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THE STRANGE CASE OF SIR WILLIAM FOX.

IN November in the year 1842, there arrived at Wellington a Mr. William Fox, described as "of the Inner Temple, Barrister-at-law." He was accompanied by his wife. At this time, the new colonist was thirty years of age. He proposed to spend the rest of his life in New Zealand.

This learned immigrant had been educated at Durham Grammar School and Wadham College, Oxford, where he graduated B.A. in 1828 (at the age of sixteen years), and M.A. in 1839. He was called to the Bar by the Inner Temple in 1842, shortly before his departure for New Zealand. Previously, he had written a text-book, *Treatise on the Law of Contract.*

On April 1, 1843, Mr. Fox appeared before the Chief Justice, Sir William Martin, at a sittings of the Supreme Court at Wellington. Application was made for his admission, on the motion of Mr. W. V. Brewer. Mr. Fox gave evidence of his being an English barrister, and requested that he might be enrolled.

On the day before the application was made in Court, Mr. Fox had been informed, either by the Chief Justice or at his direction, that he must make the following declaration, as a condition of his admission:

> I have not [at any time before or] since my leaving England done any act whereby I should be precluded from practising as such barrister-at-law.

Mr. Fox objected to making this declaration, and the words in brackets were deleted. He said that the balance of the declaration made it quite as objectionable as before.

To return to Sir William Martin's Court in Mulgrave Street on the morning of April 1, 1843. The learned Chief Justice asked Mr. Fox if he would make the declaration, as amended, which had been proposed to him. Mr. Fox said that he would not. He tells the remainder of the proceedings in Court in a letter which he addressed to Sir William Martin on April 3. This was published on the same day in the *New Zealand Gazette and Britannia Spectator*:

> To His Honor the Chief Justice of New Zealand.
>
> May it please Your Honor.
>
> At the sitting of the Supreme Court this morning a motion was made by my learned friend, Mr. Brewer (in accordance with the practice of the Australian Colonies), that I might be enrolled as a barrister of the Court. Your Honor asked what precedent Mr. Brewer followed, and intimated that the motion was contrary to the practice of the Court. On this I tendered the evidence usual in other places, of my being an English barrister, and requested that I might be enrolled. You Honor asked me, whether I would make the declaration which had been previously proposed to me. I was proceeding to call your Honor's attention to a part of it which I considered objectionable; but your Honor immediately interrupted me by saying, that "the Court sat to try causes, and not to hear discussions." As I was endeavouring again to address your Honor, your Honor said, "Mr. Fox, I request you to answer me categorically: will you, or will you not, make that declaration?" I replied, that "I would not make it, on the ground that it was derogatory to the character of the English bar to suppose such a declaration necessary:" your Honor saying at the same time, "Mr. Fox, Mr. Fox, I request that you will desist." I trust that during the proceedings my demeanour was perfectly respectful towards the Court.
>
> I would not have conscientiously made the declaration. In addition to the reason which I gave in Court for declining to do so, (and which weighed with me more than any other,) I beg now respectfully to call your Honor's attention to the following grounds of objection, which I submit are entitled to some consideration.
>
> 1. The declaration is one which ought not to be tendered to any person filling the station of a gentleman. It requires him to say in substance, "I am not the disreputable person you think it probable that I may be;" and it presupposes a strong likelihood that the body to which the individual belongs would be guilty of frequent disreputable acts. In no position of life, civil or military, has any English gentleman as far as I can learn, ever been required to make such a declaration.
>
> 2. It can answer no good purpose. The man who would commit acts of such a nature as ought to prevent his practising at the bar would seldom hesitate to deny that he had committed them; or by some verbal subterfuge or mental reservation he would evade the difficulty. If it be said that any inquiry into the previous life of an applicant would be considered tyrannical, if made without his concurrence, but that by making this declaration he puts his previous life into your Honor's hands, I would respectfully submit, that it can make no difference whether the powers to institute such enquiry be arrogated in the first instance, or whether the party is compelled to put himself into a situation in which it is considered fair to institute it. The private circumstances of most emigrants would amount to compulsion. And, in addition to this, any enquiry subsequent to the making of such declaration, would involve the disagreeable preliminary of doubting the party's word solemnly pledged; which, I submit, would in any but the most glaring instances prove an absolute bar to such enquiry, unless it were carried on through the medium of spies and inquisitors, who I trust are not to be found among the officers of the Court.
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> 3. A natural consequence of the proposed course will be that men of a nice sense of honor who may object to make a declaration repugnant to their feelings will be deterred from

entering the Colony, and the bar of your Honor's Court instead of being more select will be composed of the least scrupulous part of the profession, and such as necessity may compel to accede to the terms proposed to them.

4. Supposing an applicant guilty, it is unfair and contrary to all precedent to require him to incriminate himself. If it be necessary, let the Attorney-General, or other officers to whom the duty may be assigned, make the enquiry. The character of professional men is not hid behind a screen, and oftener precedes than follows him.

5. The terms of the declaration are so explicit as to afford no guide to an applicant with respect to what acts he is required to search his conscience. I am not well informed what power their [*sic*] exists in England to prevent barristers practising on account of delinquency; but I am certain that its exercise has been so infrequent as not to afford any precedent or general rule. What acts are intended to be guarded against? Would a *faux pas* in private life, which might exclude from society, be held sufficient? Would a misdemeanour of a public and criminal nature? or must it be an act of professional misconduct. I admit that to a person of entirely free conscience, this obscurity may be of little consequence, but I submit that such loose wording of the declaration opens a door for subterfuge to the dishonest, and leads to the inference that it has been framed without that grave consideration which ought to precede the introduction of a practise so novel and unprecedented.

6. In conclusion, I have been advised by several friends, for whose opinions I entertain great respect, that I might with propriety make the declaration under a protest. Independently of the course adopted by your Honor this morning, which would have effectually prevented any protest in Court, I cannot satisfy myself that a protest would be proper in a case like the present. It would amount to no more than giving what I conceived to be several good reasons for not doing that which I had just voluntarilly [*sic*] done. It would be otherwise, if I were under actual compulsion; but while I have the means of quitting the Colony, and resorting to some place where the character of the bar is regarded by the bench with the same respect as at home, and its members admitted to practise on the same terms, I cannot feel I am under such compulsion as to oblige me to make this declaration.

I have the honor to remain
Your Honor's obedient humble servant,
WILLIAM FOX
Of the Inner Temple Barrister-at-Law.

Since addressing the above to his Honor, I have been informed, that *previously to the sitting of the Court*, he directed the Sheriff to hold himself in readiness to take me into custody, if it should be necessary to commit me for contempt. On enquiry, I learn that the report is well founded. I deeply regret that his Honor should have been so ill advised as to believe me capable of conduct which might called for such severe measures. I cannot but feel that the precaution was premature; and I trust that the result proved that I was not ignorant of the respect that was due to the office which his Honor fills, and to myself also.

On the evening of April 3, the following "remonstrance" was sent by Colonel William Wakefield to the learned Chief Justice. In publishing it in the issue of the same day, the *Spectator*, in an editorial note, apologized:

to those of our fellow-settlers who were not afforded an opportunity of attaching their signatures, but it was thought expedient to lose no time in presenting it to his Honor.

Wellington, April 3, 1843.

May it please your Honor,

Your Honor, having on the 1st instant refused to admit Mr. Fox as a Barrister of the Supreme Court of New Zealand, because he declined to make a declaration, "That he had not, since his leaving England, done any act whereby he should be precluded from practising as a Barrister-at-Law in the Superior Courts of England," which declaration Mr. Fox declined to make on the ground that it was derogatory to the character of the English Bar, We, the undersigned settlers at Port Nicholson, feel it our duty respectfully to remonstrate against your Honor's persisting in a decision calculated to inflict the most serious injury, not only on this settlement, but on the Colony of New Zealand.

Deeming, as we do, the declaration to be most repugnant to the feelings of a gentleman, and incompatible with the duty imposed on every Barrister of upholding the dignity of his profession we cannot but express our approval of the course pursued by Mr. Fox, and at the same time our surprise and deep regret that the exercise of such honourable feelings should be the means of depriving us of so valuable a settler.

Further when we consider that there is no precedent for such a declaration either in England or in any of her numerous Colonies, and being convinced that its tendency will be to deter other Members of the Bar, entertaining the same sense as Mr. Fox, of what is due to themselves and their profession, from settling in this Colony, and that instead of operating as a check to the admission of disreputable members, it will rather (by excluding such men as Mr. Fox) induce them to flock to your Honor's Bar, we are still more deeply impressed with a sense, not merely of the injustice to Mr. Fox, but of the evils which will inevitably result to ourselves from the declaration being insisted upon.

And it is with these feelings that we now respectfully urge upon your Honor the justice and expediency of adopting some other course more in accordance with the practise of the Courts in England, and in the neighbouring Colonies, more consonant to the feelings of honourable men, and as such, better calculated to insure the respectability of your Honor's Bar, an object of paramount importance to the colonists of New Zealand.

William Wakefield, J.P.,
Henry W. Petre,
Charles Clifford, J.P.,
William Vavasour,
I. E. Featherston, M.D.,
Samuel Charles Brees,
Francis Skipworth,
Alfred Ludlam,
C. R. Bidwill,
F. A. Molesworth, Ald.,
W. Johnston, M.D.,
I. M. Stokes, M.D.,
G. Hunter, J. P., Mayor,
H. S. Knowles,
Arthur Whitehead,
George Smith,
John Sutton,
W. M. Smith, J.P.,
Nat. Levin,
H. S. Durie,
S. Mocatta,
Alfred W. Hort,
Samuel Revans,
Daniel Riddiford,
E. Daniel, J.P.,
James Jackson,
H. Moreing, J.P.,
James Kelham,
Richard Baker,
Joseph Boulcott,
Wm. Lyon, Alderman,
I. Ridgway,
W. H. Donald,
Charles M. Penny,
Edward Catchpoll,
H. S. Tiffen,
Kenneth Bethune,
George White, J.P.,
Abraham Hort, jun.,
Alderman,
F. V. Martin,
Ed. Johnson, Alderman,
Andrew Wylie, Assistant
Surveyor to N.Z. Co.,
J. Woodward,
Robert Waitt, Alderman,
William Gayton, J.P.,
Alderman,
Robert Park, C.E.,
J. D. Greenwood,
J. H. Greenwood,
John Wade, Alderman,
John Dorset, Alderman,
James Watt,
George Scott, Alderman,
George Hunter, jun.,
George Moore,
James H. Hansard, M.D.,
Thomas H. Machattie,
John Howard Wallace,
George Samuel Evans, LL.D.,
J.P., Barrister-at-Law,
W.V. Brewer, Barrister-at-Law

The following editorial note was appended to the publication of the "Remonstrance":

We have readily given insertion to the foregoing document, seeing from Mr. Fox's statement, that his Honor upon reflection was pleased to take out, what we presume he admitted was most objectionable and repulsive; and, therefore it is, that we have a confident hope, upon further consideration, he may be induced to dispense with it altogether: at all events we have no doubt that the Barristers, whose names we notice to the address and Mr. Fox, will forward a correct statement of the matter to the Benchers of their respective Inns of Court.

Sir William Martin replied to the "Remonstrance," and his reply appeared in the *Spectator* of April 8. The Chief Justice's letter, which was addressed to Colonel William Wakefield, is as follows:

Wellington, April 6, 1843.

Sir,

I have received the memorial dated April 3, which you were requested to forward to me.

That memorial is in itself of a very singular nature, but the names subscribed thereto are such as to give a degree of weight to any document. For the information of the greater

part probably of the memorialists, it may be proper to state that the declaration, which is deemed so objectionable, has been made and signed by two Barristers,* whom I have no reason to believe to be inferior to their brethren in point of high principle or intelligence; and further that it has been approved by the Leader of the bar in this Colony, than whom, I am bold to say, there exists not a more sensitively or sternly honourable man. I mention these facts simply for the purpose of giving information.

Having regard for the circumstances of this Colony, I am satisfied that I am doing my duty towards both the legal profession and the people of the land in refusing to enrol, as either Barrister or Solicitor of the Supreme Court, any man who will not consent to bring within the cognizance of the Court the course of his previous professional life. When the authorities at home, to whom in this and in every matter connected with the administration of Justice here I am responsible, shall tell me that I have acted erroneously, the regulation in question will cease to be enforced.

I have the honour to be, Sir,

Very respectfully yours,

WILLIAM MARTIN.

In its issue of April 7, the other Wellington daily newspaper, the *Colonists' Advertizer*, editorially took up the cudgels on behalf of the Chief Justice. But Fox was not lacking editorial support. On April 8, the *Spectator* contained the following editorial, which sufficiently indicates the nature of its contemporary's argument of the day before :

In our last number we refrained from offering any remarks either upon the power of the Court to frame the *rule* to which our attention was called (*i.e.* the rule under which the Chief Justice acted) or admitting the power of raising the question how far such a power called for immediate repeal.

That all Courts of Law should possess full powers to frame laws for the regulation of their practice nobody will for a moment deny, and that all parties that come within the scope of them should be expected to conform to them.

At the present moment we have been unable to ascertain whether the Supreme Court of this Colony owes its origin to a charter similar to those belonging to most other Colonies, or solely to the Ordinance 5th Vic. No. 1 entitled: "An ordinance for establishing a Supreme Court."

Our contemporary, it appears, rests his arguments in favour of the validity of the rule, now the subject of discussion, upon the 13th section of the recited ordinance, which provides that:

> 13. The Court shall enrol, to practice therein as barristers, such persons only as shall have been admitted as Barristers or Advocates in Great Britain or Ireland, and to practice therein as Solicitors such persons only as have been admitted as Solicitors, Attorneys, or Writers in one of the Courts at Westminster, Dublin, or Edinborough, or Proctors in any Ecclesiastical Court in England, or shall have served such term of Clerkship with a Solicitor of the Court as shall be required by the general rule thereof. All so enrolled shall be removeable from the Rolls of the Court upon reasonable cause.

He then proceeds to discuss the expediency of it. Before, however, we follow our learned contemporary on the latter point we beg to say that we differ with him upon his first point, namely, the validity of the rule in question.

Our contemporary observes: "We do not feel fully qualified to decide whether the declaration to which Mr. Fox objects is such as ought not to be required of a barrister in passing." We would just remark that we doubt whether, even had our contemporary felt himself qualified to decide the point, his Honour would have felt himself bound by his decision; and, therefore, shall not question our ability to decide the point, but merely express our opinion, which is all we shall presume to do, and, we trust, in such a manner as, whatever may be its worth, neither the style or the tone will be such as can give offence.

First, then, as to the validity of the Rule of Court which requires a member of the Bar possessed of his credentials, by which he claims his right to practice, to declare upon his honour, before one or more of her Majesty's Courts of Law in Great Britain (which is tantamount to his oath), that "I have not at any time before or since my leaving England done any act whereby I should be precluded from practising as such barrister-at-law." Now we contend that the ordinance under which his Honour claims the power to frame his Rule of Court gives him *no power to frame or enforce the Rule in question.*

Our contemporary says: "All courts have the right inherent in their very constitution, except so far as this right may be qualified by *positive* law." Admitted; and here our contemporary and we are at issue, for we contend that there is a positive law by which such a Rule of Court is not only qualified but prohibited. It is an admitted axiom in British jurisprudence that no man shall be called upon to criminate himself, and, further, that no man is called upon to defend himself before he is accused. Now, what says the ordinance ?

> 23. It shall be lawful for the Judges of the Court from time to time to make rules for regulating the time and place of holding the Court, and the Practice and Pleadings upon all Indictments, Informations, Suits, and other proceedings therein; the proceedings of the Sheriff and other Ministerial Officers; the admission of Barristers and Solicitors; the Fees and Poundage to be paid to any Officers; Costs of Suits and the taxing thereof; and all matters relating to the business of the Court; and such rules from time to time to alter or revoke; Provided that the same shall not be repugnant to any of the provisions hereinbefore contained.

Now we ask our learned contemporary whether, since the days of the Star Chamber and the Inquisition, he can refer to any Act of Parliament, Colonial Ordinance, or even a Rule of Court instituted under either of the above, or even under the charter, in which such an enactment has been declared, or such a rule laid down, as the one now the subject of discussion. Nay, we will go farther and ask our contemporary if he thinks he can name any individual in the whole circle of his acquaintance who, as a member of any legislative assembly of the present century, would have proposed such a provision as the following in any Act of Parliament or ordinance framed for the institution of any Court of Law:

> Provided always, and be it enacted, that before any person shall be admitted to plead before such Court, or practice as an Attorney in such Court, he shall take the following oath, or make the following declaration, viz :—
>
> That I have never in my whole life done any act which, if known to a second party, would subject me to the consequences of any penal or criminal statute."

We repeat: Is there a member of any existing Legislative Assembly who would propose such a clause ? Where is the Assembly who would adopt it ? Even if such were possible to be found, we say no Assembly would enact such a law ! If we are right, then no Judge is empowered by any Act or Ordinance to frame rules and regulations for the practice of his Courts (or) is authorized to frame any rule which as it is, to have the same effect as if enacted in such Ordinance itself, would be contrary to the principle of our jurisprudence, and, consequently, inadmissible in our statutes, which must be conformable to law, because the authority to make by-laws cannot be construed to making laws exceeding in effect the powers by which that liberty is granted. We are therefore of opinion, with all submission to the superior legal knowledge of our contemporary, and with every respect for his Honour, that the rule cannot be justified upon the principle of right.

Let us now see how it is that our contemporary justifies the expediency, supposing the right to enforce the rule established. He very justly observes, in this latter question, "the whole community is interested, because if those rules are such that a *gentleman* cannot, without violation of self-respect, conform to, then the character of the profession must be degraded and the administration of the law must suffer in an equal degree. It is the assumed tendency of the *present regulations* to produce this result, which we propose to examine." We beg to say we refer to one only. Our contemporary draws a distinction between a general rule, to which all persons are bound to submit, and a particular rule applicable only to a single individual or to a few persons. The latter, in our opinion would be, if possible, more invidious, if not much more insulting than the former, and therefore we pass on to the parallel case as our contemporary conceives he has discovered in the Bench of Magistrates. We have taken the trouble to peruse the oaths

*His Honour was referring to two recent admissions at Auckland.—ED.

tendered to gentlemen named in the Commission of the Peace, but confess we are unable to discover anything approaching to such a declaration as the one under discussion. What may be the conduct of gentlemen here, after being sworn in under any new ordinance which may contain any requisition of such a tendency, it is impossible to say, but at present they are relieved from the consideration of such an alternative. Now, as to the legality of it as regards the manner in which it was tendered to Mr. Fox, we believe whatever code of rules and regulations may be laid down they are not valid until they have been proclaimed. The rule as originally framed and published, we believe, required the following declaration, viz., "that I have not *at any time before or since, etc.*", but whether in consequence of the remonstrance of Mr. Fox, or from whatever cause, we learn for the first time that the words "at any time before or" have been erased, or, if not so, that in the instance of Mr. Fox they were dispensed with. If such is the case then we contend that it was illegal, as there had been no promulgation of the rule as amended; and if it is to be altered to meet individual cases then the argument of our contemporary in support of the reasonableness of the rule on account of its generality falls to the ground; and, consequently, the reasonableness of the objection proportionately strengthened.

Having stated our opinion upon the subject, we are not presumptuous enough to suppose it is such as will carry any weight with it. At the same time we could not have remained silent and thereby have been supposed to acquiesce in the view taken of the matter by our contemporary.

Here the editor acknowledges receipt of the reply of the Chief Justice to the petition of remonstrance signed by fifty-two influential residents "against your Honour's persisting in a decision calculated to inflict the most serious injury, not only to this settlement, but on the colony of New Zealand." The editorial then continues:

We cannot agree with His Honor that the reasons assigned by him, in the above letter, afford any justification of the obnoxious declaration. In point of fact they have both been answered by anticipation in Mr. Fox's letter to his Honor. First, that two Barristers have made the declaration at Auckland may be true, but what were their private circumstances? Did they or did they not amount to compulsion? And, in addition, have they or have they not been guilty of a neglect of duty towards their professional brethren and, by their inadvertence in not objecting to the declaration thrown the onus of doing so upon Mr. Fox? Secondly, there is no refusal on the part of Mr. Fox to put his previous professional life into the hands of the Court. On the contrary, he admits the power of the Court to make the enquiry if it thinks proper; but he denies the right of the Court to make the enquiry of himself, and that in terms which involve suppositions not only derogatory to himself, but to the body to which he belongs.

Fox turned his back on the law courts and became editor of the *New Zealand Gazette and Britannia Spectator*, his erstwhile champion. After a few months, he was appointed resident Agent of the New Zealand Company at Nelson, and he retained his association with the Company until its dissolution, holding, in the year 1848, the position of Attorney-General for the Province of New Munster, which included Wellington and the South Island settlements. He resigned that office when he had come to the conclusion that Sir George Grey was retarding the introduction of representative government in the Colony. He purchased 5,000 acres of land in Rangitikei, and established, on half of that area, his Westoe station; and he sold the remainder in small farms on time-payment to needy settlers.

Fox went to England in 1850, and, while there, collaborated with Charles Adderley (afterwards Lord Norton), Henry Sewell,* Weld, and Edward Gibbon Wakefield in drafting the bill which became the New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72). His legal knowledge and his practical experience in New Zealand made him, in Wakefield's words, "our chief tower of strength."

Fox's subsequent career is part of New Zealand history: it is well told in Dr. Scholefield's *Notable New Zealand Statesmen*. It is sufficient here to say that, in later years, Fox was four times Premier of New Zealand. In Parliament, he represented Wanganui and Rangitikei at different times. He held the office of Attorney-General in the Cabinet formed by him, which lasted from May 20, 1856, to June 2, 1856 ("The thirteen-days Ministry"), and, again on his becoming Premier on July 12, 1861, until August 2, 1861, when he resigned the office of Attorney-General in favour of his colleague, Henry Sewell, though he retained the Premiership until August 6, 1862. (His call to the English Bar was his qualification for the Attorney-Generalship.) He was a member of the Whitaker-Fox Ministry from October 30, 1863, to November 24, 1864, the Premier and Attorney-General then being the Hon. Mr. (later Sir Frederick) Whitaker, M.L.C., the founder of one of Auckland's leading legal firms. Fox was again Premier from June 28, 1869, to September 10, 1872. Finally, he was Premier from March 3, 1873, to April 8, 1873. He was created K.C.M.G. in 1880, and he remained in Parliament until November 8, 1881.

* * *

Did Fox ever practise law in New Zealand?

Alfred Saunders, who was a life-long friend of Sir William Fox, says, in his *History of New Zealand*, "When fully equipped with qualifications, he declined to practise as a lawyer." Dr. G. H. Scholefield, in his *Dictionary of New Zealand Biography*, says:

It is not clear whether he really wished to practise law. In any case, this was impossible because he was called upon to make a declaration which he considered humiliating for an English gentleman, and accordingly refused.

And in his more recently published *Some New Zealand Statesmen*, Dr. Scholefield, in his chapter on Sir William Fox, says:

When the *George Fyfe* reached Wellington (November, 1842) Fox had not fully decided whether he would practise law. The matter was decided for him when he applied for admission to the New Zealand Bar and the Chief Justice called on him to make a declaration which he considered repugnant to the feelings of an English gentleman. This incident diverted him to political action.

It is a matter of record that Fox did again apply for admission. A search of the Roll of Barristers in the Supreme Court, Wellington, discloses the fact that Fox was admitted and enrolled as a barrister on March 9, 1868, within a few weeks of the twenty-fifth anniversary of his refusal to take the declaration required on his application for admission before Sir William Martin. The papers are not on the Court file.

In the meantime, Fox had been responsible in 1861 for the passing of the first comprehensive Law Practitioners Act, which consolidated all previous Ordinances and enactments respecting admission and practice. It was passed on August 29, 1861, some three weeks after Fox had vacated the office of Attorney-General, and while he was still Premier; and it is reasonable to infer that he had had much to do with its preparation,

* Sewell was an English barrister, who, in middle life, became interested in New Zealand as adviser to the Canterbury Association. He gave up English practice and came to New Zealand. He became legal adviser to the Superintendent of Canterbury. His special interest was constitutional law. He was the first Solicitor-General, a Cabinet post then, in 1854; and held office in several Ministries, including the offices of Premier and Attorney-General. He was admitted as a barrister in Wellington on August 6, 1862, and, as Dr. Scholefield remarks, "paraded Lambton Quay in his wig and gown as if in . . . Chancery Lane." He had been admitted in England on March 30, 1833.

since it was prepared during his tenure as principal Law Officer. It made no great changes regarding admission. Section 3 provided that one of the qualifications for admission as a barrister of any person over the age of twenty-one years was that he had been admitted as a barrister in Great Britain or Ireland, and had passed the examination in the law of New Zealand so far as it differed from the law of England. On production to a Judge of evidence of his age, previous admission, and identity with that admission, good character, and proof of examination, the applicant was entitled to enrolment.

Shortly after his admission—and this may have been the immediate incentive to his seeking it—he acted as counsel for the Stafford Government in the Rangitikei-Manawatu purchase arbitration, which lasted through part of the year 1868. As we have seen, he had two terms of office as Premier after his admission—namely, from June to September, 1872, and again in March and April, 1873. For a short period in the 'seventies, while out of office, he was Registrar-General.

At the election after his completion of his last term of office as Premier, Fox retired from Parliament. He spent his retirement in supporting philanthropic and social causes, founding, in 1886, the New Zealand Alliance, of which he was president for the remainder of his life. He does not appear to have practised his profession regularly, and it would seem that he was more interested, when not in the political forefront, in his farm near Marton. He died at Auckland on June 23, 1893.

The declaration of character required by Sir William Martin, C.J., looked at from the distance of over a century, cannot be said to vary greatly from the affidavit of character required in support of any application for admission to-day. The only difference was that, in the early days of the Colony, the learned Chief Justice required an applicant himself to make the declaration owing to the fact that he was necessarily a recent arrival in New Zealand, and independent evidence of character would not be available. Moreover, Fox was Attorney-General when the Law Practitioners Act, 1861, prescribed evidence of good character (not specifying by whom it was to be made) as a prerequisite of admission. But those early days of colonization were days when a man was very sensitive to slights, or imagined slights, on his character. Less than six months after Fox's counsel had applied for Fox's admission, that counsel had defended his own personal honour in a duel which proved fatal to him. The other party was also a lawyer, their difference having arisen over some matter of practice. *Autres temps, autres mœurs!*

SUMMARY OF RECENT LAW.

ANNUAL HOLIDAYS.

Rate of Payment—Calculation on Ordinary-time Rate of Pay applicable from Time to Time during Employment Period—"Ordinary pay"—Annual Holidays Act, 1944, ss. 3, 4. Section 3 of the Annual Holidays Act, 1944, deals with annual holidays without loss of wages, and s. 4 deals with special payments which are to be paid to a worker in addition to wages; and the two sections must be independently interpreted. The concluding words of s. 4 (2) of the Annual Holidays Act, 1944, "one twenty-fifth of his ordinary pay for that period of employment," mean "one twenty-fifth of his remuneration for that period of employment, calculated on the assumption that during the said period he regularly worked his normal weekly number of hours at the ordinary time rate of pay which was applicable from time to time to his employment." (*Moon* v. *Kent's Bakeries, Ltd.*, [1946] N.Z.L.R. 476, applied.) Therefore, where a worker worked for twenty-six weeks as an apprentice at £6 a week and three weeks as a journeyman at £7 1s. 6d. per week, the method of calculation of his holiday pay is twenty-six weeks at £6 per week, plus three weeks at £7 1s. 6d. per week, aggregating £177 4s. 6d., of which one twenty-fifth is £7 1s. 10d. *Rawlins* (*Inspector of Awards*) v. *Coleman and Coleman, Ltd.* (Ct. of Arb. Wellington. August 17, 1948. Tyndall, J.)

AGRICULTURAL WORKERS.

Market Gardeners—Worker refusing to join Union—Employer refusing to dismiss him—Employer charged with failing "to see that such worker complied with requirements" of Order—No Offence in failing to dismiss such Worker—Agricultural Workers Act, 1936, s. 20—Agricultural Workers Extension Order, 1947 (Serial No. 1947/31), Cls. 11, 12. Clause 11 of the First Schedule of the Agricultural Workers Extension Order, 1947, is as follows: "Every worker employed within the scope of this Order shall immediately become and remain a financial member of a union affiliated to the New Zealand Federated Labourers and Related Trades' Industrial Association of Workers or the Otago Labourers and Related Trades' Industrial Union of Workers, and it shall be the duty of the employer, on representations being made to him, to see that such worker complies with the requirements of this clause: Provided that contributions shall not be in excess of an amount deemed reasonable by the Minister of Labour." The defendant was charged in that being the employer of an agricultural worker employed in a market garden within the scope of the Order, he failed in his duty to see that such worker complied with the requirements of cl. 11 that he should become and remain a financial member of a union specified in such clause. The defendant and his worker came within the scope of the Order. Representations had been made to the defendant by the Labour Department that he must see that his worker joined the union. It was admitted that the Order was validly made under s. 20 of the Agricultural Workers Act, 1936, and that the defendant did his utmost to induce the worker to join the union, but without success. *Held*, 1. That, as the Order had the effect of a penal statute, any offence arising under it must be shown by coercive words or clear intendment; and, as the Order did not come within the ambit of the Industrial Conciliation and Arbitration Act, 1925, and its amendments, provisions such as preference to unionists must be specifically set out. 2. That the duty cast on an employer by cl. 11 of the Order is to take all reasonable steps to ensure that his workers join the union, but, as there is no provision in the Order that he must dismiss them, he is not guilty of an offence if he does not dismiss them. *Semble*, The argument between the employer and the Department of Labour as to the employer's duties in connection with employment of his workers should have been referred to a Committee, and, if necessary, to the Conciliation Commission for the district for first decision, in terms of cl. 12 of the Order, which provided that, "should any matter arise out of or connected with the provisions of this Order, or connected with the employment of workers coming within the scope of this Order," it should so be referred. *Weir* (*Inspector of Factories*) v. *Bartosh.* (Otaki. August 19, 1948. Thompson, S.M.)

BUILDING.

Control—Permitted Cost of Work exceeded—Defences open to Alleged Offender—Cost of supplying Article—Inclusion in Permitted Cost—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended by S.R. & O., 1941, Nos. 1596 and 2011, 1945, No. 502), reg. 56A (2), (6), (8). By an oversight in failing to apply for a supplementary license, the plaintiffs supplied material and did repair work on the defendant's house in excess of the cost covered by licenses from the Minister of Works. In an action by the plaintiffs to recover the balance due for the additional work, *Held*: (i) If a license is granted to do certain work at a specified cost and the cost is exceeded, that is *prima facie* a contravention of reg. 56A (2) of the Defence (General) Regulations, 1939, and the defences provided by provisos (*a*) and (*b*) of para. 6 of the regulation are available to the alleged offender, and it matters not that there is also

an offence under para. 8 of the regulation as for a breach of a condition of the license; in the circumstances, there had been a contravention of the regulations; and the defendants could not bring themselves within proviso (*a*) or proviso (*b*), and, therefore, the plaintiffs' action must fail. (Dictum of *Lord Ellenborough*, C.J., in *Langton* v. *Hughes*, (1813) 1 M. & S. 593, 596; 105 E.R. 222, 224, *Brightman and Co.* v. *Tate*, [1919] 1 K.B. 463, and *Re Mahmoud and Ispahani*, [1921] 2 K.B. 716, applied.) (ii) If the cost of the work for which a license was obtained included the cost of providing and fixing an article and the licensed cost was exceeded, it was not permissible to deduct the actual cost of the article from the excess and seek to reduce the apparent excess to that extent. *Quaere*, Whether, if a builder already has an article, or if the article is obtainable without a license, the building license must cover its cost as well as the cost of fitting it. *Bostel Brothers, Ltd.* v. *Hurlock*, [1948] 2 All E.R. 312 (C.A. (Tucker, Somervell, and Cohen, L.JJ.).

As to Contracts made Void or Illegal by Statute, see *7 Halsbury's Laws of England*, 2nd Ed. 164–169, paras. 235–239; and for Cases, see *12 E. and E. Digest*, 269–274, Nos. *2200–2244*.

For Defence (General) Regulations, 1939, reg. 56A, see *39 Halsbury's Complete Statutes of England*, 1001.

COMPANY LAW.

A Resolution in Writing. *92 Solicitors Journal*, 253.

Terminology. *92 Solicitors Journal*, 279.

CONFLICT OF LAWS.

Renvoi. (J. H. C. Morris.) *64 Law Quarterly Review*, 265.

CONSTITUTIONAL LAW.

The Prerogative of Mercy. *112 Justice of the Peace Jo.*, 366.

CONTRACT.

The Severance of Illegality in Contract. (N. S. Marsh.) *64 Law Quarterly Review*, 230.

CONTROL OF PRICES.

*Offences—Sale, Agreement, or Offer to sell Goods for Price not in Conformity with Price Order—Company, as Agent for Butcher, taking Orders for and Delivering Meat and Collecting Moneys therefor without Knowing of Prices Charged—Price not in Conformity with Price Order—*Mens rea*—Knowledge of Price at Time of Delivery necessary for Conviction—Control of Prices Act, 1947, ss. 2, 29, 37.* The appellant company's van-driver took orders for meat to be supplied by a butcher, delivered the meat, and collected the moneys due to the butcher. The prices charged by the butcher for the meat were not in conformity with the Price Order in respect of meat then in force, but there was no evidence that the appellant or its servant knew what the prices of the meat were at the time of delivery. On appeal from a conviction of the appellant by a Stipendiary Magistrate, *Held*, allowing the appeal, 1. That the butcher was the principal who sold the meat, and the appellant, his paid agent, did not by the acts of its servant sell or agree to offer to sell the meat for a price not in conformity with the Price Order in force; and *mens rea* on the part of the appellant, to the extent that the appellant knew the prices charged at the time of delivery, was necessary to constitute an offence under s. 29 of the Control of Prices Act, 1947. 2. That the appellant did not "aid" or "abet" the commission of the offence, within the meaning of those words as used in s. 37 of the statute, either by delivering the meat or by collecting the moneys payable for it, because it knew nothing of the prices. (*R.* v. *Coney*, (1882) 8 Q.B.D. 539, referred to.) (*Van Chu Lin* v. *Brabazon*, [1916] N.Z.L.R. 1097, distinguished.) *Hazelwood and Co., Ltd.* v. *Richardson*. (Wellington. August 17, 1948. Fair, J.)

CONVEYANCING.

Conditions against Alienation. *92 Solicitors Journal*, 254.

Directions to Settle. *92 Solicitors Journal*, 280.

Title to Property of Nationalized Bodies. *98 Law Journal*, 438.

CRIMINAL LAW.

Evidence—Unlawful Use of Instrument with Intent to procure Miscarriage—Discovery in Accused's Room of Abortifacients to be taken orally—Evidence of Possession thereof Corroboration of Evidence as to Use of Instrument and of Accused's Identity. If a person is in business as an abortionist and it is alleged that he attempted to procure abortion in a particular way, the fact that he was carrying on such business is relevant and admissible as an element for consideration upon a charge that he did on a particular occasion commit that offence, by whatever means. The inference to be drawn from the accused's possession of abortifacients to be taken orally was a matter for the jury to consider, and one which it was particularly within their province to determine, in considering their verdict on a charge of unlawfully using an instrument with intent to procure a miscarriage; and that possession was evidence enabling the jury to draw the inference, if they thought fit, that the accused habitually practised the procuring of abortion. If this inference was drawn, it corroborated the evidence of the Crown witnesses that the person doing the operation quickly and competently, gave an opinion as to the duration of the pregnancy, and it was some corroboration of identification; and it was evidence as to the identity and intent of the accused leading to the inference that he practised in a specialized type of crime. (*R.* v. *Mullins*, (1848) 3 Cox C.C. 526, and *R.* v. *Baskerville*, [1916] 2 K.B. 658, applied.) *The King* v. *Reddeway*. (Court of Appeal. August 20, 1948. Kennedy, Fair, Cornish, and Stanton, JJ.)

Reform of the Criminal Law. *98 Law Journal*, 454.

DIVORCE AND MATRIMONIAL CAUSES.

Custody—Custody pending Suit—Preservation of Status quo *until Trial—Husband and Wife—Proceedings by Wife—Injunction—Matrimonial Home belonging to Wife—Right to exclude Husband.* A husband and a wife and their three children occupied as their matrimonial home a house belonging to the wife. On December 16, 1947, the wife left the house, alleging the husband's cruelty as her reason for doing so, and she went to her brother's house, taking with her the two daughters, aged sixteen and twelve, but leaving behind the son, aged three, in the care of his nurse. Her solicitors later informed the husband that she could not return to the house while he was there, and, accordingly, he left on December 26, and the wife returned there with her younger daughter. On March 30, 1948, the husband telephoned saying that he would be returning to the house on the following day, and the wife thereupon arranged to go back to her brother's house with the children. She sent the son and the younger daughter in the car with the nurse, but the husband stopped the car and took the daughter back with him to the wife's house. On April 28, the wife filed a petition for divorce on the ground of the husband's cruelty. By his answer the husband denied the wife's allegations and asked for restitution of conjugal rights. On May 1, the husband took the son and the nurse back to the wife's house. The wife applied (*a*) for the custody of the younger daughter and the son pending suit, and (*b*) for an injunction to restrain the husband from entering her house: *Held*: (i) In regard to the custody of children *pendente lite*, the *status quo* which it was desirable to preserve, bearing in mind that the interests of the children were the paramount consideration, was the state of affairs which existed on March 29, 1948, and, therefore, the wife was entitled to the custody of the children until the suit was heard. Where there was no allegation against the husband or the wife in regard to his or her conduct as a parent, it was the duty of the Court to decide what was best for the child irrespective of any preference which the child might express for one parent or the other. (ii) Where property belonged to the wife, the Court had jurisdiction to grant an injunction to restrain the husband from entering the premises, but the jurisdiction was one which would be exercised with care, especially where it involved the breaking up of the matrimonial home. In the circumstances of the case, the wife was entitled to the injunction. (*Shipman* v. *Shipman*, [1924] 2 Ch. 140, and *Symonds* v. *Hallett*, (1883) 24 Ch.D. 346, applied.) *Boyt* v. *Boyt*, [1948] 2 All E.R. 436 (C.A.).

As to Interim Orders with respect to Custody of Children, see *10 Halsbury's Laws of England*, 2nd Ed. 721–723, paras. 1102–1104; and for Cases, see *27 E. and E. Digest*, 418, 419, Nos. *4232–4248*.

As to Wife's Right to Injunction for Protection of her Private Property, see *16 Halsbury's Laws of England*, 2nd Ed. 739, para. 1209; and for Cases, see *27 E. and E. Digest*, 258, 259, Nos. *2278–2282*.

Non-Cohabitation Clauses in Magistrates' Orders. *92 Solicitors Journal*, 292.

Refusal of Sexual Intercourse and the Law of Desertion. (Jasper Ridley.) *64 Law Quarterly Review*, 243.

The Three Cases. *92 Solicitors Journal*, 249.

EQUITY.

Points in Practice. *98 Law Journal*, 454.

EVIDENCE.

Admissibility—Statement in Document—"Person interested"—Proof of Deceased Solicitor's Clerk—Probate Action anticipated—Partner of Firm propounding Will—Evidence Act, 1938 (c. *28*),

s. 1 (3) (Evidence Amendment Act, 1945 (N.Z.), s. 3 (3)). In anticipation of probate proceedings in respect of the validity of a will, which was propounded, as one of the executors, by a partner in a firm of solicitors, a clerk employed by the firm prepared a statement of the evidence he would be able to give at the trial, but before the action was commenced he died. The statement was tendered in evidence under s. 1 of the Evidence Act, 1938. *Held*: The clerk was not a "person interested" within the meaning of s. 1 (3) of the Act, and, therefore, the statement was admissible in evidence. (*Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.*, [1941] 1 All E.R. 311, distinguished.) *In the Estate of Hill (deceased), Braham* v. *Haslewood and Another*, [1948] 2 All E.R. 489 (P.D.A.).

FAMILY PROTECTION.

Son Applicant—Position with Special Reference to his Needs—Time for Ascertainment—Family Protection Act, 1908, s. 33. The position of an applicant under the Family Protection Act, 1908, subsequent to the date of the testator's death is relevant only in exceptional circumstances. To form a judgment as to whether a will is a just will requires that it be considered in the light of the circumstances at the time—strictly speaking, at the time it was made; but, as it speaks at death, it must be judged then. After events are relevant in so far as they may be said to have been probable, or even possible, and therefore to have been in contemplation of the testator, or ought to have been recognized as possibilities; but happenings subsequent to the date of death are relevant only to the discretion of the Court. *In re Lethaby (deceased).* (Auckland. July 19, 1948. Gresson, J.)

Time for Application—Summons issued before Representation taken out—Statement in Will of Reasons for Dispositions—Admissibility of Evidence as to Reasons—Inheritance (Family Provision) Act, 1938 (c. 45), ss. 1 (7), 2 (1) (Cf. Family Protection Act, 1908 (N.Z.), s. 33 (9)). The Inheritance (Family Provision) Act, 1938, s. 2 (1), provides: "an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out." The testator died on October 29, 1946, and the summons in an application under the Act of 1938 was issued on March 18, 1947. Representation was not granted until May 6, 1947. *Held*, The application, although made before representation was taken out, was made before November 6, 1947, when the period of six months from the date of the grant expired, and it was, therefore, within the provisions of s. 2 (1). *Quaere*, Whether under R.S.C., Ord. 54F, it is permissible to start an application before probate, provided it can be discovered who are named as executors in the will, irrespective of whether they ultimately prove the will or not. Section 1 (7) of the Act provides: "The Court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision . . . for a dependant, and the Court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the Court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement." The testator stated in his will his reason for making no provision for his wife. *Held*, The statement in the will did not, on the construction of s. 1 (7), preclude the taking of evidence of the testator's reasons for excluding his wife, nor were those claiming through the testator estopped by the statement from adducing evidence. *Re Searle (deceased), Searle* v. *Siems and Others*, [1948] 2 All E.R. 426 (Ch.D.).

FINANCE.

Finance Emergency Regulations, 1940, Amendment No. 8 (Serial No. 1948/139). Amendment of definition of "gold" in Reg. 291.

Gold Acquisition Notice, 1948 (Serial No. 1948/140), bringing into force on August 20, 1948, Reg. 4 of the Financial Emergency Regulations, 1940 (No. 2).

INCOME TAX.

Annuities. *92 Solicitors Journal*, 293.

Companies. *92 Solicitors Journal*, 290.

Deductions—Cost of Litigation—Appeal vital to retain Services of Valuable Employee—Income Tax Act, 1918 (c. 40), Sched. D, Rules Applicable to Cases I and II, r. 3 (a). To secure a supply of potatoes for the purpose of their business a company formed and held all the shares in a subsidiary company which, with the parent company's money, acquired a large estate, previously managed for many years by an experienced farmer, Y. To retain Y.'s services, the subsidiary company entered into an agreement with him under which he was paid, in the accounting year ending March 31, 1941, £6,486, which was included in the accounts of the subsidiary company. In computing the profits of the subsidiary company (which were included in the parent company's profits for assessment to excess profits tax for that chargeable accounting period), the Commissioners of Inland Revenue decided that for excess profits tax purposes no deduction should be allowed in respect of Y.'s remuneration in excess of £3,500, being the amount the Commissioners considered reasonable and necessary having regard to the requirements of the trade or business and to the actual services rendered by Y. Both companies, regarding Y.'s employment as essential to the wellbeing of the enterprise and fearing they would suffer through Y.'s discontent, appealed to the Board of Referees against this decision and the Board held that £5,800 out of the sum of £6,486 was deductible. As a result, the Commissioners did not seek to disallow any part of Y.'s remuneration in subsequent years. The subsidiary company incurred legal and accountancy costs of £622 in the preparation and prosecution of the appeal: *Held* (*Viscount Simon* and *Lord Oaksey* dissenting), The legal and accountancy costs incurred were not a disbursement "wholly and exclusively laid out or expended for the purposes of the trade" within the meaning of r. 3 (*a*) of the Rules Applicable to Cases I and II of Sched. D to the Income Tax Act, 1918, and so were not deductible by the subsidiary company for the purposes of its assessment to income tax and were not deductible by the parent company for the purpose of the assessment subject to excess profits tax. (Dicta of *Lord Loreburn*, L.C., and *Lord Davey* in *Strong and Co., Ltd.* v. *Woodifield*, [1906] A.C. 448, 452, 453, applied.) (Dictum of *Viscount Cave*, L.C., in *British Insulated and Helsby Cables* v. *Atherton*, [1926] A.C. 205, 211, 212, considered.) (*Allen* v. *Farquharson Bros. and Co.*, (1932) 17 Tax Cas. 59, and *Worsley Brewery Co., Ltd.* v. *Inland Revenue Commissioners*, (1932) 17 Tax Cas. 349, considered.) Decision of Court of Appeal, [1947] 1 All E.R. 704, affirmed. *Smith's Potato Estates, Ltd.* v. *Bolland (Inspector of Taxes), Smith's Potato Crisps (1929), Ltd.* v. *Inland Revenue Commissioners*, [1948] 2 All E.R. 367 (H.L.).

Deductions—Cost of Litigation—Appeal in respect of Incidence of Excess Profits Tax—Income Tax Act, 1918 (c. 40), Sched. D, Rules Applicable to Cases I and II, r. 3 (a). In computing their profits for both income tax and excess profits tax the taxpayers sought to charge as a deduction from such profits the costs and expenses of an appeal to the Special Commissioners in respect of the incidence of excess profits tax. Those costs and expenses included solicitors' costs, fees of consulting accountants, fees of accountants acting generally for the taxpayers for professional services specially connected with the appeal, and travelling expenses of witnesses. *Held*, The costs and expenses were not a disbursement "wholly and exclusively laid out or expended for the purposes of the trade" within the meaning of r. 3 (*a*) of the Rules Applicable to Cases I and II of Sched. D to the Income Tax Act, 1918, and were, therefore, not allowable as a deduction in the computation of profits for the purposes of either income tax or excess profits tax. (*Smith's Potato Estates, Ltd.* v. *Bolland (Inspector of Taxes), Smith's Potato Crisps (1929), Ltd.* v. *Inland Revenue Commissioners*, [1948] 2 All E.R. 367, followed.) Decision of Court of Appeal, [1947] 1 All E.R. 699, affirmed. *Rushden Heel Co., Ltd.* v. *Keene (Inspector of Taxes), Rushden Heel Co., Ltd.* v. *Inland Revenue Commissioners*, [1948] 2 All E.R. 378 (H.L.).

As to Expenses Wholly or Exclusively Expended for Purposes of Trade, see *17 Halsbury's Laws of England*, 2nd Ed. 152, para. 312; and for Cases, see *28 E. and E. Digest*, 42–44, 56, 57, Nos. *215–226, 286–292.*

LANDLORD AND TENANT.

Furniture and Equipment. *92 Solicitors Journal*, 255.

Restrictions on Alienation by Reference to Class. *92 Solicitors Journal*, 294.

Surrender *in futuro*. *92 Solicitors Journal*, 281.

LICENSING.

Offences—Supply of Liquor to Maori in Proclaimed Area—Aiding and Procuring Commission of Offence—Maori, in Proclaimed Area, winning Liquor in Raffle in Bar and taking it away from Hotel—Supply "for consumption off licensed premises"—Aiding and Abetting proved by Fact of Removal of Liquor by Maori—Licensing Amendment Act, 1910, s. 43 (2). Where liquor was supplied to a Maori in a proclaimed area for consumption off licensed premises in breach of s. 43 (2) of the Licensing Amendment Act, 1910, the Maori aided and abetted the commission of the offence by accepting the liquor in the bar and carrying it away from the premises; and it was immaterial

whether the necessary proof appeared in the evidence of the prosecution or of the defendant (as here). (*C. L. Innes and Co., Ltd.* v. *Carroll*, [1943] N.Z.L.R. 80, followed.) (*Davies* v. *Glover*, [1947] N.Z.L.R. 806, applied.) *Police* v. *McGregor*. (Levin. June 22, 1948. Thompson, S.M.)

MASTER AND SERVANT.

A Safe System of Working. *92 Solicitors Journal*, 277.

MISTAKE.

Mistake of Law—Money paid under Mistake—Recovery—Money had and received—Personal Claim in Equity—Construction of Will—Residue of Testator's Estate paid to Charitable Institutions by Executors—Directions in Will void for Uncertainty—Right of those entitled under Intestacy to recover from Institutions Sums Paid—Limitation of Action—Recovery of Sums paid under Invalid Residuary Bequest—Action by Next-of-kin. By his will, dated November 3, 1919, a testator, who died on March 23, 1936, directed his executors to apply his residuary estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England" as they in their absolute discretion should select. By 1939, pursuant to that direction the executors had paid over £200,000 to 139 charitable institutions, and in that year certain of the testator's next-of-kin challenged the validity of the direction. Accordingly, on October 18, 1939, the executor's solicitors wrote to each of the said charitable institutions informing them of the challenge and calling on them not to deal with the distributed sums until they had further heard from them. In 1944, the House of Lords held that the residuary bequest was void for uncertainty. In actions begun by the testator's next-of-kin in 1940 and 1945 to recover the sums paid to the charitable institutions, *Held*, (i) It was impossible to contend that a disposition which, according to the general law, was held to be invalid could yet confer on those who, *ex hypothesi*, had improperly participated under the disposition some moral or equitable right to retain what they had received against those whom the law declared to be properly entitled. (ii) The next-of-kin had an equitable right to recover the money paid by mistake, and a claim thereunder was not liable to be defeated merely (*a*) in the absence of administration by the Court, or (*b*) because the mistake under which the original payment was made was one of law rather than fact, or (*c*) because the charity concerned in any particular claim had no title and was a stranger to the estate. In the first instance, the right was against the executors, and the extent of the claim against the charities was limited to the amount not recovered from the executors. (*David* v. *Frowd*, (1833) 1 My. & K. 200; 39 E.R. 657, considered). (*Re Hatch, Hatch* v. *Hatch*, [1919] 1 Ch. 351, criticized.) (*Re Mason*, [1929] 1 Ch. 1, explained.) *Per curiam*, The absence or exhaustion of the beneficiary's right to go against the wrongdoing executor or administrator ought properly to be regarded as the justification for calling on equity to come to the aid of the law by providing a remedy which would otherwise be denied to the party who has been deprived of that which was justly his. (iii) The actions were "in respect of" claims to personal estate within the Limitation Act, 1939, s. 20, and, therefore, the limitation period applicable to the equitable claims *in personam* was twelve years, and the claims were not barred. (*Re Blake, Re Minahan's Petition of Right*, [1932] 1 Ch. 54, considered.) (iv) Equity recognized the right of the next-of-kin to the money as a proprietary interest, and, when once that proprietary interest had been created as a result of the wrongful dealing with the funds by the executors, it would persist and be operative against an innocent third party who was a volunteer, provided only that means of identification in or disentanglement from a mixed fund remained. There could be no difference in principle between a case where the mixing had been done by the volunteer and one where the mixing had been done previously by the fiduciary agent. (*Sinclair* v. *Brougham*, [1914] A.C. 398, applied.) (v) Where a defendant institution had mixed with its own money money received from the executors and employed the mixed fund in the purchase of property—*e.g.*, land or stock—the next-of-kin would be entitled to a charge on the property, but, where the money from the executors had been used in the alteration or improvement of assets which the institution already owned, the money could not be traced in any true sense, and a declaration of charge would not produce an equitable result, and was, therefore, inapplicable. The position was similar where the money had been given for the purpose of the payment off of an existing encumbrance on land. (vi) Where moneys from the executors had been mixed in an active banking account by a defendant institution, withdrawals thereout should not be attributed rateably to the "Diplock money" and the charity money. The rule in *Clayton's Case*, (1816) 1 Mer. 529, 572, should be applied, but that rule should not be applied by analogy to the purchaser and sale of war stock. Decision of *Wynn-Parry*, J., [1947] 1 All E.R. 522, reversed in part. *Re Diplock's Estate, Diplock and Others* v. *Wintle and Others (and Associated Actions)*, [1948] 2 All E.R. 318 C.A. (Lord Greene, M.R., Wrottesley and Evershed, L.JJ.).

As to Mistake of Law, see *23 Halsbury's Laws of England*, 2nd Ed. 131, 132, paras. 181, 182; and for Cases, see 35 *E. and E. Digest*, 91–95, Nos. *9–44*.

As to Right to Follow Assets, see *13 Halsbury's Laws of England*, 2nd Ed. 200–202, paras. 192, 193; and for Cases, see *43 E. and E. Digest*, 1017–1023, Nos. *4580–4624*.

NEGLIGENCE.

Stevedore—Injured by falling into Uncovered Hatch—Hatch covers and Electric Lights removed by Ship Repairers—Breach of Statutory Regulations by Shipowner and Repairers—Contributory Negligence—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), regs. 12 (c), *37, 45.* Where an accident was a result of the negligence and breach of statutory duty of both the shipowner and the repairers, the repairers could not escape liability by reason of the so-called "rule of the last opportunity," as it was still their negligence which directly contributed to the accident. It was a settled principle that, when separate and independent acts of negligence on the part of two or more persons had directly contributed to cause injury and damage to another, the person injured might recover damages from any one of the wrongdoers, or from all of them. (*Admiralty Commissioners* v. *North of Scotland, &c. Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350, applied.) Where the negligence which was the cause of the accident was a breach of regulations, made to secure the safety of workmen which might be presumed to be strictly enforced in the ordinary course of the ship's discipline, it could not be said that the workman was careless if he assumed that there had been compliance with the law. (*Gee* v. *Metropolitan Railway Co.*, (1873) L.R. 8 Q.B. 161, approved.) Accordingly, the shipowner and the repairers were both liable to the stevedore in damages. (Per *Lord du Parcq.*) Since the ship was at the quayside, the pursuer was engaged in "moving and handling goods . . . at" a "quay," within the meaning of the Docks Regulations, 1934. The regulations imposed on the repairers the duty of replacing the hatch coverings and of leaving the lights in their proper place after removing them, and, accordingly, the repairers were in breach of their duty, under regs. 37 and 45, while the shipowner had failed in his duty under reg. 12. *Grant* v. *Sun Shipping Co., Ltd., and Others*, [1948] 2 All E.R. 238. (H.L. (Lord Thankerton, Lord Porter, Lord Uthwatt, Lord du Parcq, and Lord Oaksey).

PRACTICE.

Adjournments for Want of Time. *98 Law Journal*, 437.

Parties—Misnomer—Substitution of Plaintiff—Action begun in Name of Firm—Sole Proprietor of Firm dead—Substitution of Proprietor's Executrix as Plaintiff—R.S.C., Ord. 16, r. 2 (Code of Civil Procedure, R. 60). By R.S.C., Ord. 48A, r. 1, an action can be brought in a firm's name only where there are two or more partners. A.M. was the sole proprietor of a business which he carried on in the name of "A.M. & Co." After his death, his executrix, who continued to carry on the business under the same trading name, brought an action in the name of "A.M. & Co. (trading as a firm)," the action being in respect of a contract made by A.M. during his lifetime. On an application to amend the writ by substituting the executrix as plaintiff, *Held*, While the action did not fall within R.S.C., Ord. 16, r. 2, as having been "commenced in the name of the wrong person as plaintiff," the case might properly be treated as one of misnomer and the writ amended by substituting the executrix as plaintiff. (Decision of *Lord Goddard*, L.C.J., [1948] 2 All E.R. 144, reversed.) (*Tetlow* v. *Orela, Ltd.*, [1920] 2 Ch. 24, and *Clay* v. *Oxford*, (1866) L.R. 2 Exch. 54, distinguished.) *Alexander Mountain and Co.* v. *Rumere, Ltd.*, [1948] 2 All E.R. 482 (C.A.).

PROBATE AND ADMINISTRATION.

Will—Separate Identical Wills—One Counterpart of Other, but not Carbon Copy—One Copy forwarded to Executor, Other retained by Testatrix—Evidence of Sequence of Execution inconclusive—Probate granted of Will retained in Testatrix's Possession. The testatrix typed two copies of her will, they being identical in language. One had errors in typing, and it was forwarded by the testatrix to the executor; and the other, which was typed without errors, was retained by the testatrix. Each copy revoked all former wills, but, on the question of execution, the evidence was inconclusive. On application for probate, *Held*, That probate should be granted of the copy retained by the testatrix in her own possession, and the other copy should

remain in the Registry, no note being made on the probate as to its existence. *In re Hodgson (deceased).* (Auckland. August 10, 1948. Gresson, J.)

RATIONING.

Rationing Emergency Regulations, 1942, Amendment No. 5 (Serial No. 1948/142), revoking the Sugar Rationing Order, 1942, and the Sugar Rationing Order, 1945, as from August 30, 1948.

ROAD TRAFFIC.

Motoring Offences and Penalties. (Dr. C. K. Allen.) *64 Law Quarterly Review,* 207.

SHARE-MILKING AGREEMENTS.

Profits on Pigs—Standard Conditions—Construction—Time for reopening of Accounts—Share-milking Agreements Act, 1927, s. 3—Share-Milking Agreements Order, 1946 (Serial No. 1946/156), Cl. 5. Clause 5 of the standard terms and conditions set out in the Share-milking Agreements Order, 1946, which is as follows, "The share-milker shall receive half share of the value of all calves, which shall be valued as grades, including bobby calves and pigs, which shall be valued as grades, providing the share-milker buys in as grades," confers on the share-milker the right to receive a half share of the profits of all pigs tendered by him in pursuance of the agreement. In arriving at his share of the profits, the farmer is entitled to deduct half the cost of any pigs purchased for the business, and half the cost of any supplementary feed purchased, and of any amounts paid for carting or commission on sale, subject to the share-milker's right to require the cost of pigs purchased to be assessed at the rate payable for grades. If an agreement, made between the farmer and the share-milker respecting the profit on pigs during the currency of a share-milking agreement, operates less favourably to the latter than the standard terms and conditions, such agreement is null and void by virtue of s. 3 of the Share-milking Agreements Act, 1937. *Dawson* v. *Logan.* (Pukekohe. August 11, 1948. Luxford, S.M.)

TRANSPORT LICENSING.

Passenger-service License—Omnibus operated under Contract with Travel Agency—License authorizing Itinerary "arranged through a travel tourist agency approved by the Licensing Authority"—Passengers not joining Omnibus at its own Place of Commencement of Route—Tour as arranged by Travel Agency—No Offence—Transport Licensing Act, 1931, s. 20 (1) (b). The proprietor of an omnibus business at Whangarei, operating under passenger-service licenses, owned an omnibus the license of which designated operations between points of commencement and termination of routes as "from Whangarei to any point in the North Island." The license provided that "all trips must be of a tourist nature and must be arranged through a travel agency approved by the Licensing Authority." A firm of passenger agents, Messrs. Russell and Somers, arranged a tourist trip to be run over a route Auckland to Waitomo, New Plymouth, Wanganui, Pipiriki, Taupo, Rotorua, and back to Auckland, The Licensing Authority authorized the special tourist trip "as arranged through Messrs. Russell and Somers, Booking Agency." The omnibus left Whangarei, but did not pick up passengers until it reached Auckland; and two passengers joined at Hamilton. Two passengers who joined at Auckland returned by the omnibus to Whangarei at the end of the trip. The defendant was charged with carrying on a passenger service otherwise than pursuant to an authority and in conformity with the terms of its passenger-service license, being an offence created by s. 20 (1) (*b*) of the Transport Licensing Act, 1931. The offence was alleged to have consisted in picking up passengers at places other than Whangarei. *Held,* That the place where a passenger got on the omnibus or left it was irrelevant, as the omnibus was operated under a special contract with Messrs. Russell and Somers for a fixed sum, the specified fare having been approved by the Licensing Authority; and the defendant was paid for the carriage of the passengers on the basis of a journey from Whangarei to Whangarei; and, consequently, what the defendant did was not in breach of his passenger-service license. *Treadgold* v. *Webb.* (Auckland. August 8, 1948. Luxford, S.M.)

WILL.

Frauds on a Power. (Dr. H. G. Hambury.) *64 Law Quarterly Review,* 230.

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Hernia—Pain following Accident due to Old Hernia—Symptoms of Existence of Old Hernia—Workers' Compensation Act, 1922, s. 3. The plaintiff, while he was lifting a case of cargo, was injured by his foot slipping on some oil on the wharf, whereby he suffered a strain, and he alleged that thereby he sustained a hernia. A small swelling in his left groin was noticed that evening, but it had disappeared next morning, but came on again when he started work. *Held,* That the plaintiff had an old hernia, because the facts that the swelling was down when the worker was standing up and it disappeared when he lay down were proof of a large internal ring which indicated an old hernia; and, consequently, it was not proved that the lift caused the hernia. *Blair* v. *Wellington Harbour Board.* (Comp. Ct. Wellington. August 10, 1948. Ongley, J.)

Accident arising out of and in the Course of the Employment—Shingles—Contact of Head with Overhead Beam—Pain immediately following—Shingles resulting in Loss of Sight of Eye—Loss of Sight due to Disease, not Blow—Workers' Compensation Act, 1922, s. 3. *Herpes zoster* (shingles) is an infection caused by an unknown virus which attacks the ganglia of the sensory nerves, the ganglia being collections of nerve cells related to the nerves, and situated either within the skull or the spinal column; and infection reaches the ganglia by means of the cerebro-spinal fluid of the body. The usual symptomless incubation period of the disease is from seven to twenty-four days. A worker, immediately following contact with an overhead beam that drove his sun-helmet down his forehead and over the bridge of his nose, felt a severe and continuing pain in his left eye and in his head that ended in the destruction of the sight of that eye, and proved to be due to an attack of *herpes zoster. Held,* That the disease was not due to the accident; but its onset was merely coincident with the blow. *Wheeler* v. *Clements.* (Comp. Ct. Auckland. August 9, 1948. Ongley, J.)

Accident arising out of and in the Course of the Employment—Heart Disease—Ventricular Fibrillation—Coronary Insufficiency—No Proof that the Work caused the Worker's Death. The deceased worker was taken part of the way to his work in a truck, and, on getting out of the truck, he walked to a hut at the site of the work, a distance uphill of about a quarter of a mile. Death was due to coronary insufficiency causing ventricular fibrillation, the immediate condition (it was contended) being brought about by the walk from the truck to the site of the work. *Held,* on the medical and other evidence, That the deceased had had heart disease, and he did an easy walk at an easy pace for about twenty minutes, but there was no evidence that it caused him any ill effects; he sat down for five to ten minutes, then squatted down and began to sharpen a scythe; he then fell over dead; and it was not proved that work caused his death. *Joyce* v. *New Plymouth Borough.* (New Plymouth. July 27, 1948. Ongley, J.) (Compensation Court).

Accident arising out of and in the Course of the Employment—Suburban Work—Employer authorizing Worker to use his own Means of Transport to go to and from his Work—Accident to Worker while so travelling—Accident "deemed to arise out of and in the course of the employment"—Workers' Compensation Amendment Act, 1943, s. 7. An employer, by instructing a worker to use the worker's own bicycle to go to and from his work, authorizes its use as a means of transport, with the result that an accident caused to the worker while so travelling is "deemed to arise out of and in the course of the employment," by virtue of s. 7 of the Workers' Compensation Amendment Act, 1943. (*Gollan* v. *Westfield Freezing Co., Ltd.,* [1945] N.Z.L.R. 103, not followed.) *Hassett* v. *Bridgeman.* (Wellington. June 15. 1948. Ongley, J.) (Compensation Court).

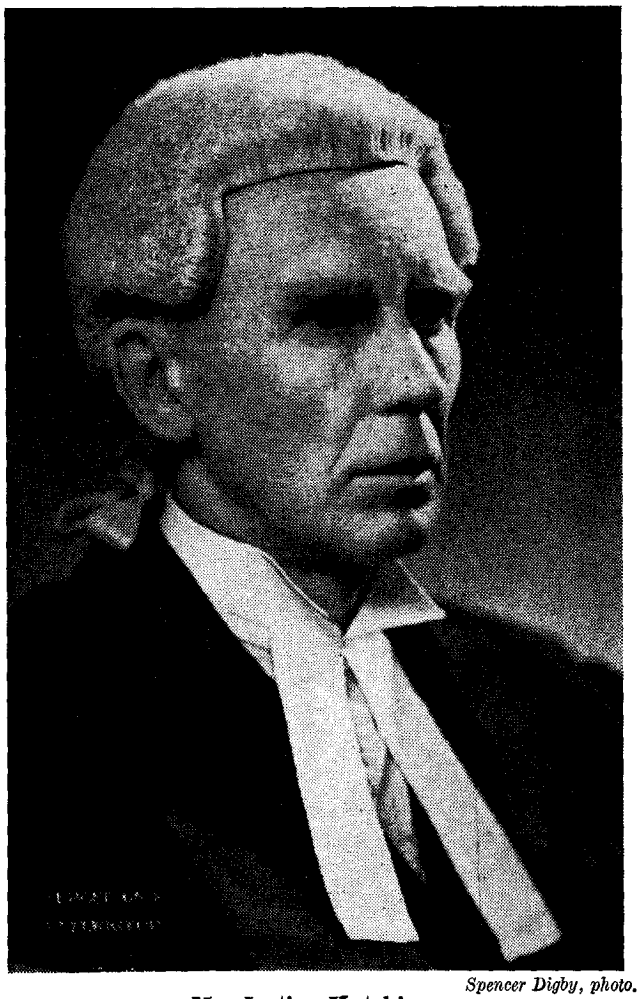
Assessment—Partial Incapacity—Overtime—Post-accident Earnings, including Overtime, to be taken into Account—Workers' Compensation Act, 1922, s. 5 (6)—Workers' Compensation Amendment Act, 1943, s. 3 (1). Overtime must be taken into account in computing post-accident earnings for the assessment of compensation in cases of partial incapacity under s. 5 (6) of the Workers' Compensation Act, 1922, as enacted by s. 6 (6) of the Workers' Compensation Amendment Act, 1936, and amended by s. 3 (1) of the Workers' Compensation Amendment Act, 1943. (*Baggs* v. *London Graving Dock Co., Ltd.,* [1943] 1 All E.R. 426, and *Tompkins* v. *Northern Steamship Co.,* [1925] N.Z.L.R. 465, referred to.) (*Brookes* v. *McKay,* [1940] N.Z.L.R. 222, mentioned.) *Old* v. *Thos. Borthwick and Sons, Ltd.* (New Plymouth. July 27, 1948. Stilwell, D. J.) (Compensation Court.)

MR. JUSTICE HUTCHISON.

His Useful and Varied Career.

There was widespread gratification among the members of the Bar and public in Canterbury when the Minister of Justice announced last month the appointment of Mr. James Douglas Hutchison, of Christchurch, as a Judge of the Supreme Court to fill the vacancy caused by the retirement of the Hon. Sir David Smith.

The new Judge, who was born in Dunedin in 1894, is the son of the late Sir James Hutchison, for many years editor of the *Otago Daily Times*. He was educated at the George Street School, Otago Boys' High School, and Victoria University College. After practising in Carterton for a short period after his admission, he went to Christchurch in 1926, and has since been a partner in the firm of Messrs. J. J. Dougall, Son, and Hutchison.



Spencer Digby, photo.

Mr. Justice Hutchison.

During the eighteen years from 1931 to 1948, he was for fifteen years a member of the Council of the Canterbury District Law Society, and filled with distinction the office of President in 1938, officiating at many public functions at the Dominion Law Conference held at Easter of that year. Those who were present will recall the commendation given by the Chief Justice (the Rt. Hon. Sir Michael Myers) at the Conference dinner, when he made particular reference to Mr. Hutchison's speech at the laying of the foundation stone of the new Court-house in Christchurch. For some years before his recent appointment, he served on the Disciplinary Committee of the New Zealand Law Society.

The new Judge left New Zealand with the Main Body of the First N.Z.E.F., and celebrated his twenty-first birthday on Gallipoli. After being invalided home, he re-enlisted and served on the Western front at the closing pages of the war. He served through various ranks from Gunner to Lieutenant.

In the second World War, the new Judge served as D.A.A.G. of the Southern Military District from 1940 to 1943, and went overseas for a short period with a draft of the 9th Reinforcements. At the time of his appointment to the Supreme Court Bench, he was Deputy Judge Advocate-General for the Southern Military District.

The new Judge has always been a keen enthusiast in the world of sport, gaining his New Zealand University blue in football and boxing. In the latter sport he was middle-weight champion for two successive years after his return from the first World War. He also gained Provincial honours in Rugby football. Of later years he has continued to be a keen golf and tennis player; and he has continued closely associated with the administrative side of boxing, having been in great demand as a referee and judge of amateur and professional contests.

His wide experience both in practice and in the various activities as a citizen eminently fits him for his new appointment. Even from his earliest years he has impressed his contemporaries by his judicial cast of mind. While he was quick to react to theatrical tricks on the part of a forensic opponent, he always maintained, on his side, the best traditions of restrained but tenacious advocacy.

He served as District Transport Licensing Authority in Canterbury, and, later, as the Chairman of one of the Mortgage Adjustment Commissions. In each office, he demonstrated his aptitude for judicial duties. He has been appointed while still relatively young in years; and he has always been endowed with robust physical health, which will be so desirable a quality in the arduous duties which now befall him. By him, the dignity of office will be lightly and naturally carried. He assumes his new rank with the confident hope of his fellow-practitioners that he will have a long and successful career on the Supreme Court Bench.

The pride and delight of those fellow-practitioners in his appointment as a Judge are evidenced by the speeches made at the farewell given to him by the Christchurch Bar, a report of which appears on the next page.

His Honour took the oaths of judicial office at Wellington on July 30. His first duty was to preside at the Wanganui Sessions on August 2, and later at the New Plymouth Sessions.

He has been appointed a member of the First Division of the Court of Appeal.

Farewell by Christchurch Practitioners.

There was almost a full attendance of Christchurch practitioners, as well as representatives from other towns in the Province, at a complimentary tea tendered by the Canterbury District Law Society to the Hon. Mr. Justice Hutchison on the occasion of his appointment to the Supreme Court Bench. Altogether about a hundred and twenty were present.

An apology was received from Mr. Justice Fleming, who was unable to attend because of the Criminal Sessions of the Supreme Court. His Honour, in a letter read at the function by the President, said that he desired to join with members of the Law Society in extending hearty congratulations and best wishes to the new Judge. "I am sure," the letter continued, "that he will do great credit to the Canterbury Bar and uphold and enhance the traditions of the Judiciary."

THE LAW SOCIETY'S PRESIDENT.

Mr. L. J. H. Hensley, President of the Law Society, said that this was a momentous occasion for the Canterbury Bar, as, for the second time within ten months, members were gathered to honour one of their number who had received a well-merited appointment to the Supreme Court Bench. He wished to apologize for the absence of Mr. A. T. Donnelly, who had landed in England some ten days before, and was suspected to be now somewhere in the vicinity of Leeds.

"We have not been able, in the limited time at our disposal, to prepare a more elaborate function, which would more fittingly do justice to such an important occasion," the President continued. "Our guest this afternoon, however, may be assured, as was his predecessor, Mr. Justice Gresson, last year, that what this occasion may lack in what I may term elaboration will be compensated for by warmth of feeling and sincerity of all present to-day in applauding a well-merited appointment."

Mr. Hensley welcomed the two Magistrates, Mr. Frank Reid and Mr. Raymond Ferner, and extended a cordial welcome to Judge Goldstine, the President of the Local Body Commission, who had adjourned the Commission to enable the counsel engaged to attend the gathering. The President continued:

"In a few moments Mr. L. D. Cotterill and Mr. W. R. Lascelles will voice for you the tributes which I know you would desire to pay to-day to our guest, Mr. Justice Hutchison. I do not, therefore, intend to speak at length, or to trespass on the time and material of the speakers who will follow me. I think, however, that, as President of your Society, I should convey to our guest our most hearty congratulations on his judicial preferment, and assure him of the gratification that we, his old colleagues, feel, and the undoubted confidence that we all have that he will acquit himself in all the best traditions of the Supreme Court Judiciary.

"You will remember that at one time it was confidently stated that all our Judges were appointed from South of the Waitaki. On the appointment last year of Mr. Justice Gresson, some of us felt that the Waimakariri would have to be substituted for the Waitaki; but with the appointment of Mr. Justice Hutchison, I feel the matter has become further localized, and it would appear that a residential qualification in Wroxton Terrace is an essential.

"We all know that 'Hutch' (as we all call him for the last time to his face) has in full measure those varied qualities that make a Judge. He has, in his twenty-odd years in Christchurch, contributed fully to our legal and community life. He has never shirked an unpleasant duty or an unpleasant task, and our regret at losing a colleague is tempered with pride that yet another Canterbury practitioner has joined the ranks of his illustrious predecessors."

OTHER SPEAKERS.

Mr. L. D. Cotterill, an ex-President of the Society, offered the new Judge the congratulations of the Bar and expressed the complete satisfaction of the profession with the appointment. He referred in particular to the long and valuable service to the profession given by the new Judge on the Council of the Law Society, where, amongst many other outstanding services, he had been instrumental in negotiating the recurrent agreement with the employees. He had also served on the Disciplinary Committee of the Law Society in Wellington. Mr. Cotterill also paid tribute to the new Judge's services as an administrative Staff Officer during the recent War.

Another ex-President, Mr. W. R. Lascelles, opened by referring to the only circles in which doubt had been expressed at the propriety of the new appointment. In the Common Room at Christ's College on the preceding Saturday morning, Lascelles Junior, who was reading the *Press*, noticed a photograph of a particularly young-looking man on the second page, and remarked to Hutchison Minor, "Here's your Dad's photograph in the paper." Hutchison Minor asked, "What's he been up to this time?" Lascelles Junior, reading on, said, "I see he's been made a Judge." Hutchison Minor commented, "Good Lord!"

Mr. Lascelles added that he was sure that the new Judge would appreciate this appeal to the highest authority.

He recalled having first met Mr. Hutchison thirty years before, when he was stripped for action in the inter-Varsity boxing tournament, where he won the middle-weight championship for the second time. In the first World War he had served as a common Gunner, and was a particularly fine soldier. As a footballer, he gained Provincial honours, and as a tireless forward had battled for the New Zealand University First Fifteen. He came to Christchurch in 1926, and local practitioners soon got to know a companionable colleague.

Mr. Lascelles then proceeded to give the new Judge a little friendly advice, thus following the accepted practice of counsel to advise persons of eminence freshly appointed to the Bench.

"First, on the criminal side, I would urge, sir, that you show an ample measure of indulgence to counsel upon sentence of prisoners. Don't be too critical of counsel's pleading! Rather, remember the day upon which you yourself appeared for a thief addicted to liquor, with seven previous convictions, who had been divorced for adultery and lost his children for cruelty! If Mr. Russell submits the offence was committed in a state of amnesia, or Mr. Moloney suggests it was done in a state of Cecciarellian catalepsy, or if Mr. Thomas affirms that, though the plea is 'guilty,' the crime was never really committed at all—please strive to remember that counsel are not being scandalously irrelevant, but are only doing their best in all the circumstances. It also helps counsel tremendously if a sentence is cellophaned with such an observation as, 'I had intended to inflict a penalty of two years' hard labour, but, in view of counsel's submissions, I now make it reformative detention.'

"On the civil side, never forget, we beg of you, that there is a grossly over-worked and worried legal denizen called the Conveyancer, who, used to delays in the Stamp Office, certainly does not expect them upon applications for probate.

"You have said that you approach your new task with humility. Be comforted, however, by the assurance given by Mr. Justice Hosking to a member of the Christchurch Bar upon his elevation to the Bench. 'Probates,' said the Judge, with confidence, 'will give you no worry at all if only you observe the golden rule and make sure the beggar's dead!' Having done that, you may act with the same blithe indifference that is exhibited in the ordinary restitution suit. In this connection, you will remember that it was probably yourself who once, in an audible whisper, said on Divorce day: "I have a very thin one this morning.'"

In conclusion, Mr. Lascelles said: "You assume an ancient, high, and honourable office in strange times—in days when the lot of the constable on night duty is relieved by a surreptitious beer; when a murderer released from gaol re-marries and rejoins society to start life afresh; when circumstances apparently require that the Chief Justice and eminent counsel be detached from the all-important duties of the Courts to function upon such involved questions as the handling of the *Mountpark's* hatches. All of which goes to show the difficulties and delicacies of your new office.

"You have become one of the traditional guardians of the Common Law and a protector of liberty in a system which, up to now, has been the envy of the world.

"We have had you with us for twenty-two years, an ample time within which to appraise your merits. You have made no enemies but have gained the increasing respect of your friends. We have held you in the highest regard, for your manly qualities and unimpeachable character. In judicial tasks of lesser kind, you have exhibited an absence of prejudice, a thoroughness, a moderation, and an impartiality which, added to wisdom and understanding of men, leads us to say goodbye with great regret, but with implicit confidence in your capacity to serve justice with distinction."

THE GUEST'S REPLY.

Mr. Justice Hutchison received a great ovation on rising to reply. He thanked the previous speakers for their kindness and flattering remarks. He reviewed his past association with the members of the Bar in Christchurch, and, in particular, referred to the high tone of practice set by the leaders at the time when he first came to Christchurch, Mr. O. T. J. (later Mr. Justice) Alpers and Mr. Maurice Gresson. He spoke of some of his earlier appearances, particularly his first Supreme Court action, where his opponent was Mr. A. W. (later Mr. Justice) Blair, and his first defended Magistrates' Court case, where his opponent was Mr. Robert (now Mr. Justice) Kennedy.

The new Judge referred particularly to his indebtedness to Mr. A. T. Donnelly, and paid a graceful tribute to his partner, Mr. L. A. Dougall. He congratulated Mr. E. A. Lee on his elevation to the Magisterial Bench, and expressed his pleasure at the presence of their two resident Magistrates. He concluded by quoting the remark made by Mr. Justice Gresson at a similar function last year, when, in addressing the Bar, he said, "I am what you have made me."

THE NEW LAND TRANSFER REGULATIONS.

A General Review and Explanation.

By E. C. Adams, LL.M.

The new Land Transfer Regulations, 1948 (Serial No. 1948/137), which came into force on September 1, 1948, demand the most careful consideration of every conveyancer. As almost all the privately-owned land in the Dominion is now held under the Torrens system, the ability to draft, and have executed, instruments which will survive the vigilant scrutiny of the Land Transfer officials is an accomplishment of great practical value. To have an instrument rejected after settlement has been effected may be the cause of grave inconvenience, if not actual loss.

Form of Instruments.

As Edwards, J., pointed out in *District Land Registrar (Auckland)* v. *Kauri Timber Co.*, (1902) 22 N.Z.L.R. 260, 269, under the Land Transfer Act, *form* may be, and often is, essential. It may be confidently concluded from a perusal of that case that an instrument drawn in the form of a conveyance under the general law is not registrable as a memorandum of transfer under the Land Transfer Act. There is one exception to this: s. 26 of the Land Transfer (Compulsory Registration of Titles) Act, 1924 (commonly referred to as "the compulsory Act"), provides that any deed affecting any land brought under the principal Act in pursuance of the provisions of the "compulsory" Act, which might have been registered under the provisions of the Deeds Registration Act, 1908, if the "compulsory" Act had not been passed, may, if such deed bears date before, or within six months after, the date of the first certificate of title for such land, be registered under the principal Act notwithstanding that it is not an instrument in one of the forms prescribed by the principal Act.

The forms of the various instruments which are registrable under the Land Transfer Act are set out in the Third and Fourth Schedules to the Act. As pointed out in *Finlayson* v. *District Land Registrar, Auckland*, (1915) 34 N.Z.L.R. 977, 981, both the Schedule to an Act and the directions given in a form prescribed by such Schedule are as much a part of the Act and as much an enactment as any other part of it.

These forms should, therefore, be followed as closely as possible. It is true that s. 223 (2) provides that any variation in such forms, "*not being in matter of substance*," shall not affect their validity or regularity, and that they may be used with such alterations as the character of the parties or circumstances of the case render necessary. But whether a departure from a form is or is not a *substantial* variation therefrom is often a matter for argument. Thus, the area must be correctly stated, and, if a plan is referred to in the body of the instrument, that plan must be correct: *Finlayson's* case (*supra*). Perhaps the greatest latitude has been permitted by custom and by the Courts in grants of easements and *profits à prendre*, and perhaps this is because the operative words "do hereby transfer" prescribed in a memorandum of transfer (into which these grants must be moulded) are really not precisely applicable according to the ordinary usage of the English language. Thus, in a memorandum of transfer, being a grant of timber rights, the operative words "hereby sell and dispose of" were judicially sanctioned: *Hutchison* v. *Ripeka te Peehi*, [1919] N.Z.L.R. 373, 379. And the creation of easements by way of reservation in memoranda of transfer has been sanctioned by a long-standing custom in New Zealand, following English law.

With these introductory remarks, it is now convenient to cite the Land Transfer Regulations, 1948, Regs. 12, 13, and 16, which read as follows:

> 12. All applications to bring land under the Act and instruments for registration or entry on the Register must be on forms in accordance with section 220 of the Act, and the parts of such forms which are not printed must be fairly and legibly written or typed. If typed, the original, and not a carbon copy, shall be retained in the Registry Office.
>
> 13. In the case of instruments presented for registration in duplicate or triplicate each part must be an exact replica of the other or others, both as to the body of the instrument and as to any declarations, consents, or other matters endorsed thereon or annexed thereto, and as to original signatures and seals relating to the execution making attestation and verification thereof respectively.
>
> 16. All applications, evidentiary documents, and other documents which do not upon registration become a part of the Register, or upon delivery to the Registrar require to be the subject of an entry in the Register, shall be fairly and legibly printed, written, or typed on paper of good quality and demy or foolscap size.

Regulation 16 is a very necessary one, and enables the Registrar to decline mere "scraps of paper." All documents have to be filed in such a manner as to make them readily accessible to the officials and to those who are doing searches: if instruments and annexures are of a uniform size, the work of filing is much facilitated and the risk of documents getting out of place reduced to a minimum. This may seem a small matter; but it is one in which all can assist for the common good, and for the particular benefit of those who will follow us in the somewhat tedious path of the conveyancer.

Prohibition of Extraneous Matter.

Regulation 14 deals with a cognate subject, extraneous matter in Land Transfer instruments. This subject is particularly difficult, and one must know what the Courts and the customs of conveyancers have sanctioned and what the Courts and custom have not sanctioned: in short, it is a case of *experientia docet*.

This very important regulation reads as follows:

> The Registrar may refuse to register any instrument—
>
> (*a*) Which purports to create estates or interests not capable of registration, or to deal with estates or interests not registered or not capable of registration:
>
> (*b*) Which purports to deal with land or other property not subject to the provisions of the Act:
>
> (*c*) Which purports to deal with matters not capable of inclusion in the Register:
>
> (*d*) Which for any other reason is incapable of complete registration.

Note, particularly, how the word "purports" runs through all parts of the regulation with the exception of the last part, which is merely a general clause, perhaps *ex abundante cautela*. An examination of the authorities shows how aptly this word has been used.

The judgment in *Horne* v. *Horne*, (1906) 26 N.Z.L.R. 1208, 1218 (following the leading case of *Fels* v. *Knowles*, (1906) 26 N.Z.L.R. 604), shows that nothing can be properly registered, *so as to obtain the projection of the Land Transfer Act*, the registration of which is not expressly authorized by that statute or other statute or enactment having the effect of a statute. If by any mistake or oversight of the Registrar anything not so authorized is placed upon the Register, it is not registered within the meaning of the statute; and the registration does not give protection, at all events to the person who has procured it. I do not think that that statement of the law is in any way inconsistent with the subsequent and much-discussed case, *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174. That was a case of a Proclamation irregularly obtained, where it was held that, the Proclamation having been registered, the corporation had obtained an indefeasible title; but the point is that the registration of a Proclamation under the Land Transfer Act is expressly authorized by the Public Works Act, 1928.

It has been held that a mortgage of land under the Land Transfer Act must not include a mortgage of chattels: *Quill* v. *Hall*, (1908) 27 N.Z.L.R. 545, 554. A lease of land under the Land Transfer Act purporting to include a bailment of chattels is not registrable under the Land Transfer Act: *Boswell* v. *Reid*, [1917] N.Z.L.R. 225. A lease of land under the Land Transfer Act must not purport to demise also land not under that Act: *Horne* v. *Horne*, (1906) 26 N.Z.L.R. 1208, 1218, 1219.

Similarly, although s. 94 of the Land Transfer Act, 1915, authorizes the insertion in a memorandum of lease of an option to purchase the land thereby leased, it does not authorize the inclusion of an option to purchase *other* lands. Such an option is *foreign* to the purposes of the instrument *and of the statute—i.e.*, the Land Transfer Act.

In the foregoing examples I have been illustrating the application of paras. (*a*) and (*b*) of Reg. 14—the purported creation or dealing with estates, interests, or rights which are not authorized.

Paragraphs (*c*) and (*d*) can, perhaps, be explained best by showing how the Courts have dealt with restrictive and personal covenants in memoranda of transfer. It has been held that these are not registrable under the Land Transfer Act: *Wellington and Manawatu Railway Co., Ltd.* v. *Registrar-General of Land*, (1899) 18 N.Z.L.R. 250, and *Staples and Co., Ltd.* v. *Corby and District Land Registrar*, (1900) 19 N.Z.L.R. 517. If a memorandum of transfer contains such a covenant, it is the duty of the Registrar to decline registration. Since the above-cited two cases, an exception has been created by s. 7 of the Fencing Act, 1908. A covenant or agreement made or entered into between owners of adjoining lands for the purpose of varying the rights and liabilities conferred or imposed on them by the Fencing Act, 1908, is deemed to create an interest in land within the meaning of the Land Transfer Act, and is registrable accordingly, but the assigns are not bound unless the covenant or agreement is registered. It follows that, in the case of fencing covenants, the Registrar should note its existence on the Register Book. If the Registrar failed to do so, a purchaser or other person contracting on the strength of the Register would get a title freed from the covenant: *Gallagher* v. *Thomson and Allen*, [1928] G.L.R. 373.

In the immediately preceding paragraph, I have dealt with extraneous matter in a memorandum of transfer, which transfers a pre-existing estate or interest in land. Some Land Transfer instruments, however, besides creating an estate or interest in land, are also contractual in their nature—*e.g.*, leases and mortgages. More latitude is allowed in instruments of this dual nature; the reason for this distinction is that the contract is still subsisting, whereas in a transfer or conveyance the contract has become merged in the conveyance. This distinction has been recognized in the Land Transfer Act itself: the Second and Fourth Schedules as to mortgages and leases make ample provision for covenants, and it appears that the covenants need not necessarily run with the land. Referring to a memorandum of mortgage, the Court of Appeal said in *Re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489, 500:

> Broadly speaking, the contractual part is left wholly at large so that the parties may insert what they please, provided, of course, it does not render the instrument something different from a mortgage within the definition. It may be granted as possible that a mortgage may be prepared containing covenants or provisions of such a character as to embarrass or confuse the Register or bring the Assurance Fund into jeopardy if registration were allowed, and thus be held to be a substantial departure from the permitted forms. Any such case cannot be defined beforehand, but must be left to be dealt with as it arises. In Australia the power to vary the form without holding the substance to be infringed has been very liberally interpreted by the High Court. In *Perpetual Executors Association* v. *Hosken* (14 C.L.R. 286) a mortgage was held registrable although it contained a guarantee by persons not parties to the mortgage. This accords with a constant practice in New Zealand, where a husband joins to covenant for payment in a mortgage given by the wife. In *Mahony* v. *Hosken* (14 C.L.R. 379) the registration of an instrument granting an annuity to secure the covenants in a publichouse lease was enforced, and in *Drake* v. *Templeton* (16 C.L.R. 153) a declaration by the mortgagees that the principal belonged to them in certain specified proportions was held to form no obstacle to the registration of the instrument containing the declaration.

But a Land Transfer mortgage should be rejected if any attempt is made to clog the equity of redemption: *Staples* v. *Mackay*, (1892) 11 N.Z.L.R. 258. Such an instrument would not be a true mortgage.

The highest Court of Australia has held that, in a mortgage of land under the Torrens system, a covenant may refer to documents and instruments not embodied in the Register: *Gibb* v. *Registrar of Titles*, (1940) 63 C.L.R. 403.

In a memorandum of lease, a covenant for renewal may be inserted: *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542.

Before leaving Reg. 14, it should be pointed out that the Registrar should reject all instruments which *appear* to be illegal, or contrary to statute law, or *contra bonos mores*, or otherwise improper: *Finlayson* v. *Auckland District Land Registrar*, (1904) 24 N.Z.L.R. 341, *Walker* v. *District Land Registrar*, [1918] N.Z.L.R. 913, *In re Goldstone's Mortgage*, [1916] N.Z.L.R. 19, and *Jordan* v. *Stanford*, (1898) 2 G.L.R. 105. The Registrar should not register any order of Court which *ex facie* has been made without or in excess of jurisdiction: *In re Hinewhaki No. 3 Block*, [1923] N.Z.L.R. 353, 362, per Hosking, J.; nor should he register an instrument authorized by an order of Court made without or in excess of jurisdiction: *Templeton* v. *Leviathan Proprietary, Ltd.*, (1921) 30 C.L.R. 34.

Notice of a *public* trust being entered on the Land Transfer Register is expressly authorized by the Act, and the effect of such a note is that it acts as a perpetual caveat to restrain any dealing with the lands affected, so far as such dealing is manifestly incon-

sistent with such trust; these provisions have been extended to public reserves, domains, and national parks: s. 13 (2) of the Public Reserves, Domains, and National Parks Act, 1928.

Finally, many statutes embodying important State policy contain express commands to Registrars not to register any dealing in contravention of such statutes—*e.g.*, s. 125 of the Public Works Act, 1928; s. 332 of the Municipal Corporations Act, 1933; s. 15 of the Land Subdivision in Counties Act, 1946; and s. 47 of the Servicemen's Settlement and Land Sales Act, 1943.

(To be concluded.)

FIFTY YEARS IN PRACTICE.

Mr. W. L. Fitzherbert honoured.

On July 19, Mr. W. L. Fitzherbert of Palmerston North completed fifty years in practice. To mark the occasion, Palmerston North practitioners held a dinner in his honour at the Manawatu Club, and they all attended it. The guests included Mr. Justice Stanton, Mr. J. R. Herd, S.M., Mr. P. B. Cooke, K.C., President of the New Zealand Law Society, Mr. G. C. Phillips, President of the Wellington District Law Society, and Messrs. Martin Luckie and Arthur Manson, who were especially invited at Mr. Fitzherbert's request.

The Guest of Honour.

Mr. T. D. M. Rodgers, the Palmerston North President, proposed the toast of the guest of honour. He said it was given to few men to practise the profession of law (or, indeed, anything else) continuously for fifty years; and he expressed the pleasure of his professional brethren that Mr. Fitzherbert showed every sign of continuing to practise his profession for many years to come. The local practitioners, in particular, were glad of the opportunity of gathering to give Mr. Fitzherbert their congratulations, and to express the high regard in which they held him.

For half a century, the speaker continued, Mr. Fitzherbert had practised his profession in a manner which commanded not only the respect, but also the affection, of his fellow-practitioners. He had at all times set a high standard of conduct, and he had been an example to his younger professional brethren. His method of practice had done much to enhance the regard in which the profession is held by the public. His wide experience had always been available for the benefit of others, and he had been readily approachable even to the most junior practitioner, and, indeed, to the most junior of law clerks. In this regard, Mr. Rodgers referred to Mr. Fitzherbert's encouragement of a Law Students' Association which existed in Palmerston North years ago, when he was President of the Palmerston North practitioners.

The speaker referred to Mr. Fitzherbert's activities as a citizen. He had served as a City Councillor, as Chairman of the High Schools Board of Governors, as President of the Manawatu Golf Club, and in a number of other public and semi-public positions, and he still represented his district on the Wellington Harbour Board in the election for which he topped the poll last year. Despite the fact that he had seen great changes in fifty years of practice, he had still retained a youthful outlook that was a source of envy to his fellow-practitioners. Notwithstanding the responsibility resting on his shoulders as senior partner in one of the biggest and oldest-established firms in the district, he had been as keen as a young office boy only a few days ago to take a half-day off and see a football match.

In practice, it was always a pleasure to deal with Mr. Fitzherbert. His courteous and friendly approach gave every meeting with him the attribute of a pleasant interlude in the rush and tear of modern business. He could look back with pride and satisfaction over half a century of honourable and successful practice and service to his profession and to his fellow-men. He could perhaps remember that those who knew him best rejoiced in the opportunity of showing their high regard, their great respect, and their very deep affection.

Numerous letters and telegrams received from members of the profession outside Palmerston North were handed by the President to Mr. Fitzherbert.

In his reply, Mr. Fitzherbert treated the gathering to a delightful account of his experiences during the past fifty years, and recalled instances of his early days in the profession. He remembered an early practitioner, noted for his colourful advocacy, having a difference of opinion with the Bench and ending by being committed for contempt of Court. Nothing daunted, he obtained special permission, and, from behind the bars of his prison, he addressed the electors and was returned to Parliament. He recalled the time when both he and his father were practising in Palmerston North, and he had brothers practising in most of the surrounding towns. He had himself at one stage practised in Levin, and was present when a well-known practitioner challenged a substantial publican to a 100 yards race along the street at midnight. The publican was handicapped by 50 yards; but the practitioner carried another man on his shoulders, and carried him to victory. Mr. Fitzherbert added that it was perhaps a pity that the practice of law is not lightened a little more in these days. He concluded with a tribute to the happy relations which had existed among the profession throughout his career.

The Bench.

The toast of "The Bench" was proposed by Mr. A. M. Ongley, who recalled the first sittings of the Supreme Court in Palmerston North over forty-five years ago, and the difficulties then experienced by the local Court staff and practitioners. He expressed appreciation of the assistance that the Judges had given to the profession. Now, with four Sessions a year, lasting six weeks and more each, the need for a resident Judge was becoming urgent. Practitioners were particularly pleased to be able to welcome Mr. Justice Stanton on his first visit to the city in his judicial capacity.

Mr. Justice Stanton, in reply, expressed his pleasure at having the opportunity of meeting the Palmerston North Bar on such a happy occasion. He felt that a Judge should not isolate himself entirely from his fellow-men, and live a life apart. Few were so constantly in need of opportunities for freshening their outlook, and coming in contact with—and understanding—the general public in their daily life. Some men feel that "to walk with kings nor lose the common touch" means a loss of prestige; but he was not of that opinion. His Honour made humorous reference to certain correspondence recently appearing in the Auckland Press concerning the office of City Solicitor, and mentioned one correspondent who had even suggested that not only that office, but also judicial office, should be shared around among the profession by ballot.

His Honour spoke of his long and happy personal friendship with Mr. Fitzherbert, and to his association with Mr. J. R. Herd, S.M., who had worked in his office.

The New Zealand Law Society.

In proposing the toast of "The New Zealand Law Society," Mr. G. I. McGregor paid particular tribute to the work of Mr. P. B. Cooke, K.C., the President. He referred to the enormous amount of work done, and time given, by Mr. Cooke in the interests of the profession, not only on the executive of the Law Society itself, but on the Rules Committee and all the other committees on which, as Dominion President, he served with grace and distinction, and to the great advantage of the profession generally.

In his reply, Mr. Cooke said that he was sure that, on such an occasion, no one wanted to hear about the New Zealand Law Society, august body though it was. He proposed, therefore, to speak of Mr. Fitzherbert, whom he had known intimately for many years. He paid tribute to the many virtues of the guest of honour. He recalled that Mr. Fitzherbert was descended from a fifteenth century English Judge who was responsible for various learned legal works, including a sort of "pocket Halsbury" known as *The Grand Abridgment*. He thought that history was repeating itself, and that the expression might well be applied to the golf-swing of the evening's guest of honour.

Other Toasts.

Mr. G. C. Phillips, President of the Wellington District Law Society, proposed the toast of the Palmerston North President, Mr. T. M. N. Rodgers. In expressing his gratitude for the opportunity of attending the dinner, he referred to the hospitality extended to outside practitioners by Palmerston North practitioners every year in the "Devil's Own" Golf Tournament.

The toast of "The Manawatu Club" was proposed by Mr. P. W. Dorrington, who made reference to the many kindnesses extended by the Club to visiting practitioners. Mr. J. M. Gordon, the present President of the Club, assured his hearers that visiting lawyers were always welcome.

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

The State in Business.—A contributor has drawn attention to some sage observations of Paterson, S.M., in *Conservator of Forests* (*Rotorua*) v. *Henderson Timber Co., Ltd.*, in relation to alleged breaches approximately four years old. "The Courts will not encourage the Crown to lay informations in this form," he says, "and embark, as it were, on a fishing expedition in the waters of the past in the hope that something may be dragged up which will enable it to secure a conviction. This kind of thing can be very oppressive, especially when, as in modern times, the State has taken on itself extensively to regulate the business and private life of the community." This restriction on the fishing tactics of the State (with which Scriblex is wholly in agreement) reminds him of a conversation he had recently with a young friend to whose judgment has been entrusted the issue or refusal of import licenses that run, in the industry concerned, into some millions of pounds. The young friend desired to drag up from the mellow wisdom of Scriblex some opinion as to whether he should accept a lucrative offer of employment from a leading business house in this particular field. Your experience, he was asked, has no doubt prompted the offer from the company. "That," was the reply, "and my precise knowledge of the affairs of its competitors!"

A Lost Art.—The banishment of birching by the government in England recalls *Gardner* v. *Bygrove*, (1889) 53 J.P. 743, a case on appeal to the Queen's Bench Division. Here a Magistrate, being of the opinion that caning on the hand was attended by risk of serious injury, convicted a Board schoolmaster of an assault by giving a pupil four strokes, though the boy deserved corporal punishment and the caning was inflicted unobjectionably, and did not in fact cause any serious injury. The Court considered that, when Parliament laid down a chart showing the particular regions of the body to which corporal punishment in schools was to be confined, it would take care that those limits were not overstepped, but down to that time there had been no such chart. In answer to the submission of counsel that such punishment on the hand might seriously interfere with the pupil's later occupation, and that it could just as well be inflicted "elsewhere," Mathew, J., interposed. "And what," he inquired drily, "if his occupation were a sedentary one?"

Professional Misconduct.—In 1948, *Law Society Gazette* records two interesting decisions of the Disciplinary Committee in England on the question of professional misconduct. In the first, it ordered a solicitor to be suspended from practice for a period of three years for having been guilty of conduct unbefitting a member of the profession in that he had administered an injection to a woman client by means of a hypodermic syringe. In the second, the Committee, while not holding that mere negligence of itself constitutes professional misconduct or conduct unbefitting a member of the solicitors' profession, held that negligence may be of such a character as to merit either of those descriptions. The case before the Committee was found to be an instance of negligence of this exaggerated character. In this country, complaints against practitioners most frequently arise from a refusal or neglect to answer the inquiries of clients as to the position of their affairs. Delays occur in the best-regulated offices, but rudeness of the type mentioned is unpardonable.

Food Parcels.—The Law Institute of Victoria has sponsored a system of food-parcels to elderly members of English Law Societies. Extracts from some of the replies published in the *Journal* of the Institute are well worthy of repetition:

> I have been in practice as a solicitor for forty-three years, and in view of the crippling taxation to which we are subject in these days I see no prospect but to carry on for another forty-three years.
>
> I am still in active practice, but at seventy-seven it is a bit of a strain, so your kind gift will sustain me and help me to swim through troubled water.
>
> I am in my eighty-sixth year and I am glad to be able to say that I am still in possession of all my faculties and attend at the office every day including Saturday mornings.
>
> The lawyer's dilemma is, however, not concerned with shortages but rather with a surfeit of legislation and regulations, and after a period in the Forces it is an overwhelming task trying to acquaint oneself with the precise details of the contemporary law.

Tempora Mutantur.—"In the present case, the petitioner is a poor man earning a precarious livelihood as a waterside worker."—MacGregor, J., in *Roxburgh* v. *Roxburgh*, [1930] G.L.R. 34.

Law and Morals.—In a recent English case (mentioned in the *Estates Gazette* of April 24, 1948), the ground for possession sought by the landlord was that he had assumed that his tenants were married, whereas, sad to relate, they were in fact no more than a quasi-husband and his unmarried spouse—a liaison that annoyed his neighbours, who suggested that he was condoning this awful state of affairs. The tenants blatantly retorted (*a*) that he had always known the true set-up, (*b*) they paid their rent promptly, and (*c*) what the devil had it to do with him, anyway? To this last proposition, the County Court Judge seems to have assented, although in a more elegant form. In refusing the application, he expressed himself as satisfied that the landlord knew of the relationship, and added: "Far be it from me to say that a Court should express its pleasure or approval at the way these two people choose to live. But this is a free country and marriage is not compulsory." For the information of practitioners whose duty causes them to stray into this distasteful field (in Wellington the alleged homosexual tendencies of the tenant have been pleaded as a "nuisance and annoyance"), it should be stated that in *Victoria Dwellings Association, Ltd.* v. *Roberts*, (1947) 14 L.J. N.C.C.R. 177, it was held that the tenant had not broken a covenant against sub-letting by admitting to her flat, as well as to her bed and board, a man to whom she was not married; and that he was, *vis-à-vis* the landlord, in a position exactly similar to that of a lawful husband. Probably better behaved, too!

Technical Point.—One of those essential producers of litigation, a draftsman of wills, tells Scriblex of an adventure that befell him the other day. It seems that he submitted a testamentary document to his client, an elderly lady lacking neither in determination nor in sensitiveness. After signing her name to the document, she scored out the fourth word and wrote in one above it. "I'm sorry to spoil the look of it," she said, apologetically, "but 'This is my *first* will' more correctly states the position."

PRACTICAL POINTS.

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

1. Companies.—*Employee purchasing Shares—Uncalled Capital owing thereon—Preferential Claim for Wages—Whether Receiver can set-off Amount owing on Shares against Unpaid Wages.*

QUESTION: A company employed A as its manager at a wage of £10 per week. A purchased shares in the company on which there is now owing £100 uncalled capital. All the company's assets including uncalled capital were given as security under a debenture. The debenture-holder has now appointed a receiver. A has a preferential claim for wages amounting to £80. The receiver claims he is entitled to set-off A's liability on his shares against his preferential claim for wages. Is the receiver entitled to set-off the amount owing on A's shares against A's preferential claim for wages?

ANSWER: A shareholder is bound to pay the full amount unpaid on his shares only in accordance with the articles of association—*e.g.*, in response to calls or as provided by the terms of issue; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56. "Until the call is made there is nothing more than a liability to contribute. This indeed creates a debt, but the debt does not accrue till a call is made": per Lord Chelmsford in *Re Overend, Gurney and Co., Grissell's Case*, (1866) 1 Ch. App. 528, which decided that, where a company is in liquidation, there is no right of set-off in respect of calls, and a shareholder must first pay the amount of the call before he can receive a dividend in respect of a debt due to him from the company, but that he does not have to make any payment in respect of uncalled capital.

The right of set-off would appear to depend upon there being an actionable debt: *Rawley* v. *Rawley*, (1876) 1 Q.B.D. 460, and *Downes* v. *Bank of New Zealand*, (1895) 13 N.Z.L.R. 723. Presumably the company here cannot immediately maintain an action for the amount unpaid on the shares, and so has no right of set-off.

In the case of a bankrupt shareholder, however, ss. 104 and 111 of the Bankruptcy Act, 1908, apply: see *In re Duckworth*, (1867) 2 Ch. App. 578, where a right of set-off was held to exist in respect of unpaid calls notwithstanding the fact that the company was in liquidation; and *In re Anderson*, [1924] N.Z.L.R. 1163, where a company was held entitled to set-off against the amount claimable in respect of future calls a sum due to it from the bankrupt. W.2.

2. Rent Restriction.—*Economic Stabilization Emergency Regulations—Determination of Sub-tenancy—Procedure.*

QUESTION: What form of notice should be given to a recognized sub-tenant of urban premises in the case where the landlord is serving notice on the tenant who occupies portion of the building and wishes to proceed simultaneously against the sub-tenant who occupies another portion of the building? See Reg. 21E of the Economic Stabilization Emergency Regulations, 1942.

ANSWER: The underlying purpose of Reg. 21E of the Economic Stabilization Emergency Regulations, 1942, is to protect sub-tenants immediately the contractual tenancy under which the head tenant held the premises came to an end; and for that purpose there is an immediate assignment to the landord by operation of law of the head tenant's estate or interest in the sub-tenancy, and a continuance thereof in all respects as if the same had been granted in the first instance by the head landlord, and not by the head tenant: *Rayner* v. *Tomlinson*, (1947) 5 M.C.D. 52. Assuming that the sub-tenancy comes within the definition of "urban property," and the part of the premises subject to the sublease is not itself within the definition of "dwellinghouse" in s. 2 of the Fair Rents Act, 1936, then it would appear that simultaneous notices to quit against the tenant and sub-tenant are not maintainable. Two stages are necessary. First, the head lease must be determined by a proper notice to quit; and, on the expiry of that notice, the contractual tenancy is at an end, and then, and only then, by operation of law, does the head landlord become the assignee of the sub-tenancy, or, in other words, the landlord of the erstwhile sub-tenant. Consequently, when the head tenancy has been determined, and only then, the new tenancy with the former sub-tenant is capable of determination by the landlord; and then a second notice to quit can be served on the former sub-tenant. X.2.