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DEATH DUTIES: PROTECTION OF INSURANCE POLICIES.

OVER thirty years ago, Lord Macnaghten, in delivering the judgment of the Judicial Committee of the Privy Council in *Commissioner of Stamp Duties* v. *Byrnes*, [1911] A.C. 388, 392, spoke of the days "before death duties assumed their present proportions in taxation, or became an object of terror to mortal men."

The various *rates* of death duties in this country, at least, with the exception of Native succession duty, have more than doubled (and in some cases trebled), since His Lordship's dictum was uttered. We are, not surprised therefore, that the statement of the law contained in Mr. E. C. Adams's article, "The Liability of Life Insurance Policies to Death Duty in New Zealand," in last year's JOURNAL, at p. 77, occasioned considerable interest and much comment. Following that article, we have had several inquiries as to whether or not life-insurance policies in the circumstances stated by Mr. Adams will be liable to death duty on the death of one or another person. We accordingly return to the subject, in order to answer in a general way the questions that have been addressed to us.

In the judgment delivered by Lord Macnaghten from which we have quoted, His Lordship went on to hold out some ray of hope in the gloom in which he found himself. He said, at p. 392,

> No one may act in contravention of the law. But no one is bound to leave his property at the mercy of the Revenue authorities, if he can legally escape their grasp.

So, with an easy conscience, we may proceed to discuss the exclusion of the proceeds of life-insurance policies from the estate of a deceased policyholder, and their consequent exemption from death duties on his death.

At the outset, we must make it clear that we are not concerned with the difference of opinion which exists as to the propriety of rendering life-insurance policies liable to death duty like any other species of property, or of exempting them altogether. On this point, there seem to be two schools of thought. The first one (to which, no doubt, every person connected with a life-insurance company subscribes) is that, as life-insurance policies are a form of thrift, they should be encouraged; and the best means of encouragement is to grant relief or partial relief from all forms of taxation, especially death duty. To some extent, this view has been recognized by the Legislature; every one who pays income-tax knows that, to a limited degree, premiums paid by a taxpayer in respect of a policy of insurance on his life are exempt from income-tax. This principle was reflected in the enactment of s. 2 of the Death Duties Amendment Act, 1925, which provided that the proceeds of life-insurance policies to the extent of £1,000 were to be exempt from estate duty. (The Legislature had a change of heart some fourteen years later.)

The other school of thought holds that, as life-insurance policies are a valuable species of personal property, and as the deceased policyholder has subtracted from his means during his life to keep the contract in being, and as the proceeds are usually payable on his death, they are ideal subjects for reduction of his estate by assessment of death duty; and, to argue otherwise, is to favour beneficiaries of moneys coming from life-insurance policies at the expense of beneficiaries deriving from other forms of property. This school of thought appears to have influenced the Legislature to repeal the exemption of the proceeds of life-insurance policies up to £1,000, which we have mentioned; because s. 25 of the Finance Act, 1939, totally abolished that exemption. The present law, both in Great Britain and in New Zealand accords with this view. There is now no direct or express exemption of the proceeds of life-insurance policies from death duties: see *Tennant's Trustees* v. *Lord Advocate*, [1939] 1 All E.R. 672, and the note in last year's JOURNAL, p. 214, in warning against what are termed "Probate Policies," with special reference to s. 31 of the Death Duties Act, 1921.

I.—GENERAL PRINCIPLES OF EXEMPTION.

Before proceeding further, we recall a paragraph from Mr. Adams's article to which we have already referred. He said:

> Although the meshes of the net cast by the Revenue are fine, it does not catch—as *Inland Revenue Commissioners* v. *Hamilton's Trustees*, [1942] S.C. (Ct. Sess.) 426, and *Barclays Bank* v. *Attorney-General*, [1944] 2 All E.R. 208, 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.

We suggest that that article be re-read, and considered again with reference to the law as it stands on the question of death duties and their impact on the estate of a deceased policyholder.

First, as to gift duty: In New Zealand there is no ready market for life-insurance policies: probably that is the reason for the Stamp Duties Department valuing them according to their surrender value; and there appears no present likelihood of the Depart-

ment's altering its practice in this respect. But, as every lawyer, accountant, or businessman knows, the surrender value of a life-insurance policy is considerably below its real present value, since, if the premiums are kept up, the policy will realize a sum the present value of which (as ascertained by the usual actuarial tables) is appreciably in excess of the surrender value.

If a businessman has a life-insurance policy in a recognized sound insurance company, on which he has paid premiums for, say, twenty years, and he makes a gift of that policy, the gift duty is charged on the surrender value of that policy as at the date of the gift. If the surrender value is less than £500, no gift duty is payable. If the interest of the beneficiaries under the gift indefeasibly vests before the death of the donor, and he lives for three years after making the gift, then, so long as no life interests are created by the gift, no death duties will be payable in respect of the policy-moneys on the death of the donor. That is, provided that he (the donor himself) pays none of the premiums payable between the date of his gift and his death: *Barclays Bank* v. *Attorney-General* (*supra*); *Inland Revenue Commissioners* v. *Hamilton's Trustees* (*supra*).

The important thing to remember is this: that, from the date of any gift, settlement, or other disposition of a life-insurance policy, the donor or settlor must not himself pay any of the premiums to keep the policy alive. That is the principle to be deduced from those two famous victories of the taxpayer over the revenue authorities mentioned above. It is well that we should examine these judgments more closely, as their principles are capable of a variety of application in "legally escaping the grasp" of the Commissioner of Stamp Duties.

In *Barclays Bank, Ltd.* v. *Attorney-General*, [1944] 2 All E.R.R. 208, as Lord Macmillan said, stripped of details immaterial to the controversy, the facts were not complicated. The late Viscount Devonport effected two ordinary policies of insurance on his own life. He executed a family settlement in 1922; and to the trustees thereby appointed he assigned his two policies. At the same time, he transferred to his 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 Viscount Devonport to the trustees; and in 1930, by a deed of appointment, he had entirely divested himself 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.

In his speech, with which Viscount Simon, L.C., agreed, Lord Macmillan, at p. 209, said:

> Policies of life assurance do not by their nature fit very logically into the scheme of estate duty, which is a duty leviable on property passing on death. They have accordingly been specially dealt with in the legislation. By the joint operation of the Finance Act, 1894, s. 2 (1) (*c*), of the Customs and Inland Revenue Act, 1889, s. 11 (1), property passing on the death of a deceased is deemed to include:
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> > . . . money received under a policy of insurance effected by any person . . . on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.*
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> In this way the proceeds of a life policy are rendered in whole or in part liable to estate duty on the death of the assured, where the policy has been wholly or partly kept up by him for the benefit of a donee.

The contention of the Crown was that, although all the premiums on the policies had been paid by the settlement trustees out of trust income since 1922, nevertheless the policies had been throughout that period kept up by Viscount Devonport. But Lord Macmillan went on to say that the Attorney-General had expressly and, in his opinion, rightly declined to support the ground of the judgment in his favour by Wrottesley, J., who heard the case in the first instance and took the view that the trustees had paid the premiums either under contract with or as the agents of Viscount Devonport. This, His Lordship added, was a misconception of the legal character of a trustee. He continued:

> To keep up a policy is to pay the premiums thereon as they fall due, and the person who pays the premium is the person who keeps up the policy. The funds which yielded the income with which the premiums in the present case were paid were no doubt originally provided by Viscount Devonport, but when the premiums were actually paid he had no rights whatever in the income so employed. In no sense can it be said that, when the settlement trustees paid the premiums, it was Viscount Devonport who paid them: they paid them with their own trust moneys. You cannot make payments out of money with which you have already parted; you cannot keep up a policy with money which you have already given away.

Lord Wright, at p. 211, after referring to the settlement, said:

> On these dispositions the first Lord Devonport, the settlor, did not himself in the ordinary sense of the word pay the premiums necessary to keep the policies alive. The trustees paid them. I think that "keeping up" a policy according to the ordinary use of language connotes payment of the premiums which is the normal method of keeping up a policy. This involves generally periodical payments, and, though a single-premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not apparently contemplate this contingency: but, however that may be, the insertion of the words "in proportion to the premiums paid by him" is necessary to deal with the case where the deceased did not himself wholly keep up the policy but only did so partially. In that case the death duty is to fall on the deceased's estate in proportion to the premiums paid by him. The change in expression from "kept up" to "payment of premiums" is necessary to give the basis of apportionment, but at the same time it identifies "paying the premiums" with keeping up the policy. It is not necessary to speculate why this apportionment was provided for. The language of the subsection seems sufficiently plain. It supports the view that when the Act refers to keeping up the policy it means the method of paying the premiums as they fall due.

His Lordship said that the essential question was whether the first Lord Devonport could be properly said to have kept up the policies after the settlement of August 15, 1922. He was of opinion that the answer was, No. Once there was an express trust to provide for payment of the premiums fully constituted in the terms in which it was, the settlor had thenceforth nothing to do with keeping up the policies. That devolved upon the trustees. The first Lord Devonport had divested himself of his property in the fund by his voluntary assignment of it to the trustees, to hold upon the trusts declared in the deeds. These trusts included keeping up the policies by paying the premiums. But the settlor did not himself pay them. That was the duty of the trustees under the trusts, subject to which they held the fund. They did not

* This provision corresponds with s. 5 (1) (*f*) of the Death Duties Act, 1921.

pay the premiums as agents for the settlor; nor did they do so under any covenant or agreement with him, for there was nothing of the sort in the trust documents. The settlor could not revoke the trust or terminate the trustees' powers, as he would have been able to do if they had been his agents; nor could he control the way in which they executed the trust, or take steps to enforce it. He was not a beneficiary under the trust: the terms of the trust clearly excluded even any resulting trust in his favour in any contingency, however remote. The ultimate reversion, if it ever became effective, was for charitable objects. As he was not a beneficiary, he could not invoke the powers of the Court if he had found that the trustees were not duly performing the trust. The assignment of the fund to the trustees vested in them an absolute property in law, subject only to the equitable obligation, affecting their conscience, to fulfil the trust under which they held the property, an obligation enforceable only in equity at the suit of the beneficiaries. Lord Wright said that he had ventured to state these propositions because they seemed to negative the reasoning adopted in the Courts below. He concluded his speech, at p. 212, by saying:

> The phrase "keep up the policies" is no doubt an ordinary expression, but the question is whether, within the meaning of the Act, it is the settlor who has kept them up. I have given the reasons which have led me to the conclusion that it is not true to say that he did so.

The facts in *Hamilton's Trustees* v. *Lord Advocate*, [1942] S.C. (Ct. of Sess.) 426, on appeal to the Second Division, were that the deceased, twenty-four years before his death, assigned the 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.

Lord Jamieson, in his opinion, said that there was no interest which arose on account of the death of the assured. He added:

> The interest provided, and the interest accruing or arising on death, must, I think, be the same interest. Here the interest in or right to the policies passed from the deceased to his children at the date of the assignation, and no other interest arose or accrued to them on his death.

Lord Wark, in his opinion, at p. 438, said:

> It is, I think, enough to say that it seems clear from the terms of the deed that the granter retained no interest whatever in the policies or their proceeds, and could never have any interest therein in future; and that, as from the date of the deed, the interest in the policies was vested in the children. In short, the deceased made an out-and-out gift of the policies in 1912, which took immediate effect, although through the medium of a trust. During the six years which elapsed between taking out the policies and the date of the declaration of trust the deceased had paid a substantial sum in premiums, and the policies had a considerable surrender value. The trustees kept them up by borrowing, and in fact they borrowed from the deceased, granting him bills of exchange for the sums borrowed, with interest. The policies were limited payment policies. The £5,000 policy became fully paid up in 1914, and the others in 1915. The total sum borrowed was £3,881 17s. 4d. with interest of £1,331 8s., making a total of £5,213 7s. 4d., which was included as an asset in the deceased's inventory at his death. The sums payable under the policies at the death of Mr. Hamilton amounted to £25,214 8s. 6d., and duty is claimed upon the difference between the sums and the amount of the loans, namely, on £19,981 3s. 2d.

His Lordship, at pp. 440, 441, said:

> In order to succeed, the Crown must establish two things: (first) that the property sought to be charged has been provided or purchased by the deceased, either by himself alone or in concert or by arrangement with any other person; and (second) that to some extent there has been a beneficial interest arising or accruing by survivorship or otherwise on the death of the deceased. If either of these is not established, the claim fails. And it is well to keep in view the elementary principle of construction of taxing statutes that it is for the Crown to show that the subject is within the ambit of the statute and not for the subject to show that he is outside it. Having regard to what I have said as to s. 2 (1) (c), I think there is soundness in the argument for the respondents that, where you are dealing with policy moneys, it is not sufficient to bring them within the expression "purchased or provided by the deceased" that the policy was originally taken out by him, or even that certain premiums were paid by him upon it, if it has been assigned to a donee and the assured has thereafter paid no further premiums. And, in my opinion, this is true, even when the gift is made through the medium of a trust, so long as it is not one of the purposes of the trust to make payment of the premiums out of funds provided by the truster.
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> The argument for the Crown amounted to this, that the deceased had in effect provided the premiums after the date of the declaration of trust by creating a trust and empowering the trustees to borrow upon the trust property, which was of sufficient value to afford security for the further premiums required. Alternatively, it was said that the trustees were his mandataries to pay the premiums. I do not think this argument is bound in either alternative. The trustees were trustees, not for the deceased, but for the beneficiaries. They were answerable to them alone, and, when they borrowed, it was in their interest and on their behalf. They were not directed to borrow, but only empowered to do so. They might have surrendered the policies, or some of them, at any time. Accordingly, the further premiums required were paid truly by the beneficiaries entirely, and not by the deceased. . . .
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> The Crown also maintained that, even if the true view of the transaction were that the deceased had paid no premiums and had not made provision for their payment after the date of the assignation to the trustees under the deed of declaration of trust, he had nevertheless provided an interest within the meaning of s. 2 (1) (*d*) in concert or by arrangement with the trustees. I did not understand that this argument was founded upon the fact that the trustees borrowed money at interest from the deceased rather than from a stranger in order to pay the premiums. In any event, I think the Lord Ordinary supplies the answer, namely, that, if there was any concert or arrangement, it was made, not by the deceased in concert with the trustees, but by the trustees in concert with the deceased; and that is not sufficient to bring the arrangement within the section: *Attorney-General* v. *Murray*, [1904] 1 K.B. 165.

And, after discussing various judgments, at pp. 442 and 443, he continued:

> The present case appears to me to be in complete contrast to all these cases. There was here no direction to pay future premiums and no provision made for their payment. The power to borrow only resulted in this, that the trustees might find means to keep up the policies at the expense of the beneficiaries. The deceased provided nothing after the assignation of the policies. . . .
>
> Coming to the second point, I am of opinion with the Lord Ordinary that the claim of the Crown fails because it has not been shown that any beneficial interest accrued or arose on the death of the deceased to the beneficiaries under the declaration of trust.

Dealing with the question of the indefeasible vesting of the policies in the beneficiaries before the death of the insured, Lord Wark, at p. 443, said :

In the present case, the whole interest in the policies and the policy moneys passed to the beneficiaries twenty-four years before the death of the deceased. Their interest then was fully vested and, in my opinion, was neither altered nor increased by the death of the assured. The nature of the interest was the same, although the value of it increased during the lifetime of the assured. If, then, there is any distinction to be drawn between an interest arising and an interest accruing—as to which the authorities give no guidance—I am of opinion that neither of these things happened on the death of Mr. Hamilton. If no beneficial interest accrued or arose, I do not understand how the Crown case is assisted by the definition of an interest in expectancy in s. 28 of the Finance Act, 1934, or by the provisions of s. 22 (1) (j) of the Finance Act, 1894. Section 28 of the 1934 Act is not a charging section. It is, in my opinion, a provision dealing with the method of valuation of 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.

The opinion of Lord Jamieson was to the same effect.

Lord Mackay, in his opinion, at p. 446, dealing with the onus of proof in revenue cases, said :

Mr. Green, in his book on Death Duties, commences the whole discussion with this sentence : "In a dispute as to the construction of a taxing Act, it is for the Revenue to show that the case is within the Act, not for the taxpayer to show that it is outside. There is no *a priori* liability in a subject to pay any particular tax." I think that in that statement the author is well founded. Not seldom I feel that the Crown has begun with the opposite presumption, that because it claims duty upon policies (in certain given circumstances) it will fall to the lot of the subject to find means to exempt himself, and to the lot of the Court to express the exact way, the exact factor or feature, in which the claim fails. To subscribe would be simply to reverse the onus. I further put alongside the above passage the words of Viscount Haldane in *Nevill* v. *Commissioners of Inland Revenue*, [1924] A.C. 385. He refers to the general scheme of the Act, and says at p. 389 :

"That scheme is that a new duty, called estate duty, is to be levied on the principal value of the property, settled or not settled, which 'passes' on death. 'Passes' may be taken as meaning 'changes hands.' The principle is contained in s. 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all . . . These cases are technically altogether outside s. 1."

Compare also the words of Lord Tomlin in *Attorney-General* v. *Lloyds Bank, Limited*, [1935] A.C. 382 :

But if the only persons beneficially interested in the fund immediately before the death are also the only persons beneficially interested in the fund immediately after the death . . . where is any passing or shifting to be found ? In my opinion there is none.

It follows from the combination of all these passages that in a case where, as your Lordships have most amply demonstrated, there is no "passing" or "shifting" or "changing hands," either at death or at any time subsequent to the intimation of the assignation, there rests on the Crown a very high *onus demonstrandi* to prove that, nevertheless, the facts attach the subject in question as being, in Viscount Haldane's words, "to such an extent in an analogous position that it has been deemed proper in these instances to impose a similar tax."

In the concluding part of this article, we propose to apply the principles enunciated in these two important judgments to New Zealand conditions, with special reference to the relevant provisions of the Death Duties Act, 1921. Furthermore, we intend to say something about children's endowment policies, and their possible sensitiveness to payment of duty on the parent's death. And, finally, we shall make some passing reference to the insurance of the lives of officers of companies in which the company itself has an insurable interest.

SUMMARY OF RECENT JUDGMENTS.

SADD v. NEW ZEALAND CO-OPERATIVE DAIRY COMPANY, LIMITED.

COMPENSATION COURT. Auckland. 1945. November 16. 1946. March 14. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Worker engaged as Engine-driver in Butter Factory allowed to use Bunker House as Garage for his Motor-car—Worker Injured on his Day off when he was putting a front therein—Whether Accident arose "out of and in the course of the employment"—Test to be Applied—Workers' Compensation Act, 1922, s. 3.

The test of whether the accident arose "out of and in the course of the employment" of a worker within the meaning of those words under s. 3 of the Workers' Compensation Act, 1922, is this : "Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury ?" If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment.

This test, as laid down by Lord Summer in *Lancashire and Yorkshire Railway Co.* v. *Highley*, [1917] A.C. 352, 10 B.W.C.C. 241, was applied.

In the present case, on the facts, the learned Judge found that the plaintiff who owned a motor-car, was engaged as engine-driver in the butter factory of the defendant. He wanted a garage for his car, and was given permission to use the bunker-house. The accident by which the plaintiff was injured occurred on his day off, when he was putting a front therein. On a claim for compensation,

Held, That the onus was on the plaintiff to prove that the work at which he was injured was work which (either expressly or by implication) he was employed to do; that he had not discharged that onus, as it was proved that he was allowed to put the front in the bunker-house, not employed to do it, and that, accordingly, the plaintiff had not shown that the accident by which he was injured, was an accident arising out of and in the course of his employment.

Burton v. *Beauchamp and Beauchamp*, [1920] A.C. 1001 ; 13 B.W.C.C. 90, and *A. G. Moore and Co.* v. *Donnelly*, [1921] 1 A.C. 329 : 13 B.W.C.C. 424, applied.

Brown v. *East Coast Rabbit Trustees*, (1915) 17 G.L.R. 593, and *Trustees Executors and Agency Co., of New Zealand, Ltd.* v. *The King*, [1937] G.L.R. 434, distinguished.

Armstrong, Whitworth and Co., Ltd. v. *Redford*, [1920] A.C. 757, 13 B.W.C.C. 68, referred to.

Counsel : *A. L. Tompkins*, for the plaintiff ; *W. J. King*, for the defendant.

Solicitors : *Tuck and Bond*, Auckland, for the plaintiff ; *King, McCaw, and Smith*, Hamilton, for the defendant.

LESTER v. THOMAS BORTHWICK AND SONS (AUSTRALASIA), LIMITED.

COMPENSATION COURT. New Plymouth. 1945. November 22, December 7. 1946. February 13, May 21. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Cardiac Disease—Ventricular Fibrillation Coronary Insufficiency—Coronary Thrombosis—Rupture of Suprarenal Artery—Modes of Death explained and distinguished as likely to be precipitated by Effort—Workers' Compensation Act, 1922, s. 3.

Where a worker dies of a cardiac disease, there are at least three possible causes of death—namely, (*a*) ventricular fibrillation, (*b*) coronary insufficiency, and (*c*) coronary thrombosis ; and the question of a ruptured suprarenal artery may also arise.

The Court in this case, on the evidence and in view of the medical referee's report thereon, held that the deceased worker had died of coronary insufficiency, and that he would not have died as and when he did, except for the effort on his part required in the class of work he was doing.

Observations by the medical referee defining and distinguishing between these four possible modes or causes of death abovementioned.

Counsel: *R. H. Quilliam* and *J. P. Quilliam*, for the plaintiff; *Wheaton*, for the defendant.

Solicitors: *Govett, Quilliam and Hutchen*, New Plymouth, for the plaintiff; *Bamford, Brown, and Wheaton*, Auckland, for the defendant.

DEATH DUTY PAYABLE ON FOREIGN SHARES.

Three Fundamental Principles of Revenue Law Illustrated.

By E. C. Adams, LL.M.

The recent decision of the Court of Appeal, *Grear* v. *Commissioner of Stamp Duties*, [1946] N.Z.L.R. 267, (reversing the decision of the Supreme Court, [1945] N.Z.L.R. 708), illustrates three important principles of revenue law.

(*a*) *Bad practice does not make good law.*

(*b*) *If the construction of the statute is doubtful, the subject should be given the benefit of the doubt.*

(*c*) *The Court will lean against a construction of the statute which would involve double taxation.*

A good illustration of the first principle is *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A.C. 531, 546, where Lord Halsbury said:

> I am not able to assent to the view that the course pursued by the executive office of the Crown is one which under the circumstances of the case could afford any clue to the true construction of the statute.

Fairly recently the English Court of Appeal applied the same principle in a stamp duty case, *In re Robb's Contract*, [1941] 3 All E.R. 186. For years the English practice had been to refrain from stamping a certain class of instrument with an adjudication stamp; but the Court declined to be influenced by that fact, and held that the instrument should have been presented for adjudication.

A later example still is the New Zealand case, *Taupiri Coal-mines, Ltd.* v. *The King*, [1943] N.Z.L.R. 446, dealing with annual license fee payable under our Stamp Duties Act. The plaintiff company was incorporated in New Zealand, on March 3, 1899, under the Companies Act, 1882, and had carried on the business of mining and selling coal since that date. No annual license fee had at any time been paid by the company until August 29, 1941, when license duty for the year 1941 was paid "under protest, and with the reservation of all rights to dispute any legal obligation to pay such duty." Counsel for the plaintiff company submitted that the company had not, and never had been liable to pay license fees. He first relied on the ground that as the duty and the exemption in this form had been in force since the Stamp Duties Act, 1882, and was re-enacted in 1908 and 1923, the omission to demand or collect duty for more than forty years amounted to a *practice* which must be taken to have been adopted by the Legislature in its re-enactment of the provisions and as determining that the company fell within them. His Honour Mr. Justice Fair, however, rejected this submission, and held that annual license fee was payable.

In other words, the Crown is not bound by the blunders of its officials. Conversely, the subject is not bound by a bad practice of the Executive in levying too much duty, as the recent decision of our Court of Appeal shows.

In *Grear* v. *Commissioner of Stamp Duties* (*supra*), the deceased died domiciled in New Zealand, owning *inter alia* shares in companies incorporated in Australia. Where deceased dies domiciled in New Zealand, the maxim *Mobilia sequuntur personam*, applies, by virtue of s. 7 of the Death Duties Act, 1921. Section 8 (*i*) provides that shares in a company incorporated out of New Zealand shall be deemed to be property situated out of New Zealand, save in the case of shares registered in a colonial or branch register in New Zealand. The shares in question therefore were liable to death duty in New Zealand. But they were also liable to no less than *three* duties in Australia, Federal duty, duty in the State where the companies were incorporated, *and also in the State where they carried on business or owned property.* The words in italics refer to very curious and far-reaching provisions in the death duty law of Queensland and Western Australia: in those States estate and succession duties are levied on shares in companies which are not even incorporated in those States, but which carry on business or own land there.

Now, it would be a distinct hardship if death duty in respect of the same property had to be paid in two or more countries. Consequently s. 32 (1) of the Death Duties Act, 1921, provides that there shall be deducted from the death duty payable in respect of any property situated out of New Zealand at the death of deceased the amount of any duty which by reason of his death is payable in respect of that property in the country in which it is situated at his death. Now the Death Duties Act, 1909 (which came into force on January 1, 1910), contained a similar provision, and I think that ever since that date the Stamp Duties Department had held that the section did not apply to the special death duties above explained which are payable in Queensland and Western Australia, even when the companies are not incorporated in those States. Successive Commissioners have held that the share are not actually situated in Queensland or Western Australia, but in the respective States where they were incorporated. This was the view adopted in the Court of first instance by His Honour Mr. Justice Johnston, who gave judgment in favour of the Crown.

The Court of Appeal, however, thought that too much emphasis had been placed on the local situation of the shares. The crucial word which needed interpretation in the section was the word *country.* Such shares are situated in Australia of which Queensland and Western Australia form part, and therefore in a broad sense these special duties are payable in the

country in which they are situated, and therefore are entitled to the allowance authorized by s. 32. The broad liberal interpretation should be adopted, because s. 32 was obviously designed to prevent double taxation. If there were any doubt about the meaning of the word *country* in the section, then the subject was entitled to the benefit of that doubt.

Further cases may be cited in support of our second principle—*viz., If the construction of the statute is doubtful, the subject should be given the benefit of the doubt.*

Hennell v. *Inland Revenue Commissioners*, [1933] 1 K.B. 415, and *Commercial Union Assurance Co., Ltd.* v. *Inland Revenue Commissioners*, [1937] 4 All E.R. 159, are two English stamp-duty cases where this principle was applied. His Honour Mr. Justice Smith also applied it in the New Zealand gift duty case, *McGrath* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 950. The over-taxed but courageous taxpayer, who feels like taking the Crown to Court, may have his courage fortified by these cases: and see, also, *31 Halsbury's Laws of England*, 2nd Ed., p. 540, para. 710.

The same principle applies to criminal or penal statutes: *R.* v. *Chapman*, (1931) 23 Cr. App. R. 63, a decision of the English Court of Criminal Appeal.

Finally, we may cite two cases in support of our third proposition—*viz., The Court will lean against a construction of the statute which would involve double taxation.*

In the stamp duty case, *Boyle* v. *Minister of Stamps*, [1918] N.Z.L.R. 859, 862, Sim, J., said:

> With regard to the other claim, the answer is that duty is payable on the transfer of the mortgages as on a conveyance on sale of the shares of Edgar Studholme and Harold Studholme in these mortgages, and that the Minister is not entitled to collect duty on them under some other head as well.

The other case involves death duty, *Public Trustee* v. *Commissioner of Stamp Duties*, [1936] N.Z.L.R. 740. At pp. 741, 742, Reed, A.C.J., said:

> This section [s. 60 (1) of the Death Duties Act, 1921] must be read with s. 5 (1), which specifies what property is subject to estate duty. As relevant to the question involved in this case the following properties are liable: (*a*) Property beneficially owned by the deceased at his death; (*b*) property comprised in any gift made by deceased within three years before his death; and (*c*) property comprised in any gift made by the deceased unless *bona fide* possession and enjoyment has been assumed by the beneficiary not less than three years before the death of the deceased, and has been thenceforth retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise. As I read this section, if a specific property is beneficially owned by a deceased at his death, the same property cannot be liable under either (*b*) or (*c*); it cannot be beneficially owned and at the same time be the property of another person. Even though a gift does not escape death duty through its falling within either (*b*) or (*c*), that does not bring it within (*a*) as being beneficially owned by the deceased.

In other words, property liable to death duty on the death of a person as a part of his free or transmissible estate cannot also be liable as forming portion of his notional estate under s. 5 (1) (*b*) to (*j*) of the Death Duties Act, 1921. This may have great practical importance in considering the application of s. 49 of the Death Duties Act, 1921 (that bugbear of a section dealing with gift duty), to death duty. I have endeavoured to explain this at p. 77 of the cumulative *Supplement No. 2* to my book on the *Law of Death and Gift Duties in New Zealand.*

COURT DOCUMENTS.

The Right of Search.

In respect of searches of Court documents, three positions seem to obtain:

(*a*) Where there is express provision for search:

(*b*) Where the right to search is a qualified one—*i.e.*, subject to the discretion of the official in whose custody the records are.

(*c*) Where the right of search is expressly forbidden.

In *Steele* v. *Williams*, (1853) 22 L.J. Ex. 225, the material facts so far as the present inquiry is concerned were that the plaintiff applied to the defendant, a parish clerk, who kept the parish registers under the direction of the rector, for permission to search them. He told the defendant he did not want certificates, but only to make extracts, and was informed that the charge must be the same whether he made extracts or had certificates. He accordingly searched the registers and made extracts. It was held on this point that the plaintiff was entitled to take minutes in the course of his search but not to occupy an unreasonable time for that purpose, not to have the registers in his hands, it being the duty of the clerk to superintend the search, and to keep a control over the registers. In the course of the argument Parke, B., observed:

> According to the strict letter of the law, the defendant was only bound to hold open the book to enable the plaintiff's clerk to look through it. He might keep the book in his own custody, holding it open for the party to see the contents of it. The parish clerk was not bound to wait an unreasonable time for a person to make a search and to take extracts from the book.

Then in giving his judgment the learned Baron said:

> The plaintiff's clerk went to the defendant for the purpose of making a search, and if he had been able to make a minute of the extracts he could not have been legally prevented. He would not indeed be entitled to remain an unreasonable time looking at the registers, and perhaps he would not be entitled in strictness to have the book in his hand for that purpose, it being probably the duty of the parish clerk to superintend the search, and keep a control over the book. If a party requires a copy of any entry in the book, he is to pay the regular fee for it. But it was illegal for the defendant to call upon the plaintiff's clerk to pay 3s. 6d. for the taking of each extract.

That case was followed by McCardie, J., in *Best and Best* v. *McKinley*, [1920] P. 75; where it was held that the Births and Deaths Registration Act, 1837, s. 35, give the public an absolute right to search the register at reasonable times and that such right cannot be

taken away by the power given to the Registrar-General to make regulations as to search by s. 44 of the Act of 1874. In the course of his judgment the learned Judge says:

> By s. 35 . . . it is expressly enacted that persons keeping any register books shall at all reasonable times allow search of such books and give certified copies on payment of fees. These are clear, wide and emphatic directions and the right thereby given to the public was recognized in *Steele* v. *Williams* though it was said to be the duty of the parish clerk (the official in that case) to superintend the search and keep control of the books. Subject to proper control and the precautions suggested by common sense, inspection was to be allowed.

Then referring to the provisions of s. 44 of the Act of 1874, he proceeds:

> It may possibly give a power to frame appropriate regulations controlling the procedure, but the power to regulate the exercise of a right does not entitle an official on whom it is conferred to destroy the right which he purports to regulate. That could only be effected by a statutory provision as clear and forcible as that which conferred the right.

In both the foregoing cases there was an absolute right of search. Accordingly on complying with the prescribed conditions the person desiring to make the search was entitled to do so. And it was clearly improper to deprive him of or to interfere with his right of search.

In *In re The Evening Star, Campbell* v. *Kennedy*, (1884) N.Z.L.R. 3 S.C. 8, 11, 12, Williams, J., says:

> The contention that the statement of claim when filed in Court is a public document, in the sense that it is open to any one to publish it, is practically disposed of by the Vice-Chancellor in *In re Cheltenham and Swansea Railway Carriage and Wagon Company* (L.R. 8 Eq. 580). The statement of claim in an action is filed in the Court . . . for the information of the Court and of the parties. There is no law or rule that I know of which gives all the world a right to peruse it. No objection is, it is true, made to any one perusing statements of claim on payment of the prescribed fee; but if the Registrar had reason to believe that the perusal was asked for by some person who was an entire stranger to the action, for the purpose of publishing the statement to the world it would be his right, if not his duty to refuse to allow the perusal. It is not until the case is heard that the proceedings become completely public property.

In respect of this case the following points must be noted:—

(*a*) In respect of semi-public documents—*e.g.*, statements of claim before hearing—a Registrar has a discretion as to whether he will or will not allow a search;

(*b*) As to complete public documents—*e.g.*, documents relating to a case which has been heard.

It is indicated or suggested that there is no room for discretion the matter having become "completely public property." Therefore, one concludes that at some stage there may be only a qualified right to search, and this becomes an absolute one at a later stage. So far, too, as the Supreme Court Code is concerned; there are no express provisions relating to searches in fact the only reference thereto is in the scale of fees. In making the remarks he did, one is forced to the conclusion that Williams, J., was enunciating the general principles as to right of search. It is necessary to add, in order to fully appreciate this decision, that the public is concerned with the administration of justice, and has a right except in unusual circumstances of being present at the hearing of an action: see, for example, *McPherson* v. *McPherson*, [1936] A.C. 177.

There are other matters, however, that are not so much the concern of the public as actions are, but which would nevertheless come within the category of semi-public documents. In respect of these no right of search is expressly reserved, and yet it seems that they would not come within the class of documents, inspection of which would not be forbidden on the grounds of public policy. Therefore it would appear to follow that from the observation made by Mr. Justice Williams in the *Evening Star* case (*supra*), that such records are open to inspection at the discretion of the official in whose custody they are. Such for example would be adoption records. Were this not so, then grave difficulties could arise. It may, for example, be necessary in certain cases to prove the adoption at a place distant from the office of the Court in which the order was made. A certified copy is evidence: s. 44 of the Evidence Act, 1908; but first of all it would be necessary to search the records to ascertain the existence of the order. But, before allowing a search, the Clerk would, according to the said decision, need to be satisfied of the *bona fides* of the enquirer. In this connection it is interesting to refer to and contrast subss. (6) and (7) of the Adoption of Children Act, 1926 (Gt. Brit.). The former requires the Registrar-General to keep an index of the Adopted Children Register and every person is entitled to search the index and to have a certified copy of any entry in the register. But, in respect of the "other registers and books" which he is required to keep under the following subsections, there is the express enactment that such records shall not be open to inspection or search, nor is any copy or extract therefrom to be furnished otherwise than pursuant to an order of the Court.

In the Central Office Practice Rules, R. 16 (3), relating to searches and office copies, provided that "the Head Clerk will consider the propriety of allowing such search or inspection": *1927 Annual Practice*, p. 2477. This rule seems to have been repealed: but it does indicate the proper attitude to adopt where there is no absolute right to search or inspection and where there is no express prohibition of search or inspection.

Before concluding, there is one other point that should be mentioned because of its relevancy, and that is one indicated in the *Evening Star* case. It is that a distinction is drawn between parties to a case, and outsiders. In the case of a qualified right to search, the latter must first of all, it appears, satisfy the official concerned of his *bona fides*. If unable to do this, then search would be denied them. Again, even where there is an absolute right to search, the cases show that that right should be exercised under proper control; *a fortiori* where the right is only a qualified one.

In the case then of an adoption, the inquiries as to the *bona fides* of the person desiring the search should be of a more or less inquisitorial character; and, having regard to the necessity for the exercise of proper control and adequate safeguards (lest the search be abused), the search should be made by the official. As regards outside persons—*i.e.*, persons not directly concerned with or affected by the adoption—it is difficult to conceive any circumstances when a search should be permitted them. If outsiders inquire about an adoption, it would only be to satisfy curiosity.

Where there is a qualified right of search, the person desiring the search must first of all satisfy the particular official of his *bona fides*, and the search should be made by the official.

ACCUSEDS' STATEMENTS TO POLICE.

Their Admissibility.

A practitioner acting for a man accused of a crime, who has made to the Police a statement of a most incriminating character, is sometimes confronted with the question: Is it proper for me to object at the trial to the admissibility of the statement? This matter of the admissibility of statements made to the Police by accused persons has never been more comprehensively dealt with than by Ex-Superintendent of Scotland Yard, in his work, *Savage of Scotland Yard.* In his chapter on this particular point he quotes an address to Police officers delivered by Lord Brampton (the famous Sir Henry Hawkins), and also the Rules drawn up by the Judges of the High Court. Ex-Superintendent Savage, at pp. 228, *et seq.*, says:

> I wish every Police officer would understand that he has a perfect right to ask any question of any person, whether suspect or not, from whom he believes he can obtain information bearing on the commission of a crime . . . He should never be deterred from asking questions simply because he thinks the person questioned might incriminate himself.
>
> During my service I always bore in mind the words of Mr. Justice Hawkins (the late Lord Brampton) in an address he delivered to Police officers many years ago. Mr. Justice Hawkins was one of the greatest criminal Judges that ever sat on the Bench, and as I kept a copy of his speech, I make no apology for quoting the advice he gave.
>
> "It is your duty," he said, "to discover the criminal if you can, and to do this you must make inquiries, and if in the course of the inquiries you should chance to interrogate and receive answers from a man who turns out to be the criminal himself, and who inculpates himself by these answers, they are nevertheless admissible in evidence.
>
> "When, however, a constable has a warrant to arrest or is about to arrest a person on his own authority, or has a person in custody for a crime, it is wrong to question such a person touching the crime of which he is accused. Neither Judge or Magistrate, nor juryman, can interrogate an accused person unless he tenders himself as a witness, or require him to answer questions tending to incriminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is to arrest and detain him in safe custody. On arresting a man a constable ought simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases.
>
> "For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong. It is well also that it should be generally known that if a statement made by an accused person is made under, or in consequence of, any promise or threat, even though it amounts to an absolute confession, it cannot be used against the person making it.
>
> "There is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence; nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement without first cautioning him that he is not bound to say anything tending to incriminate himself. Perhaps the best maxim for a constable to bear in mind with respect to an accused person is: Keep your eyes and your ears open and your mouth shut."

The Ex-Superintendent then proceeds as follows:

> Nothing could be more clearly explanatory of a Police officer's powers and duty than these words of the famous Judge, but curiously enough, there still remained in the minds of some Police officers and even of lawyers, a misconception of his meaning. Consequently . . . the Judges of the High Court, at the request of the Home Secretary, drew up definite rules for the guidance of the Police. The rules, which are nine in number, are as follows:—
>
> "(1) When a Police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
>
> "(2) Whenever a Police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions as the case may be.
>
> "(3) Persons in custody should not be questioned without the usual caution being first administered.
>
> "(4) If the prisoner wishes to volunteer any statement, the usual caution should be administered.
>
> "(5) The caution to be administered to a prisoner when he is formally charged, should therefore be in the following words: 'Do you wish to say anything in answer to the charge? You are not obliged to say anything, but whatever you say will be taken down in writing and given in evidence.'
>
> "(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.
>
> "(7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given the day of the week and day of the month which do not agree, or has not made it clear to what individual or to what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.
>
> "(8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged the Police should not read these statements to the other persons charged, but each of such persons should be furnished by the Police with a copy of such statements, and nothing should be said or done by the Police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.
>
> "(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."

The author adds:

> Whenever a crime is committed, the Police may find it necessary to interview and take statements from scores of people, any one of whom might turn out to be the actual culprit. If an arrest follows, it is obvious that any statement already made is admissible as evidence, whether it be of an incriminating nature or not, and whether a caution has or has not been administered.

And, commenting on the Judges' Rules, the author observes:

> As a matter of fact, the Judges' Rules not only adequately provide for the fair treatment of guilty persons, but are a strong safeguard for innocent people who might be wrongly suspected or accused. It is within my own knowledge that the innocence of many suspects has been established as the result of persistent Police questioning.

The answer to the question posed by the accused's solicitor is, therefore, as follows: If the statement was obtained at a time when the Police officer had not made up his mind to charge the accused with the crime, the statement is admissible; but if, on the other hand, the officer had determined to charge the accused with

e crime, and obtained the statement without first arning him, then the statement can be objected to.

It may be that the statement was made in similar rcumstances to those obtaining in the Australian ase of *R.* v. *Potter*, [1944] Q.W.N. 6, 38 Q.J.P.R. 148. here, an officer of Police without warning the prisoner aterrogated him on a written confession which the risoner had made after the customary warning, to nother officer, the trial Judge, being of the opinion that there was no obligation on the second officer to warn the prisoner, admitted evidence of the further interrogation, and the prisoner's answers thereto.

If, however, the statement was made while the accused was in an exhausted condition, such statement would not be admissible; as the Court could not be satisfied that the statement was voluntarily made: *R.* v. *Burnett*, [1944] V.L.R. 115, A.L.R. 247.

RETIREMENT OF MR. H. T. GILLIES.

Thirty-six Years Crown Solicitor at Hamilton.

On May 16, at the Supreme Court, Hamilton, there was a ıll attendance of the practitioners of the city and district to ay farewell to Mr. H. T. Gillies, in his capacity of Crown olicitor for the Hamilton Judicial District, from which office e was retiring after an unbroken service of thirty-six years. On the Bench was His Honour Mr. Justice Finlay, who had ractised for many years in the District, and who was then residing over the May Session at Hamilton.

THE BAR'S TRIBUTES.

Mr. J. F. Strang, addressing His Honour, said that the Bar f the Hamilton District desired to attract His Honour's attenion to the retirement of their senior member, Mr. Gillies. His ong association with the work of the Courts in the Hamilton udicial District seemed to them to call for some special reference. The Hamilton Judicial District was first constituted in or about he year 1910, and the appointment of Mr. Gillies as Crown Solicitor for that district synchronized with the constitution of the district itself. The life history of the District, therefore, had extended over a period of thirty-six years and had comprised approximately one hundred and fifty Sessions. The irst of those was presided over by the late Mr. Justice Edwards, and, at that Session, Mr. Gillies first appeared in his role of Crown Prosecutor. Such had been the excellence of his health hat he has been able to attend, and had in fact attended, every subsequent Session without a single omission.

The speaker continued: "In partnership association with other practitioners, Mr. Gillies has throughout all these years conducted an extensive general practice; but it is principally n his capacity as Crown Prosecutor that we have come into contact with him, and, generally speaking, we have been ranged on the opposite side to him. There is one outstanding feature of his work concerning which we are in complete and emphatic unanimity, and that is the absolute fairness which he has nvariably shown towards the accused and defending counsel in the conduct of his prosecutions.

"The people of this country are accustomed to rely, and to rely with confidence, on the impartial administration of justice. One of the contributing factors to this happy result is the fairness shown by prosecuting counsel. It is not less than true to say that this is a most important element in the duty of prosecuting counsel. The principle is not merely one of practice: it is one of law also and is aptly expressed in *Halsbury's Laws of England* in these words: 'Prosecuting Counsel must not press for a conviction. They should regard themselves as ministers of justice assisting in its administration rather than as advocates.'

"We are all agreed that there has never, on any occasion, been an infringement of that rule by our departing friend. Now, Sir, I wish to say that we all regret his retirement. We feel that now that all our battles with him are over, and such differences as we have had are finally laid to rest, we would wish to convey to him through Your Honour our most sincere expressions of cordial goodwill, and that goes for every member practising at the Bar.

"It is something, I think, in the nature of a happy coincidence that these remarks are being addressed to Your Honour, because Your Honour first commenced the practice of the profession in this District. You, too, have been in close association with the District. You, personally, know Mr. Gillies as well as most of us, and I am very happy to be able to address these observations to Your Honour."

In conclusion, Mr. Strang added that the Court gathering had been convened at the instance of the Law Society Council, and of its President, Mr. Tanner. It is intended that practitioners shall later on hold a social function at which Mr. Gillies will be an invited guest, and at which they will be able to express themselves with more freedom and abandon than would be appropriate to this present occasion.

Mr. C. L. MacDiarmid said that he would like to associate himself with the remarks so eloquently made by his learned friend, Mr. Strang.

"As the oldest practitioner in this town and District, and having known Mr. Gillies from the time of his arrival in Hamilton, shortly after my own arrival, I have come to have a very real respect and, indeed, affection for our friend," Mr. MacDiarmid proceeded. "It is with some degree of emotion that one takes part in an occasion such as this. I would just like to add that Mr. Gillies bears a name very highly respected in this Dominion and indeed in the Empire. His family has been intimately connected with the professions of the Church, Law, and Medicine; and in those professions the name is an honoured one.

"Mr. Gillies himself has resided for many years in Hamilton and has made many friends, and we, the members of the Bar, wish to express on this occasion our very best wishes for his future happiness and for that of his family.

MR. JUSTICE FINLAY'S TRIBUTE.

Mr. Justice Finlay, addressing the members of the Bar, said:

"This is at once a very great pleasure to join in paying a tribute to Mr. Gillies, and yet a pleasure tinged with pain. It is a pleasing and gracious thing to say kindly things of one's friends, but it is painful when the occasion is the breaking of an association of a lifetime, and the association of all of us with Mr. Gillies has extended over a lifetime.

"Of those present only Mr. MacDiarmid and I remember the constitution of the judicial system of the district before the Supreme Court was established. There was a District Court which functioned in a desultory way for some years, and, in that Court, the Hon. J. A. Tole was the Crown Prosecutor. Then, such was the progress of the district, that a Registry of the Supreme Court was established here; and, contemporaneously with that established, Mr. Gillies was appointed Crown Solicitor. In a sense, therefore, his appointment was symbolic of the progress of the district— a progress which happily, despite wars and depressions, is still maintained.

"It would be invidious and unfitting upon such an occasion as this to embark on an analysis of the qualities of Mr. Gillies, but at least we can in broad outline sketch in the outstanding characteristics of his work. They are integrity and fairness. They are great qualities in a man who has the responsible duty of maintaining the rule of law in the community and of securing the safety of life and property. They are qualities which Mr. Gillies learned in that great school of legal learning whence the law of half the world has emanated: a school dedicated to the establishment of personal liberty. In a truly splendid fashion, Mr. Gillies has always exhibited and maintained these qualities. Of that, Mr. Strang's tribute leaves no doubt.

"However, Gentlemen, the time has come when Mr. Gillies feels he must hand the torch on; and, whilst we pay this tribute of affection, it is with regret and with some feeling of pain that we part company with him as Crown Solicitor. One can only hope that, as the shadow of his life lengthens and deepens, and as the future loses its interest and recollection grows dominant, he may look back on this and on this occasion with feeling of pride and satisfaction, remembering the feelings of affection and respect which it betokens.

"So, Gentlemen, whilst I am glad to join you in paying this last tribute to the outgoing Crown Solicitor, it is with the happy feeling that, although the office may fall vacant, the man, still goes on. And so I trust that he and his will have long life, and much happiness in it."

LAND AND INCOME TAX PRACTICE.

Farmers' Live-stock Adjustments.—This note gives a final warning that unless written application is made to the Tax Department before June 30, 1946, it will not be possible to obtain any form of relief in terms of s. 17 of the Land and Income Tax Amendment Act, 1945, in respect of adjustments to live-stock values. It is not necessary for the taxpayer or his agent to furnish all the required details in support of the formal application—but it is important to note that the section referred to does not give to the Commissioner any power to grant relief under the section unless application is made before June 30, 1946.

An explanatory pamphlet (see *ante*, p. 122) has been issued by the Commissioner to all farmers, through station agents and other agencies with which farmers associate. This legislation appears to be a final chance to fix reasonable values for live-stock, and at the same time qualify for relief from taxation which would otherwise be assessed upon a large discrepancy between low standard values and relatively high market values on the sale or other disposition of the live-stock. Wide publicity to this matter has been given through the Press and the Departmental pamphlet, and there should be little room for difficulty in the future if farmers and those who prepare farmers' returns take advantage of the full explanations which have been made. Whilst the subject is under consideration, practitioners will notice the necessity of maintaining standard values at a reasonable level in future years. Any amended value approved by the Department should not be allowed to stand indefinitely, but should be reviewed from time to time in the light of the reasons now being publicized by the Department. Furthermore, the composition of the live-stock on any farm should be watched, and if a material or permanent alteration is made it may be desirable to re-classify the values of stock for tax purposes, and seek the approval of the Department to any alteration. For example, a sheepfarmer may have shown in his returns a standard value of £1 per head for 3,000 sheep—(actually comprised of 1,000 lambs worth 10s., 1,000 hoggets at £1 and 1,000 ewes at 30s., all of those values being fair and reasonable values). Due to a change in farming policy the same farmer may in a later year have 3,000 sheep comprised of 1,000 hoggets and 2,000 ewes, each class being worth the same per head as the original stock. The average value over the whole flock has increased from £1 to £1 6s. 8d., and the "standard" value of £1 per head would not be a sufficient standard because of the change in composition. Had the 3,000 sheep been originally classified into the three categories mentioned there would not be any necessity to consider an alteration in the overall standard of £1 per head. Thus, farmers who for any reason alter the composition of live-stock should consider whether the alteration is affecting the adequacy of live-stock standard values.

It is suggested that the subject of standard values for live-stock in taxation returns should be fully understood by those practitioners who act for trustees in farming estates, particularly on the death of a farmer taxpayer. An appreciable saving in taxation could be obtained from a proper appreciation of the effect of having the T[illegible] Department's approval of a reasonable set of standard va[illegible] being adopted for the balance date at the end of the first [illegible]ing period succeeding the date of death.

Interest on Income Tax paid in advance.—Considerable publicity is being given in the Press to the scheme for payment of tax in advance. The scheme is simplicity itself, and there is the advantage of payment concessions equivalent to interest at the rate of $1\frac{1}{2}$ per cent. per annum. It has recently been stated that the same rate of interest ($1\frac{1}{2}$ per cent. p.a.) will be allowed in respect of family benefits assigned to the Commissioner of Taxes. It is not clear from family benefit application forms whether any interest would be allowed on such assignments, and the official announcement is reassuring. Also, as from March 6, 1946, interest will be allowed on income-tax payments made in advance by civil servants, by way of deductions from salary.

Last Day for Payment of Instalments of Social and National Security Charge.—The last day for payment of the first instalment of the combined charge on income other than salary or wages derived during the year ended March 31, 1946, was Saturday, June 1, 1946. An interesting point arises, because branches of the Department are closed on Saturdays, and payment over the counter at Branches could not be made on the "last day."

The Acts Interpretation Act, 1924, provides at s. 25 (*a*): "If the time limited by any Act for any proceeding, or the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to and such thing may be done on the day next following which is not a holiday; and all further changes of time rendered necessary by any such alteration may also lawfully be made."

Section 4 of the same Act defines the word "holiday":—"'Holiday' includes Sundays, Christmas Day, New Year's Day, Good Friday, and any day declared by any Act to be a public holiday, or proclaimed by the Governor-General as set apart for a public fast or thanksgiving or as a public holiday."

Saturday is not a holiday within the meaning of the Acts Interpretation Act, because it is not declared by any Act to be a public holiday, nor has it been proclaimed by the Governor-General as a public holiday.

Thus, if the last day falls on a Saturday the legislation does not enable payment of an instalment to be made without penalty on the next day which is not a holiday. It appears that if the last day falls on a Sunday then payment could be made on Monday, without penalty charge.

Another point regarding penalties is that in calculating the income-tax attributable to excess profits, in an excess profits tax assessment, any 5 per cent. additional tax on account of late payment must be eliminated.

Free of Tax Government Stock Issued in place of Bank of New Zealand Shares.—Interest on the above class of stock is free of income-tax, social and national security tax, by virtue of s. 5 (1) (*c*) of the Bank of New Zealand Act, 1945. The first payment of interest on this class of stock was due on May 15, 1946.

Trustees' Income: Exemption up to £50.—It is emphasized that the exemption referred to in s. 9 of the Land and Income Tax Amendment Act, 1945, refers to income-tax on income assessed to trustees under s. 102 (*b*) of the principal Act. The exemption does *not* extend to income assessed under s. 102 (*a*), and does *not* extend to social and national security tax.

The word "income" used in s. 9 refers to assessable income only. Thus, in the case of an assessment of income under s. 102 (*b*) comprized of assessable income £53 and non-assessable income £75 the tax payable is £3 (being the excess over £50—*vide* s. 9) and not the tax on £128 less the tax on £75.

Government Services Superannuation: Refunds of Contributions.—Under the legislation relative to the superannuation funds of State employees the widow of a deceased contributor may elect to accept a refund of contributions made by her husband. Section 14 of the Finance Act (No. 2), 1940, provides that a lump sum refund of contributions is payable to the widow, and not to the estate of the deceased; except where the contributor dies, leaving no widow, in which case the refund of contributions is made to the personal representatives of the deceased as part of his estate.

Where a deceased contributor to a State superannuation fund owed income-tax, the refund of contributions to the widow is not an estate asset and the funds are not available for payment of the outstanding tax.

Special Exemptions, 1946 Assessments.—There still appears to be some doubt concerning the special exemptions which will be allowed against income derived during the year ended March 31, 1946. The personal exemption now remains at £200. The exemption to a married taxpayer for a dependent wife (or husband) will be £100, reduced by £2 for every complete £1 of the wife's (or husband's) income in excess of £50, and the maximum rebate in tax as a result of allowing the exemption is £26. The maximum housekeeper exemption will be £100, with a maximum tax rebate of £26. The maximum exemption under the dependent relative heading is still £50, but there is a limit of £26 in the rebate in tax payable consequent on the exemption being allowed.

The usual exemption of £50 will be allowed for children under eighteen years of age in assessments of income-tax on income derived during the year ended March 31, 1946. Section 3 of the Land and Income Tax Amendment Act, 1945, abolished the special exemption for children, but the Rt. Hon. Minister of Finance has since indicated that legislative authority for restoring the exemption, to apply for current year's assessments only, will be introduced during the next session of Parliament. It is probable that a limit of rebate in tax, £26, will be included. The 1946 income-tax return forms ask for the details regarding children so that the Department will be in a position to allow an exemption.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Queues.—Another illustration of an inconvenience which must be suffered without legal remedy is afforded by the facts in *Dwyer* v. *Mansfield*, (1946) 62 T.L.R. 171, in which the defendant was a greengrocer and adjoining businesses complained of queues which formed outside his shop. They complained that he had wrongfully caused or permitted these queues to form, and in consequence access to their premises had been rendered impossible or difficult to members of the public who were likely to be customers and that, in consequence, damage had been suffered. Atkinson, J., considered that queues had become a very common sight and it was better that there should be queues than unruly crowds of people, each trying to get in first. Holding that those in question did not prevent any one entering the plaintiffs' shops if they desired to do so, he added that it would be difficult to find that any nuisance had been established: moreover, even if it had, plaintiffs still had to prove that it was due to something for which the defendant who had a license from the Ministry of Food to sell fruit and vegetables and who was bound to sell while his supply lasted was to blame. He referred to *Harper* v. *Haden and Sons, Ltd.*, [1933] Ch. 298, in which Romer, L.J., observes that the law relating to the user of the highways is in truth the law of give and take—those who use them must, in so doing, have reasonable regard to the convenience and the comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people.

Appeal from Sentence.—In *R.* v. *McBain*, (1946) 62 T.L.R. 232, the Lord Chief Justice recently stated that he wanted to make it perfectly clear that hitherto the Court of Criminal Appeal, when of the opinion that the sentence imposed had not been severe enough, had generally warned the applicant that if he persisted in his appeal the Court might increase his sentence. He then proceeded :

> The Court will no longer take that course. The Criminal Appeal Act, 1907, does not require that course to be taken. It provides that, where a prisoner applies and obtains leave to appeal against his sentence, this Court shall pass such sentence as it thinks ought to have been passed, whether greater or less. The time has certainly come, in the state of crime in this country, when sentences have to be severe, and if the Court thinks it right to do so it will not shrink from increasing sentences where the prisoner appeals.

These observations have application to the function of the Court of Criminal Appeal in this Dominion. From the number of applications that are read by the Registrar at the opening of each sessions of the Court of Appeal, it would seem that prisoners consider that an appeal is an essential ingredient in the serving of the sentence. Many who do appeal have not the slightest justification for so doing. The occasional increase in the sentence, where the facts justify this course, would serve as a powerful reminder that resort to the Court of Appeal against sentence should not be lightly made.

A Win on Points.—An issue or two ago, Scriblex made passing reference to the habit of Judges of interrupting counsel's argument, but he now hastens to add that it is not always counsel who scores in the mental interchanges that ensue. Lord Justice Bowen like to put posers from the Bench, and on one occasion did so to Sir Horace Davey, who was an old friend. "I am exceedingly sorry, my Lord," said Davey, "but the constitution of my mind is such that I cannot see the point." "It is not for me, Sir Horace," replied Bowen, "to condole with you on the constitution of your mind. This point, however, must be discussed by some one who is not thus prevented."

Master of the Rolls.—For a long period the Court of Chancery remained under the sole guidance of the Lord Chancellor and the Master of the Rolls who were its only Judges. The former was entrusted with the records of that Court. As his office gradually became more judicial, he was given precedence next after the Chief Justice of the King's Bench and, as his title implies, he is now head of the Record Office. One matter that he might be said to have had in common with a Judge of our Supreme Court Bench is that prior to Sir George Jessel's time, the proper mode of referring to, and addressing him, was "His Honour" or "Your Honour." It is related that at the Robin Hood Debating Society which met near Temple Bar and which was attended by many afterwards famous in law or politics, Burke on being introduced by his fellow-countryman, Samuel Derrick, was struck by the eloquence and imposing appearance of the President, a wealthy London baker. He remarked that he seemed to be cut out for a Lord Chancellor. "No, no," whispered Derrick, "only for a Master of the Rolls."

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

FAMOUS SOLDIER ENTERTAINED.

Canterbury Law Society Welcomes General Kippenberger.

More than one hundred members of the Canterbury Law Society attended a luncheon held on June 6, in honour of Major-General H. K. Kippenberger, C.B., C.B.E., D.S.O. and Bar, E.D., a member of the Society, who practised at Rangiora.

The President, Mr. L. D. Cotterill, welcomed back the returned servicemen in the profession who had resumed practice since the Society's Victory Dinner, in August last. He then paid a tribute to Major-General Kippenberger as a profound student of military affairs. The President referred to the General's distaste and horror of war, and to his firm conviction after 1918 that another war was coming. After alluding to the guest's distinguished public services, the President congratulated him on his appointment as War Historian, in which capacity the profession wished him every success.

In the course of his reply, General Kippenberger explained that, whilst the War had not increased his legal experience, he had thereby got to know a good many lawyers. At one stage all three Infantry Brigadiers in 2 N.Z.E.F. were lawyers—*viz.*, Barrowclough, Inglis, and himself. As one British Brigadier had remarked, " What a predicament ! "

At Minqar Qaim, Major-General Inglis had rendered a service to the Allied cause that could not ever be over-estimated. The Division was surrounded, General Freyberg was wounded, and, at that stage, General Inglis took command and extricated the Division. Inglis had earned high praise for his justice and ability in Germany, where he was putting a very confused situation into order.

Turning to Barrowclough, General Kippenberger said that, apart from the Pacific zone, his greatest service was at Sidi Rezegh, where, despite its own severe losses, the 6th Brigade practically destroyed the infantry of the Afrika Korps.

The General also referred to the desirability of having lawyers as staff officers. He mentioned Brian Bassett (Christchurch) whose gallantry and skill would have earned him a great career had he not been killed so early. He also paid a generous tribute to Denis Blundell (Wellington).

The General recalled a luncheon which he had attended at Middle Temple when his immediate neighbours were Lord Wright, Lord Porter, Lord Merriman, and Mr. Justice Singleton. This function with its delightful table-talk lasted urbanely until 3.30 p.m.

The General recalled a conversation with a Canadian General who was a lawyer in private life. The Canadian had asked General Kippenberger what he proposed to do after the War, and added that he himself had been made a Judge. In urging the General to follow his example, the Canadian said: " You do not have to know anything about law for that post, as there is always some one to tell you what it is."

Major-General Kippenberger met a London solicitor, who said he now had ten practising solicitors back on his staff after discharge from Army service. In all, he had a staff of forty-five solicitors and one hundred and fifty clerks. His clientele included: " Two kings at present in jobs." The solicitor's net income was £66,750 !

While in Paris, presiding at a New Zealand Court Martial of an Ex-P.O.W. who was charged with murder, the General had a talk with the Court Interpreter, a charming young Frenchman of twenty-five years. The latter had just come from the trial of his ex-fiancée, who had betrayed him to the Germans when he was serving with the underground movement. He had escaped from a concentration camp, and had his ex-fiancée brought to trial; and now the girl had been sentenced to twenty years' rigorous imprisonment. The Interpreter's manifest joy at the sentence was an indication of the bitterness existing in European communities.

In conclusion, the General explained in outline the wide scope of his duties as War Historian, which would last five to seven years, and mentioned the different ways in which the New Zealanders' share in the recent War could be recorded.

Major-General Kippenberger expressed regret at severing his connection with the law and spoke of the work before him. As he saw it, he said, there were two aspects of the task—military and civilian—and he had a large staff already collecting the information from which the war histories would be compiled.

OBITUARY.

Mr. E. F. Hadfield, Wellington.

With the death, on June 4, of Mr. Ernest Frederic Hadfield, at the age of 80, the Wellington Bar has lost one of its best-known and most-loved members.

The fourth son of a former Bishop of Wellington, the late Mr. Hadfield was educated at Wellington College and at schools in England, in Trent, and Derby, at the latter of which he won a scholarship that took him to Selwyn College, Cambridge, where he distinguished himself in mathematics, being one of the Wranglers of his year. He was called to the English Bar at the Inner Temple in 1888. He returned to New Zealand and worked with the firm of Messrs. Carlile and McLean, in Napier, for a short time before beginning the practice of his profession in Wellington in 1890. He was in partnership from time to time with the late Messrs. Moorhouse and Newman and Mr. J. C. Peacock, and at the time of his death was a member of the firm of Messrs. Hadfield, Peacock, and Tripe.

The late Mr. Hadfield was essentially an equity and conveyancing lawyer, specializing in the law relating to trusts, wills, and conveyancing. It was mainly in those branches that he appeared from time to time in the Supreme Court and Court of Appeal. In recent years he took a prominent part in litigation in connection with the wills of the late Mr. W. B. Rhodes and Mrs. Sarah Ann Rhodes, in which complicated questions were involved as to the interpretation of wills, entails, and the rule in *Shelley's Case*. His knowledge of conveyancing was of great assistance in the questions arising thereon coming before the New Zealand Law Society, of whose conveyancing committee he had been for several years, and was at the date of his death, a member. He was President of the Wellington District Law Society for the year 1907–08.

Another branch of law in which he had special knowledge was the ecclesiastical, as befitted the son of so great a churchman as the late Bishop Hadfield, and he held the position of Chancellor of the Diocese of Wellington for many years, resigning that post only a few months before his death.

For several years he acted as examiner to the University of New Zealand in the subjects of New Zealand law required of candidates who had been admitted elsewhere.

With his sound knowledge of law and ripe experience, he combined the gifts of wise counsel and staunch friendship with dry wit and power of humorous reminiscence that won him the respect and affection, not only of all the profession, but of all who knew him. A tribute of respect and affection was paid to him at a dinner recently given to him, Mr. L. O. H. Tripp, and Mr. H. F. von Haast, on the occasion of their having been 50 years in practice, at which, in responding to the toast of that trio, he was in his best form as a raconteur: see (1942) 18 N.Z.L.J. 212.

He married, in 1902, Miss May Wood, of Napier, who predeceased him in 1939, and is survived by four daughters, Miss Ernestine Hadfield, Mrs. J. F. Zohrab, Mrs. Cecil Peate, and Miss Elizabeth Hadfield.

TRIBUTES OF BENCH AND BAR.

On June 7, at the Supreme Court, Wellington, there was a large attendance of practitioners gathered to honour the memory of the late Mr. Hadfield.

Their Honours Mr. Justice Blair, Mr. Justice Johnston, and Mr. Justice Fair were on the Bench. Among those present were Messrs. W. F. Stilwell, S.M., and H. J. Thompson, S.M., and several members of the late Mr. Hadfield's family.

THE BAR.

Mr. W. P. Shorland, President of the Wellington District Law Society, asked leave of their Honours to make reference to the passing of the late Mr. Ernest Frederic Hadfield, who had for no less than fifty-six years past graced the profession of the law with ability, outstanding character, and such kindliness of nature as to win not merely the respect but also the affection of his fellow-practitioners in Wellington.

A son of Bishop Hadfield, Bishop of Wellington, he was born in 1866 to a family tradition of service to others, which he faithfully supported throughout his eighty years of life. His early education at Wellington College, and at Trent and Derby in England, led to Selwyn College, Cambridge, where he graduated. Admitted to the Bar of the Inner Temple in 1888, Mr. Hadfield returned to New Zealand in 1890, to establish a practice in Wellington, which quickly grew, and had since been carried on by him in association with others.

"Mr. Hadfield justly earned the reputation of being a sound lawyer, with special qualifications in equity and in the law of property, and his opinions and his services as counsel in matters pertaining to these spheres of the law have been freely sought, and the *Law Reports* record many important matters—some of them going to the Privy Council—in which he was engaged", Mr. Shorland continued. "He served his clients well and it was but typical of his character that he should find time to serve both the Law Society and his Church in full measure.

"He was President of the Wellington District Law Society in 1908; member of the Council for many years; representative of the Hawke's Bay District on the Council of the New Zealand Law Society from 1904 to 1921; and a member of the Conveyancing Committee of that body from the inception of that Committee to the day of his death.

"His service to his Church was distinguished by the high offices he held which included a period as Chancellor of the Diocese.

"Mr. Hadfield will be remembered as a sound lawyer with outstanding learning in equity and the law of property; but above all, will he be remembered as a true gentleman whose kindliness of nature and cheerfulness of disposition won for him the affection of all.

"We who have assembled on the floor of this Court—and may I interpolate that I am requested to say the Attorney-General wished to be present, but has been unavoidably called out of town—the practitioners of this City for whom I speak, as President of The Wellington District Law Society, pay tribute to the memory of Mr. Hadfield and extend to his relatives sympathy in their loss."

THE BENCH.

His Honour Mr. Justice Blair, then said: "On behalf of the Bench, I desire to add a few words of tribute so eloquently paid by you to the memory of the late Mr. E. F. Hadfield. The Chief Justice is unfortunately unable to be present.

"It has been my privilege to have known him for more than forty years. He was a very lovable personality, and he was held in the very highest esteem by the members of the profession; and he was a very eminent figure in the Church as well. We all join in tendering to his family our sincere sympathy.

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. Executors and Administrators.—*Intestacy—Widow sole Beneficiary and Administratrix—Completion of Title—Transfer from Widow to herself.*

QUESTION: A. died in December, 1945, leaving a widow and three children, her surviving. A.'s estate which consisted only of a parcel of land under the Land Transfer Act, and a few pounds in the bank, is well under £1,000 in value, and consequently the widow is entitled to the whole of the estate, under s. 6 (1) (*a*) of the Administration Amendment Act, 1944. She is the sole administratrix, and has procured herself registered proprietress by transmission. Should she now go to the expense of registering a transfer from herself, as administratrix, to herself as beneficiary? Can such a transfer be registered?

ANSWER: In the circumstances a transfer as suggested should be registered. The relevant facts should be recited in the transfer, including the fact that she is the sole beneficiary and that A.'s estate was less than £1,000. The transfer will be evidence that A.'s estate has been fully administered, and that the widow in the circumstances, was his sole beneficiary. On the widow's death there will then be no question raised as to the necessity of letters of administration *de bonis non* as to A.'s estate: see *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839.

Yes. Such a transfer is registrable under the Land Transfer Act: *Hosken* v. *Danaher*, [1911] V.L.R. 214.

X1.

2. Rights of Way.—*Covenants for Upkeep—Whether binding on Assigns.*

QUESTION: To give the necessary road frontage on a subdivision of land, it is often necessary to vest the fee-simple of a narrow strip in each purchaser. Each purchaser takes a separate strip, but grants a right of way over his strip to the others. The intention is that each owner should use all the strips as a common right of way. It is necessary that there should be mutual covenants to share the cost of maintenance and repair of the common right of way. It is customary to insert such covenants in the grants of the rights of way. Do such covenants run with the land so as to bind the respective successors in title of each lot?

ANSWER: Such covenants do not run with the land, so as to bind successors: *Cator* v. *Newton and Bates*, [1940] 1 K.B. 415; [1939] 4 All E.R. 457; *11 Encyclopaedia of Forms and Precedents*, 574 (*n*).

We are constantly receiving similar inquiries. It is our view that the law should be altered so as to make such covenants in *registered* easements run with the land. It appears to be a matter for the Law Revision Committee.

Some local bodies when granting consent to a right of way under the Municipal Corporations Act, 1933, make conditions as to maintenance and repair of the way: in such cases the conditions are registered as an encumbrance and probably bind assigns: s. 187 of the Municipal Corporations Act, 1933.

X1.

3. Executors and Administrators.—*Postponement of Sale of Intestate Estate—Administrator Carrying-on Intestate's Business—Administration Amendment Act, 1944, s. 4 (1).*

Question: Section 4 (1) of the Administration Amendment Act, 1944, gives the administrator of an intestate estate power to postpone the sale of the intestate's real and personal estate to such a time as the administrator thinks proper. It has been held that under a will the power of postponing sale implies the power to carry on the business in the meantime: *Whyte* v. *Whyte*, (1911) 31 N.Z.L.R. 1209. The same reasoning would apply in the case of a postponement of sale under the above Act. Is the effect of the above section that it is no longer necessary for an administrator to apply to the Court for leave to carry on business (in the present instance a farming business) under s. 98 of the Trustee Act, 1908?

Answer: In *Williams on Executors*, 12th Ed. 1171 it is stated as follows:—

"The general rule is that the representatives have no authority in law to carry on the trade of the deceased: *Barker* v. *Parker*, (1786) 1 Term Rep. 287, 295.

"It has been said (by Lord Langdale in *Kirkman* v. *Booth*, (1848) 11 Beav. 273, 280: 50 E.R. 821, 824: see further. *Travis* v. *Milne*, (1851) 9 Hare 141, 68 E.R. 449) that, in order to authorize executors to carry on a trade, or to permit it to be carried on with the assets, there ought to be the most distinct and positive authority and direction given by the will for that purpose.

"A power to postpone the sale and conversion of the testator's estate . . . authorizes executors to carry on his trade for any time, even if it is not carried on with a view to sale . . . But when the estate becomes divisible, the power to postpone sale ceases."

The footnote (*a*) to p. 1171 states that "On the death of a person wholly or partially intestate after 1925, the trust for sale imposed by Administration of Estates Act, 1925, s. 33 contains a power to postpone sale."

At p. 1172 it is stated: "It is conceived that where the business is undisposed of by the will of a person dying after 1925, and there is no direction as to whether it should be sold or carried on, the personal representatives may now carry on the business for purposes other than realization; for the Administration of Estates Act, 1925, s. 33 (5) contains a wide power to postpone sale and conversion: see *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56. *Query*, whether such power to postpone would cease when the estate becomes divisible . . . *Semble*, it would not authorize the personal representatives to employ assets of the deceased in carrying on his business, except such assets as form the capital of the business at his death.

"It may be stated generally that if a personal representative considers it expedient to carry on the deceased's business not merely for the purpose of realization, and there is no authority to carry on the business conferred by the will, he should take the precaution of obtaining the indemnity from the beneficiaries. Unless the estate is bordering on insolvency, it will not usually be necessary to obtain the consent of the deceased's creditors."

In *14 Halsbury's Laws of England*, 2nd Ed. 386, para. 719, it is stated as follows:—

"An executor has no power in the absence of a direction contained in his testator's will, to carry on the testator's business . . . except for the purpose of winding it up . . . A general power to postpone the conversion of the testators' estate bequeathed upon trust for sale is sufficient authority to an executor to carry on the business for a reasonable period with a view to selling it as a going concern: *Re Chancellor, Chancellor* v. *Brown*, (1884) 26 Ch.D. 42, *Re Smith, Arnold* v. *Smith*, [1896] 1 Ch. 171, but does not apparently authorize him to carry it on indefinitely: *Re Smith, Arnold* v. *Smith* (*supra*) commenting on *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56."

It should be noted that *Halsbury*, in discussing the effect of a power to postpone conversion, does not refer to the statutory power referred to in the above quoted extracts from *Williams on Executors*; and it should also be noted that the extract from p. 1172 of this work commences with the words: "It is conceived" and does not support the opinion with a decided case. The English Administration of Estates Act, 1925 (*8 Halsbury's Complete Statutes of England*, 306) contains a *trust* for conversion of intestate estates but s. 4 of our Administration Amendment Act, 1944, contains a *power* to convert, each statutory provision being followed by a wide power to postpone conversion. The statement in the extract from *Williams* (*cit supra*) as to the value which the editors conceived should be given to the English statutory power to postpone conversion should therefore apply with greater force to s. 4 of our Administration Amendment Act, 1944. It is difficult to think up reasons for arriving at a different conclusion as to the effect of a statutory power to postpone conversion from that arrived at by the learned editors of *Williams on Executors*, for, if an administrator can retain an asset (the business) for so long as he thinks fit, it surely must follow that he can carry on such business because if he could not do so he would be retaining, not the business but the plant, machinery, goods and chattels, &c., employed therein—in other words, the works would be there but the wheels would not turn. In the absence of a decision of the Court upon the question asked, a more definite answer than that given above cannot be given. If, however, the administrator desires to use assets of the estate other than those used in the business at the intestate's death, he must obtain Court authority.

Y2.

RULES AND REGULATIONS

Supreme Court Emergency Revocation Rules, 1946. (Judicature Amendment Act, 1930.) No. 1946/70.

Income-tax (Canadian Traders) Exemption Order, 1946. (Land and Income Tax Amendment Act, 1935.) No. 1946/71.

Camping-ground Regulations Extension Order, 1946. (Health Act, 1920.) No. 1946/72.

Traffic Sign Regulations, 1936. Amendment No. 1. (Motor-vehicles Act, 1924.) No. 1946/73.

Land and Income Tax Regulations, 1946. (Land and Income Tax Act, 1923.) No. 1946/74.

Occupational Re-establishment Emergency Regulations, 1940. Amendment No. 4 (Emergency Regulations Act, 1939.) No. 1946/75.

Animals Protection and Game Regulations, 1939. Amendment No. 3. (Animals Protection and Game Act, 1921–22.) No. 1946/76.

Opossum Regulations, 1946. (Animals Protection and Game Act, 1921–22.) No. 1946/77.

Motor-vehicles Registration Regulations, 1946. (Motor-vehicles Act, 1924.) No. 1946/78.

Motor-vehicles Insurance (Third-party Risks) Regulations, 1939, Amendment No. 5. (Motor-vehicles Insurance (Third-party Risks) Act, 1928.) No. 1946/79.

Finance Emergency Regulations, 1940, Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1946/80.

Revocation of Emergency Regulations and Order relating to Registration and Licensing of Motor-vehicles. (Emergency Regulations Act, 1939.) No. 1946/81.

Local Authorities (Replacement of Debentures) Regulations, 1931, Amendment No. 1. (Finance Act, 1931 (No. 2).) No. 1946/82.

Seal-fishery Regulations, 1946. (Fisheries Act, 1908.) No. 1946/83.

Customs Export Prohibition Order, 1946, No. 2. (Customs Act, 1913.) No. 1946/84.