1919.

NEW ZEALAND.

CORRESPONDENCE

RELATING TO

1. **The Methods by which Representation may properly be made to a Judge of the Supreme Court of New Zealand on behalf of a Barrister or Solicitor who considers himself aggrieved by Judicial Comments upon his Conduct or Advocacy.**

2. **The Limits of the Right of an Advocate, when defending a Prisoner charged with a Crime, to suggest that a Person other than the Prisoner committed the Crime.**

Presented to both Houses of the General Assembly by Command of His Excellency

SIR, Wyndham Street, Auckland, 20th March, 1918.

By direction of the Council of the Auckland District Law Society I forward to you—

(1.) A letter from Mr. R. A. Singer, a member of the Bar, practising at Auckland.
(2.) Copy letter from Mr. Singer to Mr. Gifford Marshall, Crown Prosecutor, Wanganui.
(3.) Copy of Mr. Marshall's reply.
(4.) Cuttings from the *Wanganui Herald* and the *Wanganui Chronicle*.
(5.) Copy of depositions taken at the Magistrate's Court, Stratford, in the case of John Benjamin Clark, charged with arson, and of evidence taken at the inquiry of the Coroner.

My Council feels that the position revealed by the enclosed documents is one that calls for some action. If the course which was taken by Mr. Singer merited the comments of the Judge as reported, then it is felt that steps should be taken against Mr. Singer under the disciplinary sections of the Law Practitioners Act. It may be, of course, that Mr. Justice Edwards will say he has been incorrectly reported. If, however, he was correctly reported, and Mr. Singer's conduct of the defence did not merit the judicial comments, then my Council feels that the independence of the Bar is being endangered.

As the matter is one which concerns not merely a member of the Bar but also a Judge of the Supreme Court, my Council feels that it is advisable to refer it direct to you in your office of Attorney-General. It may be doubted whether the Auckland Law Society can appropriately approach His Honour Mr. Justice Edwards for a statement of the facts, and without such a statement it may be difficult to completely review the whole position. It is for this reason that the Council decided not to refer the matter direct to the New Zealand Law Society, but to submit it in the first instance to you. Moreover, Mr. Marshall, in his capacity of Crown Prosecutor, can hardly object to supply you, as the head of his Department, with that information which Mr. Singer has applied for without success.

My Council now asks you to take such steps as you consider best to ascertain the whole of the facts, and to take such further action as you deem proper.

I am, &c.,
T. N. BAXTER,
President, Auckland District Law Society.

The Hon. the Attorney-General, Wellington.

COPY OF ENCLOSURE NO. (1) REFERRED TO IN FOREGOING LETTER OF 20TH MARCH.

187 Queen Street, Auckland, 23rd February, 1918.

To the President and Council of the Auckland District Law Society.

DEAR SIRS,—

On Monday, 4th February of this year, I appeared at the criminal sessions of the Supreme Court at Wanganui before His Honour Mr. Justice Edwards on behalf of one John Benjamin Clark, who was charged with committing arson in Stratford on the 12th January, 1918. The accused pleaded "Not guilty."

I enclose herewith a copy of the depositions taken in the Magistrate's Court, Stratford, upon which the accused was committed for trial.

The accused instructed me that he had not committed the offence, and that he was satisfied that the man ———,* the chief witness for the prosecution, was the guilty person. On considering the depositions and the information given to me by my client I came to the conclusion that the three important elements justifying suspicion against ———* were present—namely, knowledge, opportunity, and motive. It appears that ———* is the owner of the premises occupied by Clark at the time the fire took place, and also of the adjoining premises in which ———* himself was carrying on a drapery business, and that the back yard was common to the two premises; further, that the back door of the premises occupied by Clark contained a window which was broken, and that the door itself was insecurely held by an iron bar on the inside, which bar could be removed by a person passing his hand through the broken glass. It appeared also that ———,* on his own admission, was sleeping on his own premises on the night upon which the fire took place, the same happening just after 11 p.m., and that his so sleeping there was unusual; also that, on his own admission, a few minutes before the fire took place ———* went both to the front and back of the premises occupied by Clark; and the information was given to me by my client, and was confirmed by ———* when I cross-examined him, that ———* at the time the fire took place believed that his stock was insured for £1,000, and that it was only after the fire that ———* discovered that through a mistake of his manager his stock was only insured for £250. Further, it appeared that Clark had rented the premises occupied by him through an agent as subtenant to one Dixon, who was the immediate tenant of ———,* and that the lease from ———* to Dixon contained conditions that the premises were not to be sublet without ———* consent, and that they were not to be sublet to any person dealing in drapery. ———* admitted in cross-examination that he made complaints about and resented the subtenancy because there had been breaches of the above two conditions, Clark having on the premises occupied by him a large stock of drapery.

In accordance with my instructions I conducted the defence on the lines that Clark had not committed the alleged crime, but that some one else was guilty thereof, in all probability the guilty person being ———.* The jury convicted Clark, the Judge's summing up being a very strong one indeed for conviction. I pleaded for mitigation of penalty. His Honour said to me that I had accused an innocent man, and a man whom I myself knew to be innocent, of the crime of which Clark had been found guilty. Upon His Honour making the above remark I said as follows: "Your Honour must not say that. I could not know that ———* was innocent. I did not know that ———* was innocent."

I left Wanganui on Tuesday, the 5th February, and Clark came up for sentence on Friday, the 8th February, when of course I was not present in Wanganui. I append an extract from the *Wanganui Chronicle* of the 9th February, which contained some remarks of the presiding Judge with regard to my conduct of the defence: "I do not propose to punish you for the infamous course taken by your counsel in urging to the jury that the crime was committed not by you but by the tradesman who was partly ruined, because you entrusted that part of the scheme to another person, although, no doubt, you assisted to have that unfortunate man asked questions to fasten insults upon him. However, all the questions asked he answered satisfactorily. I repeat what I said before: the course taken in the defence of the prisoner was contrary to all traditions of the Bar, and in itself disgraceful."

These comments of Mr. Justice Edwards constitute, in my opinion, a menace to the rights of counsel, the safety of accused persons, and the liberties of the people. I bring the whole matter under your notice, believing that it is my duty to do so more in the interests of the community than of myself. I am confident that I discharged my duty to my client to the best of my ability, but that I never transgressed in the slightest the rules and principles of practice. I need only refer you to Mr. Gifford Marshall, the Crown Prosecutor of Wanganui, who was present throughout the trial, and who, I know, can bear out my statement.

So important is the matter, in my opinion, that I venture to suggest that it should be referred to the New Zealand Society for consideration, and for the taking of such action as may secure the Bar from attacks by the Bench, and to accused persons and the public generally the rights and liberties that are threatened.

Yours faithfully,

RICHARD A. SINGER.

* Name omitted in this print.

SIR, Attorney-General's Office, Wellington, N.Z., 22nd March, 1918.

I have the honour to acknowledge the receipt of your letter of the 20th instant covering a letter from Mr. R. A. Singer to the Auckland District Law Society, and other papers.

As it appears to me that the subject-matter of Mr. Singer's letter is one more fitted for the consideration of the Council of the New Zealand Law Society than of the Attorney-General, I am forwarding your letter and its enclosures to that Council.

I need hardly say that I do not express any opinion as to whether the matter is or is not one in respect of which the Council of the New Zealand Law Society should in their discretion take any action.

I have, &c.,
F. H. D. BELL.

The President, Auckland District Law Society, Post-office Box 461, Auckland.

SIR,— Attorney General's Office, Wellington, 22nd March, 1918.

I have the honour to enclose herewith (1) a letter dated 20th March, 1918, addressed to me by the President of the Auckland District Law Society, and copy of my reply thereto attached; (2) a bundle of papers covered by Mr. Baxter's letter to myself, and specified in the first paragraph of that letter.

I have the honour to request that you will lay the correspondence and the papers before the Council of the New Zealand Law Society, noting that in my letter to the President of the Auckland District Law Society I have abstained, as I now do, from offering any comment or suggestion of my own.

I have, &c.,
F. H. D. BELL.

The Secretary, New Zealand Law Society, Supreme Court Library, Wellington.

SIR, New Zealand Law Society, Wellington, 29th April, 1918.

Re *Mr. R. A. Singer's Complaint as to Remarks made by the Hon. Mr. Justice Edwards in the Case of Rex* v. *Clark.*

Your letter of the 22nd March, 1918, together with the enclosures therein referred to, were considered by the Council of the New Zealand Law Society at a meeting held on the 19th April, 1918, and I am directed by the Council to state the position which it takes up in connection with the matter.

The Council was clearly of opinion that, while it is its duty to protect the legitimate rights and privileges of barristers and solicitors practising in New Zealand, it cannot and ought not to intervene in any case in which the facts have not been clearly ascertained so as to enable it to come to a conclusion whether the particular complaint is or is not a just one. It is clear that the Auckland District Law Society is justified in investigating the facts and ascertaining what is the real position. So far the Auckland Society has not investigated the facts, but apparently thinks that it is desirable that you as leader of the profession should approach His Honour Mr. Justice Edwards and request him to furnish a statement of the facts. The propriety of this request is not a matter which concerns the New Zealand Law Society. It is clear that the New Zealand Society does not possess the necessary machinery to itself investigate the facts; and to attempt to make such an investigation would be to disregard the plain and sensible working rule of practice which has obtained for a long time, that complaints touching or affecting the conduct or privileges of legal practitioners must be investigated in the first place by the society to which the particular practitioner belongs. It is clear that the Council of the New Zealand Law Society cannot with propriety at the present stage approach His Honour the learned Judge with a request that he should supply it with a statement of what took place at the trial.

I have, &c.,
C. P. SKERRETT, President.

The Hon. the Attorney-General, Wellington.

Attorney-General's Office, Wellington, 1st May, 1918.

SIR,— *Mr. R. A. Singer's Complaint.*

I have the honour to acknowledge the receipt of your letter of the 30th ultimo covering file of papers herein.

I am also in receipt of a letter of the 29th ultimo from the President of the Council on the same subject.

I have, &c.,
F. H. D. BELL.

The Secretary, New Zealand Law Society, Supreme Court Library, Wellington.

Attorney-General's Office, Wellington, 1st May, 1918.

DEAR MR. JUSTICE EDWARDS,

Mr. R. A. Singer, on the 23rd February last, formally wrote to the Council of the Auckland District Law Society complaining of certain observations which you had made upon the trial of one Clark for arson at the criminal sessions at Wanganui on the 4th February last gravely affecting Mr. Singer's character. He further complained of comments made by your Honour upon him when sentencing Clark on the 9th February.

On the 20th March last the President of the Auckland District Law Society wrote me a letter, copy of which I enclose. To that letter I replied on the 22nd March (copy attached).

On the same date I wrote to the Secretary of the New Zealand Law Society a letter (copy attached). I am to-day in receipt of a letter from the President of the New Zealand Law Society (copy attached).

I desire informally to submit the position to your Honour for your consideration, and to inquire whether your Honour has any objection to my more formally submitting to you the precise matter of Mr. Singer's complaint and your comment on his conduct for any observations you may think it right or fitting to make thereon. Severe comment by a Judge upon the conduct of a practitioner does appear, as the Council of the Auckland Law Society points out, to involve a duty on the governing body of the profession either to take proceedings against the practitioner in consequence of the comment, if justified, or to aid the practitioner in asserting his innocence if it should appear that the comment was mistaken.

I have, &c.,

The Hon. Mr. Justice Edwards, Supreme Court, Wellington. F. H. D. BELL.

DEAR MR. ATTORNEY-GENERAL, Judge's Chambers, Wellington, 6th May, 1918.

As the principle involved in the question put by your letter of the 1st May is one which affects the whole of the Judges of the Supreme Court, I have thought it necessary to submit the correspondence to the Judges of the First Division of the Court of Appeal, who are at present the only Judges in Wellington.

The enclosures forwarded with your letter do not show what I am called upon to answer. All the Judges agree with me that before I can say whether I will or will not further reply it is necessary that I should be informed as to this.

Meantime it is proper to say that all the Judges agree that no question should be put to any Judge which may involve a breach of the principle embodied in the rule thus stated by Baron Cleasby in *Duke of Buccleuch* v. *Metropolitan Board of Works* (L.R. 5 H.L. 418, at p. 433): "With respect to those who fill the office of Judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance and, I think I may say, prevent them being examined."

All the Judges also agree that the offence of counsel who imputes the guilt of a crime charged against the person whom he defends to another person against whom there is no evidence which could directly or indirectly implicate that person in the crime cannot be punished by any proceeding whatever.

No doubt if that offence were repeated on the same occasion or on a retrial of the person charged, after warning from the Judge, the offender could be punished for contempt of Court, but not otherwise.

There is therefore no check to such an offence save speedy condemnation by the presiding Judge.

If the Judge is afterwards to be called upon, by any tribunal save Parliament, to account for what he has felt it to be his duty to say upon such an occasion it is obvious that the administration of justice must be seriously impeded, and that innocent persons may with impunity be branded before the public by unscrupulous counsel as being themselves the criminals. Even if the Judge's remarks in such a case are admitted or proved, the proposition that any Law Society or other body, upon a perusal of the depositions in the Lower Court, and upon a report from the counsel implicated of what he has done at the trial, can determine whether or not the remarks of the Judge were justified is obviously erroneous.

Notwithstanding the foregoing observations, I am willing in the present case, as being one of first impression and not as a precedent, to say that I did, on the trial of John Benjamin Clark at Wanganui on the 12th February last on a charge of arson, comment with severity upon the conduct of Mr. Singer, who had imputed the crime to ——,* one of the witnesses of the Crown, who was a draper, who occupied the adjoining premises, and who lost many hundreds of pounds by the fire. I did say that there was not a tittle of evidence to justify that imputation or to cast any suspicion upon ——.* I did say that Mr. Singer's conduct in making that imputation against a person whom he must have known to be innocent was an offence against the best traditions of the Bar. I believe that I added that it was in itself infamous. Except that I know that I did refer to the traditions of the Bar, I cannot speak to the exact words used at this lapse of time, but the above is substantially correct.

I do not know that any other question could properly be asked of me in connection with this matter without infringing the principles upon which the Judges have agreed, as I have stated.

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* The name of the person referred to appears in His Honour's letter, but is omitted in this print.

If, however, you do not take this view I shall be glad if you will let me know as early as possible, as the majority of the Judges will leave Wellington on Saturday next to conduct the circuit sittings at various towns, and I desire that the whole correspondence shall be submitted to them.

I am authorized by His Honour the Chief Justice to add that on the trial of the case of *The King* v. *Armstrong* at Auckland on the 20th August, 1917, Mr. Singer was guilty of the same offence in imputing the crime with which the prisoner in that case was charged to another person against whom there was not a tittle of evidence; that His Honour severely rebuked Mr. Singer on that occasion, and warned him that if he repeated his offence he would be dealt with for contempt of Court; that the jury in that case disagreed, and a retrial was ordered; and that upon the retrial Mr. Singer did not repeat the offence.

I mention this as showing how necessary it is that the Judge's exercise of his duty to reprove such malpractices should remain unchallenged, and the temporary efficacy in any case of such a rebuke. In the case of counsel who erred through ignorance alone one such rebuke would probably suffice for a lifetime. I desire that this letter should be communicated to those through whom the complaint has been made to you.

I have, &c.,

The Hon. the Attorney-General, Wellington. W. B. EDWARDS.

Attorney-General's Office, Wellington, 8th May, 1918.

DEAR MR. JUSTICE EDWARDS,—

I am greatly obliged for your letter of the 6th instant. The course taken by you of submitting my letter of the 1st instant, and its enclosures, for the consideration of their Honours the Judges of the First Division of the Court of Appeal prior to your reply must be as satisfactory to the whole profession as it is to myself, and I desire to thank you on their behalf and on my own for thus enabling approach to an authoritative direction upon a subject in respect of which no definite rule seems to have been laid down.

I must at the outset say that the object of my letter of the 1st instant has evidently been mistaken. Your Honour writes, "The enclosures forwarded with your letter do not show what I am called upon to answer." Nothing was further from my intention than to call upon your Honour to answer any matter, nor do I think any such intention can be gathered from the terms of my letter. My object was to ascertain your view of the form and propriety of procedure in such cases to be adopted by either a Law Society or the Attorney-General where a member of the profession alleges that he is aggrieved by the comments of a Judge.

A Judge's comments on the conduct of an advocate (other than conduct constituting offensive or rude behaviour) must depend on the facts. And it must be conceded that the Judge may have been mistaken as to the facts, and so be led into making observations very injurious to the reputation and prospects of the advocate. It is quite certain that a Judge, if it could be shown to him that he was so mistaken, would at once repair the injury by withdrawing the comment. The question is, How is the Judge to be approached? Is the person aggrieved to write to the Judge? That course has been adopted in some cases in the past, but there are obvious objections. Is he to write to the Press? That is a course which I believe the profession is practically unanimous in holding to be undesirable. In my view, which I submit with all deference to the Bench, the proper course is for the advocate so aggrieved to lay his grievance before his District Law Society, and ask the Council of that Law Society either itself to lay the alleged facts before the Judge for his reconsideration, or to refer the matter for the same object to the Council of the New Zealand Law Society.

And again, in my view either the District Council or the New Zealand Council may properly ask the Attorney-General to be the medium of communication with the Judge.

I feel sure that freedom of speech and of advocacy is recognized by the Bench to be the right of the Bar and of the client. It is the duty of the Bar as a body in every Dominion of the Empire to defend and protect that right. In England the Bar was long without a representative body, but it now has an elected Bar Council to which every barrister may submit his grievances. In New Zealand, where the two branches of the profession are so largely united, the Council of a Law Society is both the Bar Council and the solicitors' representative body. It is as a Bar Council that the Auckland District Law Society asked me to approach your Honour, and it was as Attorney-General that I wrote asking your Honour whether you had any objection to my laying before you the subject of Mr. Singer's complaint "for any observations you might think it right or fitting to make thereon."

Mr. Singer alleges facts which he, rightly or wrongly, contends justified the nature of his defence, in which he suggested the guilt of another. It is his statement of those facts which I desire to lay before your Honour for your observations, if you think fit to observe upon them. It may be that your Honour may find the statement erroneous, or that the facts, if correct, do not justify the conduct you denounced; or, again, it is possible that your Honour may be satisfied that the existence of certain facts, if you had known of them, would have induced you to take a different view.

In the vast majority of criminal cases the fact that a crime was committed by some one is not in dispute. The defence of the prisoner at the bar in such cases involves at least the suggestion of possibility that some one else than the prisoner was the criminal. It was not, of course, your Honour's intention to lay down a general rule that the prisoner's counsel is not entitled to make such suggestion of guilt against another person; I gather that your Honour would limit the rule to a denial of the right of the prisoner's counsel to suggest the guilt of a person against whom no evidence of guilt

appears. If that be the limit, then I would with all respect and deference contend that your Honour's rule would unduly limit the right of the prisoner and the privilege of his counsel; and in that case I submit that it is within the right, and even the duty, of the Council of a Law Society, with all due respect, to represent to the Bench that the privilege of free advocacy is unduly endangered.

I do not interpret your Honour's reference to the rights of "a Law Society or other body" as necessarily denying the right to communicate with a Judge on the subject of his comments on the conduct of the member of the Bar to the extent, in the manner, and with the object which I have endeavoured to indicate. But if your Honour's observations do involve a denial of the existence of such a right, I must with all respect insist that a duly constituted representative body of the profession has that right, and that it would fail in its duty if it did not seek to maintain it.

I have, &c.,

The Hon. Mr. Justice Edwards, Supreme Court, Wellington. F. H. D. Bell

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Dear Mr. Attorney-General,— Judge's Chambers, Wellington, 9th May, 1918.

In reply to your letter of the 8th current, I have to say that I am sorry if my letter of the 6th was obscure. I did not mean that I understood that I was called upon by you to answer anything, but that I did understand that I was indirectly called upon by the Auckland District Law Society to supply "a statement of the facts." The only guide which I had to the meaning of this was the following sentence in the letter of the 20th March from the Auckland District Law Society to yourself: "It may be, of course, that Mr. Justice Edwards will say that he has been incorrectly reported." To that, treating the case as one of first impression and not as a precedent, I replied.

I have submitted your last letter to the other Judges for their consideration.

The Judges agree that while it is true "that a Judge's comments on the conduct of an advocate (other than conduct constituting rude or offensive behaviour) must depend on the facts," the question as to whether or not an advocate is justified in imputing the guilt of a crime charged against his client to another person against whom there is no evidence which could directly or indirectly implicate that person in the crime, must depend upon *the facts given in evidence at the trial, and upon those facts alone*. To hold otherwise would be to hold that counsel who wilfully offends must always escape reprobation.

This being the case, the Judges are unable to understand what facts can be suggested in the present case which would not infringe the rule stated by Baron Cleasby in *Duke of Buccleugh* v. *Metropolitan Board of Works*, quoted in my last letter. To that rule the Judges feel bound in the public interest to adhere.

The Judges do not question the right of an advocate, *where the facts warrant it*, to attribute the crime with which his client stands charged to another person, or to point out that another person or persons is under suspicion, or that another person or persons may equally as well as the prisoner have committed the crime. But to justify such observations there must in every instance be facts proved before the jury, or obvious from the nature of the case, to justify such observations.

The Judges, not unmindful of the saying of La Rochefoucauld, "Il s'en faut bien que l'innocence trouve autant de protection que le crime," do say that no advocate can ever be justified in directly imputing the crime with which his client stands charged to another person unless there is evidence before the jury which reasonably justifies that imputation.

The Judges do not agree that the Council of any District Law Society necessarily represents the Bar, even within the district where the solicitors are subject to its jurisdiction; no such Council can pretend to represent the Bar of the Dominion. The objections to such a body arrogating to itself the right to, in effect, adjudicate upon a complaint made by one of its members against a Judge, and to that end to call upon a Judge to give evidence—for that is what the claim amounts to—are too obvious to require discussion.

Such questions as those raised by your letter certainly do not come within the purview of the Law Practitioners Act or the functions of any District Law Society; and no claim such as that made by the Auckland District Law Society has ever hitherto been made or even suggested.

The Judges consider that if any body, save Parliament, is to be recognized by them as having the right to communicate with them upon such matters, it should be the Council of the New Zealand Law Society, which may be considered to be representative of the legal profession in the Dominion. But the Judges are of opinion that in that case the Council of the New Zealand Law Society should themselves undertake the duty of so far investigating any question which may be submitted to them as to satisfy themselves that there is reasonable ground for further investigation before approaching any Judge in the matter.

Subject to these qualifications, the Judges see no objection to receiving any communication which the Council of the New Zealand Law Society, either directly or through the Attorney-General, may think it proper to address to any one of their number.

You will understand that this letter has been submitted to and that it expresses the views of all the Judges of the First Division.

Strictly speaking, the correspondence upon this matter should have been with His Honour the Chief Justice as the head of the Judiciary, but the Judges think that as it began with me it may be so continued.

I have, &c.,

W. B. Edwards.

Attorney-General's Office, Wellington, 9th May, 1918.

DEAR MR. JUSTICE EDWARDS,—

I desire at once to acknowledge your letter of the 9th instant, in reply to mine of the 8th. I think the correspondence necessarily began by a letter addressed to yourself, since the object was to ascertain what you yourself would admit to be a proper method of communication to you on behalf of a practitioner who desired reconsideration by you of observations made judicially affecting him. I have already expressed my thanks to you for bringing the questions involved in my first letter before their Honours the Judges of the First Division, and wish to repeat my thanks to you for now submitting to their Honours my letter of the 8th. The result has been to obtain an authoritative expression of their Honours' views on two questions.

As to the first matter dealt with—namely, the requirement in every instance of "facts proved before the jury, or obvious from the nature of the case," before counsel for a prisoner can be justified in either attributing the crime to another person, or in pointing out that that other person is under suspicion, or that another person or persons may equally as well as the prisoner have committed the crime—the ruling is apparently wide enough to mark as improper in future certain lines of cross-examination and address by counsel for a prisoner which a long experience of criminal procedure leads me to believe have not hitherto been regarded by the profession as exceeding the limits of honourable advocacy. But I feel sure that the expression of opinion from their Honours on such a subject will have all due respect and weight.

With regard to the second matter—namely, the Judge's view that the Council of the New Zealand Law Society should be the only recognized channel of such communications—I personally see no objection to that view, but should like to first consult the Council of the New Zealand Law Society, and through them the District Law Societies, before replying. The stipulation that the Council should first satisfy itself of the existence of reasonable grounds for any such communication I accept at once as a necessary condition.

I gladly accept your Honour's suggestion that any further correspondence on the subject should be addressed to His Honour the Chief Justice. I desire your Honour's permission to circulate this present correspondence to the profession, and shall assume that permission unless I hear from you to the contrary.

I have, &c.,

The Hon. Mr. Justice Edwards, Supreme Court, Wellington. F. H. D. BELL.

DEAR MR. ATTORNEY-GENERAL,— Judge's Chambers, Wellington, 10th May, 1918.

In reply to your letter of yesterday's date I have to say that the Judges have no objection whatever to the publication of the correspondence in this matter.

The Judges agree that this correspondence properly began with a letter necessarily addressed by you to me, and that it has so been properly continued. It is a mere incident that it has developed further than was at first anticipated.

With reference to your remarks as to the effect of the ruling of the Judges upon the matter in question, the Judges desire to say that they are unable to understand how that ruling can in any way conflict with the practice which has hitherto been observed by reputable members of the Bar.

I have, &c.,

W. B. EDWARDS.

Attorney-General's Office, Wellington, 31st May, 1918.

The Secretary, New Zealand Law Society, Supreme Court Buildings, Wellington.

SIR,

I have the honour to submit for the information of the Council of the New Zealand Law Society a printed copy of the correspondence which has recently taken place between myself as Attorney-General and His Honour Mr. Justice Edwards.

The Council will observe that the exact details of Mr. Singer's complaint have not been submitted for the consideration of either His Honour Mr. Justice Edwards or their Honours the Judges of the First Division of the Court of Appeal. Their Honours having conceded the privilege of the Council of the New Zealand Law Society to submit for reconsideration of a Judge of the Supreme Court subject-matter in respect of which that Council is itself satisfied that a member of the profession has made out a *prima facie* case of grievance, it appears now to be for the Council to consider whether the present matter is one in regard to which it considers that such a *prima facie* case has been established. The view taken by their Honours of the limit of honourable advocacy may bring the present complaint of Mr. Singer within a class of complaint in respect of which the Council of the New Zealand Law Society may hold itself bound to abstain from any intervention.

I append to this letter a copy of the original letter addressed by Mr. Singer to the Council of the Auckland District Law Society. I have slightly altered one part of that letter to render it suitable for reprint with this correspondence.

I am sending to the Council of each District Law Society, and also to their Honours the Judges, a copy of this letter and its enclosures.

I have, &c.,

F. H. D. BELL.

Supreme Court Library, Wellington, 8th July, 1918.

Re *Correspondence between the Hon. Mr. Justice Edwards and Yourself (Singer's Complaint).*

SIR,—

I have the honour, by direction of the Council of the New Zealand Law Society, to send you a copy of the resolution passed in relation to this subject at a meeting held on 5th July.

At such meeting a general desire was expressed that the above-mentioned correspondence and a copy of the Society's resolutions should be sent by you to the English Bar Council.

I have, &c.,

F. HARRISON,

The Hon. the Attorney-General, Wellington — Secretary, N.Z. Law Society.

RESOLUTION OF THE COUNCIL OF THE NEW ZEALAND LAW SOCIETY IN THE MATTER OF THE CORRESPONDENCE BETWEEN THE HON. MR. JUSTICE EDWARDS AND THE ATTORNEY-GENERAL RELATING TO MR. SINGER'S COMPLAINT.

(5th July, 1918.)

THE Council resolves:

1. That counsel has the same privilege as his client of asserting and defending the client's rights, and of protecting his liberty or life by the free and unfettered statement of every fact and the use of every argument and observation that can legitimately, according to the principles and practice of the law, conduce to this end, and that any attempt to restrict this privilege should be jealously watched.

2. That it is inadvisable to lay down what a barrister defending a client on a charge of crime may legitimately do in the course of his defence, but he is not entitled to attribute to another person the crime with which his client is charged wantonly or recklessly, nor unless the facts or circumstances given in evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed.

Such a line of defence ought to be taken only after careful consideration whether under the particular circumstances of the case it may be legitimately adopted and is proper and necessary for the prisoner's defence.

3. That where a practitioner complains that he has been unjustly censured by a Judge he should bring the matter before the Law Society of the district in which the complainant usually practises, and that such District Law Society should investigate the complaint and, if it thinks fit, report thereon to this society. This society, if in its opinion the facts warrant it in so doing, may then, either directly or through the Attorney-General, bring the matter before the Judge for any statement or remarks he may desire to make thereon; and after due consideration of the complaint and of the Judge's statement and remarks it may deal with the complaint as it thinks proper.

4. That the above procedure is applicable to Mr. Singer's complaint; and that the Auckland District Law Society has not in that case so far provided sufficient material to enable the Council to come to a conclusion upon the matter.

Attorney-General's Office,

SIR, Wellington, 9th July, 1918.

I have the honour to acknowledge the receipt of your letter of the 8th instant covering copy of the resolutions passed by the Council of the New Zealand Law Society on the questions raised by the recent correspondence between myself and the Hon. Mr. Justice Edwards.

As a member of the profession I accept the resolutions as authoritative directions from the Council to which is entrusted the determination of rules of professional conduct, subject only to the condition that such rules may not contravene any principle established by decision of the Courts or determination of the Bench.

But I respectfully submit to the Council that in the second resolution the expression "unless the facts or circumstances given in evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion" may be interpreted as limiting the scope of *cross-examination* of the witnesses for the Crown. It was indeed the use of a similar expression in one of the Judge's letters which led to my doubt whether the rule as laid down by the Judges might not exclude a line of cross-examination which in my experience had not been considered to exceed the limit of professional duty. If a counsel is instructed by the prisoner that certain circumstances exist which might, if elicited, entitle the counsel to at least suggest the guilt of another, then it appears to me that it would be the duty of the counsel, by cross-examination of the witnesses for the Crown, to endeavour to elicit those circumstances, and the apparent effect of suggestion of the guilt of another would be created by the questions so put. If "the facts or circumstances given in evidence" referred to in the second resolution of the Council means "facts or circumstances given in evidence for the Crown or elicited in cross-examination for the prisoner," and if the prisoner's counsel is free to cross-examine though his effort to elicit such facts and circumstances fail, then I should respectfully agree with every part of the Council's resolution.

The Council will observe that there are two separate and distinct points at which the question of professional duty arises—first in the cross-examination of witnesses for the Crown, and secondly in the address to the jury; and it is at the first point of time, when no facts are in evidence to support the suggestion of guilt of another, that the more serious question of professional duty seems to me to arise and to be not sufficiently dealt with in the Council's resolution. The second paragraph of the second resolution is properly applicable to both the point of time of cross-examination and the point

of time of the address to the jury, and it may be equally the duty of the counsel not to enter upon such cross-examination without carefully considering the circumstances, as it is his duty to abstain from raising a similar question in his address to the jury if he has failed in his cross-examination to elicit the anticipated evidence.

I trust the Council will not consider that I have exceeded my functions in thus respectfully commenting upon one of its resolutions.

I cordially agree to the suggestion of the Council that I should send a copy of the correspondence to the Bar Council in England and endeavour to obtain the opinion of that Council on the questions which have arisen.

The Secretary, New Zealand Law Society,
Supreme Court Library, Wellington.

I have, &c.,
F. H. D. Bell.

Sir,

Wellington, 12th July, 1918.

I have the honour to acknowledge receipt of your letter of the 9th instant addressed to the Secretary of the New Zealand Law Society.

I have to thank you on behalf of the Council and myself for your letter. It affords me the opportunity of clearing up what may possibly be left in doubt by the resolution of the Council. In dealing with Mr. Singer's complaint and the correspondence which followed it, the Council were desirous of confining their conclusions as closely as possible to matters arising out of the particular facts of the complaint. The strictures complained of by Mr. Singer apparently related to his address to the jury, and so the formal resolutions of the Council were confined to the obligations in that respect.

But, as you will no doubt have surmised, the discussion which preceded the passing of the resolutions necessarily dealt with the rights and obligations of counsel when cross-examining as well as when summing up the evidence. I am able to inform you that without exception the opinions expressed by members of the Council in relation to the obligations of counsel in cross-examination are in substantial agreement with the views expressed in your letter. Indeed so much might have been inferred from the language of the resolution alone.

As you say, the second paragraph of the second resolution is probably applicable to both the point of time of cross-examination and the point of time of the address to the jury. It was the general view that, in putting questions in cross-examination intended to elicit facts suggestive of the guilt of another, counsel is entitled to have regard to his instructions, and should disregard them only if the line of defence suggested by them is plainly foundationless. It was further pointed out that there is not the same opportunity afforded to the advocate of considering and ascertaining the reasonableness of the imputations during the course of cross-examination as there is at the conclusion of the evidence, when all the facts are elicited.

There are in practice two great safeguards against the abuse of the privilege of counsel. The one is the sense of justice and fair play of the average practitioner, and the other is that a defence suggesting or imputing the crime to another is almost invariably a hazardous defence.

I have, &c.,
C. P. Skerrett,
President, New Zealand Law Society.

The Hon. the Attorney-General, Wellington.

Sir,

Attorney-General's Office, Wellington, 17th December, 1918.

Herewith I beg to enclose twelve printed copies of certain correspondence which has taken place between myself as Attorney-General for New Zealand, the Judges of the Supreme Court of New Zealand, and the Council of the New Zealand Law Society.

You will observe that the Secretary of the New Zealand Law Society, in his letter to me of the 9th July, 1918, conveys a request from the Council of the New Zealand Law Society that the Bar Council of England should be invited to express an opinion upon both questions raised, each question being a matter affecting the rights and privileges of counsel.

I desire in the first place to refer to what I conceive to be a satisfactory settlement of one question arising for decision in the correspondence—namely, the consent of the Judges of the Supreme Court Bench to allow the Council of the New Zealand Law Society, either directly or through the Attorney-General as leader of the Bar, to submit in writing to a Judge the matter of any grievance which a member of the New Zealand Bar may feel that he has suffered by reason of comment by the Judge on his conduct. It appears to me that this conclusion may be of interest to the Bar Council of England as determining procedure the manner of which has been the subject of considerable diversity of opinion not only in New Zealand but in England.

It is the second matter, however, in which I join with the Council of the New Zealand Law Society in the request for an opinion from the Bar Council of England. You will find the point stated in my letter to Mr. Justice Edwards of the 8th May, and the determination by the Judges of the point in Mr. Justice Edwards's letter to me of the 9th May. You will also see to what extent in my own letter of the 9th May I challenged the precedent for the Judge's ruling, and I specially call attention to the last paragraph of Mr. Justice Edwards's letter of the 10th May as expressing a more than definite conclusion.

If the decision of the Judges in New Zealand has narrowed the right and duty of counsel defending a prisoner as that right and duty is interpreted by the Bar of England, then we who desire in New Zealand to maintain in every respect the traditions of the English Bar, especially in its defence of the rights of advocacy, seek to be fortified by the opinion of the Bar Council of England. Obviously the decision as to such limits in New Zealand must rest with the New Zealand Bench, and neither the Council of the Law Society nor I desire to disregard that obvious result. But we do desire to know whether what has been laid down in this correspondence by the Supreme Court Bench of New Zealand is in accord with the recognized rule of professional conduct in such matters adopted by the Bar of England, either with regard to cross-examination of witnesses for the Crown or with regard to the address to the jury in defence of a prisoner.

I need only add that the New Zealand Law Society is incorporated by statute, and that the Council of the New Zealand Law Society has statutory functions and audience in relation to all matters of professional conduct.

Barristers and solicitors are admitted to the several branches of the profession by several classes of examination as in England, but in New Zealand a member of the Bar may be also a solicitor. There is a considerable number of solicitors who are not members of the Bar, and a small number of barristers who are not solicitors. The New Zealand Law Society and its Council has control of both branches of the profession.

I have, &c.,
F. H. D. Bell.

The Secretary, General Council of the Bar, 2 Hare Court, Temple, London E.C.*b*.

General Council of the Bar.

Sir, 5 Stone Buildings, Lincoln's Inn, W.C. 2, 13th February, 1919.

I beg to acknowledge the receipt of your letter of the 17th December and the printed copies of correspondence enclosed therewith.

I shall be pleased to bring the matter to the notice of the Bar Council, and will in due course communicate with you again.

I have, &c.,
Harold Hardy, Secretary.

The Hon. Sir Francis H. D. Bell, K.C., K.C.M.G., Attorney-General, Wellington, New Zealand.

General Council of the Bar.

Sir,— 5 Stone Buildings, Lincoln's Inn, W.C. 2, 6th May, 1919.

Referring to our correspondence, I have the pleasure of sending you herewith two copies of a report of the Professional Conduct Committee, which has now been approved by the General Council of the Bar.

I have, &c.,
Harold Hardy, Secretary.

The Hon. Sir Francis H. D. Bell, K.C., K.C.M.G., Attorney-General, Wellington, New Zealand.

General Council of the Bar.

REPORT OF THE PROFESSIONAL CONDUCT COMMITTEE.

(NEW ZEALAND BAR: PROCEDURE AND PRACTICE.)

Your Committee have had under their consideration the letter from the Attorney-General of New Zealand, dated the 17th December, 1918, together with the accompanying printed correspondence, referred to them by the Council, and beg to report as follows:—

The Committee understand that they are not asked to express any opinion upon the particular case which has arisen, and indeed it would not be practicable to do so.

The case, however, raises a question of the greatest importance as to the obligations of honourable advocacy in defending a prisoner.

The Committee are of opinion that the rule which should be observed by an honourable advocate in accordance with the traditions of the profession is correctly expressed in resolutions 1 and 2 of the New Zealand Law Society of the 5th July, 1918, with the additions and explanations contained in the Attorney-General's letter of the 9th July, 1918, to that society.

In the opinion of the Committee it is the right and may be the duty of counsel for a prisoner accused of a crime to suggest that some other person is in fact guilty of the crime alleged, but no such suggestion should be made unless the advocate believes that there is reasonable ground for the suggestion. What is reasonable ground in each case must necessarily be left to the judgment and honourable feeling of the advocate. It is obvious, as the Attorney-General points out in the letter referred to, that at the stage of cross-examination of the witnesses for the Crown the suggestion cannot ordinarily be based on evidence before the Court.

Copies of the resolutions referred to and an extract from the Attorney-General's letter are annexed:—

"1. That counsel has the same privilege as his client of asserting and defending the client's rights, and of protecting his liberty or life by the free and unfettered statement of every fact and the use of every argument and observation that can legitimately, according to the principles and practice of the law, conduce to this end, and that any attempt to restrict this privilege should be jealously watched.

"2. That it is inadvisable to lay down what a barrister defending a client on a charge of crime may legitimately do in the course of his defence, but he is not entitled to attribute to another person the crime with which his client is charged wantonly or recklessly, nor unless the facts or circumstances given in evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed. Such a line of defence ought to be taken only after careful consideration whether under the particular circumstances of the case it may be legitimately adopted and is proper and necessary for the prisoner's defence."

Extract from the Attorney-General's letter of the 9th July, 1918, to the New Zealand Law Society.

"As a member of the profession I accept the resolutions as authoritative directions from the Council to which is entrusted the determination of rules of professional conduct, subject only to the condition that such rules may not contravene any principle established by decision of the Courts or determination of the Bench.

"But I respectfully submit to the Council that in the second resolution the expression 'unless the facts or circumstances given in evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion' may be interpreted as limiting the scope of *cross-examination* of the witnesses for the Crown. If a counsel is instructed by the prisoner that certain circumstances exist which might, if elicited, entitle the counsel to at least suggest the guilt of another, then it appears to me that it would be the duty of the counsel by cross-examination of the witnesses for the Crown to endeavour to elicit those circumstances, and the apparent effect of suggestion of the guilt of another would be created by the questions so put. If 'the facts or circumstances given in evidence,' referred to in the second resolution of the Council, means 'facts or circumstances given in evidence for the Crown or elicited in cross-examination for the prisoner,' and if the prisoner's counsel is free to cross-examine though his effort to elicit such facts and circumstances fail, then I should respectfully agree with every part of the Council's resolution.

"The Council will observe that there are two separate and distinct points at which the question of professional duty arises—first in the cross-examination of witnesses for the Crown, and secondly in the address to the jury; and it is at the first point of time, when no facts are in evidence to support the suggestion of the guilt of another, that the more serious question of professional duty seems to me to arise and to be not sufficiently dealt with in the Council's resolution. The second paragraph of the second resolution is properly applicable to both the point of time of cross-examination and the point of time of the address to the jury, and it may be equally the duty of the counsel not to enter upon such cross-examination without carefully considering the circumstances, as it is his duty to abstain from raising a similar question in his address to the jury if he has failed in his cross-examination to elicit the anticipated evidence."

26th February, 1919.

SIR,— Attorney-General's Office, Wellington, 17th July, 1919.

Referring to the correspondence between the Hon. Mr. Justice Edwards and myself, following on a complaint made by Mr. R. A. Singer, I have now the honour to forward copies of a letter I wrote on the 17th December last to the Secretary of the General Council of the Bar in England, and of his reply, dated the 6th May, 1919, forwarding copies of a report of the Professional Conduct Committee dealing with the subject.

It is possible that I shall lay the whole of the correspondence before Parliament during the coming session.

I have, &c.,
F. H. D. BELL, Attorney-General.

The Secretary, New Zealand Law Society, Wellington.

DEAR SIR, Attorney-General's Office, Wellington, N.Z., 24th July, 1919.

I am directed by the Hon. Sir Francis Bell, Attorney-General, to acknowledge and thank you for your letter of the 6th May forwarding two copies of a Report of the Professional Conduct Committee regarding certain correspondence which took place between himself, the Hon. Mr. Justice Edwards, and the Council of the New Zealand Law Society on the subject of the rights and privileges of Council.

Yours faithfully,
J. W. BLACK, Private Secretary.

Harold Hardy, Esq., Secretary, General Council of the Bar,
5 Stone Buildings, Lincoln's Inn, London W.C. 2.

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