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DEFAMATION: SOLICITORS' PRIVILEGED COMMUNICATIONS.

THERE are a few, not many, cases, where communications or statements which are defamatory by the law of England are treated as absolutely privileged, said Scrutton, L.J., in *More* v. *Weaver*, [1928] 2 K.B. 520; "so that," he continued, "although they are untrue, defamatory, and malicious, the law does not allow action to be brought in reference to them. The reason is that there are certain relations of life in which it is so important that the persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly."

Thus, absolute privilege attaches to statements made in Court by counsel and by solicitors acting as advocates, as well as by Judges and witnesses. In *Watson* v. *McEwan*, [1905] A.C. 480, it was held that absolute privilege extends to statements made by a witness to a solicitor taking his proof.

In the ordinary course of a solicitor's practice there must necessarily be many occasions on which he must speak or repeat statements about other people which are *prima facie* defamatory of them. It would be intolerable if he were exposed at every turn to actions for libel or slander in consequence of his legitimately performing his professional duties. Consequently, the Courts have given solicitors a considerable measure of protection, and have held that privilege may be set up by way of defence in many circumstances to be met with in the course of every-day legal practice.

As is well known, privilege in the law of defamation is of two kinds—qualified privilege, which attaches to statements made in pursuance of legal, moral, or social duties or interests, but which is liable to be destroyed on proof of malice; and absolute privilege, which has its own well-defined limits. In some circumstances, solicitors have been held to be entitled to qualified privilege, and in others—though subject to doubt—to absolute privilege. Reference to the facts in a number of decisions will help to elucidate a position that, in regard to communications between the solicitor and his client in relation to third parties, is by no means settled.

In *Pullman* v. *Hill and Co.*, [1891] 1 Q.B. 524, it was held that if a merchant dictated to a clerk a letter containing a libellous statement about a customer, and the letter was copied in a letter-book, there was a publication to the clerks, and the occasion was not privileged. But the facts in *Boxsius* v. *Goblet Frères*, [1894] 1 Q.B. 842, were that solicitors wrote, on behalf of a client, demanding a debt, a letter which contained defamatory statements. It was dictated to and written by a clerk in the solicitor's office, and was copied by another clerk in a letter-book. The Court distinguished *Pullman's* case, on the ground that it was part of the ordinary business of a solicitor to endeavour to secure money due to his client. In the course of his judgment, Lopes, L.J., said:

> If a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client and in the interest of the client the occasion is privileged. In the present case, if the communication had been made direct to the plaintiff it would have been made on a privileged occasion, and though not so made, but made to a clerk in the office, the occasion was also, in my opinion, privileged. It was reasonably necessary that the solicitor should make such a communication; it was usual to do so in the course of business, and it was in the interest of the client that it should be made. The decision in *Pullman* v. *Hill and Co.* was pressed upon us, but to my mind that case is distinguishable. The ground of the decision was that it was not the usual course in a merchant's business to write letters containing defamatory statements and to communicate them to a clerk in the office. . . . The case of a solicitor seems to me to be entirely different. The business of a solicitor's office could not be carried on unless it was communicated to the clerks in the office, and it is common knowledge that such is the usual course. If, then, the occasion was privileged, the plaintiff could not succeed in this action unless he gave evidence of express malice; and the existence of express malice has been negatived by the jury.

Another case arising from every-day facts was *Baker* v. *Carrick*, [1894] 1 Q.B. 838, where solicitors had been consulted by a client with a view to recovery of a debt from the plaintiff. Both the solicitors and their client believed *bona fide* that the plaintiff was insolvent and had absented himself in order to defeat and delay his creditors. Knowing that a certain auctioneer had been instructed to sell goods belonging to the plaintiff,

the solicitors gave him formal written notice that the plaintiff had committed an act of bankruptcy and that he must not pay over the proceeds of the sale. The plaintiff brought an action for libel against the solicitors, but the Court of Appeal held that he was not entitled to succeed. The act of the solicitors was part of their ordinary duty, and, as the occasion was one to which qualified privilege would have attached if the clients themselves had done what the solicitors did, it was privileged also for the solicitors. There being no evidence of malice, the plaintiff failed.

The foregoing judgments do not go so far as to lay down that a solicitor is entitled to write to third parties whatever his client may desire. Thus, in *McKeogh* v. *O'Brien*, [1927] I.R. 348, a solicitor, who wrote on his client's behalf to a third party, was held to be in no better position than his client; and that he is not free to write everything his client might suggest or state. He exceeds the bounds of his protection if he includes defamatory matter that is not relevant to the subject or the occasion of the letter. So, too, in conversations with a client or with another in the course of which the client's business is discussed, the "gossipy solicitor," as Scrutton, L.J., described him in *More* v. *Weaver* (*supra*), is not protected when he wanders from the path of relevancy. And in *Groom* v. *Crocker*, [1938] 2 All E.R. 394, 403, Lord Greene, M.R., said he did not assent to the proposition that a solicitor, who, in breach of his duty to his client, writes a letter in the course of litigation to the solicitor on the other side, containing matter defamatory of his own client, in the truth of which he does not believe, can assert against that client that the occasion was a privileged one. Even assuming that it was privileged, it was open to the jury to find the existence of malice, or indirect motive. Thus, where solicitors, acting for a defendant, had written such a letter without the defendant's authority for the purpose, and admitted negligence on the defendant's behalf, as Scott, L.J., said, at p. 416, the foundation of the defence of privilege disappeared.

The decisions so far mentioned were given in cases where the defamatory matter had been published to third parties, and the privilege was held to be qualified. There are other cases, however, where the communications have passed between the solicitor and his client.

In *Morgan* v. *Wallis*, (1917) 33 T.L.R. 495, the alleged defamatory matter was contained in a bill of costs, which, as Scrutton, L.J., in a later case, described as being "an extremely unattractive document to him who receives it, but to those who are not called upon to pay it, it is a document full of human interest." A solicitor sent a detailed bill to his client, and this included a summary of an attendance at which the client had made defamatory statements against the plaintiff, who sued the solicitor for libel. It was alleged that there was publication to the typist who copied the bill, to the client who received it, and to some third person who read it to the client who was blind. Darling, J., held that there was no case for the jury on the question of publication to the typist. On the other points, he held that statements in a bill of costs were privileged, provided they were, in the widest sense, relevant to the matter in hand, and reasonably necessary for the information of the client so that he might know for what he was paying. He also held that the privilege would be destroyed by evidence of malice, and it was competent for the jury to investigate that question.

In *More* v. *Weaver* (*supra*), the decision of Darling, J., (as he then was), in *Morgan* v. *Wallis* was considered by the Court of Appeal. Scrutton, L.J., reviewed the authorities in which doubt had been expressed whether the privilege in communications between a solicitor and his client in the ordinary course of a solicitor's duty was absolute or qualified. He disagreed with the view on this point expressed by Darling, J.; and Lawrence and Greer, L.JJ., concurred. The Court of Appeal held, therefore, that the privilege as to relevant communications between solicitor and client is absolute. The statements made may be untrue, but privilege of that nature is only designed to shelter untrue statements.

From the Court of Appeal decision in *More* v. *Weaver*, it is clear that absolute privilege not only attaches to a solicitor, as stated, but it also extends to a client consulting his or her solicitor and making statements to him for the purpose of obtaining advice and for the purpose of discussing the advice given—statements which are untrue, but which are made for the purpose of obtaining advice. In that case, the question being discussed between the respondent and her solicitors was whether a loan granted to the appellant should be called in, and at what time and on what terms. All the defamatory statements appeared to relate to the character of the debtor and the redemption of the loan, and were thus relevant.

This question of the absolute nature of the privilege of communications between solicitor and client had not previously been decided; but certain observations of Lord Herschell, L.C., and Lord Bowen, made in *Browne* v. *Dunn*, (1893) 6 R. 67, 71, 73, 80, were referred to in Scrutton, L.J.'s, judgment in *More* v. *Weaver*. Lord Bowen had said, though *obiter*,

> I very much doubt whether, when a professional relation is created between the solicitor and the client with reference to the prosecution of a third person or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything outside what is relevant to the communication which he is making as solicitor to his client. I very much doubt whether malice destroys that kind of privilege, unless it is shown that what passed was not germane to the occasion.

Based on these observations, Fraser, J., in the 6th Edition of his work, *Law of Libel and Slander*, 189, 190, had expressed the law to be as follows:—

> Where a professional relation is created between a solicitor and client no action will lie in respect of any communication passing between the solicitor and client with *reference to the matter upon which the client* is seeking the professional advice of such solicitor, and which is relevant to such matter; and provided the communication fulfils these conditions, the privilege is not destroyed by the fact that the solicitor or client in making such a communication is actuated by malice against some third person.

In his judgment in *More* v. *Weaver*, Scrutton, L.J., approved that statement of the law, and referred to the fact that the learned author had suggested that Darling, J.'s, decision in *Morgan* v. *Wallis* would not be upheld in the Court of Appeal.

It seems regrettable that after the position has been clarified, and the question, it was thought, settled by

the Court of Appeal in *More* v. *Weaver*, doubts should again, almost immediately, have been revived as to whether the privilege attaching to communications between solicitor and client was absolute. These doubts were raised in the much-discussed case of *Minter* v. *Priest*, [1930] A.C. 558, where, though several of their Lordships questioned the correctness of *More* v. *Weaver*, they made it clear that their observations were intended to be *obiter*. In the result, the House, after considering that case more or less fully, gave no decision on the point, but left it open for later consideration. Thus, as was said at the time, their decision was more important for the questions raised than for those answered. Until it is definitely overruled, the Court of Appeal decision accordingly stands.

Some confusion is likely to arise in considering their Lordships' speeches in *Minter* v. *Priest*, because their decision turns on the professional privilege which protects from disclosure communications between solicitor and client. This, of course, is a question of admissibility of evidence, forming part of the law of evidence. It has nothing whatever to do with privilege in the law of defamation, which is a distinct right in itself. *Minter* v. *Priest*, apart from the observations to which we have referred, does not touch the subject-matter of this article as it decided that at the time when the statement, the subject of the proceedings, was made, there was no relationship of solicitor and client. It is, however, a mine of authority on the question as to the circumstances in which communications are relevant to the relationship of solicitor and client. This was necessary to the judgment, because although the nature of privilege is not similar in evidence and in defamation, in both cases the privilege must be based on proof of the fact that the relationship of solicitor and client existed at all material times.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1943.
April 6, 7;
July 9.
Myers, C.J.,
Smith, J.,
Johnston, J.
Fair, J.

In re **BURNS (DECEASED) HODGKINSON v. NEW ZEALAND INSURANCE COMPANY, LIMITED.**

Will — Construction — "Heirs" — "Respective Heirs" of Pecuniary Legatees—Whether Statutory Next-of-kin or Heir-at-law entitled—Costs—Contest solely between Common-law Heir and Statutory Next-of-kin—General Estate not affected—Form of Order—Administration Act, 1908, s. 11 (b).

A clause in a will, "If any of the afore-mentioned legatees predecease me the legacies are to go to their respective heirs," creates a substantial gift, and, each of the two legatees in question having predeceased the testator, the persons in each case entitled to the legacy are the statutory next-of-kin of each said legatee.

Doody v. *Higgins*, (1856) 2 K. & J. 729, 25 L.J. Ch. 773, 69 E.R. 976; *Re Porter's Trusts*, (1857) 4 K. & J. 188, 70 E.R. 79; *Vaux* v. *Henderson*, (1806) 1 Jac. & W. 388n, 37 E.R. 423; *Gittings* v. *McDermott*, (1834) 2 My. & K. 69, 39 E.R. 870; and *Hillier* v. *Hiscock*, [1900] S.A.S.R. 1, applied.

In re Douglas, [1918] N.Z.L.R. 594, G.L.R. 564, and *Martin* v. *Holgate*, (1866) L.R. 1 H.L. 175, distinguished.

Jacobs v. *Jacobs*, (1853) 16 Beav. 557, 51 E.R. 895; *In re Philp's Will*, (1869) L.R. 7 Eq. 151; *Finlason* v. *Tatlock*, (1870) L.R. 9 Eq. 258; *In re Stannard*, *Stannard* v. *Burt*, (1883) 52 L.J. Ch. 355; *De Beauvoir* v. *De Beauvoir*, (1852) 3 H.L. Cas. 524, 10 E.R. 206; *In re Macleay*, *Macleay* v. *Treadwell*, [1937] N.Z.L.R. 230; *Nicholson* v. *Nicholson*, [1923] G.L.R. 59; and *Smith* v. *Butcher*, (1878) 10 Ch.D. 113, referred to.

So held by the Court of Appeal, dismissing an appeal from the judgment of *Blair*, J., [1942] N.Z.L.R. 185.

As the dispute concerned nothing but two legacies (all the other pecuniary legacies having long since been paid) and nobody other than the common-law heir on the one hand, and the statutory next-of-kin of the deceased legatees, on the other hand, the order as to costs should be that in the action in the Supreme Court the trustee should have its taxed costs as between solicitor and client out of the residue of the estate, and, if there was an insufficiency of residue, then as to the whole or any deficiency as the case might be *pro rata* out of the two legacies in question; and that the taxed costs of all other parties as between solicitor and client should be paid *pro rata* out of the two legacies. On dismissal of the appeal subject to such variation, the appellant should pay fifteen guineas costs to the respondent trustee and seventy-five guineas to the statutory next-of-kin. If the trustee's costs of the appeal were more than fifteen guineas, the excess would be payable out of the residue of the estate.

McLean v. *Levin* (*No. 2*), (1910) 29 N.Z.L.R. 739, 12 G.L.R. 676; *In re Buckton*, *Buckton* v. *Buckton*, [1907] 2 Ch. 406; *Wilson* v. *Squire*, (1842) 13 Sim. 212, 60 E.R. 83; and *Attorney-General* v. *Lawes*, (1849) 14 Jur. 77, 68 E.R. 261, applied.

So held by the Court of Appeal (*Myers*, C.J., and *Smith* and *Johnston*, JJ., *Fair*, J., dissenting), varying the judgment of *Blair*, J., appealed from.

Counsel: *W. D. Campbell*, for the respondent; *Evans*, for the respondent company; *G. G. G. Watson*, for the next-of-kin.

Solicitors: *W. D. Campbell*, Timaru, for the appellant; *Perry, Finch, and Hudson*, Timaru, for the respondent; *Tripp and Rolleston*, Timaru, for the next-of-kin.

Case Annotation: Doody v. *Higgins*, E. and E. Digest, Vol. 44, p. 868, para. 7231; *Re Porter's Trust*, *ibid.*, Vol. 44, p. 500, para. 3199; *Vaux* v. *Henderson*, *ibid.*, Vol. 44, p. 868, para. 7233; *Gittings* v. *M'Dermott*, *ibid.*, Vol. 44, p. 868, para. 7234; *Martin* v. *Holgate*, *ibid.*, Vol. 44, p. 858, para. 7127; *Jacobs* v. *Jacobs*, *ibid.*, Vol. 44, p. 868, para. 7241; *Re Philp's Will*, *ibid.*, Vol. 44, p. 804, para. 6583; *Finlason* v. *Tatlock*, *ibid.*, Vol. 44, p. 802, para. 6565; *In re Stannard*, *Stannard* v. *Burt*, *ibid.*, Vol. 44, p. 869, para. 7246; *De Beauvoir* v. *De Beauvoir*, *ibid.*, Vol. 44, p. 865, para. 7194; *Smith* v. *Butcher*, *ibid.*, Vol. 44, p. 866, para. 7201; *Re Buckton*, *Buckton* v. *Buckton*, *ibid.*, Vol. 24, p. 860, 861, para. 8972; *Attorney-General* v. *Lawes*, *ibid.*, Vol. 24, p. 854, para. 8884; and *Wilson* v. *Squire*, *ibid.*, Vol. 24, p. 841, para. 8741.

COURT OF APPEAL.
Wellington.
1943.
July 14, 15, 23.
Myers, C.J.
Blair, J.
Callan, J.

THE KING v. CROSSAN.

Criminal Law—Disabling in order to commit a Crime—"Violent means"—Whether actual Physical Force or Bodily Injury required—Indictment—Duplicity—"Double or multifarious"—Two separate and distinct Offences alleged in one Count—Conviction on such a Count—Whether legally justifiable—Whether Substantial Wrong or Miscarriage of Justice occasioned—Evidence to justify Verdict on both Offences—Crimes Act, 1908, ss. 195, 387, 388, 428, 445.

The prisoner was tried upon an indictment containing, *inter alia*, the following counts:—

"(1) That with intent to facilitate the commission of a crime by violent means—to wit, by threatening to shoot her with a loaded revolver—he did render one R. incapable to resistance:

"(2) That with intent to carnally know a woman, one R., he did by night take her away from her home at Blackbridge Road and detain her at a house, . . . , Island Bay, against her will:

The jury found him guilty on both counts.

On a case stated by the learned trial Judge asking (*a*) whether the first count stated any crime, and (*b*) whether the second count should be quashed,

Held, by the Court of Appeal, affirming the convictions on both counts, 1. That, in order to constitute "violent means" within the meaning of that term in s. 195 of the Crimes Act, 1908, under which the first count was laid, it is not necessary to prove that a person charged under that section has used upon the person whom he is alleged thereby to have rendered or attempted to render incapable of resistance such physical force, or inflicted bodily injuries of such a nature, as to render such other person physically incapable of resistance.

2. That the inclusion in the second count of two separate and distinct offences was legally justifiable for the reasons following:—

Per *Myers*, C.J., and *Callan*, J., (*a*) That the provision in s. 388 (1) of the Crimes Act, 1908, "A count shall not be deemed objectionable . . . on the ground that it is double or multifarious," refers to the case of one and the same act or conduct giving rise to different or cumulative charges and not to the case of different acts or sets of acts giving rise to and constituting entirely separate and distinct offences. Such inclusion of two different and cumulative offences in one count, while legally justifiable, is undesirable.

R. v. *Surrey Justices*, [1932] 1 K.B. 450; *R.* v. *Thompson*, [1914] 2 K.B. 99; *R.* v. *Molloy*, [1921] 2 K.B. 364; *Attorney-General* v. *Sillem*, (1864) 2 H. & G. 431, 159 E.R. 178; *Castro* v. *The Queen*, (1881) 6 App. Cas. 229; *R.* v. *Disney*, (1933) 24 Cr. App. R. 49; and *R.* v. *Wilmot*, (1933) 24 Cr. App. R. 63, referred to.

(*b*) That s. 388 (3) is not (as subs. (2) of that section is) limited to the count referred to in s. (1), but gives a general power to amend or divide any count in an indictment. Therefore had objections been taken at the trial to the second count the Court could have divided it in accordance with subs. (3).

Per *Blair*, J. That at common law the second count as framed would have been bad for duplicity, but it is included in category of "double or multifarious" counts in s. 388 and thereby made unobjectionable, provision in subss. (2) and (3) being made for amendment or division.

Nash v. *The Queen*, (1864) 33 L.J.M.C. 94; *R.* v. *Thompson*, [1914] 2 K.B. 99; *R.* v. *Harris*, (1910) 5 Cr. App. R. 285; and *R.* v. *Edwards and Gilbert*, (1912) 8 Cr. App. R. 128, referred to.

3. That there was ample evidence to justify the jury in finding the prisoner guilty of both offences included in the second count and that no substantial wrong or miscarriage of justice had been occasioned.

Counsel: *Taylor*, for the Crown; *C. A. L. Treadwell*, for the prisoner.

Solicitors: *Crown Law Office*, Wellington, for the Crown; *Treadwells*, Wellington, for the prisoner.

Case Annotation. *R.* v. *Surrey Justices, Ex parte Witherick*, E. and E. Digest, Sup. Vol. 33, p. 31, para. 643a; *R.* v. *Thompson, ibid.*, Vol. 14, p. 223, para. 2061; *R.* v. *Molloy, ibid.*, Vol. 14, p. 224, para. 2076; *Attorney-General* v. *Sillem, ibid.*, Vol. 15, p. 731, para. 7901; *Castro* v. *The Queen, ibid.*, Vol. 14, p. 230, para. 2150; *R.* v. *Disney, ibid.*, Sup., Vol. 14, p. 19, para. 2076a; *R.* v. *Wilmot, ibid.*, Sup., Vol. 14, p. 67, 68, para. 5680a; *Nash* v. *The Queen, ibid.*, Vol. 14, p. 232, para. 2179; *R.* v. *Harris, ibid.*, Vol. 14, p. 517, para. 5809.

THE LAW AND THE PEOPLE.

Confidence in the Judicial System.

By Lieut.-Col. C. A. L. Treadwell, O.B.E.

Amongst the British institutions the law occupies a peculiar position in the affection of the people. They regard its proper administration as one of the principal foundations of social stability: the means by which order within the State is maintained.

It is treason to speak or act against the King under whose peace this law and order obtains. The idea of the royal duty being to maintain order is that, as Blackstone put it so long ago in his *Commentaries*, "the King's Majesty is by office and dignity royal the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept and to punish such as break it; hence it is usually called the King's peace." Some of our profession will have seen in the course of their own experience the form of indictment which ended with the words "against the peace of Our Lord the King, his Crown and Dignity."

It is the stability of this peace which makes life in a British community socially freer and commercially assured. In an oblique way, the people look to the Judges of our Courts as the human instruments for putting into effect their own will and purpose. In order that Judges shall be impeccable and beyond the reach of commercial and political temptations their salaries are settled on a scale supposedly adequate to the dignity and needs of the holder of such high office. They are barred from political partisanship and may be removed from their office only on a vote to that effect from both Houses of Parliament. *Quamdiu se bene gesserint* is the well known expression determining their tenure of office. That is, of course, apart from the modern requirement that statute has passed as an age limit.

The ordinary John Citizen takes a lively interest in the maintenance of judicial integrity and immunity from insult or scandalous criticism. He feels that his own peace would be involved if personal or political authority could with impunity put the character or standing of a judicial officer in peril. This same John Citizen would as fiercely defend his right to appoint his own legislators as he would to defend those who are appointed to interpret the result of their political decisions. He knows that he may change his member of Parliament if he should prove unsatisfactory. He regards him as his advocate, and if he fails his services are soon dispensed with.

But the judicial functionary is a very different person. He maintains the course of the law pure; he is unapproachable by the seductions of bribery. He ensures that the rich or the poor, the Conservative or the Socialist, may come unprejudiced by their financial circumstances or political colour before him for justice. In other words, the administrator of law and order must be above moral reproach. If, and how seldom it happens, a Judge prove unworthy of the trust reposed

in him, he is deposed, but then only after a full inquiry has revealed that he has fallen short in the high standard required of a holder of his office. The Lord Chancellor Bacon was the last English holder of that office to be dismissed from office for an offence. He had been found guilty, as readers will remember, of corruption. But it speaks well for the integrity of British Judges that such demissions from judicial office are rare. Appointments may be made of men whose juristic qualities are unimpressive, but almost invariably their honesty of purpose is unquestionable. John Citizen will forgive foolishness but not dishonesty in the person who is appointed to "poise the cause of Justice' equal scales whose beam stands sure."

Of our judicial system there is a feeling of confidence that it is of machinery well made and tempered. Contrasting it with those made in foreign lands helps to confirm that feeling of confidence. Our system is peculiarly well fitted for British people; no other system could administer justice so admirably as we understand it. "The majesty and power of law and justice" is very real under the British rule. There is, therefore, a great and general conceit in every citizen for the code and the way it is administered. That carries with it a great feeling of resentment when for no apparent sufficient cause offence or insult is given to a holder of high judicial office. Indeed, in a country which values to a degree amounting almost to worship the free institutions and their unimpeded operation, disapproval of a Judge should surely be only by such public clamour that political action would necessarily follow.

It cannot be suggested that Judges do not make mistakes. When they do we usually procure the aid of their fellow-Judges to put them right; and, if that fails, then there is always the Privy Council, when the cause is worthy of such expense, to determine finally on the matter. Still it is only their law that is corrected. When many years ago the Privy Council went further and imputed unworthy motives in our Justiciary the whole legal profession of New Zealand, backed by strong public opinion, rose in wrath. That censure was unique, inexplicable, unjustified, and unworthy. It served as a classic example for the fact that the public will resent without clear cause an imputation on the moral integrity of its judicial officers.

The three original professions, the Church, the Law, and the Armed Forces, provide the basis in the national security of State. The Church gives us our spiritual strength and guidance. How it fares in its duties these days is not relevant to this article. The Armed Forces provide the national means wherewith the nation defends itself from enemy aggression. The Law regulates the rights of the nationals and directs the maintenance of law and order within the State. In that duty it is concerned not only with the strict letter of severe, scrupulous law, but also with the application of moral principles. It is concerned with the material and moral rights and obligations of all. That it does so to the general advantage is shown by the lively interest and concern generally expressed when any act is done or word uttered which, designedly or not, tends to impugn the high standing or the integrity of high judicial office.

In a free country such as ours no national is free to place in peril the reputation of that most free institution, the British Court of Justice, or its high officers.

LICENSING ACT AND EMERGENCY REGULATIONS.

Recent Decisions.

(*Concluded from p. 167.*)

C. L. Innes and Co., Ltd. v. Carroll, [1943] N.Z.L.R. 80.

This judgment is a classical example of a hard case making bad law. The appellant is the owner of a licensed brewery in Hamilton, and has a "mail order" department in which, apparently, a large volume of business is done. Hamilton is the centre of an extensive district in which a large Maori population resides. An order was received in the ordinary course of the post, requesting the appellant to consign three cases of draught beer to William Francis at Putaruru. Both Hamilton and Putaruru are in a proclaimed area to which s. 43 of the Licensing Amendment Act, 1910, applies. That section makes it an offence to supply liquor to a Native in a proclaimed area except in specified circumstances. None of those circumstances are applicable to the present case. The appellant fulfilled the order for liquor, not knowing that William Francis was a Maori, who had used his European name in order to hide the fact that he was a Maori.

The point in issue was whether the offence created by s. 43 falls within the second or the third class of offences specified in *R.* v. *Ewart*, (1905) 25 N.Z.L.R. 709, 8 G.L.R. 22. The Class II offences are those in which from the language or from the scope and object of the enactment to be construed it is plain that the Legislature intended to prohibit the act absolutely, and the question of the guilty mind is relevant only for the purpose of determining the quantum of punishment following the offence.

The Class III offences are those in which, although from the omission from the statute of the words "knowingly" or "wilfully," it is not necessary to aver in the indictment that the offence charged was knowingly or wilfully committed or to prove a guilty mind, and the commission of the act itself *prima facie* imports an offence, yet the person charged may still discharge himself by proving to the satisfaction of the tribunal which tried him that in fact he had not a guilty mind.

The facts of the case showed clearly that the appellant had been deceived and in consequence had made a supply of liquor in breach of s. 43. That made it a hard case, but placing the offence in Class III will in a material degree nullify the remedial effect the enactment was intended to give—namely, the prevention of an indiscriminate supply of liquor being made to Maoris in a proclaimed area, and the evils arising therefrom.

The purpose of s. 43 is to protect the Maori people; not wholesalers or brewers. Yet, the whole judgment

is based on a consideration of the effect the enactment would have on a wholesaler's or a brewer's business if s. 43 were construed as imposing an absolute prohibition. Thus, the learned Judge says:

> Wholesalers and brewers must do a large part of their business by correspondence and it would be impracticable for them to institute a system of visual inspection of every correspondent who gave an order. Yet without an inspection of every correspondent, the wholesaler or the brewer could not be sure that he was not a Maori using a European name. The imposition of such a burden would mean that wholesalers and brewers could not carry on a class of business which they are licensed by the Legislature to carry on. It seems not too much to say that if they were obliged to institute the system of visual inspection to which I have referred, that they would either have to go out of business on account of the cost, or, if to-day permitted by the Price Tribunal, would have to raise the cost of liquor substantially. As I do not think the Legislature can have intended these results, I do not think that s. 43 should be construed to impose a prohibition independently of *mens rea*.

Apart from the fact that the Legislature was concerned only with the protection of the Maori people and not wholesalers or brewers, the reasoning of the learned Judge is open to this criticism. If a wholesaler or a brewer receives orders by mail to forward liquor to a proclaimed area from a customer who is not known personally to him, very little expense would be incurred by the wholesaler or the brewer if, before accepting the order, he wrote to the customer pointing out that Maoris were using European names in order to circumvent s. 43, and requesting the customer to sign a certificate, witnessed by a well known European, that he, the customer, was not a Maori.

The next step in the judgment is to draw the inference, based on the history of the legislation, that the prohibition against supplying liquor to Natives was intended to apply to the holders of publican's licenses and that the extension of the prohibition to wholesalers and brewers was accidental; consequently, it would be unreasonable to attribute to the Legislature an intention to continue the imposition of the absolute liability in respect of a supply by wholesale which might well have been imposed against a supply by retail. The difference between the position of the retailer and the wholesaler is, according to the judgment, that the retailer has the opportunity of visually observing the purchaser, but the wholesaler has not when he receives an order by post. It has been overlooked, however, that the holder of a publican's license is entitled to receive an order by post to supply liquor in any quantity —small or large—and to forward it by rail or any other means: see *Peterson* v. *Paape*, [1929] N.Z.L.R. 780.

The only difference between the rights of a wholesaler and those of a retailer is that the wholesaler may not sell less than two gallons at a time nor allow liquor sold by him to be consumed on the premises. A brewer is also prohibited from selling less than two gallons at a time, but not from allowing liquor sold by him being consumed on the premises (unless such a prohibition may be inferred from s. 46 (2) of the Finance Act, 1917).

The provisions of s. 43 of the Licensing Amendment Act, 1910, were enacted in substitution for s. 270 of the principal Act, which made it an offence to supply liquor to any Maori for consumption off the premises in any proclaimed area. The section did not apply to any Maori who was married to a European or to half-castes living as Europeans. It was construed by Cooper, J., in *Rhodes* v. *Bowden*, (1907) 26 N.Z.L.R. 1097, as imposing an absolute prohibition. Later a loophole in the section was discovered by reason of the words "off the premises." Chapman, J., held in *Gibbs* v. *Fitzpatrick*, (1908) 28 N.Z.L.R. 140, that the word "premises" was wide enough to include unlicensed premises, but not wide enough to include a railway carriage forming part of a train in the course of a journey. Edwards, J., adopted the same meaning of the word in *Police* v. *Wi Taka*, (1910) 13 G.L.R. 129. In order to close this loophole, the Legislature repealed s. 270, and s. 43 of the Licensing Amendment Act, 1910, was substituted therefor, by which the offence is created without reference to the supply being for consumption "off the premises." This change in the enactment is commented on in the judgment in *C. L. Innes and Co., Ltd.* v. *Carroll* thus:

> But the omission of the word "premises" which had previously suggested such a supply by hand as would occur when sales were made by retail under a publican's license or where sales or gifts were made on unlicensed premises, created a now situation requiring a now approach to the construction of the section. The generality of the prohibition now included a supply by wholesale and new exceptions were made.

The correctness of this dictum is open to serious doubt. The holder of a wholesale license or a brewer's license could have been convicted for an offence against s. 270 of the 1908 Act if he had supplied liquor for consumption off the premises in exactly the same way as the holder of a publican's license, or a wine license, or an accommodation license could have been convicted. It is true that the wholesaler who sold liquor to be consumed on his licensed premises would have been liable to be convicted of an offence against s. 195; but if he supplied a Maori in a proclaimed area, however the order was given or delivery was made, he came within s. 270, once it was proved that the liquor supplied was not to be consumed on the wholesale premises. That meant that he could not lawfully supply liquor to a Maori at all if the wholesale premises were in a proclaimed area. The provisions of s. 43 of the 1910 Act did no more than tighten up the restrictions against supplying liquor to Maoris in proclaimed areas. The judgment in *Rhodes* v. *Bowden* (*supra*) declared that s. 270 of the 1908 Act imposed an absolute prohibition because the section had been enacted for the protection of the Maori people. That was its paramount purpose and, it is submitted, is the paramount purpose of s. 43. The judgment in *C. L. Innes and Co., Ltd.* v. *Carroll*, however, declares that the continuance of absolute liability would be unjust to wholesalers and brewers who receive orders through the post (no reference is made to retailers who receive similar orders), and consequently if such an order is received from a Maori and the wholesaler or brewer cannot reasonably know from the signature on the order that the customer is a Maori, the wholesaler or brewer may not be convicted of an offence against s. 43. In other words, a wholesaler or a brewer, who conducts a branch of his business in a way in which he can easily be deceived, is immune from the penalty prescribed by s. 43 when a Maori, whom the Legislature intended to protect, takes advantage of the opportunity to deceive so afforded him.

Although the learned Judge who decided *C. L. Innes and Co., Ltd.* v. *Carroll* distinguishes *Rhodes* v. *Bowden* (*supra*), it is suggested that the principle involved in both cases is the same and the two judgments are in direct conflict. There the matter must remain until it comes under the review of the Full Court.

SERVICEMEN'S SETTLEMENT AND LAND SALES BILL.

New Zealand Law Society's Criticism.

The Standing Committee of the New Zealand Law Society considered the above proposed measure, and the President, *Mr. H. F. O'Leary*, K.C., made the following statement on behalf of the Society on 9th inst. :—

"The profession approves of the objective aimed at in Parts I and II which are directed to the acquisition of land at reasonable prices for the settling of servicemen thereon.

"Some of the particular provisions in these Parts are open to objection, examples of which are the following :—

"(*a*) Clause 6 provides for the appointment by the Crown of the lay-members of the Land Sales Court and clause 17 for the appointment also by the Crown of the members of the Land Sales Committee, with the result that the owner of the land has no representative either on the Court or on the Committee. The appointees on these tribunals are appointed by the Crown and hold office at the pleasure of the Crown.

"(*b*) Clause 12 provides in effect that the two laymen on the Court can override the Judge. Such a position for one who has the status of a Supreme Court Judge would be intolerable.

"(*c*) By clause 19 (5) the Land Sales Committee in dealing with any matter which comes before it may 'obtain the opinion of expert valuers or other persons as in the circumstances it may require.' This means that the Committee may go behind the backs of the parties and deal with the matter on evidence which neither party has an opportunity of meeting.

"There are other clauses in these Parts of the Bill which are open to criticism, but, as stated above, the profession is quite in accord that the best means should be adopted for successfully settling servicemen. It may well be, however, that the arbitrary method provided in the Bill for calculating price of land in accordance with 'basic value' may lead to extraordinary results.

"The profession is, however, very much exercised in regard to the effect of Part III, which provides for the control of all sales of land and leases of land for three years or more. It is provided that every contract for sale of any interest in land and any contract for the leasing of land for a term of not less than three years is unlawful unless it is approved by a Committee to be set up under the Bill.

"It is understood that the proposed legislation is considered necessary as part of the stabilization policy of the Government. If this is so, attention is directed to the fact that other stabilizing measures are for the duration of the war and a short period thereafter, but there is no such limitation in the present Bill.

"For whatever period the provisions are intended to operate the profession is definitely of opinion that such drastic proposals will lead to evasion on a large scale. Members of the profession have definite information that in one Dominion where somewhat similar legislation has been enacted evasions are such as to make the scheme of little effect.

"It is, however, with the delays, the difficulties, the extra cost, and the disturbing effect on the holders of title to land that the profession is particularly concerned. Lawyers have very extensive experience of every kind of land transaction and they also have some knowledge of how the average person regards the title to his land. With many people the purchase of a house property is the one investment of a lifetime. In many cases they never sell nor do they desire to sell, but they always cherish the idea that the property is their own and that they or their estate can sell it, if they feel so disposed, for such price and to such buyer as they wish. The restrictions provided by the Bill will constitute a blot on the owner's title and the owners will doubt whether they own the 'freehold.' It is felt that it will have a most disturbing effect on all those who hold title to land. What has just been said deals with the broad aspect of the matter, but when the carrying out of the provisions is attempted it is felt that such delay and difficulties and costs will occur as to make the measure entirely unworkable.

"In 1941, 6,260 transfers and leases were registered in Wellington alone—that would cover the Wellington Registration District. It is pointed out that many leases for periods in excess of three years are not registered so that the number of transactions to be approved in the Wellington District in the year may well approach 6,500. It will be seen at once how impossible it will be for any Committee or Committees to deal promptly with the volume of applications that would be made and what delays and uncertainty must result.

"Then, too, there is the uncertainty when a contract is entered into as to whether it will be approved, another feature which will create concern and lack of confidence.

"The extra cost and work must be a matter for serious consideration. The work must be done through the legal profession who are already over-burdened through depletion of staffs and the cost must necessarily fall on the parties to the transactions.

"The difficulty in applying the Act becomes more obvious when one considers some of the cases which will have to be dealt with. Here are some examples :—

"(1) A mortgagee's sale involves an application to the Committee for leave to sell, preparation of conditions of sale, expense of advertising, &c. The mortgagee may go through all this process and then find that, even if he sells at auction, that the sale is not approved by the Committee.

"(2) Auction sales, particularly where, perhaps, several sections are sold at one auction. The vendor and purchasers may not know for months afterwards whether the contracts they have made are valid. Possibly the purchasers in the intervening period may withdraw their offers.

"(3) Formations of companies to take over business. One can hardly imagine that business people would spend the time involved in negotiations of this kind, knowing that where land is involved the transactions and presumably all its details must be discussed in open Court by the Committee, always with a possibility that the transaction may not be approved.

"Under clause 58 proceedings of the Court and Committee shall be heard in public. This means that all the confidential details of every transaction of sale or lease of land for more than three years are available to all who care to listen, including, of course, business rivals. Such a provision cannot be justified."

What has been set out above is the attitude of the whole legal profession to the measure. With its peculiar knowledge of the matters that are dealt with in Part III it feels sure that the proposals will lead to such evasions, delays, difficulties, and cost as to make the measure harsh and oppressive. It has been considered advisable to inform the public of the Society's view.

The Society interviewed the Prime Minister, who later promised several amendments as the result of the representations made.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

(*Concluded from p. 170.*)

Bodies Corporate purporting to Act as Solicitors.—Mr. von Haast wrote as follows :—

"I have recently perused *Law Society* v. *United Service Bureau Ltd.*, [1943] 1 K.B. 343, from which it appears that legislation was passed in England in 1932 to prevent 'persons' pretending to be solicitors; and it was held that the word 'person' in certain sections did not include a limited company. In consequence, the Solicitors Act, 1934 (*27 Halsbury's Statutes of England*, 521), was passed prohibiting companies from purporting to act as solicitors, and making the word 'persons' to include bodies corporate in certain sections of the 1932 legislation.

"The reasoning of Avory, J., on pp. 348 and 349, may possibly apply to ss. 9 and 16 of our Law Practitioners Act, 1931, which might be held to contemplate only persons who could be admitted and enrolled and not corporate bodies. I call your attention to this case on the English legislation in order that your Society may consider whether there is any need for the enactment of the English amending legislation or any similar legislation on the subject."

It was decided that a sub-committee of Dunedin members should consider the question and furnish a report at the next meeting.

Conveyancing Scale.—The Wanganui Society at the December meeting of the Council drew attention to what was considered an anomaly in the conveyancing scale as applied to long-term agreements for sale and purchase coupled with possession and a lease for a similar term with a compulsory-purchasing clause.

The question had accordingly been referred to the Conveyancing Committee, who reported as follows:—

"We have considered the letter from the Wanganui Law Society enclosed in your letter to us of March 23, 1943, concerning the costs of preparing a lease for seven years containing a compulsory-purchasing clause for £5,400 as compared with the costs of preparing an agreement for sale on like terms.

"The scale applying to leases is set out in *Ferguson's Conveyancing Charges*, 3rd Ed., p. 30 *et seq.* and p. 62, and the Society's ruling on compulsory-purchasing clauses at p. 32. The costs are to be borne by the lessee and the lessor's solicitor is entitled to charge the lessee for the purchasing clause as for an extra covenant. The question raised by the Wanganui Society is, What is a reasonable fee for the clause?

"As the Wanganui Society points out, it is desirable if possible to harmonize the costs for a lease with a compulsory-purchasing clause with those for an agreement for sale on like terms.

"The scale of costs for agreements for sale and purchase is set out by *Ferguson* at pp. 10 and 60. They are two-thirds of the appropriate charge for a deed of mortgage securing a sum equivalent to the total amount of the purchase-money. As to the incidence of the costs, *Ferguson* says, p. 10: 'Where separate solicitors act for vendor and purchaser the proper practice is for the vendor's solicitor to prepare the agreement and the purchaser's solicitor to peruse it.' Each party in that case, whether the balance of the purchase-money is payable within a limited time or over a lengthy period, must in accordance with law pay his own costs *unless otherwise agreed*. It is reasonable in cases in which the payment of the purchase-money is extended for a period of twelve months or upwards that the agreement for sale and purchase should provide for the costs of that agreement being paid by the purchaser.

"We think it is reasonable that in both cases—*i.e.*, a lease with a compulsory-purchasing clause and an agreement for sale—the costs should be chargeable to the purchaser.

"As to the amount of the costs, we are of the opinion that the same scale should apply both to the compulsory-purchasing clause in the lease and to the agreement for sale and purchase including, of course, the purchaser's solicitor's fee. Whether the present scale for the latter of the two is too high, as suggested by the member of the Wanganui Society in his well reasoned letter, we do not like to venture an opinion, but we are inclined to think this is not the moment to make any reduction.

"If, however, the full scale for drawing an agreement for sale is applied to the compulsory-purchasing clause in a lease, the total costs for preparing the lease become a good deal higher than those for preparing an agreement for sale, and the aim of synchronizing the costs in the two cases is not achieved. We think, however, they should be somewhat higher, and we therefore suggest that in the special case of a lease with a compulsory-purchasing clause while the full fee may be charged for the clause, the fee for the lease should be diminished by 10s. 6d. per £100 of rent (see *Ferguson*, p. 62), the perusal fee to be one-half of the reduced fee.

"We think solicitors would avoid being placed in the invidious position mentioned by the Wanganui solicitor if such a practice were adopted. We assume that ultimately it is the client's responsibility whether he will give or take a lease or agreement for sale, but his solicitor must undertake the difficult task of explaining to a layman the legal incidents of leases and agreements which the Court of Appeal in *Rhodes* v. *Commissioner of Taxes*, (1910) 29 N.Z.L.R. 725, was able to satisfactorily elucidate to us lawyers."

It was stated that the Wanganui Society was satisfied that the position was satisfactorily covered and it was decided that the report should be adopted.

Jury Service during the War Period.—With regard to the question of the curtailment of jury service during the war period, the Chairman stated that following the annual meeting, the views expressed by the District Societies had been given publicity to in the Press.

It was decided that the attention of the Government should be again drawn to the views expressed by the Law Societies on this question.

Law Society, London.—The Secretary reported that in a recent letter the Secretary, Law Society, Chancery Lane, London, stated:—

"May I say that I have had an opportunity of meeting several members of the New Zealand Forces in this country, but I have not so far been fortunate enough to meet any lawyer. If you know of any New Zealand lawyer stationed in this country I shall be most grateful if you will put me in touch with him, as I should like to show him this building, for example, and to give him some hospitality should it be possible."

It was decided to bring this invitation to the attention of the District Law Societies.

LAND AND INCOME TAX PRACTICE.

Expenses Against Fixed Salary or Wages.

The provisions of the Land and Income Tax Act, 1923, governing the deduction of expenses connected with income from salary or wages, are contained in s. 80 (2) of the Act—

"80. (2) In calculating the assessable income of any person deriving such income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year. In calculating the assessable income of any person deriving such income from two or more sources, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived by the taxpayer for that year from all such sources as aforesaid. Save as herein provided, no deduction shall be made in respect of any expenditure or loss of any kind for the purpose of calculating the assessable income of any taxpayer."

In general, claims made for deductions against salary or wages, on the grounds that the item is "spent in earning the salary or wages," are disallowed by the Department because items claimed are not in fact "*expenses exclusively incurred in the production of assessable income for any income year* which may be deducted *from the total income derived by the taxpayer for that year.*"

Claims commonly made are: Travelling-expenses incurred in travelling between the taxpayer's residence and place of work; the cost of removal from one town to another to take up a new position; cost of travelling when a taxpayer is forced to live at an unusual distance from his work; expenses and depreciation of cars used by a salaried taxpayer in performance of his duties; entertainment and hospitizing expenses incurred by a salesman or business executive in order to maintain or attract business for his employer, and subscriptions to commercial or professional journals.

The Commissioner takes the view that such expenses are not "*exclusively incurred in the production of assessable income for any income year,*" but are expenses paid by the taxpayer to place himself in a position to earn income. The expense itself must be necessary for or instrumental in the production of assessable income, or relate specifically or exclusively to the amount of earnings which is or will be derived during the same year ending on March 31 next. For example, the expenditure of say train fares is not of itself instrumental in producing the amount of income earned—a weekly train fare of £1 has no relation to the amount of income earned by a company secretary earning a salary only—he would earn the same fixed salary if he lived on the premises and paid nothing for travelling. The earning of the salary commences from the time he arrived at his place of employment. Again, removal expenses are no doubt necessary if a person is intending to take up a position in another town, but they do not exclusively relate to the income which will be earned, and are certainly not related to the earnings of only one year—such expenses merely place the person in a position to commence earning income for as long as he chooses or is required to remain in that particular employment. Two English cases illustrate the principles involved—

(*a*) *Andrews* (*H.M. Inspector of Taxes*) v. *Astley*, (1924) 8 Tax. Cas. 589.—A storekeeper employed on salary contended that owing to the abnormal shortgage of houses in that town he was compelled to reside outside the town,

and claimed to deduct from his salary the expense of maintaining a motor-cycle to get to his work. *Held* that the expenses in question were not incurred in the performance of the duties of the office and that the deduction claimed was not admissible.

(b) *Ricketts* v. *Colquhoun*, (1925) 10 Tax. Cas. 118, which involved a claim for travelling and hotel expenses incurred by a barrister and solicitor, residing and practising in London, when travelling to Portsmouth to fulfil an office as Recorder. Scrutton, L.J., stated:

"I cannot understand how it is suggested that when, in the case of residence 400 miles away, he sets out on his journey of 400 miles he is performing the duties of Recorder. He is travelling to a place where he has to exercise the duties of Recorder, and he is travelling to that place because of personal conditions of his own which have nothing to do with the duties of Recorder, but are personal matters which he alone controls, and as to which his Corporation have nothing whatever to say, so long as he holds his Sessions. It appears to me that the money spent on travelling, feeding, and sleeping is not wholly and exclusively expended in the performance of the duties of Recorder. Travelling-expenses I have no doubt whatever about. The expenses of food and of sleeping stand in a slightly different category. Take, in the case of food, the simplest case of the lunch of the Recorder during the sitting. The expenses of lunch of a Recorder are simply those of having his meal; it may be that his meal costs more because he is sitting as Recorder instead of lunching in his Inn of Court, but to say that the sum he expends is wholly expended in the performance of his duty appears to me to be an impossible reading of the rule."

(c) *Income Tax Case No. 489*, (1941) 12 South African T.C. 69.—The appellant, a journalist, was granted a bonus by the newspaper by which he was employed for reporting parliamentary debates. He sought to deduct therefrom the cost of travelling by motor-car to and from Parliament and his place of residence. In the course of his judgment, Dr. Manfred Nathan, K.C., referred to a New South Wales case, *In re Adair*, and stated—

"There in the Court of Review, Murray, D.C.J., said: 'If a man chose to live at a distance from his place of business because it was more convenient, healthy, or pleasant for himself, that was a matter entirely within his own discretion, and was not in any way connected with the earning of his income. If it were otherwise, the extraordinary result would follow that a man might for his own convenience reside a considerable distance from his place of business and deduct the annual amount of his railway fare from the taxable amount of his income. Such a thing was utterly outside the principle and intention of the Act.'"

The wording of the New South Wales Act was "*expenses actually incurred* in the production of income."

Claims are frequently made by salaried taxpayers for subscriptions or fees paid to commercial or professional organizations or societies for the purposes of keeping abreast of advances and modern practice—*e.g.*, subscriptions paid by a cost accountant to an institute which issues journals dealing with accountancy practice, subscriptions paid by a medical man (on salary) to the B.M.A. The point arose in an English case, *Simpson* v. *Tate*, (1925) 9 Tax. Cas. 314, where a medical officer for Health joined medical and scientific societies and claimed to deduct from his income (salary) the subscriptions paid by him to these societies as being money which he was obliged to expend wholly, exclusively, and necessarily in the performance of his duties of office. Mr. Justice Rowlatt decided that he was not entitled to deduct these sums and said: "When looking into the matter closely, however, one sees that these are not moneys expended in the performance of his official duties. He does not incur these expenses in conducting professional inquiries or get the journals in order to read them to the patients. If he did, the case would be altogether different. He incurs these expenses in qualifying himself for continuing to hold office, just as before being appointed to the office he qualified himself for obtaining it. I think it is desirable to lay down some principle applicable to cases of this kind. In my view the principle is that the holder of a public office is not entitled under this rule to deduct any expenses which he incurs for the purpose of keeping himself fit for performing the duties of office, such as subscriptions to professional societies, the cost of professional literature, and other outgoings of that sort."

It should be noted that the statutory wording in the English Acts, upon which the foregoing cases were decided, is that a deduction is allowed for money "wholly, exclusively, and necessarily expended in *performance of duties*," whereas the New Zealand law is, briefly, that deduction is allowed for "expenses exclusively incurred in the *production of assessable income*." The writer is not aware of any cases in New Zealand where an objection to the disallowance of a claim made by a salaried taxpayer for expenses against salary or wages has been determined in the Courts, but it is understood that claims are frequently made. The Commissioner has for many years cited the foregoing cases as an indication of the attitude which would be adopted if an objection went to the Courts.

It does not follow, however, that a salaried taxpayer cannot under any circumstances obtain a deduction for expenses. Where a manager or salesman incurs entertaining expenses the Department will not allow a claim for such items, but the difficulty may be overcome in the future by the employer paying a salary and allowance to cover specific expenses such as entertaining and hospitizing. In such circumstances the Commissioner will disregard the allowance for assessment purposes, provided he is satisfied that the amount thereof is reasonable. Any excess expenditure, not covered by an allowance, which is claimed by the taxpayer would not be admissible—the Commissioner takes the view that such matters are for adjustment between employer and employee. Where the Commissioner is satisfied that a particular class of taxpayer receives an honorarium or fee out of which it is usual to meet recognized expenses, he may deem a certain proportion of the gross earnings to cover essential expenses: *vide* the paragraph *re* Chairmen of Local Bodies: *ante*, p. 170.

Some offices and employments involve a person's travelling in the performance of work for which a fixed salary is paid. In this connection the Commissioner allows the following expenses as deductions against a fixed salary:—

(i) Where the employee is required under his contract of employment to use his own car on his employer's business, then the cost of any benzine, oil, and car maintenance not covered by an allowance paid for such items is allowable. Expenses of private running are not allowable, but the proportion of annual depreciation of the car applicable to business use is allowable.

(ii) Any reasonable excess of hotel expenses over an allowance provided by the employer for that purpose is permissible as a deduction.

An English case in point is *Nolder* (*H.M. Inspector of Taxes*) v. *Walters*, (1930) 15 T.C. 380, where an aeroplane pilot claimed a deduction for an excess of subsistence expenses when away from home, over an allowance granted by his employer. Mr. Justice Rowlatt said:

"I think it has always been agreed, that when you get a travelling office, so that travelling-expenses are allowed, those travelling-expenses do include the extra expense of living which is put upon a man by having to stay at hotels and inns, and such places, rather than stay at home. Of course his board and his lodging in a sense, eating, and sleeping are the necessities of a human being, whether he has an office, or whether he has not, and therefore, of course, the cost of his food and lodging is not wholly and exclusively laid out in the performance of his duties, but the extra part of it is. The extra expense of it is, and that is the quite fair way in which the Revenue look at it. In this case, therefore, he would be entitled to charge something for the extra expense which he is put to by having to go and spend all the day, and often the night, away from home, because that is part of his duty; and then it comes to the question really of quantum."

It is interesting to compare this case with *Ricketts* v. *Colquhoun*. The distinction appears to rest in the fact that in *Nolder* v. *Waters* the taxpayer incurred an expense during the course of his duties—*i.e.*, while he was being paid for travelling—whereas in *Ricketts* v. *Colquhoun* the taxpayer incurred expenses before he commenced the work for which he received payment.

The question as to whether travelling and subsistence expenses connected with earning director's fees may be set-off against the fees was considered in *Income Tax Case No. 415*, (1938) South African T.C. 258. The facts were, briefly, that the appellant carried on farming operations and resided at the farm. He was also a director of several companies, and as occasion required, he made visits to various towns some distance from the farm, for the purpose of attending directors' meetings of the companies from which he earned directors' fees. The appellant contended that as it was impossible for him to reside in all the towns, the expenditure involved in travelling to attend meetings was incurred in the production of his income. Dr. Manfred Nathan, K.C., stated:

"In the view we take of this case, however, it seems to make no difference whether the appellant has to attend

meetings at one town or at several towns away from his ordinary place of residence. It seems to us that it is necessary to prove that the expenditure has been incurred in the production of the income."

Reference was made to the English cases *Nolder* v. *Waters* and *Ricketts* v. *Colquhoun* and Dr. Nathan went on to say:

"The appellant's representative has sought to distinguish the English cases on the ground that the English Act uses the words 'wholly, necessarily, and exclusively' incurred in the production of the income, whereas the Union Act, s. 11 (2) (*a*), speaks of 'actually incurred' in the production of income. It seems to us that the words used in s. 11 (2) (*a*) are wide enough to exclude a deduction of this nature. It does not appear to us that this money was expended 'in the production of income.' There is nothing to show that the appellant would not have earned the same amount by way of director's fees had he not had to travel to the respective headquarters of the companies of which he was a director, but resided at the seat of each respective company. It does not seem to us to make any difference to how many places the appellant has to travel to attend meetings of boards of directors so long as he is paid a fixed sum for his attendance. In other words, it does not appear that the appellant is paid a greater sum as director's fees by reason of his having to travel to the places of meeting. In our opinion, the expenses claimed by the appellant are not deductible."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The Law Society and the Public.—Over the past decade the New Zealand Law Society has seemed to show an increasing tendency to remain publicly silent on questions on which, with its special knowledge and experience, it might usefully express an opinion publicly and strongly. A recent case in point is the Industrial Conciliation and Arbitration Amendment Bill, upon which the Society made no public statement, but contented itself with making representations to the Labour Bills Committee of the House of Representatives. It was refreshing, therefore, to read the forthright public statement which the Society issued so promptly with reference to the provisions of the Servicemen's Settlement and Land Sales Bill, and there are many in the profession who hope that the Society will not hesitate to act similarly in the future whenever the occasion arises. Some feel that in this direction the Society is somewhat handicapped by the fact that its Standing Committee in Wellington is so small in number, and consider that the Society should have, in the capital city, a Vigilance Committee comprising, in addition to the three Wellington members of its Council, say six or more other Wellington lawyers, with full power to make representations and statements on behalf of the Society on any matter of urgency arising in between the regular quarterly meetings of the Council.

"Judge" or "Mr. Justice"?—Legend has it that when Lord Darling was a High Court Judge a lady at the dinner-table said to him: "I never know whether to call you Judge Darling or Mr. Justice Darling." The Judge is supposed to have replied, "Just call me Darling." When Lord Darling died in 1936 many obituary notices recalled the story; but, according to his biographer, Derek Walker-Smith, it is entirely apocryphal.

Appointment of K.C.'s in War Time.—English legal journals just arrived print an official statement on this subject issued by the Lord Chancellor (Viscount Simon) in May last. The Lord Chancellor said that, like his predecessors in similar circumstances, he had previously maintained the view that it was undesirable in time of war to create further King's Counsel, for it was important that the professional prospects of those who had undertaken military or other national service should not be unnecessarily prejudiced. The ranks of practising K.C.'s had, however, been so thinned by death and other causes that practical inconvenience arose, and the Lord Chancellor was satisfied that the public interest required that more K.C.'s should be available to assist in the administration of justice. In deciding whom to recommend the Lord Chancellor would bear predominantly in mind the public need which existed in particular areas and in different branches of the law for additional leaders. It will be observed that the Lord Chancellor's decision is based upon the *absolute necessity* for some further appointments. No one can suggest that such a state of affairs prevails in this Dominion.

Judicial Condescension.—The judgments of MacKinnon, L.J., always repay reading. This Lord Justice is not given to sparing feelings. He says what he thinks, and says it plainly; though he is not always upheld by the House of Lords. *Summers* v. *Salford Corporation*, [1943] 1 All E.R. 68, is an interesting recent instance of a unanimous and undoubting reversal. The case had to do with the meaning of the words "in all respects fit for human habitation" in the Housing Act, 1936—a measure designed for the benefit of the working classes. In the Court of Appeal MacKinnon, L.J., had said:

> The words are not words of art taken from the usual provisions of covenants in leases. *They are words almost of journalistic generality*, and I find it extremely difficult to make up my mind as to whether it can possibly be said that a failure to put right one broken sash-cord can be treated as a breach of a statutory obligation to keep a house in all respects reasonably fit for human habitation *having regard to the general standard of housing accommodation for working classes in the district, as to which I have no information whatever.*

These observations drew the following comment from Lord Wright in the House of Lords:

> The words of the Act are meant to be wide and elastic, because they are to be applied to the needs and circumstances of poor people living in confined quarters. *The Court has to condescend to realize what these are.*

A Question of Conscience.—MacGregor, J., when at the Bar, was once briefed for the plaintiff in an action against an agent who was alleged to have taken advantage of his position and to have bought in a property for himself in breach of his duty to his principal. MacGregor cross-examined the agent in considerable detail, till at last the agent protested: "I can't tell you, Mr. MacGregor. It all happened two years ago and I can't keep everything in my mind." "Oh no," replied the cross-examiner, "but you have this on your conscience."

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Probate.—*Lost Probate—Probate required for Registration of Transmission—Procedure to obtain Copy.*

QUESTION: A probate, after having been uplifted from the Stamp Office, before completion of the winding-up of an estate, is lost. It is now required in order to register the transmission. I am informed by the Registrar of the local Supreme Court that it is not possible to seal a duplicate. What is the correct procedure to be followed now?

ANSWER: The Registrar is correct in saying that a duplicate probate cannot be issued. The correct procedure is to apply for a certified copy of the probate or for an exemplification of the probate. On this being sealed, it will be sent by the Court to the Stamp Duties Department. A declaration that no further assets have been found will be required, and, on this being furnished, the Stamp Office will certify that all duty has been paid, and the certified copy or exemplification will then be available for registration of the transmission.

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2. Income-tax.—*Company's Payment of Directors' Life Insurance Premiums—Whether claimable by Director as Special Exemption.*

QUESTION: A company pays the premium in respect of a life insurance policy effected on the life of one of its directors, without reimbursement from the director. Can the director claim the amount of premium paid as a special exemption in his return?

ANSWER: The following points arise in connection with this question:—

(1) If the director is a salaried employee of the company, which has a scheme of paying the premiums of its employees, or certain specified officers, then the amount paid by the company is treated as additional remuneration to the director—*i.e.*, the company is entitled to claim the amount as a deduction, and must account for social security charge and national security tax as if the premium were salary or wages. The director is entitled to claim the premium as a special exemption in his return, but must also show the premium as additional remuneration received in the year during which the company paid the premium.

(2) If the director is not a salaried officer of the company, the position is that the premium is a distribution of the company's profits for the benefit of the director. The company cannot claim the premium as a deduction in its return—the premium is equivalent to a dividend, and must be shown as such in the director's return. He may, however, claim the amount as a special exemption.

(3) If the company has made the arrangement with a view to securing funds on the director's death, or for the purposes of providing a security for advances, then the transaction is regarded as an investment. The policy should be shown amongst the company's assets. The premiums cannot be claimed as deductions by the company. The policy is not for the benefit of the director or his wife or children, and is disregarded as income or an exemption in his assessment.

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3. Land Transfer.—*Joint Tenants—Mortgage by One of his Interest—Mortgagor dying before other Joint Tenant—Whether Mortgage extinguished.*

QUESTION: A. and B. are joint tenants of an estate in fee-simple under the Land Transfer Act. A. (without the concurrence of B.) mortgages his interest in the land to C., and the mortgage is duly registered. A. dies before B. Does B. now own the entirety of the land freed from the mortgage to C.? Would it have made any difference if A. had transferred his interest to B. before he died but after the registration of the mortgage to C.?

ANSWER: In the circumstances stated in the question, B., upon registration of a transmission by survivorship in his favour, will become the sole owner of the land, freed from C.'s mortgage, which will be extinguished so far as the title is concerned. The reason is that a mortgage under the Land Transfer Act operates not as a transfer of the legal estate, but merely as a charge, and therefore does not act as a severance of the joint tenancy as would a legal mortgage under the "old system." At common law the creation of a rent-charge by one joint tenant did not effect a severance and was not binding on the surviving joint tenant or tenants, the maxim being, *Jus accrescendi praefertur oneribus.* The same maxim must be applicable to mortgages by one joint tenant under the Land Transfer Act: *27 Halsbury's Laws of England*, 2nd Ed. 663, *n.* (1).

But, if A. had transferred his interest to B. before he died, B. would take subject to C.'s mortgage, because then B. would be claiming not by virtue of the *jus accrescendi*, but of the transfer from A: *Lord Abergavenny's* case, (1607) 6 Co. Rep. 78 (*b*).

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4. Stamp Duty.—*Agreement to Lease, not carried into Effect—Whether Stamp Duty refunded.*

QUESTION: A. agrees in writing to lease to B. a piece of land for a short term at an annual rental of £200 per annum. B. gets the agreement stamped at the Stamp Office, at 14s. Subsequently both parties alter their minds; B. never enters into possession and the agreement "goes west." Is B. entitled to a refund of the stamp duty paid by him?

ANSWER: No; B. is not entitled to any refund. The agreement was liable to stamp duty on its execution, and s. 53 of the Stamp Duties Act, 1923, does not operate. No refund may be made under the Spoiled Stamps Regulations, for they derive their authority from s. 18 of the Stamp Duties Act, 1923, and that section deals only with stamps destroyed, spoiled, or wasted by *accident or error.* There is no accident or error in the proper stamping of an instrument by the Stamp Department.

RULES AND REGULATIONS.

Agricultural Workers Wage-fixation Order, 1943. (Agricultural Workers Act, 1936.) No. 1943/125.

Board of Trade (Bread-price) Regulations, 1936, Amendment No. 1. (Board of Trade Act, 1919.) No. 1943/126.

Naval Discipline Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/127.

Cinematograph Films Exhibitors' Licenses Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/128.

Agricultural Workers Extension Order, 1941, Amendment No. 1. (Agricultural Workers Act, 1936.) No. 1943/129.

Tobacco-growing Industry Regulations, 1936, Amendment No. 2. (Tobacco-growing Industry Act, 1935.) No. 1943/130.

Electoral Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/131.

Paper (Manufacture and Sale) Control Notice, 1942, Amendment No. 2. (Factory Emergency Regulations, 1939.) No. 1943/132.