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THE OFFICE OF JUDGES.

INDUSTRIOUS authors, and benevolent publishers, have devoted much time and thought in an endeavour to equip and to maintain the practising barrister in the arts and crafts of his profession. He is thus enabled to procure Guides to help him in ascending the heights. As the more or less busy years go on, he may sustain himself with the Hints that are his for the purchasing. When the shadows lengthen, there are sundry Lamps to be had for his advocacy (and no coupons required). And, in addition to the adventitious assistance of the written word, he is, throughout his forensic career, the recipient of much well-meant advice, gratuitously supplied by the members of the tribunals before whom it is his duty, if not always his pleasure, to appear.

Yet, in the ever-increasing bulk of legal literature, there is not to be found one comprehensive treatise containing sailing directions for one who is about to embark on the onerous duties that fall to the lot of His Majesty's Judges. For him there is no Guide; not even a Hint. And for lack of Lamps, the Judiciary seems to be condemned to wander in a perpetual blackout. Save with one notable exception, to which we shall refer, it would seem that the centuries of English legal history and learning have left the Judge in his exalted isolation to achieve and practise the art (or is it the science ?) of his calling by the simple method of trial and error.

There must be some explanation for this *liber omissus*. In the first place, upon appointment to the Bench, in these modern days, the voice of the elevated is stilled by reasons that will suggest themselves to the initiated. Mr. Justice Avory was asked some years ago by Lord Hewart, L.C.J., what he should say about the Judges in a forthcoming reply to a toast of their health. "Oh! say that we are well satisfied with the universal admiration in which we are held," was the ready answer. Lord Hewart tells us that he followed that suggestion, though a natural caution prompted him to interpolate the word "almost" before the word "universal." A glimmering of the reasons may be seen in Lord Bowen's remark when a committee of the Judiciary were considering an address to the Queen on the opening of the Law Courts. With the humility that cloaks true greatness, the draft prepared by Lord Selborne, L.C., contained the phrase, "We, Your Majesty's Judges, conscious as we are of our manifold shortcomings." Sir George Jessel, M.R., testily interjected that he was himself not conscious of manifold defects, and if he were he should not be fit to sit on the bench. "Why not say," suggested Lord Bowen, "'Conscious as we are of each other's manifold shortcomings'?" But his amendment was not adopted. In the second place it may well be that the real reason for a lack of literature on the duties of a Judge lies in the fact that the voice of him, who, from the ranks of the Bar where all text-books are written, would commit himself to advice or suggestion, is hushed where the Judiciary is concerned. Sensitive souls might take it to be implied criticism. *Quis custodiet ipsos custodes* ?

But, after all, Lord Bacon, in his Essay, "On Judicature," may have written, in a few pages, the last word on the theory and practice of the perfect Judge. To improve upon him may have been found impossible in the three hundred and fifty years since his writing. And there is consolation in the fact that a great Lord Chancellor—though even he did not practise all that he preached—has once and for all outlined the whole duty of a Judge. That is plain when we examine extracts from his matchless essay. How well might his precepts be adopted and acted upon by Judges of all time!

Lord Bacon begins by saying: "Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law." That there has been much judicial law-making since that advice was given is unquestioned; and even the Privy Council has legislated on occasion, to the discomfiture of the reversed. But then generations of Judges have told us that their judgments have not extended the common law; they have merely stated what it has always been. So we are professionally bound to an understanding that the more they change it, the more it remains the same thing.

Still Lord Bacon's advice is a counsel of perfection. At times, in its relation to statute law, a Judge has forgotten it, and has by no means confined his office to *jus dicere*, when he has ventured to rebuke the Legislature or the Executive whose function it is to *jus dare*. And, in so doing, not every one has expressed himself in the guarded language used by Chief Justice Vaughan, when, in *Harrison* v. *Burwell*, (1670) 2 Vent. 9, 10, 86 E.R. 278, 279, he said: "Perhaps if we, the Judges, had been makers of the law, this question had not been; but we are to proceed upon the laws as made, & cannot alter them. This is not a thing of our promotion, & this I speak to satisfy such as may object against us." The Judges, as Lord Bacon indicates, have nothing to do with policy; their duty is simply to ascertain the meaning of a statute as it stands: to construe the law, not to make or to criticize it.

Lord Bacon also wrote: "It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness or conceit in cutting off evidence or counsel too short; or to prevent information by questions, though pertinent." Of course, no Judge of any experience would nowadays interrupt a cross-examination by cutting off evidence or counsel too short. As counsel opens the plaintiff's case, the real issue becomes clear to the Bench. When a witness has been examined, cross-examined, and re-examined, that which is true and material in his evidence is quite plain. Howsoever difficult he may find it, the Judge, if he is to suspend judgment until both sides have been heard, must hear each side out.

It is true that many eminent Judges in recent times have adopted the Socratic method with counsel by way of getting at the real point at issue in an argument. Sir George Jessel did, and Lord Esher. Constant questioning from the Bench spoils the symmetry of an argument, and, by leading to reiteration of submissions, if carried too far, results in a costly waste of time. Some one, however, has said that truth is more than symmetry, and time must wait on justice. But a multitude of "questions, though pertinent" are disconcerting to the best of counsel, whose endeavour always is to elicit truth and to avoid unnecessary cost to his client, to whom time spent in litigation means money. It is recorded that that great Judge, Lord Watson, was once heard breaking into counsel's argument with frequent questions while pursuing a line of thought that had occurred to him. The case was the trade-union one, *Allen* v. *Flood*, [1898] A.C. 1, and the point at issue was what constituted "molesting." Lord Morris, who was beside him, endured these questionings for some time, but he was at last compelled to observe: "I think that the House quite understands now the meaning of molesting a man in his business." But the same Lord Watson once told a friend of his that he never interrupted a fool.

Correlative with the last precept is Lord Bacon's dictum, "Patience and gravity of bearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal." No one who has ever earnestly attempted to perform the duties of a Judge fails to realize these facts.

In an address given last year to the Society of Comparative Legislation, Lord Atkin said: "As a Judge, my experience has been that 80 per cent. of the cases try themselves if the Judge will only sit still and hold his tongue." Emphasis, too, is given to Lord Bacon's dictum by a recent incident in the Court of Appeal. The point at issue was a very short one, and the facts were within a narrow compass. One of the learned Lord Justices asked counsel who was addressing the Court why the argument in the Court below had extended over three days. Counsel was equal to the emergency. He replied: "It was this way, my Lord: His Lordship took a very great interest in the discussion."

And "gravity of bearing." There has always been some objection to "humour on the Bench." A high quality is nowadays the only justification for judicial wit. When a Judge is tempted to be funny, he should remember that there are usually two persons in Court to whom the suit may be anything but a joke; and one of them will probably have to foot the bill for the costs of the whole of the proceedings.

Not that wit or humour is always out of place in a Court of Justice: *Dulce est desipere in loco* is as true in a banco argument as it was on Horace's Sabine farm. Sir William Erle, L.C.J., told counsel who apologized for raising a laugh: "The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity." And how many delightful interludes there have been, when, in humorous vein, a Judge has attracted pointed attention to some constructive observation! To give one example, among the many: Once, before the late Mr. Justice MacGregor, counsel for the prisoner was addressing the jury on a count which charged his client with the possession of housebreaking tools. Counsel was telling the jury that the iron bar found in the accused's motor-car was merely a lever for taking off and replacing the tyres. "And," interjected the Judge, "you had better go on and tell the jury that the gelignite found on the back seat was for blowing them up again!"

But to proceed with Lord Bacon: "The parts of a judge in hearing are four: to direct the evidence; to moderate length, repetition, or impertinence of speech; to recapitulate, select, and collate the materia points of that which hath been said; and to give the rule or sentence." As to the last, Lord Esher said that "the business of a Judge is to find good legal reasons for conclusions of common sense." The tasks of the Judge have not become easier since Lord Bacon gave this synopsis of his duties. Nowadays, he has often to endure running-down cases, wherein, as a high judicial authority has it in one of his essays, there will be found "a person, or the relatives of a person, who has suffered bodily injury in a collision between two stationary motor-cars, each on its proper side of the road, and each keeping a good look-out, endeavouring to convince a Judge and jury that the liability rests upon the defendant, and to collect suitable compensation by way of damages."

Were Lord Bacon alive to-day, and in a writing mood, he would perhaps have some advice for a Judge presiding over a running-down action, maybe in this wise: "Neither hath this thing to be revealed to the jury (though peradventure they may wax wider in their knowledge, which is of all mankind), that the magnitude of the reparation is measurable, in the sum which hath been sought by the sower of suit, by the extent of the capacity of the unnameable pool to pay it. Salomon saith, *He that considereth the wind shall not sow, and he*

that looketh to the clouds shall not reap. This be the fifth part of a judge: To be so advigilant as to be advisable to say indifferently at the ending of such a contention of fast carriages, *Haec pro justitia nostra occultavi.*" That, of course, implies that the learned Judge has not forgotten his Latin, and that he pronounces it in the approved judicial manner.

But we must get on. "A judge ought to prepare his way to a just sentence, as God used to prepare his way, by raising valleys and taking down hills so when there appearest on either side an high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen, to make inequality equal; that he may plant his judgment as upon an even ground." But the parallel cannot be extended too far in these days, when the high hand of bureaucracy, shown as it is in regulations and orders, places inequalities beyond the reach of the Judge to make them equal; and not all the skill and energy of the engineers of the Eighth Army could demolish the obstructions placed, with cunning advantages, in his path. What Lord Hewart, L.C.J., has called "administrative lawlessness" has devised many ingenious booby-traps to frustrate the virtue of a Judge. Regulations, "the making of which shall be conclusive evidence that the requirements of the Act have been complied with," or the order that "has been duly made and is within the powers of this Act" may be located beside the regulation that says a Ministerial decision "shall be final and not subject to appeal to any Court," and the order itself "shall be final and conclusive," or that it "shall have effect as if enacted in the statute." Why, the Judge very often cannot place one foot upon an even ground upon which to plant a judgment, since—to quote Lord Hewart's words, written in 1935—the simple method of obtaining a decision from the Court by means of a "case stated" incurs so much Departmental dislike. He proceeds: "The well-known legal remedies of 'prohibition,' 'certiorari,' and 'mandamus' are designed to prevent or correct usurpation of jurisdiction, or to compel a duty which has been omitted to be duly performed. What is it—the plain citizen may well ask—that makes it in some quarters appear desirable that jurisdiction may be usurped or duties may be neglected with impunity?" As Lord Farwell has said, "the Courts are the only defence of the liberty of the subject against departmental aggression"; yet, in the like quarters, while it is recognized that the Judges are, as they must be, independent of the Executive, the heresy is cherished that the Executive is to be somehow independent of the Judges.

But Christmas approaches, and the time for the making of New Year resolutions is at hand. We must conclude on a happier note. And again Lord Bacon does not fail us. "There is due from the judge to the advocate some commendation and gracing, when causes are well handled and fair pleaded: especially towards the side that obtaineth not; for that upholds in the client the reputation of his counsel, and beats down in him the conceit of his cause." That the learned artificers of all legal achievement may long continue to perform this pleasant duty, to the confusion of unsuccessful litigants—and to adhere to all others of the wise old Chancellor's advisings—is our Christmas wish and greeting to Bench and Bar.

Roll of Honour.

BLANCHARD, C. F., Flying Officer, R.N.Z.A.F. (Messrs. Hosking and Blanchard, Pukekohe.) Missing, believed killed, July, 1943.

CHING, F. F., Pte., 2nd N.Z.E.F. (2666). (Messrs. Rishworth and Harrison, Whangarei.) Auckland Rifle Battalion. Crete, September, 1941.

CUTLER, J. G., 2nd Lieut., 2nd N.Z.E.F. (23131). Messrs. Oliphant and Munro, Auckland.) Killed in action, July, 1941.

GRAY, J. R., Brigadier, 2nd N.Z.E.F. (Messrs. Keegan and Gray, Auckland.) Killed in action, July, 1942.

GREEN, M. C., Pte., 2nd N.Z.E.F. (Messrs. Turner and Growers, Ltd.) Killed in action, Libya, 1942.

HESKETH, G. L., Pilot-Officer, R.A.F. (Messrs. Jackson, Russell, Tunks, and West, Auckland.) Killed during air operations, Singapore, February, 1942.

JAMIESON, J. A., Sergt. (23843). (Messrs. Cooney and Jamieson, Tauranga.) Missing, believed killed, 1941.

MCCARTHY, J. J., 2nd Lieut., 25th Battalion, 2nd N.Z.E.F. (Messrs. Welsh, McCarthy, Houston, and Coleman, Hawera.) Killed in action, El Alamein, 15th August, 1942.

MCDONALD, L., R.N.Z.A.F. (Mr. C. N. O'Neill, Paeroa.) Killed during air operations.

MITCHELL, T. V., Lieut. (24182). Messrs. Hayes, Mitchell, and Goulding, Dargaville.) Killed in action, August, 1942.

MOODIE, J. E., Pilot-Officer, R.A.F. (Messrs. Turner and Kensington, Auckland.) Killed during air operations in England, December, 1941.

UPTON, J. P., Sub.-Lieut. (Messrs. Russell, McVeagh, Macky, and Barrowclough, Auckland.) Missing, presumed killed, April, 1942.

WILSON, W. St. G. W., Sgt.-Pilot, R.N.Z.A.F. (Messrs. Wynyard, Wilson, and Baxter, Auckland.) Believed killed during air operations, April, 1942.

ZIMAN, A. M., L/Sgt., 2nd N.Z.E.F., N.Z. Engineers. (Mr. R. L. Ziman, Auckland.) Killed in Greece, 1941.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1943.
July 15, 16, 19, 20, 21, 22, 23;
August 25, 26, 27, 30, 31;
September 1, 2, 3, 6, 29.
Blair, J.
Kennedy, J.
Callan, J.

INSPECTOR OF MINES v. ONAKAKA IRON AND STEEL COMPANY, LIMITED, AND OTHERS.

Mines, Minerals, and Quarries—Iron and Steel Industry—Forfeiture—Equity against Plaintiff—Mining Privileges—"Act or thing done or omitted to be done by or on behalf of the Crown in relation to any of those privileges"—"Special circumstances"—Iron and Steel Industry Act, 1937, s. 13—Mining Act, 1926, s. 193 (d).

In a forfeiture suit under the Mining Act, 1926, any circumstance which raises an equity against the plaintiff personally results not in the substitution of a fine for forfeiture, but in the dismissal of the suit.

Dictum of *Sir Robert Stout*, C.J., and *Edwards* and *Chapman*, JJ., in *Ewing* v. *Scandinavian Water Race Co.*, (1904) 24 N.Z.L.R. 271, 287, 7 G.L.R. 48, 57, 59, accepted and applied.

The only acts or omissions referred to in the following phrase in s. 13 (2) (*b*) of the Iron and Steel Industry Act, 1937—

> "The Court shall not take into consideration any act or thing done or omitted to be done by or on behalf of the Crown in relation to any of those privileges"—

(*viz.*, the mining privileges specified in the First Schedule of the said Act) that are excluded from consideration by the Warden's Court on an application made under that section are acts or omissions which relate specifically or exclusively to a privilege.

Therefore, on such an application, in consideration whether the Crown was so affected by equities as to be disentitled to the forfeiture of such privileges, the Court was entitled to take into consideration the whole of the circumstances summarized in the judgment, and especially the attitude and actions of the Government in connection with the whole undertaking to the holders of the said privileges and to the other parties interested therein.

Upon these facts set out in the judgment, if the supposed forfeiture suit referred to in s. 13 of the Iron and Steel Industry Act, 1937, were considered in the ordinary way upon the special circumstances of the case and the equities shown to exist by a full knowledge and proper understanding of all that had happened between the parties, it should fail, because it would not have been equitable for the Crown—

(*a*) To seek forfeiture of mining privileges on the ground that they were unsaleable when a well-founded fear of changed Government policy created by what the Government had itself said had prevented any satisfactory test of the markets:

(*b*) To found such a suit upon non-user, by which the Government had financially benefited, of which it had been fully aware, and to which it had taken no exception.

Quaere, Whether, apart from equities there were "special "circumstances" within the meaning of those words in s. 193 (*d*) of the Mining Act, 1926, warranting the refusal of a decree of forfeiture.

Appeal from the judgment of Sir Michael Myers, C.J., [1942] 18 N.Z.L.J. 207, dismissed.

Counsel: *Solicitor-General* (*Cornish*, K.C.) and *C. A. L. Treadwell*, for the appellant; *Cooke*, K.C., and *Cresswell*, for Onakaka Iron and Steel Co., Ltd. (in Liquidation); *Weston*, K.C., and *Kelly*, for Golden Bay Proprietary Co., Ltd., and the Executors of W. C. Sproule and T. A. Turnbull, deceased; *Sim*, K.C., and *Hadfield* (for *Tripe*, on war service), for Pacific Steel, Ltd.

Solicitors: *Crown Law Office*, Wellington, for the appellant; *Glasgow, Rout, and Cheek*, Nelson, for the Onakaka Iron and Steel Co., Ltd. (in Liquidation); *Kelly and McNeil*, Hastings, for the Golden Bay Proprietary, Ltd.; *Perry, Finch, and Hudson*, Timaru, for Pacific Steel, Ltd.

COURT OF APPEAL.
Wellington.
1943.
September 19;
October 22.
Myers, C.J.
Blair, J.
Smith, J.
Fair, J.

In re **WHAKAMARU TIMBER COMPANY, LIMITED (IN LIQUIDATION).**

Company Law—Winding-up—Articles of Association—Provision for Distribution where Assets after payment of Debts more than sufficient to Repay the Whole of the Paid-up Capital, but not where such Assets not so sufficient—Method of Distribution—Equilization of Capital.

Unless it is otherwise provided by the memorandum and articles of a company, then, subject to the terms on which any capital has been issued, and in the absence of special circumstances such as those in *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Co.*, (1887) 36 W.R. 1, in the winding-up of a company the surplus assets are divided and losses are borne in proportion to the nominal amounts of the shares, and not to the sums paid up.

Where, however, some shareholders have paid up more than others, the Court adjusts the amounts until all have paid up in the same proportion, and the surplus thus arrived at is then distributed in proportion to the nominal amounts.

It cannot be implied from an article, which expressly excludes the operation of this principle in the event of there being a surplus of assets after the company's debts have been paid and all the paid-up capital has been repaid, and which makes the profits distributable in proportion to the amount paid up on the shares, that a capital loss is to be treated in the same way in a winding-up as a capital benefit.

In re Hodge's Distillery Co., Ex parte Maude, (1870) L.R. 6 Ch. 51, and *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889) 14 App. Cas. 525, applied.

In re Mutoscope and Biograph Syndicate, [1899] 1 Ch. 896; *In re Kinatan (Borneo) Rubber, Ltd.*, [1923] 1 Ch. 124; *In re National Cement Co., Ltd.*, [1923] N.Z.L.R. 1065, G.L.R. 729; and *In re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 327, referred to.

So held by the Court of Appeal, dismissing an appeal from the order made in pursuance of the judgment of *Johnston*, J., [1943] N.Z.L.R. 394.

Counsel: *Spratt*, for the appellant; *Cousins*, for the respondent liquidators; *Pringle*, for the fully-paid shareholders.

Solicitors: *Morison, Spratt, Morison, and Taylor*, Wellington, for the appellant; *Findlay, Hoggard, Cousins, and Wright*, Wellington, for the liquidators; *Pringle and Gilkison*, for the fully-paid shareholders.

Air-raid Shelters: Expenses on Restoration.—In certain cases the Government has approved of the removal of air-raid shelters in business premises. Any expenditure incurred by owners or lessees, not being expenditure subsequently reimbursed by the Government, in respect of restoring premises previously set aside as shelters to their original state will be allowable as a deduction in arriving at assessable income.

The Commissioner of Taxes states that where, during the restoration, the owner or lessee effects alterations, repairs, or improvements to the premises, as they originally stood, full details should be submitted to the Department when furnishing the next annual return.

DEPRECIATION AND MAINTENANCE.

The Rights of Third Parties.

A recently-reported English decision, *Edwards* v. *Saunton Hotel, Ltd.*, [1943] 1 All E.R. 176, forms a useful aid on a matter of accountancy in which legal direction from practitioners is sometimes necessary, but on which judicial authority is scanty; that of allowances for depreciation. An hotel manager with a five years' engagement was to be paid partly by a percentage "on the sum available for distribution by the company at the end of each year." It was common ground that this phrase meant "profits" and it was admitted that depreciation, if properly assessed, ought to be deducted to arrive at the amount of profits; the way in which depreciation ought to be arrived at was one of the issues in dispute. The decision is founded on the judgment of Moulton, L.J., in *In re Spanish Prospecting Co.*, [1911] 1 Ch. 92, where half a dozen pages make a mine of information on legal questions relating to commercial accounts. According to the earlier case (at p. 98), "profits" fundamentally means the gain of a business during a period, which can in strictness be ascertained only by comparison of assets at beginning and end of the period. In practice revaluation is, in the case of most assets, not undertaken, and this omission, if proper alternative steps are taken, receives judicial sanction. Revaluation might show appreciation, but omission to take appreciation into account till the asset is disposed of is held justifiable on good business principles. It is of course a truism of commerce that a profit should not be taken into account till it is realized. Depreciation, on the other hand, should be provided for whenever it is considered to exist.

"Depreciation" was divided by Sir J. F. Moulton into physical deterioration and "depreciation in value from commercial causes"—a phrase that is wide enough to cover (1) the drop in value that occurs merely because an article is a used one, even though it has not physically deteriorated, (2) obsolescence, and (3) such drop in value as occurs when the market price of new articles has come down, and second-hand articles of the same kind fall in sympathy. In order to write off depreciation in some regular serial manner that shall equitably take the place of periodical revaluations in a way that the Courts will approve, the first thing is to estimate the useful life of the asset, and then to adopt a scale that will reduce the asset at the end of its useful life to scrap value; the *Saunton Hotel* case sanctions (apart, no doubt, from special cases) the selection of 10 per cent. of cost as a justifiable approximation of scrap value. Two scales of abatement are in vogue, the "straight-line" or cost-price scale, and the "reducing" or diminishing-value scale. With the former, the same set amount (usually expressed as a percentage of cost price) is written off every year; with the latter, one set proportion (likewise usually expressed as a percentage) of the value at the end of the previous year. Thus, plant costing £100 with an estimated life of ten years will be written down by the straight-line method if 9 per cent. of the original cost is deducted in each year. Approximately the same final result will be reached by writing off 20½ per cent. of the diminishing value. By the latter method, during the first few years the amounts written off are substantially greater than with the "straight-line" scale; during the last few years, substantially less. With the example quoted, about half the cost is written off by the end of the third year. Various arguments are brought forward to support the reducing scale. As a matter of office method it is handy as obviating the need to refer to any record of value earlier than the last balance-sheet. It certainly leans to the side of prudence. It responds to the market fact that between new and fresh second-hand articles the drop in sale value is great and sudden; and that between rather old and somewhat older articles there is much less difference. It overlooks however the fact that a going concern does not contemplate sale of recently-acquired plant, and the value to the business which should be stated in the books is rather the productive value than the sale value; productive value may most reasonably be regarded as diminishing in a straight line from cost to scrap value.

When there is only one party to consider—the owner of an individual business, or partners or shareholders all on an equal footing—how depreciation is computed is rarely a matter of importance. Depreciation found to have been based on too pessimistic an estimate, or affected by supervening commercial trends, like appreciation or inflation, can be written back again: *Stapley* v. *Read*, [1924] 2 Ch. 1. As the *Spanish Prospecting* case and the *Saunton Hotel* case both point out, the position is very different when a third party is concerned, such as (in those cases) a person remunerated according to profits; another instance would be where there are different classes of shareholders, with varying rights; deferred shareholders being especially concerned to scrutinize debits to the profit and loss account. The *Saunton Hotel* case justifies the proposition that in the absence of special circumstances the adoption of the reducing scale is a legal ground of complaint; although there is ground for believing that it is very frequently adopted.

The position as regards income-tax returns is special, and governed by the decisions of the Commissioner of Taxes as to what depreciation he will allow, under the powers conferred by the first proviso to para. (*a*) of subs. (1) of s. 80 of the Land and Income Tax Act, 1923. The current rulings appear at p. 479 of the second edition of Messrs. Cunningham and Dowland's textbook on *Taxation Laws of New Zealand*. It is noteworthy that the Commissioner allows the reducing scale to be used in connection with the majority of plant items listed; but he requires such things as loose tools and crockery to be the subject of annual revaluation. This ruling, it is submitted, has no bearing on the equitable rights of third parties. It may well be that in the same concern three different sets of accounts may have to be kept—one, with straight-line reduction, to fix the interests of third parties; a second, adopting reducing values, to take advantage of the ruling of the Commissioner of Taxes; and a third, to record the state of the business with whatever additional reduction the owners of the concern think it prudent to make for their own estimates of the growth and value of their own business.

The question of Depreciation Reserve is connected, though not identical, with the question of writing off depreciation. Merely to write off depreciation is like writing off a bad debt; so much capital is gone for good

with nothing to replace or represent it. On the other hand, the raising of a Depreciation Reserve Account in the books, though it has the same effect in depleting the profit and loss account, has a different effect on the balance-sheet. It envisages the ultimate need for replacement of worn-out plant; if a mere account is raised, then it can only be said that if the balance-sheet is healthy recourse for replacement expenses is "somewhere in the business"; if, instead of a mere account, there is a Depreciation Reserve Fund, separately invested, there are funds, more or less liquid, available when required. Both to write off depreciation and to raise a depreciation reserve would be to attack the profit and loss account twice for the same expense. Where, therefore, third parties are concerned, even though what is done is to create a depreciation reserve, the annual debit to profit and loss account must still be one that would be fair if the question were one of merely writing off.

Since in the *Saunton Hotel* case the method of charging replacements was adverted to, it may be assumed that in that case a depreciation reserve had been raised. The judgment lays down that to debit revenue with renewals as well as depreciation, as the company's accountants had done, was wrong. "If you have carefully written off your linen, in ten years you cannot also debit the revenue account with the money spent in purchasing new linen: that is doing it twice over."

Repair is another allied topic. Between items of maintenance and repair on the one hand, and partial replacement or renewal on the other, the distinction in practice is a fine one. In strictness it may be submitted that whatever work is necessary to maintain an asset, without extending the life it has, subject to being kept in repair, been assumed to possess, is maintenance; but whatever extends its assumed life is replacement. Some things, like dams, watercourses, or wire fencing with concrete posts, may be regarded as permanent as long as properly repaired; for such assets the provision of a depreciation reserve can be justified, if at all, only by the consideration of obsolescence. Normally repair bills are heaviest towards the end of an asset's useful life. In a concern with plant in all stages from newness to decrepitude, repair bills tend to be steady; but in one the plant of which has all been acquired about the same time, charging repairs direct to profit and loss is calculated to produce undesirable fluctuations of dividend. Such fluctuations can be damped out by a Maintenance Reserve. By analogy from the *Saunton Hotel* case it seems probable that the erection of such a reserve is a legitimate charge against profits, even though it works adversely to the interest of a person who is concerned with the profits of the business only in its earliest years. Where the Depreciation and Maintenance Reserves are combined, cases of conscience as to whether an expense is a repair or a renewal do not arise. Otherwise, however, it is believed that the rule of prudence leads usually in a doubtful case to making the charge against maintenance. With income-tax returns, however, prudence no doubt gives way to the rights of the revenue. It may be noted that the depreciation permitted by the Commissioner is depreciation simply; repairs and maintenance are allowed to be additionally charged; the question whether an item of expenditure was actually for maintenance or for replacement is one that is constantly arising.

There are some types of assets, of which loose tools and crockery are instances given in the ruling of the Commissioner of Taxes, and crockery, linen, and glassware in the *Saunton Hotel* case, which depreciate rapidly, and also frequently disappear, and as to which it is generally agreed that, as the judgment says, it is "better to charge renewals than depreciation"; that is to say, such assets should be the subject neither of writing-off nor of a depreciation reserve. Cost of new articles is regarded as a recurring expense and charged directly to profit and loss as an annual outgoing. This course necessarily involves annual stocktaking and revaluation.

BENCH AND BAR.

Mr. G. M. Lloyd, of Dunedin, has been released from the Army after two and a half years with the Forces. He recommenced practice on November 1.

Lieut.-Colonel D. E. Wanklyn joined the Army as Transport Officer of the 3rd Infantry Brigade. In March, 1941, he was promoted to Major, and appointed to command the 3rd Reserve Motor Transport Company. In April, 1942, he was promoted to Lieut.-Colonel and appointed Area Commander, Area 10, an appointment held until October, 1943, when he was retired and posted to the Reserve of Officers. He has resumed practice in Christchurch.

Colonel R. H. Quilliam, who has been on full-time duty in the Adjutant-General's Branch at Army Headquarters for over four years, has just relinquished his appointment. He began duty with the rank of Captain in November, 1939, and was subsequently promoted to Major. Later, on his promotion to Lieutenant-Colonel, he was appointed Director of Mobilisation. Early in 1942, he was promoted Colonel and appointed Deputy Adjutant-General, a post which he has held ever since. He will resume practice in New Plymouth at the beginning of next year.

Captain Graham Crossley, of the firm of Messrs. Fitzherbert, Abraham, and Crossley, Palmerston North, has recommenced practice. He volunteered and entered camp in May, 1940. In the following month he was appointed Orderly Officer, with the rank of Lieutenant, to the Chief of the General Staff (Major-General Sir John Duigan, K.B.E., C.B., D.S.O.), whom, as Personal Assistant, he accompanied to military conferences in Australia, Fiji, Singapore, and the Middle East, and to the Eastern Group Conference in New Delhi. He was promoted Captain in June, 1941. On the retirement of Major-General Sir John Duigan, Captain Crossley served on the staff of General Sir Guy Williams, K.C.B., D.S.O., military adviser to the New Zealand Government; and as Personal Assistant to the Adjutant-General of the New Zealand Military Forces (Brigadier A. E. Conway, O.B.E.) from August to December, 1941. In January, 1942, he was appointed Personal Assistant to the G.O.C. New Zealand Military Forces (Lieutenant-General E. Puttick, C.B., D.S.O.), and remained in that appointment until December, 1943, being then posted to the Reserve of Officers.

OPTIONS TO PURCHASE AND THE PERPETUITY RULE.

Sixty Years with Gomm's Case.*

By I. D. CAMPBELL.

(*Concluded from p. 261.*)

UNDER THE LAND TRANSFER ACT.

Gomm's case and the other decisions which have been mentioned in earlier portions of this article were concerned with conveyancing of the "Deeds" type. How far do they apply under the Land Transfer system?

Considering, first, the most common type of option to purchase—one contained in a lease—there is this provision in the Land Transfer Act, 1915, s. 94:

> A right for or a covenant by the lessee to purchase the land may be stipulated in a memorandum of lease; and in case the lessee pays the purchase-money and otherwise observes his covenants expressed and implied in such instrument, the lessor shall be bound to execute a memorandum of transfer, and to perform all other necessary acts for the purpose of transferring to the lessee the said lands and the fee-simple thereof.

Has this section abolished the rule against perpetuities in regard to an option in a registered lease? Its very plain terms might suggest that conclusion, especially in view of the decision of the Court of Appeal in *Fels* v. *Knowles*, (1906) 26 N.Z.L.R. 604, that the section gives the lessee an indefeasible statutory right to purchase. But it is submitted that the Act does not save such an option from disaster if it is not in conformity with the rule against perpetuities.

It may be observed in the first place that the section was originally enacted, in New Zealand, eleven years before *Gomm's* case was decided, and before it was generally recognized that an option gave any interest in land whatever. Indeed, nine years after *Gomm's* case it was argued by counsel for plaintiff in *Rutu Peehi* v. *Davy*, (1890) 9 N.Z.L.R. 134, that an option to purchase did not pass any estate in land, and Edwards, J., also unmindful of *Gomm's* case, accepted this view. At p. 151 he says:

> Options of purchase are, however, recognized by s. 53 of the Act of 1870, and by s. 87 of the Act of 1885, and provision is made in both Acts for their enforcement. In my opinion the rights so acquired by the lessee are as much protected as the term granted by the lease. To hold otherwise would work the grossest injustice, and would strike a dangerous blow at the utility of the Land Transfer Acts.

It is clear, then, that this provision was designed to give the option the full benefit of indefeasibility of title attaching to what are without question estates or interests in land. It also enabled the option-holder, through registration, to ensure that every purchaser of the reversion acquired the estate with notice of the option. Unless an option could be included in a registered lease it would have been necessary to draw a separate instrument and lodge a caveat. This cumbersome procedure was avoided.

But it is equally certain that the section was not framed to meet the problem of perpetuity, and was enacted without any realization that this particular provision in a lease was subject to the rule against perpetuities and was not parallel with an option or covenant for renewal. What, then, is its effect on an option which creates an interest exceeding the permitted limit of remoteness?

It had been said by Mr. Justice Richmond in *Katene te Whakaruru* v. *Public Trustee*, (1893) 12 N.Z.L.R. 651, 665, that

> the latter part of s. 87 [our s. 94] . . . is an ineffectual provision, for registration of a mere agreement must of necessity leave open the question whether it is valid and enforceable.

The majority of the Court of Appeal in *Fels* v. *Knowles* (*supra*) discussing this statement, at p. 623, said:

> We do not think that he meant more than he said: "Registration of a mere agreement must of necessity leave open the question whether it is valid and enforceable." This is clearly correct. The registered proprietor can grant an option to purchase, and his power to do so cannot be questioned; but this leaves open all questions as to whether the words used are effectual to grant the option, and as to whether or not the lessee is, in the circumstances which exist when he seeks to exercise the option, entitled to do so.

Are the words used effectual to grant the option? Registration bars all questions which would involve going behind the proprietor's right to convey, but it is submitted that the option, even in a registered lease, is *not* effectual if it creates an interest that infringes the perpetuity rule.

Section 87 (1) of the Act of 1915 provides that the registered proprietor may limit any estates, whether by remainder or in reversion, and whether contingent or otherwise, and for that purpose may modify the prescribed form of transfer. Does this mean that the Registrar would have to accept a transfer to X. (a bachelor) for life, remainder to his unborn son on attaining the age of thirty? It is suggested that the policy of the law against perpetuities, built up so elaborately for centuries past, has not suddenly been jettisoned by this enactment, and that s. 94 is equally restricted in its operation.

Even if s. 94 does create a specific exception in favour of an option to purchase contained in a lease, there remain the cases of a bare option to purchase, and an option to repurchase as in *Gomm's* case. These cannot be affected by s. 94, and it has been expressly decided that if a covenant to reconvey is not limited in compliance with the perpetuity rule it will not support a caveat: *Kauri Timber Co.* v. *District Land Registrar*, (1902) 21 N.Z.L.R. 84. In this case the purchaser had covenanted to reconvey land after timber had been removed and not later than ninety-nine years from the date of the covenant. The land was subsequently brought under the Act, and a caveat was lodged to protect the vendor. The Supreme Court ordered the removal of the caveat on the ground that the interest created by the covenant contravened the rule against perpetuities.

Hogg's Australian Torrens System, p. 941, says:

> Registration [of statutory instruments containing covenants] does not appear to have any effect in abrogating such rules of law as the rule against perpetuities.

It is submitted that nothing in the Land Transfer system—including s. 94—has restricted the application of the rule against perpetuities to conveyancing in New Zealand, and that Hutchen in his annotations of the Act is right in citing *Woodall* v. *Clifton* as a warning to conveyancers when drafting an option to purchase.

* *London and South Western Railway Co.* v. *Gomm*, (1881) 20 Ch.D. 562.

Could it be argued, relying on *Boyd* v. *Mayor of Wellington*, [1924] N.Z.L.R. 1174, that registration gives an indefeasible title not only when the transfer or other instrument was unauthorized or defective, but also where it would have created an interest void for perpetuity? If this were so, writers on the Land Transfer system with tacit unanimity have completely overlooked this truly remarkable result of the Act. But there seems to be no decision directly on this question of perpetuity, and if the Court of Appeal did divide on the question one may be permitted to doubt whether the school of "indefeasibility" would again triumph.

What course should the conveyancer and the District Land Registrar adopt in this matter at present? It is suggested that the District Land Registrar should decline to register any lease with an option to purchase not in conformity with the perpetuity rule and should have the question decided on a summons taken out by the applicant under s. 200. The conveyancer drafting a lease should consider whether the option would create a remote future interest, and, if it does, should add an alternative option limited to the lives of Queen Victoria's descendants and twenty-one years. In this way he would obtain the longest possible period whatever the interpretation of s. 94 might be.

Finally, post-war law revision might well include in the agenda the formulation of a new perpetuity rule, stripped of its present refinements and absurdities. Must we suffer this elaborate anachronism in perpetuity?

ROAD TRAFFIC AND THE WAR EMERGENCY REGULATIONS.

XI.—Recent Regulations.

By R. T. Dixon.

The Emergency Regulations issued since the last article (*ante*, p. 155) while not numerous have some interesting provisions.

Goods-service Charges Tribunal Emergency Regulations, 1943, Amendment No. 1 (Serial No. 1943/123).—The chief purpose of this amendment to the principal regulations (for which see *ante*, p. 156) is to make clear the powers of the tribunal in dealing with charges for cartage under continuing contracts.

His Majesty's Forces (Motor-vehicles) Suspension Order, 1943 (Serial No. 1943/161).—This suspends the prohibition of left-hand drive vehicles in the case of motor-vehicles of the Armed Forces, and also waives the necessity of a front centre blue light for such vehicles, otherwise obligatory, when they or their loads exceed 7 ft. in width or 20 ft. in length, or draw a trailer. By reason of Reg. 14 of Regulations Serial No. 1943/56 these exemptions extend to motor-vehicles of the U.S.A. Forces.

Transport Licenses Emergency Regulations, 1942, Amendment No. 1 (Serial No. 1943/175).—These regulations are for the general purpose of enabling Licensing Authorities, when dealing with transport-license applications, to give preference to applications from discharged servicemen, and, when dealing with transfer applications, not only to give such preference, but to refuse the application if the Authority considers that the transferor is requiring excessive valuable consideration for the transfer.

Warrant of Fitness Emergency Order, 1943 (Serial No. 1943/182).—This order represents a recognition (many motorists will consider a belated one) by the Government that a six-monthly inspection of private cars is unnecessarily frequent under the present benzine rationing.

The period for renewal of warrants of fitness is by the order extended to twelve months in the case of any private car classed as such under Class 4 of the Motor-vehicles Insurance (Third-party Risks) Regulations, 1939 (Serial No. 1939/34), if the car is "used over less than two thousand miles of public highway within six months since" the date of issue of the last warrant of fitness. It is unlikely at the present time that many private cars will be excluded from the concession by reason of this mileage condition! Note that business cars, namely those classified under Class 5 for purposes of the latter Insurance Regulations, do not qualify for the concession, nor do motor-cycles, trailers, or trucks.

An interesting legal point arises as to the expiry date of those warrants of fitness in force before the date of issue of the order. A careful examination of the wording indicates that apparently those issued for private cars are automatically extended a further six months, and this seems to apply even in the case of those warrants which had run their six months before the issue of the order.

Some Recent Traffic Decisions.

Space does not permit of more than a cursory review of the following cases, to which should be added the *Ford* v. *St. Clair Golf Club* case, to be referred to.

In a Wellington City Council case, *Hazeldon* v. *Mackin* (unreported), Mr. Stout, S.M., held on May 27, 1943, that a "garage," as defined in Reg. 8 (3) of the Heavy Motor-vehicle Regulations, 1940 (Serial No. 1940/78), and therefore (by reference) in s. 2 of the Motor-vehicles Act, 1924, does not necessarily require to be a building or other structure, but may be any place where the vehicle is kept when not in use, even if that place is merely a vacant plot on the roadside.

Dix v. *Fordell Timber and Case Co., Ltd.*, (1943) 3 M.C.D. 156, is of interest as an indication of the wide extent of the by-law powers of local authorities in regard to recovery of damage to roads caused by heavy traffic. In this case J. H. Salmon, S.M., held that under a county by-law security to an amount fixed by the county engineer may be required from any person conducting or about to conduct heavy traffic on a road of the county.

Of the traffic cases the Full Court decision *Hazeldon* v. *Andrews*, [1943] N.Z.L.R. 261, already the subject of a special article (1943 New Zealand Law Journal, 93), is now rendered nugatory by the Traffic Regulations, 1936, Amendment No. 3 (Serial No. 1943/99).

In *Police* v. *Young*, (1943) M.C.D. 175, the Court held that although a turning motorist may have the right-hand rule in his favour by reason of *Hazeldon* v. *Andrews*, he may nevertheless be held liable in a prosecution for negligent driving if the turning manoeuvre is not exercised with due care.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Judges and Damages for Libel.—The recent case of *Garbett* v. *Hazell, Watson, and Viney, Ltd.*, [1943] 2 All E.R. 359, shows how markedly, and how positively, Judges can differ in their views as to damages for libel. The monthly magazine *Lilliput*—in a number which Scott, L.J., somewhat censoriously described as a "horrid" publication and, in his opinion, a "pornographic" publication—published, on one page, a photograph of the plaintiff pursuing his trade as an outdoor photographer and showing a photograph of two women. At the foot of this page was the uncompleted sentence: "Of course, for another shilling, madam—" On the opposite page was a photograph of a completely naked woman and, under it, thus finishing the sentence begun on the other page, the words: "you can have something like this." The plaintiff claimed that the innuendo was that he dealt in indecent pictures. Hilbery, J., the trial Judge, upheld his claim and awarded him £50. The defendants appealed to the Court of Appeal; but the appeal was dismissed and leave to appeal to the House of Lords refused. All three of the Lords Justices made observations as to the damages. Scott, L.J., said that he would have thought £500 much more suitable. MacKinnon, L.J., saying that in too many libel cases damages have been assessed on an extravagant basis, thought the trial Judge's £50 was a correct assessment. Goddard, L.J., without naming his own figure, thought that the damages might have been "considerably higher," saying that "the only way to punish people of this sort is to hit them in their pockets, for they publish this sort of muck because it pays them to do it." Notwithstanding the judicial strictures, Scriblex does not propose to cancel his subscription!

Bureaucratic Informality.—Six informations against a Waikato beekeeper for breaches of the Honey Emergency Regulations have been dismissed by Paterson, S.M. The following extract from the Press report of the Magistrate's judgment gives further publicity to the methods of officialdom:

> In each case the defendant was charged that having been required by the Director of the Internal Marketing Division to do certain things he failed to do them. There was no evidence that the Director had made any requisitions in terms of Regulation 5 to the defendant either personally or by public notice. The defendant received a document "formally requiring" him to comply with instructions given earlier. It was signed "yours faithfully, Internal Marketing Division," with some indecipherable initials added.

How typical, nowadays, of departmental methods.

The Humour of Darling, J.—However one may assess the judicial calibre of the late Lord Darling, there is no doubt that he was a humourist of the first rank. But he had the great advantage of being senior puisne Judge of the King's Bench for a long period, and this position gave him the opportunity of selecting for trial in his Court the sensational plums in the common-jury list; and thus his humour became assumed of a vast public. For true and really spontaneous wit he was probably surpassed by Eve, J.; but the latter was a Chancery Judge and the dry-as-dust cases tried in his Court were little publicized. (It was Eve, J., for instance, who once described a flute as a disgusting wind and water instrument.) Darling, J.'s, jesting is referred to by Gilchrist Alexander in his *The Temple of the Nineties*, published some five years ago.

Sleeping—or Not?—The reference in a recent page to the somnolent appearance sometimes assumed by MacGregor, J., has prompted a valued correspondent to write as follows:—

> As an old friend and admirer of MacGregor, J., I venture to suggest that if any counsel had been venturesome enough to try to take advantage of the Judge's temporary "inattention" he might have struck a snag. Appearances are at times deceptive, and those who practised regularly before Williams, J., will remember that he frequently appeared to be taking forty winks, but such was not the case. I must say the learned Judges have my sympathy if they do drop off for a rest now and again. You mentioned in a recent number the prolixity of some judgments. I suggest that you might open a column with some "Hints on Advocacy"—with special reference to brevity.

Telling the Wife.—A number of years ago the lawyers of held one of their most successful dinners. Champagne supplies were unrestricted. A genial K.C., now gathered to his fathers, did full justice to the occasion, and he was among the last of those to leave the hostelry (now no longer such) where the dinner was held. He had first to negotiate a long corridor to the cloak-room to get his hat and coat. This task was very creditably accomplished, but two juniors thought it appropriate, nevertheless, that they should help him on with his hat and coat and accompany him to his home which, after all, was not in those days very far from the hostelry. For the night was frosty and it would have been quite possible for even the most nimble pedestrian to slip on the footpath. So, with the genial silk in the middle, the trio set off. The K.C. was in good form and his cultured wit literally sparkled on the homeward journey. When at last the latch-key had been found, and safely inserted into the keyhole of the front door, the K.C. turned to his two friends and, in the gentlemanly and charming fashion for which he was renowned, but with an entire disregard for the truth, said: "Thank you, gentlemen, very, very much. When I get inside I shall tell my wife how kind you have been."

Judges and the Authorities.—Lord Halsbury and Esher, M.R., were conspicuous examples of Judges who never made the error of allowing reported decisions to distract them from the first and foremost task of determining the facts of the case. When Esher, M.R., presided over the Court of Appeal counsel who began his address to the Court by saying that the appeal raised some interesting questions of law, would be at once asked to deal with the facts first; and it would shortly transpire, more often than not, that in Esher's view of the facts no point of law arose at all. Esher, M.R., was one of the most robust of England's Masters of the Rolls, and was said to have sniffed whenever the House of Lords was mentioned in his presence—possibly because he was disappointed in not getting the Lord Chancellorship.

OBITUARY.

MR. P. B. BROAD, Wellington.

Wellington practitioners heard of the death of Mr. P. B. Broad, of the Crown Law Office, with a profound sense of grief. His passing was a shock, as he had been among them so recently.

Born at Nelson in 1890, the youngest son of the late Judge Lowther Broad, Phil Broad was educated at Wellington College and Victoria University College, where he obtained his Master of Laws degree. He served during the last War as a member of the New Zealand Artillery, and was gassed severely. For a short time, he practised on his own account in Wellington. He joined the legal staff of the Public Trust Office, where his professional brethren generally learned to appreciate his pleasant manner, his sound judgment, and his ability. He served his Department faithfully and well; and his merits attracted the attention of the Crown Law Office. There, for the last six years, he specialized in all kinds of Revenue matters.

In the Supreme Court, and often of late in the Court of Appeal, Phil showed his quality. In the latter Court he was particularly successful. His integrity, his legal mind, and his industry, allied to sound argument and precise statement, showed him well fitted to cross swords with any counsel who might be engaged against him. He knew that he was always fated to represent an unpopular cause; but he never lost a fraction of his own popularity in his advocacy, so fair and courteous was his manner of presenting it.

In cricket circles, Phil won his laurels on the field, and later in management. As a member, and later for eight years as Chairman, of the Wellington Cricket Association, he gave of his best. His knowledge of the game, and his sound advice, were valuable contributions to the success that body now enjoys.

Phil was a universal favourite. His pleasant manner, and his unvarying good humour and imperterbability, won him legions of friends. These he retained from his college and university days until the end that came too soon. The great attendance at his memorial service of members of the profession, departmental officers, and representatives of sporting and other interests that he had made his own, was a silent witness of the appreciation of his fellow-men; and a sad one.

Phil Broad is survived by his wife and three young children. Their's is the greatest loss. But they have the consolation and one that will last their lives, of knowing that the qualities which endeared as husband and father were shared and appreciated by many whom they will never know, but who, while life lasts, will remember with affection one who was, and in all circumstances, a friend.

Tributes from Bench and Bar.

On the morning of December 8, there was a large attendance of Wellington members of the Bar in the Supreme Court, when tributes were paid to the memory of the late Mr. Broad. On the Bench were His Honour the Chief Justice, Mr. Justice Blair, Mr. Justice Smith, Mr. Justice Johnston, and Mr. Justice Finlay. The Wellington Magistrates were represented by Mr. J. L. Stout, S.M., Mr. W. F. Stilwell, S.M., and Mr. A. M. Goulding, S.M. The Solicitor-General apologized to the Court for the absence of the Attorney-General, the Hon. H. G. R. Mason, who had been prevented by urgent business from being present.

The Solicitor-General.

The Solicitor-General, Mr. H. H. Cornish, K.C., addressing their Honours, said:

"We have met this morning to pay a tribute of respect and affection to the memory of a brother, who, whilst still in the full possession of his trained and more than useful faculties and in the midst of his work, has been suddenly taken from us. As a man he was kindly and courteous, with a sane and wholesome outlook on life. He was esteemed universally in the profession, and was respected and loved by all who knew him."

In his profession, Mr. Broad gave many years of faithful service to the State, first as Assistant Solicitor in the Public Trust Office, and afterwards as Crown Solicitor in the Crown Law Office. The Solicitor-General continued: "In his work in the Crown Law Office Mr. Broad dealt principally with matters arising out of the revenue claims of the Crown. He was particularly concerned with claims for income-tax and death duties. His knowledge of these matters was comprehensive and sound; and before the Courts he maintained the cause of the Crown with wisdom, dignity, and moderation. He was scrupulously careful never to take a point that savoured of unfairness; and no opponent of his in the Courts ever felt or could ever feel that the Crown had obtained advantage by means of advocacy that fell short of the highest standard of fairness.

"In the Great War of 1914–18, he volunteered for service with the armed forces and served overseas with the N.Z. Field Artillery," the speaker added. "One cannot but feel that his early death must be largely attributed to the fact that he was badly gassed during the War.

"By Mr. Broad's untimely death the Crown has lost a valued servant and the legal profession a well-loved member."

In conclusion, the Solicitor-General extended to the deceased's relatives, and very especially to his widow and his young sons and daughter, the sympathy of the legal profession and of the Government, whose faithful servant he was.

The Wellington Law Society.

The President of the Wellington District Law Society, Mr. T. P. Cleary, said that the members of the Law Society wished to associate themselves with the tribute that had been paid by the Solicitor-General to the memory of their late colleague.

"Philip Broad spent almost his whole life amongst us in Wellington," he continued. "Here, for the most part he was educated, and here he served his apprenticeship in the law in the office of the late Mr. Edmund Bunny. Then came the interruption of the last war, where he was wounded and gassed. Upon his return, he set up in practice in Wellington. After a few years, he entered the service of the State, where he remained until his untimely death; but throughout his work brought him into constant touch with his fellow-practitioners in Wellington. In the last six years in particular when it fell to him to undertake so much of the important and difficult revenue work of the Crown, his colleagues had every opportunity of judging the manner in which he carried out his duties.

"We feel that we are able to speak with knowledge of those qualities which made of him an admirable success in this work. His quiet courtesy was unfailing. His candour and fairness shone through all his actions. He was, need it be said, the soul of honour and reliability. These innate qualities made dealing with him a pleasure; but they were also united with a marked ability, and a thorough industry, that fully equipped him to discharge exacting duties with justice to the Crown and fairness to the subject. His work, weighty and onerous though it was, seldom attracted the public notice. The spectacular was alien to him, both by nature and as an advocate. He was temperamentally adapted for argument in Banco. His appearances before the Supreme Court and the Court of Appeal had become increasingly frequent, and his arguments were distinguished by his ability, and reflected the fairness and honesty that characterized the man.

"It is only a few short weeks since we were accustomed to see him about the Courts. He underwent successfully an operation in hospital, and he and his friends were looking forward to his early return home. He had already deserved well of his country, both in war and in peace. At the age of fifty-three, there lay ahead of him the years of maturer wisdom and greater service. His death is indeed a grievous loss. It is an especial loss to the profession of the law, for men of such character and ideals as he are the best guardians of our traditions, and are the core of our profession.

"We join with the Solicitor-General in an expression of our sincere sympathy to his widow and relatives."

The Chief Justice.

His Honour the Chief Justice, in addressing the members of the Bar, said:

"If I were asked to describe your late comrade whose loss you now mourn, I would say, as indeed I have often said of him to my colleagues and to some of the leaders of the Bar, that he was an admirable advocate, convincing because he was fair, and never misused his knowledge. I use those words advisedly. They are the very words spoken by Lord Macnaghten, one of the greatest Judges of his day, of Sir Francis Bell, or Mr. H. D. Bell as he then was, one of the greatest of the lawyers who have adorned the Bar of this country; and I know that Sir Francis regarded his Lordship's description as one of the highest compliments ever paid him. Just as these words were true of Sir Francis Bell, so I may say for my colleagues as well as myself they are equally true of the late Mr. Broad.

"For many years Mr. Broad represented the Crown in this Court and in the Court of Appeal in all its important revenue cases. He had become a master in that branch of the law; he invariably presented his cases not only with exceptional ability, but also with punctilious regard to that obligation of scrupulous fairness which the traditions that we inherit from the English Bar impose upon the barrister who represents the Crown, whether in criminal prosecutions or in civil litigation. Those qualities coupled with his unfailing cheerfulness and courtesy earned for him the respect and esteem of the Bench as well as of his comrades at the Bar.

"The Judges share your feeling of deep regret that a promising career should have been cut short just as it was approaching its zenith and associate themselves with you in your expression of sympathy with the family and relatives of your deceased friend and comrade in their grievous loss."

LAND AND INCOME TAX PRACTICE.

Some South African Tax Cases.

The following notes are compiled from *South African Tax Cases*, recently come to hand. The cases were decided in the Special Court for hearing income-tax appeals.

Income-tax Case No. 498 (June, 1941).—Excess profits duty—Assessment on cash basis—Whether taxpayer entitled to claim reopening and adjustment to accrual basis of past assessments.

The facts were that the appellant was a consulting engineer, whose income-tax returns had always been prepared on the cash basis—that is to say, on the basis of the cash actually received during the year by way of fees, &c., and without taking account of accrued income not actually received. During the year ended June 30, 1940, the appellant's income was substantially increased by the inclusion of certain large amounts of fees received in that year for work done in previous years, and a considerable sum of excess profits duty was assessed. The appellant contended that he ought to be taxed on the accrual basis and not on the cash basis and that the assessments made upon him in past years should be reopened and adjusted accordingly.

It was held, in dismissing the appeal, that once an assessment has been made on a cash basis the tax due on any accruals of that year must be paid during the subsequent years in which those accruals are actually collected and received in cash, and that the Commissioner had made correct assessments which could not be reopened.

The President of the Special Court, Dr. Manfred Nathan, K.C., referred to the case of a medical practitioner who had, during the year 1940, received payment of a large amount of outstandings accrued to him as professional fees during previous years, and remarked that the appellant in that case laboured under the same sense of wrong as the appellant does in the present case in that he said that it was a most unjust assessment and that it was never the intention of Parliament that excess profits duty should be collected on income accrued long before July, 1940. The Court said there: "As, however, he is treated like most other professional men on the cash basis, the cash received by him during the year of assessment is subject to tax."

In New Zealand, the Commissioner of Taxes permits doctors, dentists, and barristers (who are not also practising as solicitors) to furnish returns on a cash basis. Any taxpayer who is permitted to furnish returns on a cash basis may not subsequently revert to an earnings basis for his own convenience.

Income-tax Case No. 503 (September, 1941).—Deduction—Payments to eliminate trade competition whether allowable as expenditure incurred in the production of income.

The appellant sought to deduct from his income certain payments made by him to a trade association of which he was a member, for the purpose of enabling the association to eliminate the competition of a similar company which was not a member of the trade association. The Commissioner disallowed the claim made by the appellant, and on appeal it was held that the expenditure claimed was capital expenditure and accordingly not allowable.

After reviewing the facts, Dr. Manfred Nathan, K.C., referred to the appellant's contention that the expenditure which he sought to deduct was expenditure on income account. Dr. Nathan cited the case of *Collins (H.M. Inspector of Taxes)* v. *Joseph Adamson and Co.*, [1938] 1 K.B. 477, [1937] 4 All E.R. 236, 21 Tax. Cas. 400, where it was held in the Appeal Court that a similar item of expenditure was capital expenditure. Dr. Nathan quoted Mr. Justice Lawrence's remarks in *Southwell* v. *Savill Brothers, Ltd.*, [1901] 2 K.B. 349, 4 Tax. Cas. 430, when he said: "Nor do I think that the argument that what was produced by the expenditure in these cases was impalpable or intangible or incalculable is a sound argument for holding that it must be treated as of a revenue nature. In my opinion those payments created for the members of the association advantages of an enduring nature, and, I think, of such an enduring nature as properly to be treated as capital, and not to be treated as revenue."

The language of the South African statute regarding the allowance of "expenditure incurred in production of income" bears a close resemblance to the wording of s. 80 (2) of the Land and Income Tax Act, 1923—"expenditure or loss exclusively incurred in the production of assessable income for any income year may be deducted from the total income derived by the taxpayer for that year . . . ." The New Zealand practice is to allow as a deduction to taxpayers in business, subscriptions to Trade Associations, Chambers of Commerce, Employers' Associations, Trade Journals, &c., but not subscriptions to an association to ensure protection of a trade—*e.g.*, the Licensed Victuallers' Fighting Fund, or Farmers' Unions.

Income-tax Case No. 505 (October, 1941).—Deduction—Amounts placed to reserve to meet liability on expiry of lease of machinery—Whether deductible either as expenditure incurred in production of income or as a premium in respect of use of machinery.

The appellant was engaged in a manufacturing business, and one of the conditions upon which he leased machinery was that on the expiration or earlier termination of the lease from any cause payment was to be made of a stipulated sum, described as additional rent. The appellant claimed to deduct from his income an amount of £300 which was debited to his revenue accounts and credited to an account styled "Return Payment Reserve." The Commissioner disallowed the claim, and the appellant lodged objection and appeal.

It was held, that no actual expenditure having been incurred, the amount claimed could not be allowed as expenditure incurred in production of income; and, further, that the sum claimed did not constitute a premium for the use of machinery.

The appellant's representative argued that, in connection with the claim that the expenditure was a premium in respect of the use of leased machinery, the word "paid" in the statute was equivalent to "contracted to be paid" but the Court was unable to agree to such a construction.

The relevant provisions in New Zealand are s. 80 (2) of the Land and Income Tax Act, 1923 (see notes on previous case), and s. 8 of the Land and Income Tax Amendment Act, 1936, which permits a deduction in respect of premium paid on account of leased machinery.

Bonuses.—For income-tax purposes, a bonus received by a person on salary or wages is treated as income during the year in which payment is actually received, notwithstanding that the employer may intend the bonus to cover services rendered over several years.

For social security charge and national security tax purposes, however, a bonus is regarded as accruing from day to day, in respect of the period for which the payment is intended. Where an alteration in the rate of combined charge on wages has occurred, appropriate adjustments may be made by the employer.

An employer may claim the amount of bonus paid to an employee as a deduction against assessable income during the year in which the bonus was actually paid. Sums allocated to a bonus reserve in the employer's books cannot be claimed as a deduction unless an entry is made debiting the reserve account and crediting an account for each employee with the amount of bonus due—in these circumstances only may a bonus be claimed as a deduction before payment is actually made.