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DAMAGES: ASSESSMENT OF INCOME-TAX.

IN this place, p. 34, *ante*, the question of the non-deduction of the Social Security charge from damages for loss of earnings was considered in the light of *Ramstad* v. *Union Steam Ship Co., Ltd.* (to be reported). We now propose to consider the question whether or not damages (in the widest sense of the word) recovered in an action, or on the compromise of an action, are assessable to income-tax. In the case of the payer of the damages, the further question arises whether he can obtain any allowance or deduction in respect of the payment. In the case of the recipient of the damages, the question is whether the payment is assessable to tax, or can be brought into computation in any way.

In many cases, the taxpayer's position will be found to depend primarily on statutory provisions contained in the Land and Income Tax Act, 1923; but in all cases there will arise the further question, which underlies most tax problems, whether the payment or receipt has a capital or revenue nature: see s. 80 (1) (*b*). It must always be borne in mind that the answer to this question is to be found by applying certain principles of law to the circumstances affecting the person assessed, be he the payer or the recipient; the circumstances of the payer may differ from those of the recipient, and a payment may be an " income " outgoing of the payer, so that he will obtain an allowance for the payment, while it is a " capital " receipt of the recipient, who will, therefore, escape liability. Thus, although the Commissioner of Taxes would no doubt wish to collect tax from one party or the other (if not from both), it does not necessarily follow that he can do so from either.

In this connection, it is convenient, before examining the legal principles to be applied in particular cases, to consider the question of evidence. Whether the issue concerns a receipt or a payment, much will turn upon the precise nature of the claim from which it results. If the damages in question are paid under a judgment in Court proceedings or by way of compromise, the nature of the claim can be ascertained from the pleadings. Where there has been no action, and the sum in question is compensation rather than damages, the field of inquiry is obviously wider, and it is often difficult to discover exactly the actual nature of the payment. The payer may have been influenced by considerations different from those affecting the recipient. On an appeal from a decision of the Commissioner of Taxes, the appellant may be able to show the true nature of the payment from his own evidence, but he may have to consider whether it is necessary to produce the other party as a witness; it will be remembered that the Commissioner has power under s. 161 to summon and examine him, if necessary. If the " tax interests " of the two parties conflict, it may be possible to arrange (with the consent of all parties) for an appeal to be made by each party, and for both appeals to be heard together.

I. Receipt of Damages.

This part of the problem almost invariably arises in the computation of trading or professional profits. The relevant New Zealand statutory provisions are contained in s. 79 (1) and s. 80 (2) of the Land and Income Tax Act, 1923. So far as is necessary for our purposes here, s. 79 (1) provides by paras. (*a*) and (*h*) as follows:

> (*a*) All profits or gains derived from any business (including any increase in the value of stock in hand at the time of the transfer or sale of the business, or on the reconstruction of a company):
>
> (*h*) Income derived from any other source whatsoever.

A sum received as damages or compensation might be assessed, or included in an assessment, in the following cases:

(i) Where it properly forms part of the profits or gains derived from a trade or profession under s. 79 (1) (*a*) of the Land and Income Tax Act, 1923, or, possibly, of a transaction falling within s. 79 (1) (*h*).

(ii) Where it is chargeable as " interest " or as an " annuity payment " under s. 79 (1) (*g*).

(iii) Where it forms part of the emoluments of an office or employment under s. 79 (2) (*b*).

The question whether damages or compensation received by a trader form part of his assessable profits is governed by the same sort of considerations as apply in the case of the trader who pays them, except that here the matter is not affected by s. 80 (2). The questions are, first, whether the transaction or event giving rise to the claim is connected with the trade or profession and forms part of it, and, secondly, whether the payment has a capital or a revenue character.

The authorities appear to justify the following general propositions:

(*a*) The fact that compensation has been calculated on the basis of profits lost will not necessarily mean that it is a revenue receipt.

(*b*) If the damages or compensation are received on account of the trader having been deprived of the opportunity of carrying on business, they will be capital receipts.

(*c*) If the damages or compensation merely stand in the place of payments which would have been revenue receipts, they are themselves revenue receipts.

A good example of propositions (*a*) and (*b*) is *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Commissioners*, (1922) 12 Tax Cas. 427. The company worked fireclay on land adjoining a railway. They were interdicted, at the suit of the railway, from working part of the land, and later the railway, acting under statutory powers, required them not to work clay on the land concerned, on payment of compensation. The case concerned the compensation so received, and a further sum received as damages for wrongous interdict. Both were held to be capital receipts for the fireclay company. In the House of Lords, Lord Buckmaster said, at pp. 463, 464 :

> the sum of money is the sum paid to prevent the Fireclay Company obtaining the full benefit of the capital value of that part of the mines which they are prevented from working by the Railway Company. It appears to me to make no difference whether it be regarded as a sale of the asset out and out, or whether it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the capital asset of the company to that extent has been sterilized and destroyed . . . It is unsound to consider the fact that the measure, adopted for the purpose of seeing what the total amount should be, was based on considering what are the profits that would have been earned . . . there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at.

An example of the third proposition is *Ensign Shipping Co., Ltd.* v. *Inland Revenue Commissioners*, (1928) 12 Tax Cas. 1169. The company had two ships ready to sail with cargoes of coal ; they were detained in port for a period, by order of the Government (in consequence of a coal strike), and the company received £1,078 compensation. It was held (distinguishing the *Glenboig* case) that the compensation was a revenue receipt, to be included in computing the profits. In the course of his judgment, Rowlatt, J., said, at pp. 1175, 1176 :

> Now it is quite clear that if a source of income is destroyed by the exercise of the paramount right I have described, and compensation is paid for it . . . that is not income, although the amount of the compensation is the same sum as the total of the income that has been lost . . . Here these ships . . . could not sail for a certain number of days, and in lieu of the value of the use which they would have been to their owners . . . this money was paid . . . I think I ought to regard this sum . . . as a sum paid which to the shipowners stands in lieu of the receipts of the ship during the time of the interruption.

In accordance with these principles, payments for the cancellation or determination of a contract entered into in the ordinary course of trade will normally be revenue receipts—*e.g.*, compensation received by a shipbuilder for cancellation of an order for a ship : *Short Bros., Ltd.* v. *Inland Revenue Commissioners*, (1927) 12 Tax Cas. 955 ; or damages for late delivery of a ship from ship repairers : *Burmah Steam Ship Co., Ltd.* v. *Inland Revenue Commissioners*, (1930) 16 Tax Cas. 67.

In cases founded on a contract, it is usually fairly simple to decide whether the contract was of a capital or of a revenue nature. In cases of tort, it is often useful to consider whether the injury in respect of which damages are received affects the fixed or circulating capital of the business. Thus, damages recovered for negligently destroying a motor-vehicle would be a capital receipt in the hands of a greengrocer whose van was destroyed, but would be a revenue receipt in the hands of a motor-dealer if the van was part of his stock in trade. Another useful test is to see whether, to use the language of the Lord President (Lord Clyde), at pp. 71, 72, 73, in the *Burmah Steam Ship Co.* case, the damages recovered go to fill a hole in the profits or go to fill a hole in the capital. Whatever test is applied, each case has to be considered on its merits, in relation to the trade carried on and the nature of the event giving rise to the payment.

The only New Zealand decision that appears to touch the distinction between damages received as a revenue payment and damages received as a recompense for loss of profit is a recent judgment in the Magistrates' Court, *Matakana Afforestation, Ltd.* v. *Commissioner of Taxes*, (1949) 6 M.C.D. 221. The facts in that case were that, by an agreement, dated January 26, 1943, the company agreed to sell all the timber growing, standing, or being upon an area of 500 acres, part of the land owned by the company. This agreement was for a term of ten years from January 1, 1943. The purchaser fell into arrears with the terms of this agreement, and the demands made on him by the company were compromised by an agreement whereunder the purchaser agreed to pay to the company the sum of £8,250 in respect of his prior breaches, the sum of £3,250 being based on the estimated value of the excess increase of wood content of the growing trees up to December 31, 1947, over the increase which would have accrued to the purchaser had there been no default ; and the sum of £5,000 was a compromise, based on the estimated value of the excess increase in such wood content from December 31, 1947, to the date of the expiration of the agreement over the increase which would have accrued to the purchaser had there been no default. The sum of £1,250 was payable on or before December 31, 1947, and the balance by equal quarterly payments. It was common ground that all sums payable under the original agreement were assessable income. In the company's income year ending March 28, 1948, the sum of £1,250, on account of the sum of £8,250, was paid by the purchaser, but was not included by the company in its income for that income year. The Commissioner of Taxes, however, included that amount in the company's income, and assessed income-tax and Social Security charge thereon. The company objected to the assessment of any part of the £8,250 as assessable income ; but the Commissioner disallowed such objection. The company appealed.

After reviewing the two lines of authority defining respectively what are revenue payments and what may be classed as payments in the nature of capital, Mr. H. Jenner Wily, S.M., said that the test to be applied to any payment is not the method of calculating the payment, or the actual method of payment (by lump sum or instalments) ; and the fact that the payment is in settlement of damages for breach of contract is not in itself relevant. On the facts, the substantial nature of the payment showed that it was received by the appellant company in the ordinary course of its business as a recompense for loss of profit ; and, accordingly, it was part of the company's revenue. The company was, therefore, liable for income-tax on the whole of the sum of £8,250 under the provisions of

s. 79 (1) (*a*) (and possibly of s. 79 (1) (*f*)) of the Land and Income Tax Act, 1923. The Commissioner's assessment of income-tax and Social Security charge on the sum of £1,250 received in the income year as part of the sum of £8,250 was correct. The judgment reviews most of the authorities, and forms a good stepping-off point for anyone concerned with the problem of distinguishing capital from revenue payments in relation to an award of damages or a compromise of an action for damages.

II. Deduction of Damages.

Section 80 (2) provides as follows :

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

Rule 3 of Cases I and II of Schedule D of the Income Tax Act, 1918 (Gt. Brit.), is as follows :

> In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—
>
> (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation ;
>
> (*b*) any loss not connected with or arising out of the trade, profession, employment, or vocation.

It is pointed out in the judgment of the Court of Appeal in *Ward and Co., Ltd.* v. *Commissioner of Taxes*, [1921] N.Z.L.R. 934, 940, that the New Zealand provision ("in the production of the assessable income") is narrower than the English one ("for the purposes of such trade"). Expenditure which would be disallowed under the latter would almost certainly be disallowed under the former ; but expenditure which might be allowed in England might be disallowed in New Zealand.

New Zealand is singularly lacking in authoritative decisions regarding the assessment to tax of damages, either in respect of the payer or in respect of the recipient. Most of our authorities are necessarily founded on r. 3 of Cases I and II of Schedule D of the Income Tax Act, 1918 (Gt. Brit.) (*9 Halsbury's Complete Statutes of England*, 424, 563).

The leading case on the interpretation of the English provisions, as set out above, is *Strong and Co., of Romsey, Ltd.* v. *Woodifield*, [1906] A.C. 448. The appellants there were brewers, and owned licensed premises at which they carried on business as innkeepers. A visitor staying at one of these houses was injured by a falling chimney, and the appellants had to pay £1,490 damages and costs in respect of his injuries. It was held that such damages and costs were not an admissible deduction in computing the appellants' taxable profits. In the House of Lords, Lord Davey, who considered the deduction claimed was excluded by r. 3 (*a*), said, at p. 453 :

> I think that the payment of these damages was not money expended "for the purpose of the trade." These words . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade . . . It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

Lord Loreburn, L.C., founded his judgment on r. 3 (*e*). On the meaning of this rule, he said, at pp. 452, 453 :

> It does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction . . . I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader . . . To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted . . . In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders, but of householders.

In considering the application of s. 80 (2) of the Land and Income Tax Act 1923 one has, therefore, to look at the transaction or event giving rise to the claim for damages, and decide whether it has that exclusive connection with the income derived by the taxpayer during the income year which the statute requires : see *National Coke and Manufacturing Co.* v. *Minister of National Revenue*, [1944] A.C. 126, 133, *Smith's Potato Crisps (1929), Ltd.* v. *Inland Revenue Commissioners*, [1948] A.C. 508 ; [1948] 2 All E.R. 367, *Inland Revenue Commissioners* v. *Reid's Trustees*, [1949] 1 All E.R. 354, and *Kemball* v. *Commissioner of Taxes*, [1932] N.Z.L.R. 1305. It is not sufficient that it was incurred in the course of carrying on a trade or profession. It must relate, not generally to the taxpayer's business or profession, but exclusively to the income on which he is being taxed.

It is clear from Lord Loreburn's dictum that, to be allowable, the obligation to make the payment must fall on the trader in his capacity as trader or professional man, and not in some other capacity. For this reason, payments of penalties to the Crown for breach of statutory obligations or (*semble*) for the taxpayer's own wrongful acts, for example, his personal negligence, are not allowable, except perhaps in the most exceptional circumstances : they fall on the trader as a subject, and not as a trader : *Inland Revenue Commissioners* v. *Warnes and Co., Ltd.* [1919] 2 K.B. 444. For the same reason, in *Fairrie* v. *Hall* (*Inspector of Taxes*), [1947] 2 All E.R. 141, the Court disallowed a deduction claimed in respect of damages and costs incurred in a libel action, as the loss fell upon the trader in his capacity as an individual. In that case, the loss was in some measure connected with the trade (the libel was on a trade competitor), but the appellant was found to have been actuated by malice. In that case, *Macnaghten*, J., added a new reason for his decision (the interests of the public revenue), when, at p. 143, he said :

> the loss which the taxpayer has sustained—£550 damages and £3,025 costs—is in one sense a loss connected with his trade, but the case falls, it seems to me, exactly within the words of *Lord Loreburn*, L.C., when he said that the losses : "cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader." The loss fell on the taxpayer in the character of a calumniator of a rival sugar broker. It was only remotely connected with his trade as a sugar broker. The case seems to me to be plain beyond all possible doubt, and, bearing in mind that at that date the standard rate of income-tax was 10s. in the £, it would, indeed, be preposterous if the taxpayer were allowed to deduct these sums from his assessment and were thus enabled to share equally with the public revenue the loss to which he was condemned by the judgment of *Atkinson*, J.

III. Capital and Revenue Payments.

Once it has been determined that the allowance is not prohibited by s. 80, the further question arises

whether it is of a capital or of a revenue nature, as payments of a capital nature are not in any event allowable.

It was pointed out by their Lordships of the Judicial Committee of the Privy Council in *Ward and Co., Ltd.* v. *Commissioner of Taxes*, (1922) N.Z.P.C.C. 625, 628, that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing where such difference exists. Nevertheless, in New Zealand, decisions of the English, Scottish, and Australian Courts are relevant as regards capital expenditure: *Kemball* v. *Commissioner of Taxes*, [1932] N.Z.L.R. 1305, and *Ward and Co., Ltd.* v. *Commissioner of Taxes*, [1923] A.C. 145. For the test of capital expenditure, see *Shaw and Baker on Income Tax*, 193, *British Insulated and Helsby Cables, Ltd.* v. *Atherton*, [1926] A.C. 205, *W. Nevill and Co., Ltd.* v. *Federal Commissioner of Taxation*, (1937) 56 C.L.R. 290, and *Ounsworth* v. *Vickers, Ltd.*, [1915] 3 K.B. 267. Thus, where the expenditure was in the nature of "capital" expenditure, or, in the words of the statute, "money used or intended to be used as capital," the deduction is expressly prohibited by s. 80 (1) (*b*) of the Land and Income Tax Act, 1923. Sir Michael Myers, C.J., in delivering the judgment of the Court of Appeal in *Kemball* v. *Commissioner of Taxes*, [1932] N.Z.L.R. 1305, 1308, said: "On this point the English and Scottish authorities are relevant."

In *Timaru Herald Co., Ltd.* v. *Commissioner of Taxes*, [1938] N.Z.L.R. 978, Sir Michael Myers, C.J., with whom Blair and Callan, JJ., concurred, said, at p. 1003:

> The question whether a particular item is in substance a revenue or a capital expenditure is said by *Viscount Cave*, L.C., in *British Insulated and Helsby Cables* v. *Atherton* ([1926] A.C. 205, 213), to be a question of fact which is proper to be decided by the Commissioners (in New Zealand this would be the Magistrate or the Commissioner of Taxes as the case may require, according to the procedure adopted) upon the evidence brought before them in each case; but where, as in the case which the Lord Chancellor was then considering, there is no express finding by the Commissioners upon the point, it must be determined by the Court upon the materials which are available and with due regard to the principles which have been laid down in the authorities.

It would be unwise to attempt any general definition of what is capital and what is income expenditure; for the present purpose, it is sufficient to say that, if the claim resulting in the payment arises from day-to-day trading or professional activities, the payment will probably be of an income character. Examples which might be quoted are damages for breach of, or delay in carrying out, an ordinary business contract, claims for negligence in performing such a contract, or damages for wrongful dismissal of an employee: see, as regards wrongful dismissal, the remarks of Lord Shand in *Royal Insurance Co.* v. *Watson*, [1897] A.C. 1, 9.

On the other hand, a payment will have a capital quality if the claim from which it arises affects, or is connected with, capital assets of the trade or profession, or if a capital asset is required by the payment. An example is offered by *Countess Warwick Steamship Co., Ltd.* v. *Ogg*, [1924] 2 K.B. 292. The appellant company in that case had placed a contract for the construction and purchase of a ship, but, before any substantial progress had been made, it cancelled the contract, on payment of £60,000; it was held that this sum was not allowable as a deduction in computing profits, as it was capital expenditure. The ship itself would, of course, have been a capital asset. A more recent case, in which most of the authorities are referred to, is *Doncaster Amalgamated Collieries, Ltd.* v. *Bean* (*Inspector of Taxes*), [1946] 1 All E.R. 642.

SUMMARY OF RECENT LAW.

BUILDING CONTRACTS.

The Defence of Illegality in Building Cases. *23 Australian Law Journal*, 539.

House to be erected with Special Foundation—House later sinking and settling so as to render it Uninhabitable—Builder's Responsibilities—Breach of Implied or Expressed Term or Warranty against Such Settling or Sinking of House—Builder required to build Useful and Durable House for Living-purposes—Measure of Damages. The defendant undertook to build a house for the plaintiff on a section belonging to the latter. Both parties knew that this section had been filled in, partly with sawdust, and some discussion took place between them as to the possibility of sinking or settlement taking place. It was decided to proceed with the erection of the house with a special type of foundation, called a "concrete raft." The defendant, a building contractor of ability and experience, prepared the plans and specifications for the building, and prepared and signed a contract for the erection of it. The contract had no reference to the possibility of the ground's sinking, and no provision as to whether the defendant or the plaintiff was to take the risk of such a contingency. After the house had been built, and the plaintiff had been in occupation for some months, the house showed signs of sinking. It had moved in such a way that it was evident that the concrete raft had cracked or broken, and considerable settlement had taken place. If nothing were done, the house would become uninhabitable. It was common ground that the only remedy was a foundation on what is called the "pier and beam" system, and its cost would exceed the original cost of the house. The plaintiff claimed to recover from the defendant £2,200 as the cost of the new foundation, and a further sum of £500 as representing the depreciated value of the house when so reinforced. The action was tried before a common jury, when it was decided to submit the following issues to the jury, and, on their answers being obtained, to leave all further questions, including the amount of damages, if any, to be determined by the trial Judge. The questions put to the jury, and their answers, were as follow: 1. Did the defendant undertake to erect a house for the plaintiff on foundations which would ensure that it would settle evenly and without material damage resulting? Answer: Yes. 2. Did the plaintiff agree to accept the risk of the section's being unsuitable for the house and of the damage that has occurred resulting? Answer: No; we consider that plaintiff did accept risk of slight even settlement. On a motion for judgment for the plaintiff on the jury's findings, *Held*, 1. That the view that the jury took of the facts as presented to them was that neither party expected or contemplated that there would be any settlement other than a slight and even one, and that no special provision was made or intended to provide for the serious and destructive settlement that had actually taken place. 2. That the plaintiff was entitled to rely on either an implied or an express term or warranty that there would not be sinking of such a nature as had occurred, and so to require the defendant to erect a useful and durable house fit to live in; and, as the house as built was not of that description, but was steadily deteriorating to the condition of being uninhabitable, the defendant was in default, and was liable in damages accordingly. (*Taylor* v. *Caldwell*, (1863) 3 B. & S. 826; 122 E.R. 309, and *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, followed.) (*Smith* v. *Johnson*, (1899) 15 T.L.R. 179, applied.) (*Lawrence* v. *Cassel*, [1930] 2 K.B. 83, and *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113, referred to.) 3. That the measure of damages was the difference between the contract price and the cost of making the building conform to the contract, and the disparity between the original cost of the house and the cost of putting in new foundations could not be taken into account; but there should be a deduction from the amount of the damages so estimated on account of the fact that the proposed foundation would eliminate all danger of the house's sinking, and would thereby improve the house and increase its value. (*British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Under-*

ground Electric Railways Co. of London, Ltd., [1912] A.C. 673, applied.) 4. That the plaintiff was entitled to £2,000 damages in all. *Cooke* v. *Rowe*. (S.C. New Plymouth. February 20, 1950. Stanton, J.)

CIVIL AVIATION.

Air Navigation Regulations, 1933, Amendment No. 15 (Serial No. 1950/27), adding Reg. 34A as to the reporting, investigation, and rectification of defects in any New Zealand aircraft or aircraft component, and revoking Schedule 1 of the principal Regulations and substituting a new Schedule as to the registration and marking of aircraft.

CLUB.

Negligence—Unincorporated Club—Member injured by Fall down Unlighted Steps—Liability of Committee—Liability of Steward. The plaintiff, a married woman, was a member of an unincorporated members' club, the management of which was carried on by a committee. The defendants were all members of the committee, and included the secretary and steward of the club. The steward was responsible for seeing that the club premises were generally in a fit condition for use by the members and, *inter alia*, that lights were switched on and off when and where necessary. In the early part of December, 1946, on the authority of the secretary and steward, certain alterations were carried out to the position of some steps leading from the men's quarters of the club. On December 31, 1946, the plaintiff attended a social function at the club, and remained there until 10.30 p.m., when she left with others by the exit normally used by the male members. When the plaintiff arrived outside the building, she found that the place was in darkness, and, being unaware of the newly-constructed steps, she fell down them and was injured. In a claim by the plaintiff against the defendants for damages for negligence, it was proved that there was a light suspended near the steps, but that this had been switched off by the steward at 10.10 p.m. on the night in question. *Held*, That the fact that the defendants were all members of the committee and one of them the secretary of the club imposed no duty on them towards the plaintiff, but the steward, having been appointed as such by the members, was the agent of each member to do with reasonable care all those things which he had been appointed to do, and owed a duty to each of the members to carry out his functions without negligence; on the facts, the plaintiff was entitled to use the exit from the club which she did use; and the steward, in switching off the light when he did, was guilty of negligence, and was liable in damages to the plaintiff. *Prole* v. *Allen and Others*, [1950] 1 All E.R. 476.

As to Liability of Members of a Club for Torts of Committee or Servants, see *4 Halsbury's Laws of England*, 2nd Ed. 503, para. 931; and for Cases, see *8 E. and E. Digest*, 518, 519, Nos. *89-91*.

CONSTITUTIONAL LAW.

The Changing Role of the United States Supreme Court. (Bernard Schwartz.) *28 Canadian Bar Review* 48.

The Constitution of the Indian Republic. (M. Ramaswamy.) *28 Canadian Bar Review* 1.

CONTEMPT OF COURT.

Divorce—Child—Custody—Failure to obey Order—Child sent out of Jurisdiction—Proceedings for Custody by Petitioner in Eire—Waiver—Need to purge Contempt. On the petition of the applicant's wife, a decree absolute for divorce was made against him, and he was ordered to deliver the child of the marriage to her custody. He, having previously sent the child out of the jurisdiction to his mother in Eire, failed to comply with the order, and in February, 1949, he was committed to gaol for his contempt of Court by *Finnemore*, J. Proceedings were instituted in Eire by the wife, but the High Court in Eire refused to make an order granting her custody, and the child remained in Eire. In support of the applicant's application for discharge, it was contended that he had suffered sufficiently by remaining in prison for a year, and that his wife, at whose instance he was attached, had waived her rights by taking proceedings in the Eire Court. *Held*, (i) That, although there might be cases of contempt by failure to pay money in which waiver by the person to whom the money was owed gave a right to release to the party in contempt, there could be no question of waiver where there was failure to obey an order of the Court relating to a child, and the fact that the wife had taken proceedings in Eire could not constitute a waiver. (*Best* v. *Gompertz*, (1837) 2 Y. & C. Ex. 582, distinguished.) (ii) That the only ground on which the Court would be justified in releasing the applicant would be on condition that he carried out the terms of the order of *Finnemore*, J., and that he refused to do. *Corcoran* v. *Corcoran*, [1950] 1 All E.R. 495.

As to Discharge from Custody after Committal for Contempt, see *7 Halsbury's Laws of England*, 2nd Ed. 56-58, paras. 78-82; and for Cases, see *16 E. and E. Digest*, 84-87, Nos. *1030-1071*.

CONVEYANCING.

Easements implied on Severance. *100 Law Journal*, 130.

Medical Partnerships. *100 Law Journal*, 129.

Rectification: Covenant to Pay Annuity "free of income-tax." *209 Law Times Jo.*, 23.

Redemption and the Statute of Limitations. *23 Australian Law Journal*, 537.

Will: The Perpetuity Rule and the Statutory Trusts for Next-of-kin. *209 Law Times Jo.*, 39.

COSTS.

Counsel's Fees—Fee on Appeal—Allowance of Fee less than that allowed at First Instance. In taxing the costs of an action at first instance, a Taxing Master allowed a fee of thirty guineas on the brief of counsel for the defendant. Counsel's brief on the appeal (which was by the plaintiff) was also marked thirty guineas, and the Taxing Master reduced the fee to twenty guineas. The defendant objected to the reduction, and, in overruling the objection, the Taxing Master gave as his reason: "I consider the work counsel had to do did not merit more. Counsel appeared against [the plaintiff] previously always with success and there was no expectation that she would win in the Court of Appeal." On a summons to review taxation, *Held*, That, while there were exceptions to the rule that counsel's fee should be the same in the Court of Appeal as at first instance, there was no indication in this case that the Taxing Master had found valid grounds for regarding counsel's work in the Court of Appeal as of less value than that in the Court below, and, therefore, the *prima facie* rule ought to be applied and the brief fee restored. (*Sturgis* v. *Morse* (*No. 2*), (1859) 33 L.T.O.S. 5, applied.) *Sunnucks* v. *Smith*, [1950] 1 All E.R. 550 (Ch.D.).

As to Allowance of Fees on Taxation, see *2 Halsbury's Laws of England*, 2nd Ed. 548-554, paras. 753-763; and for Cases, see *E. and E. Digest*, Practice, 932-940, Nos. *4722-4807*.

CRIMINAL LAW.

Suspected Person—Previous Convictions—Character not known to Police before Arrest—Vagrancy Act, 1824 (c. 83), s. 4. A person who is proved to have frequented or loitered about a "place" within the meaning of s. 4 of the Vagrancy Act, 1824, with intent to commit a felony and to have been previously convicted can be properly described as a "suspected person" within the section, although the Police officers who give evidence of his frequenting or loitering with that intent and who arrested him were then unaware of the previous convictions. *R.* v. *Clarke*, [1950] 1 All E.R. 546 (C.C.A.).

As to Suspected Persons, see *25 Halsbury's Laws of England*, 2nd Ed. 440-442, para. 790; and for Cases, see *37 E. and E. Digest*, 363-365, Nos. *1651-1662*, and Digest Supp.

GAMING.

Wages and Collateral Contracts. (H. A. J. Ford.) *23 Australian Law Journal*, 528.

INDUSTRIAL RELATIONS.

Practical Aspects of Collective Bargaining. (Industrial Relations and Disputes Investigation Act, 1948 (Can.).) (N. L. Mathews.) *28 Canadian Bar Review*, 30.

JUDICIAL CHANGES.

Mr. Justice Fullagar of the Supreme Court of Victoria has been appointed a Justice of the High Court of Australia, to fill the vacancy caused by the retirement of Mr. Justice Starke.

LAW PRACTITIONERS.

Some Things a Lawyer has Learned. (A. N. Carter.) *28 Canadian Bar Review*, 62.

PRACTICE.

Service—Service out of Jurisdiction—Action for Account and Payment of Commission—Breach of Contract committed within the Jurisdiction—English Company acting as American Company's Agents in Europe—Commission payable in England—Duty to render Account in England—Prima facie *Case—R.S.C., Ord. 11, r. 1* (e) (*Cf. Code of Civil Procedure* (*N.Z.*), *R. 43*). An English company applied under R.S.C., Ord. 11, r. 1 (*e*), to serve a writ of summons out of the jurisdiction on an American company in an action claiming (*inter alia*) (*a*) an account of all sales

made by the American company to purchasers in Europe between November, 1941, and May, 1948, and (*b*) payment of commission on such sales. Affidavits, sworn on behalf of the English company by one of its directors, alleged that in November, 1941, a contract was made in the United States of America between the two companies whereby the English company was to be the sole agent of the American company in England and the other countries of Europe and the American company agreed to pay to the English company a commission of 15 per cent. on all products of the American company (with certain exceptions) sold in Europe; that the English company had from time to time claimed commission on the products sold by the American company in Europe; and that the American company had failed to make the payments and to submit any accounts. None of these allegations had been denied by the American company, who resisted the application for service out of the jurisdiction. It was contended by the English company that the commission was payable in England, and, therefore, there had been a breach of the contract within the jurisdiction of the Court. In the statement of claim, the contract to pay commission was limited to commission on products of the American company sold in Europe in consequence of introductions effected, or work done, by the English company on behalf of the American company. *Held*, (i) That, if the affidavits on behalf of the English company showed a *prima facie* case, it was immaterial and showed no lack of good faith that the contract alleged in the statement of claim was more restricted than the contract alleged in the affidavits, and was limited to payment of commission on products sold in consequence of work done by the English company. (ii) That the inference on the material before the Court was that the alleged contract was one under which (*a*) it was the duty of the American company to account to the English company in England, and (*b*) commission became payable in England, as by English law—and, for this purpose, it was to be assumed that American law was the same in such circumstances—it was the duty of the debtor to seek out his creditor and pay him at his place of business or where he would be found; and, therefore, the English company had made out a *prima facie* case, within R.S.C., Ord. 11, r. 1 (*e*). (iii) That the fact that one of the remedies sought was an account did not preclude the English company from obtaining an order for service out of the jurisdiction. (*Hoerler* v. *Hanover Caoutchouc, Gutta Percha and Telegraph Works*, (1893) 10 T.L.R. 103, applied.) *International Corporation, Ltd.* v. *Besser Manufacturing Co.*, [1950] 1 All E.R. 355 (C.A.).

As to Service out of the Jurisdiction, see *26 Halsbury's Laws of England*, 2nd Ed. 31-35, paras. 44-50; and for Cases, see *E. and E. Digest*, Practice, 344-351, Nos. *610-666*.

PROBATE AND ADMINISTRATION.

The Court of Probate as a Court of Construction. *93 Solicitors Journal*, 751.

ROAD TRAFFIC.

Vehicle driven in Reverse—No Regulation affecting Conduct of Driver in Reverse—Negligence—Duty on Driver of Vehicle proceeding backwards across Intersection—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 14 (1) (2)—Damages—Award—Assessment of Ten per cent. for Injured Person's Responsibility for Accident—Some Material for Jury—Verdict not Unreasonable or Perverse—Plaintiff's Loss speculative, but a Definite Loss—Award of Damages not disturbed as Excessive. Regulation 14 (1) and (2) of the Traffic Regulations, 1936, which should be read as referring to the left or near side of a vehicle proceeding forwards, contains no specific provisions regulating the conduct of a person driving a vehicle in reverse. When a motor-vehicle is driven backwards across an intersection, a very high duty rests upon the person in charge of the vehicle to see that the way is clear and that a situation of danger is not created. (*M'Knight* v. *General Motor Carrying Co.*, [1936] S.C. (Ct. of Sess.) 17, followed.) Where there is some material on which a jury could arrive at an assessment of the deceased's responsibility for the damage at 10 per cent., its verdict cannot be held to be wholly unreasonable or perverse. (*Petrie* v. *Frank M. Winstone (Merchants), Ltd.*, [1949] N.Z.L.R. 886, applied.) Where the amount of loss in an action under the Deaths by Accidents Compensation Act, 1908, is somewhat speculative, but there definitely is a loss, it is impossible to say that the award of damages is excessive in that there is no reasonable proportion between the loss sustained and the amount awarded. (*Taff Vale Railway Co.* v. *Jenkins*, [1913] A.C. 1, followed.) *White* v. *Tip Top Ice Cream Co. (Wellington), Ltd.* (S.C. New Plymouth. February 20, 1950. Stanton, J.)

SHARE-MILKING AGREEMENTS.

Private Agreement between Employer and Share-milker—Provision therein for Share-milker to contribute towards Expense of using Tractor—"Motor-lorry" not including Tractor—Such Provision operating less favourably to Share-milker than Terms of Order—Provision void—Share-milking Agreements Act, 1937, s. 3 (2)—Share-milking Agreements Order, 1946 (Serial No. 1946/156), cls. 10, 11. The provision of a tractor (which is not included in the term "motor-lorry" in cl. 10) is, under the Share-milking Agreements Order, 1946, the sole concern of the employer; and, under cl. 11, he alone, if he provides one, must bear the whole cost of its use. (*Handley* v. *Wishnowsky*, [1941] N.Z.L.R. 390, applied.) (*Perry* v. *Gardiner*, [1948] N.Z.L.R. 295, distinguished.) Consequently, a term in a private contract between the employer and the share-milker that the latter was liable to pay a contribution to the expense and loss involved in the use of a tractor is less beneficial to the share-milker in a financial sense than the relative terms of the Order; and it is, consequently, null and void by virtue of s. 3 (2) of the Share-milking Agreements Act, 1937. *Montague* v. *Wood*. (S.C. Hamilton. January 17, 1950. Finlay, J.)

SOVIET LAW.

A Glance at Soviet Law. (Dr. R. Schlesinger.) *65 Law Quarterly Review*, 504.

STATUTE.

Retrospective Effect—Statute coming into Force after Hearing of Action, but before Judgment—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 10. The Landlord and Tenant (Rent Control) Act, 1949, s. 9, provides, *inter alia*, that, where the tenant of any premises, being a house or part of a house, has sublet a part of the premises, then, as against his landlord, no part of the premises shall be treated as not being a dwellinghouse to which the Rent Restrictions Acts, 1920 to 1939, apply by reason only that the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons. Section 10 provides: "The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period." On February 21, 1949, the landlord issued a plaint claiming possession of a dwellinghouse to which the Rent Restrictions Acts applied. By an amendment made on May 6, 1949, the landlord alleged that the house was no longer a separate dwellinghouse because the tenant shared the kitchen with subtenants to whom part of the premises were let. On May 31, 1949, the hearing was concluded and judgment was reserved. On June 2, 1949, the Act of 1949 came into operation. On July 7, 1949, following a letter written by counsel for the tenant to the Registrar referring to the possible application of the Act of 1949, the parties appeared before the County Court Judge, when counsel for the landlord successfully resisted the suggestion that there should be further argument. On August 4, 1949, the County Court Judge gave judgment for the landlord, on the ground that the tenant shared the kitchen, and so was not protected. On appeal by the tenant, *Held*, That the hearing on May 31, when judgment was reserved, was not "anything done" within s. 10; there was not "anything done" within the section until the order was made; and, therefore, s. 9 applied, and the order of the County Court Judge should be set aside. (*Hutchinson* v. *Jauncey*, [1950] 1 All E.R. 165, applied.) *Jonas* v. *Rosenberg*, [1950] 1 All E.R. 296 (C.A.).

As to the Retrospective Effect of Statutes, see *31 Halsbury's Laws of England*, 2nd Ed. 513-517, paras. 670-672; and for Cases, see *32 E. and E. Digest, 701, 707*, Nos. *1169-1249*.

As to Separate Dwellings, see *20 Halsbury's Laws of England*, 2nd Ed. 312-316, paras. 368-373; and for Cases, see *31 E. and E. Digest*, 557, Nos. *7044-7048*.

WILL.

Charity—Gift in Trust to Navy League Sea Cadets or any other Youth Welfare Organization—Gift to "any other youth welfare organization" Void for Uncertainty—Effect—Property Law Act, 1928 (No. 3754), s. 131. A testator bequeathed in trust to trustees the income from certain property "for the Navy League Sea Cadets Geelong Branch or any other youth welfare organization male or female as in their wisdom they deem fit." *Held*, That the gift to the Navy League Sea Cadets was a charitable gift, but that the gift to "any other youth welfare organization" was void for uncertainty; the former gift was, and the latter gift was not, saved by s. 131 of the Property Law Act, 1928. *In re Belcher (deceased)*, [1950] V.L.R. 11.

PROFESSIONAL STANDARDS.

By The Right Hon. Sir JOHN LATHAM, Chief Justice of Australia.*

I am glad to be again giving a lecture to law students. For many years I did it, and it was one of the means I had of learning law. A good way to learn a subject is to have to teach it. You really have to learn something about it, as your audience is of average intelligence, and my audiences were, especially after my training, of more than average intelligence. I am glad to have another opportunity of addressing the law students of the University of Melbourne.

The subject which I have chosen is entitled "'Professional Standards." Before descending into some detail, I would like to say something which you may regard as obvious enough, but which is, nevertheless, I suggest, of some importance, upon the significance of law in society and upon the general importance to the community of the maintenance of professional standards in law.

LAW IN THE MODERN WORLD.

In the first place, although law is by no means the whole of civilization, the existence of law is a condition of there being any civilization. Without law there can be no civilized society in the sense of a body of men and women between whom definable and coherent relations exist.

Law in the modern world is much more than a series of commands directing people to do this or not to do that. Austin looked upon law as directed to prescribing or prohibiting certain actions or abstinences from action. Much of the law which we see to-day is concerned with the organization of the community for the purpose of attaining certain objectives, and a great deal of this law never comes into the Courts at all, or, if it does, very seldom.

Consider some important branches of law of which the practising lawyer sees hardly anything, such as the legislation dealing with education, which is very important to the community, but which does not become a subject-matter of litigation or for advice to a client. Consider the law relating to land settlement, which is one of the most important large bodies of law in Australia. It is very seldom indeed that that law, administered by the Lands Department, comes into the Courts or becomes a subject-matter for advice by a professional man. As a third example, consider the law relating to old age pensions, of the greatest importance to a very large section—indeed, to the whole—of the community. I am not aware that there has ever been a case in the Courts with respect to the Old Age Pensions Act. I turned up the Digest to see if there had been such a case. I was unable to remember one, and I did not find one.

Now, law in that sense is concerned with the organization of a community in certain definite respects, and with that law the professional practising lawyer has very little to do. The law with respect to which he advises and the law with respect to which there may be a controversy in the Court is law of a different nature, and it is more particularly in relation to this law that I say that the existence of a body of law and of competent and reliable tribunals for the administration of law is a pre-condition of the possibility of civilization.

As long as disputes between individuals, or between individuals and the Government, are settled by private violence, then the rule is in the hands of the strong, of the bully, of the ruffian. It is only when a community has sufficient sense, and sufficient sense of responsibility, to entrust the settlement of its disputes to an impartial third person or impartial tribunal that civilization has a chance of existing. If a community allows disputes which affect the interests of the community to be determined by physical or economic violence, then that community is driving towards anarchy.

Law administered in the Courts provides the means of excluding what I have called private violence as a means of settling disputes. Unless the law is efficiently and fairly administered, the contents of the Statute Book matter but little. You can read in the constitutions of quite a number of States in Europe very fine provisions preserving this principle and that right and that freedom. They are there, written in black and white into the constitutions of the countries. But these provisions do not matter at all, because either no means has been adopted in the law to give effect to them or they are not administered by impartial and independent tribunals.

Tribunals cannot be efficient and competent unless they hear both sides. They cannot be fair unless they hear both sides. Few people have the capacity to put their own cases, and a skilled legal profession is a necessity if both sides are to be effectively presented to a tribunal. Accordingly, the standards which are observed by the Bench and by practising lawyers are of fundamental importance to the well-being of society. The standard of the legal profession is a matter of the standard of the Bench as well as of the several branches of the profession.

ONE STANDARD OF CHARACTER.

You, the students of this year, will be told that in a profession there is only one standard of service, and that is the best. The surgeon, when he performs an operation, performs the operation according to his highest standard of skill, whether he is operating for nothing or for a large fee. In exactly the same way, the lawyer in every case gives his best service, whether the fee be large or small, and the only standard of service is the best.

So also there is only one standard of character—the highest standard of integrity and honesty. There can be few greater curses in a community than dishonest lawyers. The lawyer is trained in subtlety of thought and in speaking, and, if he is skilled, possesses a power of persuasion. If lawyers are dishonest, they can do an almost immeasurable amount of harm. The only standard in our profession is the highest, I repeat, in honesty and integrity.

Accordingly, a lawyer should never lend his ability to the service of dishonesty, and no practitioner should promote a cause which he knows to be dishonest.

* An address to the law students of the University of Melbourne.

Abuse of legal proceedings may do very grave harm. In some Oriental countries, if A hates B and desires to injure him, one recognized method is to involve him in a lawsuit. You will find this in India, you will find it in China, you will find it throughout the East, and they are experts at it in Abyssinia: if you can only make the proceedings long enough, you may ruin your opponent, and that is frequently done.

The Chinese in Melbourne used to do it. In the days when there was a large population of Chinese here, we had a Police Magistrate, Mr. J. M. Panton. He knew all the Chinese, and, if one Chinese had a quarrel with another, he would sue him for, let us say, £40 money lent. The complainant would bring along eight or nine men, who would all swear that they were there when the money was lent. The defendant knew far better than to deny this quite convincing evidence, given with full detail and with every sign of sincerity. He would call ten or twelve witnesses to prove that they saw him pay it back. All the witnesses were lying in most cases, but Mr. Panton knew all the persons concerned, parties and witnesses, and in some cases he would think there was something in it, and would decide in favour of the man who on this occasion appeared to be honest, and he would make up his mind on the knowledge that he had of the parties. Of course, if one looked at such a case as through a transcript, darkly, in the High Court I do not know where we would get. I have always remembered what I learned about Mr. Panton in considering whether, on a paper presentation, one ought to differ from the primary Judge in relation to believing or disbelieving any witnesses. Many of Mr. Panton's cases would have been impossible to support on a transcript, and yet the decisions were perfectly right.

I add to what I have said about abuse of legal process only that, in our community, such abuse is limited by the control exercised by the Courts over what takes place in the Courts. We find, I think I can say, very few instances where proceedings in Australia are merely malicious. Also, there is the very useful principle that, generally speaking, the loser pays costs, and that is a great safeguard against what one might call illegitimate litigation. That is a matter which will have to be considered in connection with the extension which is almost bound to take place, and in some directions ought to take place, in schemes of assistance to poor persons or to persons of moderate means. A person of moderate means will hesitate a long time before he embarks on litigation at least in a superior Court, but the remedy is not to be found in a general licence to everybody to litigate without risk. The power to award costs, if it existed in all jurisdictions, especially in some of the not exactly legal jurisdictions, in a strict sense, would prevent a great many applications being made which are sometimes made merely for purposes of publicity.

A Lawyer's First Duty.

The first duty of a professional man, presuming that he has the proper ideas as to the objective at which he is to aim, is to make himself fully competent in his work, and for a lawyer to make himself fully competent is a rather extensive task.

I have found in my life that hardly anything that I have ever learned, whether at school or at the University or in various vocations after I left the University, has not been of use to me on some occasion in the law. I advise you to read generally, not to limit yourself to legal works, but to interest yourselves in general literature, and—this is a very simple suggestion—when you find something that you do not understand, that does not succeed in conveying itself to you, if you have the time, look it up and find out about it.

The fundamental difference between a profession and a trade—both quite honourable—is that, in the case of a profession, the clients or the patients have to rely on the knowledge, the skill, and the experience of the professional man, and that they have no means of themselves determining, speaking generally, whether what he is giving them is good or bad. If one buys a pair of boots or a pound of chops or some fish, or, if you are wealthy, and can buy a suit of clothes, you have some chance of determining the quality as well as the quantity of what you are buying. Of course, if you buy a horse or a motor-car, you take your life in your hands, because *caveat emptor* is a motto which has been developed from horse-dealing and has now gone on to motor-car-dealing; but you are supposed to be able to look after yourself in transactions of that kind.

The person who employs a lawyer or a doctor cannot look after himself. He has to rely, as I say, upon the knowledge, the skill, the experience, and the good faith of the man who is advising him, and that means that there is a higher degree of responsibility in the case of the professional man than in the case of the trader.

Work in the Office.

It seems to me that, in relation to the law as viewed from the outside, far too much attention is concentrated on work in the Courts and particularly in the criminal Courts. Work in the criminal Courts has what is called human interest—that is to say, it deals with crime and disaster and misfortune and distress and suffering of one kind and another—and that is what, in this enlightened age, we call human interest. There is no news in anybody being happy, but there is a great deal of news if people are only sufficiently miserable and wretched. So work in the criminal Courts has human interest. When you read books written by journalists on the law, you would think that the law consists of a series of exciting murder cases, one after the other. Of course, it is nothing of the kind. By far the greatest proportion of legal work is done in solicitors' offices; by far the greatest proportion of the work of lawyers is not concerned with litigation in the Courts. It is concerned with land transactions, agreements of one kind and another, taxation matters, company law, probate, and the like, and that is the main body of the law as practised in our community.

May I say, having mentioned this part of the work of a solicitor, that I am very glad indeed that at last students are being given some instruction in accountancy and taxation. I am not thinking merely of the inroads that have been made upon what we regard as the legitimate province of the profession in relation to these matters. I am thinking of the competence of the profession itself. Every lawyer, whether he be a barrister or a solicitor, ought to be able to understand ordinary accounts. He ought to know why it is, for example, that the figures in an account somehow or other add up to the same total on the debit and credit side. He ought to be able to understand a profit-and-loss account and a balance sheet, because he is advising people who live with these things and who do know all about them.

Then, secondly, as to taxation. We are now seeing taxation laws in their fine and full flower. No man will go into an enterprise of any magnitude, if he is wise, without considering the possible effect upon his taxation, and his legal adviser ought to be in a position to advise him as to the effect of any proposal in relation to taxation.

Interviewing Witnesses.

I have been interested to read what has been sent to me in the way of reports of addresses given by members of the Bench and members of the Bar in this course upon previous occasions. I was particularly interested in the divergent views presented by Mr. Justice Dean and Mr. Sholl, K.C., with respect to the interviewing of witnesses who are to be called in a case. Mr. Sholl was of opinion that the English rule ought to be in substance followed, and that counsel—that is, the barrister—should see only the parties in the case and experts, and not other witnesses. Mr. Justice Dean, on the other hand, took the view that there was no sound objection to the practice which at present obtains in Victoria, and elsewhere than in Victoria, in accordance with which the barrister does see witnesses.

Mr. Justice Hilbery in his recent address on "Duty and Art in Advocacy" states the rule applied in England:

> The facts will be put before the barrister in his instructions and in the proofs of the witnesses. These witnesses will have been interviewed by the solicitor, whose duty it is to collect the appropriate evidence. Now the barrister must not see the witnesses of fact other than the plaintiff or the defendant himself for whom he is appearing or the expert witnesses, on matters which are technical or scientific and upon which the barrister may wish to obtain direct instructions. The reason for this is that a man skilled in law and experienced in Court work may know just the little difference in the evidence which would make it suffice for success. If he sees and talks to the witnesses, he may inadvertently—or, if he is unscrupulous, designedly—suggest to the witnesses what their evidence ought to be if the cause is to be won. The experience of lawyers is that litigants and witnesses are very liable, if this happens, to alter their accounts of the facts to suit the requirements of the law. The result may be that the Court is deceived and an injustice is done. In criminal cases, this rule is doubly important. The witnesses are likely to be associates of the prisoner, and are often unscrupulous and disreputable people, ready to swear anything which may result in an acquittal, and the temptation for them is the greater, because more is at stake for the accused than mere money. It may even be a matter of his life or death. Not only, therefore, is the barrister required not to see the witnesses, but, above all, he must remember, if he is defending, that it is not for him to provide or devise a line of defence for the accused. His duty is to receive the accused's story from him and to do with it the best he can.

That is a full statement of the rule as applied in England. It appears to me that there is room for comment upon these rules, which will show that not a very great deal is to be said in favour of them.

In the first place, the dangers which the rule is designed to avoid are that evidence may be perverted or manufactured or coloured. But the barrister is allowed to see the client, his own client, and it is the client who is more concerned than anybody else in the success or failure of the litigation. If the barrister is prepared to act dishonestly, he has a good chance of so acting with his client, who is often his most important witness.

Further, the rule as administered in England allows the barrister to see experts. It may be that experts are beyond the suggestion of the colouring of evidence, although I have not generally heard that view put, and, if the barrister is to see experts, he still has an opportunity of colouring his case. From a practical point of view (take a patent case), a barrister in some cases must see experts if he is to know the first thing about it.

Then the English rule permits the solicitor to see all the witnesses. The solicitor may be as good a man as the barrister, or as bad a man, and I do not see that the evils which the English rule is designed to avoid are excluded by preventing the barrister from seeing the witnesses and allowing the solicitor to work his will upon them.

I do not know whether many here have read a book, *Howe and Hummel*, recently published, describing the exploits of a pair of wonderful rascals in New York from the '60's up to the early 1900's. They prepared their witnesses thoroughly, and they dressed them in the appropriate manner. They told them when to laugh and when to cry, and they applied the rule which the Courts themselves apply—namely, what is wanted is the best evidence—and Howe and Hummel always supplied the best evidence. They would have, as required, a mother with a baby, or a deceived maiden, or some other witnesses who would appeal to the sympathies of the jury, and, under the English rule, Howe and Hummel would still have a free run, but not the barrister.

Further, by way of comment, I suggest that attention should be given to the position which exists where there is an amalgamation of the two branches of the profession. There the man who appears in Court is the solicitor who prepares the case, and, if it is wrong for some reason for the man who appears in Court to see the witnesses, what are you going to do when the same man prepares the case and appears in Court? It appears to me to be quite impossible to apply such a rule in such cases.

The final result is that the propriety of what is done in seeing witnesses will depend upon the character of the people who do it, and that will always be the case, whether they are barristers or solicitors or solicitors' clerks. These considerations illustrate the importance of proper standards being observed by all who are associated with the profession.

As far, however, as seeing witnesses is concerned, it is worth while remembering from the practical point of view that, if it is overdone, it may very well defeat itself. I have seen witnesses obviously trying to remember what they had been told to say. It does not impress a Judge if he sees that the witness is saying something he has been told to say. Over-preparation of the witness opens the road to a little bit of cross-examination about "What did you say first?" Communications between witnesses (who are not parties) and barristers or solicitors are not privileged, and witnesses can be cross-examined upon statements which they have made to counsel or the solicitor. Therefore, from the point of view of practical expediency, it is not wise to overdo the preparation of witnesses, even if ethical considerations do not operate to prevent such a course from being followed.

I should like to say a word about something else that Mr. Justice Hilbery says. He says:

> a barrister is required by his professional code to make use of the material which is contained in his instructions, and nothing else.

And he gives an example where counsel remembered that a particular plaintiff upon whose credibility the decision in a case would depend had been struck off the Roll

for forgery and embezzlement and had been sentenced to penal servitude. He turned up the *Law List* and found that the name had disappeared from the *Law List* and that his recollection was perfectly right, but, because the facts were not stated in his brief, counsel considered that he was bound not to use his knowledge. I can see no reason for such a rule as that.

Of course, counsel should not use information confidentially obtained, or information perhaps picked up from a friend, where the friend would have no idea of expressly imposing a condition that it would not be used in public. But to say that counsel who is fighting a case about something that happened on a race-course is not to use his knowledge of how a bookmaker operates unless it is written down in his brief is not very convincing to my mind.

Duty in Court.

Effective administration of justice in the Courts depends upon real co-operation between the Bench and the legal profession, and, in relation to the legal profession, the qualities that I have mentioned are integrity, knowledge, and skill, and I add independence, without developing that point; but it is most important that the legal profession should preserve an independent mind in Court and out of Court, and they should stand for the rights of their clients, and, when necessary, stand for the rights of their clients or witnesses if the Judge is denying those rights.

In the Courts, an advocate puts his client's case. The case may be a poor one. He submits what is to be said in support of the case, and he does not vouch for the case. He does not say, because he appears for a particular individual, "This individual is a great and a good man, and he has a good case." He merely submits to the Court relevant arguments which ought to be considered by the Court. Counsel must not misrepresent evidence, or adduce evidence which he knows to be false. He must not attack the character of a witness, except upon grounds as to which he is reasonably satisfied and where such an attack is relevant to the case.

He should make his points clearly, and as briefly as is consistent with effective argument. A point made in a few words may be much more effective than one made at great length. Of course, it depends upon the Judge before whom you are practising, but, speaking generally, Judges prefer to have only propositions that are relevant placed before them. That is a foible of most Judges, and vague general talk about something that might have something to do with something that has a distant association with something that might have something to do with the case is not the best form of advocacy.

I had an inspiration the other day. I do not like speaking of myself as having an inspiration, but this is a rhyme, so you can understand I do not like to take personal responsibility. It is injected into me from some higher source. There was a gathering at which Mr. Justice Dean had been welcomed, and I had the satisfaction of saying that he always knew what he was arguing about and the Bench knew what he was arguing. That characteristic is a real element in advocacy, and this is where the rhyme comes in. I said that I at least, for one, did not think very much of counsel who acted on the idea:

"*I shot an arrow into the air,*
I hope and pray it falls somewhere."

I would like to say just a word on the amalgamation of the two branches of the profession. That, it appears to me, is entirely a matter dependent upon the circumstances of the place in which the question arises. If there is work for a separate body of counsel, then the work on the whole, I suggest, is done more efficiently than if, at least in a case of any difficulty, one man both prepares the case and argues the case in Court. The existence of a separate Bar makes specialization possible in a manner which would not otherwise be possible. There are differences in the knowledge and skill required for work in Court and for other work, and the separation of the professions where there is a sufficient volume of work has the advantage that any client may have the solicitor who does his ordinary work and yet be able to choose either his solicitor or some counsel for the work in Court.

With a complete amalgamation of the profession, that is not a possible thing, at least to the same extent. There are many men who are highly competent in one branch who would be relatively incompetent in the other branch. In Victoria, there is plenty of work for both branches, and every practitioner has the right of audience in every Court. He is not excluded at all, and, if he desires to practise as one or other or both, it depends entirely upon his own volition. I think that that is a satisfactory solution of the problems presented by the organization of the legal profession.

Preparing A Case.

I will conclude by mentioning two or three matters very shortly. First of all, as to the law students, I suggest that you should not pay too much attention to the marginal cases in the law. It is very easy to get confused about, let us say, such a subject as the law with respect to civil conspiracy. It is a very interesting subject, and a difficult subject, and the law is in an unsatisfactory state; but do not let a consideration of the marginal cases of the law give you the idea that the law as a whole is uncertain and unsatisfactory, and that we ought to be ashamed of it.

Most of our law, the enormously greater part of our law, is quite certain. Think of the number of legal transactions which take place every day. In Australia, there are seven millions of people. Most of them buy or sell something every day, and enter into other relations. There are millions of legal transactions going on each day. A very small proportion of those legal transactions find their way into the Courts, because everyone knows what is the simple law which applies to those transactions.

Of the small number which find their way into the Courts, only a much smaller number find their way into the higher Courts. I suggest that you will get an entirely disproportionate view of the law if, for example, you look at the law through the *Commonwealth Law Reports*, which record the work of the High Court. We get there in general the problem cases, the difficult cases, as to which there is something serious to be said on both sides, where there is an element of doubt, or the cases in which great interests are involved, so that it is considered worth trying to see what the result may be on an appeal to the High Court.

But the volumes of the *Commonwealth Law Reports*, valuable indeed as they are, do not present anything like a fair view of the law of the country. They are concerned with the cases which, for some reason,

were worth while fighting through to the highest tribunal in Australia. They represent only a very small number of the legal transactions which actually take place in the course of the year.

I conclude by adding to what I have said that the lawyer is not only a lawyer; he is a citizen, and he owes a duty to the community. You doubtless all know that, when we are trained at the University, we pay in our fees only about one-half of the cost, on to-day's figures, of our education. To put it on a pecuniary footing is perhaps not to ground my argument upon a very high level, but that element alone indicates the debt that we owe to the community that has trained us. When we go out into the world, we go out into the the world, not merely as lawyers, but as men and women, and, by reason of the special knowledge and training which we have been given, I suggest that we have a special duty to the community, not merely to practise the law as we find it, but to try and improve both the law itself and the administration of the law.

I have been speaking to you on the subject of professional standards. The standards of our profession are administered by the profession itself and the Judges. The Committee of Counsel, the Law Institute and its associated Committees, and the Judges determine whether a man is fit to remain in the profession or whether he should be struck off the Roll.

The right to administer the standards of the profession will remain with the profession itself only so long as the profession earns and retains the respect and the confidence of Parliament and the community as a whole. The profession can earn and maintain that respect by doing its work well, in accordance with the highest standards, doing its work efficiently, and, in particular, not wasting time, and thereby adding to expense. The profession can justify itself and maintain its position as one of the leading elements in the community by realizing that we are citizens who owe a special duty to the community, because the community has treated us well.

ROAD TRANSPORT LAWS.

Changes Effected by the Transport Act, 1949.

By R. T. Dixon.

(*Concluded from p. 78*).

PART VI. ROAD TRANSPORT SERVICES AND HARBOUR-FERRY SERVICES (*contd.*).

Classification of Licences.—In s. 105 (*a*), the words in parentheses have been altered by the omission of the words "at regular intervals." In para. (*c*), the maximum period of a temporary licence is now made fourteen days for both passenger-service licences and goods-service licences, and the following words have been omitted: "or a licence for any specified occasion or occasions."

Licensing Authority to prescribe Terms and Conditions of Licence.—It will be noted that, except for matters which are prescribed by regulations (as provided by s. 106 (1), all other matters to be prescribed (as set out in subs. 2) are at the option of the Licensing Authority. Formerly, it was compulsory for the Licensing Authority to prescribe certain matters, such as the class and number of the vehicles to be used.

The Licence and Its Effect.—Section 107 (2) provides rather more discretion than formerly in the classification of a licence for a service where both passengers and goods form a substantial part of the service.

Conditions as to Vehicles and Harbour Ferries.—Section 108 (2) newly provides that it shall be a condition of every licence, whether inserted therein or not, that the vehicle used in the service shall be maintained in a fit and proper condition.

Duration of Licences.—This provides that the period of a harbour-ferry licence may be for ten years.

Renewal of Licences.—The requirement now is (s. 111) that applications for renewal of licences shall be lodged not less than twenty-eight days before expiry of the former licence, whereas previously the application was to be lodged not less than fourteen nor more than twenty-eight days before the date of expiry.

Transfer of Licences.—Section 112 is amended in subs. 3 so as to enable the Licensing Authority to grant the transfer of a licence subject to conditions.

Amendment of Licences.—Section 113 makes it clear, by the new subs. 3, that, when a Licensing Authority intends of its own motion to amend a licence, the procedure is to be the same as in an application for amendment of the licence.

Certificates of Fitness or Permits for Passenger-service Vehicles.—The words "except in case of emergency" are omitted from s. 117 (1). It will be noted that these words are still retained in s. 118 (2).

Functions of the Transport Charges Committee.—In s. 122 (1), the functions of the Committee are further clarified by inserting the words "under the next succeeding section, or under section one hundred and twenty-five of this Act." This makes it clear that the Committee proceeds to review transport charges only when so directed under s. 123 by the Transport Charges Appeal Authority or when application is made by the parties described in s. 125.

Applications to fix Charges.—In s. 125 (5), a period of fourteen clear days' notice replaces the former period of seven clear days' notice.

Transport Licensing Appeal Authority.—By s. 135, certain provisions concerning the appointment of the Authority are the subject of minor amendments, such as the previous maximum term of three years being omitted, as also the power to remove from office for various reasons.

Qualifications for Appointment as Licensing Appeal Authority or Charges Appeal Authority.—The provisions of s. 137 are new, so far as the Licensing Appeal Authority is concerned.

Seal.—The provisions of s. 138 are new, so far as the Licensing Appeal Authority is concerned.

Functions of Licensing Appeal Authority.—The provisions of s. 139 are new, so far as the Licensing Appeal Authority is concerned.

Evidence in Proceedings before Licensing Appeal Authority or Charges Appeal Authority.—The provisions of s. 141 are new, so far as the Licensing Appeal Authority is concerned.

Appeals to Licensing Appeal Authority from Decisions of Licensing Authorities.—In s. 144 (1), the time-limit of twenty-one days for lodging appeals was formerly contained in Regulations.

Rights of Licensee pending Determination of Appeal.—Section 147 (1) has had words added to it to make clear that, pending the determination of an appeal, a person granted a new transport licence may carry on the service authorized by the licence pending the appeal decision.

Hearing and Determination of Appeal.—A proviso is added to s. 148 (1) requiring the Licensing Appeal Authority to receive written representations from the proper persons when there is no formal hearing of the appeal.

Licensing Appeal Authority or Charges Appeal Authority may refer Appeals back to Licensing Authorities or Committee.—In s. 149 (3) (4), words are added corresponding to those described in subs. 1 of s. 147.

Notice of Decision on Appeal.—Section 150 (3) is new, relating to the giving of notice of decisions relating to contracts.

Evidence and Proof.—Section 157 (*d*) contains the new provision that judicial notice shall be taken of the signatures of members of the Transport Charges Committee.

Effect of This Part on Other Acts and By-laws.—Section 158 (3) is new, containing exemptions for Marine Department harbour-ferry services.

Service of Notices.—Section 161 is new, so far as it applies to Parts II and III of the Act.

Regulations.—Subsections 6 and 8 of s. 167, relating to Regulations, are new.

Act to bind the Crown.—Section 168 (2) repeats former exemptions of the Crown from heavy-traffic requirements, but does not repeat the former exemption which applied to Crown vehicles so far as road classifications and weight restrictions are concerned. The exemptions formerly applied *in toto*, because the relative Regulations (Heavy Motor-vehicle Regulations, 1940 (Serial No. 1940/78)) had their authority under the Public Works Act, 1928, which has no provision applying that Act to the Crown, and, therefore, under s. 5 (*k*) of the Acts Interpretation Act, 1924, did not bind the Crown.

SECOND SCHEDULE. MILEAGE-TAX.

There is no real alteration in the amount of tax set out in this Schedule, but the figures have been brought up to date by being based on the present motor-spirits tax of 14d. per gallon.

ANNUAL MEETINGS.

AUCKLAND DISTRICT LAW SOCIETY.

The Annual General Meeting of the Auckland District Law Society was held on March 10. The chair was occupied by the President, Mr. V. N. Hubble. The minutes of the last Annual General Meeting were confirmed and the report and balance sheet adopted.

Annual Report.—The report showed that certificates were issued during the year to 559 practitioners, this being the highest figure yet. It was recorded that during the year the following practitioners had died: C. O. Butler, D. W. Mason, and G. W. L. Robinson. Seventy-one will inquiries had been made during the year, and in several cases wills had been located.

One of the outstanding events of the year had been the holding of the Easter Conference in Auckland, the first since 1930. The weather had been exceptionally kind, and the Conference proved an undoubted success. The proceedings were fully reported in the NEW ZEALAND LAW JOURNAL.

Hugh Campbell Scholarships for the year were awarded to Messrs. F. M. Chilwell and P. F. Robinson.

A very valuable report had been furnished to the Council on the matter of war concessions to ex-servicemen. This report, having been adopted by the Council, had been forwarded to the New Zealand Law Society.

On the invitation of the Obstetrical and Gynaecological Society, members of the Council had attended a meeting at the Cornwall Hospital and discussed matters of common interest. It was proposed to have further discussions on the same topics.

The Council desired to pay a tribute to the members of the Council of the New Zealand Law Society and its various subcommittees, and in particular to the Wellington members, for the vast amount of work done by them during the year on behalf of the profession generally.

Sir Alexander Johnstone.—The Council had noticed with satisfaction the award to Sir Alexander Johnstone, O.B.E., K.C., of the honour of Knight Bachelor, and that to Mr. W. H. Cocker of C.M.G. The congratulations and good wishes of the Council had been extended to these two gentlemen.

New Magistrates.—During the year, four members of the Society had been appointed to the Magisterial Bench—namely, Messrs. F. McCarthy, W. S. Spence, M. C. Astley, and R. M. Grant. The latter, before his appointment, had been a member of the Council, and had done valuable work, in particular as Convener of the Conveyancing Committee.

Election of Officers.—Mr. H. R. A. Vialoux was elected President for the ensuing year, Messrs. C. J. Garland and T. E. Henry Vice-President and Treasurer, respectively. As a result of the postal ballot, the following members of the Council were also declared elected:

M. M. R. Grierson, member of Council representing Southern District, and H. C. Rishworth, member of Council representing Northern District. Other members: Sir Alexander Johnstone, K.C. Messrs. H. J. Butler, F. J. Cox, J. B. Johnston, A. K. North, K.C., G. W. Wallace, and S. D. E. Weir. Sir Alexander Johnstone, K.C., and Messrs. H. R. A. Vialoux, C. J. Garland, and J. B. Johnston were elected Auckland members of the Council of the New Zealand Law Society. Mr. N. A. Duthie was re-elected as auditor.

Other Business.—After the matter had been discussed, the mover of a motion to increase by two the number of members of the Council finally withdrew his motion, with the consent of the meeting. A motion that the Council might take steps to secure regular sittings of the Court of Appeal in Auckland, Christchurch, and Dunedin was also withdrawn, with the consent of the meeting.

Sir Alexander Johnstone, K.C., gave a report on the Fidelity Fund. The report was received with general satisfaction.

The new President referred to the long period of service on the Council by the retiring President, Mr. V. N. Hubble, and, on his motion, a hearty vote of thanks was accorded to the retiring President.

Reference was made to the recent notice in the Press that legal costs were no longer subject to the Price Tribunal, and hopes were expressed that appropriate steps would now be taken.

The following motion, moved by Mr. Sexton and seconded by Mr. J. N. Wilson, was also carried:

"That the Council be asked to investigate the number of persons seeking entry into the profession to endeavour to ascertain (i) Whether there are enough to provide for the reasonable carrying on of the profession. (ii) If not, the

reasons why sufficient numbers are not seeking entry, examining particularly the terms and conditions of employment, and the examinations which they are required to pass before being admitted. If thought desirable, to take such steps as are necessary to remedy the matter."

In closing the meeting, the President drew attention to the fact that the Council was in a position to grant relief from the Benevolent Fund in cases where it was needed, and he asked that any members having knowledge of proper cases for assistance should bring them before the notice of the Council.

WELLINGTON DISTRICT LAW SOCIETY.

The Annual General Meeting of members of the Wellington District Law Society was held on March 1, 1950.

Minutes.—The minutes of the Annual General Meeting held on March 1, 1949, had been circulated. Arising out of the minutes, the President informed members that the consideration of the scale of charges in connection with the State Advances Corporation had been deferred by the New Zealand Law Society pending the disposal of the general question of increased costs. It was then resolved that the minutes be taken as read and confirmed.

Report and Balance Sheet.—Before formally moving the adoption of the Annual Report and Balance Sheet, the President, Mr. Leicester, reviewed the activities of the Council during the year. He referred to the work on behalf of ex-servicemen, which had been continued through the offices of the Post-War Aid Committee and of the Secretary.

The register of positions vacant and wanted and of prospective partnerships had been fully availed of, some 150 applications having been dealt with. The President asked members to advise the Secretary when their requirements had been filled.

The President stated that the meetings of the Council had been very full ones, demanding a great deal of the time of members of the Council. There had been more complaints dealt with than usual. In this connection, the President drew attention to the fact that many of the complaints arose from the failure of solicitors to supply clients with information requested and to answer letters and inquiries.

Reference was also made to the work of the Oil Fuel Committee, which had perused applications by practitioners for special oil fuel licences. The President suggested that, when such applications were made, applicants should allow the maximum time possible to enable the application to be dealt with by the Committee.

He also referred to the work done by the Council in perusing suggestions for law reform, made by or to the New Zealand Law Society, and in preparing reports setting out the views of the Council. This work alone had occupied a considerable amount of the time of individual members and of the Council.

The President stated that on two occasions in 1949 food parcels had been sent to one hundred English practitioners residing in various parts of England. The letters of acknowledgment from the recipients were almost overwhelming in their expressions of appreciation, not only of the gift, but also of the kindness of New Zealanders in remembering their overseas brethren. It was thought that parcels should be sent again this year, and members would be further communicated with on this matter.

He also informed members that it was hoped that the Memorial, recording the names of practitioners and law clerks who had given their lives in the 1939-45 war, would be completed within two months.

Reference was made to the retirement under the Rules of Mr. G. C. Phillips from the Council. Mr. Phillips had been a member and officer of the Council for eight years. His work on the Council and as President, and also as a member of the Standing Committee of the New Zealand Law Society, had been outstanding, and his services invaluable. Willingness and a balanced judgment had characterized all his work for the Society.

The President also referred to the work done by the President of the New Zealand Society, and to the debt owed by the profession for the great amount of time so freely given by him in the interests of the profession.

Appreciation was expressed by the President for the work carried out during the year by the Secretary and her staff.

In connection with the Library, the President said it was hoped to extend the present biographical and miscellaneous sections. These would be suitably encased, and, when completed volumes could be lent for a reasonable period on application to the Librarian. Work in this connection was in hand, and members were invited to present suitable books. A list of current books would be supplied in due course.

He reported that efforts were still being made to dispose of the set of the Federal Reports.

In seconding the motion, the Treasurer stated that the finances were in a very satisfactory condition. The number of admission fees included fees from ex-servicemen who normally would have been admitted at an earlier period. He welcomed the new practitioners to the ranks of the profession.

The Treasurer then expressed the thanks of the members to Mr. Leicester for the assistance and advice he had been always so ready to give members of the Society.

As Chairman of the Post-War Aid Committee, he reported that there were fourteen of the Wellington clerks alone who had missed in Latin, some of whom had passed the majority of their law subjects. He had discussed with the Minister of Education the suggestion that Latin should not be regarded as a compulsory subject for ex-servicemen. The Minister had personally favoured the view of the Committee.

The motion was then formally carried.

Election of Officers.—President: Mr. F. C. Spratt, the only nominee, was then duly elected, and, on taking the Chair, expressed appreciation for the honour accorded to him. In his remarks, he said that, if he could be of assistance to any member at any time, he would be pleased if he would call upon him. He said that the Council and members were very grateful to Mr. Leicester for the untiring, able, and courteous way he had given his services to the profession during a very heavy year of office.

Vice-President: Mr. C. A. L. Treadwell, the only nominee, was duly elected.

Hon. Treasurer: Mr. E. D. Blundell, the only nominee, was duly elected.

Council: Nine nominations having been received for the eight places on the Council, a ballot was held, and the following members were elected: Messrs. W. R. Birks, R. Hardie Boys, R. L. A. Cresswell, F. J. Foot, E. T. E. Hogg, W. E. Leicester, I. H. Macarthur, and E. F. Rothwell.

The following were the members elected by Branches:—

Palmerston North: Mr. G. I. McGregor, the only nominee, was duly elected.

Feilding: Mr. J. Graham, the only nominee, was duly elected.

Wairarapa: As no nomination was received, Mr. R. McKenzie continues in office.

Messrs. Clarke, Menzies, and Co. were duly re-elected auditors of the Society for the ensuing year.

Delegates to the New Zealand Law Society.—Messrs. P. B. Cooke, K.C., W. E. Leicester, F. C. Spratt, and C. A. L. Treadwell, the only nominees, were duly elected. Mr. Spratt referred to the immense amount of work carried out by Mr. Cooke as President of the New Zealand Law Society, and on behalf of the members expressed their gratitude to him.

Mr. Cooke returned thanks on behalf of his co-delegates and himself. He said it had been usual to give a brief summary of the work of the New Zealand Law Society for the year, but this would not be necessary this year, as a full report had already been printed and sent to all members.

He referred to the fact that Mr. Phillips was no longer eligible to act as a delegate to the New Zealand Society, and expressed his gratitude to Mr. Phillips for the large share of the work of the New Zealand Council and its Standing Committee which had been willingly undertaken by him. Mr. Cooke also referred to the co-operation in the work of the Standing Committee given by his co-delegates during the past year, and thanked them for their assistance.

As a member of the Wellington Society, Mr. Cooke said he would like to express his appreciation of the high standard of the lectures arranged by the Society, and expressed the view that, if possible, they should be continued during the ensuing year.

Easter Vacation.—It was resolved that the Easter Vacation should be observed from the usual closing-time, Thursday, April 6, to the usual opening-hour on Monday, April 17.

Christmas Vacation.—It was resolved that the Christmas Vacation should be observed from noon, Friday, December 22, 1950, to the usual opening-hour, Tuesday, January 16, 1951.

Lectures.—Mr. Richmond asked whether it was possible, with the permission of the lecturers, to arrange for the printing and distribution of the lectures which were given last year,

pointing out that the lectures were given at a time when many of the law students were preparing for examinations, and were, therefore, unable to attend.

It was resolved that the Council be recommended to consider the possibility of having the lectures printed.

Members' Luncheons.—Mr. Hogg said that the Council asked for members' views as to whether they desired a continuance of the luncheons.

Mr. Pope was in favour of holding sit-down luncheons, but of holding them less frequently, and of making arrangements for a speaker to attend.

Mr. Leicester said the primary object of having the luncheons was to enable the members to intermingle. He thought the object would be defeated if Mr. Pope's suggestion was carried into effect, and that members would not be receptive to the idea of a talk upon legal topics during the short time available.

On the motion of Mr. Mitchell, it was resolved that it be a recommendation to the Council that four buffet luncheons (without a speaker) be held during the winter months.

CANTERBURY DISTRICT LAW SOCIETY.

The Annual Meeting was held on March 13.

Mr. E. S. Bowie, who presided, in moving the adoption of the annual report, outlined the activities of the Council during the year. Apart from the usual volume of routine work, special reports were called for, covering diverse statutory amendments.

The meeting stood in silence as a mark of respect to the late Mr. H. C. D. Van Asch.

The motion approving the Annual Report and Balance Sheet was moved by the outgoing treasurer, Mr. Penlington, and carried unanimously.

Election of Officers.—The following officers were elected: President, Mr. A. C. Perry; Vice-president, Mr. C. G. Penlington; Hon. Treasurer, Dr. A. L. Haslam; Council, Messrs. E. S. Bowie, A. I. Cottrell, E. C. Champion, T. A. Gresson, E. B. E. Taylor, P. Wynn Williams, R. A. Young, and one Timaru representative to be elected; Members of the Council of the New Zealand Law Society, Messrs. E. S. Bowie and A. C. Perry; Auditor, Mr. Denys Hoare.

Holidays.—Considerable discussion followed on the question of holidays, particularly with reference to the desirability of a long Easter vacation at a time when the pre-war race-weeks were being restored.

After numerous suggestions, including one of optional closing during race-weeks, it was decided to maintain the usual three weeks at Christmas, the full week at Easter, and, apart from Show Day, not at this stage of the year to declare any further holidays other than those fixed by statute.

Legal Education.—The question of legal education was discussed at length. The Society unanimously affirmed the following resolution, moved by Dr. A. L. Haslam and seconded by Mr. E. S. Bowie:

"1. That this meeting with respect disagrees with the opinion of the sub-committee [see *ante*, p. 28] and strongly urges the reversion to the system of examinations in subjects of Divisions II and III by an external examiner who is a practising barrister or solicitor, who shall set a common paper for New Zealand, which paper shall not be disclosed prior to the examination.

"2. This meeting approves the suggestion [see *ante*, p. 30] that representation be increased from two to four, and that, for the Faculty of Law to be adequately represented, the Deans of Canterbury and Otago should also be members."

Among the speakers in support of the motion was the Dean of the Law Faculty at Canterbury College, Mr. L. W. Gee.

General.—On the motion of Mr. E. S. Bowie, consideration was to be given by the incoming Council to the admission of qualified solicitor-clerks to membership.

Before the meeting closed, Mr. Bowie moved a further motion recording the gratitude of the Society to the Wellington practitioners who had given such outstanding service on the various committees of the New Zealand Law Society.

SOUTHLAND DISTRICT LAW SOCIETY.

The Annual General Meeting of the Southland District Law Society was held on March 6.

Election of Officers.—The following officers were elected: President, Mr. G. C. Broughton; Vice-president, Mr. C. N. B. French; Hon. Secretary, Mr. J. H. B. Scholefield; Hon. Treasurer, Mr. J. W. Howorth; Council, Messrs. I. A. Arthur, H. K. Carswell, E. H. J. Preston, H. E. Russell, and L. F. Moller. Mr. G. C. Broughton was appointed as the Council's member on the New Zealand Law Society.

Holidays.—The annual holidays were fixed as follows: Easter, Thursday, April 6, 1950, 5 p.m., to Tuesday, April 18, 1950; Christmas, Friday, December 22, 1950, 5 p.m., to Tuesday, January 16, 1951.

A general discussion took place with regard to advertising holidays, and it was suggested (*a*) that, where some firms so required, two copies of a card might be supplied to the daily newspapers, and (*b*) that re-opening be advertised in the local newspapers about the Wednesday preceding the re-opening after the Christmas vacation.

Death Duties.—A motion was carried recommending that the incoming Council consider the advisability of making further representations for the amendment of s. 49 of the Death Duties Act, 1921, so as to bring it into line with s. 38.

The Law

The Mountain of Law! The great men of the Law have ever shown dignity in the doing and nobility in the motive. The best men of our brotherhood have been wise guides and brave citizens. The brief of the best lawyers at their best has always been Freedom. If they have taken up the arms of their calling in the forum of their vitality, they have taken them up as warriors in a good cause, and not as assassins in a bad cause. There have always been men of our profession who could think in terms of society itself. "Wherever the Temple of Justice stands," said Daniel Webster, "there is a foundation for social security, general happiness, and the improvement and progress of our race." Man has always had a primeval yearning for peace and order and justice. Unity is God's plan and order is Heaven's best law. Whenever conscience cleanses the thoughts of man, whenever the voice of God is heard above the crash of thunder or in the secret places of a man's heart, there is the Power of the Law. And in words of ancient wisdom that I would like to see emblazoned on the walls of every courthouse: "Of Law no less can be acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in Heaven and Earth do her homage, the very least as feeling her care, the greatest as not exempt from her Power." And so, in the spirit of those words, wherever Nemesis overtakes the arrogant, wherever the unjust mighty are put down from their seats, wherever mercy comes to bless him who gives and him who takes, wherever there is a presumption in favour of the hunted and the accused, protection for the innocent, there too is the Law, working in the midst of men. For Law and the obedience to it are the beginning and the end of Life and Liberty. (Leonard W. Brockington, C.M.G., K.C., LL.D., to the Canadian Bar Association at Banff, Alberta, September 2, 1949.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Duty of Counsel.—One of the many pitfalls in matrimonial litigation was demonstrated at the recent Sessions held in Napier, where there was an action to rescind a separation agreement upon the ground that the wife had entered into it under duress. The solicitor who prepared it and acted for both parties appeared as counsel for the husband. At an early stage, Hay, J., clearly and unmistakably pointed out that defendant's counsel might find himself in a difficulty, but he was told that the position had carefully been considered and the difficulty would not arise. It did, however, when the defendant made the statement on oath—a statement which, it was said, he subsequently retracted—that he had told counsel that his wife had gone into hysterics the night before the separation agreement was signed, when, ably supported by his mother, he had first suggested that she should enter into it. At this point in the proceedings, counsel asked leave to withdraw; the Court granted a short adjournment, and this was followed within half an hour or so by the application to discontinue the husband's defence, for which the Court had shown no marked indication of any great fancy. No doubt in many cases—and especially matrimonial ones—clients place most faith in solicitors who have advised them throughout; but it is well to remember the observations of Sir Michael Myers, C.J. (with which Kennedy, J., concurred), in *Hutchinson* v. *Davis*, [1940] N.Z.L.R. 490, 506:

> It is true that in New Zealand most practitioners, though not all, practise as both barristers and solicitors, but I have never yet heard that that entitles a practitioner to act otherwise than in accordance with the rules of professional conduct which have been laid down by and for the Bar of England and which we have always followed in this country. A practitioner cannot be allowed to act in the dual capacities of counsel and witness. If there is a possibility of his being required as a witness, he must make his election at an early stage as to the capacity in which he will act.

The Gilbert Touch.—During the recent Sittings of the Court of Appeal, Christchurch counsel was addressing the Court upon the lengthy evidence in a case in which lack of testamentary capacity was involved. He said that a certain doctor had deposed that he had visited the testatrix on some day in March, and also six months previously; but he had kept no note of the actual date of the latter visit, although he felt certain it was in September, because it was early in spring and the flowers were already blooming in the parks. "I seem to remember," said the C.J., with a smile, "some authority for the proposition that 'the flowers that bloom in the Spring, tra la, Have nothing to do with the case.'" Had counsel followed the career of Ko-Ko, Lord High Executioner of Titipu, he might aptly have countered with the next two lines of his famous duet with Nanki-Poo, the Mikado's son—

> "*I've got to take under my wing, tra la,*
> *A most unattractive old thing, tra la.*"

—and thereby relieved, if only in a minor degree, the tedium of a hearing that occupied three full days.

Breach of Promise.—The recent breach of promise action in Auckland in which the sum of £25 was awarded the successful plaintiff on a claim for £550 draws attention to the difficulties attendant on this class of litigation, especially where, as in this case, the courtship period was devoted a good deal to acrimonious argument. Here, the engagement seemed to have lasted until the lady—who, it was alleged, wanted not only new curtains for the marital flat, but also the best seats at the theatre as well—had insisted upon occupying the bridal suite of a Hamilton hotel for the first night of the marriage. "It was not the cost," said the defendant, who was vehemently opposed to the idea, "but the principle of giving in all the time." Scriblex cannot but recall the impassioned question put to the jury by Sergeant Buzfuz: "Gentlemen, is the happiness of a sensitive and confiding female to be trifled away by such shallow artifices as these?" In *Trial by Jury*, W. S. Gilbert provides perhaps the ideal solution for a case of this kind. The Judge, who had laid the foundation to his legal career by marrying a rich attorney's elderly, ugly daughter ("She may very well pass for forty-three, In the dusk with a light behind her!"), stops further wrangling between counsel for the parties by informing them that he will marry the plaintiff himself.

Brougham.—On his accession, George IV refused to have the name of his wife—Caroline, a Princess of Brunswick—inserted in the Liturgy. She claimed the right to be crowned and came to England from abroad for that purpose. Popular feeling was on the side of the Queen and against George, whose reckless life during the Regency period had made him notorious; indeed, Justin MacCarthy describes him as "a mixture of folly and of falseness, of debauchery, vulgarity, profligacy, and baseness," and as "a heartless fop, a soulless sot, the most ungentlemanly First Gentleman of Europe." Chiefly as the result of the forensic efforts of Henry Brougham, a Bill introduced in Parliament to deprive Caroline of her status, both as Queen and wife, had to be abandoned, to the delight of the general public. George IV never forgave Brougham for appearing against him on the Queen's behalf, and prevailed upon Lord Chancellor Eldon, regarded as much too subservient to the Royal influence, to withhold silk from Brougham, then professionally the leader of the Northern Circuit. This led to the unhappy result that, when litigants insisted upon their solicitors' briefing him, juniors who were senior to him, and could have been led by him as a silk, were left out of cases altogether, and through no fault either of his or of theirs. As is well known, he became, as Lord Brougham, one of the most outstanding of the Victorian Chancellors, and was immortalized in a manner of which many lawyers are unaware. He appeared weekly on the cover of *Punch*. "Amid the troop of elves and imps," wrote J. B. Atlay in his *Lives of the Chancellors*, "who dance around the border of the frontispiece, one trails by a string a mask with an upturned face, from which is visible and distinct the proboscis which one adorned the countenance of Lord Brougham. His Lordship's nose, it is said, was well worthy of the honour. It was likened to a toe; and it was said that he used it to punctuate his speech, turning it up at the end of a long parenthesis."

PRACTICAL POINTS.

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1. Charitable Trust.—*Trust to establish Specified Institution—Trustee's Desire to purchase Adjoining Property for Purposes of Institution—No Power given in Will creating Trust—Authorization of Purchase.*

QUESTION: By his home-made will, A gave the residue of his estate to trustees to form the nucleus of an endowment fund for the establishment of an institution for specified charitable purposes. Testator expressed the wish that the institution should be erected upon a specified property owned by him. He further expressed the wish that all assets producing income should be retained as income for the institution, and that funds should be raised by public subscription for the erection of the buildings. The trustees were incorporated under the Religious, Charitable, and Educational Trusts Act, 1908. The buildings were duly erected on the specified property, and it is now desired to purchase an adjoining property, which will be farmed to supply the institution with produce and, as to any surplus, with revenue. The will does not give the necessary power, but it seems the Court has an inherent jurisdiction under the Religious, Charitable, and Educational Trusts Act, 1908, to authorize the purchase: *In re Order of St. Brigid Trust Board*, [1933] N.Z.L.R. s. 133, and the cases there cited. Presumably the application should be by way of petition analogous to a petition under the Trustee Act, 1908.

ANSWER: The Court appears to have a general inherent jurisdiction—apart from the provisions of the Religious, Charitable, and Educational Trusts Act, 1908—to sanction a sale and purchase of property where the charitable purpose of the trust will be facilitated, and to sanction the scheme proposed for the application of the surplus. In view of the possibility of others than the Trust Board being interested in the surplus, the application should be made by originating summons, and the Attorney-General should be made a party: see *4 Halsbury's Laws of England*, 2nd Ed. 204, para. 291 *et seq.*, and *In re Order of St. Brigid Trust Board*, [1933] N.Z.L.R. s. 133, and the cases therein cited. From the circumstances outlined, it appears that the inquirers should take counsel's opinion, when counsel can fully consider the nature of the institution, the presence or absence of surplus capital or income, or both, and the advantages to the carrying out of the original purpose of the purchase and the farming of the land so purchased, and direct his opinion accordingly.

B.2.

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2. Land Transfer.—*Title Bounded by Sea on One Side—Gradual Erosion—Present Title Boundary—Owner's Position with Regard to Fencing to Original Title Boundary.*

QUESTION: A property owner holds on a Land Transfer title with a frontage to a well-known metropolitan beach. The residence was erected in 1930, and a beach-wall was constructed shortly after, in line with the approximate front of the actual land-line. The beach frontage on the title and on the deposited plan is shown by a wavy water-line. The boundary measurements on the plan have been checked, and it has been found that the side boundaries extend approximately 40 ft. down the beach beyond the beach-wall, which is the apparent beach-line frontage. The area shown on the plan is not satisfied unless this beach area is included. If the owner were to fence his section as shown on the plan, the public would be prevented at most high tides from passing along the beach without entering the water. The land is described in the title in the usual way without any restrictions or mention of rights, &c. Portion of the section is, therefore, being used by the public in various ways.

Has the owner a full title to the beach area, and can he fence it? What are his rights and obligations in respect of it? The present owner did not construct the existing beach-wall. The Council has declined liability to maintain clear, on the grounds that the area is privately owned.

ANSWER: It would appear as if the sea has gradually eroded the freehold title. If this is so, the title boundary shifts with the gradual shifting of the sea, and the owner would not have the right to fence on the original sea-boundary. The land which has been eroded has become foreshore, and, as such, is vested either in the Crown at common law or in the Harbour Board by statute, if there is a special statute applicable: see *Verrall* v. *Nott*, (1939) 39 N.S.W. S.R. 89; *Attorney-General* v. *Findlay*, [1919] N.Z.L.R. 513, and see the articles in (1939) 15 NEW ZEALAND LAW JOURNAL, 272, (1943) 19 NEW ZEALAND LAW JOURNAL, 104, 119.

The fact that the present owner did not construct the beach-wall is irrelevant. In respect of the land which has thus apparently become foreshore he has no rights, except the rights of a riparian owner.

X.2.

UNINCORPORATED SOCIETY.

Comment on a Practical Point.

The Editor,
NEW ZEALAND LAW JOURNAL.

Dear Sir,

I was particularly interested in Practical Point No. 1 in (1949) 25 N.Z.L.J. 391, on the question of amendment of notice of motion in an incorporated society. May I refer you to *8 Halsbury's Laws of England*, 2nd Ed. 58, para. 101, and *Henderson* v. *Bank of Australasia*, (1890) 45 Ch.D. 330, 346, 347.

You state that: "If any amendment is permitted, how can it be said that every member of the society has had an opportunity of determining whether or not it is in his interest to attend the meeting?" I suggest that, if the amendment be germane to the notice of motion, it is reasonable that it should be accepted; but, if it is not germane to the motion, it cannot be accepted. For example, a member gives notice of motion to amend a rule. It is pointed out at the meeting that the motion as worded is ambiguous, or does not carry out the intention of the mover. Surely it is unreasonable to suggest that the motion must be passed in its ambiguous form, or else discarded and the whole procedure of tabling a notice of motion and the calling of a special meeting be done all over again, when a simple amendment would cure the defect.

Do you think the above authorities support this view?

Yours, etc.,

PRACTITIONER.

[The case cited by our correspondent is certainly in support of his opinion. But there is this difference. In that case (amendment to regulations of a Bank), the proposed alteration had to be confirmed at a subsequent meeting. In this instance, however (amendment to rules of an incorporated society under the Incorporated Societies Act, 1908), no confirmation was required.

In practice, much would depend on what view the Assistant Registrar of Incorporated Societies would take. If he took no objection to an amendment germane to the notice of motion, then registration of the alteration to the rule would constitute conclusive evidence that all conditions precedent to the making of the alteration had been duly fulfilled: s. 21 (3) of Incorporated Societies Act, 1908. The alteration to the rule does not take effect until it is registered, and, before registering it, the Assistant Registrar must satisfy himself that the alteration has been duly made.—X.2.]