New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"There are very good reasons in war-time for making use of every kind of ability, and the Government of England has certainly not been backward of late in drawing upon the experience of tried business men in many fields of work. But the assumption that there is some training or experience in business life which makes the business man altogether superior to the lawyer in dealing with affairs is utterly wrong. Each has his own field, and of the vast majority of lawyers it has to be said that they do not rise to high places in the profession unless, combined with high mental equipment and personal energy, they have a first-hand acquaintance with affairs."

—Rt. Hon. Lord Birkenhead.

VOL. XVII. TUESDAY, JANUARY 21, 1941 No. 1.

CONSCIENTIOUS OBJECTORS.

REGULATION 21 (1) (*e*) of the National Service Emergency Regulations, 1940 (Serial No. 1940/117) establishes as a ground for a right of appeal that a man called up for service conscientiously objects to serving with the Armed Forces.

Before an appeal may be allowed on this ground, under Reg. 21 (2) the Appeal Board must be satisfied that the appellant has a genuine belief that it is wrong to engage in warfare in any circumstances. In general, the Appeal Board has a discretion to accept active and genuine membership of a pacifist religious body as evidence of the appellant's convictions; and, in particular, has a discretion to allow an appeal on proof:

> (*a*) That the appellant has for a substantial period preceding the outbreak of the present war with Germany been a member of the Society of Friends or of the Christadelphian Sect, *and*
>
> (*b*) That the appellant has during that time been actively associated with the body of which he is a member.

Apart from these provisions, which are not exhaustive of the evidence that may be accepted on an appeal, the question is what proof is required that an appellant "conscientiously objects to serving with the Armed Forces on the ground that he holds a genuine belief that it is wrong to engage in warfare in any circumstances." Of this, the Appeal Board must be satisfied before it allows the appeal.

Where a man applies for a certificate of exemption, he must express his objection to the Court: *R.* v. *Deakin*, (1911) 2 D.L.R. 282; and he must satisfy the Court of his belief: *Reg.* v. *Welby, Ex parte Bird*, (1902) 66 J.P. 86 (Div. Ct.). As to refusal to being sworn as a witness on the ground of conscientious objection (such as the reason that the witness was commanded by an authority superior to earthly law to "swear not at all"), see *Re Laurence*, (1862) 20 L.T. (o.s.) 16.

Difficulty arises as to how the Appeal Board is to be satisfied that a person holds a genuine belief.

"Conscience," according to Locke, "is nothing else but our own opinion or judgment of the rectitude or gravity of our own actions": *Essay Concerning the Human Understanding*, Bk. 1, Ch. 3, s. 8; and what is each man's opinion only he can state.

In *Re Blaiberg*, [1940] 1 All E.R. 632, 635, Morton, J., paraphrasing an observation of Farwell, J., remarked that His Lordship was saying:

> It is really impossible to ascertain whether or not a person in his own heart, and in his own mind, holds a particular religious belief. It is not a matter which the Courts can ascertain with certainty.

Morton, J., at p. 636, went on to say:

> It seems to me that the question whether or not a person is "of the Jewish faith" is something which lies in his or her own conscience, and is a matter of belief. . . . It seems to me that it depends upon whether or not he holds certain beliefs. What the beliefs are which make a man of the Jewish faith or not of the Jewish faith, I do not know. It is possible that the Court could ascertain that by evidence. I do not know whether or not there would be any difference of opinion among persons called to define the beliefs which it is necessary for a man to hold in order to be of the Jewish faith, but the further question of whether or not he holds those beliefs, and really believes them, is not, to my mind, a matter which a Court can ascertain with certainty . . . It does not seem to me that that is an inquiry which the Court would undertake.

A further difficulty arises in respect of an appellant of the age of twenty-one, or thereabouts, or under that age. Can he prove that he has for a substantial period preceding the outbreak of the present war been actively associated with the pacifist religious body referred to in Reg. 21 (2); since he is not, in law, in a position truly to determine what his religion is until he attains his majority: *In re May, Eggar* v. *May*, [1917] 2 Ch.

126 (per Neville, J.) approved by the Privy Council in *Patton* v. *Toronto General Trusts Corporation*, [1930] A.C. 629, 636.

In *In Re May, Eggar* v. *May*, [1932] 1 Ch. 99, Luxmoore, J., said, as to evidence of religious belief:

> For my own part, I should have thought that a person under the age of twenty-one could properly determine his adherence to a particular religion before attaining that age. Take, for instance, the case of a member of the Church of England, a person who has been baptized and confirmed and who is a communicant; he or she is recognized as a member of the Church of England, and is at any rate after attaining eighteen years of age, eligible to be entered on the electoral roll of the particular Church which he or she usually attends. I do not think that Neville, J., decided that point, all he decided was that the fact that a person was baptized in the Roman Catholic Church did not make him a Roman Catholic, and with that part of his decision I find myself in complete agreement: *ibid.*, 106–107.

The Regulation places a duty on the Appeal Board to satisfy itself that the appellant has a genuine belief that it is wrong to engage in warfare in any circumstances, and this it can ascertain only by objective tests.

During the last war, in the course of a wide experience in appearances on appeals to Military Service Boards on grounds other than conscientious objection, one remembers listening to many appeals by conscientious objectors.

Appellants on the ground of conscientious objection could then be roughly classified as follows:

1. Members of religious bodies of recognized pacifist tenets, with an established membership therein: such bodies being the Society of Friends, the Christadelphians, and others.

Here, membership could be proved, and evidence given, from publications or by evidence of a Minister of the body itself, as to the accepted and generally professed belief of its members.

2. Members of religious bodies that do not profess any recognized pacifist tenets, but the appellants themselves hold individual views as to the wrongness of engaging in warfare, based on their private interpretation of Scriptural texts, &c.

The Appeal Boards usually required proof that such views had been held by the appellant before the war, and evidence was given in many cases. The Board itself often had stock questions to put to the appellant to test whether such views were genuinely held.

3. Persons not claiming adherence to any recognized religious body but basing conscientious objection on personal religious grounds arising out of humanitarian, political, economic, or social opinions individually held, or held by an organization of which the appellant was a member.

These cases were troublesome, but were not difficult to test as to sincerity, as, for example, by an appellant proving that he had lost his job for persisting in pacifist views. Many of the cases were those of obvious shirkers, while others could be classed as subversive. Unless sincerity were well established, these appeals were dismissed.

An Appeal Board can be relied upon to sort out the shirkers among those appealing on the ground of conscientious objection; especially after it has had a little experience of this class of appellant.

Under s. 2 of the Military Service Act, 1916 (Great Britain), a Local Tribunal (as a Military Service Board was termed), was authorized to grant a certificate of exemption to an applicant upon the ground (*inter alia*) "of a conscientious objection to the undertaking of combatant service." There was a right of appeal to an Appeal Tribunal of the area.

In reported decisions of the Central Tribunal in England in 1917, a man of 25 who had become a Quaker since the outbreak of war proved conscientious objection to military service before the war. The Tribunal were convinced of his conscientious objection to all forms of military service, and granted him exemption from combatant service only, subject to the proviso that within twenty-one days after notice of the decision, he undertook ambulance work under recognized control and approved by the Central Tribunal, so long as he continued to act in such capacity to the satisfaction of the persons in control thereof.

A Christadelphian, aged 22, who had joined that body before the war, stated he would be prepared to undertake services of a non-combatant nature provided he were not placed under military control. His creed forbade him taking the military oath or doing any work under military control. He was given exemption, provided within twenty-one days he undertook work, which, not being under military control, was nevertheless useful for the prosecution of the war under conditions approved by the Tribunal.

In respect of appeals not based on any religious belief, but alleging conscientious objection to military service, the appellants were mostly members of some organization. The cases differed; for instance, two grounds alleged were (*a*) opposition to the existing war, and (*b*) disapproval of the existing organization of society, considered as not being worthy of defence, though the appellant would fight in defence of a State organized in the way he approved. These opinions, however genuinely and strongly held, did not in the view of the Central Tribunal amount to conscientious objection within the meaning of the Military Service Act, 1916.

In cases where the Tribunal were satisfied that the appellant had a genuine settled conscientious objection, not only to the actual taking of life, but to everything which is designed to assist in the prosecution of war, such cases, where established, entitled the appellant, in the opinion of the Tribunal, to exemption from all forms of military service upon conditions as to performing work of national importance.

The Central Tribunal regarded the age of the man alleging conscientious objection as an important factor in the consideration of the question whether his objection was so deliberate and settled as to entitle him to exemption or to the widest form of exemption: (1917) 16 Sol. Jo. 312.

The recent announcement of the personnel of the various Appeal Boards is a reminder that the question of appeals by conscientious objectors to military service overseas will soon become a live issue. In view of the foregoing examples of the manner in which such appeals have been dealt with in the past, both in New Zealand and in Great Britain, these appeals should result in exemptions being few and far between, except where, in the words of the Regulation, such objection is based upon a proved genuine belief that it is wrong to engage in warfare in any circumstances.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1940.
September 17, 18; November 29.
Myers, C.J.
Blair J.
Kennedy, J.

PINNER v. MARTIN'S BOOT AND SHOE STORES, LIMITED.

Practice—Trial—Judge and Jury—View by Judge or Jury—Purpose and Limitations.

The Court of Appeal, allowing an appeal from that portion of the judgment of the learned trial Judge, dismissing an action for damages for negligence, despite the verdict of the jury in favour of the plaintiff, held that there was evidence to go to the jury upon which they could properly find a verdict for the plaintiff, and gave judgment for the plaintiff for the damages assessed by the jury.

The case is reported on the point relating to a view by a Judge or jury.

Semble, per *Myers*, C.J., The decision in *Frank Harris and Co., Ltd.* v. *Rora Hakaraia*, (1914) 33 N.Z.L.R. 1074; 16 G.L.R. 630, does not seem to be an entirely satisfactory or sufficient statement.

Semble, per *Blair*, J. The said decision that a view whether by a jury or a Judge is "for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and apply the evidence," goes no further than to lay down a proposition applicable to cases circumstanced as that one was, and it cannot be taken as an authority that in no case can a Judge or a jury, upon a view, act upon the evidence of his or their own eyes.

Frank Harris and Co., Ltd. v. *Rora Hakaraia*, (1914) 33 N.Z.L.R. 1074; 16 G.L.R. 630; *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135, considered and discussed.

Observations by *Myers*, C.J., and *Blair* and *Kennedy*, JJ., as to a view by a trial Judge after the verdict of the jury.

Judgment of *Ostler*, J., reversed.

Counsel: *Cooke*, K.C., and *Mitchell*, for the appellant; *Leicester*, for the respondent.

Solicitors: *Treadwells*, Wellington, for the appellant; *Leicester, Rainey, and McCarthy*, Wellington, for the respondent.

Case Annotation: *London General Omnibus Co., Ltd.* v. *Lavell*, E. and E. Digest, Vol. 32, p. 340, para. 236.

SUPREME COURT.
Wellington.
1940.
December 3, 11.
Smith, J.

***In re* WILLIAMS (DECEASED) WILLIAMS v. BURGE AND OTHERS.**

Will—Construction—Devisees and Legatees—"After her or their death."

A will contained the following subclauses:—

"(*iii*) Upon trust to pay the income of the share or shares to such of my said sisters who are unmarried or being married are without issue for life and after her or their death

"(*iv*) Upon trust to divide equally the said share or shares of my said sisters without issue between my said sisters with issue and my brothers G. C. W. and A. T. W. provided however should any of the said brothers or sisters then be deceased leaving issue such issue shall stand in the place of such deceased and be entitled to the share of the parent."

On originating summons for interpretation thereof,

Hadfield, for the plaintiff; *Evans*, for the first defendant; *A. T. Young*, for the second defendants; *T. P. McCarthy*, for the third defendants.

Held, 1. That the word "death" covered several deaths but indicated only one point of time, and that subcl. (*iii*) conferred a gift of income for life from each equal share held under the subclause for each married sister and each unmarried sister without issue, and after the death of any such sister the income from her share is held for the benefit of her surviving sister or sisters.

In re Ragdale, Public Trustee v. *Tuffill*, [1934] Ch. 352, applied.

Re Ibbetson, Ibbetson v. *Ibbetson*, (1903) 88 L.T. 461, and *In re Browne's Will Trusts, Landon* v. *Brown*, [1915] 1 Ch. 690, distinguished.

2. That subcl. (*iv*) took effect only upon one event—*viz.*, after the death of all who were entitled to income under subcl. (*iii*).

Solicitors: *Hadfield, Peacock, and Tripe*, Wellington, for the plaintiff.

Case Annotation: *In re Ragdale, Public Trustee* v. *Tuffill*, E. and E. Digest, Supp. Vol. 44, No. 3822a; *Re Ibbetson, Ibbetson* v. *Ibbetson, ibid.*, Vol. 44, p. 803, para. 6573: *In re Browne's Will Trusts, Landon* v. *Brown, ibid.*, p. 1215, para. 10506.

SUPREME COURT.
Blenheim.
1940.
November 21; December 13.
Blair, J.

FULLER v. PERANO.

Principal and Surety—Guarantee—Bank Overdraft—Statute of Limitations—Principal Debtor's Debt to Bank Statute-barred—Surety compellable to pay—Whether Surety can recover from Principal Debtor.

Where a surety, who guarantees the principal debtor's account at a bank, is compellable by the bank to pay, the surety, notwithstanding that the principal debtor's debt to the bank is statute-barred, can recover against the principal debtor the payments made by him.

In re Morris, Coneys v. *Morris*, [1922] 1 I.R. 81, applied.

Ascherson v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401, referred to.

Counsel: *Churchward*, for the plaintiff; *Macnab*, for the defendant.

Solicitors: *Burden, Churchward and Horton*, Blenheim, for the plaintiff; *A. A. Macnab*, Blenheim, for the defendant.

Case Annotation: *In re Morris, Coneys* v. *Morris*, E. and E. Digest, Vol. 40, p. 391, note c; *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd., ibid.*, Vol. 26, p. 127, para. 902.

COMPENSATION COURT.
Greymouth.
1940.
November 4, 6; December 4.
O'Regan, J.

FITZSIMMONS v. WESTPORT-STOCKTON COAL COMPANY, LIMITED.

Workers' Compensation—Weekly Payments—Discontinuance—Whether Worker "actually returned to work"—Statutes Amendment Act, 1938, s. 62 (2) (a), (4).

An injured worker who was receiving weekly payments of compensation returned to work on the certificate and advice of his own medical adviser with the intention of carrying on, and might have continued working had he persevered sufficiently to overcome the pain and disability he experienced at the outset. He, however, desisted after working two hours on account of what he described as an acute pain in one leg. The weekly payments were discontinued as from the date of such resumption.

W. D. Taylor, for the plaintiff; *W. J. Kemp*, for the defendant.

Held, That he had "actually returned to work," within the meaning of s. 62 (2) (*a*).

Bell v. *John Mill and Co.*, [1939] G.L.R. 428, distinguished.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Izard, Weston, Stevenson, and Castle*, Wellington, for the defendant.

(*Continued on p. 11.*)

STOCK MORTGAGEES AND THE MORTGAGES EXTENSION EMERGENCY REGULATIONS.

A Pooling Arrangement.

A further phase of the case of *In re a Mortgage, C. to the Public Trustee*, [1940] N.Z.L.R. 410, came before the Hon. Mr. Justice Ostler on December 17, 1940. His Honour had adjourned the matter in order that the stock mortgagee (a bank) might confer with the land mortgagee (the Public Trustee) with a view to the making of a pooling arrangement. The two mortgagees had failed to agree as to the period to be covered by the arrangement, and His Honour had said that in that event he would join the bank as a party, and after hearing its submissions, would make such order as might appear to be just. In the meantime the judgment of the Rt. Hon. the Chief Justice in *In re a Mortgage, F. to the State Advances Corporation*, (1940) 16 N.Z.L.J. 291, had been delivered, dissenting from that of the Hon. Mr. Justice Ostler in *C.'s* case, both on the question of the right of the current account mortgagee to place to credit of an overdrawn account profits on the sale of goods or produce entrusted to that mortgagee for disposal and also on the question of the power of the Court to join the stock mortgagee as a party to the application of the land mortgagee.

In the further stage of the proceedings in *C.'s* case, counsel for the bank agreed to submit to the judgment, either by being joined as a party in accordance with the view of Mr. Justice Ostler, or by filing an application of its own, in accordance with the view of the Chief Justice.

Mr. Justice Ostler, in his judgment in the second stage of *C.'s* case, adhered to the views at first expressed by him, with the result that there is a definite difference of judicial opinion as to the meaning of the regulations, and there is no right of appeal from the decision of a Judge in proceedings under them.

The following is the text of the second judgment of Mr. Justice Ostler, delivered orally:

I would like to say that I appreciate the attitude which has been taken up by the bank. They have had the benefit of a judgment of the Chief Justice which, if it is right, shows that they need not submit to the judgment of this Court at all, but as a matter of fairness and in order to have the matter settled they say, "We will submit to the jurisdiction, and we will do so if necessary by filing an application for leave to sell." I appreciate that very much, but I am still of opinion that there is jurisdiction in this Court, and that no stock mortgagee, whether it be bank or company or person has any right whatever by the law to pay itself any part of the principal from the money of its client without getting the leave of the Court under these regulations, and I believe that to be the meaning of the regulations and that to be the law.

Also, in my opinion, the Court has the power, even against the will of a stock mortgagee to exercise its powers under cl. 12 of the regulations, if necessary, to join the stock mortgagee and to make such order as it thinks proper. These extremely wide powers were given to the Court to enable it to give proper protection to farmers and in order to give full intent to the regulations, and the only thing the Court cannot do is to do anything contrary to the regulations.

The bank has acted very fairly in the matter. It says, "We submit to the jurisdiction, but we claim that it is equitable in the circumstances that there should be a pool for the year 1938–39 as well as for the year 1939–40 so that the Public Trustee as first mortgagee should be liable for part of the loss which occurred in the working of the farm during the first year.

Upon consideration of the whole of the circumstances I do not think that the bank has made out its claim. The losses that were being made each year in the working of the farm were imperilling the bank's security much more than that of the Public Trustee. The Public Trustee had a large margin of value to come and go on, but the bank had not. If the same system of farming were continued it would mean that the bank must make a considerable loss. It was therefore much more in the interest of the bank than in that of the Public Trust that the system of farming should be altered by establishing a permanent flock, and I think the bank showed that it was acting entirely in its own interests by not consulting the Public Trustee before taking this step. It induced the mortgagor to sell the whole of his flock at a very low price, and to purchase an entirely new flock of young sheep at a high price. It was this transaction which caused the heavy loss during the year 1938–39. The first time at which the bank saw fit to consult the Public Trustee about the matter was in February, 1940. About that time the local manager of the bank agreed with the Public Trustee to a pool for the year 1939–40, but his superior officers would not allow him to implement the agreement. Not only was the security of the Public Trust safer than that of the bank, and not only was the Public Trustee not consulted before the change over in the system of farming, but the Public Trustee had no say in the amount allowed by the bank to the mortgagor during the whole of the year 1938–39.

I think, therefore, that it is not fair that the Public Trustee should be asked to share in the losses made in that year, and that the pool should start for the year 1939–40. The figures for that year are now complete and enough money was earned to pay the interest to the Public Trustee in full. It is therefore only necessary to say that the bank should pay forthwith to the Public Trustee out of the funds in its hands all the interest in arrear down to last May, that is to say three half-years' interest. There was another half year's interest due last month, but that will go into this year's pool which the Public Trustee is willing to enter into, and the interest for that season will of course not be paid until the completion of the year.

Help from the Past.—Of present help and sympathy Greece is assured. And she is in two ways more fortunate than other nations. First, there seems to be an absence of those internal divisions which have helped the invader elsewhere. Secondly, Greeks have a past which has been the inspiration of the world, not only in culture, but in that passionate faith in their own country which is more lasting than brass—or steel. No nation which, however small and however long ago, outfaced Xerxes and Darius, need fear to flout their modern counterparts. No doubt those ancient army orders have now been heard and obeyed again—that soldiers are expected to return with their shields or on them. There will still be Spartans to stand at a new Thermopylae, and there is strength to be drawn from the memories of Salamis and Marathon.

And so the war widens. In this widening of the war no question of International Law arises, for the successive attacks by Germany, and now by Italy, are acts of pure aggression and have no support from law. It has been said, but strongly denied, that it is one of the prerogatives of a sovereign independent state to make war as it pleases. Rather it may be said with Grotius that war is rightly carried on when it is waged against a company of armed evildoers who must be overcome in battle before they will admit their guilt. That fits exactly the present war.

TRADERS' CREDIT ASSOCIATIONS.

Libel and Credit Information.

While the obtaining of credit information is vitally necessary in the present-day business world, it is as important to-day that the credit of traders be not libelled, through mistake, carelessness, or otherwise, as when Burton, C.J.O., remarked in *Robinson* v. *Dun*, (1897) 24 A.R. 287 :

> Looking at the serious consequences to the commercial community, and to individual traders, by the circulation of false reports as to their standing, too great care cannot be exercised by those associations in the mode of collecting information, and in the selection of reliable agents, and the law naturally watches them with jealousy ; an unfair report may lead to the absolute ruin of a trader previously doing a prosperous business.

Credit information is usually obtained from one or more of three sources : (1) by enquiry of persons dealing with the trader ; (2) by the pooling of ledger and other credit information through the medium of a credit or trade association ; and (3) by the obtaining of a report from a mercantile agency whose business it is to obtain such information.

In speaking of mercantile agencies and the law of libel, Lord Macnaghten remarked in *Macintosh* v. *Dun*, [1908] A.C. 390, 400 :

> The trade is a peculiar one ; still there seems to be much competition for it ; and in this trade, as in most others, success will attend the exertions of those who give the best value for money and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

This law is the same for the mercantile agency as it is for the individual. " I am aware," said Osler J.A., in *Todd* v. *Dun, Wiman and Co. and Chapman*, (1887) 15 A.R. 85, 100, " of no principle on which they, can claim a privilege for their business publications different from or higher than that to which other members of the community are entitled." The remark was approved by Burton, C.J.O., in *Robinson* v. *Dun* (*supra*).

This privilege which is the same for agencies and individuals is set out succinctly in *20 Halsbury's Laws of England*, 2nd Ed., pp. 468–69, paras. 569–70 :

> If a defamatory statement is published of the plaintiff on an occasion which is privileged not in an absolute but in a qualified sense, the defendant may set up a defence of qualified privilege.
>
> It is for the defendant to establish that the occasion was so privileged. If he does so, the burden of showing actual or express malice rests upon the plaintiff, and if this is shown, communications made, even on a privileged occasion, can no longer be regarded as privileged communications.

As Middleton, J.A., has put it in *Knapp* v. *McLeod*, (1926) 58 O.L.R. 605, 606, 607 :

> When once it is shown that the words were spoken upon a privileged occasion, this rebuts the presumption of malice which would otherwise arise, and the plaintiff is unable to succeed unless proof is given of the existence of actual malice. I do not for one moment suggest that, because there is a duty or interest which creates the privilege, this opens the door to the discussion of irrelevant matters or affords any protection in respect of utterances entirely foreign to the occasion ; but, in my view, the protection extends to all communications pertinent to the discussion giving rise to the privilege. The discussion upon a privileged occasion must not take too wide a range, and go beyond its legitimate field, or the privilege will be entirely lost ; and furthermore, the mere fact of the dragging in of matters foreign to the discussion, or the names of other parties, will be, in itself, evidence of malice ; but so long as all that is said is fairly warranted by the occasion, the protection is complete.

Middleton, J.A., then proceeds to quote Parke, B., in *Wright* v. *Woodgate*, (1835) 2 Cr. M. & R. 573, 577 ; 150 E.R. 244, where he said :

> The proper meaning of a privileged communication is only this : that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made,

and Lord Lindley in *Stuart* v. *Bell*, [1891] 2 Q.B. 841, said :

> A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language.

These quotations do not seem to carry us very far towards arriving at what is a privileged occasion. But assistance in this direction is to be derived from the judgment of Parke, B., in the case with the apt name of *Toogood* v. *Spyring*, (1834) 1 Cr. M. & R. 181, 193 ; 149 E.R. 1044 :

> The Law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.

As Lord Macnaghten has pointed out in *Macintosh* v. *Dun* (*supra*), at p. 399 :

> The underlying principle is " the common convenience and welfare of society "—not the convenience of individuals or the convenience of a class, but, to use the words of Erle, C.J., in *Whiteley* v. *Adams*, (1863) 15 C.B. (N.S.) 392 ; 143 E.R. 838, " the general interest of society."

> Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be " recognized by English people of ordinary intelligence and moral principle " in *Stuart* v. *Bell* (*supra*), to borrow again the language of Lindley, L.J., it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstances that the information is volunteered is an element for consideration certainly not without some importance.

In addition to the fact that malice destroys the privilege, there may be an excess in the use of the privilege, which excess is not privileged. In *Knapp* v. *McLeod* (*supra*), Orde, J.A., pointed out, at p. 610 :

> Where, as in the present case, the statement complained of was made upon a privileged occasion, and it is alleged that the privilege was exceeded, the first question to be determined is whether or not what is alleged to be excessive is so far beyond the occasion as to be irrelevant to it, and therefore outside the benefit of the privilege as a defence.
>
> But the mere fact that a statement otherwise within the privilege may be in some respects excessive does not necessarily exclude the excessive matter from the privilege if relevant to the main statement. The excess is then only material upon the question of malice. The excess may take one of three forms. The defendant may have gone beyond his duty or the common interest in the character of the statements made about the person as to whom the communication is otherwise privileged. Or he may have made a statement otherwise privileged in the presence of a third person outside the privilege. Or he may, while making a privileged communication, have made a defamatory statement about some person outside the privilege—the present case. The law seems to be clear that in none of the three cases does the mere fact that the communication has gone beyond what might be thought to be the strict limits of the privileged occasion, exclude the plea of privilege as a defence, if the excess is really relevant.
>
> The two cases referred to above are typical examples of excessive statements of the first and third kinds that I have mentioned. The well-known case of *Toogood* v. *Spyring*, (1834) 1 Cr.M. & R. 181, is an example of the second. In that case Baron Parke observed, at p. 194, that " the business of life could not be well carried on if such restraints were imposed upon this and similar communications." His judgment has received the stamp of approval in many later cases, and what he says with reference to a statement published to a person outside the privilege is equally applicable to a statement made about one outside the privilege.

The whole principle may therefore be summed up as follows :—" An occasion is privileged where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The privilege extends only to a communication upon the subject with respect to which privilege exists, and does not extend to anything that is not relevant and pertinent to the discharge of the duty, or the exercise of the right, or the safeguarding of the interest, which creates the privilege : " *20 Halsbury's Laws of England*, 2nd Ed., pp. 470–72, para. 573.

That, then, being the general principle, how has it worked out in regard to credit agencies and associations ? In *Macintosh* v. *Dun*, the Judicial Committee of the Privy Council dealt with a mercantile agency, and it was held that the agency's communication, having been made for profit rather than from any duty, was not privileged, at pp. 399–400 :

> No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance.
>
> If then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive ? Is it a sense of duty ? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit.

Consequently, in the circumstances, there was no privilege.

This case apparently overrules the decision in the Ontario case of *Todd* v. *Dun, Wiman and Co. and Chapman*, where the local agent of a mercantile agency gave incorrect credit information to the agency upon being requested by the agency to supply information regarding the plaintiff, such a request having been made to the agency by one of its subscribers. It was there held that the communication was privileged as the subscriber was a party having an interest in receiving the information. In another Ontario case, Burton, C.J.O., in *Robinson* v. *Dun*, (1897) 24 A.R. 287, said :

> It must be assumed as the law of this Court (until reversed by some higher authority), in regard to the associations known as mercantile agencies, that when particular information is sought for by a subscriber as to the standing and character of a customer in whom the subscriber is specially interested, the publishing of it to that subscriber is a matter of qualified privilege.

This judgment went somewhat farther than the *Todd* case, inasmuch as in the *Todd* case " the information had been procured for the immediate occasion, and in order to enable the defendant to answer the special request, while here the matter communicated had already been furnished to the defendant and entered in his books for the purpose of being given to anyone who should ask for it." Burton, C.J.O., however, pointed out that where subscribers are circularized with information they have not requested, there is no privilege.

Macintosh v. *Dun* was distinguished by the House of Lords in *London Association for Protection of Trade* v. *Greenlands Ltd.*, [1916] 2 A.C. 15, which was a case of an association of traders the purpose (*inter alia*) of which was to obtain credit information for themselves through the agency of a secretary. Lord Buckmaster, L.C., remarked at pp. 25,26 :

> A trader is clearly entitled to make inquiries about the commercial credit of a person with whom he proposes to trade. He need not make those inquiries himself. He may constitute an agent to make them on his behalf. He need not inquire of any person of whom he has personal knowledge, or with whom he has trade relations. If the inquiry be honestly and prudently made, it is impossible to fix exact limits within which it must be confined. The extended character of trade, the modern combination of many businesses of a different nature under one control, the innumerable and farreaching branches by which modern enterprise is extended, are all considerations which must be borne in mind in considering how far and by what means inquiry as to a new customer can be properly made. This, of course, is not the only consideration ; there is at the same time the essential need of safeguarding commercial credit against the most dangerous and insidious of all enemies—the dissemination of prejudicial rumour, the author of which cannot be easily identified, nor its medium readily disclosed.

The report given by the association was accordingly held to have been given on a privileged occasion.

PERSONAL COVENANTS.

As Affecting Title to Land.

By E. C. ADAMS, LL.M.

The case of *Cator* v. *Newton*, [1940] 1 K.B. 415; [1939] 4 All E.R. 457, has already attracted attention in England (see, for example, *164 Law Times*, 165); and it is worthy of more than passing notice by New Zealand conveyancers.

The land concerned was registered under the English Land Registration Act, which corresponds to our Land Transfer Act. The title was an absolute one and its nearest New Zealand equivalent would be an ordinary title issued under the Land Transfer Act, 1915—it would be a superior title to a limited one issued under the Land Transfer (Compulsory Registration of Titles) Act, 1924. A difference between the two systems is that the covenant in question was noted against the English Register, but there is no provision for noting such covenants against our Land Transfer Register Books.

In 1919 one Newton had purchased the freehold and in the conveyance to him he had entered into a covenant with the then estate owner to the effect that he would repay to the owner for the time being of the estate, a fair share of the expense of maintaining and keeping in order and repair the whole of the divisions, roads, footpaths and water drains in connection with the estate. In New Zealand such a covenant would not be usual in a transfer of the fee-simple by way of subdivision owing to the provisions of the Public Works Act, compelling the subdividing owner to dedicate roads to the satisfaction of the local authority, and such a covenant should not be inserted in a memorandum of transfer of the fee-simple—(see *Staples* v. *Corby*, (1900) 19 N.Z.L.R. 517; 3 G.L.R. 158)—but many positive covenants to keep in repair &c., will be found in registered easements. Newton obtained a land certificate for his land and on the certificate an entry had been made stating that the land was subject to the covenant entered into in 1919 by Newton with the estate owner. In 1928 Newton transferred the land to one Bates by a transfer in the common form which of course referred to the registered title. The transfer did not contain any express covenant to indemnify Newton against his personal liability under the covenant in the deed of 1919. Subsequently the then owner of the estate sued Newton for the sum of £6 18s. 1d., being a proportion of the maintenance charges for roads on that estate, and Newton joined Bates, claiming indemnity from him. It was held that Bates was not liable under the covenant, because Newton, when he transferred the land to Bates, had not taken from Bates an express covenant for indemnity. It was held also that, as the covenant was a positive one, the fact that it was entered on the Register did not extend the liability of the transferee, Bates. This case proves that registration in England or New Zealand of personal covenants (affirmative or negative) does not give such covenants any efficacy they did not previously possess at law or in equity, except so far as the question of notice may be material. Had the covenant been a negative one, such as in the leading case of *Tulk* v. *Moxhay*, (1848) 2 Phil. 774, 47 E.R. 1345, Bates would have been directly liable to the estate owner under the covenant, for registration would have been notice to him of the covenant and in England restrictive covenants are registrable.

It remains to consider the importance of this case with respect to easements over land in New Zealand.

Let us take the very common case of the creation of a right of way common to several allotments on a subdivision. The subdividing owner may desire to ensure that the owner of each allotment shall do his fair share of keeping the right of way in repair—*e.g.*, by gravelling it occasionally. He therefore takes an express covenant from each frontager accordingly. *Cator* v. *Newton* seems to show that on every subsequent transfer of an allotment, the purchaser should expressly covenant to perform his predecessor's covenant. The original transferee appears to remain personally liable under the covenant. The objection to this method is that the only person who can enforce the covenant is the person who owns the fee-simple of the right of way, who is usually the original subdividing owner: if he has sold all the allotments, he has probably lost all further interest in the subdivision, and does not care a button whether the right of way is kept in repair or not. If the subdivision is an old one, it may not even be possible to locate him—he is probably dead or has left the district. Again if the subdivision is an old one, it will probably be found that the necessary express covenant has not been taken from the purchaser on each transfer of the allotments. The result in practice often is, that if one frontager does not perform his share of the keeping in repair, the other frontagers are unable to compel him.

A better way appears to be for the fee-simple of the right of way to be vested in one of the purchasers of an allotment, and for the provisions as to keeping in repair to be made a *condition* of the continuance of each grant. It is permissible for the grantor of a right of way to annex to the right the qualification that the grantee and his successors in title must repair the way, and thus create a *conditional* easement (11 *Halsbury's Laws of England*, 2nd Ed., 334.) In such a case, if a frontager failed to keep the way in repair, the frontager who owned the fee-simple of the way could invoke s. 3 of the Land Transfer Amendment Act, 1939, which provides for the removal of easements and *profits à prendre* from the Register where they have been in any way determined or extinguished. Once removed from the Register the easement would cease to exist. It is conceived that rather than run such a risk the dominant owner would keep the way in repair.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on December 6, 1940.

The following Societies were represented: Auckland, Messrs. W. H. Cocker, J. B. Johnston, A. H. Johnstone, K.C., and H. M. Rogerson; Canterbury, Mr. J. D. Hutchison (proxy); Gisborne, Mr. N. S. Parker; Hamilton, Mr. H. J. McMullin; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. A. E. L. Scantlebury; Nelson, Mr. C. R. Fell; Otago, Messrs. J. B. Thomson and A. N. Haggitt (proxy); Southland, Mr. G. J. Reed; Taranaki, Mr. J. H. Sheat; Wanganui, Mr. A. A. Barton; Westland, Mr. A. A. Wilson; and Wellington, Messrs. H. F. O'Leary, K.C., G. G. G. Watson, S. J. Castle.

Mr. A. T. Young, Acting Treasurer, was also present.

The President, Mr. H. F. O'Leary, K.C., occupied the Chair. The President welcomed all those delegates who were attending the meeting of the Council for the first time, and he expressed his pleasure to Mr. H. B. Lusk at his recovery from his recent illness.

Solicitors' Fidelity Guarantee Fund.—Owing to Mr. Levi's continued ill-health and inability to act on the Management Committee, it was thought necessary to appoint an additional member, and Mr. H. F. O'Leary, K.C., was accordingly appointed.

Enlisting Partners and Guarantee Fund Fee.—The President reported that he had submitted the draft memorandum prepared by the Auckland sub-committee to the Crown Law draftsman who considered that the necessary powers could be given by regulation and this was accordingly done.

Copies of the Law Practitioners' Emergency Regulations, 1940, had already been circulated to the District Societies.

On the motion of the President, members of the Auckland sub-committee were thanked for their work in the matter.

The question was discussed as to what procedure should be adopted by the District Law Societies where an application for the refunding of fees was made by a soldier-solicitor. The suggestion was made that a ruling should be given by the New Zealand Council.

It was reported that as far as practising fees were concerned the Auckland Society had made proportionate refunds only where the solicitor had been on continual military service for three months and over, and then only the current fees were taken into consideration.

So far as the Guarantee Fund fees were concerned, the Secretary reported that applications had already been received and would be considered at the next meeting of the Management Committee.

It was decided that, after the Management Committee had had an opportunity of considering the question, some uniform action might be decided on with regard to the Guarantee Fund fees and that the refund of practising fees should be dealt with by the District Law Societies concerned.

Audit Regulations: (*a*) **Exchange of Cheques in Conveyancing Transactions.**—The opinion submitted by the Joint Audit Committee for the consideration of the District Law Societies was approved and it was decided that same should be included in the rulings and decisions of the New Zealand Law Society.

(*b*) **Audit Regulation 2 (6).**—Letters had been received from the Wellington, Otago, and Wanganui Societies approving of this regulation in the first form submitted by the Wellington sub-committee which was also endorsed by the Joint Audit Committee.

Members resolved that the regulation as set out in the first alternative—with the deletion of the words in parenthesis " of balance "—be adopted.

Appointment of Auditors.—The President reported that proposals formulated by the Wellington sub-committee had been submitted for the consideration of the New Zealand Society of Accountants, and a reply from that Society was being awaited.

Removal of Judgments and Orders from Supreme Court to Magistrates' Court.—The following letter was received from the Under-Secretary of Justice:—

> I have your letter of October 1 forwarding copy of a communication received from the Wanganui District Law Society relating to the removal of judgments or orders from the Supreme Court to the Magistrates' Court.
>
> In reply I have to advise you that the matter first referred to in the letter has been considered and provided for in the recently prepared draft Magistrates' Courts Bill. The question of amending the Divorce and Matrimonial Causes Act to provide for the other point will be kept in mind for action at a suitable time.

Conveyancing Scale: Vendor and Purchaser: Separate Charges.—It was decided to circulate for consideration by the District Law Societies the following memorandum:—

> That the ruling of the Council of the New Zealand Law Society given on December 9, 1938, as No. 54, be extended so that the provision included in the scale of charges covering " Conveyances of land " whereby it is provided that the vendor's solicitors costs are " to be charged only where separate solicitors are acting for the vendor and the purchaser respectively " be deleted to the intent that where one solicitor acts for both vendor and purchaser on any ordinary transfer or conveyance of land, both vendor and purchaser shall be charged a fee in accordance with the approved scale of charges.

Council of Legal Education.—Letters were received from the District Law Societies as follows:—

> (*a*) **Wellington.**
>
> The Council of the Wellington District Law Society has considered the decisions of the Council of Legal Education made at its meeting on August 29 and 30, 1940, and approves of the alterations to the degree course and to the method of examination proposed therein. Arising out of this report the Council resolved:
>
> 1. That it convey to the New Zealand Society the strong representations it has received from its country members to the effect that the present course is unduly deterring youths from entering the profession, operates as a serious obstacle to extra-mural students, and prevents country practitioners from obtaining clerical assistance.
>
> 2. That in the opinion of this Council the course requires revision and modification and that it believes that there is a general feeling among practitioners to this effect which merits consideration by the Council of Legal Education.

(*b*) **Otago.**

The report set out under number 29 in the minutes of the meeting held on September 20 last has been considered by my Council. My Council considers that para. 3 of the report should not be allowed to pass without protest. It may well be that it would be unnecessary to submit all alterations to the syllabus to the New Zealand Law Society, but my Council feels strongly that major alterations should be so referred.

My Council also wishes to support the opinion expressed by the Wellington Society that the course requires revision and modification.

It was stated that the resolution from the Wellington Society arose out of the consideration of the report of the Council of Legal Education and very strong representations had been made by the country members in the matter. Letters had been received by his Council's Palmerston North representative from practitioners in various country towns stressing the view that something should be done to make the syllabus for the LL.B. degree less arduous.

Some of the members expressed the opinion that it was very desirable not to lower the standard now obtaining.

The Otago Society felt that the course required modification and revision and that the matter should be thoroughly investigated. Objection had been taken to para. 3 of the report.

It was pointed out that the Council of Legal Education was a statutory body and nothing could be enacted affecting legal education by the Senate of the University without first being dealt with by the Council, which consisted of six members, two of whom were nominated by the New Zealand Law Society. So far as the complaint by the Otago Society was concerned regarding para. 3 of the report, it was stated that reports were submitted to the Law Society through its representative.

It was stated that the Otago Society considered that the matters should be reported on before being passed by the Council of Legal Education and not afterwards.

The President expressed the opinion that it appeared to be the view of the majority that the course was too heavy and he invited suggestions as to possible remedies.

An opinion was expressed that little progress could be made until the section was removed from the statutes which gave right to a solicitor-managing clerk to apply after five years for admission as a barrister. It was the general opinion, however, that an amendment in this direction could not be obtained.

It was decided that a special sub-committee consisting of Messrs. W. H. Cocker, S. J. Castle, C. R. Fell, J. W. Rutherfurd, and J. B. Thomson be appointed to consider the question and submit its recommendations to the Council.

It was resolved to obtain a report from the Senate on para. 8 of the report—"That the Senate be advised to take up with the Society the proposal to amend the Law Practitioners' Act with respect to the admission of graduates from overseas."

Transmission of Law Trust Moneys to Solicitors Practising at a Distance from the Court.—The following letter was received from the Under-Secretary of Justice:

Representations have been received at different times from solicitors to the effect that provision be made to enable the transmission of law trust moneys from a Court to a solicitor living at a distance. It frequently happens that plaints are issued by solicitors residing in another place. Moneys paid into Court in such cases can be paid out only in person to the plaintiff or to his solicitor holding an authority to receive the money, and cannot be forwarded by post to the solicitor direct, or to another Court for conveniance.

There are strong reasons against the adoption of the latter course, but the question of instituting a system of forwarding law trust cheques by post to solicitors at a distance has been given careful consideration, and it may be practicable to institute such a system provided full co-operation is forthcoming from the legal profession. The proposed system would involve the posting by the Clerk of Court to the solicitor a crossed law trust cheque payable to order, together with the original law trust receipt form, the solicitor to be required to sign such receipt and return it promptly to the Court, together with his own trust account receipt. The latter would be required in lieu of the duplicate law trust receipt which is signed with the original when payment is made in person to the Court, and is necessary to meet audit and treasury requirements. The only disadvantage that is foreseen in such a system is that some solicitors may be dilatory in returning the receipts to the Court, which would cause considerable inconvenience. However, if your Society would be willing to co-operate with a view to overcoming any such difficulty, the department will consider giving the proposal a trial.

I should be glad to have your Society's view on the matter.

It was resolved to advise the Under-Secretary of Justice that the suggestion met with the approval of the Council, and to ask that such suggestion be given effect to by his Department. It was further resolved that a circular be sent to the members of the profession urging that the requisite receipts be returned promptly to the Court.

Land Transfer Forms.—The following letter was received from the Southland District Law Society:

My Council has recently had under discussion the matter of Land Transfer forms and the waste of paper involved in the same, to say nothing of the higher costs now incurred.

The matter again came up at a meeting of the Council held last evening, when I was directed to write you on the subject. It has been suggested that, with paper at the present time in short supply as is clear from the fact that, in this district at any event, the department has reverted to parchment titles, some economy could be effected if transfers and similar short land transfer documents were printed on a single sheet. The average transfer is a very short document, and it is not anticipated that any inconvenience would result from the use of a single sheet in that, except for the backing, the second page seems to be rarely used. The local District Land Registrar has been approached and while he seemed sympathetic to the proposal, stated that he could do nothing without authorization from head office. On the other hand, the District Land Registrar at Dunedin is definitely opposed to the suggestion—whether on the grounds of utility or those of innovation it is hard to say.

It is thought, however, that possibly your Society might approach the Registrar-General of Land and see if anything can be done. I should be glad, therefore, if you would have the matter placed on the order paper for the next quarterly meeting.

It was suggested that an additional consideration in the matter of economy of documents might be the institution of what used to be called the "blanket" form of memorandum.

Members agreed that the suggestion of the Southland Society was a good one, and resolved that the Registrar-General be approached by the standing committee to see whether it could be made permissible by his department to use the single sheets for such documents.

Execution of Legal Processes on Soldiers.—The following report was received from the Deputy-Judge-Advocate:

Referring to your letter herein dated August 13 last, I have to inform you that I have received a memorandum from the Adjutant-General of the New Zealand Forces, of

which the enclosed is a copy. I hope the arrangement made with regard to the service of summons upon soldiers will be satisfactory to your Society.

May I add that the execution of warrants by bailiffs in respect of soldiers is another matter. Although any other property he may possess is available to his creditors, a soldier's person, pay or equipment is protected from them (Manual of Military Law, 241), and save in exceptional circumstances the execution of warrants in camps cannot be permitted.

Enclosure—

Memorandum for All Districts. Army Headquarters,
November 11, 1940.

The New Zealand Law Society has asked that a procedure be laid down in regard to the execution of legal processes against persons in the Military Forces.

At the present time the instructions provide that the person serving the summons, &c., "must come to an arrangement with the O.C. Camp to be given an opportunity to serve the soldier at a stated place such as the orderly room," vide Army Headquarters, 310/1/4 of November 13, 1939.

It is considered by the Law Society that it is difficult for a bailiff entering a camp to come to an arrangement with an O.C. Camp.

It is agreed that the process of coming to such an arrangement by personal application may be a difficult one, and it has therefore been suggested to the Law Society that bailiffs give written notice, say 48 hours previously, of an intention to serve such a notice, whereupon it will be arranged for the man to be available at a suitable place at a stated time.

Will you please arrange accordingly ?

It was decided to circulate the letters for the information of the District Law Societies.

Legal Conference Fees.—In response to the President's inquiry, it was decided that until further notice, it was unnecessary to continue to collect legal conference contributions.

Soldiers' Wills.—The following letter was received from a Hawke's Bay practitioner :

A small matter relating to the above has come to my notice which I consider might well be ventilated at the next meeting of the New Zealand Law Council.

A soldier at present in Burnham Military Camp informed me that soldiers in the Camp are practically being forced into making wills while in Camp without being given the opportunity of consulting their own solicitors. They are instructed by their officers that they must make wills, and each week a representative of the Public Trust Office and several solicitors from Christchurch visit the Camp for the purpose of making the wills. This man in particular states that he was approached by a solicitor who persisted in his persuasions even though the man said he wished for private reasons to see his own solicitor in Napier. I am informed also that in many cases the visiting solicitors are successful in having themselves appointed as executors.

The practice appears to me to be highly improper, and I therefore pass it on for your information.

It was confidently stated by a member who had been closely associated with the work amongst the soldiers, that there could be no foundation in such a report, as to his knowledge there was only one instance where a solicitor had consented to act as executor, and that was only under great pressure from the soldier concerned.

In Canterbury the soldier signed a form stating whether he had made a will and, if so, where it was to be found, or alternatively, that he did not wish to make a will. It was felt that there was no substance in the complaint and no action was taken.

Thanks to Delegates.—Prior to the conclusion of the meeting, the President expressed to the delegates his thanks for the assistance given by them during the year, and wished them the compliments of the season.

Mr. J. B. Johnston, on behalf of the members of the Council, thanked the president for his efforts in the interests of the Society and reciprocated the President's wishes.

LONDON LETTER.

By Air Mail. Somewhere in England,
My dear EnZ-ers,— December 16, 1940.

The war has reached a stage which, it is safe to say, no one anticipated when it began, and Britain and France stood arrayed "on the perilous edge of battle" against Germany. From the first it has been a fight for freedom ; whether Europe, to be followed by Britain, should be enslaved in Hitler's "New Order," or whether civilization should be allowed to proceed on the path which the enlightenment of modern times has marked out. The ruin of France, through the overwhelming might of pitiless mechanical force, and the failure of the courage which once put her in the van of progress, has left Britain, aided by the other members of the British Commonwealth of Nations—Southern Ireland only excepted—to a struggle, anxious enough, though the issue cannot be allowed to be in doubt. Welcome, therefore, it is that the brightest gleam of light which pierces the darkness of the sky comes from Greece, and Liberty is being reborn in her ancient home.

So from Time's tempestuous dawn
Freedom's splendour burst and shone,
Thermopylae and Marathon
Caught like mountains beacon-lighted
This springing fire.

And what was said of England may well be said of Greece ; she will save herself by her exertions, and Europe by her example.

Sir Henry Slesser.—We all regret that Lord Justice Slesser has found it necessary to retire from the Court of Appeal, and that Mr. Justice Greaves-Lord, also by reason of ill-health, has resigned from the Bench of the King's Bench Division. Sir Henry Slesser was appointed to be a Lord Justice by Mr. Ramsay MacDonald when he became Prime Minister in 1929 ; for, unlike other judicial appointments, the office of a Lord Justice is at the disposal of the Prime Minister. Lord Justice Slesser's appointment had not the usual preliminary of a large practice at the Bar, but he was interested in Trade Union law, and he had that intellectual interest in law and in social life which may be as good a preparation for judicial office as a busy practice in advocacy. In the case of Lord Justice Slesser this has proved to be true, and he retires from office with the reputation of a learned and distinguished Judge. It fell to him to deliver the leading judgment in the Court of Appeal in the Truck Act case of *Pratt* v. *Cook, Son and Co. (St.Paul's), Ltd.* That Sir Henry Slesser has wider interests than the law was shown also by the publication five years ago of a volume of verse under the title of *The Pastured Shire*, and in one poem, "The Judge," he challenged comparison with Lord Darling's well-known lines :

Bereft, alone, I wear no ermine more
Nor judge, yet one Assize
I, fearful, must attend.

If less awe-inspiring, Sir Henry Slesser shows at least equal sincerity :

I go to final judgment in content
Who sought to spell Thy justice faithfully.

Sir Walter Greaves-Lord.—The work of an appellate Judge and of a Judge of the High Court are of a different character. Sir Walter Greaves-Lord has been since 1935 a very useful and esteemed Judge of the King's Bench Division, and there will be great sympathy with him in the reason for retirement after so short a tenure of office. Called to the Bar in 1900, he took Silk in 1919 and entered Parliament in 1922. He became Recorder of Manchester in 1925, and his success at the Bar clearly marked him out for judicial office. This came when the Supreme Court of Justice (Amendment) Act, 1935, authorized the appointment of two additional Judges for the King's Bench Division, and the two new Judges were Mr. Justice Greaves-Lord and Mr. Justice Hilbery. The work of the Kings' Bench Division, and also the work of the High Court generally, has been the subject of recent examination, and much has been done to simplify legal procedure and to consult the interest and convenience of litigants. During Sir Walter Greaves-Lord's tenure of office these efforts at reform have been bearing fruit, and it is with the good wishes of the profession that he retires from the Bench, the reputation of which he has worthily maintained.

The University of Bristol.—The plan of waging war by the murder of civilians which Hitler, if he did not invent it, is endeavouring to bring to perfection, has now taken the form of concentrated attack from the air on selected cities, and Bristol and Southampton have been the latest victims, though London with its suburbs and Merseyside are never forgotten. I need not now recur to the argument that, as warfare, all this is illegitimate. Sufficient will be heard of that when the day of reckoning comes, and one chief object of the peace will be to see that this senseless murder and destruction shall not happen again. But while protest has become in vain, it should still be recorded that one main result of the German attack is the destruction of buildings devoted to religion, philanthropy and learning. Churches and hospitals figure largely in the daily casualty list; Bristol and Southampton have both suffered in this way, but Bristol has also suffered in the damage to her university buildings. Opened only a few years ago, these were a welcome product of the recent movement for spreading university education to the provinces, and sympathy will be felt for the disaster which has overtaken them. But the great merchant city of the West, with its illustrious history, is not likely to let its University suffer a permanent loss. The Prime Minister, it may be noted, is Chancellor of the University.

Mr. J. T. Luscombe.—I regret to record the recent death of Mr. John Turnley Luscombe, the editor of the *Law Times*. He was the son of a solicitor, and was called to the Bar by the Inner Temple in 1892. He did not, I believe, practise at the Bar, but in the course of a varied life he acquired a wide knowledge of men and affairs which stood him in good stead during the twelve years of his editorship. He was widely read, and his love of the literature and history of the law was reflected in the space which the *Law Times* devotes to it week by week, to the delight of the profession. Though we regret his loss, we cannot but bear in mind that he has gone to his rest at a time when the needs of the profession were never more exacting and difficult to meet.

Yours as ever,
APTERYX.

SUMMARY OF RECENT JUDGMENTS.

(*Continued from p. 4*)

COURT OF APPEAL.
Wellington.
1940.
September 24, 25, 26;
November 29.
Myers, C.J.
Blair, J.
Kennedy, J.

NEW ZEALAND DAIRY-FARM MORTGAGE COMPANY, LIMITED v. COMMISSIONER OF TAXES.

Public Revenue—Income-tax—Trusts and Trustees—Trust-money invested in Company Debentures—Company's Advances on Mortgage—Two per cent. Premium payable to Company's Reserve Fund by Mortgagor—Mortgagor exercising Option of adding Premium to Amount of Loan—Company paying Amount so added at outset out of own Funds into Reserve Fund—Whether Premiums so paid assessable as Income—Company borrowing Moneys on issue of Debentures for Lending on First Mortgage—Brokerage, Printing, Advertising and Legal Expenses in connection with issue of Debentures—Whether Deductible in computing Assessable Income—Trustee Amendment Act, 1935, s. 5 (2) (e).

The appellant company's principal object was the lending of money on first mortgage on farming land or interests therein to supplying members of the New Zealand Co-operative Dairy Co., Ltd. Its memorandum of association included the condition of s. 5 (2) (*e*) of the Trustee Amendment Act, 1935, and provision was made for the establishment of a Reserve Fund for the purpose of providing for depreciation of securities and for losses on the realization of securities and other like contingencies; for the payment to the credit of the Reserve Fund all moneys paid by mortgagors of the company in pursuance of the said condition as and when the same were received by the company and for the investment of the Reserve Fund on authorized securities. The company was empowered to raise money by the issue of debentures or debenture stock.

The company's balance sheet for the financial year ending March 31, 1937, showed as standing to the credit of the Reserve Fund as at that date the sum of £3,111 1s. 10d. During that year the appellant by arrangement deducted from advances made to mortgagors the sum of £468 6s. 10d. on account of the two per cent. to be paid to the credit of the Reserve Fund and this sum was paid to the credit of the Reserve Fund. There was, in the same year, added to the table mortgages securing moneys advanced in that year the sum of £1,310 as an additional two per cent. and, of this sum, £11 11s. 10d. had been paid to the company in the income year. The sum of £1,398 was added by way of two per cent. addition to the flat mortgages securing moneys advanced in that year and no part of this sum had been paid to the company in the year in question. The company, although it had received in cash only the sum of £468 6s. 10d., paid to the credit of the Reserve Fund a sum sufficient to bring the Reserve Fund up to two per cent. of the loans made.

On a case stated by the Commissioner of Taxes,

North and *Cunningham*, for the appellant; *Cornish*, K.C., Solicitor-General, and *Broad*, for the respondent.

Held, by the Court of Appeal (*Myers*, C.J., and *Kennedy*, J., *Blair*, J., dissenting as to the inclusion in the assessable income of the two sums hereinafter specified), That the only amounts to be included in the assessable income were the said sums of £468 6s. 10d. and £11 11s. 10d.

Per *Myers*, C.J., and *Kennedy*, J. 1. That s. 5 (2) (*e*) of the Trustee Amendment Act, 1935, conferred an option on the mortgagor, instead of paying the premium in cash, to enter into a covenant to pay the amount, which was to be added to the amount of the mortgage and to be secured thereby as if it were part of the loan. If the option be exercised, then so far as the requirements of the statute are concerned the payment required to be made into the reserve fund is only when the premium-money is paid by the mortgagor to the company in pursuance of the terms of the mortgage.

2. That the premiums must be brought into the company's assessable income only as and when paid to and received by the company.

St. Lucia Usines and Estates Co., Ltd. v. *Colonial Treasurer of St. Lucia*, [1924] A.C. 508; *Inland Revenue Commissioners* v. *Fisher's Executors*, [1925] 1 K.B. 451; aff. on app. [1926] A.C. 395; *Leigh* v. *Inland Revenue Commissioners*, [1928]; 1 K.B. 73 and *Dewar* v. *Inland Revenue Commissioners*, [1935] 2 K.B. 351, applied.

Per *Blair*, J. That none of the contributions to the Reserve Fund became taxable income until the company either obtained payment of or became entitled to obtain payment of them untrammelled by any trust.

Semble, per *Myers*, C.J. That, if the mortgagor elect to have the amount of the premium added to the loan and secured by the mortgage, the statute does not permit interest to be charged on the premium.

The appellant company claimed to deduct from the assessable income brokerage on debentures subscribed for through brokers, printing, advertising and legal expenses in connection with the issue of debentures either as lump sums in the year ending March 31, 1937, or alternatively by way of a proportionate deduction in each income year over the term of the said debentures.

Held, per totam Curiam, That money borrowed upon the security of the debentures was borrowed upon such a permanent footing that it must be regarded as the borrowing of money intended to be used as capital in the business, and the cost of providing such capital was not deductible.

Texas Land and Mortgage Co. v. *Holtham*, (1894) 3 Tax. Cas. 239; *British Insulated and Helsby Cables* v. *Atherton*, [1926] A.C. 205; *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1932] 1 K.B. 124; 16 Tax. Cas. 253; *European Investment Trust Co., Ltd.* v. *Jackson*, (1932) 18 Tax. Cas. 1; *Kemball* v. *Commissioner of Taxes*, [1932] N.Z.L.R. 1305; [1931] G.L.R. 647, applied.

Farmer v. *Scottish North American Trust, Ltd.*, [1912] A.C. 118; 5 Tax. Cas. 693, distinguished.

Anglo Continental Guano Works v. *Bell*, (1894) 3 Tax. Cas. 239, referred to.

Solicitors: *Earl, Kent, Massey, North, and Palmer*, Auckland, for the appellant; *Crown Law Department*, Wellington, for the respondent.

Case Annotation: St. Lucia Usines and Estates Co., Ltd. v. *Colonial Treasurer of St. Lucia*, E. and E. Digest, Supp. Vol. 28, p. 61, note sk; *Inland Revenue Commissioners* v. *Fisher's Executors*, *ibid.*, Vol. 28, p. 107, para. 664; *Leigh* v. *Inland Revenue Commissioners*, *ibid.*, Supp. Vol. 28, para. 672a; *Dewar* v. *Inland Revenue Commissioners*, *ibid.*, para. 656b; *Texas Land and Mortgage Co.* v. *Holtham*, *ibid.*, Vol. 28, p. 43, para. 222; *British Insulated and Helsby Cables* v. *Atherton*, *ibid.*, p. 52, para. 264; *Anglo-Persian Oil Co., Ltd.* v. *Dale*, *ibid.*, Supp. Vol. 28, para. 249a; *European Investment Trust Co., Ltd.* v. *Jackson*, *ibid.*, para. 252b; *Farmer* v. *Scottish North American Trust, Ltd.*, *ibid.*, Vol. 28, p. 50, para. 259; *Anglo-Continental Guano Works* v. *Bell*, *ibid.*, para. 258.

SUPREME COURT. Greymouth. 1940. November 14; December 10. *Northcroft*, J.

McCORMACK v. LEE AND ANOTHER.

Executors and Administrators—Widow Administratrix cum testamento annexo *of Husband's Estate—Land held by Husband under Crown Lease subject to Mortgage—Lease cancelled by Crown—Registration of Transmission of his other Lands by Widow and on her death by her Executors—Sale of such Lands by Latter—Availability of Surplus on Sale payment of Mortgage moneys due by Husband—Executors* de son tort.

An administratrix *cum testamento annexo* of her husband's estate (hereinafter called the widow) registered transmission to herself as administratrix of certain properties to which she was entitled under her husband's will. On her death, the defendants, the executors of her will, to whom probate thereof was granted, registered transmission to themselves of the same properties, sold them, and had a surplus in hand. The moneys due under a mortgage over land held by the deceased husband under a lease from the Crown, which had been cancelled because of default in payment of rent before the widow registered her transmission, had not been paid.

In an action by the mortgagee against the defendants to determine whether such surplus should be treated as an asset in the estate of the said husband available for the payment of the said mortgage moneys,

Hannan, for the plaintiff; *J. K. Patterson*, for the defendants.

Held. That the widow, as administratrix of her husband's estate, held his property in trust for the payment of his debts, and must discharge this trust before she could take a title as legatee, the defendants upon learning of the trust had a duty to discharge it by paying the mortgage debt unless there were some bar to the claim of the plaintiff, and that the said surplus should be treated as such an asset available for the payment of the said mortgage-money.

Semble, The defendants, having notice of plaintiff's claim, had become executors *de son tort* of the husband's estate, and held the proceeds of the sale as assets of that estate.

Solicitors: *Hannan and Seddon*, Greymouth, for the plaintiff; *I. Patterson and Son*, Reefton, for the defendants.

LEGAL LITERATURE.

Handbook of Emergency Legislation. Edited by A. E. CURRIE. Vol. 2. Pp. 229–561. Wellington: Government Printer.

In this volume, the Emergency legislation, consisting almost wholly of regulations, is complete down to September 24, 1940. It has been compiled according to the useful method adopted in Volume 1, of which it is a continuation. A useful feature is the cumulative index, which gives quick reference to the contents of both volumes. The annotation of regulations subjected to amendment has been accomplished either by notes, insertions in the text, or, in relation to the first volume, by slips for pasting in where required. The volume should prove very useful to practitioners when dealing with this troublesome and ever-increasing form of legislation.

RULES AND REGULATIONS.

Margarine Act, 1908. Margarine Regulations, 1940. December 19, 1940. No. 1940/315.

Labour Legislation Emergency Regulations, 1940. Clothing Trade Labour Legislation Suspension Order, 1940. Amendment No. 1. December 19, 1940. No. 1940/316.

Labour Legislation Emergency Regulations, 1940. Clothing Trade Labour Legislation Suspension Order, 1940, No. 2. Amendment No. 1. December 19, 1940. No. 1940/317.

Supply Control Emergency Regulations, 1939. Southland and Otago Silver-beech Marketing Notice, 1940. December 19, 1940. No. 1940/318.

Transport Legislation Emergency Regulations, 1940. Transport Legislation Suspension Order, 1940 (No. 2). December 23, 1940. No. 1940/319.

Termites Act, 1940. Termites Regulations, 1940. January 9, 1941. No. 1940/320.

Finance Act (No. 2), 1940, and the Finance Act (No. 4), 1940. Government Superannuation Funds (Annuities for Dependants) Regulations, 1940. January 9, 1941. No. 1940/321.

Emergency Regulations Act, 1939. Hides Emergency Regulations, 1940 (No. 2). January 9, 1941. No. 1940/322.

Emergency Regulations Act, 1939. Building Emergency Regulations, 1939. Amendment No. 1. January 9, 1941. No. 1940/323.

Samoa Act, 1921. Samoa Customs Order, 1939. Amendment No. 1. January 9, 1941. No. 1940/324.

Domestic Proceedings Act, 1939. Destitute Persons (Crown Servants) Attachment Order, 1940. January 9, 1941. No. 1940/325.

Emergency Regulations Act, 1939. Reclamation of Waste Material Emergency Regulations, 1940. January 9, 1941. No. 1940/326.

Emergency Regulations Act, 1939. Oil Fuel Retail Hours Emergency Regulations (No. 2), 1940. January 9, 1941. No. 1940/327.

Emergency Regulations Act, 1939. Reserve Bank Emergency Regulations, 1940. January 9, 1941. No. 1940/328.