

TRUSTEE AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill makes miscellaneous amendments to the Trustee Act 1956.

Clause 2 makes certain securities of the Marlborough Harbour Board authorised trustee investments as from 31 January 1960. The clause also brings up to date the Schedule of Trustee investments authorised by Acts other than the principal Act.

Clause 3 authorises a trustee in that capacity to sue, and be sued by, himself in a different capacity. In any such case he is required to obtain the directions of the Court as to the manner in which the opposing interests are to be represented. The clause extends to all trustees a provision now contained in section 101 of the Public Trust Office Act 1957.

Clause 4: Section 35 of the principal Act enables a trustee to obtain protection against creditors by means of advertisements. The clause makes it clear that the protection extends to—

- (a) All creditors whether present or future, certain or contingent:
- (b) Persons having causes of action that survive against the estate of the deceased under Part I of the Law Reform Act 1936:
- (c) Other claimants who come within the classes specified in the revised *subsection (7)* and are not excluded by the new *subsection (8)*.

Clause 5 declares that a trustee may deliver to an infant or his guardian any chattels absolutely vested in the infant. The clause also makes it clear that the existing authority to hand over chattels to a life tenant extends to cases where the life tenant is an infant.

Clause 6: Section 41 of the principal Act provides that a trustee may apply any capital money or other capital asset subject to a trust for the maintenance, etc., of any person entitled thereto, whether absolutely or contingently. Paragraph (b) of the proviso to the section declares that if the person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money or asset so paid or applied shall be brought into account as part of that share. The clause rewrites the paragraph so as to make it clear that the share is charged with the money and assets so applied, whether that person or any other person ultimately takes the share.

Clause 7 makes it clear that a trustee, when exercising any power to apply any property for the maintenance, education, advancement, or benefit of any person or for any one or more of those purposes, may impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise. Conditions so imposed may thereafter be waived either wholly or in part, and the normal precautions governing trustee securities need not be observed.

Clause 8: In cases where the trust instrument expressly forbids specified administrative dealings with trust property, it is a vexed question as to the extent to which the Court should be authorised to sanction the dealings so forbidden, especially on an *ex parte* application. Subsection (1) of section 64 and subsections (4) and (5) of section 2 of the principal Act were framed so as to take away the previous jurisdiction of the Court to authorise, on an *ex parte* application, administrative dealings prohibited by the trust instrument. At the same time, section 65 of the principal Act added a new provision authorising the Court, in proceedings in which all interested parties are joined or represented, to direct a sale or lease of any property, notwithstanding anything to the contrary in the trust instrument. In the case of *In re Allison (deceased)* [1958] N.Z.L.R. 678, F. B. Adams, J. was critical of the changes made by sections 2 and 64 (1). These provisions have been reviewed and are all being altered to some extent by this Bill. In particular the provisions now contained in section 65 are being expanded and brought into section 64 (1) so as to enable the Court, in proceedings in which all interested parties are joined or consent, to sanction and direct any administrative dealing in connection with trust property that could be sanctioned under section 64 (1). *Clause 8* clarifies subsections (4) and (5) of section 2, and rewrites the provisions now contained in section 64 (1) so as to make it clear that they apply where the granting of powers would be in the best interests of the persons beneficially interested under the trust, and that expediency in the management or administration of any property vested in a trustee is not the only consideration. The point arose in a recent case where the Court was asked to approve of trust money being expended in the purchase of a home, and the Judge expressed doubts as to whether the proposed purchase could be said to be expedient from the point of view of the management or administration of the money. It is expressly stated that the Court's powers under section 64 (1) are subject to any contrary intention expressed in the instrument (if any) creating the trust.

Clause 9: Section 64 (2) of the principal Act gave the Court power to sanction a variation of trust on behalf of a person under a disability or an unborn or unascertained or unknown person. Legislation on much the same lines was subsequently enacted in the United Kingdom by the Variation of Trusts Act 1958. That Act covered a useful point not dealt with in the New Zealand provision in that it gave the Court power to disregard a discretionary interest under a protective trust. *Clause 9* rewrites as a separate section the provisions now contained in section 64 (2) so as to cover this point. The wording of the U.K. provision has been followed as far as possible so as to secure the benefit of U.K. cases and textbooks.

Clause 10 rewrites section 72 of the principal Act, which relates to trustees' commission, so as to allow commission to be awarded to a trustee who has retired or to the personal representative of a trustee who has died. The clause also provides that the Executors Commission Rules 1935 and the amendment thereof shall enure for the purposes of section 72; and gives power to make rules for carrying the provisions of that section into effect.

Clause 11 amends section 75 of the principal Act, which section relates to the barring of claims. Subsection (1) is rewritten to bring the wording into line with section 35 (1), as set out in *clause 4* of the Bill. The *new subsection (3A)* of section 75 enables more than one claim to be barred in the same proceedings. Subsection (5) of section 75 is being repealed because the provisions therein contained are being covered by the *new section 76A* set out in *clause 13*.

Clause 12 rewrites section 76 of the principal Act, which relates to the distribution of shares of missing beneficiaries after due advertising for all possible claimants. In the case of *In re Sheridan (deceased)* [1959] N.Z.L.R. 1069, the Court ruled that the fact that any person had sent in a claim, however improbable, precludes the operation of section 76; that the claim has to be barred under section 75; and that the trustee cannot in such circumstances obtain an order under section 76. The revised section authorises the trustee to serve notice on any such claimant calling on him to take legal proceedings to enforce his claim within three months; and enables all such claims to be reviewed by the Court on an application made under section 76. On such an application the Court can authorise a distribution of trust property as if the persons specified in the order were not in existence or never existed or had died before a date or event specified in the order. Such an order protects the trustee who makes the distribution, but preserves any rights which the missing persons may have to follow the property that is distributed. In this connection see the proposed *new section 30B* of the Administration Act 1952 set out in *clause 2* of the Administration Amendment Bill.

Clause 13 makes normal provision for the services of notices, etc., under sections 75 and 76 of the principal Act.

Clause 14 makes it clear that section 84 of the principal Act (which defines the incidence of testamentary expenses, debts, legacies, etc.) shall not apply to annuities. The incidence of all annuities, whether granted by will or otherwise, will be governed by the rules of law that have been settled by the Courts in a long series of cases.

Hon. Mr Mason

TRUSTEE AMENDMENT

ANALYSIS

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A BILL INTITULED

An Act to amend the Trustee Act 1956

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. **Short Title**—This Act may be cited as the Trustee Amendment Act 1960, and shall be read together with and deemed part of the Trustee Act 1956 (hereinafter referred to as the principal Act).
- 10 2. **Authorised investments**—(1) Section 4 of the principal Act is hereby amended, as from the thirty-first day of January nineteen hundred and sixty, by inserting in paragraph (e) of subsection (1), after the words “the Gisborne Harbour Board”, the words “the Marlborough Harbour Board”.

(2) The First Schedule to the principal Act is hereby amended by adding the following items:

“1958, No. 11 (Local)—

The Nelson Harbour Board Empowering Act 1958:
Section 7. 5

“1959, No. 11 (Local)—

The Nelson Harbour Board Empowering Act 1959:
Section 7.”

(3) Section 9 of the Marlborough Harbour Amendment Act 1960 is hereby consequentially repealed. 10

3. Trustee may sue himself in a different capacity—

The principal Act is hereby amended by inserting, after section 33, the following section:

“33A. Notwithstanding any rule of law or practice to the contrary, a trustee of any property in that capacity may sue, 15 and be sued by, himself in any other capacity whatsoever, including his personal capacity:

“Provided that in every such case the trustee shall obtain the directions of the Court in which the proceedings are taken as to the manner in which the opposing interests are to be 20 represented.”

4. Protection against creditors and others by means of advertisements—(1) Section 35 of the principal Act is hereby amended by repealing subsection (1), and substituting the following subsection: 25

“(1) Where a trustee has given notice by advertisement published at least once in a newspaper circulating in each locality in which in the opinion of the trustee claims are likely to arise requiring persons having claims to which this section applies to send to the trustee, within the time fixed in the 30 notice, particulars of their claims and warning them of the consequences of their failure to do so, then, at the expiration of that time or at any time thereafter the trustee may administer or distribute the property or any part thereof to which the notice relates to or among the persons entitled thereto 35 having regard only to the claims, whether formal or not, of which the trustee then has notice; and he shall not, as respects the property so administered or distributed, be liable to any person of whose claim he has not had notice at the time of the administration or distribution: 40

“Provided that nothing in this section shall prejudice any remedy which the person may have under subsection (1) of section 30B of the Administration Act 1952 (which section was inserted by section 2 of the Administration Amendment Act 1960) or any other right or remedy available to him against any person other than the trustee, including any right which he may have to follow the property and any money or property into which it is converted.”

(2) Section 35 of the principal Act is hereby further amended by repealing subsection (7), and substituting the following subsections:

“(7) Except as provided in subsection (8) of this section, this section shall apply to the following claims, whether present or future, certain or contingent, against a trustee:

“(a) Claims against or in respect of the estate of the deceased person or the trust property, including (without limiting the generality of the foregoing provisions of this paragraph) claims that survive or lie against or in respect of the estate or property under Part I of the Law Reform Act 1936:

“(b) Claims against the trustee personally by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property that he is administering.

“(8) This section shall not apply to—

“(a) Any claim under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949, or arising out of any contract to make a will containing certain provisions or not to revoke an existing will or a specified provision therein or not to make a will; or

“(b) Any claim by a person to be a beneficiary under the will or to be entitled on the intestacy of the deceased person, or to be beneficially interested under the trust.”

5. Protection of trustee in handing over chattels to infant—

(1) The principal Act is hereby amended by inserting, after section 39A (as inserted by section 7 of the Trustee Amendment Act 1957), the following section:

“39B. (1) A trustee may in his discretion deliver to an infant, or to the guardian or any of the guardians of an infant, any chattels absolutely vested in the infant, and the receipt of the infant or guardian shall be a complete discharge to the trustee for any chattels so delivered.

“(2) The powers conferred by this section are in addition to the powers conferred by section 41 of this Act and, for the purposes of paragraph (a) of the proviso to that section, the value of the chattels delivered pursuant to this section shall not be taken into account in any way.”

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(2) The said section 39A of the principal Act is hereby amended by inserting in subsection (1), after the words “bequeathed to any person”, the words “including an infant”.

6. Power to apply capital for maintenance—Section 41 of the principal Act is hereby amended by repealing paragraph (b) of the proviso, and substituting the following paragraph:

“(b) Where that person or any other person is or becomes absolutely and indefeasibly entitled to the share of the trust property in which that person had a presumptive or vested interest when the money or asset was so paid or applied, that money or asset shall be brought into account as part of that share in the trust property; and”.

7. Conditional advances for maintenance, etc.—The principal Act is hereby amended by inserting, after section 41, the following section:

“41A. (1) Where a power to pay or apply any property for the maintenance, education, advancement, or benefit of any person, or for any one or more of those purposes, is vested in a trustee, the trustee when exercising the power shall have, and be deemed always to have had, authority to impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise. At any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.

“(2) In determining the amount or value of the property which a trustee who has imposed such a condition may pay or apply in exercise of the power, any money repaid to the trustee or recovered by him shall be deemed not to have been so paid or applied by the trustee.

“(3) Nothing in this section shall impose upon a trustee any obligation to impose any such condition; and a trustee, when imposing any condition as to giving security as aforesaid, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by this Act or by any rule of law or by the trust instrument (if any).

“(4) A trustee shall not be liable for any loss which may be incurred in respect of any money that is paid or applied as aforesaid, whether the loss arises through failure to take security, or through the security being insufficient, or through
5 failure to take action for its protection, or through the release or abandonment of the security without payment, or from any other cause.”

8. Power of Court to authorise dealings with trust property—(1) Section 2 of the principal Act is hereby amended—

10 (a) By inserting in subsection (4), after the words “given by”, the words “any other Act and by”:

(b) By omitting from subsection (4) and also from subsection (5) the words “so conferred”, and substituting in each case the words “conferred on the trustee
15 by this Act”.

(2) Section 64 of the principal Act is hereby amended by repealing subsection (1), and substituting the following subsection:

20 “(1) Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the Court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested
25 in a trustee, or would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested
30 in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct
35 in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income:

“Provided that, notwithstanding anything to the contrary in the instrument (if any) creating the trust, the Court, in
40 proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent to the order, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.”

(3) Section 65 of the principal Act is hereby consequentially repealed.

9. Power of Court to authorise variations of trust—(1) The principal Act is hereby amended by inserting, after section 64, the following section: 5

“64A. (1) Without limiting any other powers of the Court, it is hereby declared that where any property is held on trusts arising under any will, settlement, or other disposition, or on the intestacy or partial intestacy of any person, or under any order of the Court, the Court may if it thinks fit by order approve on behalf of— 10

“(a) Any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or 15

“(b) Any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the Court; or 20 25

“(c) Any unborn or unknown person; or

“(d) Any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined— 30

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts: 35

“Provided that, except by virtue of paragraph (d) of this subsection, the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and in determining whether any such arrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs: 40

“Provided also that this subsection shall not apply to any trust affecting property settled by any Act other than the Administration Act 1952.

5 “(2) Any rearrangement approved by the Court under sub-section (1) of this section shall be binding on all persons on whose behalf it is so approved, and thereafter the trusts as so rearranged shall take effect accordingly.

“ (3) In this section—

10 “ ‘Discretionary interest’ means an interest arising under the trust specified in paragraph (b) of subsection (1) of section 42 of this Act or any like trust:

“ ‘Principal beneficiary’ has the same meaning as in the said subsection (1):

15 “ ‘Protective trusts’ means the trusts specified in paragraphs (a) and (b) of the said subsection (1) or any like trusts.”

(2) Subsection (2) of section 64 of the principal Act is hereby consequentially repealed.

20 **10. Commission**—The principal Act is hereby amended by repealing section 72, and substituting the following section:

“72. (1) The Court may, out of the property subject to any trust, allow to any person who is or has been a trustee thereof or to that person’s personal representative such commission or percentage for that person’s services as is just and
25 reasonable:

“Provided that the aggregate commission or percentage so allowed in respect of all persons who are or have been trustees shall not exceed five per cent.

30 “(2) No such allowance shall be so made except on the termination of the trust, unless the Court otherwise orders.

“ (3) Where the Court allows a commission or percentage under this section in any case in which two or more persons are or have been the trustees, whether acting at the same time or at different times, the Court may, in its discretion, apportion
35 the total amount allowed among the trustees in such manner as it thinks fit, and, in particular, may divide the amount in unequal shares or may make the allowance to one or more of the trustees to the exclusion of the other or others.

40 “ (4) Rules may from time to time be made in the manner prescribed by the Judicature Act 1908 for carrying the provisions of this section into effect. The Executors Commission Rules 1935 and the Executors Commission Rules 1935,

Amendment No. 1, so far as they were in force on the thirty-first day of December, nineteen hundred and fifty-six, shall continue and have effect as if they had been made under this subsection and as if this section had been in force when they were made, and may be amended or revoked accordingly.” 5

11. Barring of claims—(1) Section 75 of the principal Act is hereby amended by repealing subsection (1), and substituting the following subsection:

“(1) Where a trustee desires to reject a claim that has been made, or that he has reason to believe may be made,— 10

“(a) To or against the estate or property that he is administering; or

“(b) Against the trustee personally by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property 15 that he is administering—

the trustee may serve upon the claimant or the person who may become a claimant as aforesaid a notice calling upon him, within a period of three months from the date of service of the notice, to take legal proceedings to enforce the claim 20 and also to prosecute the proceedings with all due diligence.”

(2) Section 75 of the principal Act is hereby further amended by inserting, after subsection (3), the following subsection:

“(3A) Where a trustee has served any such notices in respect of claims on two or more persons and the period specified in each of the said notices has expired, he may, if he thinks fit, apply for an order in respect of the claims of those persons in a single application, and the Court may on that application make an order accordingly.” 30

(3) Section 75 of the principal Act is hereby further amended by repealing subsection (5).

12. Distribution of shares of missing beneficiaries—The principal Act is hereby amended by repealing section 76, and substituting the following section: 35

“76. (1) Where any property is held by a trustee and the property or any part thereof cannot be distributed because the trustee does not know whether any person who is or may be entitled thereto is or at any material date was in existence, or whether all or any of the persons who are members of any 40 class who are or may be entitled thereto are or at any material

date were in existence, or because the trustee does not know whether any such person is alive or dead or where he is, the trustee may publish such advertisements (whether in New Zealand or elsewhere) as are appropriate in the circumstances
5 calling upon every such person and every person claiming through any such person to send in his claim within a time to be specified in the advertisements, not being less than two months in any case from the date on which the advertisement is published. Where the trustee is in doubt as to
10 what advertisements should be published under this subsection, he may apply to the Court for directions in that regard.

“(2) Where the trustee has received (whether as a result of the advertisements or not) any claim to be a person to whom any such advertisement relates, or any notice that any
15 person may claim to be such a person, but the trustee is not satisfied that the claim is or would be valid, the trustee may serve upon the claimant or the person of whom the trustee has notice as aforesaid, a notice calling upon him, within a period of three months from the date of service of the notice, to take
20 legal proceedings to enforce the claim, if he wishes to pursue it, and to prosecute the proceedings with all due diligence; and advising him that, if he fails to do so, his claim may be disregarded and application may be made to the Court without further notice for an order authorising the distribution
25 of the property. Nothing in this subsection shall make it necessary for the trustee to serve such a notice on any such person; and the Court may make an order under this section, whether or not such a notice has been served on any such person, if it is satisfied that the information supplied to the
30 trustee by that person or otherwise in the possession of the trustee indicates either that the person is not one of the persons specified in the advertisements or that he is not likely to be one of those persons.

“(3) Upon proof by affidavit of the circumstances, and of
35 the inquiries that have been made, and of the results of the inquiries and advertisements, and of the claims of which the trustee has received notice, and of the notices that the trustee has given to claimants under subsection (2) of this section, and of the action (if any) which the claimants have
40 taken to enforce their claims, the Court may order that the trustee may distribute the property or part thereof, subject to such conditions as the Court may impose,—

- “(a) As if every person and every member of any class of persons specified in the order (being all or any of the persons specified in the advertisements) is not in existence or never existed or has died before a date or event specified in the order; and 5
- “(b) Where as a consequence of the order it is not possible or practicable to determine whether or not any condition or requirement affecting a beneficial interest in the property or any part thereof has been complied with or fulfilled, as if that condition or requirement had or had not been complied with or fulfilled (as the Court may determine). 10
- “(4) In making any order under subsection (3) of this section, the Court may—
- “(a) Disregard (without express reference thereto in the order) the claims of any persons who do not appear to the Court to be, or to be likely to be, any of the persons specified in the advertisements: 15
- “(b) Disregard (without express reference thereto in the order) the claim of any person to whom the trustee has given notice under subsection (2) of this section and who has failed to take legal proceedings to enforce the claim or to prosecute any such proceedings with all due diligence: 20
- “(c) Exclude from the operation of the order any person to whom the trustee has not given notice under subsection (2) of this section and who in the opinion of the Court may be one of the persons specified in the advertisements, or any person whom the Court considers should for any reason be excluded from the operation of the order: 30
- “(d) Provide that the order shall not be acted on for such period or except on such conditions as may be specified in the order or that the effect of the order shall during a period so specified be advertised in such manner and form as may be specified in the order, or that the order be served upon such person or persons as are specified therein; and in the event of the Court exercising the jurisdiction conferred by this paragraph it may in the order direct that the same shall be of no effect in respect 40

of any person specified therein in the event of that person instituting proceedings in New Zealand to enforce his claim and serving the proceedings upon the trustee within such period as is specified in the order.

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“(5) Any such order may be made notwithstanding that there has not been strict compliance with any directions as to advertisements previously given by the Court, or that an error has been made in any advertisement (whether or not any directions have previously been given by the Court) if the Court considers that the error would not be likely to have prejudiced or misled the persons to whom the advertisement relates.

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“(6) Where the Court makes an order under this section that the trustee may distribute any property or part thereof as if every person and every member of any class of persons specified in the order (not being a person expressly excluded from the operation of the order) is not in existence or never existed or has died before a date or event specified in the order, and the trustee distributes in accordance with the order, the trustee shall be exonerated from any further liability to any such person or to any member of any such class:

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“Provided that nothing in this subsection shall prejudice any remedy which any person may have against any person other than the trustee, including any right which he may have to follow the property and any money or property into which it is converted.

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“(7) The Court may make one or more orders under this section in respect of the same property.

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“(8) Any order made under this section may direct how the costs of the order and of advertising under or for the purposes of the order shall be borne.

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“(9) It shall not be necessary to serve notice of an application for an order under this section upon any person, unless the Court otherwise orders.

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“(10) Nothing in this section shall prejudice the right of the trustee (if he so desires) to distribute under any other law or statutory provision or prejudice the protection thereby afforded when he makes distribution pursuant to any such law or provision.”

13. Service of notices, etc., under sections 75 and 76—The principal Act is hereby amended by inserting, after section 76, the following section:

“76A. (1) Any notice, application, or order that is to be served in accordance with section 75 or section 76 of this Act, or in accordance with any order made pursuant to section 76 of this Act, may be served— 5

“(a) Either by delivering it to the person for whom it is intended or by sending it by post in a registered letter addressed to that person at his usual or last known place of abode or business; or 10

“(b) In such other manner as may be directed by an order of the Court.

“(2) Where a notice is sent by post as aforesaid it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.” 15

14. Annuities—Section 84 of the principal Act is hereby amended by adding the following subsection:

“(6) Nothing in this section shall apply to any annuity which is payable out of the estate of the deceased.”