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HUSBAND AND WIFE: WIFE'S MEDICAL AND FUNERAL EXPENSES.

UNTIL recently it has been considered by the writers of text-books that a husband is liable for the funeral expenses of his wife, whatever his wife's means may have been, even though he may have separated from her altogether, and though she be buried without his knowledge or request; and that he is equally liable whether the person who causes the body to be buried is an undertaker or any other person: See *Lush on Husband and Wife*, 4th Ed. 372; *Eversley on Domestic Relations*, 5th Ed. 216.

That there was doubt on the matter is shown by the fact that a statement of the law to the foregoing effect was qualified in *3 Halsbury's Laws of England*, 2nd Ed. 459, para. 862, by the words "at any rate" if she leaves no property"; and, on the authority of *In re M'Myn, Lightbown* v. *M'Myn*, (1886) 33 Ch.D. 575, it is there stated that a husband who is his wife's executor is entitled to retain out of her estate the expenses of her funeral, although her will contains no charge of debts or funeral expenses, and the estate is insolvent.

The subject has recently been under consideration by the Court of Appeal (Scott, Morton, and Tucker, L.JJ.) in *Rees* v. *Hughes*, [1946] 2 All E.R. 47, where the question arose whether the executors of a deceased wife could recover from the husband (*a*) a sum which they, in their capacity as executors, had paid in respect of medical and nursing attendance; and (*b*) where a wife had left no direction in her will for the payment of her funeral expenses, the amount of such funeral expenses.

In *Rees* v. *Hughes*, the wife, who, as shown in her death-duty statements, owned separate property, (£1,063 8s. 3d. gross personalty, and £1,200 gross realty), with total debts of £170 4s., including £32 17s. 6d. being the cost of her funeral expenses, and £18 7s. 6d. for her medical expenses. Before her death, with her husband's consent, she had been living for three months in the house of her sister and brother-in-law, who were executrix and executor named in her will. The husband visited his wife regularly, and she remained there until she died. Her will disposed of all her property, but it contained no direction that her executors should pay her debts and funeral expenses.

In an action in the County Court by the wife's personal representatives against the husband for repayment to them of the sums paid in respect of the wife's funeral and medical expenses, the husband was held to be liable for that amount, £51 5s. His defence was a denial of liability, and a plea that "the payments were not made for or on the defendant's (husband's) behalf." There was no evidence of any request having been made by the husband to his sister-in-law or brother-in-law to pay either of the debts. The learned County Court Judge held that the medical and nursing services were "necessaries," and that that fact of itself entitled the executors to recover from the husband. With regard to the funeral expenses, he relied on "a presumption of law in the absence of special circumstances" that the husband was liable, and, as there were no special circumstances, the husband must pay. On appeal to the Court of Appeal, Scott, Morton, and Tucker, L.JJ., it was held that he was wrong on both issues.

It was argued for the appellant in the Court of Appeal that, while under the old common law, when a wife died covert, her husband was liable for her funeral expenses, the present statute law placed a married woman with regard to property in exactly the same position as a *feme sole*. This argument, in the opinion of Scott, L.J., was unanswerable.

In reviewing the common-law position of a husband before the enactment of the legislation to which reference will presently be made, Scott, L.J., said that there is an obligation at common law, in the nature of a public duty, which rests on certain persons, in whose possession a dead body may be—a husband being one—to bury it. And at common law, before modern legislation about married women, if a woman died covert, her husband was bound to discharge that duty, at his own expense, up to a reasonable amount, no doubt varying with his position in the world. So fundamental was his obligation that even a stranger, who as a volunteer carried out the funeral and burial of the dead wife at his own expense, was entitled to recover the amount (up to that reasonable limit) from the husband. It was this ancient duty of the husband, at common law, which the County Court Judge doubtless had in mind when he decided against the appellant. But, as the appellant's solicitor submitted in the Court below—and, in his Lordship's view, had rightly

submitted—the position has been completely changed by legislation. The very foundation of the duty, the foundation which gave rise to the common-law doctrine, has completely gone, and has taken with it the superstructure which the common law had erected on it.

In order to demonstrate the change in the position, counsel for the appellant took the Court through the relevant decisions, in logical sequence, beginning with *Willock* v. *Noble*, (1875) L.R. 7 H.L. 580, from which he cited Lord Cairns, L.C., at pp. 589–591; Lord Chelmsford, at p. 596, and Lord Hatherley at p. 603. The wife being by marriage completely identified with her husband and having at law no property of her own, and no separate power of disposition, the duty of burying her body inevitably fell at common law on her surviving husband. *Bertie* v. *Lord Chesterfield*, (1723) 9 Mod. Rep. 31; 88 E.R. 296, was an early recognition of the husband's duty at law, in which it was held that a power in equity of disposition over settled personalty could not extend to her own funeral expenses since that would mean that " she had given away more than she had to dispose." It not being proved in that case that the late Earl had requested the plaintiff, as executor of the Countess's equitable estate, to pay the funeral expenses, his bill against the late Earl's estate was dismissed with costs. The executor of the Countess was not liable, because he was not executor of property on which the liability for funeral expenses would or could legally fall.

No authority for the proposition, that, even in the pre-1883 period, the executor of a married woman, disposing by will of her equitable settled estate, had any liability at common law to pay for her funeral expenses, was called to their Lordships' attention by counsel for the respondents; and counsel for the appellant submitted that there is none. That equity would give effect to a direction in the will of a married woman that her funeral expenses should be paid out of her settled estate does not touch the common-law rule of the husband's obligation. In this context counsel for the appellant cited *Gregory* v. *Lockyer*, (1821) 6 Madd. 90; 56 E.R. 1024, *Willeter* v. *Dobie*, (1856) 2 K. & J. 647; 69 E.R. 942, and *In re M'Myn, Lightbown* v. *M'Myn*, (1886) 33 Ch.D. 575.

Where a man dies possessed of personal property, the learned Lord Justice continued, the duty of burying his body falls primarily on his personal representatives: see *2 Blackstone's Commentaries*, ch. 32, p. 508; and this duty entitles the personal representatives to absolute priority of reimbursement out of the estate: see *Edwards* v. *Edwards*, (1834) 2 Cr. & M. 612; 149 E.R. 905—a case of an insolvent estate. By an extreme application of the husband's liability, the common law allowed even a stranger to recover from the estate his voluntary expenditure on funeral expenses: see *Tugwell* v. *Heyman*, (1812) 3 Camp. 298, and particularly the note to that case to the effect that a stranger who uses assets of the estate for that purpose does not thereby make himself an executor *de son tort*.

That the funeral expenses fall within executorship expenses hardly seemed to call for authority, but counsel for the appellant, cited, in an argument termed by Scott, L.J. " an illuminating exposition of the position of married women," three plain cases: *Sharp* v. *Lush*, (1879) 10 Ch.D. 468, *Green* v. *Salmon*, (1838) 8 Ad. & El. 348; 112 E.R. 869, and *Williams* v. *Williams*, (1882) 20 Ch.D. 659. Indeed, the executor is not only so entitled; but is bound thereto, because, apart altogether from the will, the law imposes that duty. But no case was brought to the attention of the Court in which the executors of the wife had ever attempted to recover from the husband their own expenditure on the funeral.

His Lordship next dealt with the statutory alterations beginning, in the United Kingdom (apart from Scotland), on January 1, 1883, when the Married Women's Property Act, 1882, came into force. For convenience, we shall transpose the reference made by the learned Lord Justice in terms of New Zealand statute law. Section 4 of the Married Women's Property Act, 1908 (which reproduces s. 3 (1) of the Married Women's Property Act, 1884) is as follows:

> A married woman is in accordance with the provisions of this Act capable of acquiring, holding, and disposing by deed, will, or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

The next stage on the journey of the married woman to independence, to use His Lordship's words, was brought about in Great Britain by the Administration of Estates Act, 1925, which has its parallel in s. 5 of the Administration Act, 1908, (reproducing s. 7 of the Administration Act, 1879, which, here, was in force when the Married Women's Property legislation was first enacted). It is as follows:

> The real estate of every deceased person shall be assets in the hands of his administrator for the payment of all duties and fees payable under any Act making or charging duties or fees on the estates of deceased persons, and for the payment of his debts in the ordinary course of administration. . . .

Of course, in this section the masculine includes the feminine. Section 11 (*a*) provides that the administrator of any person who dies leaving a will shall hold the real estate according to the trusts and dispositions of such will: and s. 13 provides that the administrator is subject to the same duties with respect to the real estate of any deceased person that executors and administrators have had or been subject to with respect to personal estate. With regard to insolvent estates, administered under Part IV of the statute, s. 64 (*b*) specifically provides as follows:

> Any claim by the administrator or appointee in respect of the proper funeral and testamentary expenses incurred by him in and about the deceased debtor's estate, and in respect of any amount allowed by the Court for his own expenses or allowances, shall be deemed a preferential debt under the order, and be payable in full out of the estate in priority to all other debts.

As to the order of application of assets for payment of debts, generally, see the article by Mr. J. H. Carrad, p. 104, *ante*.

Then, His Lordship referred to s. 46 (1) of the Administration of Estates Act, 1925 (Eng.), which we reproduced as s. 6 (1) of the Administration Amendment Act, 1944, which provides in detail for the distribution of the residuary estate of an intestate, and subs. 1 (*b*) says:

> If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate.*

As a result of the above-cited provisions, read with the Married Women's Property Act, counsel for the appellant

* We interpose on the judgment to point also to s. 6 (2) of the Administration Amendment Act, 1944, where it is declared that for purposes of the section husband and wife are to be treated as two persons.

submitted that husband and wife became entirely separate persons in law, and were treated as being each in precisely the same position as the other for practically all purposes connected with property. Whatever gaps were still left were filled in by (our) s. 12 of the Law Reform Act, 1936, which, by subs. (1) provides, subject to certain provisions not relevant here :

> . . . a married woman shall (*a*) be capable of acquiring, holding, and, disposing of, any property . . . in all respects as if she were a *feme sole*.

And s. 13 (1) provides that (similarly subject) :

> . . . all property which . . . (*b*) belongs at the time of her marriage to a woman married after the passing of this Act ; or (*c*) after the passing of this Act is acquired by or devolves upon a married woman, shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly.

As to the various amendments of the Married Women's Property Act, 1908, which are set forth in the Schedule to the Law Reform Act, 1936, and the amendments to the other statutes made by virtue of s. 16 of the latter enactment, Scott, L.J., in *Rees* v. *Hughes*, at p. 50, said :

> The amendments . . . are consequential on the main provisions of the [Married Women's Property] Act, and fill in the interstices in order to perfect the reform intended by Parliament—so that, for all questions of rights or liabilities relating to property of any kind, there should in future be no difference whatever between the position of a married woman and a *feme sole*—or, for that matter, of a man.

His Lordship proceeded, at p. 51,

> This being the effect of the express language of the three statutes, all the original reasons, which made the common law put on *the husband the public duty of burying his* deceased wife, have wholly ceased to operate. The contention of the appellant is that, if the wife is to be treated as a *feme sole* during her life, she also dies as a *feme sole* ; the duty of burying her in that capacity necessarily falls on her personal representatives, to exactly the same extent and for the same reasons as on the death of her husband it is the duty of his personal representatives to bury him. That contention is, in my opinion, well-founded, as resting on an express provision of statute law.

Lord Justice Morton reviewed the statutory position as indicated above, he found that a married woman having been put by s. 13 (1) of our Law Reform Act, 1936, in the same position as a *feme sole*, which is equivalent for those purposes as that of a man, the provisions of our Administration Act, 1908, and the Administration Amendment Act, 1944, that are equivalent to the parallel provisions of the Administration of Estates Act, 1925 (Eng.), are equally applicable to the estate of a married woman as to the estate of her husband. He went on to say, at p. 53,

> It seems clear, therefore—and I do not understand this to be disputed—that the executors of a deceased married woman are now liable to pay her funeral expenses. But it is contended for the executors that the husband still remains liable as he was at common law and that his liability is the " primary " liability so that the executors can recover from him any sum which they have been called upon to pay as a result of their " secondary " liability. No authority for this proposition was cited and for my part I do not understand in this connection the notion of a " primary " and " secondary " liability. The executors, it is to be noted, are not claiming contribution. They are asking to be indemnified.

His Lordship then said that he considered the true view to be that contended for by counsel for the appellant—namely, that the basis of the husband's liability at common law was the status of a married woman and her limited power to make a will as described by Lord Cairns, L.J., in *Willock* v. *Noble*, (1875) L.R. 7 H.L. 580, where he said,

> Before the Wills Act a married woman was, as a general rule, incapable of making a will. Her will of land was declared void by statute. Her will of personalty was equally invalid, not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence separate from her husband, and no separate disposing or contracting power.

Lord Cairns then went on to refer to certain modifications which were engrafted on this general rule, and pointed out that the Wills Act left her capacity to make a will exactly as it stood before 1837.

Lord Justice Morton referred briefly to certain cases relied upon by counsel for the executors, where Courts of equity have been called upon to decide whether the wife's separate estate or the husband should bear the funeral expenses. In *Gregory* v. *Lockyer* (*supra*), where a decree had directed the funeral expenses to be paid out of the separate estate of a *feme covert*, Sir John Leach, V.-C., ordered the cost thereof to be repaid by the executor to the husband who had actually paid the bill, but expressed a doubt whether generally the husband has a right to throw the funeral expenses on the wife's separate estate. In *Willeter* v. *Dobie* (*supra*), the wife, in exercise of certain powers of appointment given to her notwithstanding coverture in relation to her separate estate, appointed the residue among her nieces " after payment of her just debts, funeral and testamentary expenses." It was held that this was a good charge upon the residue. Sir W. Page Wood, V.-C., said that the rule that a husband is liable to pay the funeral expenses equally with the debts of his deceased wife was not disputed, but added—

> . . . the point is, whether, by this clause in her will, the wife has not relieved her husband out of her separate estate—whether she has not made him a present, in effect, of what her funeral expenses would have cost him.

In *In re M'Myn, Lightbown* v. *M'Myn* (*supra*) Chitty, J., said :

> In *Willeter* v. *Dobie* it is true that there was a charge by the wife of her funeral expenses. It is also true that the law casts upon a husband the duty of burying his wife, but the law does not on that account cast upon the husband the burden of burying his wife at his own cost always. In most cases the husband takes all his wife's personal property by reducing it into possession during his lifetime. To call upon him to bury her out of his own moneys in a case like the present, where the wife exercised her power of appointment, and made the fund general assets for her creditors but has omitted to mention her funeral expenses, would be too hard. I think, therefore, that the husband is entitled to retain the sums expended on her funeral.

All the cases referred to, in the learned Lord Justice's view, merely indicate that the Court, in the exercise of its equitable jurisdiction, was always careful to see that the separate estate of a married woman should not without sufficient reason be made to bear an obligation which was imposed on the husband at common law. He concluded :

> Now that the separate estate of a married woman has ceased to exist and she has in this respect the status of her husband, the very foundation for the old common-law rule has disappeared, and the wife's estate is, in my view, liable for that which had previously been an obligation imposed on the husband who had by the marriage acquired his wife's personalty. For these reasons, I think the executors' claim against the husband was not maintainable.

At common law, in order that a husband may be bound by contracts made by his wife on his behalf, either the contract must be made with his express

or implied authority, or he must have so conducted himself as to be estopped from denying the authority, or have ratified the contract: by virtue of her marriage alone, a wife has no authority to contract on his behalf. Consequently, a husband is not liable on a contract made by his wife on her own behalf on the credit of her separate property, or in any case where the contracting party elects, with knowledge of the circumstances, to give exclusive credit to the wife: see, generally hereon, *16 Halsbury's Laws of England*, 2nd Ed. 682 *et seq.*

Their Lordships, in *Rees* v. *Hughes*, held that the husband was under no liability in respect of the doctor's fees and the nursing charges. The fact that both types of service might or would come within the description of "necessaries," was, they considered, irrelevant. Lord Justice Scott, at p. 51, said:

> As the wife was ill as a *feme sole* the *prima facie* presumption of law is that credit was given to her and not to her husband: and, there being no fact in evidence to support a finding that either doctor or nurse relied on the husband's credit, there was no possible foundation in law for the Judge's conclusion. But, in any case, if the wife's executors who paid, did so because they thought the husband was liable—a most unlikely supposition—they were mere volunteers, paying under a mistake not of fact but of law, and "money paid at request" does not lie in such a case.

On this point, Lord Justice Tucker, said:

> The medical and nursing fees must have been a liability either of the husband or the wife. If they were the wife's liability they have been properly discharged out of the estate and there is no liability on the husband. On the other hand, if they were the liability of the husband, they should not have been paid by the executors, and if the executors have paid without any request from the husband and without legal compulsion so to do, they cannot recover the money as paid, from the husband. There was no suggestion that there had been any such request, express, or implied, or any compulsion in law, and, consequently, that part of their claim should have been dismissed.

In other words, credit had been given to the wife, and not to the husband; and the executors were liable. Even if it could have been said that the husband was legally liable, the executors could not claim from him a voluntary payment made by them under a mistake of law.

The presumed agency that is imputed to married women so as to bind their husbands as principals in certain circumstances seems to be another survival of the common-law position before its modification by recent statute law. In view of that legislation and its consequent change of the status of a married woman with regard to contract, the law is left at present in a very unsatisfactory state. In at least one respect, the Court of Appeal has clarified a position on which there was some doubt, and its judgment in *Rees* v. *Hughes* may lead to further rationalization in the law of husband and wife with regard to the common-law view of her capacity to pledge her husband's credit in certain directions. That this is by no means improbable is apparent from the application by Scott, L.J., to this branch of the law of husband and wife of the principle expressed in the maxim, *Cessante ratione legis, cessat ipsa lex.*

Lord Justice Scott, with whom the other members of the Court agreed, said that if there should be any doubt as to the statutory position of a married woman, as stated by him, he regarded the case as one in which the maxim, *Cessante ratione legis, cessat ipsa lex*, applied directly and obviously. He added that *Broom's Legal Maxims*, 9th Ed. 107, begins with the positive and complementary maxim, *Ubi eadem ratio, ibi idem jus*, which is paraphrazed as, "The law consists 'not in particular instances and precedents, but on the reason of the law,'" quoting Lord Holt, C.J., in *Ashby* v. *White*, (1703) 2 Ld. Raym. 938, 92 E.R. 126. The negative maxim, which Scott, L.J., said was the more relevant in the case before their Lordships, is paraphrazed at p. 110, as "Reason is the soul of the law, and, when the reason of any particular law ceases, so does the law itself." The legislation about married women has caused the law, requiring the husband to bury his dead wife, to cease—at any rate, where she leaves assets, as in the present case.

The question whether a husband still remains liable to pay his wife's funeral expenses if the wife leaves no estate, or if the wife's estate is insufficient to make the payment, did not arise in *Rees* v. *Hughes*. Their Lordships were careful not to express any opinion upon it, and consequently it remains open.

SUMMARY OF RECENT JUDGMENTS.

PUBLIC TRUSTEE v. HEFFRON.

COURT OF APPEAL. Wellington. 1946. March 13; June 19. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Deaths by Accidents Compensation Act—Apportionment of Damages—Whether Class Fund can be created—"Successive interests"—"Periodic payments"—"Lump sum"—Deaths by Accidents Compensation Act, 1908, s. 6—Public Trust Office Amendment Act, 1913, s. 13—Statutes Amendment Act, 1939, s. 14.

The Deaths by Accidents Compensation Act, 1908, provides for individual compensation and not for class or group compensation: that is to say, the lumping together of damages belonging to individual claimants, so that the aggregate may be treated by some nominated trustee for the benefit of the class or for meeting the varying and incalculable future needs of the members of that class.

Kiernan v. *Donovan*, [1930] N.Z.L.R. 145, approved.

Public Trustee v. *Brewer*, (1912) 32 N.Z.L.R. 239, overruled.

In re Coleman, Henry v. *Strong*, (1888) 39 Ch.D. 443, and *Pym* v. *Great Northern Railway Co.*, (1863) 4 B. & S. 396; 122 E.R. 508, referred to.

Each person by whom or on whose behalf a suit is brought under the Deaths by Accidents Compensation Act, 1908, recovers damages proportioned to his or her individual loss and the damages so recovered are the sole and separate property of the person in respect of whose loss they are recovered. Until paid, the moneys recovered represent a legal debt due to each of the persons to whom the jury have awarded damages.

Section 13 of the Public Trust Office Amendment Act, 1913, and s. 14 of the Statutes Amendment Act, 1939, serve the ancilliary purpose of providing machinery for the disposition of damages after recovery and do not, by express words or from necessary implication, abrogate the personal rights conferred by the Deaths by Accidents Compensation Act, 1908, which are of a proprietary nature, and consequently those sections do not authorize the making of an order which would create a class or group fund.

Section 14 of the Statutes Amendment Act, 1939, does no more than confer upon the Court power to create successive interests, and to authorize the payment out of capital or income of periodic payments, or of a lump sum out of a specific portion thereof, to or for the person entitled to that sum whether or not that person be adult or minor or a person of unsound mind It does not leave the whole matter to a nominated trustee to be

dealt with according to his judgment from time to time according to the relative needs of the various members of a group.

Grand Trunk Railway Co. of London v. *Jennings*, (1874) 29 L.T. 831, and *Avery* v. *London and North Eastern Railway Co.*, [1938] A.C. 606; [1938] 2 All E.R. 592, followed.

In re Cuno, Mansfield v. *Mansfield*, (1889) 43 Ch.D. 12, *Walsh* v. *Secretary of State for India*, (1863) 10 H.L. Cas. 367; 11 E.R. 1068, and *Randolph* v. *Milman*, (1868) L.R. 4 C.P. 107, applied.

Rose v. *Ford*, [1937] A.C. 862; [1937] 3 All E.R. 359, *Manchester* v. *Carlton Iron Co., Ltd.*, (1904) 89 L.T. 730, and *Crocker* v. *Knight*, [1892] 1 Q.B. 702, referred to.

Orders for successive interests cannot be made to extend to persons who are not members of the class defined as claimants under the Deaths by Accidents Compensation Act, 1908; and, therefore, the children or remoter issue of such claimants cannot be included as beneficiaries.

So held, by the Court of Appeal, on originating summons removed into that Court for determination.

Per *Myers*, C.J., *Blair*, *Kennedy*, and *Finlay*, JJ.: A separate share must be apportioned to each claimant, except in so far as the Court may consider it necessary or advisable not to apportion, in order the more efficiently to create successive interests, and the power to create successive interests is limited to a power to create a succession on the termination of the personal interests of the beneficial owner of the right for the time being in the apportioned share, and is not to extend beyond the creation of successive interests to the shares of the beneficiaries who might die before a power of disposition could be exercised or, in other words, during disability.

Per *Callan*, J. Instead of making an apportionment so that each person may become individually entitled to an ascertained capital sum, the Court may lump all the damages together and then divide the beneficial effect either by giving one person a life interest, or an interest during widowhood, or during some other term of years, followed thereafter by an interest to another or others, which interest may be either in capital or income, and lump sum payments out of capital may be authorized to one person at the expense of others who may be waiting for their shares.

Counsel: *D. R. White* and *Brown*, for the plaintiff; *Arndt*, for the first defendant; *Leicester*, for the second defendant.

Solicitors: *Public Trust Office*, Wellington, for the plaintiff: *Ongley, O'Donovan, and Arndt*, Wellington, for the first defendant: *Leicester, Rainey, and McCarthy*, Wellington, for the second defendant.

AUCKLAND HARBOUR BOARD v. NORTHERN ROLLER MILLING COMPANY, LIMITED.

AUCKLAND HARBOUR BOARD v. AUCKLAND FARMERS' FREEZING COMPANY, LIMITED.

AUCKLAND HARBOUR BOARD v. A. G. FRANKHAM, LIMITED.

COURT OF APPEAL. Wellington. 1946. March 14, 15; June 19. MYERS, C.J.: BLAIR, J.; KENNEDY, J.; CALLAN, J.

National Expenditure Adjustment—Lease—Progressively Increasing Rentals—Reduction of "the rate prescribed by the contract"—Whether applicable to Progressive Rentals or confined to a Rental uniform throughout Term—National Expenditure Adjustment Act, 1932, ss. 31, 32, 34—Finance Act, 1934, s. 14—Mortgagors and Lessees Rehabilitation Act, 1936, s. 84.

The National Expenditure Adjustment Act, 1932, applies not only to a lease at a uniform rent throughout the whole term, but also to a lease with progressively increased rentals The reduction directed by the Act is to be made not merely on the first rental, but also on each increased rental during the period of its operation.

City Freeholds, Ltd. v. *Woolworths Ltd.*, (1932) 33 N.S.W.S.R. 49, applied.

Daniel Haynes Trust, Ltd. v. *Drapery and General Importing Co. of New Zealand, Ltd.*, [1949] N.Z.L.R. 9, referred to.

So held by the Court of Appeal on three originating summons, removed by consent, into the Court of Appeal.

Per *Myers*, C.J., This decision does not affect the rights of parties in respect of rental (except for the period current at the date of the commencement of the Act) payable under what is known in New Zealand as a Glasgow Lease, that is to say a lease which is renewable periodically in perpetuity at a rental for each new term, generally assessed by arbitration and a new lease is actually granted in respect of any such new term.

Counsel: *Barrowclough*, for the plaintiff; *Cooke*, K.C., and *Wheaton*, for the Northern Roller Milling Co., Ltd.; *North*, for the Auckland Farmers' Freezing Co., and A. G. Frankham, Ltd.

Solicitors: *Russell, McVeagh and Co.*, Auckland, for the plaintiff; *Bamford, Brown, and Wheaton*, Auckland, for the Northern Roller Milling Co., Ltd.; *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the Auckland Farmers' Freezing Co., Ltd., and A. G. Frankham, Ltd.

LANE v. McDONALD.

COURT OF APPEAL. Wellington. 1946. June 13; July 8. MYERS, C.J.: FAIR, J.; CORNISH, J.

Practice—Appeals to Court of Appeal—New Trial—Two Actions by different Plaintiffs against the same Defendant for Negligence in practically the same Collision—Separate Trials on Substantially the Same Evidence—Contradictory Verdicts given by two different Juries—Whether Ground for New Trial.

Where in litigation *between the same parties* on substantially the same evidence in two actions in respect of the same or substantially the same subject-matter, separately tried, different juries find contradictory verdicts, and the evidence at each trial is so fairly balanced that a jury might find either way, the Court may order a new trial of the whole action, both cases to be tried together.

Australasian Steam Navigation Co. v. *Smith and Sons*, (1889) 14 App. Cas. 321, and *Deck* v. *Reed*, (1914) 33 N.Z.L.R. 883, distinguished.

Aliter, where the parties are not the same, even though the defendant is the same in both actions, and the evidence is substantially the same.

The facts that the jury, in one of two such actions for damages based on the alleged negligence of the defendant, found for the defendant on the ground that negligence on his part had not been found, and that the jury in the other action found for plaintiff on the ground of defendant's negligence, cannot be regarded as a feature upon which to base the conclusion that the verdict in either one case or the other is to be regarded as not satisfactory.

The question whether there should be a new trial in the case in which the plaintiff succeeded depends upon whether or not there was evidence upon which it was competent for the jury to find negligence on the part of the defendant.

So held by the Court of Appeal (*Myers*, C.J., and *Fair*, J., *Cornish*, J., dissenting), allowing an appeal from the order of *Blair*, J. (ordering a new trial limited to the question of liability), reported *ante*, p. 46.

Counsel: *Watson* and *Graham*, for the appellant; *Ongley*, for the respondent.

Solicitors: *Graham and Reed*, Feilding, for the appellant; *A. M. Ongley*, Palmerston North, for the respondent.

EMERY v. EMERY.

SUPREME COURT. Wellington. 1945. November 22. JOHNSTON, J.

COURT OF APPEAL. Wellington. 1946. June 18, 19. MYERS, C.J.; BLAIR, J.; FAIR, J.; CORNISH, J.

Divorce and Matrimonial Causes—Separation (as a Ground of Divorce)—Agreement for Separation—Petitioner's Wrongful Act or Conduct—Whether confined to a Definite or Recognized Matrimonial Offence—"Wrongful act or conduct"—Divorce and Matrimonial Causes Act, 1928, s. 18.

In an opposed petition for divorce on the ground of separation by mutual consent for not less than three years, the effect of s. 18 of the Divorce and Matrimonial Causes Act, 1928, is that any wrongful act or conduct on the part of the petitioner is an absolute bar to the divorce, if in fact it was the effective cause of the separation.

The words "wrongful act or conduct," as used in s. 18 of the statute, include all conduct that the moral standard of the community regards as blameworthy, and whether or not such wrongful act or conduct amounts in law to a definite or recognized matrimonial offence.

Any act or conduct on the part of a husband (and *mutatis mutandis* on the part of a wife) should be regarded as blameworthy which a self-respecting woman could not reasonably be expected to continue to suffer.

Schlager v. *Schlager*, [1924] N.Z.L.R. 1011, approved.
Lodder v. *Lodder*, [1923] G.L.R. 122, overruled.
Lunn v. *Lunn*, [1924] G.L.R. 157, *Mason* v. *Mason*, [1921] N.Z.L.R. 955, *Steedman* v. *Steedman*, [1926] G.L.R. 121, and *Cronin* v. *Cronin*, [1945] N.Z.L.R. 180, referred to.

Counsel: *Biss*, for the appellant: *Cooke*, K.C., and *White*, for the respondent.

MAREO v. THE KING (No. 3).

COURT OF APPEAL. Wellington. 1946. April 10–13, 15, 16, June 19. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; FINLAY, J.

Criminal Law—Appeal—Verdict unreasonable and not supported by Evidence—When Verdict is "unsatisfactory"—"Miscarriage of justice"—Prisoner's not giving Evidence at Trial—When Court of Appeal may take such Fact into Consideration—Criminal Appeal Act, 1945, ss. 3, 4.

It is the duty of the Court of Appeal on an appeal against conviction under s. 3 of the Criminal Appeal Act 1945, to allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that on any other ground there was a miscarriage of justice.

In England and elsewhere, in many cases, a verdict has been set aside upon the ground that either the verdict or the trial has been "unsatisfactory": though this may be a sound working test, a miscarriage of justice must be apparent before the Court sets aside a conviction.

R. v. *Barnes*, (1942) 28 Cr. App. R. 141, *R.* v. *Wallace*, (1931) 23 Cr. App. R. 32, *R.* v. *Hart*, (1914) 10 Cr. App. R. 176, *Jackman* v. *The King*, (1914) 16 W.A.L.R. 8, *Armannisco* v. *The King*, (1914) 16 W.A.L.R. 174, *Coulter and Treffene* v. *The King*, (1926) 29 W.A.L.R. 40, and *R.* v. *Dent*, (1943) 29 C. App. R. 120; [1943] 2 All E.R. 596, referred to.

On the hearing of such an appeal, if the question is solely whether the conviction should be quashed on the ground that there was no case to warrant conviction, then the Court should not take into consideration the fact that the prisoner did not give evidence. If, however, the appeal against conviction resolves itself in substance into an application for a new trial on the ground merely that the verdict was against the weight of evidence and there was a *prima facie* case made out against the prisoner, the Court of Appeal may take into consideration (unless there appears to be a satisfactory explanation of the failure) the fact that the prisoner did not give evidence; but such consideration should be applied with great caution.

R. v. *Droux*, [1936] 2 D.L.R. 780, and *Steinberg* v. *The King*, [1931] 4 D.L.R. 8, applied.
R. v. *White*, [1945] G.L.R. 108, and *Dolling* v. *Bird*, [1925] N.Z.L.R. 545, referred to.
Weston v. *Cummings*, [1916] N.Z.L.R. 460, distinguished.

Counsel: *Sexton* with *Harding* as additional counsel, for the appellant: *V. R. S. Meredith* and *F. J. McCarthy*, for the Crown.

Solicitors: *Sexton, Manning, and Fortune*, Auckland, for the appellant: *Crown Solicitor*, Auckland, for the Crown.

GORDON AND ANOTHER v. COMMISSIONER OF STAMP DUTIES AND OTHERS.

SUPREME COURT. Invercargill. 1945. August 10: 1946. January 31. KENNEDY, J.

Charitable Trust—Gift to Trustees of Land and Buildings, Chattels and Furniture, to carry on same as Maternity Hospital as thought fit—Power to fix charges and Manner of Conduct—Power to Lease to one of Trustees—Profits to be used for Equipment of Hospital and Development of Business—Residue to Discharge encumbrance and for Benefit of Hospital and use in Connection with said Business—Whether such Gifts were Valid Charitable Gifts.

A testatrix devised and bequeathed to her trustee a specified freehold property with the buildings and the household chattels and furniture therein to be held upon trust to carry on the same as a maternity hospital in such manner as they might think fit, with power *inter alia* to fix the charges to be made in connection therewith and the manner in which the said hospital should be conducted, and power to lease the hospital to one of the trustees specified. She directed that the profits arising from the carrying on of such business should be used for the better equipment of the hospital and the development of the said business, and that any funds not required for those purposes should be accumulated and invested until required. The net proceeds of residue were to be applied towards payment of any encumbrance on the said property, and any residue was to be retained for the benefit of the said hospital and for use in connection with the said business.

Held. That there was in the will an absence of definition of the purposes for which the said hospital was being carried on and an absence of indication of those to benefit by the carrying on, and, in particular, an absence of anything to show that it must be carried on in some way for the benefit of a class of the community, or of any particular class of the community sufficiently large to be treated as constituting a public use.

Hence, the said dispositions were not charitable, and the rule against perpetuities being infringed, were invalid and void; and the property so apparently disposed of would go as on an intestacy with respect thereto.

Nightingale v. *Goulburn*, (1847) 5 Hare 484; 67 E.R. 1003, *Taylor* v. *Taylor*, (1910) 10 C.L.R. 218, *In re Compton, Powell* v. *Compton*, [1945] Ch. 123, and *Hunter* v. *Attorney-General and Hood*, [1899] A.C. 309, applied.

In re Osmund, Midland Bank Executor and Trustee Co., Ltd. v. *Attorney-General*, [1944] Ch. 206, distinguished.

Counsel: *J. S. Sinclair*, for the plaintiffs: *H. Macalister*, for Attorney-General: *F. B. Adams* and *E. A. Duncan*, for the next-of-kin and also for Commissioner of Stamp Duties.

Solicitors: *Sinclair and Stevenson*, Dunedin, for the plaintiffs; *Macalister Brothers*, Invercargill, for the Attorney-General: *Duncan and McGregor*, Dunedin, for the defendants.

ANSELL v. CLAPHAM.

SUPREME COURT. Auckland. 1946. July 8, 11. CALLAN, J.

Rent Restriction—Dwellinghouse—Premises leased as Dwelling and as Boarding and Apartment House—Assignment of Lease to Tenant, who with his Family continuously resident on Premises—Letting Rooms unoccupied by them—No previous Tenant of Whole Premises residing thereon—Whether a "Dwellinghouse"—Fair Rents Act, 1936, s. 2.

The owner of a fourteen-roomed house had for some years conducted therein the business of apartment house keeping. She leased the premises to a predecessor of the defendant for five years by an agreement, which provided that the premises "shall not be used for any business except that of a dwelling and/or boarding and apartment house without the consent in writing of the lessor first had and obtained." The lease was assigned to the defendant, a civil servant, who was married, and had seven children. None of the previous tenants lived in the house. He, however, had done so continuously since taking over the lease, his wife managing the premises. In evidence, he said that, in making the purchase, it was a dwellinghouse that he was mainly concerned with. He and his family had not continuously occupied the same rooms, but had changed and increased the number of rooms used by them. When the term expired, he and his family were occupying only two or three of the rooms; but at the time of the hearing they occupied a total of five rooms.

The term expired and the plaintiff sued for possession and mesne profits and damages. She had given no notice in writing of her intention to commence proceedings as required by s. 12 of the Fair Rents Act, 1936.

Held, 1. That the premises were the defendant's dwellinghouse from the time he entered into possession under the assigned lease, and were therefore a "dwellinghouse" within the definition of s. 12 of the Fair Rents Act, 1936.

Bethune v. *Bydder*, [1938] N.Z.L.R. 1, *Blakey* v. *Brennan*, [1944] N.Z.L.R. 929, and *Wood* v. *Barber*, *ante*, p. 116, distinguished.

2. That the appropriate judgment was a non-suit.

Mahoney v. *The Queen*, (1890) 8 N.Z.L.R. 457.

Counsel: *Alexander*, for the plaintiff: *Schramm*, for the defendant.

Solicitors: *Keegan and Alexander*, Auckland, for the plaintiff; *Schramm and Elwarth*, Auckland, for the defendant.

REFRESHER COURSE.—6

THE LAW OF TORTS.

Changes Since 1939

By A. L. HASLAM, B.C.L., D.PHIL. (OXON.) LL.M. (N.Z.).

As the learned editor of the Tenth Edition of *Salmond on The Law of Torts* points out, this topic has during war-years been developed and enriched by many ju ments of first-class importance. In one notable instance at least—*Read* v. *J. Lyons and Co., Ltd.*, [1945] 1 All E.R. 106—there is the possibility of an appeal to the House of Lords, where their Lordships may take up the challenge of Scott and du Parcq, L.JJ., in the Court of Appeal and enunciate a final ruling on the first principles of liability. For our present purposes, this discussion of wartime decisions must be limited to the salient features of the more notable cases.

NEGLIGENCE.

August 26, 1928, is an important date in modern legal history, as on that day the plaintiff in *Donoghue* v. *Stevenson*, [1932] A.C. 562, consumed part of the contents of an opaque bottle of ginger beer before discovering therein the mortal remains of a snail. Negligence in the law of tort, the scope of the duty of care, and liability to the ultimate consumer for putting into circulation dangerous chattels, all received detailed attention in the speeches of the majority in the House of Lords. To cite a more recent application of that authority, the distinction was drawn against the plaintiff in *Saddlemire* v. *Coca-Cola Co. of Canada*, [1941] 4 D.L.R. 614, that he had had a reasonable opportunity of intermediate examination. From a transparent bottle he drank a cordial which was the last resting place of a mouse and as such had a noisome smell and taste. Again, the duty in tort of manufacturers of goods does not make them insurers of the abnormally sensitive: *Levi* v. *Colgate-Palmolive Pty., Ltd.*, (1941) 41 N.S.W. S.R. 48, where the unsuccessful plaintiff was allergic to bath-salts which were innocuous to the average consumer.

In *Haseldine* v. *C. A. Daw and Son, Ltd.*, [1941] 2 K.B. 343, [1941] 1 All E.R. 525, the engineers, who had negligently repaired a lift in a block of flats, were held to be under a duty of care to a visitor to the premises who was injured as a result of the defective workmanship.

The influence of child behaviour on the development of this topic has not diminished with the declining birthrate. In *Burfitt* v. *A. and E. Kille*, [1939] 2 K.B. 743, [1939] 2 All E.R. 372, a shopkeeper, who had sold a toy pistol and ammunition to a boy, was held answerable in negligence to another child whom the purchaser had injured by discharging the weapon. But the more primitive bow and arrow is in a different category: *Ricketts* v. *Erith Borough Council*, [1943] 2 All E.R. 629.

In *Glasgow Corporation* v. *Muir*, [1943] A.C. 448, 457, [1943] 2 All E.R. 44, where Lord Macmillan discussed the subjective theory of negligence, the occupier of premises was exculpated in a suit brought by infant invitees and was held to have exercised due care for their safety in terms of *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274. In *Muir's* case, the proprietors of a kiosk were sued after members of a picnic party had upset a tea-urn on the premises and scalded some children who were purchasing sweets at a nearby counter. The House of Lords could find no evidence of negligence in the structure or management of the establishment.

The fine gradations of vigilance, which vary according to the status of the entrant upon defective premises, make it seem almost a play upon words to assert that "the law of torts does not recognize . . . different degrees of negligence": *Salmond on the Law of Torts*, 10th Ed., 439. The jurist might find further reason for doubt in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152, 160, [1939] 3 All E.R. 722, where contributory negligence on the part of a workman was finally held to be a defence to an action based on breach of an absolute statutory duty: but juries were at the same time afforded ample scope for reconciling their duty with their sympathies. (Contrast *Jackson* v. *De Havilland Aircraft Co. of New Zealand, Ltd.*, [1944] N.Z.L.R. 484, where the plaintiff was unsuccessful, as his employment with defendant did not entitle him to visit the scene of the accident.)

In the United Kingdom traffic accidents, occurring during the black-out, gave rise to considerable litigation, which, in the exigencies of wartime, was not infrequently tried by a Judge alone. A vigorous reminder that posterity need not be embarrassed by seemingly inconsistent conclusions on what were only question of fact in individual cases was given by Lord Greene, M.R., in *Morris* v. *Luton Corporation*, [1946] 1 All E.R. 1.

Lastly the British Parliament has enacted the Law Reform (Contributory Negligence) Act, 1945, thereby importing the principles of the Admiralty Rules to all cases where contributory negligence would otherwise afford a defence. As the last opportunity doctrine with its attendant subtleties has been held to be applicable to collisions at sea—*Anglo-Newfoundland Development Co. Ltd.* v. *Pacific Steam Navigation Co.*, [1924] A.C. 406—it yet remains to be seen whether a legislative intrusion on so wide a front will simplify an admittedly confused situation.

NERVOUS SHOCK.

Some day it may be necessary to determine which Caesar is paramount in this Dominion in the many cases of clash between the Judicial Committee and the House of Lords: *cf.*, "The Binding Effect of English decisions upon Australian Courts, (1944) 60 L.Q.R. 378. The apparent conflict between the Privy Council in

Coultas v. *Victorian Railway Commissioners*, (1888) 13 App. Cas. 222, and the judgment of the House of Lords in *Coyle* v. *John Watson, Ltd.*, [1915] A.C. 1, 13, has been resolved in New Zealand by s. 2 of the Law Reform Act, 1944, which enacts that in any action for injury to the person the plaintiff shall not be debarred from recovering damages merely because the injury arose wholly or in part from mental or nervous shock.

While conceding that " there is no magic in physical contact "—*Hambrook* v. *Stokes Brothers*, [1925] 1 K.B. 141—the law is not yet prepared to compensate every plaintiff whose nervous system is upset by a sequence of events flowing from defendant's wrongful act. Already much has been written concerning *Bourhill* v. *Young*, [1943] A.C. 92, [1942] 2 All E.R. 396—*e.g.*, Goodhart (1944 *Cambridge Law Journal*, 265) and Charlesworth (1944 60 L.Q.R. 150), wherein the House of Lords excluded from the ambit of the duty of care a person who, while under no reasonable fear of bodily injury, sustained severe shock from hearing a nearby collision attributable to the negligence of a motor cyclist. Their Lordships left the door open for fresh developments in this field.

Remoteness of Damage.

The deceased in *Murdoch* v. *British Israel World Federation (New Zealand) Incorporated*, [1942] N.Z.L.R. 600, had sustained such severe injuries, in consequence of the negligence of defendant's servant, that while in a state of depression he committed suicide. The plea that his *felo de se* could not be visited upon the defence was met by a finding that upon the evidence, deceased, at the time of his death, was insane within the meaning of s. 43 of the Crimes Act, 1908. Hence the hand of the wrongdoer still lay heavily upon the victim and his death was the direct result of the defendant's tort.

The " rescue " principle, which is derived from *Haynes* v. *Harwood*, [1935] 1 K.B. 146, did not extend to a zealous Traffic Inspector in *Ireton* v. *Whyte and Hancock and Co., Ltd.*, [1942] N.Z.L.R. 325, who, while pursuing a speeding motorist, injured himself by reason of the resulting pace of his own vehicle. The moral duty which precludes the conduct of the injured man from being regarded as a *novus actus* debarring all remedies and therefore a voluntary assumption of risk on his part was to be restricted to cases where defendant's negligence placed other persons in peril: *Cf.*, *Steel* v. *Glasgow Iron and Steel Co., Ltd.*, [1944] S.C. (Ct. Sess.) 237, where a wider different view of the " rescue " principle was adopted.

Master and Servant.

Piecemeal but relentlessly, the demands of social expediency are corroding the few surviving limitations to vicarious liability. The metaphysical distinctions concerning servants who negligently smoked while about their master's business were swept into oblivion in *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] A.C. 509, [1942] 1 All E.R. 491, where the offending driver of a petrol wagon lit a cigarette as petrol was flowing from his vehicle into a storage tank.

The stubborn vitality of *Williams* v. *Jones*, (1865) 3 H. & C. 602, 159 E.R. 668, upon which earlier editions of *Salmond* lavished such care, could no longer save it from extinction.

A logical extension of the principle in *Lloyd* v. *Grace Smith and Co.*, [1912] A.C. 716, included a forgery by a servant acting within the scope of his ostensible authority and thereby defrauding a person who was not a client of the employer, but a third party. In *Uxbridge Permanent Benefit Building Society* v. *Pickard*, [1939] 2 K.B. 248, [1939] 2 All E.R. 344, the plaintiff company advanced moneys on the strength of a forged mortgage prepared as a result of a scheme in which defendant's managing clerk was a party.

While special legislation in New Zealand covers our public hospitals—Hospitals and Charitable Institutions Amendment Act, 1936, s. 2—the common law is still of importance in respect of private institutions. In *Gold* v. *Essex County Council*, [1942] 2 K.B. 293, [1942] 2 All E.R. 237, Lord Greene, M.R., cast grave doubts on Kennedy, L.J.'s celebrated dictum in the *St. Bartholomew's Hospital* case, [1909] 2 K.B. 820, that once the door of the operating theatre swings shut, the nurse ceases to be a servant and becomes an independent contractor, for whose negligence the hospital is no longer responsible. In *Gold's* case, where the defendant was made answerable for the negligence of a radiographer employed by it, Lord Greene explained that the theatre surgeon did not become *dominus pro tempore* during the operation, but that nevertheless obedience to his express instructions negatived any carelessness in the part of the nurse.

While an express prohibition may be evidence of the limits of the employment, an employer is still liable if the servant defies orders as to the method of performing acts within the sphere of employment and thereby commits a tort. In *Canadian Pacific Railway Co.* v. *Lockhart*, [1942] A.C. 591, [1942] 2 All E.R. 464, the employer of a driver, who had been forbidden to use uninsured vehicles, was successfully sued for the negligence of his servant who while on duty drove his own uninsured car.

A corporation was held liable for the negligence of its employee while engaged on an undertaking—*viz.*, passenger service—which was *ultra vires* the defendant company: *Northern Publishing Co., Ltd.* v. *White*, [1940] N.Z.L.R. 75. While theoretical criticism can be advanced against such a result, the practical convenience of the decision can hardly be doubted.

Animals.

This illogical branch of the subject has had few additions. In *McQuaker* v. *Goddard*, [1940] 1 K.B. 687, [1940] 1 All E.R. 714, the unloved, unloving camel, was judicially classified as *mansuetae naturae*, and, as neither scienter nor negligence had been proved, the plaintiff who had been bitten by the beast in question, failed in his action against its owners. Possession of the offending animal would appear to be a *sine qua non* of liability, however the action is shaped: *Brackenborough* v. *Spalding Urban District Council*, [1942] A.C. 310, [1942] 1 All E.R. 34. The defendant in *Aldham* v. *United Dairies (London), Ltd.*, [1940] 1 K.B. 507, [1939] 4 All E.R. 522, was held responsible in negligence for the act of a normally docile pony, which he had left unattended in the street for half an hour, knowing that the animal was inclined in such circumstances to grow restive.

Rylands *v.* Fletcher.

The Court of Appeal in *Read* v. *J. Lyons and Co., Ltd.*, [1945] 1 All E.R. 106, refused to invoke the

Rylands v. *Fletcher* doctrine in aid of an employee who was injured in an unexplained explosion in a munitions factory at which the plaintiff was then working. Escape from the premises of the offending substance is an essential ingredient of liability.

Conspiracy.

The elaborate opinions of the House of Lords in *Crofter Hand-woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] A.C. 435, [1942] 1 All E.R. 142, followed tradition in conspiracy cases in finding for the defendant. Neither the facts nor the law in this case readily lend themselves to brief treatment, but the main result of the decision is that the defence of enlightened self-interest still excuses a combination to injure. On the other hand, in the related topic of including a breach of contract, common interest, aggravated by breach of covenant on the plaintiff's part, was regarded as no justification: *Camden Nominees, Ltd.* v. *Slack*, [1940] 2 All E.R. 1.

Nuisance.

An occupier must abate a nuisance on his property, even though created by a trespasser, if he has knowledge or means of knowledge of its existence: *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349. This principle received prompt application in *Slater* v. *Worthington's Cash Stores, (1930), Ltd.*, [1941] 3 All E.R. 28, where defendant had failed to remove accumulation of snow on his roof, with knowledge of the danger to persons on the roadway, whereas in *Cushing* v. *Peter Walker and Son (Warrington and Burton), Ltd.*, [1941] 2 All E.R. 693, where enemy action had loosened a slate on defendant's premises, the fact that reasonable inspection would not have revealed the defect excused the defendant.

The unsatisfactory decision in *Wringe* v. *Cohen*, [1940] 1 K.B. 229, [1939] 4 All E.R. 241, is difficult to reconcile with the *Sedleigh-Denfield* case: *Salmond on the Law of Torts*, 10th Ed. 240, 241.

Lastly, our Court of Appeal in *Irvine and Co., Ltd.* v. *Dunedin City Corporation*, [1939] N.Z.L.R. 741, held that the word "nuisance" in s. 173 of the Municipal Corporations Act, 1933, was not limited to public nuisance.

Defamation.

The Court of Appeal in *Newstead* v. *London Express Newspaper, Ltd.*, [1939] 4 All E.R. 319, upheld a verdict for the plaintiff where a correct report of the bigamy trial of "Harold Newstead, 30 year old Camberwell man" was regarded as defamatory of the plaintiff, who had the same name and description as the accused: see the strictures of the late Sir William Holdsworth, (1941) 57 L.Q.R. 74. A narrow construction of the defence of privilege was given in *White* v. *J. and F. Stone, Ltd.*, [1939] 3 All E.R. 507. Here defendant was overheard accusing a servant of dishonesty and it was held by the Court of Appeal that the necessary reciprocity of duty and interest in respect of a protected communication did not apply between defendant and plaintiff.

Defamatory references to a political society of which plaintiff was nominal head are not actionable—*Knupffer* v. *London Express Newspaper, Ltd.*, [1944] A.C. 116, [1944] 1 All E.R. 495, for "a class cannot be defamed as a class nor can an individual be defamed by a general reference to the class to which he belongs."

VICTORY DINNER AT HAMILTON.

Law Society Honours Servicemen.

The Hamilton District Law Society recently held a very successful dinner in honour of those of its members who served in His Majesty's Forces during the recent war. About fifty-six members of the Society, with the President, Mr. W. C. Tanner, in the chair, were present. Opportunity was also taken of the occasion to farewell Mr. H. T. Gillies, who was retiring from practice, and who for thirty-six years had held the office of Crown Solicitor in Hamilton. A very happy and friendly atmosphere pervaded the function, which intensified as the evening wore on.

"Our Ex-Servicemen."

Mr. S. L. Paterson, S.M., in proposing the toast of "Our Ex-Servicemen," made play on some well-known legal maxims. Mr. Paterson said:

"One of the objects—in fact, the principal object of this convivial gathering—is to do honour to our ex-servicemen.

"In proposing this toast, I must perforce be serious because, in spite of the hilarity of the occasion, it is a serious subject. At the same time I crave the indulgence of this learned and convivial assembly, that I may reserve to myself, as it were, a *locus poenitentiae* and indulge in such jesting as may also be fitting to the occasion.

"It is not my desire, any more than it is the desire of those we honour, that I should indulge in fulsome or fatuous adulation. That can be left to the politicians who want their votes. After all, the best advocacy is that which presents its case with moderation, and a slight suggestion of understatement. We are proud of our ex-servicemen, proud of them because of what they are, what they are, and what they did. They are fellow-members of our ancient and honourable profession, a profession renowned in peace, not less than in war. They are the good chaps we were, and now happily again are, accustomed to meet in consultation, at the settlement table, and at the bar. They are men of honour and integrity with a strong sense of responsibility, that same sense of responsibility which led them at the call of King and Country, nay at the call of civilization itself to lay aside wig and gown, and don, in their place, steel-helmet and battledress—to abandon the comforts of home and the superabundance of God's Own Country, and accept in their stead 'A soldier's billet at night, and a soldier's ration.'

"We regretted the necessity of their going. We watched them march away with sorrow in our hearts. We followed their careers, in the air and on land and sea, with interest and anxiety, whether in New Zealand, in the Libian Desert, in England, Greece, Crete, Italy, or the Islands of the Pacific. Now, with joy and gladness in our hearts, we welcome them again in our midst, and gather with them around the festive board.

"I must confess that on at least two occasions I was very concerned for their welfare. On the first occasion, I was informed on excellent authority, no less an authority indeed than that of a 'Conscientious Objector,' that they spent all their nights in drinking and gambling. The gentleman in question objected to service, because (he said) Scripture enjoined him not to allow himself to be unequally yoked with the ungodly. I asked him if he were not unequally yoked with his fellow-workers in the factory in which he worked, and he said that they were all right because they did not spend all their nights in drinking and gambling; and, when I asked, if he thought

that was how soldiers spent their nights he assured me that it was. Was it any wonder that I was concerned? The next occasion was rather more serious. I was more than perturbed when I heard that the members of the 2nd N.Z.E.F. had been likened to the associates of a notorious character from *Arabian Nights*. I was all the more perturbed because we of the 1st N.Z.E.F. were noted for our piety. Do I hear derisive laughter? I assure you it was quite true. It was a bearded Sikh, a very discerning and observant gentleman, who made the comment. He said that whenever the New Zealanders were not in the Line, they were always holding religious services. They formed a ring, just like the Salvation Army. Then One Holy Man got in the middle and prayed and prayed to the Almighty, and the others threw offerings of money into the ring, after which the Holy Man took up two coins and threw them up to Heaven as an offering to God; and, as he threw them up, all the worshippers looked up to Heaven, and prayed 'Good God': and then they all bowed down to the ground and said: 'Lord Almighty! He's headed them again.'

"That our ex-servicemen acquitted themselves well goes without saying—*res ipsa loquitur*, in fact. They would not have been lawyers if they had not. Generally speaking, New Zealand lawyers seem to make good soldiers. Perhaps it is because serving in the Middle East they had for their example that great Middle-Eastern-non-Aryan lawyer and soldier, Moses.

Why Lawyers Make Good Soldiers.

"Now I have given some thought to why it is that lawyers seem to make good soldiers. Perhaps it is because there is a certain similarity in their training. Who but a lawyer would feel at home among the masses of documents, forms, and returns, which seem inseparable from a modern army. One of my friends, writing about his first impressions of the army, said that Hitler may think he is going to win the war by means of *Mein Kampf*, but he had another think coming because our people seemed to put their faith in 'Mine Paraph.' Again, a lawyer is accustomed to being alert, observant, and a quick thinker. Who but a lawyer could have realized that although in Napoleon's day, an army marched on its stomach, a modern army needs a 'conveyance?' Who would be quicker to realize the necessity for co-operation of all arms—air, land and sea—than one nurtured on the maxim, *cujus est solum ejus est usque ad coelum et ad inferos?* Who more staunch in defence than he who refuses to give seisin to the enemy and treats him as a trespasser *ab initio?* Or who more irresistible in attack than he who, waiving the tort, dashes forward and dispossesses the enemy because he is not a holder in due course? I think, too, it must have been a legal member of the Long Range Desert Group, who, when they had captured prisoners, whom they could not take with them and could not afford to allow to give the patrol's presence away too soon, devised the scheme of taking off their pants and boots, and letting them go. Clearly, you will agree, an application of the maxim *ex nudo pacto non oritur actio*, or would it be *posteriores leges non fit?*

"And talking of juice, in their moments of relaxation, when *de minimis non curat miles*, what terrors could the canteen hold for one accustomed to 'Refreshers' at the Bar'? But all that is now happily over. Our servicemen are again with us, and the maxim '*Qui peccat cerius luat sobrius*' again applies: and here let me correct the rumour that the Hamilton National Military Reserve were sent to 'The Island' because of their drunken and licentious habits, and the Island they were sent to was not Rotoroa, but The Barrier. All honour to those legal members of the Reserve who dropped their practices at a moment's notice to go to an unknown destination. If the Japanese had come to New Zealand, they would have been in the forefront of the battle. Believe me, their spell on the Island made them tough. One prominent practitioner, was, if not bearded like the pard, when having lost his way one night in the scrub and forgotten the password, at least so full of strange oaths that the amazed sentry let him past.

"I come now to speak of the future. What has it to offer? What have we to offer towards it? Fortunately, the ex-servicemen of our district seem to want little rehabilitation. They are the best of all soldiers and citizens, the men who rehabilitate themselves. If they can ask nothing of us for themselves, we can at least lend a sympathetic ear when they approach us on behalf of their less fortunate comrades, and we can endorse their petition with the *fiat*, 'Let Right be done.' And again, what of the future? When we look round the world, can we help but be filled with dismay and foreboding for the future? We can offer our servicemen no Valhalla or earthly paradise. Not for them a life of ease, but of warfare. Many of our ancient liberties and landmarks are in danger. The ancient virtues of thrift, honesty, integrity, and honour, are assailed, and must be defended. Lord Sankey, some time ago, likened the law to a great rock, amidst the currents of contending factions and the shifting sands of politics, upon which a man in troublous times might set his foot and be safe. To our ex-servicemen I say, 'You, with us, are the guardians of that rock. Long may you be spared to defend that rock. Steadfast and true be your guard.'"

Mr. B. D. O'Shea replied to the toast, on behalf of the Navy, Mr. P. Gilchrist, Jnr., in replying on behalf of the Army, traversed the careers of many of the high-ranking officers of the 2nd N.Z.E.F., and pointed out how those with legal experience always did their job well and acquitted themselves with honour. Mr. N. I. Smith suitably replied on behalf of the Air Force.

Mr. C. L. MacDiarmid, as the senior practitioner in the district, proposed the health of Mr. H. T. Gillies, and presented him, on behalf of the Hamilton practitioners, with a cheque. Mr. Gillies suitably replied. After the dinner, the members gathered in the lounge, where anecdotes, stories and reminiscences were exchanged until a late hour. Thus concluded a very happy and pleasant function, quite in keeping with the highest traditions of the local Bar, and of the profession generally.

INTEREST ON UNPAID DEATH DUTIES.

Reduction and Remission.

It is of general interest to practitioners to know that, as the result of representations made by the New Zealand Law Society, the following letter was received by the Society's Secretary from the Minister of Stamp Duties.

"With reference to your letter of the 24th July last, addressed to the Hon. H.G.R. Mason, K.C., asking that consideration be given to two suggestions regarding interest on unpaid death duties, I am pleased to inform you that arrangements will be made to give relief in both cases mentioned by you.

An amendment to existing legislation will be required before any remissions of interest can be given, but if possible the necessary legislation will be submitted to Parliament this session. The legislation will give the Commissioner of Stamp Duties authority in appropriate cases to remit or reduce interest if the circumstances of the estate and/or the earning capacity of the assets warrant some such concession.

I am also arranging for the gazetting of the necessary Order in Council to provide for a reduction in the rate of interest at present charged on unpaid death duties. It can be taken that the rate to be charged in most cases will be 4 per cent. only, but under certain circumstances the Commissioner will have power to require payment at the present rate of 5 per cent. where it is considered that undue delay occurs in the payment of the duties."

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 85.—C. TO C.; C. TO W.; C. TO Y.

Land Agent's Commission—Commission payable by Purchaser—Reference in Sale Contract—Effect of increasing Purchase Price—Undue Hardship alleged—Consent subject to Condition that Purchaser released from Undertaking to pay Commission—Servicemen's Settlement and Land Sales Act, 1943, ss. 50, 63.

The Court said: "To obviate further delay in this matter where regrettable delays have already occurred, the Court has decided to give an immediate judgment in short memorandum form.

"It was not disputed by the Crown that the appellant-vendor is entitled to have the price fixed by the Committee at £675 restored to the sale price of £800 and in this regard the appeal is therefore allowed accordingly.

"The substantial matter in dispute related to a sum of £30 agreed to be paid by the purchaser to a Mr. T., the Land Agent concerned in arranging the sale. The Crown has at all times contended that the payment of commission by the purchaser amounted in effect to an increase of £30 in the basic price and the matter is properly in issue in this appeal.

"It was disclosed on the face of the contract that a commission would be payable by the purchaser by the insertion after the purchaser's signature of the words 'who will be responsible for the commission to the introducing agent, E. P. Levien and Co.' The purchaser also signed a seperate document appointing Levien and Co. her agents and agreed to pay £30 commission on acceptance of the offer which she had signed for the property.

"The Court is primarily concerned with the contract of sale from C. to C. which may be referred to as the principal transaction. It is, however, by s. 50 enjoined to have regard among other considerations to the terms of any other transaction in any way related thereto.

"The Court has no doubt that the transaction between C. and Levien and Co. (or T.) is related to the principal transaction and therefore is properly a matter for consideration by the Court in determining whether consent should be granted to the principal transaction and if so, whether unconditionally or subject to conditions.

"On a consideration of the whole facts leading to the two transactions in question, the Court is of opinion:

"(i) That in view of the demand for sections in the Wellington district very little difficulty would have been experienced by Mr. C. in selling the sections himself, or by an agent in effecting a sale on his behalf.

"(ii) That in fact Mr. T., by advertising this section for sale, interviewing and introducing the purchaser and drawing the contract for sale and collecting the deposit, did everything which an agent duly appointed by the vendor would have been required to do in order to earn his commission.

"(iii) That notwithstanding that Mr. C. could have done this work himself he failed to do so, his only reason, according to his evidence, being that he was too busy and had not the time.

"(iv) In effect, therefore, Mr. C. accepted Mr. T.'s services which in the normal relationship of vendor and agent would have rendered Mr. C. liable to pay the commission, but notwithstanding his acceptance of these services C. at all times stipulated that he should not be chargeable with commission.

"(v) That the purchaser at no time appointed T. her agent in the general sense that she wished him to search for and secure a property on her behalf nor did he undertake any such duties or in fact perform any substantial work at all as an agent on her behalf.

"(vi) Viewing the matter broadly and looking at the essence rather than at the form of the transaction, the sum of £30 alleged to be payable to T. for services rendered as the purchaser's agent was in fact rather a premium paid by the purchaser for the opportunity of making an offer to a vendor for whom the agent was in substance already acting, but who had stipulated that he would not pay the usual commission for his agent's services.

"Notwithstanding the foregoing findings the Court freely accepts the assurances of counsel that all parties acted in good faith and in the belief that the arrangements so entered into were not in breach of the Act.

"The Court is nevertheless of opinion that viewing the matter as a whole the effect of the transactions outlined above is to increase the price to the purchaser by £30 over and above the basic value as fixed by the Court and to enable the vendor to receive the benefit of services from the agent for which normally he would be expected to pay £30 commission, but with the stipulation that the incidence of payment of commission be transferred from him to the purchaser.

"The Court is of opinion that such an arrangement is contrary to the spirit and intention of the Land Sales Act and that consent to the principal transaction should therefore be subject to the condition hereafter provided.

"Counsel on behalf of the purchaser requested the Court to give weight to the undue hardship which the purchaser had already suffered by reason of delay and will further suffer if by reason of the condition imposed by the Court the sale should not be completed, and it was urged that the Court, under s. 63, had a general jurisdiction to waive consideration of so small an amount as £30, when a much greater loss might possibly fall on the purchaser should the sale fall through. We think it proper to state that we were impressed with the purchaser's honesty and her extreme desire and necessity to obtain this property, but now that it has been determined that the payment of the so-called commission by her cannot be permitted, the onus of preventing any undue hardship to the purchaser must surely be undertaken by the other parties to the transaction and cannot properly be laid at the door of the Court. In the present case two things are clear to us, on the one hand that the agent, Mr. T., at no time performed any services to the purchaser for which he could properly charge the sum of £30 as claimed, and on the other hand the agent, notwithstanding Mr. C.'s clear statement that he would not pay commission, did in fact render certain service to Mr. C., which he was prepared to accept. It is suggested that in the circumstances the proper course, and it should be a simple course, would be for the agent, Mr. T., and the vendor, Mr. C., to settle between themselves the question of whether any commission should be payable by C. or, in the alternative, whether T. should in the circumstances entirely forgo his commission, but that in either case they ought to be able to come to some satisfactory conclusion which will enable the sale to be completed and will prevent the serious consequences which it has been stated will follow in the event of Mrs. C. being deprived of the property.

"The decision of the Court is therefore as follows:—

"The appeal as to price is allowed and consent to the sale is granted at the sale price of £800, but upon the following condition, namely, that the vendor shall first secure the release of the purchaser from her undertaking to pay the sum of £30 or any other sum by way of commission or otherwise to E.P. Levien and Co., and shall secure the repayment to the purchaser of the sum of £30 paid by her accordingly to E. P. Levien and Co., on August 22, 1945."

C. to W. This case was heard with the above appeal, C. to C., and turns on precisely the same facts save that in the present case the purchaser was not called to give evidence.

The Court said: "As in the case C. to C. no opposition was raised to the increase of the price from the amount allowed by the Committee to the full sale price of £686 and the appeal is therefore allowed to that extent accordingly.

"The substantial question in issue was whether the purchaser could properly be permitted to pay an amount alleged to be due to E. P. Levien and Co., for commission on sale. For the reasons set out in the decision already given in C. to C. the Court is of opinion that the transaction considered as a whole is contrary to the spirit and intention of the Land Sales Act and that consent to the principal transaction should, therefore, be subject to the condition hereafter provided.

"The decision of the Court is therefore as follows:—

"The appeal as to price is allowed and consent to the sale is granted at the sale price of £686, but upon the following condition—namely, that the vendor shall first secure the release of the purchaser from his undertaking to pay any sum by way of commission or otherwise to E. P. Levien and Co., and shall, if such sum has already been paid, secure the repayment of any such sum to the purchaser."

C. to W. This case was also heard with C. to C., and turns on precisely the same facts, save that in the present case the purchaser was not called to give evidence.

The Court said: "As in the case C. to C. no opposition was raised to the increase of the price from the amount allowed by the Committee to the full sale price of £780 and the appeal is therefore allowed to that extent accordingly.

"The substantial question in issue was whether the purchaser could properly be permitted to pay an amount alleged to be due to E. P. Levien and Co. for commission on sale. For the reasons set out in the decision already given in *re* C. to C. the Court is of opinion that the transaction considered as a whole, is contrary to the spirit and intention of the Land Sales Act and that consent to the principal transaction should therefore be subject to the condition hereafter provided.

"The decision of the Court is therefore as follows:

"The appeal as to price is allowed and consent to the sale is granted at the sale price of £780, but upon the following condition—namely, that the vendor shall first secure the release of the purchaser from his undertaking to pay any sum by way of commission or otherwise to E. P. Levien and Co., and shall, if such sum has already been paid, secure the repayment of any such sum to the purchaser."

No. 86.—C. to McL.

Rural Land—Value—Many Years' Serious Neglect—Inherent Quality and Power of Recovery—Potential Value.

Appeal by the Crown against the grant of consent to sell a farm of 111 acres at Makotuku, for the sum of £2,719 10s.

The Court said: "The Court accepts the evidence of the Crown valuers that, owing to serious neglect over many years, the farm, whatever its past or prospective capacity, is not at present an economic unit. Subject to any necessary adjustment it is the present condition of the property which must form the basis of valuation.

"The vendor relied upon a sight value and budget presented by Mr. D., and upon the opinions as to carrying capacity of several practical farmers. Before the Committee Mr. D. presented a budget which was shown to be prepared upon a wrong basis in respect of labour reward. Before the Court he amended this budget in several material respects, but so as to arrive at much the same final result. Mr. D. admitted that in his amended budget he had discarded his previous considered opinions in favour of opinions, given before the Committee, by other witnesses. In the circumstances, the Court can place little reliance upon either of these budgets. The practical farmers, who made no claim to be valuers, were evidently men of above average efficiency, and in our view were influenced to take too rosy a view of the capacity and potentiality of this farm by reason of the measure of success they had themselves achieved on land which had been well farmed for many years.

"For the Crown, Mr. B. valued the property at £2,170 and Mr. G. at £2,102. Both appear to have made adequate allowance for the buildings and for the clearing and grassing of the land, while their allowance for fencing and timber is considerably in excess of that of Mr. D. There is a substantial difference of opinion as to the unimproved value, but the Crown valuers' figure receives some support from an analysis of the selling price in two recent sales of comparable properties. The Court finds the value of the property, assessed solely by reference to its present depreciated condition, to be £2,200.

"The Committee evidently considered that the basic value of the land should be increased to the amount of the sale-price by reason of its 'inherent quality and power of recovery.' We have no doubt, on the evidence, that this property has seen much better days, and may again, subject to efficient farming over a period of not less than three years and to the expenditure of a considerable sum of money, achieve a much higher productive value. We are concerned, however, only to determine the amount (if any) over and above the present value of the property assessed as above, which a purchaser might reasonably be expected to pay in view of the prospect of obtaining these higher returns, subject to his own expenditure of time and money. Giving due weight to the opinions of the practical farmers called on behalf of the vendor, we cannot but feel that this property has a potential value (as the term was used in the case reported as *No. 45—D. to S.*) which is not reflected in the valuations presented by the Crown. The estimation of such additional value is always a matter of difficulty and is of necessity a matter of opinion. The Court considers that a sum of £200 should on this account be added to the present value of £2,200, making a total of £2,400 which is found to be the basic value of the property.

"As this is below the sale-price to which consent was granted by the Committee, the appeal is allowed. Consent to the sale will be granted subject to the price being reduced to £2,400 accordingly.

No. 87.—V. to J.

Urban Land—Builder—Undue Aggregation—"Speculation purposes"—Twenty-one Properties owned—Since coming into Force of Act, Three Properties purchased, Eight Houses and Block of Flats built and Nineteen Properties Sold—Sale of Bare Sections—Disclosure of Building Contracts (Servicemen's Settlement and Land Sales Act, 1943, s. 50 (3)).

Appeal by the Crown against the consent granted by the Committee to the sale by the vendor to Mr. J. of a house and approximately 5 acres of land in the suburbs of Hastings. The price of £2,000 was not in issue, and was acknowledged by the Crown to be reasonable. The Crown objected to the sale before the Committee and now appeals upon grounds, which may be shortly termed "undue aggregation" and "speculation."

The Court said: "It would appear, and the Court so finds upon the evidence, that the purchaser, Mr. J., who is a retired restauranteur, has during the past eight years bought and sold a considerable number of properties and has erected a considerable number of houses. At the time when the Servicemen's Settlement and Land Sales Act, 1943, came into force, he was the owner of twenty-one properties, of which nineteen were houses let to tenants. Those nineteen houses he still owns. Since the coming into operation of the Act, Mr. J. has purchased three properties, exclusive of his present purchase, and two of these were areas of land suitable for subdivision. Upon these areas he has built eight houses and is now building a block of four flats. He has also sold a number of sections on which other houses have been built. At the present time his aggregate land holdings are almost identical with his holdings before the Act came into force, and, subject to the completion of the flats he possesses no suitable sections upon which to carry on future building operations. In all, Mr. J. has sold no less than fifteen properties, either houses or sections, since the Act and in every case his sales have been passed by the Committee without reduction of price. He gave evidence which stands uncontradicted, that he has the necessary knowledge and experience to build a fairly low-priced house and that most of the houses already disposed of have been sold to discharged servicemen and accepted for loan purposes by the Rehabilitation Department. His stated object in purchasing the present property is to subdivide it into fifteen sections and to continue building as materials and labour are more readily available.

"The Court, in Case reported, *No. 21.—F. to S.*, laid down the principles to be applied in determining whether the purchase of further land can properly be deemed "undue aggregation" and in particular the Court intimated that the purchase by a builder of a reasonable number of building sites for the carrying on of his business is not to be so deemed. We are satisfied that no objection could properly have been raised by the Crown to Mr J.'s present purchase but for the fact that he owns some nineteen tenanted properties or thereabouts. All these properties, however, belonged to him before the coming into operation of the Act and he states that would readily sell any which fell vacant but that they are virtually unsaleable today by reason of being tenanted.

"The Court is of opinion that in the particular circumstances of this case Mr. J.'s business should be dissociated from his properties let to tenants and that he is entitled to claim to be a builder and as such to purchase sections for the continuation of his business. That being so, the area now purchased does not seem excessive, nor is his purchase likely to deprive any other enterprising builder or any individual of obtaining similar land in Hastings and we are therefore of opinion that the Crown's objection upon the ground of undue aggregation must fail.

(To be concluded.)

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Reflections upon Judicial Emoluments.—Even the most hardened opponents of change, uninfluenced by the rise in the cost of living, must admit that after forty years at the same remuneration the Judges were due for a rise. It is no answer to quote s. 10 of the Judicature Act, which prevents a diminution of salary, or s. 4 of the 1913 Amendment, which provides a somewhat involved scale of superannuation. It is said that an *obiter dictum* of Lord Hewart was that "a Judge should try to look as wise as he is paid to look"—which means that to the outside and uninitiated world a Chief Justice of New Zealand looks only half as wise as a Lord Chief Justice of England. Another and more celebrated theme of Hewart's was "not only should justice be done, but it should *appear* to be done." This expression makes its appearance from time to time in our Courts. Does any reader know its precise origin? Slesser, L.J., uses it in *R.* v. *Sulford Assessment Committee*, [1937] 2 All E.R. 98, 101, with "manifestly" before "appear," while Sir Boyd Merriman in *Cottle* v. *Cottle*, [1939] 2 All E.R. 535, 540, throws in an adverb for good measure, by saying that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." This phraseology is attributed to user by Hewart, L.C.J., "by no means for the first time," in *R.* v. *Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

Shakespearian Note.—Judges are not, for the most part, keen movie-goers, and MacGregor, J., at a late stage of his judicial career confessed that he had never been inside a cinema theatre. On the other hand, Scriblex remembers sitting close to Myers, C.J., at a showing of "Disraeli" and being impressed by his obvious relish in the film, particularly in the scene where the great politician spends several millions with careless abandon on the purchase of Suez Canal shares. The other night, when he had the pleasure of appearing behind, not before, an unofficial Court of Appeal (Kennedy, Callan, and Finlay, JJ.) which was giving rapt attention to Lawrence Olivier's production of "Henry V." Scriblex could not help thinking of the story told of Baron Martin who, when on circuit with a brother Judge, admitted that *he had read nothing written by* Shakespeare. His colleague who was never without his Shakespeare, lent him the plays, recommending in particular "Romeo and Juliet" as a starting point. Martin took the book and went to bed. One being asked next morning what he thought of it, he observed, with impatience, "I don't believe a word of it!"

Women Barristers.—As an inveterate reader of gossip columns, Scriblex *could not* fail to notice that "Melbourne's leading divorce lawyer, wife of a doctor and a young grandmother" was to visit New Zealand at the end of the year. This information recalled a paragraph which Mr. James Agate, the most entertaining of modern diarists, once cut out of his daily newspaper. It read as follows:—

> A young Indian seaman refused to be cross-examined by a woman barrister at Liverpool Assizes yesterday. "Mind your own business, I go by boy. I no talk to girls," he said. The barrister tried again, but the Indian would not answer her questions, persisting that he "did not talk to girls." "You are a good boy," said Mr. Justice Singleton, "but this lady is a good girl. You must answer her questions." "Oh! she good girl," said the Indian. "Very well, I answer questions."

The Indian, says Agate, was right the first time. The woman barrister, in his view, looks and is ridiculous, and has been so since Portia. Neither should the sex sit on juries, he adds, since no woman will believe that a witness wearing the wrong clothes can be giving the right evidence.

Women Witnesses.—It is generally conceded that the observation of women is keener and more accurate than that of men, who are inclined to draw inferences from what they have seen and to confuse what they surmise must have happened with what they actually saw happening. Women usually relate what they saw: but, on the other hand, in the opinion of Strachan, in his *Bench and Bar of England*, their evidence is reliable only so long as their passions are not involved. "When love of their husband or children enters into the question, not a word they utter can be trusted: they have no conscience." Although the average practitioner might well regard such a statement as far too sweeping, that well-known advocate, the late Sir Edward Marshall Hall, K.C., was wont to contend that a woman giving evidence against her own interest regarded the truth as of secondary importance only. On one occasion, a charming female asked Grantham, J., "Is it true, Sir William, that women have less regard for the truth in the witness-box than men have"? He replied: "I should scarcely like to say that, madam. I should prefer to say that they coquet with it more."

The Adulterous Wife.—The careless, but unconcealed, raptures of this type of woman have given rise, no doubt, to that misused term "the unwritten law." If a man kill his wife, or the adulterer, in the act of adultery, it is manslaughter, says Parke, B., in *Pearson's Case*, (1835) 2 Lew. C.C. 144, provided the husband has similar inspection of the act, but only then. Summing-up to a jury in *R.* v. *Rothwell*, (1871) 12 Cox C.C. 145, Blackburn, J., told a jury that if a husband suddenly heard from his wife that she had committed adultery and, having had no idea of such a thing before, thereupon killed her, it might be manslaughter. That a confession of past adultery might have the effect of reducing murder to manslaughter was conceded in *R.* v. *Jones*, (1908) 72 J.P. 215, although the last two cases have been subsequently explained upon the basis that a sudden confession of past adultery is "equivalent to a discovery of the act itself." This convenient rule does not, however, extend to a confession to a man to whom the woman is merely engaged, or with whom she is living, nor is a mere suspicion of wife's adultery sufficient nor a confession of an intention to commit adultery. In *R.* v. *Holmes*, [1946] 1 All E.R. 524, the wife whom the appellant suspected of infidelity admitted during a heated quarrel that she had been unfaithful whereupon the husband, recently returned from war service, picked up a hammer-head and struck her with it. Alleging that he could not endure her suffering, when she fell on the ground, he strangled her with his hands until she stopped breathing. The Court of Criminal Appeal (Lord Goddard, C.J., Wrottesley and Croom-Johnston, JJ.) dismissed an appeal from the trial Judge who directed the jury that upon these undisputed facts it was not open to return a verdict of manslaughter. This decision has since been affirmed by the House of Lords.

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. Income-tax.—*Co-operative Dairy Company—Net Profits solely distributable amongst Suppliers—Whether Net Profit exempt from Income-tax.*

QUESTION: (*a*) Section 48 of the Dairy Industry Act, 1908, as amended by s. 10 of the Dairy Industry Amendment Act, 1922, defines a co-operative dairy company. It is sometimes stated that, because of this section, a dairy company to be co-operative must have more than 50 per cent. of its shareholders as supplier shareholders. It would appear that the real test is not by reference to the *number* of shareholders, wet or dry, but by the *amount* of dairy products supplied to the company by the shareholders. Would you please advise which is the true test to be applied?

(*b*) Section 78 (*ee*) of the Land and Income Tax Act, 1921, makes provision for exemption from taxation in favour of a dairy company, having for its objects the sale of milk supplied to the company by its shareholders, if and so far only as the rules of the company provide that its income shall be distributed solely amongst suppliers of milk in proportion to the quantity of milk supplied by them.

Does this mean that the whole income of a dairy company is taxable if the articles provide for payment of dividends on paid-up capital as well as a distribution to shareholders in proportion to their supply?

ANSWER: The provision referred to in the Land and Income Tax Act, 1923, has been repealed, and a new para. (*ee*) was substituted by s. 6 of the Land and Income Tax Amendment Act, 1936.

It is considered that the view expressed in the question is correct, and that the Courts would interpret the word "income," employed with reference to its distribution in para. (*ee*) (i), as net, and not gross, income. A contrary intention would render as surplusage in the section the words "if and so far" in the sub-paragraph; and if possible words in an exempting section of a revenue Act, should not be treated as surplusage: per Reed, J., in *Commissioner of Stamp Duties* v. *Schultz*, [1934] N.Z.L.R. 652, 658.

A contrary interpretation would also unduly limit the operation of the exemption, which it is submitted, should receive a benevolent interpretation, as it is the expressed object of the Legislature to encourage the dairy industry, as Part III of the Dairy Industry Act, 1908, and the cases decided thereon show.

The articles referred to in the question appear similar in this particular respect with those in such leading cases as *Brook* v. *Cambridge Co-op. Dairy Co., Ltd.*, [1923] N.Z.L.R. 602, *Johnson* v. *Eltham Co-op. Dairy Factory Co., Ltd.*, [1929] N.Z.L.R. 216, and *MacDonald* v. *Normanby Dairy Factory Co., Ltd.*, [1923] N.Z.L.R. 122, 146; and it is not to be inferred that the Legislature intended that these and similar companies were to be outside the benefit of this exemption.

X.2.

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2. Land Tax.—*Transfer of Land—Apportionment on Settlement Whether an "outgoing"—Land and Income Tax Amendment Act, 1944, s. 12.*

QUESTION: Recently, some farmer clients of ours entered into a contract to sell part of their property and one of the clauses in the contract reads as follows:—"The property shall be at the risk of the vendor until the date of possession and thereafter at the risk of the purchaser and all rates, insurance premiums and other outgoings shall be apportioned as at the date of possession."

An argument has arisen as to whether under this contract the land tax is apportionable. We contend that "other outgoings" covers land tax, but the purchasers state that this is not so.

ANSWER: Before 1944, any agreement was void so far as it altered the incidence of land tax: Land and Income Tax Act, 1923, s. 170. By s. 12 of the Amendment Act, 1944, however, the reference to land tax in s. 170 was deleted, so that there is now nothing to prevent a contract for the sale of land providing for the apportionment of land tax.

Whether the agreement of the parties is sufficiently wide to provide for apportionment may be open to doubt, on the ground that *expressio unius exclusio est alterius*. However, it would seem that the Court would construe the agreement as sufficiently wide and comprehensive to cover land tax.

A.2.

RULES AND REGULATIONS

Rural Electrical Reticulation Council (Travelling-allowance) Regulations, 1946. (Electricity Act, 1945.) No. 1946/144.

Transport (Passenger) Order, 1936, Amendment No. 2, and Transport Licensing (Passenger) Regulations, 1936, Amendment No. 7. (Transport Licensing Act, 1931.) No. 1946/145.

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Emergency Regulations Revocation Order, No. 5. (Emergency Regulations Act, 1939.) No. 1946/153.

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Metropolitan Milk Boards (Travelling-expenses) Regulations, 1946. (Milk Act, 1944.) No. 1946/155.

Share-milking Agreements Order, 1946. (Share-milking Agreements Act, 1937.) No. 1946/156.

Animals Protection (Australian Spur-winged Plover) Warrant, 1946. (Animals Protection and Game Act, 1921–22.) No. 1946/157.

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Quinnat Salmon Regulations, 1940, Amendment No. 2. (Fisheries Act, 1908.) No. 1946/160.

Fresh-water Fisheries (Southland) Regulations, 1941, Amendment No. 5. (Fisheries Act, 1908.) No. 1946/161.

Food and Drug Temporary Regulations, 1946. (Sale of Food and Drugs Act, 1908.) No. 1946/162.

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