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"THE QUEEN OF THIS REALM": SOME CONSTITUTIONAL ASPECTS OF THE ROYAL VISIT.

THE constitutional significance of some aspects of the recent visit to New Zealand of Her Majesty Queen Elizabeth II calls, we think, for some recording in these pages.

The Statute of Westminster.

When, in December, 1931, the Royal Assent was given to the Statute of Westminster, there were many to criticize its provisions and its implications. These may, briefly, be summed up in the expression: "It will not 'work'."

As we all know, the Preamble recited in part:

> And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

Notwithstanding the cold and abstract legalistic term "symbol", used to express the person of the Sovereign, the devotion and love of the peoples of the nations of the Commonwealth had already long since become a living reality which united them to the reigning Monarch by intangible links of ever-growing strength, and in a bond of self-governing independent nations in close association with one another in a manner for which the pages of history can find no parallel.

The Royal visit gave all our people a new sense of Commonwealth unity and solidarity. But it also gave them a long-sought opportunity to greet the Queen of New Zealand in person as their own Sovereign with an outburst of personal feeling which, in sincerity, knew no limit. It was, indeed, the expression of the joy of hope realized and of faith fulfilled.

Viscount Bryce, in his *American Commonwealth*, written in 1888, said that the conspicuous position of the Crown as the authority common to the whole of the British peoples, "makes it an object of special interest and respect to persons living at a distance. It touches their imagination" (Vol. 1, 2nd Ed., p. 26(i)). But, while there may once have been some justification for that observation, it is an over-simplification of the true position now.

The feeling of personal individual loyalty to the Monarch, which, in the recollection of all living New Zealanders, has been a vital part of the lives of us all, transcends imagination. It is something more than a sentimental or juridical bond. It is an integral part of the political structure of this Dominion, because it is a cherished possession of every one of our citizens, Pakeha and Maori. With the recent visit of Her Majesty Queen Elizabeth II fresh in our memories, we can all testify to the fact that a usually undemonstrative people seized the opportunity to give full vent to the pent-up feelings of personal and individual loyalty, which they and their forbears in this country have held for the person of their Sovereign—not as a "symbol", but as a living object of personal fealty and devotion—for over a hundred years.

Long before that landmark of constitutional progress and development, the Statute of Westminster, was erected, its purport was foreshadowed. In 1919, at Paris, the memorandum of the Dominion Prime Ministers as to the principles of constitutional government obtaining throughout the realms of the Birtish Crown, declared:

> The Crown is the supreme executive in the United Kingdom and in all the Dominions; but it acts on the advice of different Ministers within different constitutional limits.

That statement succinctly epitomizes the constitutional characteristics of the Commonwealth as a whole and of each of its component nations. Because, as has often been said, the form of government which the British peoples have evolved and taken with them to new homes overseas, is a paradoxical conception which "works". In essence, all political authority comes from the people; hence, the people's will must prevail. Yet, in conjunction with the constant application of that principle, there is maintained a monarchy with Royal Prerogatives and reserve powers, which are scrupulously exercised in strict accordance with accepted constitutional principles or in harmony with recognized constitutional conventions.

The foregoing is as true of our constitutional position in New Zealand as it is of each other kingdom in the Commonwealth. Thus, Her Majesty the Queen, as Queen of this Her Realm of New Zealand, is in all respects in the same position in relation to public affairs here as is held by Her Majesty in relation to public affairs in the United Kingdom of Great Britain and Northern Ireland. The fact that, in practice, and in pursuance of statute, Her Majesty's authority is ordi-

narily exercised in this Dominion by her personal representative, the Governor-General for the time being, is merely a geographical incident.

Very recently, we had ocular demonstration of those constitutional principles in action.

Change in the Royal Style and Titles.

As a natural corollary of the Statute of Westminster, and as evidence of the quiet development which it signifies, it became necessary to re-define the Royal Style and Titles. It will be noticeable how unobtrusively the term " British Commonwealth of Nations " has developed into " the Commonwealth " in recent years. The adjective was thought inappropriate to a community of nations of whom only some seventy millions claim descent from or close association with the British Isles, or use the English language with any degree of familiarity. In consequence, in December, 1952, the Dominion Prime Ministers, when in London for the Economic Conference, reached general agreement on the form of the Sovereign's new title. It was decided that each nation should use that form which seemed most suited to its circumstances, but that there should be an element common to them all. After each Dominion's Parliament, in accordance with the convention recited in the Statute of Westminster, had passed its own necessary legislation, the change could be made throughout the Commonwealth by separate Royal Proclamations on the same day.

In New Zealand, by the Royal Titles Act, 1953, the assent of Parliament was given to the adoption by Her Majesty, for use in relation to New Zealand and all other territories for whose foreign relations Her Government in New Zealand is responsible, of the style and titles—

> Elizabeth the Second, by the Grace of God, of the United Kingdom, New Zealand and Her Other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

Parliament also assented to the issue by Her Majesty, for the purpose of using such style and titles instead of the style and titles then appertaining to the Crown, of Her Royal Proclamation.

That statute became law in this Dominion on April 20, 1953.

Each of the seven nations and the republic, which constitute the Commonwealth, each in its own Legislature, enacted similar legislation which was notable for the differences of wording, though all adopted the title " Head of the Commonwealth ".

Her Majesty's Royal Proclamation, relating especially to New Zealand, was given " By the Queen " at Her Court at St. James's on May 28, 1953, in the second year of her reign. It was published in New Zealand on July 2, 1953, in the Statutory Regulations for 1953, as Serial No. 1953/79, and was in the following terms :

> Whereas there has been passed in the present session of the Parliament of New Zealand the Royal Titles Act, 1953, which Act recites that it is expedient that the style and titles at present appertaining to the Crown should be altered so as to reflect more clearly the existing relations of the members of the Commonwealth to one another and their recognition of the Crown as the symbol of their free association and of the Sovereign as the Head of the Commonwealth, and which Act also recites that it was agreed between representatives of Our Governments in the United Kingdom, Canada, Australia, New Zealand, the Union of South Africa, Pakistan, and Ceylon assembled in London in the month of December, nineteen hundred and fifty-two, that there is need for an alteration thereof which, while permitting of the use, in relation to each of those countries, of a form suited to its particular circumstances, would retain a substantial element common to all:
>
> And whereas by the said Act the assent of the Parliament of New Zealand was given to the adoption by Us, for use in relation to New Zealand and all other territories for whose foreign relations Our Government in New Zealand is responsible, of the style and titles hereinafter set forth, instead of the style and titles at present appertaining to the Crown, and to the issue by Us for that purpose of Our Royal Proclamation:
>
> We have thought fit, and We do hereby appoint and declare that so far as conveniently may be, on all occasions and in all instruments wherein Our style and titles are used in relation to all or any one or more of the following, that is to say, New Zealand and all other territories for whose foreign relations Our Government in New Zealand is responsible, Our style and titles shall henceforth be accepted, taken, and used as the same are set forth in manner and form following, that is to say :
>
> > Elizabeth II, by the Grace of God of the United Kingdom, New Zealand and Her Other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

This was, indeed, the Statute of Westminster in active operation. And, so, Her Majesty, who, in virtue of that Statute, was already Queen of New Zealand, was styled Queen of this Realm, New Zealand, and Head of the Commonwealth.

Commenting on the change made in the Royal Titles in each of the Commonwealth countries, Mr. R. E. V. Heuston, writing recently in the *Law Times* (London) (Vol. 215, p. 270), said this :

> It will be observed how diversity and independence are emphasized by the substitution of " Realms and Territories " for " British Dominions beyond the Seas ". But at the same time the note of unity is struck by the common recognition of the Queen as the symbol of free association and as such the Head of the Commonwealth. Nor is this a mere personal union—an aggregation of States, each of which has by accident the same monarch. There is one historic Crown devolving according to a recognized right of succession. Nor is the Commonwealth itself a fortuitous collection of nations bound together only by the mundane factor of a common interest in trade, finance, defence, and foreign policy. There are deeper ties and more lasting bonds, and it is in the Crown that what is truly inexpressible finds expression.

The " symbol " of unity in diversity of nationhood—seven kingdoms and one republic—has taken on a more personal significance : our young Queen has given it personality and charm in the setting of her great and traditional inheritance.

The Royal Powers.

Doubts had been expressed by constitutional lawyers that Her Majesty the Queen (or any other British Sovereign), notwithstanding the statutory adoption here of the Statute of Westminster, could not, *sua voluntate*, exercise her royal functions in New Zealand, when some of those functions, with some curtailment of her Royal Prerogative, were already the subject of statute-law in this country. We think that those doubts were well-founded ; because, though by authority of statute, the Governor-General can exercise some of Her Majesty's powers and prerogatives in her name, the authority to do so is delegated or conferred by statutes, operating in, or originating in, New Zealand, on the Governor-General, without mention of the Sovereign.

Consequently, in last year's Session, the Legislature made it clear that all such powers are exercisable by Her Majesty in person in New Zealand, as well as by the Governor-General. The operative sections of that statute, the Royal Powers Act, 1953, are as follows :

> 2(1) It is hereby declared that every power conferred on the Governor-General by any enactment is a royal power which is exercisable by him on behalf of Her Majesty the Queen, and may accordingly be exercised either by Her Majesty in person or by the Governor-General.

(2) It is hereby further declared that every reference in any Act to the Governor-General in Council or any other like expression includes a reference to Her Majesty the Queen acting by and with the advice and consent of the Executive Council of New Zealand.

The Opening of Parliament.

Her Majesty could now exercise the powers given by s. 44 of the New Zealand Constitution Act, 1852 (15 & 16 Vict., c.72), which authorizes the holding of the General Assembly of New Zealand at any place and time within New Zealand which the Governor-General shall from time to time for that purpose appoint (which is really delegation of the Royal Prerogative to summon Parliament). This was amplified by the Royal Powers Act, 1953, to New Zealand, so as to be exercisable in this Realm by Her Majesty.

This became manifest when, on the day after her arrival in New Zealand, as the first reigning Monarch to set foot on these shores, Her Majesty issued a Royal Proclamation. It was "Given at Our Court at Government House, Auckland, and issued under the Seal of New Zealand, this 24th day of December, 1953, in the second year of Our Reign". Her Majesty declared it to be "Our Royal Will and Pleasure" that the General Assembly of New Zealand should be holden on January 12, 1953; and its Members were required and commanded to give attendance accordingly (*1953 New Zealand Gazette*, 2045). In accordance with constitutional practice, evidence of the fact that this Proclamation was issued on the advice of Her Majesty's Ministers in New Zealand, was provided by the countersignature of the Proclamation by the Prime Minister of New Zealand.

Next, in constitutional significance was Her Majesty's exercise of her Royal Prerogative to open the Session of the New Zealand Parliament on January 12, 1954. We cannot, with exactitude, say, with some of the writers in our lay Press, that this was the most important "constitutional" happening in New Zealand since the signing of the Treaty of Waitangi. But that is how the public of New Zealand regarded it. Can we be so pedantic as to say that they were wrong in so far as an historical national event was concerned?

It is now a matter of record that the Opening by Her Majesty of the Fourth Session of our Thirtieth Parliament was a magnificent and well-executed ceremony. Those who were privileged to be present within the Legislative Chamber were thrilled by the significance of the occasion. And so, too, were those thousands who thronged the precincts of Parliament and those tens of thousands who, like them, heard the proceedings on relay or on the radio.

Trained observers from overseas expressed themselves as enthralled by the similarity of the ceremonial with that of the Opening by the Sovereign of a Session of the Mother of Parliaments. They have told us that it was an experience they would not have missed, because it brought home to them, as nothing else could have done, the unity of the Commonwealth and the maintenance of Britain's oldest traditions in these new nations.

The final touch "which made the picture complete," as one distinguished overseas representative told us, was the presence of Her Majesty's Judges, twelve in all, in their ceremonial scarlet, their decorations, and their full-bottomed wigs. It was the first occasion on which a Chief Justice of New Zealand and eleven of his brethren had appeared in public together. And it was a worthy and timely gesture—which the whole of the legal profession appreciated—when the Officer Commanding the Royal Guard of Honour, Major E. E. McCurdy, E.D., paid a formal compliment to their Honours in procession on their way to attend the function by bringing the Guard to attention as they went by.

The New Zealand Judiciary cannot claim to share in legislative functions, as do some of their brethren in Great Britain; and no one in this country has ever thought it would be proper that they should do so. Their presence, however, by invitation, at the Royal Opening of Parliament reminded many of the medieval conception of Parliament as primarily a Court of justice. It was "the High Court of Parliament", from which there was no appeal. The Barons of the Exchequer and the Justices of the King's Bench and of the Court of Chancery were among its regular members, in virtue of their membership of the more ancient Curia Regis.

A Session of Parliament can be brought to an end only by the exercise of the Royal Prerogative. Hence, Parliament is prorogued at the end of a Session in the ordinary course by the Governor-General's exercising the Royal Prerogative in that behalf delegated to him. The recent Session was prorogued by Her Majesty in person by Royal Proclamation, "Given at Our Court at Government House, Wellington, and issued under the Seal of New Zealand, this 14th day of January 1954, in the second year of Our Reign."

While Her Majesty was in the capital city of her Realm of New Zealand, she presided at a meeting of the Executive Council. There is a permanent record of the proceedings in the Statutory Regulations for 1954, as Serial Nos. 1954/1-5, 9, 11, 13, and 15. There may be seen Orders-in-Council, made by "Her Majesty the Queen, acting by and with the advice and consent of Her Executive Council".

A Meeting of the Privy Council.

Another interesting event from the constitutional viewpoint took place during Her Majesty's visit. It was her summoning a meeting of her Privy Council to sit at her Court at Government House, Wellington, on January 13, 1954. This was, of course, the first occasion on which a meeting of the Privy Council was held in this country. It was attended by all Privy Councillors then in New Zealand.

This is not the place to give any extended history of the Privy Council and its place in British constitutional history. Suffice it to say that it is the modern adaptation of the Curia Regis of Norman times. Later on, before it was stabilized by s. 3 of the Act of Settlement, it was remodelled by Charles II into something like its modern form, as an executive and administrative body: its present constitution, powers, and appointments, may be learnt from *6 Halsbury's Laws of England* 2nd Ed., 643, while its varied and troubled history may be found in *Holdsworth's History of English Law*, Vols. 4 and 6 *passim*.

It is interesting to learn from a recent writer that, by the end of the medieval period, the King's Privy Council was coming to be thought of merely as an executive body, but it still retained judicial, fiscal, and legislative powers. Remnants of these powers (except the fiscal) descended through the ages; and he tells us they have

been inherited by the modern Privy Council, " along with certain other duties which still defy expert analysis as exclusively executive, or judicial, or legislative."

A record of the meeting of the Privy Council in this country appears in *1954 New Zealand Gazette*, 67, from which it appears that " Her Majesty, by the advice of her Privy Council was pleased to order (the Clerk in Ordinary of the said Council being absent) that Thomas James Sherrard, Esquire, O.B.E., should, in respect of the business to be transacted at that day's Council, have and perform all the powers, duties, and functions, and be in the place of the Clerk of the Council in Ordinary." Mr. Sherrard, who is Clerk of the Executive Council, temporarily held an office of great tradition. The office of Clerk of the Council in Ordinary was created on August 10, 1540. And, referring to the work of that earliest Clerk in Ordinary, Holdsworth, in his *History of English Law*, Vol. 6, p. 63, says :

> The Acts of the Council give us a photographic picture of the activities of Tudor Government in all its various aspects.

Her Majesty, in her absolute discretion, appoints members of Her Most Honourable Privy Council. While she was in New Zealand, it was her pleasure to appoint the Chief Justice of New Zealand, then the Hon. Sir Harold Barrowclough ; and, by Her Majesty's Command, he was sworn at the Privy Council meeting by taking the oath of allegiance and the Privy Council oath. He then took his place at the Board for the transaction of business.

Her Majesty's Speech.

We cannot conclude without placing on record in these pages some passages from Her Majesty's Speech at the Opening of the New Zealand Parliament, because, we feel, they have a bearing on what has been written above. Her Majesty, in part, said :

> It is with a feeling of real satisfaction that I speak to you, the elected representatives of the people of New Zealand, as your Queen, and that I exercise my prerogative of opening the fourth session of this thirtieth Parliament.
>
> This is the first occasion on which it has been possible for your Sovereign to exercise this high function in person in New Zealand. I know how much my father, with his intense devotion to his people, would have valued this historic privilege, of which his ill-health so tragically deprived him. My constant prayer is that I may, in some measure, carry on that ideal of service of which he gave so outstanding an example.
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> In addressing this Assembly, I feel especially conscious of the community of spirit which exists among the Parliaments of our Commonwealth. Our association of nations and peoples, united in the possession of common traditions and ideals, can fairly lay claim to greatness ; and I can think of no greatness more worthy of respect than that symbolized by a firm faith in the strength of parliamentary institutions and the rights of man.
>
> A hundred years ago, when the people of New Zealand gained for themselves the right of responsible self-government, it would have required a prophetic imagination to have foreseen the possibility of the present occasion. But in these hundred years New Zealand has grown to be a sovereign and mature State, while the ocean surrounding these bountiful islands has become a main highway in a world which has itself been transformed. I welcome the ease with which, in these times, it is possible to travel from one part of the Commonwealth to another. It will always be my endeavour to take advantage of the opportunities afforded by our age to enter with ever closer sympathy and understanding into the problems and aspirations of my Government and people in New Zealand.
>
> New Zealand, through her steady progress in matters of social welfare and in the development of her agricultural and other industries, has won international esteem. It is my earnest hope and expectation that this progress will continue and bring increased benefits and prosperity to her people.

SUMMARY OF RECENT LAW.

ARBITRATION.

Sale of Company Shares—Agreement between Shareholder and Company providing for Company to have Pre-emptive Right to acquire Shares at Fair Value—Failing Agreement by Parties to Fair Value, Auditors of Company to determine any Dispute—Such Auditors Arbitrators and not Valuers—Auditors, as Arbitrators, not liable in Respect of Want of Skill or Care—No Misconduct Short of Bad Faith or Fraud rendering them Liable for Damages at Suit of Dissatisfied Shareholder—Allegation of wilfully or negligently discharging Duty under Parties' Agreement—No Cause of Action. Twenty-five shares in M. company of a nominal value of £10 each were acquired by the plaintiff at par in 1947 as a long-service employee of that company, in which the principal shareholder was alleged to be D.H. company, a subsidiary of D. company, the second defendant. Upon the acquisition of the shares the plaintiff entered into an agreement, dated September 4, 1947, giving D. company pre-emptive rights in respect of the shares. The agreement provided that, if the plaintiff should from any cause cease to be in the employ of M. company, or should die while the holder of the shares, the plaintiff his executors administrators or assigns should transfer the shares to D. company upon the terms, *inter alia*, that he would transfer forthwith the shares to D. company, its successors or assigns at the fair value if required by that company to do so. It was further provided by the agreement that, in the event of any dispute arising between the parties to the agreement as to the fair value of the shares, such dispute should be referred to the auditor for the time being of D. company, whose decision should be final and binding upon both parties to the dispute. In April, 1952, the plaintiff resigned his employment with M. company and he received a notice from D. company, in terms of the agreement, requiring him to transfer the shares to one T. at the fair value as provided in the agreement. The matter of fixing the fair value was submitted to D. company's auditors and notice was given to the plaintiff that such step was being taken in terms of the agreement. The auditors, the first defendants, fixed the sum of £17 per share as the fair value of the shares. The plaintiff notified the auditors and M. company that that value was not acceptable to him, and he refused to complete a transfer which had been tendered to him by D. company. The directors of M. company (after having given preliminary notice to the plaintiff pursuant to the articles of association of that company) purported by resolution to transfer the shares to T. at £17 per share, which, the plaintiff alleged was below their true value. The plaintiff alleged that he had obtained an independent valuation showing that the true fair value of the shares is not less than £37 10s. per share. The plaintiff's allegations against the auditors were that in fixing the value of a share at £17 they wilfully or negligently discharged the duty laid upon them by the agreement, and thereby deprived the plaintiff of a substantial sum of money to which he was entitled as the holder of the shares. The plaintiff's allegations against D. company were that, by wilfully or negligently aiding or abetting the transfer of the shares with a full knowledge of the dispute between the parties, it had likewise deprived the plaintiff from receiving the true fair value of the shares, and had benefited by acquiring the shares in the name of its trustee or agent at less

than their true value. The plaintiff claimed to recover against the defendants jointly the sum of £937 10s. by way of damages, being the value of the shares at £37 10s. per share. On summons by the auditors, the first defendants for an order to strike out the statement of claim on the ground that it disclosed no reasonable cause of action against them or D. company; and on summons by D. company, the second defendant for an order striking it out from the action, and dismissing the action accordingly on the ground that the statement of claim disclosed no action against it, whether or not the statement of claim disclosed a cause of action against the first defendants. *Held*, 1. That the Court had ample power to deal with the matter by virtue of its inherent jurisdiction, and notwithstanding the absence in New Zealand of an express rule corresponding to R.S.C.O. 25 r. 4. (*Bell* v. *Mack*, [1927] G.L.R. 156; *Hurlstone* v. *Steadman* (*No. 2*), [1936] N.Z.L.R. 590; *Boundy* v. *Bennett*, [1945] N.Z.L.R. 460; and *Tankard* v. *Boston*, [1950] N.Z.L.R. 199, referred to.) 2. That the position of the first defendants was one of arbitrators or quasi-arbitrators, and not of valuers in the strict sense; and there was no room for the introduction of evidence to controvert that position. (*Finnegan* v. *Allen*, [1943] K.B. 425; [1943] 1 All E.R. 493, applied.) 3. That, as arbitrators, the first defendants were not liable for want of skill or care, and no misconduct short of bad faith or fraud would render them liable to an action for damages. 4. That the only way in which the duties of the first defendants could have arisen was pursuant to the agreement of 1947, and on a dispute arising as to the fair value of the shares; and that no cause of action against the first defendants was disclosed on the action as it was constituted, and the appropriate order to make was one of dismissing them from the action. 5. That while the statement of claim might not disclose a cause of action against the second defendant either in contract or in tort, it was arguable whether a breach of contract might not arise if the second defendant took any steps to procure in any way the transfer of the plaintiff's shares at otherwise than the fair value in accordance with the agreement between the parties; and, as the facts had not been explored, and there was a doubt about the position as to the plaintiff's rights, the proceedings should not be struck out on an interlocutory application, and the plaintiff thereby deprived of his remedies. 6. That the summons issued by the second defendant would accordingly be dismissed, the costs thereof to be costs in the cause; and on the summons issued by the first defendants, there would be an order striking out the first defendants as parties to the action, but in the circumstances without costs, as an application of this kind should be made promptly. (*Vallance* v. *Birmingham and Midland Land Investment Corporation*, (1876) L.R. 2 Ch. 369, 372, referred to.) *Penberthy* v. *Dymock and Another and John Duthie and Company, Ltd.* (S.C. Wanganui. August 13, 1953. Hay, J.)

COMPANY LAW.

Adjournment of Company Meetings. *103 Law Journal*, 775.

CONVEYANCING.

Enforcement of Covenants to Settle After-acquired Property. *97 Solicitors' Journal*, 825.

CRIMINAL LAW.

Carnal Knowledge—Girl under Sixteen—Defence of Reasonable Belief—"First occasion"—Separate Committals for Trial on Two Separate Occasions Relating to Two Different Girls—Trial on One Indictment. By s. 2 of the Criminal Law Amendment Act, 1922: "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge [of carnal knowledge of a girl under sixteen] under s. 5 . . . of the Criminal Law Amendment Act, 1885 . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section." The accused was committed on two separate occasions by justices for trial at assizes on two charges of carnal knowledge of two different girls between the ages of thirteen and sixteen years, contrary to s. 5. At the trial both charges were included in one indictment. *Held*, (i) A "charge" was made within the meaning of the section when the accused was charged before a court which had jurisdiction to determine the matter in question; where justices committed the accused for trial, there was no "charge" until he was tried on indictment; and, therefore, the accused was "charged" for the first time at the trial. (ii) Although the accused was committed for trial on separate occasions, both charges were joined in one indictment, and, therefore, the accused was charged on one "occasion" for the purposes of the proviso to s. 2 of the Act of 1922. (*R.* v. *Rogers*, [1953] 1 All E.R. 206, applied.) *R.* v. *Rider*, [1945] 1 All E.R. 5.

DIVORCE AND MATRIMONIAL CAUSES.

Divorce and the Defence of Just Cause. *103 Law Journal*, 759.

The M'Naghten Rules in Matrimonial Causes. *216 The Law Times*, 587.

EXECUTORS AND ADMINISTRATORS.

Absent or Incapacitated Representatives, *103 Law Journal*, 697.

The Interests of Residuary Legatees Pending Administration, *103 Law Journal*, 712.

FIRE BRIGADE.

Injury to Fireman—Liability of Fire Authority—Injury by Jack insecurely fixed in Vehicle. The plaintiff, a fireman employed by the defendants, the county fire authority, was travelling in the back of a lorry to the scene of an accident. In the lorry there was a jack weighing between two and three hundred-weight. It was not possible to fix the jack in any way as the lorry was not fitted for it, the usual vehicle for carrying the jack not being available. The driver of the lorry was forced to apply his brakes suddenly which caused the jack to move forward and strike and injure the plaintiff. *Held*, Apart from statutory requirements, an employer was bound to exercise reasonable care to avoid exposing his employees to unnecessary risks, but what was "reasonable" depended on the circumstances and nature of the employment; a fireman voluntarily engaged himself in a type of employment involving much greater risks than did other types of employment, and fire authorities were entitled to require firemen to undertake far greater risks than those encountered in other employments; in the circumstances, the defendants were justified in using the lorry, and, speed being an essential requirement of the fire service, the plaintiff must have been prepared to take risks which other persons travelling in motor-vehicles would not be required to take; and, accordingly, the plaintiff had not established that the accident was due to the defendant's negligence, and his claim must fail. *Watt* v. *Hertfordshire County Council*, [1954] 1 All E.R. 141 (Q.B.D.).

HUSBAND AND WIFE.

Funeral Expenses of Wife—Separated Wife buried with Husband's Knowledge and Funeral Expenses paid by Her Sister—Claim on Him by Sister—No Proof of Contract—Husband's Liability to pay Such Expenses if Wife left No Estate—Wife's Estate liable if She left Estate. A husband is liable for the funeral expenses of his wife if she leaves no property, even though he may have separated from her altogether, and even though she be buried without his knowledge or request, and he is equally liable whether the person who causes the body to be buried is an undertaker or any other person. (*Jenkins* v. *Tucker*, (1788) 1 Hs. Bl. 90; 126 E.R. 55; *Ambrose* v. *Kerrison*, (1851) 10 C.B. 776; 138 E.R. 307; *Bradshaw* v. *Beard*, (1862) 12 C.B.N.S. 344; 142 E.R. 1175; and *Bingham* v. *Walker*, (1848) 11 L.T. (O.S.) 151, followed.) Where, however, the wife leaves separate estate, her estate is liable for the payment of her funeral expenses. (*Rees* v. *Hughes*, [1946] 2 All E.R. 47, followed.) The defendant and his wife had been living apart under a separation agreement for over three years when the wife died. Her sister made the funeral arrangements, after notifying the defendant, who did not attend the funeral; and she paid for it. She claimed from the defendant the amount of the funeral expenses. *Held*, 1. That the plaintiff had not proved a direct contract by the defendant to pay the funeral expenses, as she had alleged. 2. That the evidence did not show, and a reasonable inference could not be drawn from it, that the wife had left no estate. *Robinson* v. *Shaw*. (Invercargill. December 17, 1953. Dobbie, S.M.)

INTERNATIONAL LAW.

The Minquiers and Ecrehos Case. *103 Law Journal*, 778.

JUDICIARY.

The Hon. Sir Harold Barrowclough, K.C.M.G., C.B., D.S.O., M.C., Chief Justice of New Zealand, at the Court at Government House, Wellington, on January 13, 1954, was, by Her Majesty's Command, sworn of Her Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.

Mr. Justice Croom-Johnson has resigned his office as a Judge of the Queen's Bench Division owing to ill-health.

Mr. Justice Pearce has been transferred from the Probate, Divorce, and Admiralty Division to fill the vacancy.

LANDLORD AND TENANT.

Surrender by Change in Character of Occupation, *97 Solicitors' Journal*, 736.

"Unfit for Human Habitation." *117 Justice of the Peace and Local Government Review*, 736.

LICENSING.

Offences—Golf-club in No-licence District—Liquor purchased by Club and sold to Members in Club-house—Club Unincorporated Body—President and Secretary of Club charged with keeping Liquor for Sale in No-licence District—Neither Defendant taking Part in Forbidden Act or aiding or abetting it—Position of Club Members found consuming Liquor in Club-house—Licensing Act, 1908, s. 146(a)(ii). The Wyndham Golf Club, situated in a no-licence district, purchased liquor in the orders of individual members charged to the Club, and, when it was received, the Club kept it at the Golf-house and sold it members on Club days. Any profit went to the Club. When the Police visited the Club, there were eighteen members in the Club-house, and, with one exception, they were drinking liquor. The Police saw two glasses of beer being served to members at a counter, over which money passed. The Club was unincorporated. When the Police arrived, the Club Secretary was on the golf-links, and the Club President was in Christchurch. The President and Secretary were charged, under s. 146(*a*)(*ii*) of the Licensing Act, 1908, with keeping liquor for sale in a no-licence district. *Held*, 1. That, as the Club was unincorporated, it was not recognized in law as being an entity, and no prosecution could lie against it (*Bindon* v. *Returned Services Association*, (1947) 5 M.C.D. 162, followed.) (*Campbell* v. *Thompson*, [1935] 1 All E.R. 831, and *Davey* v. *Shawcroft*, [1948] 1 All E.R. 827, applied.) 2. That the members of an unincorporated body are not criminally liable for the acts of that body unless they are actually participants, either as principals or as aiders or abettors, in the acts which constitute an offence by it. (*Gardner* v. *Akeroyd*, [1952] 2 All E.R. 306, followed.) 3. That neither of the defendants took part in the forbidden act constituting the offence charged and they could not be convicted of aiding or abetting it. (*Thomas* v. *Lindop*, [1950] 1 All E.R. 966, and *Goldfinch*, v. *Opie*, [1946] 4 M.C.D. 554, referred to.) *Semble*, The eighteen members found consuming liquor in the club-house could have been charged at least as aiders and abettors. *Police* v. *Geary*: *Police* v. *Heath*. (Gore. December 15, 1953. Dobbie, S.M.)

Licensing Committee—Member not Present during Entire Hearing but taking Part in Decision—Lapse not necessarily Fatal to Validity of Decision if No Objection taken and No Injustice done—Alleged Disqualification of Member on Ground of Bias—Member and Applicant for Licence Members of Same Political Party—No Ground to justify Court's Interference with Committee's Decision—Licensing Act, 1908, ss. 43 (2), 51. Licensing Committees are quasi-judicial bodies and it is proper that all the members taking part in any decision of such a committee should be present during the whole of the hearing of that particular matter; their proceedings, however, are not subject to any stricter rules or practices than are considered necessary in the Courts themselves. Where such a lapse has occurred, it is not necessarily fatal to the validity of the decision, if no protest was made and no objection was taken, and if no injustice has been done. (*Reg.* v. *Jeffreys*, (1870) 22 T.L.R. 786; *Bolton* v. *Bolton*, [1949] 2 All E.R. 908; and *Reg.* v. *Brown*, (1878) 4 V.L.R. 138, followed.) (*Lord* v. *Lord*, (1855) 26 L.J.Q.B. 34, and *British Metal Corporation* v. *Ludlow*, [1938] 1 All E.R. 135, distinguished.) In view of the nature of a Licensing Committee, and of the safeguards that the Licensing Committee has as its Chairman a Stipendiary Magistrate, and that there is an appeal from its decision to the Licensing Control Commission, and having regard to the provisions of ss. 43(2) and 51 of the Licensing Act, 1908, which have a bearing on the kind of circumstances which ought to be regarded as sufficient to disqualify a member of the Committee on the ground of bias, it would require a very strong case to justify interference with the decision of a Licensing Committee merely because a member of the Committee and an applicant for a licence were both interested in the same political party (*Reg.* v. *Nailsworth Licensing Justices*, [1953] 2 All E.R. 652, applied.) *Muir* v. *Franklin Licensing Committee and Another*. (S.C. Auckland. October 12, 1953. Stanton, J.)

NEGLIGENCE.

Accidents in Docks, *216 Law Times*, 561.

Australian Views on "Last Opportunity" Considered, *27 Australian Law Journal*, 451.

Licensee—Young Child accompanying Father to Premises and injured there—Whether Licence to Parent extends to Child—Question of Fact only. Whether a licence to a parent extends to a young child in his charge is purely a question of fact to be resolved by the tribunal of fact upon consideration of all the circumstances of the case. (*Burchell* v. *Hickisson*, (1880) 50 L.J.C.P. 101; *Latham* v. *Johnson*, [1913] 1 K.B. 398; and *Coates* v. *Rawtenstall Borough Council*, [1937] 3 All E.R. 602, referred to.) *Murfitt* v. *T. H. Walker and Sons, Ltd.* (S.C. New Plymouth. October 13, 1953. Cooke, J.)

"Sole Causes" and Contributory Negligence, *103 Law Journal*, 744.

The Burial of the Donkey, *27 Australian Law Journal, 447.*

NEW YEAR HONOURS.

Knight Commander of the Most Distinguished Order of Saint Michael and Saint George (K.C.M.G.)—

The Hon. H. E. Barrowclough, C.B., D.S.O., M.C., E.D., Chief Justice of New Zealand.

Companion of the Most Distinguished Order of Saint Michael and Saint George (C.M.G.)—

Mr. G. E. L. Alderton, at present High Commissioner for New Zealand in Australia.

Mr. G. R. Powles, at present High Commissioner of Western Samoa.

Officer of the Most Excellent Order of the British Empire (O.B.E.)

Mr. H. F. Guy, of Kaikohe.

Mr. N. H. Moss, of Stratford.

NUISANCE.

Tree—Branches overhanging Boundary—Immaterial whether Tree planted or self-sown—Effect of Distinguishing between Natural user or Non-natural user. Where damages are claimed, or an injunction is sought, in respect of the branches of a tree growing on a neighbour's property and overhanging the plaintiff's boundary, it is immaterial whether the tree was planted by human hand or was self-sown by natural means. The nuisance arises not from the mere presence of the tree, but in the fact that it encroaches on to the neighbour's land. (*Mandeno* v. *Brown*, [1952] N.Z.L.R. 447, and *Noble* v. *Harrison*, [1926] 2 K.B. 332, followed.) (*Molloy* v. *Drummond*, [1939] N.Z.L.R. 499, referred to.) *West* v. *Edgecombe*. (Auckland. August 28, 1953. Astley, S.M.)

OBITUARY.

Dr. H. C. Gutteridge, Q.C., Emeritus Professor of Comparative Law in the University of Cambridge, aged 77.

PRACTICE.

Citation of Cases—Report by Person not Member of the Bar In the course of the argument counsel for the appellant drew the Court's attention to a report contained in the *Estates Gazette*. *Somervell*, L.J., said that he did not wish to be cited cases that were reported by persons who were not members of the Bar since such reports might mislead rather than assist the Court. *Denning* and *Romer*, L.JJ., agreed and *Denning*, L.J., said that there were sufficient cases that could be cited apart from those in the *Estates Gazette*. *Birtwistle* v. *Tweedale*, [1953] 2 All E.R. 1598 (C.A.).

Jury—Verdict—Given in Judge's Absence—Validity. In an action for damages for false imprisonment and malicious prosecution the Judge left the Court before the jury had finished deliberating, and their verdict, which was a simple verdict in favour of the defendants, was given to the associate in his absence. The associate discharged the jury and on the next day of the sitting of the Court the Judge entered judgment for the defendants. *Held*, The verdict of the jury was a public verdict and not a privy verdict requiring to be affirmed or altered before the Judge in open Court, and, though it was undesirable that the verdict should be given in the absence of the Judge (dicta of *Scrutton*, J., in *Fanshaw* v. *Knowles*, [1916] 2 K.B. 549, and of *Scrutton*, J., in *Banbury* v. *Ban kof Montreal*, [1917] 1 K.B. 442, adopted), his absence did not of itself render it a nullity. *Hawksley* v. *Fewtrell and Another*, [1953] 2 All E.R. 1486 (C.A.).

Lis Alibi Pendens, *103 Law Journal*, 711.

NOTICE OF PARTNERSHIP.

MESSRS. WILLIAM THOMPSON CHURCHWARD and FRANK WILMOT HORTON, who have for some years carried on the practice of Barristers and Solicitors at Blenheim under the style of BURDEN, CHURCHWARD & HORTON wish to announce that as from the 1st day of February, 1954, they have admitted into partnership MR. PAUL LOXTON MOLINEAUX, M.A., LL.B., who has been associated with them for some time past, and that henceforth the practice will be carried on at the same premises in Blenheim under the style of CHURCHWARD, HORTON & MOLINEAUX.

WANTED.

SOLICITOR aged 28, recently qualified, seeks position in town or city. Experience of conveyancing and estates. Please reply "CONVEYANCING," C/o P.O. Box 472, WELLINGTON.

LEGAL ANNOUNCEMENTS.

Continued from cover i.

OLD ESTABLISHED FIRM, AUCKLAND, requires Barrister and Solicitor with sound knowledge conveyancing estate and other branches legal work. PARTNERSHIP later available to suitable applicant. Reply with particulars to "ESTATES," C/o P.O. Box 472, WELLINGTON.

PARTNERSHIP NOTICE.

Mr. K. Gillanders Scott, LL.B., Barrister and Solicitor, has pleasure in announcing that he has been joined in partnership as from 1st January, 1954, by Mr. Robert Alfred Wilson, LL.B., Barrister and Solicitor (formerly partner of Mr. W. C. Kohn of the legal firm of Messrs. Wauchop Kohn, & Wilson, Gisborne). The partnership business will be carried on under the name of GILLANDERS SCOTT & WILSON, at 14 Lowe Street (near Read's Quay), GISBORNE. Tel. No. 2570.

HOLIDAY RESORT MANAGEMENT.

Applications are invited from qualified persons for the management of a leading holiday resort hotel. Preferably man and wife without encumbrances. Hotel management experience by either or both is essential. Qualifications in any or all of the following will merit special consideration. General engineering and mechanics, marine engineering, launch service operation and maintenance work, nursing, bookkeeping or accountancy and entertaining. Kindliness for aged people and fondness of children is also desirable. Joint managers must be of outstanding character of good personality and disposition. A full understanding of awards concerned and ability to attract and maintain a happy and friendly but thoroughly disciplined staff is of importance. Sober habits absolutely essential. This presents an outstanding opportunity for advancement according to capabilities and results attained.

Applications should be addressed to "HOLIDAY RESORT," C/o J. Ilott Ltd., Advertising, P.O. Box 1491, WELLINGTON.

THE PROFESSION'S ADDRESS TO HER MAJESTY.

And Her Majesty's Reply.

The following is the text of the Address to Her Majesty the Queen from the President, Vice-Presidents and Council of the New Zealand Law Society, and all the Society's members:

TO
THE QUEEN'S MOST EXCELLENT MAJESTY

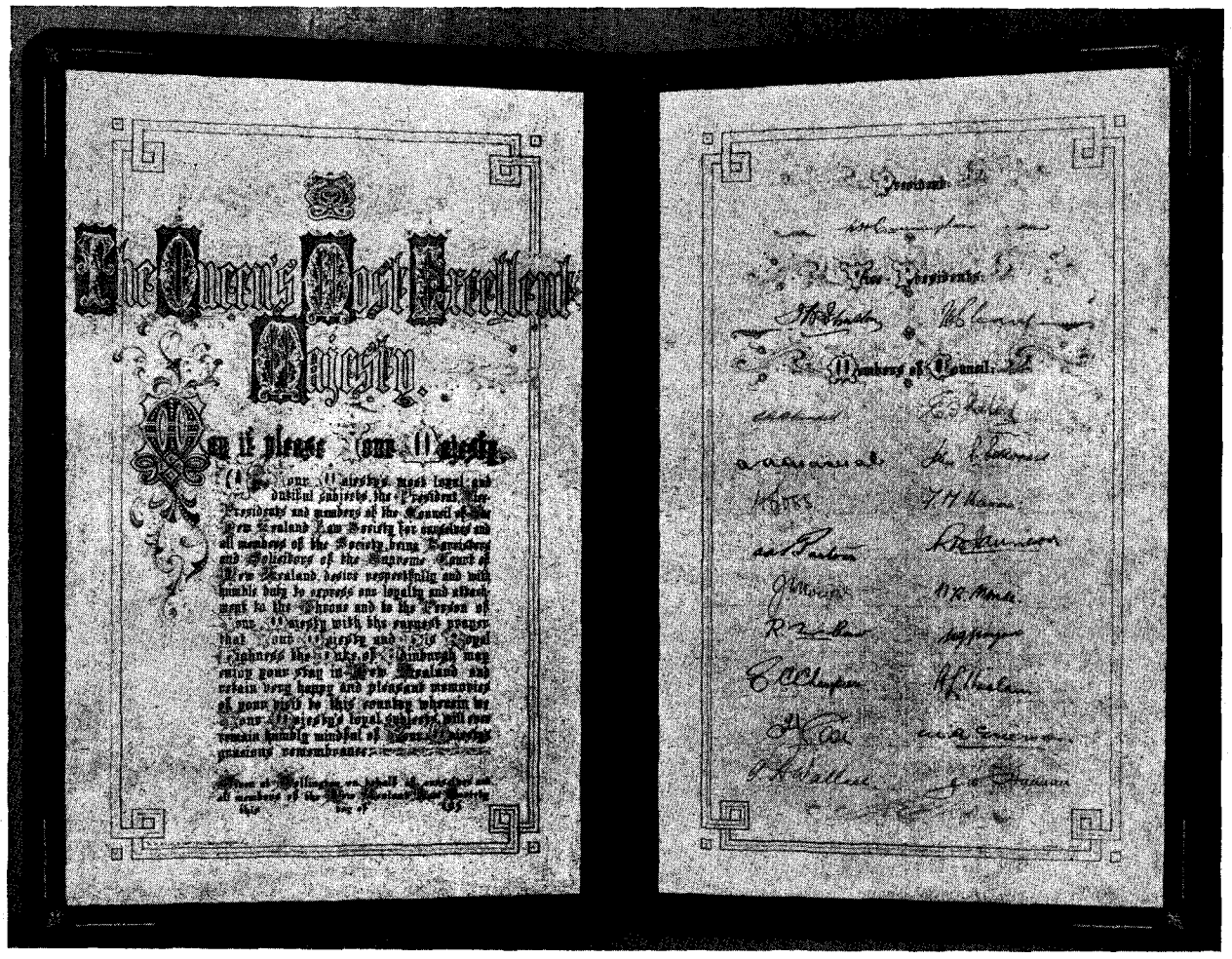
MAY IT PLEASE YOUR MAJESTY,

We Your Majesty's most loyal and dutiful subjects, the President, Vice-Presidents, and members of the Council of the New Zealand Law Society, for ourselves and all members of the Society, being Barristers and Solicitors of the Supreme Court of New Zealand, desire respectfully and with humble duty to express our loyalty and attachment to the Throne and to the Person of Your Majesty with the earnest prayer that Your Majesty and His Royal Highness the Duke of Edinburgh may enjoy your stay in New Zealand and retain very happy and pleasant memories of your visit to this country wherein we, Your Majesty's loyal subjects, will ever remain humbly mindful of Your Majesty's gracious remembrance.

Given at Wellington on behalf of ourselves and all members of the New Zealand Law Society this twenty-second day of December 1953.

The Address was signed by the following:

President: W. H. Cunningham; *Vice-Presidents*: J. B. Johnston, T. P. Cleary; *Members of Council*: E. D. Blundell, E. F. Rothwell (Wellington); A. A. McNab (Marlborough); John H. Holderness (Hawke's Bay); H. S. Ross, F. M. Hanan (Otago); A. A. Barton (Wanganui); R. D. Jamieson (Taranaki); J. W. Howarth (Southland); W. R. Maude (Gisborne); R. McCaw (Hamilton); J. Glasgow (Nelson); E. C. Champion, A. L. Haslam (Canterbury); F. J. Cox, M. R. Grierson, G. H. Wallace (Auckland); J. W. Hannan (Westland).



The Address was beautifully illuminated by Messrs. W. R. Bock and Son, Ltd., of Wellington, and was handsomely bound in blue leather, with the figure of Justice embossed in gold in the centre of the front cover. It was greatly admired by all who saw it before it was presented to Her Majesty on the day of her arrival in the Dominion.

HER MAJESTY'S ACKNOWLEDGMENT.

The following letter was received by the President of the New Zealand Law Society from the Private Secretary to Her Majesty the Queen:

"The Queen has commanded me to write to you and ask you to convey her thanks to the Vice-Presidents, the members of the Council of the New Zealand Law Society, and all members of the Society for the Loyal Address which you have sent to Her Majesty.

"The Queen much appreciates this message and the kind wishes which came with it."

RECENT LEGISLATION AFFECTING THE CONVEYANCER.

By E. C. Adams, LL.M.

Since the 1939-45 War, the statute-book has assumed mammoth proportions: practitioners will find the 1953 volume no exception to this post-war rule. Although most of the Acts passed during the 1953 session of the New Zealand Parliament do not affect conveyancing, there is much in the 1953 Statute Book which the practitioner cannot afford to ignore.

Change of Christian Names.

There has been some doubt as to whether or not a person domiciled in New Zealand could change his or her Christian name. As late as 1946, it was held that in England a person could not change his Christian name: *In re Parrott's Will Trusts*, *Cox* v. *Parrott*, [1946] 1 All E.R. 321; 62 T.L.R. 189. This matter has now been set at rest so far as New Zealand is concerned by s. 2 of the Births and Deaths Registration Amendment Act, 1953, which provides that any person who has attained the age of twenty-one years, or who has at any time been married, may by deed poll change his name, whether as to his surname or as to his first name or Christian name. Probably this statutory provision will have to be read subject to the general principle laid down by *Lord Lindley*, in *Cowley* v. *Cowley*, [1901] 2 A.C. 450, 460: "Speaking generally, the law of this country allows any person to assume and use any name provided its use is not calculated to deceive and inflict pecuniary loss".

Where the name of any person is changed under that section, or has been changed before the commencement of the section by deed poll in accordance with the law in force at the date of the deed, the change of name may be registered by depositing the deed in the Registrar-General's Office. Therefore, the former New Zealand practice of filing a copy of the deed in the Supreme Court Office will probably now die out.

Chattels Transfer Act, 1924: Two Important Amendments.

Perhaps there is not on the Statute-book a trickier or more troublesome Act than the Chattels Transfer Act, 1924. It is full of pitfalls for the unwary conveyancer. All will agree, I think, that the two amendments effected by the Chattels Transfer Amendment Act, 1953, are in the right direction and will remove at least two of the pitfalls.

Practitioners will recollect that last year charges given by Industrial and Provident Societies were put on the same footing as charges by companies registered under the Companies Act, 1933: the registration of certain charges was made obligatory. It was not noticed, however, that these charges so made registrable under the Industrial and Provident Societies Act, 1908, might also have to be registered under the Chattels Transfer Act. To have to register under both Acts was, to say the least, inconvenient and expensive. The effect of s. 2 of the Amendment Act, 1953, is that mortgages or charges granted or created by a society registered under the Industrial and Provident Societies Act, 1908, do not now require to be registered under the Chattels Transfer Act. In short, they are, in this respect, put on the same footing as charges registered under the Companies Act, 1933.

The second amendment abrogates a ruling given by the majority of the Court of Appeal in *Dempsey and the National Bank of New Zealand, Ltd.* v. *The Traders' Finance Corporation*, [1933] N.Z.L.R. 1258. Despite the fact that the definition of "Instrument" in s. 2 of the Chattels Transfer Act, 1924, excluded customary hire-purchase agreements, as defined in the Act, and s. 57(3) of that Act (as amended) provided that a customary hire-purchase agreement and any assignment of a customary hire-purchase agreement, whether absolute or by way of mortgage, was valid and effectual for all purposes without registration thereof, the majority of the Court in that case expressed the very strong opinion that an assignment of a customary hire-purchase agreement still needed registration, because it is also an assignment of the chattels, as the ownership of the chattels remains in the vendor and must be assigned with his interest under the customary hire-purchase agreement. Section 3 of the Amendment Act, 1953, now makes it clear that assignments of customary hire-purchase agreements do not require registration under the Chattels Transfer Act, 1924.

It necessarily follows that assignments of customary hire-purchase agreements by way of charge made by companies and industrial and provident societies will also not require registration under the Companies Act, 1933, or the Industrial and Provident Societies Act, 1908: see s. 89(2)(*c*) of the Companies Act, 1933, and s. 17(2)(*c*) of the Industrial and Provident Societies Amendment Act, 1952.

Both amendments to the Chattels Transfer Act, 1924, have been made retrospective.

Registration of Easements on Sale of State Houses.

This matter is provided for in Part II of the Finance Act (No. 2), 1953, which the conveyancer will find most interesting. It constitutes a distinct departure from the normal method of creating easements over Land Transfer land by the registration of a Memorandum of Transfer pursuant to s. 90 of the Land Transfer Act, 1952. Many state-house properties have appurtenant to them or are subject to *de facto* easements which are not yet *de jure* easements. These easements are of three classes: first, drainage easements for the disposal of water or storm water or sewage (called in the Act pipe-line easements), secondly, rights of way, and thirdly,

party-wall easements. In respect of these *de facto* easements, the Corporation may issue certificates and register them against the respective Land Transfer titles. The statute sets out explicitly the respective rights of the servient and dominant tenements on registration of the certificates.

Subsection 7 of s. 16 provides that, notwithstanding any rule of law or enactment to the contrary, any easement certificate registered under that section shall be deemed to be binding on any prior or subsequent mortgagee, if any, of the land or of any interest in any of the land affected by the certificate, and no consent under the Municipal Corporations Act, 1933, or otherwise shall be necessary to the issue or registration thereof.

Provision is also made for the variation and cancellation of the certificates after they have been registered.

The nearest analogy to this novel, but, I think, very effective, legislation is s. 232 of the Municipal Corporations Act, 1933, which provides for the registration by the municipality of certificates relating to private drains affecting separately owned premises.

Friendly Societies: Dealing with Deceased Member's Interest Without Grant of Administration.

Section 5 of the Friendly Societies Amendment Act, 1953, increases from £150 to £200 the maximum amount of a member's interest in the funds of a friendly society that he can dispose of on his death by nomination or that can be distributed on his death by the society without a grant of administration by the Supreme Court. This brings the Friendly Societies Act into line with such Acts as the Post and Telegraph Act, 1928, the Industrial and Provident Societies Act, 1908, and the Trustee Savings Bank Act, 1948.

Geothermal Energy Act, 1953.

I expect that this Act will interest only those practitioners who practise in the "infernal" regions of New Zealand.

Section 3 provides that the sole right to tap, take, use, and apply geothermal energy is to vest in the Crown.

Section 7 gives the Crown power to take land necessary for the tapping, taking, use, or application of geothermal energy in conneciton with any public work.

Mortgages of Life Insurance Policies need not now be Executed by Mortgagee.

The Life Insurance Amendment Act, 1953, ought to prove a great convenience. It abolishes the requirement imposed by s. 44 (1) of the Life Insurance Act, 1908, to the effect that, except where the mortgagee was the company liable under the policy, a mortgage of a life insurance policy had to be executed by the mortgagee, as well, of course, as by the mortgagor. Now a mortgage of a life insurance policy need be executed only by the mortgagor. This, of course, will not prevent the mortgagee from suing under the express or implied covenants under the mortgage. Mortgages of life insurance policies are thus in this respect put in the same position as mortgages of other classes of property, *e.g.*, mortgage of land either under the general law or under the Land Transfer Act.

Water Supply Companies may be Registered: Variation of Leases under Land Act Registrable.

In s. 3 of the Land Amendment Act, 1953, practitioners will find elaborate provisions relating to and authorizing the formation under the Companies Act, as private companies, of community water supply associations. One noteworthy provision is that of linking the shares in the company with the ownership of the land served by the community water scheme.

All conveyancers now know that s. 116 of the Land Transfer Act, 1952, provides for the registration of extensions or *variation* of Land Transfer leases by a short memorandum of extension of the term of the lease or of the variation of the covenants before the term has expired, as the case may be. This section and its predecessors (s. 4 of the Land Transfer Amendment Act, 1939, and s. 36 of the Statutes Amendment Act, 1947) have proved a great boon to practising solicitors. They have saved the typing of voluminous memoranda of leases on the expiration of a lease, and rendered unnecessary the surrender of an existing lease and the execution of a new lease, when the term was left alone but a variation in the covenants or conditions in the lease was desired. But what few practitioners know is that, in the case of Crown leases or licences under the Land Act, they have to be extended in accordance with the provisions contained in the Land Act, 1948, itself which contains its own provisions as to extension of terms of leases or licences: s. 170 of Land Act, 1948. But the Land Act, 1948, did not contain any provisions for *variation* of the covenants or conditions, except where the lessee or licensee was entitled to a renewal of his lease or licence, or to a new lease or licence in exchange for his existing lease or licence. This defect has now been remedied by the enacting of s. 10 of the Land Amendment Act, 1953.

Amendments to the Land Subdivision in Counties Act.

Under the principal Act, subdivisions of land in a Town Board District were included within its provisions. Now, by the 1953 Amendment Act, subdivisions of land in an independent town district are excluded from the Land Subdivision in Counties Act: instead, they will come under s. 332 of the Municipal Corporations Act, 1933. Subdivisions in a town district forming part of a county will continue as heretofore to come under the Land Subdivision in Counties Act, 1946.

The conveyancer will find some very novel provisions as to easements in s. 10 of the Land Subdivision in Counties Amendment Act, 1953: he will also find some very similar provisions in the Municipal Corporations Amendment Act, 1953. These novel provisions have been found necessary in order to ensure that subdivisions in cities, boroughs, town districts and counties should conform to modern town-planning principles. Subdivisions of land have often been approved either by the Minister of Lands or the borough council subject to the condition that certain easements should be created: these easements often add to the amenities enjoyed by the purchasers of the various lots and their successors in title, but hitherto there has been no guarantee that such easements would be created, and, if they were created, that they would not be surrendered some time in the future. Section 10 (3) (*c*) of the amending Act prohibits the District Land Registrar from registering any instrument of transfer of any allotment shown on the plan of subdivision, unless he is satisfied that all rights of way and drainage easements so specified which are appurtenant to that allotment or to which that allotment is subject have been duly granted or reserved. Section 10 (3) (*a*) provides that no such right of way or drainage

easement may be surrendered by the owner of the dominant tenement or, in the case of a drainage easement in gross, the grantee of the easement, or be merged by transfer to the owner of the servient tenement, except with the approval of the Minister of Lands. Fortunately for the peace of mind of the conveyancer, whose job is getting more and more complicated as time marches on, the statute directs the District Land Registrar to endorse on the instrument by which the right of way or drainage easement is granted or reserved a memorial that the right of way or drainage easement is subject to the provisions of the paragraph.

A provision which could very well catch and embarrass the unwary conveyancer is s. 6 which reads as follows:

> 6. Section three of the principal Act is hereby further amended by inserting, after subsection seven, the following new subsection:
>
> "(7A) Where a scheme plan has been approved for the purposes of this Act but no plan of subdivision in respect of the land affected by the scheme plan is deposited under the Land Transfer Act 1952 or the Deeds Registration Act 1908, as the case may require, within a period of two years after the date of that approval or, in the case of a scheme plan approved before the commencement of this subsection, within a period of two years after the commencement of this subsection, the approval shall be deemed to have lapsed at the expiration of that period, and thereupon the scheme plan shall cease to have any effect."

However, a similar provision already exists with regard to approved subdivisions under the Municipal Corporations Act, 1933.

The Maori Affairs Act, 1953.

This is, indeed, a mammoth statute consisting of 473 sections and a Schedule, and even it does not consolidate *all* the law relating to Maori land. For example, it does not repeal Parts XIV, XV or XVI of the Maori Land Act, 1931, and it does not affect the various Maori Reserves Acts. However, as the average conveyancer is not very much interested in the complexity of our Maori Land laws, it will suffice, perhaps, if I indicate very briefly some of the changes effected. It must be pointed out that the Act does not come into force until the first day of April, 1954.

One notable change is the method of conferring title on the successor to a Maori's interest in Maori freehold land. The legislature has made a praiseworthy effort to deal with the problem of the succession to uneconomic interests in Maori land. Consequently, instead of title to Maori land being conferred, as it has been since the coming into operation of the Maori Land Act, 1909, by succession order, it will now be conferred by a *vesting* order. The Maori Land Court in due course will either vest the interest in the Maori Trustee (when he acquires an uneconomic interest) or in those beneficially entitled to the succession, except that, when land is devised to a trustee other than a bare trustee, the vesting order will be in favour of the trustee and, contrary to ordinary Land Transfer principles, notice of the trust will be endorsed on the vesting order. For the purposes of the Death Duties Act, 1921, every such vesting order shall be deemed to be a succession order and liable to Maori succession duty accordingly, if exceeding £200 in value, at the rate of 2 per cent.

The provisions as to subdivision of Maori Land have also been tightened up considerably. Formerly, ss. 125 and 128 of the Public Works Act, 1928, did not apply to subdivisions of Maori land situate outside a borough, but that has now been altered. The relevant sections are too bulky to permit of quoting verbatim in this article and I think that for conciseness' sake I cannot improve on the explanatory note to the Bill when it was presented to Parliament.

> (1) The owner of any Maori freehold land who sells any part thereof not having a frontage to a road or street is required to comply with the provisions of s. 125 of the Public Works Act, 1928.
>
> (2) Where the Court makes a partition order in respect of any land within a borough the partition order is deemed to be a subdivision into allotments for purposes of sale, and, where any such land has an existing frontage to a road or street of less than the statutory width, the Court is required, before making a partition order, to comply with the requirements imposed on owners by s. 128 of the Public Works Act, 1928.
>
> (3) On the subdivision of any Maori freehold land within a borough the owner is required to comply with the provisions of s. 332 of the Municipal Corporations Act, 1933 (regarding the deposit of plans, &c., for approval by the Council).
>
> The sections also make machinery provisions which empower the Court to facilitate the dedication or setting apart of lands required for roads, streets, or reserves by the making of vesting orders. The foregoing provisions as to streets and reserves, as applicable to Maori land in boroughs, are, by s. 432 (9), applied expressly to Maori land within town districts.

Amendments to Municipal Corporations Act, 1933.

Special orders dispensed with in certain cases.—Special orders are now dispensed with where:

(1) Land is sold by the municipality for residential purposes: s. 12 of the Municipal Corporations Amendment Act, 1953.

(2) Dedication of a new street is accepted by resolution of the council and the instrument of dedication is registered: s. 16 *ibid.*

Special orders were never necessary where the dedication was under s. 125 or s. 128 of the Public Works Act, 1928, for under those sections dedication was mandatory and the sections themselves set out the form of dedication.

Agreements for Sale and Purchase of Dwellinghouses made registrable.—As a general rule, an agreement for sale and purchase of land is not registrable under the Land Transfer Act: that is because an agreement for sale and purchase does not transfer the legal title: it affects only the equitable title. There are several exceptions to this rule. First, there is s. 339 of the Maori Land Act, 1931, which authorizes the registration under the Land Transfer Act of *contracts* of sale under Part XIV of that Act. Secondly, deferred payment licences issued under the Land Acts have always been registered under the Land Transfer Act: they are, in substance, agreements for sale and purchase. Thirdly, agreements for sale and purchase of State houses are registrable under that Act: s. 25 of Finance Act, 1950. Finally, agreements for sale and purchase of dwellinghouses from City and Borough Councils have now been made registrable under the Land Transfer Act: s. 22 of the Municipal Corporations Amendment Act, 1953, which has been modelled on s. 339 of the Maori Land Act, 1931. The immediate purpose of this section is to meet the request of many purchasers of houses from the municipalities to be permitted to settle their homes under the Joint Family Homes Act, 1950.

Ameliorating provisions as to Rights of Way and Stopping Streets.—For many years now the law as to creation of rights of way in cities, boroughs, and town districts has been out of date. The statutory restriction that a right of way should not exceed 20 feet in width

measured at right angles to its course has caused practical inconveniences: since the age of the motor-car this did not allow much opportunity or providing good visibility for traffic or of providing for turning places. These inconveniences have now been removed by s. 14 of the Municipal Corporations Amendment Act, 1953, which reads as follows:

> 14. Section one hundred and seventy-four of the principal Act is hereby amended by adding to subsection six the following provisos:
>
> "Provided that a private way may be of any greater width for a distance of not more than twenty feet from where it meets any street:
>
> "Provided also that a private way which has a blind end may have a turning space of any width at that end."

It is clear law that the provisions of the Municipal Corporations Act, 1933, as to the stopping of streets or diminishing their width must be slavishly carried out: any slip in the procedure prescribed will render the proceedings void, and the street or part of the street sought to be closed will remain a public highway. Take, for example, the case *Stratford Borough Council* v. *C. A. Wilkinson, Ltd.*, [1951] N.Z.L.R. 814; [1951] G.L.R. 244, 345, where at a public meeting of electors held in accordance with the statute to consider a proposal to diminish the width of Portia Street, the learned Magistrate who presided at the meeting declared the resolution to have been carried *on the voices*. Even the eloquence of a Portia would have failed to convince the Court of Appeal that the procedure was in order. The Court held the proceedings to be ineffectual, because a decision of the majority of the district electors present could not be ascertained by such a method. As *Cooke*, J., said in delivering the judgment of the Court of Appeal, it was impossible to tell from sound alone, whether a majority of those present had voted for the resolution. Now by s. 27 of the Municipal Corporations Amendment Act, 1953, a public meeting is no longer required but there is substituted a provision that the Council must consider all objections, and, if it re-affirms the decision, to stop or diminish the width of the street, it must refer the decision and the objections to a Magistrate for his decision. Another ameliorating provision is subs. 3 of that section which provides that the unauthorized removal of any notice which is required by cl. 3 of the Fifth Schedule to be fixed at both ends of the street proposed to be stopped will not invalidate the stopping, but the Council must replace it as soon as practicable.

Link with Land Subdivision in Counties Act.—Section 332 of the Municipal Corporations Act, 1933, is the provision which renders it necessary for a subdivision of land in a city, borough or town district to be approved of by the municipality. The 1953 Amendment Act contains several provisions affecting s. 332. A devise of part of the land of the testator comprised in the one certificate of title is now caught by s. 332 of the principal Act thus bringing the law as to subdivision of land in a city, borough or town district more or less into harmony with subdivisions of land in a County: see s. 2 of the Land Subdivision in Counties Act, 1946, definition of "sale". This change in the law is effected by s. 23 of the 1953 amending Act, which reads as follows:

> 23. Section three hundred and thirty-two of the principal Act is hereby amended by adding to subsection one the following paragraph:
>
> "(c) Being land subject to the Land Transfer Act 1952 and comprised in one certificate of title, or being a continuous area of land not subject to that Act, the personal representative of the former deceased owner disposes of any specified part thereof less than the whole to any person pursuant to a devise of that part under the will of the former deceased owner:
>
> "Provided that nothing in this section shall affect the equitable interest of the devisee in the land."

It sometimes happens that after a scheme plan has been duly approved of by the Minister of Lands under the Land Subdivision in Counties Act, 1946, the land comprised therein becomes included in a city or borough: the position hitherto as to what extent that approval enures for the purposes of ss. 125-128 of the Public Works Act, 1928, and s. 332 of the Municipal Corporations Act, 1933, has been a little obscure. Most of the obscurities appear to have been removed by s. 25 of the Municipal Corporations Amendment Act, 1953, which in essence provides that the scheme plan remains in force for the purposes of the Public Works Act, 1928, and the Municipal Corporations Act, 1933.

Amendment to s. 125 of Public Works Act, 1928, as to Formation of Roads.

The Public Works Amendment Act, 1953, ought to assist subdividing owners of land in cities, boroughs or independent town districts. The purpose of the amending Act is to alter the law as laid down by *Sir Michael Myers*, C.J., in *Flood* v. *Lower Hutt Borough Council*, [1930] N.Z.L.R. 132, to the effect that a mere promise to form the new road to the satisfaction of the local body in the future was wrong, even though such promise might be adequately secured by a bond. The effect of the amending section is to permit dedication under s. 125 of the Public Works Act, 1928, on the subdividing owner binding himself by deed to carry out the formation work within a period of two years, or such shorter time as the local authority specifies, supported by a guarantee by a bank or an insurance company or by the deposit of money or securities to an amount equal to one and a quarter times the estimated cost of the work.

The Standing of Lawyers.

In no country in the world today has the lawyer a standing remotely comparable with his place in American politics. The respect in which the federal Courts and, above all, the Supreme Court are held is hardly surpassed by the influence they exert on the life of the United States. If it is excessive to say that American history could be written in terms of its federal decisions, it is not excessive to say that American history would be incomplete without a careful consideration of them. The presidency apart, no position is more eagerly canvassed than that of a Justice of the Supreme Court of the United States. And, while it is true that there have been Judges of poor quality in each of the three tiers of the federal Courts, it is also true that they have been able to attract into their service men whose ability, taken as a whole, rivals that of the men who have sought to win the ultimate prize of the presidency. Cabinet officers and senators have gladly exchanged their places for a position on the Supreme Court; and from Marshall, in the first generation of its history, to Chief Justice Vinson in the present age, it is not an exaggeration to say that the influence of the Court has been second to that of no other American institution.—Harold J. Laski, *The American Democracy: A Commentary and an Interpretation.*

JUDICIAL CONTROL OF TRADE UNION DISCIPLINE.

By J. F. Northey B.A. LL.M. (N.Z.), Dr. Jur. (Toronto), and B. Coote, LL.B.

(Concluded from p. 10.)

We shall now attempt a reconciliation of these decisions in so far as they appear to diverge. The control exercised by the Courts can be stated in a series of propositions, some of which are more amply supported by authority than others.

First, the Courts exercise control over the contractual relations of the parties; where the decision of the domestic tribunal constitutes a breach of the contract between the members a member injured by the decision has an action for breach of contract. What constitutes a breach of contract is a different matter. Here the position is confused by the decision in *Abbott* v. *Sullivan* [1952] 1 K.B. 189; [1952] 1 All E.R. 226, that an *ultra vires* act is not *per se* a breach of contract. This proposition can be confidently asserted and is supported by *White* v. *Kuzych*, [1951] A.C. 585; [1951] 2 All E.R. 435, and *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175.

Secondly, the Courts have jurisdiction to determine all questions of law arising from the relationship of members with their union; under this head the Courts exercise the right to interpret the rules of the union. The authorities cited under the first proposition also support this proposition.

Thirdly, the Courts do not claim the power to declare invalid all decisions of domestic tribunals which are *ultra vires*: *Abbott* v. *Sullivan* (*supra*). However, if a *final* decision is not supported by evidence considered by the Courts to be adequate, it will be *ultra vires* and void: *Lee* v. *Showmen's Guild of Great Britain* (*supra*). *Denning*, L.J., would go further and hold that any decision taken by a domestic tribunal in excess of its jurisdiction, as determined by the rules, is a breach of the contract between members and therefore invalid. With respect, we incline to the view taken by the learned Lord Justice as it follows logically from the contractual relationship on which the authority of the tribunal is based.

Fourthly, all decisions of domestic tribunals which were influenced by malice, dishonesty or bad faith are invalid. The effect of a rule permitting a committee to act dishonestly or *mala fide* has not been judicially considered but it is unlikely that a decision so affected would be upheld. Support for this proposition is found in *Maclean* v. *Workers' Union*, [1929] 1 Ch. 602, and *Abbott* v. *Sullivan* (*supra*).

Fifthly, there is some doubt whether the principles of natural justice must be observed by domestic tribunals. *Denning*, L.J., who speaks with considerable authority believes that the principles of natural justice apply and cannot be excluded by the rules; other Judges consider that the contract theory permits these principles to apply only when they are expressly or impliedly incorporated in the rules. Again, although we recognize the logic of this reasoning, we incline to the view adopted by *Denning*, L.J., for the reasons he has propounded in *Lee* v. *Showmen's Guild of Great Britain*, at p. 1181. A domestic tribunal exercises

> "powers as great, if not greater, than any exercised by the Courts of law They can deprive a man of his livelihood."

It is reasonable, then, that they should be required to give the member notice of the charge, a reasonable opportunity to answer it, and a fair hearing.

III. The Extent to which the Parties can Contract out of the Protection Ordinarily Available from the Courts.

As it has been accepted that the jurisdiction of a domestic tribunal is founded on contract, the question arises as to the extent of the parties' freedom of contract. It is clear that the parties cannot by their contract oust the jurisdiction of the Courts. This is a principle applicable to contracts generally, and it is amply supported by authority, *e.g.*, *Scott* v. *Avery*, (1856) 5 H.L. Cas. 811, 845 and 846 per *Alderson*, B., and *Lord Cranworth*, L.C.

But can the parties by their contract exclude the principles of natural justice or empower the tribunal to act *mala fide*? In *Russell* v. *Duke of Norfolk*, [1949] 1 All E.R. 109, *Goddard*, L.C.J., was prepared to concede that if the rules authorized the tribunal to expel a member without giving him an opportunity of being heard the Courts would be unlikely to interfere. A similar view was expressed by *Callan*, J., in *Donaldson* v. *New Zealand Waterside Workers' Union*, (1950, unreported). *Callan*, J., held that the union rules did not authorize Barnes, as president, to act as both Judge, prosecutor and accused but he implied that the rules could have so empowered Barnes. He cited *Dickason* v. *Edwards*, (1910) 10 C.L.R. 243, where *Griffith*, C.J., *O'Connor* and *Isaacs*, JJ. all stated that the rules of a friendly society, being contractual, could validly exclude the principles of natural justice. All, however, emphasized that the Courts would not lightly construe the rules to bear such a meaning. *Callan*, J., went further and said that the right of a tribunal to act unjustly could not be acquired by mere practice or usage.

The parties can, of course, exclude review by the Courts until domestic tribunals have finally disposed of the case. The judicial Committee of the Privy Council in *White* v. *Kuzych* (*supra*) stated at p. 600-1 [441-2] that the rules were designed to have disputes settled before a domestic forum to the exclusion of the Courts, at any rate until the remedies provided by the constitution are exhausted. The Judicial Committee refused to intervene because the respondent had not exhausted his remedies under the rules.

In *Lee* v. *Showmen's Guild of Great Britain* (*supra*), *Denning*, L.J., repeated at greater length his remarks in *Russell* v. *Duke of Norfolk* (*supra*) as to the exclusion of the principles of natural justice. It will be noted that Lloyd in (1952) 15 M.L.R. 413, 423 supports the views of *Denning*, L.J., who stated at p. 1180-1:

> Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for

instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard. That appears, I think, from the judgments of Brett, L.J., in *Dawkins* v. *Antrobus* ((1881) 17 Ch.D. 630), of Kelly, C.B., in *Wood* v. *Woad* ((1874) L.R. 9 Exch. 196), and of Lord Birkenhead, L.C., in *Weinberger* v. *Inglis* ([1919] A.C. 616), which are to be preferred to the dictum of Maugham, J., in *Maclean* v. *Workers' Union* ([1929] 1 Ch. 602) to the contrary.

It must be conceded that the authorities cited by *Denning*, L.J., are not strong, but his attitude towards judicial review is, we think, rightly dominated by the importance of the decisions of trade union authorities. As has already been pointed out, the consequence of expulsion are so serious that committees of trade unions should be expected to observe the principles of natural justice. It follows logically that any attempt to exclude these principles by provisions in the rules over which individual members have little or no control should either be construed strictly against the committee or declared void as contrary to public policy. This is particularly so in New Zealand where membership of trade unions is compulsory. When a worker is obliged to join a union or choose another occupation, it is highly artificial to speak of freedom of contracts.

IV. The Remedies Available to Members.

Because the domestic tribunals of trade unions owe their existence to contract, the remedies of certiorari and prohibition are not available to members: *R.* v. *Disputes Committee of the National Joint Council for the Craft of Dental Technicians*, [1953] 1 All E.R. 327. But an injured member is entitled to declaration and injunction in proper cases; *Lee* v. *Showmen's Guild, of Great Britain* (*supra*) at p. 1183 per *Denning*, L.J., who considered that these remedies were more effective than certiorari. He will also be entitled to damages for breach of contract.

Mandamus will also lie at the suit of a member whose name has been wrongfully removed from the register of members; *Gould* v. *Wellington Watersiders Workers' Industrial Union of Workers*, [1924] N.Z.L.R. 1025.

In addition, there is in New Zealand a remedy in tort, *e.g.*, for procuring a breach of contract or for conspiring to procure a breach of contract. There appears to have been no English decision in which an action in tort, in respect of an act of a domestic tribunal has succeeded. In *Abbott* v. *Sullivan* (*supra*) it was agreed that a mere wrongful expulsion from a voluntary organization did not give rise to tortious liability. Lloyd in (1950) 13 M.L.R. 281, 299-300 expressed the opinion that an action in tort is unlikely to be held to lie for the reason that before it can there must be a right to membership established at law which has been infringed. Such a right is contractual and the Courts will not permit an action to be framed in tort for a mere breach of contract. It is, however, submitted that there may be rights other than contractual rights infringed. This seems to have been accepted by the Courts in New Zealand where industrial legislation has created rights in members other than those under the rules of the union concerned. Thus, in *Gould* v. *Wellington Waterside Workers' Industrial Union of Workers* (*supra*) at p. 1042, *Hosking*, J., is reported as saying:

A question was made whether these actions are founded on breach of contract or tort. In so far as the striking-off the plaintiffs from the roll of members is concerned, the wrongful act may be described as a breach of the contract created by the rules. So far as the acts of the defendant consisted in preventing the plaintiffs from obtaining employment, I think the defendant's conduct amounts to a tort. It was something beyond a breach of the rules. The plaintiffs possessed a status with regard to the right of preferential employment, not dependent upon the rules but upon the industrial agreement, and created not merely by consent of the union but by the correlative consent on the part of the employers to restrict their area of choice of employees. This consideration, I think, will serve to distinguish these cases from what I may term the club cases.

That decision was followed by *Callan*, J., in *Donaldson's* case, the tort there being "wrongful interference with [the plaintiff's] employment." One of the objections to an action in tort against the English unions was that they were not incorporated so that an action against the union was an action against each of the members including the plaintiff. In New Zealand that objection does not arise. In *Donaldson's* case, the tort was committed by the president, Barnes, in the course of his employment and consequently the union, as principal, was liable.

V. Conclusions.

(1) The control of the Courts over the decisions of bodies controlling trade unions is confined within fairly narrow limits. Decisions of an administrative nature will not be questioned, nor will decisions on questions of fact or opinion. This proposition is so clearly established by the authorities cited in this article that it was considered unnecessary to discuss it.

(2) Two principal theories of the basis on which the Courts will interfere have received judicial recognition. In practice the conflict between "property rights" and "contract" appears largely illusory. The writers have found no case where the Courts have intervened to protect a proprietary right where there was not also a contractual basis for the action. As between unions and their members it could hardly be otherwise. Jurisdiction has recently been founded on contract but the conception of "property rights" has been introduced as a peg on which to hang certain doctrines which apply to statutory tribunals. It may continue to be used for this purpose in order to extend the Court's powers of review.

(3) In theory, the Courts allow almost unfettered freedom of contract as between union and member. In practice this is tempered:—

(*a*) by the ordinary principle applicable to contracts that the jurisdiction of the Courts cannot be ousted;

(*b*) by the fact that the Courts are the final arbiters on questions of law; (*Romer*, L.J., in *Lee* v. *Showmen's Guild of Great Britain* (*supra*) considered, at p. 1182, that the Courts are also the final arbiters on mixed questions of fact and law.);

(*c*) by an insistence that union decisions shall be made honestly and in good faith;

(*d*) by restrictive interpretations of rules purporting to oust the rules of natural justice;

(*e*) by an increasing awareness of the peculiar nature of trade unions and their power of affecting a person's capacity to earn his living.

Nevertheless, as far as the Courts are concerned, the contract is the vital consideration. They will not protect property or other rights at the expense of the contract. The dicta of *Denning*, L.J., to the contrary, although not fully supported by the present state of the law, may be taken as an indication of the direction in which the law is likely to move.

(4) In New Zealand, further control is exercised in tort.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Trust and Condition.—William Kendall devised to the Wax Chandler's Company certain houses and tenements, the Company to pay and distribute certain sums to charity. Were the Company trustees? Their Lordships answered in the affirmative. The case is *Attorney-General* v. *Master, Wardens, etc. of the Wax Chandlers' Co.*, (1873) L.R. 6 H.L. and Lord Cairns at p. 19 explained the problem thus:

"It appears to me that the difficulty, much more apparent than real, which has arisen from confounding together two classes of authorities upon subjects of this kind, which, in themselves, are perfectly distinct from each other. There is one well-known class of authorities of this sort. A testator devises to a corporate body or to an individual, landed property, and he affixes to that devise a condition that the corporation or the individual shall, at their or his own peril, and if necessary out of their own funds, make certain payments, or a certain payment, to some object of his bounty. In a case of that kind the devisee is said to take the land upon condition. If the devise is accepted, the condition must be fulfilled, and the money must be paid, whether the land devised is, or is not, adequate to make the payment. The very statement of a case of that kind implies that the land is the land of the devisee; and that the person or the charity which has the benefit of the condition, which receives the payment mentioned in the condition, has a right to nothing more than that payment.

"The other class of cases is of this kind. A testator devises property to a corporation, or to an individual, upon trust to apply the rents in a particular manner; and it comes to be a question of construction how the rents under those directions are to be applied; and on construing the will, questions arise as to whether the whole of the rents is, or is not disposed of; and if all of them are not disposed of in form or in substance, further questions arise as to what is to be done with the surplus, whether it is meant that the devisee is to have the surplus, or whether it is meant that the surplus is to ensure to the benefit of the other objects mentioned in the devise. Cases of that kind are not cases of condition at all, they are cases where the beneficial interest in the land is portioned out among various objects; and the question is what those objects are.

"As was said by Lord Kingsdown in your Lordships' House in the case of the *Dean and Canon of Windsor* (8 H.L. Cas. 369, 452), there is the same difference between these two classes of cases as there is between a devise to A. upon condition that he makes a payment to B., and a devise of land for the benefit of A. and B. together."

No Revocation Clause.—Sometimes a testator, in mistaken economy, himself draws up a new will upon a change of circumstances, and overlooks the routine of providing for the revocation of the preceding instrument. At other times an accident of professional draftmanship may bring about the same situation. There is useful authority in the decision of the House of Lords known as *Henfrey* v. *Henfrey*, (1842) 4 Moo. P.C. 29; 13 E.R. 211. The Rt. Hon. Dr. Lushington pointed out that two wills, both disposing of the whole property, could not be included in one probate. "Such a course would be against the whole practice of the Court, and productive of utter confusion and litigation. . . . A paper, disposing of the whole property, is a revocation in toto of a previous will, also disposing of the whole."

Stare Decisis.—"Your Lordships are now asked, in the face of these two cases, consistent with each other, and both proceeding upon a certain construction of the 38th section of the Succession Duty Act, to arrive at a decision which would be antagonistic to the decision of those cases, and which would put upon the 38th section a construction different from the construction which this House assigned to that section in those two decisions. Now, my Lords, I think that a course of proceedings of that kind is one which your Lordships never have adopted. It appears to me that it would be a most dangerous course for this House to adopt; and, if it could be more dangerous in one case than in another, it would be so in a case in which your Lordships are dealing with one of the fiscal Acts of the country, as to which the object must be, above that of all other Acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subject of this country to know what exactly is the amount of charge and burden which they are to sustain. I think that with regard to statutes of that kind, above all others, it is desirable, not so much that the pinciple of the decision shall be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty."—Per Lord Cairns in *Commissioners of Inland Revenue* v. *Harrison*, (1874) L.R. 7 H.L. 1, 8.

"Premises."—Do premises include an incorporeal right such as a right of fishing? Although in *Whitley* v. *Stumbles*, [1930] A.C. 544, their Lordships were dealing merely with the construction of s. 5 of the Landlord and Tenant Act, 1927 (U.K.), yet there is some general interest in the decision that the incorporeal right is part of the premises. The reasoning of Viscount Hailsham is instructive:

"It is, of course, conceded that in strict conveyancing language the word "premises" is used as meaning the subject-matter of the habendum of a lease; but it is said that if you look at earlier sections of the Landlord and Tenant Act you find that in this Act the word is used in what is described as a colloquial sense and as meaning merely the physical buildings and land which are included in the lease, and that the word is restricted so as to exclude such rights as are here in question. . . . It is conceded—indeed, it must be conceded—that the word 'premises' does not mean only buildings; it means also at least the land on which the buildings are erected and the land immediately surrounding the buildings, and yet the expression 'pull down or remodel the premises' would be wholly inept for such a purpose. It was conceded in argument also that it must include some incorporeal hereditaments such as, for instance, easements. When one gets that concession, which I think was quite properly and necessarily made, then it is manifest that although the word 'premises' is being used in a narrow sense to this extent that the Legislature is at times contemplating rather the buildings in which the trade is carried on than the whole of the subject-matter of the lease, yet it does not intend to exclude other things which are properly described as premises in the strict legal sense when it is appropriate that they should be included."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Viscount Simon.—The death of John Allsebrook Simon, Viscount Simon of Stackpole Elidor, in his 81st year, removed one of the greatest figures of the legal scene. When he applied for silk, in 1906, this was almost refused by the then Lord Chancellor on the ground that Simon was too young. He was then 33. The present Lord Chief Justice, Lord Goddard, claims that he was Simon's first pupil at Oxford. In 1915, when first offered the office of Lord Chancellor, he declined to accept it and became Home Secretary instead. However, he did take office in 1940, and in the following five years built up as great a reputation in the House of Lords as he previously had had at the Bar. It is said that the honour which he cherished most deeply was the personal tribute paid to him by the profession at the Middle Temple Hall last October when a dinner was given for him under the presidency of the present Lord Chancellor, Lord Simonds. In the course of his reply, Viscount Simon referred to Lord Russell of Killowen as "that elemental force, the precursor of the atom bomb," and to Sir Travers Humphreys as "the greatest and fairest Treasury prosecutor of my time." "The Courts," he also said, "seem to have lost much of their variety and colour. Where shall we hear again a judgment like that of Vice-Chancellor Bacon, who declared: 'This case bristles with simplicity. The facts are admitted. The law is plain. And yet it has taken seven days to try, one day longer than God Almighty required to make the Universe'?"

Traffic Problems.—

People on wheels hate people on feet,
It takes two to make a one-way street,
Traffic Commissions plan and study,
And nearly every is a body.
—Ofden Nash in "The Private Dining Room".

An Element of Collusion.—The Full Court of Victoria in *Heffernan* v. *Heffernan*, [1953] V.L.R. 321, has had to consider an interesting instance of collusion in connection with divorce. Here, the wife had petitioned for a judicial separation upon the ground of her husband's adultery. This was denied by him, but her solicitors were informed that if she would agree to amend her petition to claim a divorce instead of a judicial separation the husband would permit her to purchase the matrimonial home at a considerable undervalue. She consulted her Archbishop. He stressed the fact that her Church would not allow her to remarry, but, since she needed a home, it would be prudent to do as the husband suggested. The trial Judge, on being advised of these facts, held that there had been repeated acts of adultery on the respondent's part, and that the original petition was not collusive; but he referred to the Full Court the question as to whether the amendment sought was collusive. It was held that it was, and that the petition should be dismissed. Scriblex remembers a similar fate overtaking a petition in divorce heard by Salmond, J., who recalled the wife petitioner in an adultery suit to ask where the husband was then living. "Oh, he's at home," replied the petitioner. His Honour expressed some astonishment. "I told him," said the petitioner, brightly, "that if he ever strays again I'll apply for a decree absolute."

Judges' Salaries.—Reference was made in this column last year to the proposed additional allowance in England of £1000 per annum free of income tax to Judges. As was pointed out, the proposal met with considerable public criticism and was dropped. The Judges' Remuneration Bill now before the House of Commons covers taxable salary increases of £2000 per annum in the case of the Lord Chancellor and the Lord Chief Justice, and £3000 per annum in the case of seventy-seven other offices including the House of Lords: nine Lords of Appeal in Ordinary; Supreme Court, England: Master of the Rolls, President of the Probate Division, eight Lords Justices of Appeal, thirty-nine Puisne Judges of the High Court; High Court of Justiciary and Court of Session, Scotland: Lord Justice General and Lord President of the Court of Session, Lord Justice Clerk, twelve Senators of the College of Justice; Supreme Court, Northern Ireland: Lord Chief Justice, two Judges of the Court of Appeal, two Judges of the High Court. Such is the incidence of taxation in England that the benefits are surprisingly small. The Lord Chancellor, who at present receives £10,000 a year, will obtain only £254 a year from his net increase, while the salary of the Lord Chief Justice, which will rise to £10,000, benefits only to an extent of £355 a year. Although the benefits in the case of some of the lower salaries are greater, they serve in the main to illustrate the illusory nature in England of increases of high salaries.

From My Notebook (Miscellaneous Department).—"Undoubtedly the most important part of the Lord Chancellor's duty is that he has to recommend to Her Majesty the names of members of the bar to become Judges, and the best way in which he can inform himself as to who are the most suitable people is to sit and hear appeals, in order that he can form his own opinion as to who is worthy of that great office. Owing to the exigencies of business to-day, and the many calls there are upon the Lord Chancellor's time, it has become almost impossible for the Lord Chancellor to devote any appreciable time to judicial sittings. That is a great misfortune, but I have no remedy to suggest."—Lord Jowitt in the House of Lords.

In *Horton* v. *Chipperfield's Circus* heard in October at the Leicester Assizes before Finnemore, J., the plaintiff, a midget 4 ft. 3 in. high, had his right arm bitten off by a tiger. He was awarded £3000 damages . . .

"Death and the Maiden", not a traffic warning but a ballet, was presented recently at the Middle Temple before Queen Elizabeth, the Queen Mother, who is a Bencher. The accompaniment was provided by two pianos and the Bryan Gipps string quartet, the performance being given by the Ballet Rambert in aid of the rebuilding of the Temple Church.

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: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

Sale of Goods.—*Conditional Purchase Agreement—Whether affected by s. 27(2) of the Sale of Goods Act, 1908.*

QUESTION: We act for a company which conducts quite an extensive hire-purchase business relating to both radio and electrical equipment. It has been using a form of hire-purchase agreement which contained a provision that upon the hirer's making default in the payment of any particular instalment then the whole of the instalments become immediately due and payable. Recently the Court held this provision void as being in the nature of a penalty. The company wants the matter covered because it is most inconvenient to have to wait often considerable periods, before taking judgment for the amount outstanding. Repossession is not always an ideal solution. A form of Conditional Purchase Agreement appears in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 322-327. It would appear that this agreement could be easily adapted to overcome the difficulty the company has experienced. We are concerned, however, lest such an agreement could be considered an agreement to buy so as to bring it within the scope of s. 27(2) of the Sale of Goods Act, 1908. It is often useful to be able to proceed against auctioneers and other intermediate persons for conversion while adequate protection against the Official Assignee and "bona fide purchasers" is also important. We would appreciate it if you could let us have your opinion on this matter.

ANSWER: Apparently the precedent referred to (being a conditional *purchase* agreement) would be subject to s. 27(2) of the Sale of Goods Act, 1908: see, for example, *Marten* v. *Whale* ([1917] 2 K.B. 480); *c.f. Cunningham* v. *Richardson* ([1924] N.Z.L.R. 433; [1924] G.L.R. 70); a mere option to purchase.

X.2.

OBITUARY.

Mr. C. Palmer Brown (Wanganui).

Mr. C. Palmer Brown, who had practised in Wanganui since 1906, collapsed while waiting with his wife for the arrival of the Queen and the Duke of Edinburgh at the laying of the foundation stone at Wellington Cathedral on January 13. He was taken from the dais to the hostel next door where a doctor attended him and later pronounced him dead.

Mr. Brown had been a member of the Diocesan Synod for the last eighteen years, serving half that period as lay secretary. He was a member of the Standing Committee of the Diocese and was a former warden of Christ's Church, Wanganui.

Born in Invercargill 72 years ago, Mr. Brown was educated at Invercargill Boys' High School and at Otago University from where he graduated M.A. and LL.B. He moved to Wanganui in 1906, since when he had been practising there as a solicitor. He was solicitor for the Wanganui College Board of Trustees, chairman of the Technical College Committee for ten years, and a member of the advisory board of the Plunket Society for seventeen years.

He was also well known in public life, being president of the Wanganui Chamber of Commerce in 1921-22 and a member of the Wanganui Borough Council from 1921 to 1927 and again from 1929 to 1931. For three years of that period he served as deputy mayor of Wanganui. He was also on the Wanganui-Rangitikei Power Board for four years, was a member of the Wanganui River Trust, and served for ten years as president of the Repertory Theatre there.

He is survived by his wife, one son and one daughter.

Mr. Brown was a valued contributor of useful and practical articles to this JOURNAL over the whole of its history. The JOURNAL expresses to Mrs. Brown and her family the sympathy of its readers in their sad loss.

Mr. H. H. Hanna (Christchurch).

Mr. Henry Havelock Hanna, who died at the age of 71, was a well-known barrister and solicitor in Christchurch for about 38 years. For many years he was a lecturer in law at Canterbury University College.

Mr. Hanna began practice about 1912 and then served in World War I. From 1919 to 1926 he was in partnership with Mr. G. P. Purnell and then resumed practice on his own account, continuing until he retired in 1950. He was a prominent Mason and was at one time Grand Registrar of the order in New Zealand. He also was a prominent member of the Savage Club.

He is survived by his wife and one son, Mr. H. P. Hanna, of Christchurch, and one daughter, Mrs. J. L. Adair, of Wellington.

Mr. D. E. Wanklyn (Christchurch).

Mr. Douglas Endell Wanklyn, B.A., LL.B., senior partner in the firm of Messrs. Laine, Neave, and Wanklyn, who died at Christchurch on January 13, was an able lawyer, and a well-known figure in the administration of racing and cricket. He was 62.

Mr. Wanklyn was born in 1891, the son of Mr. W. H. E. Wanklyn. He was educated at Waitaki Boys' High School and then went to Trinity College, Melbourne University, which he attended from 1910 to 1914 and took his LL.B. From 1915 to 1918 he served in the 1st N.Z.E.F., and in 1919 joined the firm of Messrs. Lane and Neave in Christchurch.

Although an infrequent visitor to the Courts, Mr. Wanklyn was highly thought of as a conveyancing, trustee, and commercial lawyer.

Although not himself a first rank cricketer, Mr. Wanklyn was one of the chief administrators of the sport in New Zealand. He was Chairman of the New Zealand Cricket Council from 1937 to 1949. He was largely responsible for organizing representative tours between England and New Zealand because of friendships made with English cricket administrators when he was in England in 1938.

Racing was another of his sporting interests and again he was a notable administrator. He sat many times as an appeal judge for racing organizations and was for many years chairman of the judiciary committee of the Canterbury Jockey Club and a member of the executive committee of the New Zealand Racing Conference. He was also for one term chairman of the Canterbury Jockey Club.

All his business interests he followed with extreme attention. He was a director of New Zealand Breweries, chairman of directors of J. Ballantyne and Co., and of the Apex Ice Cream Co. From 1950 he was a member of the Totalisator Agency Board.

Apart from administration, Mr. Wanklyn, in company with Sir Arthur Donnelly, took an active part in racing with two horses, Locket and Revolte. Revolte had seven wins and ten places between the late 1940's and the early 1950's.

He is survived by his wife, two sons, Mr. P. Wanklyn, who farms near Gisborne, and Mr. John Wanklyn, and one daughter.