1) (f)*. . . . But I find it difficult to understand how it can catch the very case with which *s. 5 (1) (f)* deals—namely, the case of an out-and-out transfer of a policy by way of gift, and make the interest in such a policy liable to duty whether the policy be kept up by the donor for the benefit of the donee or not. If that is a sound view, it seems to me that *s. 5 (1) (f)* is otiose.

See also judgment of Lord Jamieson, at p. 227.

And to bring a life insurance policy in under para. (*g*), not only must the principle of *Adamson* v. *Attorney-General* (*supra*), apply, but it must also, as previously stated, be an interest purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person, *e.g.*, by deceased entering into a marriage settlement. If, at the date of the gift, assignment, or settlement, the policy was worth nothing, then in actual fact nothing has been provided by deceased and the policy cannot be brought in under para. (*g*): *Richardson* v. *Commissioners of Inland Revenue*, [1909] 2 I.R. 596. Similarly, if at the date aforesaid, the policy was beneficially owned by a third person, then deceased has not provided it. Both cases may answer the test of *Adamson's* case, *supra*, and constitute "a beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased," still they cannot be brought in under para. (*g*): *Attorney-General* v. *Murray*, [1904] 1 K.B. 165.

Adamson's case (as explained in later cases)—*e.g.*, *Attorney-General* v. *Lloyd's Bank, Ltd.*, [1935] A.C. 382, and in *Inland Revenue Commissioners* v. *Hamilton's Trustees* (*supra*), shows that para. (*g*) does not apply where the interest of the beneficiaries in the life insurance policy is indefeasibly vested *before* deceased's death. It does apply when it is not indefeasibly vested *before* deceased's death, but becomes indefeasibly vested by reason of deceased's death; then and then only can the life insurance policy be said to be "a beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." Examples of its application are (i) a contingent interest becoming absolutely vested on deceased's death, such as where deceased reserves a *special* power of appointment (a *general* power of appointment comes under para. (*h*) (*infra*)), and on default of appointment there is the usual gift over; (ii) where a vested interest subject to defeasance become indefeasibly vested on deceased's death—*e.g.*, where deceased has reserved to himself a power of revocation or variation until his death the interest of the beneficiaries is not certain.

Policy-moneys, although not beneficially vested in deceased at his death, are liable under para. (*f*), if, *since* the date of the nomination or assignment, as the case may be, the policy has been wholly kept up by him for the benefit of the nominee or assignee; a proportionate part of such moneys are liable where since the date aforesaid the policy-moneys have been partially kept up by deceased: *Attorney-General* v. *Robinson*, [1901] 2 I.R. 67; *Lord Advocate* v. *Inzievar Estates*, [1938] A.C. 402, [1938] 2 All E.R. 424. The liability under para. (*f*) arises from the *fact* of the policy having been kept up by the deceased and is independent of the existence of any obligation by him to do so or by arrangement between him and any other person in relation thereto. As to policies which are not beneficially vested in deceased at date of death and which since they ceased to be so vested in him, have not in fact been kept up by him wholly or partially, they will be liable under para. (*g*), if deceased has entered into an arrangement for the continuance of the premiums—*e.g.*, by entering into a marriage settlement: *Inland Revenue Commissioners* v. *Scott's Trustees*, [1918] S.C. (Ct. Sess.) 720; or, if the premiums are paid out of the trust funds contributed by deceased (as in *Tennant's Trustees* v. *Lord Advocate*, [1939] S.C. (H.L.)1, [1939] A.C. 207, [1939] 1 All E.R. 672; *Barclays Bank* v. *Attorney-General*, [1944] 2 All E.R. 208, and if they come within the principle of *Adamson's* case as explained above.

The facts were succinctly stated by Lord Jamieson, in *Inland Revenue Commissioners* v. *Hamilton's Trustees*, [1942] S.C. (Ct. Sess.) 426, S.L.T. 220, 226. The deceased, twenty-four years before his death, assigned six policies to trustees to be held by them for his four children equally in terms of a contemporaneous declaration of trust. That deed provided that his children should take an immediate vested right, although in the case of his three sons, their share of the capital was not payable until they attained the age of twenty-five, and in the case of his daughter she was to enjoy an alimentary life rent and the capital of her share was to go to her issue in fee with a destination over, failing issue, to her brothers or their issue. The policies were not fully paid, and no provision was made for the payment of future premiums. The trustees were empowered to hold or surrender the policies in their discretion. It was provided that the deceased's sons could not call on the trustees to surrender the policies, but the terms of the deed were such that they were in a position to sell or assign their vested rights thereunder. The deceased thus divested himself of his interest in the policies and they came to be held by the trustees, not for him, but for behoof of his children.

There was the following provision in the trust instrument:

> And to enable my trustees to carry out the purposes of the said trust I confer upon them all requisite powers and particularly but without prejudice to such generality I empower them to borrow money on the security of the said policies or any of them.

In pursuance of this provision the trustees borrowed from deceased himself the money for payment of the premiums payable after the settlement. For this reason the Crown could have claimed that the insurance moneys were liable under the Imperial provision corresponding to our para. (*f*). This possible contention was rejected by the Courts. As Lord Keith said in the Court of first instance, [1942] S.L.T. 220, 221:

> It is no doubt true that the moneys were borrowed from the deceased himself. But that would seem to be irrelevant. His estate was diminished in no way. On his death the sums borrowed were repaid with interest and presumably estate duty has been paid thereon.

And see also the opinion of Lord Wark, *ibid.*, 224.

The decision of the Scottish Courts on this point is consistent with the recent House of Lords case, *Barclays Bank, Ltd.* v. *Attorney-General*, [1944] 2 All E.R. 208.

In *Inland Revenue Commissioners* v. *Hamilton's Trustees* (*supra*), however, the contest hinged on the application to the facts of the Imperial provision corresponding to our para. (*g*). The Crown failed because, *first* it was not (as the headnote in the *Scots Law Times* correctly shows) an interest provided by deceased; and *secondly*, because it was not an interest accruing or arising by survivorship or otherwise on deceased's death. What accrued on the death of the deceased was a present right to demand payment from the insurance company in respect of a previously existing beneficial interest indefeasibly vested before deceased's death. The opinion of Lord Wark in the appeal in the Court of Session is of great moment because it deals with the Imperial provision corresponding to s. 27 of the Finance Act, 1937 (New Zealand), which provision apparently had been called in aid by the Crown. Our section is as follows:—

> For the purposes of paragraph (*g*) of subsection one of section five of the Death Duties Act, 1921, where an annuity or other interest has been purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, the extent of any beneficial interest therein accruing or arising by survivorship or otherwise on the death of the deceased shall be ascertained and shall be deemed always to have been ascertainable without regard to any interest in expectancy that the beneficiary may have had therein before the death.

After holding that no interest accrued or arose on deceased's death—the *nature* of the interest contributed being the same although its value increased during the subsistence of the trust—Lord Wark, [1942] S.L.T. 220, 226, pointed out that the above statutory provision was *not* a *charging* section. He added,

> It is, in my opinion, a provision dealing with the method of valuation of a beneficial interest which does "so pass," and it was enacted, so far as I can see, to get rid of the practical difficulty of ascertaining the value of an interest in expectancy which the rule of valuation laid down in *Adamson's* case rendered necessary.

Had it been one of the provisions of the trust to make provision for payment of future premiums out of funds provided by deceased, the case would still have been decided against the Revenue: *Barclays Bank, Ltd.* v. *Attorney-General*, [1944] 2 All E.R. 208.

Another important point in the Scottish case is the distinction which Lord Jamieson, at page 227, drew between that case and *Inland Revenue Commissioners* v. *Scott's Trustees*, [1918] S.C. (Ct. Sess.) 720. The distinction is that in *Scott's* case no vesting took place in the beneficiaries until after the truster's death, and the truster had made arrangements for payment of future premiums.

In *Barclays Bank, Ltd.* v. *Attorney-General*, [1944] 2 All E.R. 208, 209, in the House of Lords, Lord Macmillan sets out the facts. The late Lord Devonport effected two ordinary policies of assurance on his own life with the Royal Insurance Company. In 1922, he executed a family settlement and to the trustees thereby appointed he assigned his two policies. At the same time, he transferred to the trustees certain income-yielding investments. The trustees were directed by the settlement to pay the annual premiums on the policies as they fell due out of the income of the trust. Additional investments were subsequently transferred by Lord Devonport to the trustees; and, in 1930, he executed a deed of appointment and a further deed of settlement whereby he finally completed his arrangements for the destination of the trust assets. The position at Lord Devonport's death on September 5, 1934, was that—at least since 1930—he had been entirely divested of all right and interest whatsoever in the two policies of assurance and the investments held by the trustees. The premiums on the policies were from the institution of the trust paid by the trustees out of trust income as directed, and were so paid solely for the benefit of the trust beneficiaries.

Both the Court of first instance and the Court of Appeal, by deciding in favour of the Crown, had given the Imperial provision corresponding to para. (*f*) a wide meaning—much wider, I think, than specialists or the revenue authorities had previously given it. Probably the Courts were swayed that way by full knowledge of all the implications of *Adamson's* case (dealing with para. (*g*)) with reference to insurance policies. In the opinion of the Divisional Court and Court of Appeal, it was not necessary that deceased himself should actually have paid the premiums after the gift; liability was incurred under the paragraph if deceased at the date of the nomination or assignment had set up the necessary machinery or created a trust by which the premiums could be paid in the future. The House of Lords, however, in a most unmistakable manner has restored the narrow literal construction of para. (*f*); and that will remain the law until the Legislature itself alters it. This literal construction with apt brevity may best be explained in Lord Thankerton's language, at p. 209:

> The premiums were annual ones, and the crucial date in each year could not arrive until it became necessary to renew the currency of the policies for another year, because of the survival of the assured. Payment of the premium necessary for renewal was made by the appellants, over whom deceased retained no control, out of settled funds, in which the deceased had no interest, and over which he retained no control. It cannot be maintained that the appellants made such payments as agents of the deceased, and the fact that the funds out of which the payments were met were originally settled by the deceased is not relevant, in my opinion.

As Lord Wright pointed out not only did the trustees pay the premiums as principals, not as agents for the settlor, but the money out of which they paid them was their own money in law, though in equity it was the money of the beneficiaries. It was not the settlor's money. In Lord Macmillan's words, at p. 210, "To keep up a policy is to pay the premiums thereon as they fall due, and the person who pays the premiums is the person who keeps up the policy." In short, after the assignment the premiums were, in fact, paid not by the deceased but by the trustees.

We now come to para. (*h*), which includes within the charge of death duty any property in respect of which deceased had a *general* power of appointment; and "general power of appointment" is described in very wide terms in s. 2. An example of policies coming under para. (*h*) is *Public Trustee* v. *Commissioner of Stamp Duties*, (1912) 31 N.Z.L.R. 1116. By antenuptial marriage settlement, deceased assigned three policies of assurance on his own life therein specified to trustees upon trust after the solemnization of the said intended marriage, and, upon his death, to receive and invest the moneys payable thereunder, and to pay the income to his widow, if she survived him, during her life, and after her death in trust for such purposes as he should by deed or will appoint, and in default of appointment in trust for the children of the said intended marriage. Two of the said three policies of assurance had been fully paid up at the date of the deed; and the said deceased covenanted to pay the premiums on the third policy. The deceased carried out the obligations imposed by the covenant in respect of the third policy until the date of his death.

This is one of the few reported cases dealing with fully-paid policies. During the course of the argument it was admitted by the then Solicitor-General, the late Sir John Salmond, that para. (*f*) had no application to fully-paid policies. The more recent House of Lords decision, *Lord Advocate* v. *Inzievar Estates*, [1938] A.C. 402, [1938] 2 All E.R. 424, shows that that admission was well made. The policy for £2,000 came within para. (*f*), as the deceased in fact paid the premiums thereon *after* the marriage settlement. The life interest of the widow in the moneys payable under *all three* policies came in under para. (*g*), because that interest arose on the death of the widow; if the widow had predeceased the settlor neither she nor legal personal representatives would have received any beneficial interest in the moneys. The interest in remainder in

all three policies came in under para. (*h*), because it was property over which deceased had at the date of his death a general power of appointment. It is also submitted that *Adamson's* case shows that the interest in remainder came in also under para. (*g*), because the deceased covenanted to pay the premiums on the policy not fully paid up, and because, until the deceased died, the children of the marriage had merely a defeasible interest; since deceased could have excluded them at any time by deed or will. This case is useful as showing how the various provisions which catch life insurance policies may sometimes overlap.

At last we come to para. (*j*). This much litigated paragraph catches settlements and deeds of family arrangement made by deceased reserving (i) life-interest or equivalent to life-interest to deceased; or (ii) life-interests or equivalent to life-interests to deceased for the life of any person; or (iii) to deceased the right to restore himself the property.

Insurance policies are not caught by para. (*j*) as often as most other species of property; for the interest reserved must be for the deceased settlor's benefit, and, usually, the policies settled are full-life policies payable only on his death. It would, however, catch settlements of endowment policies payable at a certain date or at death, if deceased died sooner, if deceased reserved an interest of the above nature; the mere fact that deceased did not live long enough to enjoy the life-interests in the proceeds would be immaterial: *Riddiford* v. *Commissioner of Stamps*, (1913) 32 N.Z.L.R. 929; *Rabett* v. *Commissioner of Stamp Duties, New South Wales*, [1929] A.C. 444; *Weston* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 183. It also submitted, on the authority of the above cases, that para. (*j*) would catch a settlement of policies payable only on his death, if the settlement empowers the trustees at any time to accept a surrender of the policies and to pay the income arising from the proceeds to deceased for his life or for the life of any other person; again the fact that the trustees may have not exercised their discretion would be immaterial. Paragraph (*j*) would also catch every settlement of insurance policies where deceased has reserved to himself a power of revocation; such settlements would also be caught by para. (*g*), as *Adamson's* case (*supra*) shows.

Although the meshes of the net cast by the Revenue are fine, it does not catch—as *Inland Revenue* v. *Hamilton's Trustees, supra*, and *Barclays Bank Ltd.* v. *Attorney-General, supra*, show—every life insurance policy effected by deceased, payable on his death and in respect of which deceased has subtracted from his means during his lifetime.

Counsel for the taxpayer may catch a gleam of hope from the following metaphor of the sea, which enlivens the opinion of Lord Mackay in the Scottish case. The learned Judge, after stating the elementary but most important principle that the Crown must always prove its case, there being no *a priori* liability on the subject to pay a tax, said: "As the Crown are forced away, bit by bit, from one anchorage after another—as when the case of *Tennant's Trustees*, [1939] A.C. 207, is shewn to have depended upon a variety of strong factors, here absent; and as when Chief Baron Palles explained how he was for a time misunderstood in England—it is hard even to figure where it is that the flukes of their anchor come at last to hold."

OBITUARY.

Mr. Gordon J. Reed, Invercargill.

After a very brief illness Mr. Gordon J. Reed, one of Invercargill's best-known public men, died at his residence, on March 5. While playing golf at Otatara on the previous Saturday afternoon Mr. Reed complained of feeling unwell, but continued with his game. A little later he almost collapsed and was taken back to the club-house and thence to his home. He became unconscious on Saturday evening and did not recover.

Mr. Reed, who was forty-nine, was the eldest son of the late Mr. J. H. Reed. He was born at Bluff, and attended the primary school there. He completed his primary education at Gore, and then enrolled as a pupil at the Southland Boys' High School, where he was a prefect. He joined the firm of Messrs. Macalister Bros. and took up the study of law. He was admitted as a solicitor in 1918 and as a barrister in 1920, and in 1921 he began to practise on his own account. Mr. Reed was soon taking a leading part at the Bar, where his able handling of the cases entrusted to him brought him to the forefront as a criminal lawyer. He made a special study of legislation governing workers' compensation, particularly as it affected miners. For a term he served as president of the Southland District Law Society.

Mr. Reed first entered public life in 1927, when he was elected a member of the City Council. He was re-elected at successive polls until 1938. Mr. Reed had served a term as Deputy Mayor, and contested the mayoralty that year. Three years later he was re-elected to the Council, occupying fourth place. He stood again last year, and was returned near the top of the poll. As chairman of the Baths and Library Committee, he took a lively interest in the progress of those two city amenities.

On the death of his father in 1943, Mr. Reed was appointed by the Governor-General to fill the vacancy caused on the Bluff Harbour Board, and last year he was elected to the Board as a representative of the City of Invercargill and the Borough of South Invercargill. He also represented the City Council on the Invercargill Chamber of Commerce.

In 1935 Mr. Reed was a candidate for Parliament. He was nominated as a Democrat candidate for Invercargill, and in a four-cornered contest was second to Mr. W. M. C. Denham. Mr. Reed polled 3,895 votes, the highest of any Democrat candidate. As a member of the Masonic Order, he had passed many degrees and had reached Grand Lodge status.

Before the war Mr. Reed travelled widely in the Pacific, and he visited all parts of Australia, Singapore, Java, and the Malay States. He paid two visits to the Pacific Coast of the United States. A lover of the outdoor life, he was a tramper and cyclist in his younger days, and later took up tennis and golf. He was a past president of the Southland Lawn Tennis Association and was a member of the Invercargill Golf Club. He was a deacon of First Church.

He is survived by his widow.

Tributes from Bench and Bar.

On March 8, members of the Southland District Law Society, and representatives of the Police, met in the Magistrate's Court to pay tribute to the late Mr. Reed. Mr. Rex C. Abernethy, S.M., presided.

The President of the Society, Mr. John Tait, read the following letter from His Honour Mr. Justice Kennedy:—

"I share with you all a sense of profound personal loss in the early death of Mr. Gordon Reed. He bears a name which is respected in this province, and his whole course of life has been such as to increase that respect and to attract our affection. He was warm-hearted, enthusiastic and kind, and of his genuine and fundamental goodness, each one of us has had ample proof. His mind had been broadened and widened by extensive travel, but he firmly retained his liberal-minded views and his sympathy for those who really needed it. He had wide interests, and I know, played his part in the life of this city and of this province. He had

great experience in all branches of advocacy, and the Court could implicitly count upon his discharging his duties to his client with fervour and ability, but without ever forgetting that he was an officer of the Court and engaged with it in the high task of administering justice. He had already very great achievement when untimely death removed him and an equal promise of continued sevice. His death removes one whom we shall all remember as a very proper gentleman: it deprives each of us of a great friend and it leaves this community the poorer."

Mr. Tait, in expressing the Law Society's profound regret at Mr. Reed's untimely death, said that at a very early age Mr. Reed displayed a keen interest in, and aptitude for, public life, and over a long period of years he enjoyed the confidence of the citizens of Invercargill as one of their representatives on the City Council. He also served for a short time on the Bluff Harbour Board. He took a great interest in municipal affairs generally and his place was one that would be hard to fill. He had many other outside activities. In his younger days he regularly organized and participated in entertainments in all parts of the district in support of any worthy cause. He took a deep interest both in his lodge and in his Church, but his deepest and most abiding interest was in the practice of the law.

"The practice of the law, particularly on its forensic side, he regarded not only as his work, but as his greatest interest and joy," said Mr. Tait. "For many years he has regularly appeared in this Court and in the Supreme Court in cases of all kinds, but he achieved the highest reputation for his handling of criminal cases. He is remembered by all of us as a keen advocate, a vigorous and forceful fighter, and while at all times he was prepared to fight, and did fight strenuously in the interests of his clients, nevertheless he retained the goodwill of his brethren in the law and their respect for his ability and tenacity. Court practice makes very heavy demands on the vigour and, I may say, the health of those who regularly engage in it, but Mr. Reed never spared himself, and even within the last few weeks we recall that he conducted a difficult and lengthy action in the Supreme Court with his accustomed energy and skill. These qualities in any man would earn the respect of his professional brethren, but with them Mr. Reed combined an unfailing cheerfulness and geniality which won for him a secure place in our affection. He was so full of the joy and zest of living that he stirred a response in each one of us which will be for us a gracious and happy memory.

"We can hardly believe that these Courts, where he was for so long a familiar and colourful figure, will know him no more," said Mr. Tait. "The silver cord is loosed, the golden bowl is broken, the voice that stirred the echoes of this place so often and so eloquently is stilled for ever. The profession as a whole is the poorer for his passing, but his memory will long live with us. While we refer to our own sense of loss we realize that there is that inner circle of those near and dear to him whose hearts are filled with a sense of desolation and bereavement. To his widow, his sisters, and his brothers, we extend our heartfelt sympathy, but we feel that as time heals the wounds of sorrow, so many gracious memories will console and support them in their bereavement."

Mr. Abernethy, S.M., said that Mr. Reed's life was deep-rooted—in his home, in civic life, and in the profession of the law. Before a barrister could be a successful pleader he must know his fellow-men. Mr. Reed's zest for living, his gregarious nature, and his constant search for human contacts made him, first, a kindly and lovable personality, and, secondly, a knowledgeable and successful pleader in the Courts. He was on good terms with life and the brethren of his profession. A man of principle, he was in love with his profession, its traditions, and its dignity. The accused for whom he so often appeared had in him a friend at Court. Mr. Abernethy concluded by expressing sympathy with Mrs. Reed and Mr. Reed's brothers and sisters.

Mr. T. V. Mahoney, Mr. H. J. Macalister, and Inspector J. B. Young, also spoke.

LAND AND INCOME TAX PRACTICE.

Payment by Company to its Managing Director in Consideration of the Relinquishment of Rights under Service Agreement.—An interesting case relative to Salary and Pension Rights pertaining to the Office of Managing Director in a company is *Wales* (*H.M. Inspector of Taxes*) v. *Tilley*, [1943] 1 All E.R. 280.

A limited company agreed in June, 1937, to pay the respondent as its managing director a fixed salary of £6,000 per annum, and undertook, in the event of his ceasing to be managing director, to pay him a pension of £4,000 per annum for ten years following such cessation. On April 6, 1938, a new agreement was concluded whereby the respondent agreed to release the company from its obligation to pay the pension and to continue to serve as managing director at a reduced salary of £2,000 per annum; in consideration therefor, the company agreed to pay him £40,000 by two equal instalments on April 6, 1938, and April 6, 1939.

The respondent appealed against an assessment of income-tax made upon him under Schedule E for the year 1939–40 in the sum of £40,000, and the Special Commissioners held that the payment was not made as remuneration for services rendered or to be rendered to the company, but in commutation of its liability to pay the pension and the bigger salary; and that the payment was not income in his hands. It was held by the House of Lords that so much of each payment of £20,000 in the years 1938–39 and 1939–40 as represented a sum paid in compromise of reduction of salary was assessable to income-tax under Schedule E, following *Prendergast* v. *Cameron*, [1940] 2 All E.R. 35, but so much as represented capitalization of pension was not so assessable, following *Hunter* v. *Dewhurst*, (1932) 16 Tax. Cas. 605. The case was remitted to the Special Commissioners to apportion the two payments accordingly.

Lawrence, J., in the King's Bench Division, [1942] 2 All E.R. 22, in the course of his judgment in favour of the Crown, had said:

> "Both in form and in substance the payment was made in consideration both of the release from the company's obligation to pay the pension and the respondent's agreement to serve at a reduced salary of £2,000 per annum without any pension rights. It is therefore, in my opinion, impossible to say that the payment was not a profit from the office."

Dewhurst's case, His Lordship thought, was distinguishable from the present case, even if it be treated as laying down the principle that a sum of money agreed to be paid to an office-holder in consideration of the release from a contingent liability to pay him another sum stipulated for in his orginal contract of service is not taxable; for, in the present case, it was expressly agreed in cl. 2 of the 1938 agreement that the sum in question was in consideration of the respondent's agreement to serve at a reduced salary, and such a sum was, in His Lordship's opinion, clearly profit from the office. Part of the £40,000 was no doubt payable in commutation of the ten-year pension, but as that pension would have been assessable under Schedule E by virtue of s. 17 of the Finance Act, 1932, the sum payable in commutation thereof was assessable under Schedule E. If it were not so, any prospective pensioner could, by agreement with the prospective payer of the pension, defeat the Crown's right to income-tax under Schedule E and the Finance Act, 1932. The pension was "income" within the meaning of the Income-tax Acts, and a sum paid in commutation of the pension in such circumstances as the present appeared to be income in accordance with the reasoning in such cases as *Short Bros., Ltd.* v. *Commissioners of Inland Revenue*, (1927) 12 Tax Cas. 955. His Lordship concluded:

> "I am, however, of opinion that there must be two assessments for the years 1938–39 and 1939–40, in each of which years the sum of £20,000 was payable to the respondent, and not one assessment on £40,000 as was made in the assessment appealed against, since a person, to whom income can by no possibility become payable in a particular year, is not, in my opinion, liable to income-tax and sur-tax in respect of that year in respect of that sum."

On appeal against this decision, the Court of Appeal (*Mac Kinnon*, L.J., doubting), gave judgment in favour of the Crown affirming the decision of *Lawrence*, J., [1942] 2 All E.R. 22, in so far as the payments included any sum in respect of commutation of pension. Lord Greene, M.R., said:

" As will be seen, I agree with the conclusion of Lawrence, J., but I respectfully dissent from his view that a sum paid in commutation of a pension is necessarily assessable under Schedule E. The case of *Short Bros., Ltd.* v. *Commissioners of Inland Revenue*, (1927) 12 Tax Cas. 955, cited by Lawrence, J., does not, in my opinion, support his proposition. Indeed the Attorney-General, on behalf of the Crown, did not attempt to support this part of the reasoning of Lawrence, J. He preferred to argue that the pension was deferred remuneration and that the acceptance during the service of a sum in commutation of it was the acceptance of present, in place of deferred, remuneration."

An appeal against this decision was unanimously allowed in part.

In the course of his speech, Viscount Simon, L.C., at p. 282, said :

" It is evident that the £40,000 on which the Crown seeks to levy income tax is paid in part as the price of compounding the pension and in part in consideration of the reduction of the appellant's annual salary from £6,000 to £2,000. . . .

" As regards the commutation of pension, I cannot agree with Lawrence, J.'s, view that, as the pension would have been assessable under Schedule E, therefore a sum payable in commutation of it would also be assessable under the same Schedule. I think that the Master of the Tolls is right when he says that the decision in *Short Bros., Ltd.*, v. *Commissioners of Inland Revenue*, (1927) 12 Tax Cas. 955, to which Lawrence, J., referred in this connection, does not support the learned Judge's proposition ; and neither can I accept the contention contained in the case for the respondent (but not, as I understand, persisted in by the Attorney-General) that the pension under the agreement of 1937 was deferred remuneration and that the acceptance by the appellant during his service of a sum in commutation of the pension amounted to the acceptance of a present remuneration instead. Neither the pension nor the sum paid to commute it constituted, in my opinion, profit from the office. If pension was paid after ceasing to hold the office, it would have been assessable under the head of ' pension ' in Schedule E and the first rule applicable to that Schedule. I agree with the unanimous view of the members of the Court of Appeal that a pension is in itself a taxable subject-matter distinct from the profit of an office, and if an individual agrees to exchange his right to a pension for a lump sum, that sum is not taxable under Schedule E. This conclusion is in accordance with the views of the majority of the Law Lords when this House decided the case of *Hunter* v. *Dewhurst*, (1932) 16 Tax Cas. 605."

Accordingly the learned Lord Chancellor moved that these two assessments should be referred back to the Commissioners in order that they may determine, according to the best of their judgment, what would be a reasonable apportionment. So much of the two sums as should be taken as paid in substitution for the reduction of salary should be assessed in the appropriate years for tax under Schedule E. The balance of the two sums which should be regarded as representing the purchase price of the annuity, should escape taxation.

Arrears of Sales Tax.—Where a taxpayer has furnished incorrect sales tax returns to the Customs Department and is subsequently assessed with arrears of sales tax he may not claim as a decuction the full arrears in the year in which they are paid. The amount will be allocated to the various years in respect of which it was assessed by the Customs Department—*i.e.*, the years in which the sales were made on which the amount is assessed. The years for which the assessments will be reopened to allow the deduction of the additional sales tax will be limited by the provisions of s. 168 of the Land and Income Tax Act, 1923.

Dividends on Labour Shares.—Dividends received on labour shares come within the scope of s. 78 (*g*) of the Land and Income Tax Act, 1923, and are " dividends derived from shares or other rights of membership in companies " and consequently are exempt income. They also are dividends in terms of s. 6 (2) (*c*) of the Land and Income Tax Amendment Act, 1931, and constitute non-assessable income in the hands of the recipients.

Dividends on labour shares cannot be said to be payments to employees in respect of services rendered. They are payments to shareholders by virtue of their shareholding in or membership of the company and are an appropriation of profits in the same manner as are dividends on ordinary or preference shares. No deduction is allowable, therefore, to a company paying dividends on labour shares.

Share in an Estate Mortgaged and Income paid direct to Mortgagee.—A taxpayer was a life tenant in an estate and her son was a residuary beneficiary. The son was in financial difficulties and the taxpayer and her son mortgaged their interest in the estate to secure an advance to the son. The son later defaulted in payment of the interest and the mortgagee in exercising his right gave notice to the trustees in the estate to pay, direct to him, an amount from the taxpayer's share in the income of the estate, equal to the interest due on the mortgage.

This is not an assignment of the taxpayer's income, but merely a disposition of her income in satisfaction of her guarantee under the mortgage, which was her personal liability. That portion of the income required to cover the amount of the interest, although paid direct to the mortgagee, is income dealt with in the taxpayer's interest and on her behalf and under s. 90 of the Land and Income Tax Act, 1923, is deemed to have been derived by her and is assessable accordingly.

Armed Forces: National Patriotic Fund Board Workers.—Reference should be made to an article appearing in (1943) 20 N.Z.L.J. 10, under the heading of " Members of the Armed Forces," of which part of the following is a recapitulation: Prior to April 19, 1943, Welfare Social Workers (incorporating Y.M.C.A., Church Army, Salvation Army, and Catholic War Services) employed by the Board in Army and Air Force camps *in New Zealand* were not attested members of the armed forces. They received their pay direct from the National Patriotic Fund Board and such pay was deemed to be assessable income.

Personnel *overseas* became attested members of the armed forces and received their ordinary service pay, supplemented by certain amounts from the Board's funds. The service pay was not liable but the supplementary pay was assessable, although any such amounts would probably be less than £200 a year and, in the absence of private income, there would be no tax payable.

As from April 19, 1943, however, all welfare workers in Army and Air Force camps became attested members of the armed forces and as from that date they commenced to receive service pay. Their liability for taxation is limited then to any amounts received as supplementary pay from the Patriotic Fund Board in addition, of course, to any private income.

Life Insurance Premiums: Special Exemption.—Section 77 of the Land and Income Tax Act, 1923, provides that " every person, other than an absentee, who has effected an insurance on his own life . . . , shall be entitled to a deduction by way of special exemption . . . of the amount of the premium paid . . . ."

It is interesting to note that no special exemption can be allowed in the following case: A husband and wife took out a policy of life insurance on their joint lives, contributing equally towards payment of the premium which was paid in one sum, a receipt being issued in their joint names. The whole amount of the sum assured was payable to the survivor upon the death of either of them. In these circumstances neither the husband nor wife can establish that they have effected an insurance *on his or her own life*, in accordance with the requirements of the above section. The policy is effected on their joint lives and is effected by both husband and wife jointly. Consequently no special exemption can be allowed to either party in respect of any portion of the premium paid.

RULES AND REGULATIONS.

Sugar Rationing Order, 1945. (Rationing Emergency Regulations, 1942.) No. 1945/21.

Cool Store Control Order, 1945. (Primary Industries Emergency Regulations, 1939.) No. 1945/22.

Hawke's Bay Crematorium (Travelling-allowance) Regulations, 1945. (Hawke's Bay Crematorium Act, 1944.) No. 1945/23.

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. Stamp Duty.—*Transfer by Trustees of Former Unincorporated Society to the Incorporated Society—Assessment of Duty.*

QUESTION: A., B., and C., as joint tenants, hold a piece of land as trustees for a football club, which has just been incorporated under the Incorporated Societies Act, 1908. They have now been requested to transfer the land to the incorporated society, which they propose to do. What will be the correct stamp duty on the transfer?

ANSWER: The correct stamp duty will be 15s. under s. 168 of the Stamp Duties Act, 1923. It is exempt from *ad valorem* stamp duty by s. 81 (*d*), being a conveyance by trustees to the beneficiary.

Immediately before the incorporation of the society A., B., and C. held the land in trust for the unincorporated association, the football club. On incorporation of the same club they held it in trust for the incorporated society, the same football club, although in a different garb: *In re London Housing Society, Ltd.'s, Trust Deeds, Moreland* v. *Woodford*, [1940] Ch. 777, [1940] 3 All E.R. 665; *Hastings Volunteer Fire Brigade* v. *Brausche*, (1915) 17 G.L.R. 653.

2. Land Transfer.—*Incorporated Society—Power to Mortgage—Duties of District Land Registrar and Mortgagee to inquire.*

QUESTION: My client is proposing to lend £300 to a society incorporated under the Incorporated Societies Act, 1908. The security is perfectly good. Must I make inquiries on behalf of the mortgagee as to whether or not the mortgage is *intra vires* of the society? Can the District Land Registrar insist on being satisfied that the society has power under its rules to mortgage before registering the mortgage? It will be observed that s. 6 (1) (*j*) of the Act provides that the rules of a society shall state the powers (if any) of the society to borrow money. This suggests that, unless there is express power in the rules as registered to mortgage, the society has no power to mortgage.

ANSWER: It would appear that, unless there is express power in the rules to mortgage, the society really has no power to mortgage: *Second Church of Christ Scientist Christchurch Trust Board* v. *Symes*, [1930] N.Z.L.R. 65, [1929] G.L.R. 493. But it is thought that in the absence of any evidence to the contrary you are entitled to assume that the society has power to mortgage; you do not appear to be under any duty to search the rules in the office of the Assistant Registrar of Companies. The position would be otherwise if the land were under the "old system," or were a mining privilege registered under the Mining Act, provided that the seal of the society appears to have been properly affixed to the mortgage instrument, the District Land Registrar must register it, if otherwise in order: *In re Kaihu Valley Railway Co. and Owen*, (1890) 8 N.Z.L.R. 522. The District Land Registrar is not concerned with possible domestic *ultra vires*. Upon the registration of the mortgage under the Land Transfer Act, your client would in the absence of fraud obtain an indefeasible title: *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174; *B.* v. *M.*, [1934] N.Z.L.R. s. 105.

3. Mortgage.—*Mortgagee proposing to exercise Power of Sale by accepting Exchange of Land—Validity of.*

QUESTION: My client has been mortgagee in possession for many years; he has now obtained the consent of the Supreme Court to do all matters referred to in Reg. 6 (2) (*b*) of the Mortgages Extension Emergency Regulations, 1940. The mortgagor is not an "assisted discharged soldier" of the last war within the meaning of the War Regulations Continuance Regulations, 1920. My client has now an opportunity of *exchanging* the mortgaged premises for another piece of land which is very much lower in value than the amount of the total indebtedness under my client's mortgage. Can my client do this at the present stage, so that both sides of the proposed exchange may be carried out now? The power of sale expressed or implied in the memorandum of mortgage is in the usual form. My client does not desire to pay two lots of *ad valorem* stamp duty, if it can be legally avoided.

ANSWER: Your client cannot effect his part of the proposed exchange at the present stage. The power of *sale* in a mortgage instrument does not include a power to *exchange*: *Taylor* v. *Parkinson and Blyth*, (1911) 31 N.Z.L.R. 354. Your client appears to be attempting to kill two birds with the one stone like the sub-mortgagee in *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Registrar-General of Land*, [1935] N.Z.L.R. 726.

The only way your client can get a title to the fee-simple of the mortgaged land is by sale conducted by the Registrar of the Supreme Court: ss. 110-115 of the Land Transfer Act, 1915: *Hamilton* v. *Bank of New Zealand*, (1904) 24 N.Z.L.R. 109, 115.

4. Death Duties.—*Gift by Will for Erection of Mausoleum—Validity of—Liability to Death Duty.*

QUESTION: A. devised £500 to his trustees for the purpose of an erection of a mausoleum for the bodies of himself and his widow. Is such a gift valid as against the residuary legatee? If, so, is it liable to death duty?

ANSWER: (*a*) The gift is valid: *In re Filshie, Raymond* v. *Butcher*, [1939] N.Z.L.R. 91; *Re Budge, Ex parte Pascoe*, [1942] N.Z.L.R. 350.

(*b*) The gift is liable to estate duty. It is neither a "debt owing by the deceased" (within the meaning of s. 9 of the Death Duties Act, 1921) nor a "funeral expense" (within the meaning of s. 11): *Adams's Law of Death and Gift Duties in New Zealand*, 96.

(*c*) The question as to whether or not it is liable to succession duty is more difficult. As it is not a *charitable* trust, it is not exempt under s. 18 of the Death Duties Act, 1921: *Re Dalziel, Midland Bank, Executors, and Trustee Co., Ltd.* v. *St. Bartholomew's Hospital*, [1943] Ch. 277, [1943] 2 All E.R. 656. On the whole, however, it is thought that there is no liability for succession duty, because there is no human beneficiary to the £500, if the trustees in this respect carry out the provisions of the will: *Green's Death Duties*, 270. In s. 16 "successor" is defined as "any *person* who on the death of deceased acquires a beneficial interest in the dutiable estate of the deceased": *Adams's Law of Death and Gift Duties in New Zealand*, 114 (discussing s. 16 (2)).

5. Death Duties.—*Gift Duty—Gratuity by Employer to Employee—Liability to Gift and Death Duty.*

QUESTION: My client A., a very old lady, who during the last twelve months has already made gifts totalling £450, proposes to pay £100 by way of gratuity to B., her gardener, who has been in her employ continuously for twenty years, and who is about to retire, provided that she does not thereby incur any liability for gift or death duty. If A. makes this payment of £100 to B., will she be liable to gift duty and will her estate on her death be liable to death duty in respect of same?

ANSWER: The £100 will be exempt from both gift and death duty provided the Commissioner of Stamp Duties is satisfied that A. and B. are not connected by ties of blood or marriage with, each other: s. 2 (1) (*c*) (iii) of the Death Duties Amendment Act, 1923.