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" *The liberty of the subject is the highest inheritance that he hath.*"
—JOHN SELDEN.

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AFFIDAVIT OF DOCUMENTS: THE SOLICITOR'S DUTY.

IN the recent case of *Myers* v. *Elman*, [1939] 4 All E.R. 484, the professional conduct of a solicitor was under review by the House of Lords. The case concerned an order made under O. 65, r. 11 of the Rules of the Supreme Court, whereby the Court or a Judge may call on a solicitor to show cause why costs should not be disallowed as between the solicitor and his client and why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, where it appears to the Court or a Judge that costs have been incurred improperly or without any reasonable cause, or that by reason of any undue delay in proceedings, or of any default or misconduct of the solicitor any costs properly incurred have nevertheless proved fruitless to the person incurring the same. There is no similar rule in our Code of Civil Procedure; but, in view of the observations of their Lordships on a solicitor's duty in the preparation of an affidavit of documents, the judgments are of interest to practitioners generally in so far as they are an enunciation by the House of Lords of principles of professional conduct.

It must be remembered that the jurisdiction of the Court under the rule in question is of a different character from the jurisdiction to strike off the rolls or suspend a solicitor, where the application is strictly personal and relates to the solicitor himself and his fitness to practice, and mere negligence, even of a serious character, is not a ground for the exercise of disciplinary action. The jurisdiction as to costs may be exercised where there is default or negligence in the course of proceedings and the primary object of the rule is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured. The rule is supplementary to the summary jurisdiction of the Court, and is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or costs which have proved fruitless by reason of undue delay in proceeding under a judgment or order. Consequently, as Viscount Maugham observed, if the authorities show that the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that the solicitor cannot shelter himself behind a clerk, for whose actions within the scope of his authority he is liable, nor can a partner in a firm of solicitors escape from such an order on the ground that he took no part in the proceedings.

The Court of Appeal, by a majority consisting of Greer and Slesser, L.JJ. (MacKinnon, L.J., dissenting), reversed the decision of Singleton, J., who, by way of exercising the summary jurisdiction which the Court has over solicitors as officers of the Court, had directed payment to the appellant, the plaintiff in the action, of one-third of her costs of the action and two-thirds of the costs of the application in pursuance of which the order was made. The respondent had acted as solicitor for Nathaniel Rothfield, one of the defendants in the action. The Judge made the order because he found that the respondent or his clerk had been guilty of professional misconduct in regard to discovery in the action. The Court of Appeal overruled his decision, because they held that misconduct was not established against the respondent personally, but, if at all, only against his clerk, and that the punitive powers of the Court could only be exercised when the solicitor was guilty personally of misconduct. It is not clear whether they accepted that the evidence showed the deliberate obstruction to complete discovery on the part at least of the solicitor's clerk, which the Judge found as a fact. Before the House of Lords, the respondent sought to support the judgment of the Court of Appeal, not only on the ground of law on which it was based, but also on the ground that the Judge's finding of fact that there was professional misconduct was not justified by the evidence. Their Lordships accordingly heard an elaborate examination of the evidence before the Judge. In all the Courts, it was alleged, *inter alia*, that the respondent had been guilty of unprofessional conduct, on account of which he should be ordered to pay the costs of the action, in that he had prepared affidavits of documents which no solicitor could help knowing were inadequate.

Lord Maugham, in dealing with this ground, said:

> I think it useful to observe here that there is this plain distinction between defences which consist—as they did here—of a denial of allegations, and untrue affidavits of documents. The defences are not on oath, and they merely put the plaintiff to the proof of the allegations in the statement of claim. Moreover, as the Judge pointed out, there

is, in such a case as the present, a matter of damages which must be determined if the plaintiff's allegations are proved.

On the other hand, in many actions, and in particular in such an action as Mrs. Myers had brought, based on disgraceful frauds and on fraudulent conspiracy of the most shameless character, it is essential, in the interests of justice, that the defendants should be compelled to make full disclosure of all the documents bearing on the alleged frauds in the form of proper affidavits of documents.

If the defendants are guilty of the alleged frauds, it is hardly to be expected that they will make adequate affidavits without considerable pressure. However guilty they may be, an honourable solicitor is perfectly justified in acting for them and doing his very best in their interests, with, however, the important qualification that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings.

The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter, and, if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the Court, prepare and place upon the file a perjured affidavit.

His Lordship next considered the suppositions that the client swore an affidavit of documents, which disclosed nothing relating to the frauds alleged in the statement of claim, and that the solicitor had previously given his client full and proper advice in the matter but had no good reason to suppose that the affidavit was untrue. To the question, what else ought the most punctilious solicitor to do? His Lordship's answer was: "Nothing, at that time."

However, supposing that, before the action came on for trial, facts came to the knowledge of the solicitor which showed clearly that the original affidavit by his client as defendant was untrue, and that important documents were omitted from it. What then is the duty of the solicitor? Lord Maugham said, in reply to his own question:

I cannot doubt that the solicitor's duty to the plaintiff, and to the Court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and, if this course is not assented to, he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his client's false affidavit. That would, in effect, be to connive at a fraud, and to defeat the ends of justice.

A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date, if he continues to act as solicitor upon the record. The duty of the client is equally plain.

I wish to say with emphasis that I reject the notion that it is justifiable in such a case to keep silence, and to wait and wait till the plaintiff succeeds, if he can, in obtaining an order for a further and better affidavit. To do so is, in the language of Singleton, J., to obstruct the interests of justice, to occasion unnecessary costs, and, even if disclosure is ultimately obtained, to delay the hearing of the action in a case where an early hearing may be of great importance.

After dealing exhaustively with the facts, His Lordship, in concluding his speech, said that he thought he had said enough to show why he agreed with the findings of the Judge, and why His Lordship thought that his inferences, where the matters depended on inference, were fully justified. Singleton, J., had heard and seen the witnesses, and, in view of the knowledge which Elman admittedly possessed of the activities of the Rothfield family, and of his statements and those of his clerk in the witness-box, and of the correspondence which was disclosed, it was His Lordship's opinion that Singleton, J., was amply justified in concluding that Elman was guilty of professional misconduct in not insisting on his clients disclosing the relevant documents as soon as he knew that they were, or had been, in their possession, custody or power, and in preparing the putting on the file affidavits of documents which he knew to be very inadequate. He thought, too, that it was clear that MacKinnon, L.J., was of the same opinion on the facts, and that it seemed probable that Greer and Slesser, L.JJ., also agreed with their colleague as to the facts, and only disagreed on the question of law.

Lord Atkin, in the course of his speech, said that from time immemorial Judges had exercised over solicitors, using the phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the Court itself. Rules are disobeyed, false statements are made to the Court or to the parties by which the course of justice is either perverted or delayed. He proceeded:

The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties, whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, and there is no one in the profession, whether in practice or as a Judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them.

Nevertheless, as far as the interests of the Court and the other litigants are concerned, it is a matter of no moment whether the work is actually done by the solicitor on the record or by his servant or agent. If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible.

Misconduct, of course, may be such as to indicate personal turpitude on the part of the person committing it, and to lead to the conclusion that the party committing it, if an officer of the Court, is no longer fit to act as such. Over conduct such as that, punitive jurisdiction will be exercised, but it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated.

Turning to the facts before him, His Lordship said: the question was confined to the matter of discovery of documents. This, he said, is a subject which undoubtedly often presents difficulties to a solicitor, who in quite ordinary disputes finds it difficult to convince his client that business documents, as well as documents which the client considers private and confidential, must be disclosed. The difficulty is increased where the case involves a charge of dishonesty against the client, who may have every motive for concealing some, at any rate, of the relevant documents. His Lordship asked, in these circumstances, what is the duty of the solicitor? He answered this by saying:

The solicitor is at any early stage of the proceedings engaged in putting before the Court, on the oath of his client, information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance, and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents, or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter, but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate Judge, and, if he reasonably decides to believe his client, criticism cannot be directed to him.

I may add, however, that the duty is specially incumbent on the solicitor where there is a charge of fraud, for a wilful omission to perform his duty in such a case may well amount

to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution.

His Lordship said, in conclusion, that he did not go into detail as to the correspondence, but he was satisfied that the letters passing between the solicitors and the proceedings on the various summonses for further discovery well warranted the Judge's finding that, in resisting further discovery, the solicitor was obstructing the interests of justice, adding to the difficulties of the plaintiff, and causing delay where a speedy judgment was of great importance to the plaintiff. His Lordship added:

> In coming to the conclusion that the appeal should be dismissed, I have tried to bear in mind the difficulties into which an honest member of the profession is put when he has to defend a client charged with dishonesty or any other crime. He is not to arrogate to himself the ultimate decision, which is to be the Judge's. He may be suspicious, but his suspicions may be misplaced. Every one has a right to have his defence put before the Court. In such cases, however, it is specially incumbent upon solicitor and counsel alike to observe their obligations to the Court. As Dr. Johnson said, they are not to tell what they know to be a lie. It is because the rule of conduct was in this case gravely broken that I think that the salutary decision of Singleton, J., should be restored.

Lord Wright, after summarizing the facts, then discussed the duty owed to the Court by a solicitor. He said that he would not refer to any others of the numerous cases which illustrate the scope and variety of the jurisdiction of the Court over its officers, except to two which specifically refer to false affidavits. One is *Re Gray, Ex parte Incorporated Law Society*, (1869) 20 L.T. 730, which was a case where a solicitor had allowed a client to make an affidavit in which he swore to a false date known to both parties to be false. Lord Romilly, in ordering the solicitor to be suspended, said that it was impossible for the Court to proceed with safety were it not that the solicitors connected with the Court should most carefully investigate, and, as far as possible, correct, such statements of their clients as to dates. Similarly, in *Re Davies* (1898) 14 T.L.R. 332, the Court of Appeal suspended a solicitor for two years because, *inter alia*, he had allowed a client to swear an affidavit which both he and the client knew to be false. He had warned her it would be untrue but she insisted on swearing it. The Court said that he should have withdrawn from the case.

These authorities, in so far as they relate to affidavits, had, His Lordship said, special relevance to this case, where Rothfield was held to have sworn affidavits of discovery which were false, and where the solicitor (which is the term which His Lordship used to include either the respondent or his managing clerk, Osborn, to whom to a large extent he left the conduct of the discovery) could not have allowed them to be sworn if he had done the duty which he owed to the Court. And, he proceeded:

> The order of discovery requires the client to give information in writing and on oath of all documents which are or have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realise the whole scope of that obligation without the aid and advice of his solicitor, who, therefore, has a peculiar duty in these matters, as an officer of the Court, carefully to investigate the position, and, as far as possible, see that the order is complied with.
>
> A client left to himself could not know what is relevant, nor is he likely to realise that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case.
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> The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require, or if he insists on swearing an affidavit which the solicitor knows to be imperfect, or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to. That is the improper conduct which the Judge has found to have been committed by the solicitor in this case, in his findings of fact which I have summarized above.

Turning now to the particular facts of the case, the affidavit included in the schedule Nathaniel Rothfield's pass-book at Lloyds Bank, 222, Strand, "relevant entries only," which irregular description, in the circumstances of the case, should have roused the interest of the solicitor, unless he had actually prepared it. The entries disclosed in this way were about thirty in number. Some were marked with an asterisk, others had lines drawn in the margin against them. The rest of the account was sealed up. The solicitor admitted that he must have seen the incompleteness of the discovery if he had looked at the pass-book. This part of the case rested on the evidence of Osborn, the clerk, as the respondent was away from the office about that time, owing to illness. Osborn sought to excuse this manifest breach of duty on the grounds that the pass-book was not brought into the office until just before the time fixed for the appellant's solicitor to come to inspect, that he had no opportunity to examine the book, and that he simply sent it to a typist to seal all the entries except those which were marked as being relevant. He said in evidence that he did not even look at the pass-book afterwards, when it was left some days in his office, and he could have done so. Singleton, J., after hearing Osborn's evidence, and after asking him a number of questions, said that he felt sure that Osborn did examine the pass-book when it was handed to him:

> Even a cursory examination of it must have satisfied him how damaging it was to Nathaniel Rothfield's case, and, acting on his client's instructions, he determined to keep it back as long as he could.

Lord Wright, after discussing the evidence in detail, thought that Singleton, J., was entitled to find as he did upon the facts. He added:

> In my judgment, however, even if the Judge were wrong in discrediting Osborn's evidence that he did not examine the pass-book because he accepted his client's word that it contained no relevant entries, the order which the Judge made would still be justified.
>
> It would be a gross breach of duty to the Court in a matter of discovery like this for a solicitor to accept his client's bare word as to what was relevant, and not himself examine the documents, at least when regard is had to the general background of the case, and to all that the solicitor must have known of his client's character and surroundings. There is really a dilemma. Either Osborn examined the pass-book or he did not. If he did, he must have known that the affidavit was false. If he did not, he committed a gross breach of duty. He had no right to leave discovery to the decision of the client. In fact, when the appellant solicitors wrote pointing out that it was quite clear that there were material entries in the pass-book other than those disclosed, the solicitor still did no more than pass on the complaint to the client, and the appellant's solicitors were compelled to make a further application to the Court, which on November 18, 1937, ordered Nathaniel Rothfield to disclose the items sealed up in the Lloyds pass-book and in the pass-book of another bank account which he had, as well as to make a further and better affidavit. The third affidavit, which has been accepted as satisfactory, was eventually sworn under that order. Eventually, after

further delays, the case was heard and judgment entered for the appellant against all the defendants on March 11, 1937. It is clear that the difficulties about discovery had increased the costs and so delayed the trial as to diminish or destroy any chance of recovering the fruits of the judgment. In my opinion, the order of Singleton, J., was right, and should be restored.

Lord Porter, after considering the facts, said that the Judge's conclusion was that Osborn had examined the books and yet had failed to disclose the further relevant items. He (Lord Porter) could not say that this conclusion was unjustified merely because Osborn denied the examination. The book was in his possession, he had had warning of the materiality of full disclosure, and ample opportunity of examining it, if he chose to avail himself of it. His excuse was that he meant to go through it later, and that meanwhile Nathaniel Rothfield took away the book in order to see if there were any further material items. Possession of the book, opportunity, and warning of materiality and of the need of care, combined with a duty to ascertain that the client fully understood the obligation imposed upon him, seem to be enough to warrant the Judge's finding, arrived at after an opportunity of seeing the witness in the box.

Dealing with the solicitor's duty to verify what was relevant to the affidavit of discovery, Lord Porter said:

> In any case, I do not consider that the solicitor or his clerk has fulfilled the obligation of supervising to the best of his ability the swearing of a full and complete affidavit of documents by permitting the client to disclose part of a pass-book and to withhold the rest by the use of the phrase "relevant entries only." Until it is known to him what those relevant entries are, disclosure is not complete. It is still the duty of the clerk, in such circumstances, himself to examine the book and see that the relevant items have been disclosed. That indeed was, as I have indicated, Elman's own view. The two earlier affidavits of Nathaniel Rothfield were wholly inadequate, and the clerk in charge of the case must either have known the defectiveness of the second, as the Judge has found, or have been grossly negligent in failing to acquire that knowledge.

Either finding was, Lord Porter thought, enough to fix the clerk and his employer with professional misconduct, and to justify the order made in the Court of first instance.

Lord Wright concluded his judgment by a reference to delay on the solicitor's part diminishing or destroying any chance of recovering the fruits of the judgment, This, as Lord Atkin indicated, in so far as it was a breach of duty to the other litigant, did not concern the Court; but, as a dereliction of duty to itself, the actions of the solicitor was subject to the punitive power of the Court; and the House of Lords confirmed the learned trial Judge's conclusion that the solicitor by his actions was obstructing the interest of justice, adding to the difficulties of the plaintiff, and causing delay where a speedy judgment was of great importance to the plaintiff.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Auckland.
1940.
March 5.
Myers, C.J.

FRANCHI v. DUNN.

Licensing—Offences—Sale of Liquor after authorized Hours—Sale by Barman authorized to supply Boarders—Licensee on Premises but in his Office and not to be disturbed—Conviction—Penalty—Licensing Act, 1908, s. 19.

A licensee, during hours when by law liquor is prohibited to be sold, left the keys with the barman, who had authority to sell liquor to boarders. The licensee was in his office doing important work, had locked his door, and had given instructions that he was not in any circumstances to be disturbed. While he was so occupied, the barman sold liquor to a person not a boarder. The licensee was convicted and fined £5, which was increased to £5 1s. to permit a general appeal.

Dyson, for the appellant; *R. S. Meredith*, for the respondent.

Held, dismissing the appeal, 1. That the licensee was rightly convicted.

Tocker v. *Mercer*, [1917] N.Z.L.R. 156, G.L.R. 45, mentioned.

Kenning v. *Forster*, [1919] N.Z.L.R. 156, G.L.R. 69, and *Wroblenski* v. *Parnell*, [1934] N.Z.L.R. s. 122, G.L.R. 228, distinguished.

2. That, in the circumstances of the case, the penalty should be reduced.

Solicitors: *Morpeth, Gould, Wilson, and Dyson*, Auckland, for the appellant; *Meredith, Meredith, and Kerr*, Auckland, for the respondent.

COURT OF ARBITRATION.
Wellington.
1940.
February 2, 3, 16.
O'Regan, J.

HOOPER v. THE KING.

Workers' Compensation—"Accident arising out of and in the "course of the employment"—Coronary Thrombosis—Whether Injury by Accident—Workers' Compensation Act, 1922, s. 3.

Coronary thrombosis, not being due to effort, cannot be an injury by accident.

Long v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1929] G.L.R. 300; *Guyer* v. *Auckland Harbour Board*, [1937] N.Z.L.R. 808, [1938] G.L.R. 151; and *Elliott* v. *Elliott*, [1928] G.L.R. 155, applied.

Muir v. *J. C. Hutton (N.Z.), Ltd.*, [1929] N.Z.L.R. 249, G.L.R. 140; *Wynyard* v. *Daily Telegraph Co.*, [1934] N.Z.L.R. s. 137; G.L.R. 389; and *Forbes* v. *County of Sutherland*, [1939] G.L.R. 550, distinguished.

McFarlane v. *Hutton Bros. (Stevedores), Ltd.*, (1926) 96 L.J.K.B. 357; 20 B.W.C.C. 222; *Whittle* v. *Ebbw Vale, Steel, Iron, and Coal Co. Ltd.*, [1936] 2 All E.R. 1221; 29 B.W.C.C. 129; and *Clover, Clayton, and Co., Ltd.* v. *Hughes*, [1910] A.C. 242; 3 B.W.C.C. 275, referred to.

Counsel: *A. D. Brodie*, for the suppliant; *N. R. Bain*, for the respondent.

Solicitors: *A. D. Brodie*, Wanganui, for the suppliant; *N. R. Bain*, Crown Solicitor, Wanganui, for the respondent.

Case Annotation: *Clover, Clayton, and Co., Ltd.* v. *Hughes*, E. and E. Digest, Vol. 34, p. 273, para. 2316; *McFarlane* v. *Hutton Bros. (Stevedores), Ltd.*, *ibid.*, Supp. Vol. 34, No. 2317b; *Whittle* v. *Ebbw Vale, Steel, Iron, and Coal Co., Ltd.*, *ibid.*, 2714a.

[*For further Recent Judgments, turn to p. 84.*]

THE LAW RELATING TO MOTOR-VEHICLES.

Noteworthy Decisions of 1939.

By W. E. LEICESTER.

(*Concluded from p. 64.*)

In *The King* v. *Tait*, [1939] N.Z.L.R. 543, the Court of Appeal had to consider the duty of the driver of a motor-vehicle under s. 5 (1) of the Motor-vehicles Amendment Act, 1936, "to render all practicable assistance" to an injured person. In this case, a motor-truck driven by the prisoner collided with a motor-cycle, killing both the male driver and his female pillion-rider. The accident took place at night. After driving away from the scene, the prisoner went back to the place where the cyclist was lying, saw that he was dead, and then got back into his truck and drove away without reporting the matter to any one or taking any further steps in the matter. He did not notice that there was a further victim of the accident. Upon the count that he failed to render all practicable assistance to the two persons who had been injured, the Court expressed the view, in the case of the cyclist, that he was in point of fact dead at the time so that no "practicable assistance" could be rendered. A warning, however, was expressed, it being said that a motorist must understand that, when an accident has happened and he goes away without rendering any assistance by reason of an assumption that the injured person is dead, he does so at his peril if that assumption turns out to be wrong. A similar view was expressed as to his obligation towards the pillion-rider, this count being quashed. On a further count, the prisoner was charged with failing to ascertain that he had injured the pillion-rider. It was here held that the conviction could not stand as the attention of the jury had not been directed fully to the question as to whether there was evidence of any reasonable excuse for the failure. The answer to that question, it was said, would depend upon all the surrounding circumstances—such as the steps that the prisoner took, the nature and extent of the search made, the distance that the deceased had been thrown, probably the nature of the ground, and possibly the conditions regarding visibility. It was probable, or at least possible, if they had been directed on this point, the jury might not have convicted.

The most interesting practice case of the year would appear to be *Bateman* v. *Ackroyd*, [1939] N.Z.L.R. 65. The plaintiff was a passenger in a taxi-cab of one, White, when he collided with a private motor-car owned and driven by the defendant, Ackroyd. The jury found the latter solely to blame, and brought in a verdict against him of nearly £2,000, being the full amount of damages claimed. One of the grounds in a motion for new trial was that the observations of senior counsel for the plaintiff in his closing address were calculated to inflame the damages, and that they constituted misconduct of a serious and obvious nature, and must be deemed to have led the jury to an unjust and erroneous decision on the question of quantum. It was observed by Callan, J., that none of the objectionable remarks lost anything by the way they were enunciated, and the pausation, accentuation, and facial expression which accompanied their conclusion. In his view, there was a fundamental difference between warning the jury against a natural tendency which, if not checked, might produce injustice and an attempt to exploit and inflame feelings and prejudices which when so exploited might produce injustice. The difference was one between propriety and impropriety, between right and wrong; and, here, he considered the misconduct of counsel in attempting to inflame the feelings of the jury by improper reference to totally irrelevant considerations to be serious and not trifling misconduct. However, the test was that the misconduct must also, in the opinion of the Court, have led to an erroneous conclusion by the jury, and where, as in this instance, the amount of damages appeared reasonable, the inference that impropriety had influenced the amount became difficult. He was unable to come to the conclusion that the jury had, in fact, been influenced by the remarks, and, as a result, the motion for the new trial failed.

In *Martin* v. *Yule*, [1939] G.L.R. 570, Smith, J., holds that a jury's finding that the plaintiff's conduct does not amount to negligence is, in the absence of any misdirection, a finding not susceptible in its nature to any nice review by a Court of Appeal. He bases his view largely upon the report of the Law Revision Committee on contributory negligence, presented by the Lord High Chancellor to Parliament in June, 1939, and laying down the principle that a jury's finding on the question of negligence in a collision case, amounts to a choice of what was, in the real sense, the cause of the collision. He stresses that except in very strong and clear cases an appellate or reviewing tribunal cannot be expected to set aside a verdict of this kind.

The difficulties that confront the Judiciary, in problems of this sort, were touched on by Myers, C.J., in *Northern Publishing Co.* v. *White*, [1940] N.Z.L.R. 75, 84:

> In all cases arising out of accidents connected with motor-vehicles, it must be borne in mind at all stages of the trial and of subsequent applications that the people of this country have become particularly motor-minded, as is shown by the fact that the proportion of motor-vehicles to the total population of men, women, and children is about one in five. It may, therefore, be taken as almost certain that nearly every juror who is called upon to try an action arising out of a motor accident is the owner or driver, or both owner and driver, of a motor-vehicle. That being so, the jury should have no difficulty in understanding, appreciating, and applying the evidence, and their conclusions should not be lightly set aside or ignored by the Court. I venture these observations because it seems to have become the practice of counsel appearing in this class of case to invite the Judge of first instance or the Judges of the appellate Court, as the case may be, to consider the case as if they were super-expert witnesses with special mechanical knowledge and experience in the handling of motor-vehicles. For myself I have no pretensions to any such special knowledge or experience; but, if I had, I should consider it highly dangerous to accept the invitation. To my mind the proper course, and the only safe course, is to take the case as it is, and to consider (as the case may require) whether there was evidence proper to be submitted to the jury at all, or whether, on the material that was before the jury, their findings are such

as could properly be found by twelve reasonable men. Of course, the Court must retain some control in order to prevent any injustice which might be brought about by an unreasonable and improper verdict; but it is the duty of the Court to uphold the verdict of the jury if it can reasonably and properly be upheld.

An attempt was made in *Adams* v. *Clark*, [1939] G.L.R. 565, to limit a new trial that has been ordered to the question of liability. Reliance was placed upon the power sometimes exercised by the Court to limit a new trial to the question of damages, but Fair, J., decided that as no case is known in which an order restricting a new trial to the question of liability has been made in the past in New Zealand, in England, or elsewhere in the British Dominions, this seemed to him a very strong reason for refraining from making such an order.

Where the defendant puts the plaintiff to the proof as to his quantum of damages and the plaintiff fails to recover for general and special damages as much as the defendant has paid into Court, although the sum paid in does not specify the heads of damage, he is probably entitled to the costs of trial as on the amount claimed: *Purdy* v. *Durno*, [1939] G.L.R. 583. In this case, the defendant offered to accept and was awarded trial costs upon the difference between the amount claimed by the plaintiff and the amount paid into Court.

As a practice case worth noting, reference may be made to *Duthie* v. *Union Airways Ltd.*, [1939] N.Z.L.R. 1050. This is a decision upon the Statutes Amendment Act, 1939, s. 37, which appears to enlarge the law then existing as to the right of parties to obtain a special jury. Here the defence raised the question as to whether the deceased, who was a skilled expert and had been engaged as such, had properly handled an aeroplane after trouble had arisen. The question, said Blair, J., is one of the special care called for from a skilled and qualified expert in the handling of a special instrument requiring care and skill in operation. It is not a question of the care called for from a reasonable man, but the degree of care called for from an expert. That, in his view, satisfied the statutory requirement; and he therefore allowed a special jury. There seems no reason why the principle should not be applied to motor-vehicle accidents occurring in circumstances that call for technical evidence involving criticism of driving by a skilled expert—for example, an omnibus driver of many years' experience.

The necessity for correct direction on the question of onus is illustrated in *Orr* v. *Reynolds*, [1939] G.L.R. 623, in which the Court of Appeal ordered a new trial, holding that the direction and the form of issues generally amounted to a misdirection.

Insurance problems are not so manifest in the Courts this year, although a salutary lesson to the tardy insured is to be found in *Public Mutual Insurance Co. of New Zealand (in Liquidation)* v. *H. and H. Motors Ltd.*, [1939] N.Z.L.R. 1062. Here, the driver of one of the defendant company's motor-buses collided with a stationary motor-car, as the result of which a young woman was seriously injured. At the time, she stated that she was not injured but had received a shock. The police, believing there was no serious injury, failed to take any statement and the defendant company to give any notice to the plaintiff company which was its statutory indemnifier, as it was required to do under the Motor-vehicles Insurance (Third-party Risks) Act, 1928, until some eight weeks after the accident. On a claim to recover the amount of damages paid in settlement, Ostler, J., held that the words "personal injury" have no qualification and are not confined to serious personal injury or personal injury for which the person injured indicates that he intended to make a claim. If there is any personal injury at all, and in this category shock is included, it is the duty of the owner of the motor-vehicle forthwith after he becomes aware of the accident to report it. As the controlling director of the defendant company knew that the injured woman was suffering from shock, although he, like the driver, was unaware that she had fractured her spine, his company was nevertheless liable to its indemnifying insurance company.

A question of considerable practical importance was decided in *John Cobbe and Co., Ltd.* v. *Viles (N.I.M.U. Insurance Co., Third Party)*, [1939] N.Z.L.R. 377. The question involved was the liability of the statutory indemnifier to pay the plaintiff's employer the amount of compensation which had been paid to the employee and which the employee did not recover in his common-law action as it had to be deducted from his claim for wages loss. The N.I.M.U. Insurance Co., as statutory insurer, was joined under third-party notice. In Ostler, J.'s, view, there could be no doubt that had the injured plaintiff not received any compensation he could have recovered the whole of the wages he had lost from the defendant, Viles, who would have had the right to be indemnified by the insurance company against that liability. If s. 50 of the Workers' Compensation Act, 1922, had never been enacted, the employers would, in the circumstances of the case, have had a claim for damages against the defendant for the amount they had lost in paying compensation to their employee by reason of the defendant's negligence. This was a claim to be indemnified—*i.e.*, to be put in the same position by a money payment as the employer would have been in if the defendant had not acted negligently. Such a claim, Ostler, J., found, came within the very words of s. 6 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928. On appeal, [1939] N.Z.L.R. 981, this decision was upheld. Myers, C.J., said that from any point of view the claim formed part and parcel of the damages "on account of the bodily injury" to the person injured. Smith, J., held that, in the result, a liability to indemnify under s. 50 of the Workers' Compensation Act, 1922, against the loss caused by the payment of compensation to a servant or his representatives on account of death or bodily injury due to the use of a motor-vehicle, constituted for the purposes of s. 6 not a mere statutory contract of indemnity, but a liability to pay damages on account of death or bodily injury.

The difficulty of attacking a damages award in personal injury cases is exemplified by *Shelton* v. *Viles*, [1939] N.Z.L.R. 14. In this case general damages, amounting to £3,000, were claimed, and on this head £2,750 were awarded. It was not suggested that the jury were misdirected as to the principles upon which they should assess damages, or as to the evidence before them, or that counsel for the plaintiff had introduced irrelevant material; but the argument proceeded upon the basis that the amount awarded bore no reasonable relation to the wrong done, and must have been reached on the assumption that plaintiff had lost the complete use of his legs, whereas

on the medical evidence he had lost the use of his knees only, and that the jury must have failed to have taken into account the fact that plaintiff, who was aged fifty-seven, was near the period when he must expect not to be able to long continue earning his previous salary or accumulate any substantial savings. Johnston, J., based his judgment upon the view expressed in *Hip Foong Hong* v. *H. Neotia and Co.*, [1918] A.C. 888, that the jury is a tribunal to assess damages, and their finding on this, as on all questions properly submitted to them, should not be disturbed unless a Judge is convinced that their finding is so unreasonable as to amount to a miscarriage of justice. He stated that he could find no calculation or basis in the evidence which enabled him to say that a lesser sum than that awarded by the jury was the only reasonable inference from the material before him.

In *Cervo* v. *Swinburn* (*Ferretti, Third Party*), [1939] N.Z.L.R. 430, the Court had to consider the question of remoteness of such unusual damages in a personal injury claim brought by a market gardener as loss sustained through inability to plant tomatoes in time to catch the early market and through defections, as the result of the accident, in the personal habits of hot-house cucumbers, spinach, and cabbages. The test applied was whether the damage could be directly traced to the tort committed by the defendant, it being said that if an independent cause was present as an operating factor in the nature of the damage complained of, then the effect of such independent factor lets in the doctrine of remoteness and may disentitle the plaintiff to succeed. In this case, the damages awarded were allowed, but Blair, J., drew attention to the fact that they seemed to him to be in the nature of special damages and should have been claimed as such and not as general damages.

A passing reference is made to *Hall* v. *Wilson*, [1939] 4 All E.R. 85, in which Oliver, J., in the King's Bench Division, holds that in assessing damages under the Fatal Accidents Act, 1846 (and the position would be similar in this country under the Deaths by Accidents Compensation Act, 1908), it is proper to take into account the possibility of a man being killed in the war, as a member of the fighting forces if he is of military age, or as the result of war raids. Fortunately for us, there is no evidence down to the present time to justify the latter risk being more than a remote possibility.

ULTRA VIRES CONTRACTS.

By A. M. FINLAY, Ph.D. (London), LL.M. (N.Z.).

There seems to be a good deal of uncertainty among the various text-writers as to the effect of a contract *ultra vires* a company. *Buckley's Companies Acts*, 11th Ed. 8, says,

> Every Court whether of law or equity must treat a contract which is *ultra vires* the memorandum as wholly void and incapable of ratification.

Palmer's Company Law, 15th Ed. 266, says:

> A contract *ultra vires* the company is wholly void and cannot be enforced or ratified.

Stiebel's Company Law and Precedents, 3rd Ed., Vol. I, 51, says:

> An *ultra vires* act is simply not the act of the company, . . . but it is not an illegal act and it has been held that where a company has made an *ultra vires* loan it can recover the money in an action for money had and received.

Street on Ultra Vires, 76, does not go quite so far, and contents himself with saying:

> An *ultra vires* act cannot be enforced against a corporation,

but it is clear, from his discussion of *ultra vires* contracts, that they are, in his opinion, void. The New Zealand text-books on the Companies Act, 1933, appear to limit their consideration of this point to discussing the remedies available to a person from whom a company has borrowed money *ultra vires*.

It should follow, then, that a contract relating to matters not covered by a company's charter or memorandum of association is of no effect at all. But Lindley does not think so. In *Lindley on Companies*, 6th Ed., Vol. I, 215, he says:

> An act or a contract which is *ultra vires* and therefore invalid is not necessarily devoid of all legal effect. For instance, if a company expressly forbidden by its constitution to lend money does so on the security of goods or land, the property in the goods or land will, if duly conveyed, pass to the company notwithstanding the prohibition.

This proposition and the authority for it are examined by Street, in his work on *Ultra Vires*, 119–24, who draws certain conclusions that do not seem well justified.

To support his view, Lindley cites *Ayers* v. *South Australian Banking Co.*, (1871) L.R. 3 P.C. 548, where a chartered company, though forbidden to lend money on the security of merchandise, advanced money to a farmer on the security of a lien on his forthcoming wool-clip. The wool was taken by the farmer's assignees, and the Judicial Committee upheld the Bank's right to maintain trover. Street, in his work on *Ultra Vires*, at p. 120, quotes from the judgment, which was delivered by Mellish, L.J., and concludes that:

> This decision was undoubtedly to the effect that even assuming the *ultra vires* character of the acquisition, the property would have passed, but it is not a strong authority for saying that under a transaction *found* to be *ultra vires*, property may pass.

In other words, the decision was, on this point, merely *obiter*. Street continues, at p. 121:

> In spite of the language used it is difficult to believe that had there been a finding of *ultra vires*, the decision would have been the same.

Whatever may be the truth of this, the vital fact is that *Ayers's* case, and all the other cases referred to by Street, relate to chartered companies; and a distinction must be drawn between these and companies incorporated by statute.

In *Baroness Wenlock* v. *River Dee Co.*, (1887) 36 Ch.D. 675, Bowen, L.J., at p. 685, said:

> At common law, a corporation created by the King's Charter has *prima facie* . . . the power to do with its property all such acts as an ordinary person can do.

But *Ashbury Railway Carriage and Iron Co.* v. *Riche*, (1875) L.R. 7 H.L. 653, finally determined that the activities of a statutory company are strictly limited by its memorandum, and gave rise to the various quotations which commenced this article.

Street, however, seems to think this difference irrelevant here :

> If it [*Ayers's* case] stood alone, it would be easier to regard it as one of the class of cases in which the doctrine [of *ultra vires*] has been held inapplicable to chartered corporations.

But according to him, the decision has been followed and regarded as applicable to corporations generally in *Batson* v. *London School Board*, (1903) 67 J.P. 457 (" unfortunately not reported elsewhere," says Street. This is not so, and the case may be found in 20 T.L.R. 22 and 2 G.L.R. 116). Here, the Board purchased the residue of a lease, and obtained statutory authority, as required by the Elementary Education Act, 1870 (33 & 34 Vict., c. 75), to proceed to acquire the freehold, subject to a restriction as to the use of the land. After the existing buildings had been demolished, the purpose to which the Board proposed to put the land was declared *ultra vires* at the suit of certain ratepayers, and an injunction granted, restraining the Board from applying money obtained from rates to such purpose. The plaintiffs, reversioners of the lease, then claimed to re-enter for breach of covenant, and Street says :

> A question arose as to what title the Board had acquired (*a*) under the lease, and (*b*) by the acquisition proceedings. As to (*a*), it was assumed by the Court, and it appears to have been the fact, that the lease was acquired for the purpose subsequently held to be ultra vires.

Turning to the report (20 T.L.R. 23), we find Channell, J.,

> did not think it was essential, but he would draw the inference that the original intention of the defendants was to build on the land for that [*ultra vires*] purpose.

That is, he had no doubt that the erection of a building was *ultra vires*, but that does not mean that the purchase of the lease was so, too. Street says :

> The finding was, that following the *Ayers* case decision . . . the lease was good.

Certainly, the learned Judge did mention that case ; but it is submitted that the Board's title under (*a*) was good simply because the purchase itself was *not ultra vires*.

As to (*b*), it was held that *Ayers's* case did not apply, as the compulsory purchase had never been completed, and re-entry was granted. It is true that the learned Judge appears to have accepted the *Ayers* case as of general application, but it is submitted that his opinion was only *obiter*, and, in view of the unusual circumstances of the case, of very little weight.

Street cites two other cases : *Great Eastern Railway* v. *Turner*, (1872) L.R. 8 Ch. 149, and *Re Era Assurance Co.*, (1862) 2 J. & H. 400, 70 E.R. 1113, and 1 De G.J. & S. 29, 46 E.R. 12, which have some bearing on this point. In the first of these

> the chairman of the company purchased with its money, and held on its account, shares that it was not competent to hold.

On the chairman's bankruptcy it was urged that the whole transaction was illegal, and the shares passed to his assignees, but Lord Selborne, L.C., held that as the company's purported consent to the purchase was *ultra vires*, it was no consent, placing the chairman in the position of a trustee who had purchased unauthorized securities. And although the company could not have held the shares, it was entitled, as *cestui que trust*, to follow its assets which had been wrongly applied by the trustee, and was entitled to the benefit of the shares.

The *Era* case is more difficult. This company purchased the assets of the Saxon Assurance Co., but on the ground that this act was beyond the powers of both companies, Page Wood, V.-C., decreed that securities given by the purchasing company conferred no interest upon the shareholders of the selling company, and that they were not entitled to prove in the winding-up of the Era Co. This order was appealed from and the learned Vice-Chancellor's own account of the result is available in the report of the case in 32 L.J. Ch. 206, 212 :

> Now, when that case came on appeal before the Lord Justices, the whole matter being before them for consideration, they agreeing in the conclusion I had come to and therefore affirming the decision, did not concur in the grounds upon which I arrived at that conclusion. They expressed no opinion against my decision, upon the ground that matters had gone too far to be recalled : in fact, that might be considered as falling within the doctrine of acquiescence ; but they rested it upon a much higher ground. Lord Justice Knight Bruce distinctly rested it upon the acquiescence of the two companies, so that the agreement was put in a position in which neither party could resile from it. That was distinctly the ground of his decision : though he also threw out an intimation of opinion, if I may say so, that the original contract might be binding, though he did not say so positively. Lord Justice Turner, who went more minutely into that part of the case, undoubtedly arrived at a clear and distinct opinion that the agreement was within—I will not say the original scope and object of the company's deed—but within the power of the directors sanctioned by a committee of shareholders, as connected with the original scope of the business to be conducted by the society.

This rather involved explanation would seem to show that the Vice-Chancellor found some difficulty in explaining the decision of the higher Court, and it certainly is hard to find any ratio in the report. Street, too, is not altogether convincing in his explanation (see pp. 122–23) ; and although there are indications that the Lord Justices may have thought that the sale, though *ultra vires*, could still pass property, they are not conclusive, and cannot prevail against the numerous dicta to the effect that no rights at all can arise under a contract *ultra vires* a statutory corporation. Some of these are cited by Street, but even more in point perhaps, than any of those quoted by him are the remarks of Viscount Haldane, L.C., in *Sinclair* v. *Brougham*, [1914] A.C. 398, 420. He is discussing the right to follow money, and says :

> The principle appears to me to cover all cases where the property in the money has not passed, and the money itself can be earmarked in the hands of the person who has wrongfully detained it. . . . [The common law] looked simply to the question whether the property had passed, and if it had not, for instance where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it. And this appears to me, on ground of principle, as true of money paid under mistake of fact or an *ultra vires* contract, under which no property could pass or relation of debtor be constituted, as it is true in the case of a broker or bailee.

And these are supported by actual decisions—*e.g.*, to the effect that a purchase by a company of its own shares has no effect whatever, and the shares remain vested in the so-called vendor : see *Bellerby* v. *Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, and *Pulbrook* v. *New Civil Service Co-operation, Ltd.*, (1877) 26 W.R. 11, &c.

Street makes no comment on these decisions and dicta, and apparently cites them in support of his opinion that *Ayers's* case is bad law. In fact the whole effect of the section is summed up in his heading to Proposition 39, on p. 119 :

> There is some authority for the view that a transaction by which a corporation acquires property *ultra vires* is as a matter of title good. *Sed quaere ?*

It is submitted, however, that the cases show a difference in treatment of chartered corporations and

of statutory corporations, and that the proposition applies with full force to the former, but not at all to the latter. And for us in New Zealand, where chartered corporations are rare, and where "corporation" to all intents and purposes means a statutory corporation, the statement is more untrue than true.

In passing, it might be mentioned that the suggestion that an *ultra vires* contract could transfer property has apparently given rise to the idea that such contracts are really only unenforceable. For instance, Lawrence, J., in *Garrard* v. *James*, [1925] Ch. 616, 622, where he held that the directors of a company who had guaranteed the liability of the company under an *ultra vires* contract must pay, said :

> It is important to observe that the company committed no statutory offence by entering into the agreement, and that the transaction was not *malum in se*. The only result was that the agreement could not be enforced against the company.

This, however, cannot be taken literally. In *Snell on Equity*, 21st Ed. 473, the actual decision in this type of case is explained as follows :

> If A. purports to guarantee repayment of a loan made to an infant, or to a company which is borrowing *ultra vires*, the fact that the borrower is not liable, though it prevents the contract from being a true contract of suretyship, does not enable A. to repudiate liability.

And an unanswerable argument against the mere unenforceability of *ultra vires* contracts is supplied by *Great North-West Central Railway Co.* v. *Charlebois*, [1899] A.C. 114, where it was held that a judgment on such a contract, obtained in proceedings in which the question of *ultra vires* was not raised, is of no greater validity than the contract itself, and will be set aside at the instance of the company.

Different considerations apparently apply in the field of tort. As a matter of principle this is hard to account for, as an *ultra vires* tortious act is no more "the act of the corporation" for which it should in theory be liable, than an *ultra vires* contractual act. But in practice the result of such a rule would be so unjust, in this age of wealthy and powerful corporations, that it could not be tolerated. Nor is it unreasonable to draw a distinction between contract and tort, for a prospective contractor can examine the corporation's public documents, and has no one but himself to blame if he enters into an engagement by which the corporation promises to do something beyond its powers, whereas a person who is injured by tortious action is normally an involuntary agent.

Accordingly, in the recent case of *Northern Publishing Co., Ltd.* v. *White*, [1940] N.Z.L.R. 75, the principle was affirmed that :

> If a limited company does an act honestly believing that it is exercising the powers given to it by its memorandum of association, but the act is in fact in excess of these powers and amounts to a tort, the company is liable to any person damnified in an action for damages.

And if this is so in relation to statutory corporations, *a fortiori* it must apply also to common-law corporations.

LEGAL LITERATURE.

Willis's Workmen's Compensation Acts. 32nd Edition. By W. ADDINGTON WILLIS, C.B.E., LL.B., and G. BARRATT, Barristers-at-Law. London : Butterworth & Co. (Pub.) Ltd. ; Shaw & Sons, Ltd.

It is scarcely necessary to do more than announce a new edition of *Willis*. The law has been changed since the last edition by the Factories Act, 1937, with its "examining surgeons," and the Workmen's Compensation (Amendment) Act, 1938, has provided for persons plying for hire with a vehicle or vessel held under a contract of bailment. The authors note aspersions cast on the "principle of the added peril" by *Harris* v. *Associated Portland Cement*, [1938] 31 B.W.C.C. 434, and the important case of *M'Laughlin* v. *Caledonia Stevedoring Co.*, 31 B.W.C.C. 198, on the burden of proof. All the recent cases are duly noted. We are glad to see a new edition of a work which the profession and the Bench hold in equal esteem.

Handbook of Emergency Legislation, 1939. Edited by A. E. CURRIE. Issued under the direction of the Hon. H. G. R. Mason, Attorney-General. Wellington : Government Printer.

In a handy form, here are collected all the regulations which relate to conditions arising out of the war, and which were issued up to November 22, 1939. In addition, the Public Safety Conservation Act, 1932, and the Emergency Regulations Act, 1939, are printed in full. In this way, the Handbook is of great use in isolating the subject-matter of emergency regulations from the general routine regulations on what would ordinarily be peace-time subjects, which are left to the usual Regulations volume, which will, we presume, be all-inclusive.

The most useful feature of the Handbook is the Index, wherein it can be seen at a glance whether or not any topic is covered by emergency regulations. For the Index alone, all having to do with investigating the present condition of the law, should be grateful.

The Life of Sir Edward Clarke. By DEREK WALKER-SMITH and EDWARD CLARKE. With a Foreword by the LORD CHANCELLOR. London : Thornton Butterworth.

"The public sometimes think and speak badly of the Bar. In particular its members are accused of being self-seekers lacking in principle. If any believing this should speak of it as if it were a universal rule there need be no hesitation ; it is only necessary to mention the name of Sir Edward Clarke." So writes the Lord Chancellor in a preface that warmly and fitly recommends this life of a great man to whose forensic genius and kindness of heart he can of his personal experience pay tribute.

Clarke's methods were nowhere sensational in the cheaper sense, and the admirable quality of this book is that the authors' sober, dignified style sacrifices nothing of interest, marches in step with his career, and without need for any trace of theatricality holds our attention from start to finish. Full justice is done to Clarke's outstanding ability, but no attempt is made to obscure his occasional limitations of outlook and vision. These handicaps cost him his larger ambitions in the political sphere, but the telling of them enhances our appreciation of the man's essential probity, steadfastness and courage. The authors have had access to Sir Edward's own letters and to those of many of his clients and of the great figures of his age. The subject-matter of the volume ensures its interest, but its greater worth is the enthralling account it gives of the rise from humble beginnings of a man whose honesty, courage, and generosity, not less than his genius, will prove an inspiration to all who read of him.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

(*Continued from p. 71.*)

Income-tax: Review of Depreciation Allowances.—The following letter and circular from the Commissioner of Taxes was brought to the attention of members:—

In connection with the above, I annex a copy of an advertisement which is being inserted in the newspapers in the main centres.

I would appreciate your co-operation in the matter of circulation of the text of the statement amongst your members, as you may consider warranted, with a view to facilitating representations on the basis as intimated therein.

Copy of Advertisement:—

It is hereby notified for general information that the existing rates of allowance for depreciation in respect of plant and machinery (including motor-vehicles) are being reviewed. The review is being undertaken with the object of providing, in so far as practicable, for a reasonable general average rate of depreciation for plant and machinery.

Taxpayers are invited to make representations in respect of any particular claims for the revision of existing rates or the retention of any special rates at present applicable. Representations should be made in writing to reach me not later than April 30, 1940, and should be of a specific nature. Information regarding the effective life of the asset concerned should be supplied, and any other evidence which is considered will assist in determining a reasonable rate of allowance. Representations should be made where possible through the medium of trade associations or similar organizations on behalf of members of a particular class of business or industry covering New Zealand as a whole, so as to avoid the consideration of applications from individual members or district organizations expressing in all probability divergent views.

Any alterations made in rates will first take effect in assessments in respect of income derived during the year ended March 31, 1941. The rates of depreciation of buildings are not being further reviewed.

Exchange of Cheques in Conveyancing Transactions.—The following letter was received from Auckland:—

I am enclosing a portion of a letter recently received by my Council from a local public accountant.

My Council suggests that this matter might perhaps be referred to the Audit Committee so that a uniform ruling could be obtained on the points raised. Doubtless circumstances such as these are common throughout the Dominion.

Enclosure:—

One or two matters cropped up in this quarter which I think require the ruling of your Society. A client of the firm, Mrs. M., purchased from one, S., a property for £1,655. Mrs. M. paid in £423 to Messrs. A. and B., which was banked through their trust account and a receipt given. Mrs. M. then borrowed £1,000 on first mortgage from Messrs. C. and D. This cheque, the net amount of which was £958, was handed over on settlement by Messrs. C. and D. and endorsed direct over to S.'s solicitors, Messrs. E. and F., by Messrs. A. and B. No receipt was issued at the time for this £958, nor was it entered in the cash-book, but a receipt from Messrs. E. and F. was placed on the file disclosing the payment.

In another case one, H., purchased a property from R. and H. paid in £182, which appears in the trust account receipt-book. He borrowed £800 from Messrs. C. and D., the net amount being £780 10s. 6d., and here again no receipt was issued for this cheque nor entry made in the cash-book, but the cheque endorsed over direct to T.

I have had these amounts entered up in the cash column of the trust cash-book, and also shown them as paid out in cash, and then posted in the ledger, so that the transactions now appear in the books. I understand that very often transactions involving several firms of solicitors are settled in this manner, and cheques simply endorsed from one to the other, but it does seem to me that in that case a receipt should be issued and an entry made in the cash column by all concerned. I cannot see that the Law Practitioners Act requires moneys to be actually banked in the trust account, but that they should be entered in the records.

I would be glad to have your ruling, as I consider the method advocated should be adopted. The files in respect of these matters in the office of A. and B. clearly disclosed the nature and details of the transaction.

The Joint Committee reported that they had considered this matter, but desired to make some further inquiries as to the practice of legal firms before reaching a decision.

Mr. Watson pointed out that in certain cases, such as settlements by insurance offices, cheques were made out in the name of the client, and so could not be banked in the solicitor's trust account. It was, of course, desirable to have some entries in the books of account to show what had occurred.

The matter was accordingly held over until the next meeting.

Motor-vehicles: Noting Conditional-purchase Agreement on Registration Card.—Mr. Churchward said that his Society had not yet prepared a letter for circulation among the District Societies, but this would be done at an early date.

Solicitors: Debt Collecting.—After a brief discussion, it was decided to ask the Wellington delegates to frame a proposed ruling and submit this to the next meeting for discussion.

Judge's Summing-up and Oral Judgment: Keeping Proper Record.—The Under-Secretary of Justice replied as follows:—

I am directed by the Hon. the Attorney-General to acknowledge the receipt of your letter to him dated December 14, and to state in reply that this matter will be carefully considered, but at the present time, owing to the war, the personnel factor is a difficult one.

Scale of Fees for Renewal of Leases.—The Hamilton Society wrote as follows:—

Since it has become possible to register an extension of a lease by a memorandum of extension under s. 4 of the Land Transfer Amendment Act, 1939, the question of the appropriate fee on such extensions has become a matter of controversy.

My Council has given some consideration to this matter, and has formulated a scale based on that for variations of mortgages by capitalizing the rent at 5 per cent. As, however, this question affects all other Law Societies and in order that there should be uniformity of charges, it has been decided to submit the proposed scale to your Society for its consideration. My Society's proposed scale is as follows:—

		£	s.	d.
Rent not exceeding £10 per annum	(£200)	1	11	6
Rent not exceeding £25 per annum	(£500)	2	2	0
Rent not exceeding £50 per annum	(£1,000)	3	3	0
Rent not exceeding £100 per annum	(£2,000)	4	4	0
Rent not exceeding £150 per annum	(£3,000)	5	5	0
Rent exceeding £150 per annum	.. ..	7	7	0

There should, of course, be added to the above scale incidental costs of searching and stamping and registering. It is true, however, that some anomalies will arise on the application of the above scale.

Taking, as example, a lease at rent of £12 per annum, the costs of a new lease would be as follows :—

	£	s.	d.
Fee for preparation	3	3	0
Stamp duty		6	6
Registration fee		10	0
Agency	1	0	0
Total	£4	19	6

The Registrar will note any mortgages on the new lease free of cost on request from the lessee.

The costs of a renewal of such lease would be as follows :—

	£	s.	d.
Fee for preparation	2	2	0
Stamp duty		6	0
Registration		10	0
Agency	1	0	0
Mortgagee's consent fee..	1	11	6
Mortgagee's production fee		10	6
Total	£6	0	0

Other examples :—

On a rental of £10, the costs would be £4 19s. 6d. (new lease) and £5 10s. (renewal).

On a rental of £50, the costs would be £4 19s. 6d. (new lease) and £7 1s. 6d. (renewal).

On a rental of £100, the costs would be £5 0s. 6d. (new lease) and £8 2s. 6d. (renewal).

It would seem, therefore, that wherever there is a mortgage or mortgages the cost on a renewal under the Act would be more than the costs on a new lease.

I would be glad, therefore, if you would kindly have my Society's proposal brought before your Council at its next meeting.

On the motion of Mr. Churchward it was decided that the scale should be referred to the Wellington Conveyancing Committee (Messrs. Hadfield, Webb, and Weston, K.C.) for consideration and report.

Enlisting Partners and Practising Fees.—The Taranaki Society wrote as follows :—

Mr. , a member of the firm of has enlisted in the Army and is at present posted to Headquarters Staff at Wellington. He has not retired from his firm, but, of course, is not personally in practice. In these circumstances my Society desires to have a ruling on the following questions :—

1. Is he liable for practising fees ?

2. Is he liable to pay the Guarantee Fund levy ?

3. Will he be liable for either of these if he goes overseas on active service ?

The Auckland Society also wrote to the following effect :—

The question has recently been raised in Auckland concerning the practising fees of members of the profession who are on active service overseas.

In this connection it would seem that cases might fall into one or other of the following categories :—

A practitioner not being a member of a partnership firm might (*a*) give up his practice entirely ; (*b*) arrange for another practitioner already practising on his own account to carry on in addition the practice of the absent solicitor on terms mutually agreed on ; (*c*) arrange for a qualified clerk to carry on the practice in the name and on behalf of the absent practitioner.

A practitioner being a member of a partnership firm might retain his interest in the firm and practice which is carried on by the remaining partner or partners.

The opinion of the members of my Council is generally that the practising fee should be remitted, though it is realized that certain cases mentioned above may perhaps call for special treatment.

Attention has been drawn to Decision No. 22 of your Council, published on p. 12 of the Book of Decisions. Some doubt has been expressed in some quarters, however, whether in cases where a practitioner, though absent, retains his interest in a practice carried on by the partners or servants, the Society can legally waive the fee imposed by statute. In this connection the course adopted by the Law Society in England may be of interest : see *Law Society Gazette*, p. 266, November, 1939.

My Council would be glad if you would bring this matter before your Council at its next meeting. In addition to practising fees, fidelity payments also are, of course, involved.

NOTE.—The statement by the English Law Society is as follows :—

With reference to the renewal of the practising certificates of solicitors who have joined His Majesty's Forces, the Council desire to direct attention to the fact that :—

(1) The certificate duty, having been imposed by statute, must be paid in the absence of new legislation to the contrary.

(2) Any solicitor who practises either by himself or as a partner in a firm, or who receives any share in the profit costs of the firm or who has a clerk or clerks articled to him, must take out a practising certificate.

(3) The name of any solicitor not taking out a practising certificate cannot be entered in the official list of practising solicitors in the Law List.

The Council also desire it to be known that in cases in which practising certificates have not, owing to war service, been renewed, they will, in the absence of any other special circumstances, facilitate as much as possible the renewal of such certificates, although twelve months or longer may have elapsed since the date of the expiry of the last certificate.

The Council have made representations to the Chancellor of the Exchequer :—

(1) That the certificate duty of those solicitors unable to attend to their practices on account of being engaged on war service should be refunded ;

(2) That solicitors who are engaged on war service within three years after being admitted should not, as a result of such service, lose the benefit of the provision under which solicitors' certificate duty is payable at only one-half of the full rate for the first three years after admission ; and

(3) That the stamp duty paid on articles of clerkship should be returned to the dependants of any articled clerk killed on active service.

The President referred to Ruling 22, which was as follows :—

A file of correspondence between the Otago Law Society and a firm of Dunedin solicitors was sent for the opinion of the Council.

The question to determine being whether payment of practising fees of a partner who has left the Dominion on active service but retains an interest in the business should be paid by the firm during his absence.

Resolved : That the Council in dealing with the letters of the Otago Society are of opinion that it would be quite proper for any Society to waive payment of the practising fees from any solicitor while absent from the country on active service, even though a member of a partnership firm of solicitors carrying on business in New Zealand. The Council expresses no opinion as to the attitude adopted in the particular circumstances of the case by Messrs. , but that it should be brought under the notice of the latter that they run the risk of being unable to recover their costs while one member of the partnership has not paid his practising fees.

It was unanimously decided that Ruling 22 should be reaffirmed with the addition that it should also apply to those on full time military home service : but that where any enlisted practitioner receives a share of the profits, he is liable for the Guarantee Fund contribution.

(To be concluded.)

SUMMARY OF RECENT JUDGMENTS

(*Concluded from p. 76*).

SUPREME COURT.
Dunedin.
1940.
February 16, 23.
Kennedy, J.

McMILLAN
v.
COMMISSIONER OF STAMP DUTIES.

Public Revenue—Death Duties (Gift Duty)—Provision of Money for Purchase of Land—Part Gift, Part Loan—Whether Gift Duty payable on whole Amount—Death Duties Act, 1921, s. 49.

Appellant made a gift to his wife of £400 cash, and later a further gift of £47 18s. 6d. Subsequently to these gifts, she purchased land and desired to pay the rental, £1,100, on account. In order to enable her to do so, her husband decided to make the sum of £700 available to her. He gave her a further £400 and lent her £300, taking from her an agreement to mortgage her interest under the agreement for sale and purchase of the land together with interest at a rate left blank on £300 and on all further advances.

The Commissioner of Stamp Duties treated the sum of £700 as one transaction and assessed gift duties as on a gift of £700 and a gift of £47 18s. 6d.

On appeal from such decision,

Zimmerman, for the appellant; *F. B. Adams*, for the respondent.

Held, That, as to the sum of £700, there were two separate dispositions—a gift of £400, and a secured loan (to be repaid with interest at an adequate rate) carried out contemporaneously, and that s. 49 of the Death Duties Act, 1921, did not apply.

Solicitors: *Lee, Grave, and Zimmerman*, Oamaru, for the appellant; *Crown Law Office*, Wellington, for the respondent.

SUPREME COURT.
Auckland.
1940.
March 13, 15.
Ostler, J.

YOUNG v. ANDERSON AND OTHERS.
ANDERSON AND OTHERS v. YOUNG AND OTHERS.

Contract—Consideration—Will—Agreement to make Will in Person's Favour—Uncertainty—Estate consisting principally of Land—No Note or Memorandum in Writing—Whether Doctrine of Part-performance applicable—Statute of Frauds, 1677 (29 Car. II, c. 3), s. 4.

A testatrix, by her will, provided that the income of her estate should be divided equally between her six children for their lives and that after their death the corpus should be divided equally among her grandchildren.

In an action to prove the will in solemn form, her six children counter-claimed, one of the causes of action being that testatrix was bound by contract to leave her estate equally amongst them.

Anderson, for the plaintiffs on the counter-claim; *Moss*, for E. H. Young and the adult beneficiaries; *Bone*, for the guardian *ad litem* of the infant beneficiaries.

On the facts, as set out in the judgment,

Held, 1. That a definite contract had been proved in that, in consideration of five of such children withdrawing their claims for services rendered and for repayment of moneys lent, the testatrix would, by her last will, leave the whole of her property among her six children.

2. That, while for the greater part of their claims the children had no legal redress, the relinquishment of claims that they honestly considered were legal claims, even though they had no legal validity, was sufficient consideration to support the promise.

Callisher v. *Bischoffsheim*, (1870) L.R. 5 Q.B. 449, applied.

3. That the contract was not void for uncertainty upon the ground that it was made with five children only and did not include the sixth.

4. That as at the time the testatrix made her promise to leave her estate by will to her six children, that estate consisted principally of land, the contract was within s. 4 of the Statute of Frauds, and there being no memorandum in writing to satisfy the Statute, the action must fail inasmuch as the equitable doctrine of part performance did not apply, and, in any case, the acts of part performance were not unequivocally referable to the contract.

Fenton v. *Emblers*, (1762) 3 Burr. 1278, 97 E.R. 831; *Horton* v. *Jones*, (1934) 34 N.S.W.S.R. 359; *McManus* v. *Cooke*, (1887) 35 Ch.D. 681; *Lavery* v. *Pursell*, (1888) 39 Ch.D. 508; *Elliott* v. *Roberts*, (1912) 28 T.L.R. 436; *Lacon* v. *Mertins*, (1743) 3 Atk. 1, 26 E.R. 803; *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467; *Simpson* v. *Simpson*, (1918) N.Z.L.R. 319, G.L.R. 12; and *McKenzie* v. *Templeton*, (1915) 34 N.Z.L.R. 596, applied.

Solicitors: *Seller, Bone, and Cowell*, Auckland, as agents for *L. M. Moss*, New Plymouth, for the plaintiffs; *Anderson, Sneddon, and Bainbridge*, for the defendants.

SUPREME COURT.
Christchurch.
1940.
Feb. 21, 22, 23.
Northcroft, J.

McKENZIE
v.
ROBERTSON AND ANOTHER.

Practice—Trial—Negligence—Two Defendants, separately represented, each alleging Negligence against each other and Contributory Negligence against Plaintiff—Course of Trial—Order of Cross-examination—Order of Addresses—Code of Civil Procedure, R. 268.

In a running-down case in which plaintiff sued two defendants, separately represented, for damages alleged to have been caused by their negligence, and each defendant alleged negligence against the other and contributory negligence against the plaintiff, and so assumed an onus of proof, the following procedure was adopted by the learned Judge:

At the conclusion of the plaintiff's case, counsel for the first defendant opened his case and led his evidence. Counsel for the second defendant, followed by counsel for the plaintiff, cross-examined the first defendant's witnesses. Counsel for the second defendant then opened his case and led his evidence, counsel for the first defendant followed by counsel for the plaintiff cross-examined the second defendant's witnesses. The final addresses were delivered in the following reverse order of the openings—*viz.* (i) counsel for second defendant, (ii) counsel for the first defendant and (iii) counsel for plaintiff.

Rule 268 of the Code of Civil Procedure was applied by analogy.

Walter v. *London United Tramway Co.*, (Unreported, see *1940 Annual Practice*, 638), applied.

Counsel: *W. A. Brown*, and *E. E. England*, for the plaintiff; *W. R. Lascelles*, for the first defendant; *C. S. Thomas*, for the second defendant.

Solicitors: *Lane, Neave, and Wanklyn*, Christchurch, for the plaintiff; *Weston, Ward, and Lascelles*, Christchurch, for the first defendant; *Charles S. Thomas and Bowie*, Christchurch, for the second defendant.

RULES AND REGULATIONS.

Emergency Regulations Act, 1939. Supply of Liquor to Soldiers Emergency Regulations 1940. February 28, 1940. No. 1940/39.

Emergency Regulations Act, 1939. Civil Arrest of Soldiers Emergency Regulations 1940. February 28, 1940. No. 1940/40.

Industrial Conciliation and Arbitration Act, 1925. Industrial Conciliation and Arbitration Amendment Regulations 1940. February 28, 1940. No. 1940/41.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices General Regulations 1938, Amendment No. 8. February 29, 1940. No. 1940/42.

Emergency Regulations Act, 1939. Hides Emergency Regulations 1940. March 7, 1940. No. 1940/43.

Emergency Regulations Act, 1939. Waterfront Control Emergency Regulations 1940. March 11, 1940. No. 1940/44.