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THE RULE OF LAW: THE AIMS OF THE INTERNATIONAL COMMISSION OF JURISTS.

IN our last issue, we gave the text of the Act of Athens adopted at last year's meeting of the International Congress of Jurists. We now continue our consideration of the principles embodied in it.

II

The Meaning of the Rule of Law.

The primary place accorded in the thinking of the Commission to the concept of the Rule of Law requires explanation. Sir Ivor Jennings,[1] one of the foremost English authorities on constitutional law, has called it "rather an unruly horse". The older generation of English lawyers were brought up on Dicey's analysis of the Rule of Law,[2] which implied (1) that power must be derived from the law, (2) equality before the law, by which Dicey meant in fact that public officials should be answerable for their acts in the ordinary courts, and (3) that the law of the Constitution is in English law determined by the rights of individuals, which are the ultimate source of legal authority vested in the State. Later English critics of Dicey, largely under the influence of Sir Ivor Jennings, have, however, pointed out that even a tyrant may derive his authority from the law provided that it is sufficiently wide in scope; that public officials in many states are answerable for their acts only in special administrative courts and in any event in all modern states must have a wide sphere of discretion; and finally that the emphasis which Dicey put on the rights of individuals as the starting-point of English constitutional law was in fact a political and not a legal doctrine, inspired by his own liberal *laissez-faire* conception of the proper functions of the State.

On the other hand, in European legal theory what can only be translated in English as the Rule of Law—*Rechtsstaat, état de droit, stato di diritto*—has been mainly concerned with the first and the third points in Dicey's analysis. In contrast to the State ruled by the arbitrary power of an eighteenth-century despot, of a *Fuhrer*, a *Duce* or a Communist oligarchy, this conception of the Rule of Law envisages (1) the answerability of all organs of State power to the law; (2) the guarantee by the law of certain fundamental human rights, and (3) the protection of these fundamental human rights by an independent judiciary. From this basis an immense literature[3] has worked out conclusions which have secured a varying degree of general acceptance. For example, it is widely argued that the separation of powers between Legislative, Executive and Judiciary, as in the Constitution of the United States or in the *Bonner Grundgesetz* of the Federal Republic of West Germany, constitutes an essential part of the Rule of Law.

The Rule of Law, as it is understood by the International Commission, owes much to these two great legal traditions, but it does not identify itself with either of them. For the Commission the Rule of Law is a convenient term to summarize a combination of legal ideals and practical experience which should appeal to lawyers, and through them to the public whom they serve, in all countries of the world. This appeal has been stimulated by the assault made in recent times on such ideals and experience by Fascist, National Socialist, and Communist governments; the collection of documents, entitled *Justice Enslaved*,[4] presented to the International Congress at Athens in 1955, was a sufficient exposure of the Communist repudiation of principles which over the centuries have won the support of lawyers in the entire civilized world. But the Commission does not conceive of its task in a negative spirit. Its aim is rather to offer in a sphere of public life, where lawyers everywhere have a special responsibility, a constructive alternative to the tyrannous misuse of power and the unwarranted suppression of the rights of the individual. Such positive objectives are more easily defined by way of contrast with their opposites than by giving them a specific content; even the Act of Athens, approved by the jurists who attended the Athens Congress, could not avoid three references to the Rule of Law, which, as has already been suggested, has meant different things at different times and in different countries. Nevertheless, the Commission believes that not only those who attended the Athens Congress but the overwhelming majority of lawyers throughout the world, who are free to express their opinion, have two major fields of concern:

[1] *The Law and the Constitution*, 4th Ed. (1952), 59.
[2] *Introduction to the Study of the Law of the Constitution*, 9th Ed. (1945), Part II.
[3] See, e.g., Robert von Mohl, *Geschichte und Literatur der Staatswissenschaft*, (1855) Vol. I, pp. 227 *et seq*; Frederich Julius Stahl, *Staats- und Rechtslehre*, 3rd Ed. (1856), Vol. II, p. 137; Battaglia, *Stato Etico e Stato di Diritto, Revista Internazionale de Filosofia del Diritto*, Vol. XVII, pp. 237 *et seq*. Recent contributions include Thoma, *Ueber Wesen und Erscheinung der modernen Demokratie* (1948), Ernst von Hippel, *Gewaltenteilung im modernen Staate* (1949) and Wilhelm Grewe, *Die Bundesrepublik als Rechtsstaat*, DRZ (1949) pp. 392 *et seq*.
[4] Available on request from the International Commission of Jurists, 47 Buitenhof, The Hague, Netherlands.

A. Human Rights.

The Act of Athens declares that " the Rule of Law . . . springs from the rights of the individual developed through history in the age-old struggle of mankind for freedom ; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all."

It will be noted that in this formulation primary importance is given to those human rights which ensure freedom of opinion and of association and the right to take part through representatives in the government. This accords with the realistic view that, in spite of the most rigid legal safeguards of human rights, ultimate security can only lie in the existence of a sympathetic public opinion which is able to make its views effective through political channels.[5] There are however other important human rights ; the difficulty is that lawyers, however liberal their convictions, are apt to be somewhat sceptical about such sweeping assertions of human rights as are contained in the United Nations Charter, the Declaration and Covenant on Human Rights and the European Convention on Human Rights. To this scepticism the Commission replies that, although the extent and even the existence of particular rights may be the subject of a legitimate difference of opinion, there ought to be unity on what the Preamble to the United Nations Charter calls " the dignity and worth of the human person ". It is precisely the special responsibility of the lawyer to see that the legal guaranties of human rights in national systems of law (whether as in most countries formally guaranteed by the Constitution or, as in England, the result of a purely moral limitation on the powers of a sovereign Parliament) do in their total effect protect and enhance this dignity and worth ; and, what is even more important, to offer his expert guidance in regard to those exceptions to human rights which, in the alleged interests of " public policy ", " state necessity ", or " the interests of the workers " may, as experience in totalitarian countries has shown, deprive even the most rigid guaranties of human rights of any real value.

B. The Way in which Legal Systems, Procedure and Practice hamper or make possible Respect for Human Rights.

The principles which are applicable in this field include the following :

the independence of the judiciary ;

the answerability of the Executive for its acts either to the ordinary courts or to independent administrative courts or tribunals ;

the unhampered right of every citizen to independent legal opinion and representation ;

the strict control of the Public Prosecutor (and of his office where it exists) by the law ;

a police system under similar strict legal control.

There is not, and there need not be, full agreement on every detail of such principles. Different countries will feel more strongly about certain principles than others ; and much can be learnt by comparison of the views and experience of different countries, to which end the Commission hopes to contribute by its publications and by facilitating international personal contacts between lawyers. But in countries where all these principles are disregarded there can in practice be no adequate security for the rights of the individual or for the Rule of Law, as it is here understood.

Activities of the Commission.

Co-operation with National Sections. The practical work of the Commission is carried out partly by its own Secretariat and partly through the National Sections, for which the central organization provides literature, suggests speakers, arranges international contacts and in general acts as a clearing-house for the ideas and policies of the Commission. The National Sections can however greatly help, as well as be helped by, the Secretariat. Thus, for example, mention is made below of a number of questionnaires on legal themes to which the Commission is requesting answers from the point of view of different legal systems. While it is extremely valuable to have the expert guidance of comparative lawyers on such questionnaires, a real cross-section of the legal life of a community can only be obtained by the co-operative effort of a representative group of judges, public prosecutors, practising and academic lawyers such as a National Section alone can provide. Conversely, the preparation of answers to such questionnaires will help the National Sections ; both by way of stimulating interest in a precise project and by providing the material means, in the form of fees paid by the Commission for answers of general interest published in its Bulletin, to carry out the practical organization of National Sections.

Information regarding Abuses of the Rule of Law. One important aspect of the activities of the Commission is the collection and dissemination of reliable information on systematic abuse of the Rule of Law in all countries of the world, but particularly in those areas where such abuses cannot at present be rectified by a free exchange of opinion and the democratic processes of government. This work of enlightenment takes several forms. It may involve the preparation of a massively documented report, such as that presented under the title of *Justice Enslaved* to the Athens congress ; or it may be carried out by a considered statement in the name of the Commission on an incident or series of incidents which has shocked the legal conscience of the world and to which the Commission seeks to give the fullest publicity in legal journals, in the Press and through broadcasting agencies.

The exposure of such abuses of the Rule of Law has a dual purpose : in the first place it serves as a warning to those who may be inclined to take at its face value adherence to the Rule of Law by governments whose practice in their own countries does not accord with their assertions ; secondly, it gives to lawyers who understand the implications of the Rule of Law in countries where such abuses take place a feeling that they do not stand alone and that they are supported by the international solidarity of the legal profession.

[5] Cf. Sir Ivor Jennings, op. cit., p. 61 : " The test of a free country is to examine the status of the body that corresponds to His Majesty's opposition."

Thus, in a radio interview, which was broadcast in seven languages to the countries of the Soviet orbit, the Secretary-General of the Commission said in reference to recently publicized changes in the legal systems of the Soviet orbit :

> Members of the Communist Party have begun to claim for themselves such basic human rights as freedom of expression and freedom from arbitrary arrest. We wait with great interest to see what will be the next move, whether it will be possible for the Communist Party to claim these rights and to withhold them from the broad mass of the people. Lawyers in communist-dominated countries should endeavour to generalize the criticisms of their legal systems and to seize every opportunity of applying them more widely to their communities as a whole. When that begins to happen we shall begin to be able to speak of a system of justice throughout the world.

Law and Co-existence. The move towards co-existence in international relations, which was stimulated by the XXth Communist Party Congress in Moscow, is of special concern to the International Commission of Jurists in so far as it has been accompanied by apparent recognition within the countries of the Soviet orbit of some of those principles of justice, which have long been taken for granted (although not of course perfectly realized) in the rest of the world.[6] Indeed, the speeches made at the Sixth Congress of the Communist-dominated International Association of Democratic Lawyers at Brussels in May 1956 gave the impression that " violations of legality " in the Soviet Union have all been laid bare some years ago " by the decisive action of the Soviet Government ", that " those responsible have been strictly punished and the accused completely rehabilitated and re-established in their rights ".[7]

These wide claims raise serious questions which are difficult to answer and were certainly not answered at Brussels, for example: (1) What precisely are the " violations of legality " so far admitted, who were its victims and by what methods and to what extent have they (or their surviving dependants) been rehabilitated ? (2) How can we know that these violations are the only cases which require correction ? (3) How was it possible for such abuses to arise and to remain unrectified and unadmitted for many years, when their existence was commonly alleged in other parts of the world ? (4) What changes have been made in the legal systems of the Soviet orbit to prevent their recurrence and, in particular, to prevent the suppression of the very fact of their existence ? The Commission in no way underestimates the significance of the changes which have taken place in the Soviet orbit, but it considers it extremely important that the lawyers of the world should as far as possible have the material information on which answers to these questions can be attempted. For this reason the Commission hopes to publish a study of these changes in the next issue of the Bulletin.

The Commission's Responsibility in the World as a Whole. Although the Commission in pointing out systematic abuses of the Rule of Law has been in practice mainly concerned with injustice in the Soviet orbit " this does not imply that the Commission restricts its activities to the field of totalitarian systems of the Communist variety ".[8] For example, at the Athens Congress in 1955 the Committee on Public Law passed the following Resolution :

> " This Congress is of the opinion that discrimination based on race and colour is contrary to Justice, the Charter of the United Nations, and the Universal Declaration of Human Rights, and is abhorrent to the conscience of the civilized world.
>
> " The Committee on Public Law of the International Congress of Jurists, after having heard the statements made by Mr Purshottam Trikamdas on the legislation concerning the ' apartheid ', establishing inequality before the Law to the prejudice of certain groups of population in South Africa, requests the International Commission of Jurists to proceed to an extensive investigation of the juridical situation of the groups of discriminated population and to publish the results of this survey as soon as possible."

Pursuant to the Resolution the Commission is taking the necessary steps to obtain the fullest information on the legal situation in South Africa.

In considering the situation within any country, the Commission has as a primary consideration whether there is a free public opinion, especially among members of the legal profession, which is itself able and ready to ensure respect for the Rule of Law. Where opinion is free the Commission in the first place offers its facilities to representative legal opinion in the country concerned which may wish to present the issues involved before the forum of world legal opinion. It is one of the most important tasks of a National Section to provide the means whereby such representative legal opinion may find expression. On the other hand, where, as in the Soviet orbit, opinion is not free and where in particular the legal profession, in spite of recent criticisms,[9] is not independent, the Commission will continue to give the fullest possible information on the legal situation in the country concerned and, in the words of its Statute, " give aid and encouragement to those people to whom the Rule of Law is denied".

Investigation of the Implications of the Rule of Law. It has been reiterated in its statement that the work of the Commission cannot and does not rest on negative propositions, but that, on the other hand, its positive assertion of the Rule of Law necessitates clarification of the meaning attached to the concept of the Rule of Law in different countries. With this end in view, the Commission is preparing a questionnaire on the law and practice which it considers to be implied in the idea of the Rule of Law ; it will be circulated for completion by National Sections and by outstanding individual lawyers or groups of lawyers where National Sections do not exist. The results of the inquiry will be published and provide a basis for further discussion and conferences, leading, it is hoped, to the formulation of a set of principles in the spirit of, but in greater detail

[6] Thus, Joe Nordman, Secretary-General of the International Association of Democratic Lawyers, told his audience in Brussels that " as far as the right of peoples to manage their own affairs and the rights of man—in particular in penal trials—are concerned, the victories of the bourgeoisie in Britain, the United States, France and many other countries to-day form part of the common heritage of mankind".

[7] The foregoing quotations are from the speech of Peter Kudryavtsev, Vice-Minister of Justice of the USSR.

[8] See Preface to *Justice Enslaved.*

[9] As, for example, in Poland where the position of the lawyer has been under discussion for over a year, with the prosecuting authorities being taken to task for treating defence counsel as "subordinates" and "collaborators". (See especially the proceedings of the IV Congress of the Association of Polish Jurists and particularly *Nowe Prawo,* February 1956, pp. 3-69.) This and other legal developments in the Soviet orbit will be discussed in the next Bulletin (6) of the Commission.

than, the Act of Athens. Meanwhile the Commission welcomes the views of individual lawyers, whether with a view to publication or not, concerning the treatment of the Rule of Law put forward in which it has the form of a questionnaire and the answers to be made from the point of view of national systems of law.

Vienna Conference in the Spring of 1957. The questionnaire on the Rule of Law is necessarily a long-term and comprehensive project. Meanwhile the Commission is continuing its investigation of specific problems within the same broad field. For example, it is planned in the spring of 1957 to hold a Conference of European lawyers at Vienna, where two themes will be discussed in the light of questionnaires to be distributed in the participating countries. The first theme will deal with "The Nature of and Procedure Applicable to a Political Crime"; the second concerns "Legal Limitations on Freedom of Opinion". It is a very encouraging sign of the development of interest in the Commission that the initiative for this Conference has come from the French and German National Sections. Professor Vouin of the University of Bordeaux and Professor Van Bemmelen of the University of Leiden have already consented to act as rapporteurs.

The Publications of the Commission. Although the ultimate objective of the Commission is practical action, this can only be achieved through an informed legal public opinion. It is the intention of the Commission, therefore, greatly to expand the scope and interest of its publications, not only in the Bulletin but also by the issue of a periodical, to appear at rather longer intervals, in which it will be possible for leading jurists to treat legal topics of general concern to the Commission in an authoritative and expert manner. Each issue of this periodical will contain about four long articles; two will be devoted to current topics and two will form part of international symposia on chosen themes. It is probable that the first two subjects so to be treated will be "The Law and the Layman" and "The Role of the Public Prosecutor". Subject to the normal editorial discretion and the general objectives of the Commission, contributors will be encouraged to express their personal views and criticisms of their own and other systems of law. There will be provision for published correspondence and a special feature will be made of reviews of books dealing with topics of concern to the Commission; in such reviews it will normally be the rule that the reviewer comes from a different legal tradition to that of the author. In connection with this publication and indeed on any topics concerning the Commission the Secretary-General welcomes the inquiries or suggestions of lawyers in all countries.

Tasks for the Individual Lawyer. The Commission at present distributes its publications to 18,000 lawyers in 93 different areas of the world. Many of the recipients are in close contact with the Commission. A questionnaire is now in course of distribution, in which recipients are being asked to state their opinion regarding the publications of the Commission. The response so far has been most encouraging, not only because the overwhelming majority wished to continue on the Commission's mailing lists, often with a request for an increased number of copies, but even more on account of the frequent friendly and constructive comments which accompanied the answers to the questionnaire. The Secretary-General on behalf of the Commission welcomes such individual contacts and hopes that they will increase. It may however be possible to give a general answer to the questions which are frequently put to the Commission:

A. What can the individual do to help the Commission?

The Commission will put the inquirer in touch with a National Section, where it exists. In any event the Commission is always interested to hear of legal personalties in the inquirer's country, who are likely to be interested in the work of the Commission.[10] The Commission is further anxious to know about encouraging or discouraging legal developments, within the general sphere of the Rule of Law, in all parts of the world.

B. In particular, can the individual make a financial contribution to the work of the Commission and in some way be enrolled as a member?

The individual inquirer is in the first place referred to his National Section, where such is properly constituted. But the Statute specifically provides for "jurists—or juristic organizations" who "may be invited to join the Commission as Supporting Members, without vote". No fixed dues are at present presented for Supporting Members, but the Commission would welcome any contributions of whatever amount, either specifically to defer the cost of publications at present distributed free or for the general work of the Commission.

Final Resolutions.

The *Act of Athens* has already been mentioned. During the final plenary session, the Congress adopted two other resolutions. In the first, the Congress, after having stressed the necessity for a State to apply "the Rule of Law internationally as well as internally" asks the International Commission of Jurists "to formulate a statement of the principles of justice under law, and to endeavour to secure their recognition by international codification and international agreement".

The second final resolution stated that "the Congress recognizes with profound appreciation the scholarly nature of the labours of the International Commission of Jurists in compiling the illuminating selection of documents which the Congress has studied during its meeting in Athens in June 1955" and "urges the Commission to continue its efforts to illustrate the meaning of freedom and human dignity by legal materials of contrasting nature drawn dispassionately from the records of systematic violation of laws wherever found . . .". This resolution formed the final proof for the International Commission of Jurists that its efforts with regard to defending Justice wherever it is endangered have met with a favourable echo from the eminent jurists assembled at Athens. It requested the Commission at the same time to pursue its work, the usefulness of which, after the Athens Congress, does not have to be proved.

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[10] For example, correspondents in Malaya, Burma, the Philippines, Iraq, Guatemala, Chile and other countries have supplied lists of persons who would be interested to receive the publications of the Commission.

SUMMARY OF RECENT LAW.

ADMIRALTY.

Salvage—Towage—Vessel with Engine broken down—Call by Master to Harbour Board for Tow from Place of Real and Appreciable Danger to Harbour—Board's Launch towing Vessel to Harbour—Salvage, not Towage. While the fishing vessel *Coaster* was sheltering in a bay at Ruapuke Island, her engine broke down. There was no prospect of its being repaired, at least for some time, and the master thought he was not justified in risking his vessel where it was then anchored. The conditions there were such that the *Coaster* was exposed to the wind and waves, although up till the time she was taken in tow she was receiving enough shelter to shield her from immediate danger. At all material times, there was an imminent danger of the wind changing to the south, and this would have placed her in a position of peril. The master sent an urgent message to the Bluff Harbour Board to get a tow from where the *Coaster* was anchored to Bluff Harbour as soon as possible. The Harbour Master agreed to send the Board's launch *Takitimu*, and he made up a crew for it. When the *Takitimu* arrived, a towrope was made fast to the *Coaster*, and she was towed back to Bluff Harbour in normal towing time and without any untoward incident. In an action for salvage by the Bluff Harbour Board and the members of the crew of the *Takitimu* as constituted for the voyage, *Held*, 1. That the plaintiffs had rendered a voluntary service, and had proved the presence of real and appreciable danger to the *Coaster* in the conditions prevailing at the time; that the master appreciated that danger and required immediate service; and, consequently, the service performed was one of salvage, not of towage. 2. That, on a consideration of the relevant circumstances (danger to life, danger to the *Takitimu*, value of the property involved, and the care, skill, and knowledge of the salvors), £425 was a fair sum to award, and it would be apportioned upon a basis agreed upon. (*Turnbull* v. "*Strathnaver*" (*Owners*). *The Strathnaver*, (1875) 1 App. Cas. 58, followed. *The* "*Wanganui*", (1913) 13 N.Z.L.R. 842, and *The* "*Taiaroa*", (1876) 2 N.Z. Jur. (N.S.) S.C. 16, referred to.) *Bluff Harbour Board and Others* v. *The Coaster (Owners)*. (S.C. (Admiralty Jurisdiction), Invercargill. August 9, 1956. Henry J.)

COMPANY.

Winding-up—Proof—Pensioner entitled by Contract to Pension—Loss of Pension Rights—Allowance for Income Tax prospectively payable by Pensioner in respect of His Pension. A limited company went into members' voluntary liquidation. The company was then under contractual obligation to pay pensions to B. and to F. at the respective rates of £166 13s. 4d. and £75 per month. Their claims in respect of these pensions were valued for the purposes of proof in the liquidation at £14,140 and £10,238 respectively. On a summons to determine what sum, if any, should be deducted from those amounts in respect of the income tax and surtax which B. and F. would have had to pay on their pensions had they continued to be paid, *Held*, a deduction for income tax (including surtax) should be made in each case from the sum which otherwise would have been payable to B. or F., since the £14,140 and £10,238 were compensation for the breach of contract involved in the termination of the pensions on the liquidation (principle of *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796, applied); and the summons would be stood over to afford opportunity for the parties to agree on figures. *Re Houghton Main Colliery Co., Ltd.*, [1956] 3 All E.R. 300 (Ch.D.)

CORONER.

Inquest—Evidence—Witness's Written Statement of Evidence, prepared before Inquest—Witness sworn at Inquest as to Truth of Statement—Such Proceeding Irregular—No Person interested in Inquest competent to waive Statutory Requirements imposed on Coroner—"*Examine*"*—Coroners Act 1951, s. 17.* A Coroner fails in the statutory duty cast upon him by s. 17 of the Coroners Act 1951 if he accepts, as the evidence of a witness called before him, a previously-prepared written statement, upon the witness after having been sworn, stating that the statement contains the truth; and the result is an irregularity of proceedings. It is not competent for any person interested in the inquest to waive the statutory requirements imposed on the Coroner by the Coroners Act 1951. In the present case, the irregularity of proceedings in the above-mentioned respect, and the discovery of new evidence, rendered it desirable that the Coroner's finding should be quashed and another inquest held. *Re Ford's Inquest.* (S.C. Auckland. August 9, 1956. Shorland J.)

CRIMINAL LAW.

Crimes committed on Board Aircraft. *106 Law Journal*, 420.

Insanity—Defect of Reason from Disease of the Mind—Accused unaware of Nature and Quality of his Act—Temporary Defect of Reason caused by Physical Disease—Trial of Lunatics Act 1883 (46 & 47 Vict. c. 38), s. 2 (1). If the act with which an accused is charged, and which would be a crime if the requisite intent were proved, was done by him at a time when he was unconscious of what he was doing, he is entitled at common law to be acquitted; but if he was insane at the time, within the rule laid down in *M'Naghten's Case*, (1843) 10 Cl. & Fin. 200, 210, and therefore is not criminally responsible for his act, he is entitled, by virtue of s. 2 (1) of the Trial of Lunatics Act 1883 only to a qualified acquittal, viz., the special verdict of guilty but insane. The accused, an elderly man of excellent character who suffered from arteriosclerosis, struck his wife with a hammer and inflicted a grievous wound on her. He was charged with causing grievous bodily harm to her. At the trial medical evidence was called by both the prosecution and the defence which showed that at the time when he did the act he did not know what he was doing. It was common ground that all the requirements of the rule laid down in *M'Naghten's Case* for the defence of insanity were satisfied save that it was in issue whether there was disease of the mind. One doctor gave as his opinion that the physical disease of arteriosclerosis induced a mental condition of melancholia as a result of which the accused committed the act; and that melancholia was a disease of the mind. Two other doctors, however, gave as their opinions that the disease had led to a congestion of blood in the accused's brain as a result of which he had suffered from a temporary loss of consciousness which made him act irrationally and irresponsibly; but that there was not in the present case such a degeneration of the accused's brain cells as to amount to a disease of the mind. On the question whether there should be a special verdict of guilty but insane if the jury accepted the medical evidence first mentioned or an absolute acquittal if they accepted the medical evidence of the two doctors last mentioned, *Held*, whichever medical opinion the jury accepted they would be bound to return the special verdict under s. 2 (1) of the Trial of Lunatics Act 1883 since on either medical view it was established that the accused was labouring under a defect of reason within the rule laid down in *M'Naghten's Case* and that the defect was caused by a disease, arteriosclerosis, which was capable of affecting the mind and thus was a disease of the mind within the rule; it was immaterial whether the disease had a mental or physical origin or whether the defect of reason was temporary or permanent. *R.* v. *Kemp.* [1956] 3 All E.R. 249 (Bristol Ass.)

INCOME TAX.

Free of Tax. *106 Law Journal*, 437.

INDEMNITY.

Licence to occupy Railway Premises—Indemnity by Licensee against Liability for Personal Injury, except when caused solely by Licensor's Negligence, and "*which, but for the permission hereby granted, would not have arisen*"*—Accident to Servant of Licensees—Accident due partly to Negligence of Licensor's Servants and partly to Negligence of Licensee's Servant.* By an agreement, dated June 5, 1942, and made between the licensors, the owners of a railway, and the licensees, the licensees were granted a licence to use a garage on railway premises for their business. The agreement contained a clause providing that ". . . the licensees will be responsible for and will release and indemnify the [licensors] and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) . . . and any other loss, damage, costs and expenses however caused (except when proved to have been caused solely by the neglect or default of the [licensors] their servants or agents) and which, but for the permission hereby granted, would not have arisen". The garage adjoined a shunting yard, and during a shunting operation a workman employed by the licensees at the garage was fatally injured while passing through the yard after leaving the garage. The accident was due partly to his own negligence and partly to that of the servants of the British Transport Commission, in whom the railway and the premises had become vested. Damages having been awarded against the British Transport Commission in an action by the deceased's administratrix, the commission now claimed indemnity from the licensee under the agreement of June 5, 1942. *Held*, the British Transport Commission were entitled to an indemnity from the licensee under the indemnity clause in the agreement, because their liability in respect of the accident to the deceased "would not have arisen" "but for the permission . . . granted" by the licence, since if the relationship of the deceased to the commission at the time of the accident had not been that of licensee

to licensor, but that of a trespasser, the commission would not have been liable in damages to his administratrix and the relationship of licensee to licensor had existed only by virtue of the licence. (Dictum of Sir Raymond Evershed M.R. in *John Lee & Son (Grantham), Ltd.* v. *Railway Executive*, [1949] 2 All E.R. 581, 583 applied.) *Warrellow* v. *Chandler & Braddick and Another (G. F. Lester & Co. (Birmingham), Ltd. Third party)*. [1956] 3 All E.R. 305 (Shropshire Ass.)

INFANTS AND CHILDREN.

Adoption and the Conflict of Laws. *34 Canadian Bar Review*, 507.

Custody of Illegitimate Children. *106 Law Journal*, 439.

LIMITATION OF ACTION.

Action surviving Death of Tortfeasor—Jurisdiction—Jurisdiction to grant Leave to bring Action within Six Years after Cause of Action arose—Such Jurisdiction exercisable although Twelve-months Period expired before Enactment of Amendment Act conferring Such Jurisdiction—Prospective Effect thereof—Law Reform Act 1936, s. 3 (3) (b), *3 (3A)—(Law Reform Amendment Act 1955, s. 2)*. Section 3 (3A) of the Law Reform Act 1936 (as enacted by s. 2 (2) of the Law Reform Amendment Act 1955) is not a mere procedural provision or an extension of a pre-existing period of limitation; it confers jurisdiction to grant leave to bring proceedings in respect of a cause of action at any time before the expiration of six years after the date when the cause of action arose, and it has present (i.e., prospective) effect, in respect of actions which were not maintainable under the Law Reform Act 1936 in its original form. Such jurisdiction, being exercisable notwithstanding anything in s. 3 (3), is exercisable even though the period of twelve months had already run before subs. (3A) was enacted. (*Moon* v. *Durden*, (1848) 2 Exch. 22; 154 E.R. 389; *West* v. *Gwynne*, [1911] 2 Ch. 1, and *Weldon* v. *Winslow*, (1884) 13 Q.B.D. 784, applied.) In granting leave under s. 3 (3A), subsequent dealings with the estate, short of distribution, are matters which can properly be the subject-matter of terms. *Davies* v. *Public Trustee*. (S.C. (In Chambers). Invercargill. August 15, 1956. Henry J.)

NEGLIGENCE.

Licensee—Undisturbed Use by Public of Pathway across Crown Land for Twenty Years—Knowledge of Railway Servants with Ostensible Authority—Such Knowledge imputed to Crown—Users of Pathway Licensees—Children playing on Turntable near Path over Some Years—Knowledge thereof imputed to Crown as Owner—Child injured while playing on Turntable—Dangerous Allurement—No Reasonable Precautions taken to Guard against Danger to Children—Such Degree of Tolerance and Acquiescence as to constitute Child a Licensee on Turntable as well as on Pathway—Such Licence not ultra vires Department. A person acquires the status of licensee if permitted by an owner to go upon his land, and, unless such permission is coupled with a grant, it is no more than a personal, revocable, unassignable privilege conferring no interest in the land; and such permission can arise by implication when the owner knows that the public or a class of persons, of which that person is one, are in the habit of going on to his land, and he does not take steps to prevent their doing so. To raise a case of implied licence, it must be shown that the place in issue was a place habitually, or at least frequently, resorted to, and that this resort was in the knowledge of the owner or his responsible servants and with their acquiescence; but a practice of frequenting that particular place will not set up a right or a permission to go there unless it extends over such a period of time as will warrant the inference that it was known to the owner or his servants and acquiesced in by them. (*Breslin* v. *London and North Eastern Railway Co.*, [1936] S.C. (Ct. Sess.) 816, and *Jenkins* v. *Great Western Railway Co.*, [1912] 1 K.B. 525, followed.) It can be inferred from the conduct of a person with ostensible authority that either express or tacit permission to enter property has been given, and the effect of such permission is to render a person entering with such permission, and otherwise a trespasser, a person with leave and licence. The question must always depend on the authority, or ostensible authority of the person granting leave. (*Hillen and Pettigrew* v. *I.C.I. (Alkali), Ltd.*, [1936] A.C. 65; *Conway* v. *George Wimpey & Co., Ltd.*, [1951] 2 K.B. 266; [1951] 1 All E.R. 363; and *Young* v. *Edward Box and Co., Ltd.*, [1951] 1 T.L.R. 789, referred to.) *Matheson* v. *Attorney-General*. (C.A. Wellington. July 27, 1956. Gresson J. Stanton J. McGregor J.)

PRACTICE.

Change of Venue—Strong Evidence required to lead to Conclusion that Action cannot be fairly tried at Place mentioned in Writ—Inconvenience caused by Change of Venue subordinated to Over-riding Consideration of Interests of Justice—Code of Civil Procedure, R. 249. An action for damages against the Attorney-General and the New Zealand Railways Commission, arising out of the closing of the Nelson Railway, was set down for trial at Nelson before a Judge and a jury of twelve. On a motion by the defendants for a change of venue, it was shown that the action of the Commission or the Governement in closing the line was a matter of great public concern in the City of Nelson and the district immediately surrounding, and that much odium attached to those responsible for the closing. *Held*, 1. That there must be strong evidence to lead to the conclusion, in terms of R. 249 of the Code of Civil Procedure, that an action *cannot* be fairly tried at the place mentioned in the writ; and that, in the present case, the Court was forced to that conclusion as intense public feeling had been occasioned in the Nelson district by the closing of the railway and this feeling, which was directed against the Government and, incidentally, against the present defendants, was not in any way dead as a political or local issue, and, as a large number of persons had those preconceived opinions it could not be assumed that the jurymen of Nelson would approach a consideration of the case with unbiased minds. (*Reedy* v. *Westport Harbour Board*, [1916] N.Z.L.R. 352; [1916] G.L.R. 210, applied. *Gibbs* v. *Graham*, (1900) 19 N.Z.L.R. 249; 4 G.L.R. 390, distinguished.) 2. That the inconvenience which may be caused by the granting of an order for change of venue must be subordinate to the general principle that the over-riding consideration must be the interests of justice; and, accordingly, although a view might have been of assistance to the jury, the public interest required a removal of the place of trial. An order was made for a change of venue, but on terms. *Dick and Sauer* v. *Attorney-General and Others (No. 3)*. (S.C. Nelson. August 13, 1956. McGregor J.)

Judge and Jury. *222 Law Times*, 20.

SOIL CONSERVATION AND RIVERS CONTROL.

Compensation for Land taken—Land taken when Market Price of Land rising—Duty of Valuer to determine Market Value as at Specified Date—Evidence of Contemporaneous Sales of Nearby Land—Court's Duty in assessing Compensation—Factors depreciating Value of Farm Land—Computation of Interest on Compensation Moneys—Costs—Principle on which Costs allowed—Soil Conservation and Rivers Control Act 1941, s. 145—Finance Act (No. 3) 1944, s. 29 (3)—Statutes Amendment Act 1951, s. 23 (3). A valuer valuing a property at some time after "the specified date", as that term is defined in s. 29 (3) of the Finance Act (No. 3) 1944 (as enacted by s. 23 (3) of the Statutes Amendment Act 1951), is entitled to have regard to all relevant facts within his knowledge, including information as to sales subsequent to the specified date for valuation; but he should use that information only for the purpose of determining the market value of the land at that date. Consequently, though a valuer is entitled to make use of the facts disclosed by subsequent sales, he is not entitled to assume that such information was available to buyers or sellers at the specified date. Evidence of sales of land in close proximity to the land taken at a time near to the specified date is of considerable importance in ascertaining the value of the land taken; and such sales may, in most respects, be reasonably regarded as *bona fide* sales at fair market value. While the Court is not entitled to be over-generous in the assessment of compensation to a claimant against a local authority, it is the Court's duty to award a sum which will fairly and adequately compensate him for the loss of the land of which he has had to be dispossessed in the public interest. Interest should be paid upon the compensation moneys awarded, or upon the balance outstanding, from the date when possession of the land was taken (being the date of the Proclamation, unless by agreement possession was taken at some other time), until date of payment; and an order for payment of interest should be made. (*Barber* v. *Manawatu River Board*, [1954] N.Z.L.R. 391, applied.) Costs to be allowed in compensation cases should be fixed by reference to the amount of work reasonably required of counsel, rather than by reference to any scale. Depreciation on account of such factors as the risk of erosion, the shape and locality of the land, and the accretion of land and its liability to flooding, considered. *Poverty Bay Catchment Board* v. *Forge and Others*. (L.V.Ct. Gisborne. August 3, 1956. Archer J.)

TRADE AND COMMERCE.

Restrictive Trade Practices and Evidence. *106 Law Journal*, 435.

TRANSPORT.

Evidence of Dangerous Driving. *100 Solicitors' Journal*, 500.

CROWN PRIVILEGE.

Statement by the Lord Chancellor.

In the House of Lords, on June 6, the Lord Chancellor, Viscount Kilmuir, made the following statement of Government policy in respect of claims for Crown privilege in the course of proceedings.

" The Government has had under consideration for some time the whole problem of Crown privilege for documents and oral evidence. It is not a new problem, but has come into some prominence in recent years. This is not due to any extension of the principles on which privilege is claimed, but because since the Crown Proceedings Act 1947 the Crown has been liable in tort or in delict and can be sued in the same way as private persons, and that has thrown into relief its privileged position with regard to the production of documents and other evidence.

" I shall deal first with the position with regard to documents, which is the most important part of the subject, and then with oral evidence. The law in England, as laid down in the House of Lords' case of *Duncan* v. *Cammell Laird and Co., Ltd.*,[1] enables Crown privilege to be claimed for a document on two alternative grounds. The first ground is that the disclosure of the contents of the particular document would injure the public interest, e.g., by endangering public security or prejudicing diplomatic relations. The second ground is that the document falls within a class which the public interest requires to be withheld from production, and Lord Simon particularized this head of public interest as ' the proper functioning of the public service '. The Minister's certificate or affidavit setting out the ground of the claim must in England be accepted by the court.

" In Scotland, Crown privilege can be claimed on either of the two grounds that I have mentioned, but it is now clear, by virtue of the recent case of *Glasgow Corporation* v. *Central Land Board*,[2] that the court in Scotland has an inherent power to override the Minister's certificate or affidavit. This power has long been claimed by Scottish courts, but as Lord Normand said in the *Glasgow Corporation* case, ' The power has seldom been exercised and the courts have emphatically said that it must be used with the greatest caution and only in very special circumstances.' As far as I know, it has only been exercised on two occasions in the last 100 years. The position in Scotland, therefore, although substantially different in principle, may not be very different in practice.

The " Class " Ground.

" The claiming of Crown privilege on the first ground that I have mentioned has always been acceptable to the courts and public opinion. Where, however, the claim has been made on a class basis, especially in proceedings where the Crown's position seems very like that of an ordinary litigant, it has been criticised on the ground that the administration of Justice is itself a matter of public interest, and should be weighed against the other head of public interest, i.e., ' the proper functioning of the public service '.

" The reason why the law sanctions the claiming of Crown privilege on the ' class ' ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or information should know that he is doing so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of class privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

Striking a Balance.

" It is sometimes suggested that a claim for privilege on the class basis should be referred to and decided by a judge. This suggestion goes much further than the position in Scotland, where the power of the Judge is only exercisable ' in very special circumstances ' and does not permit any examination of the ground of the claim. This ground, namely, ' the proper functioning of the public service ' must in our view be a matter for a Minister to decide, with his knowledge of government and responsibility to Parliament, rather than for a Judge.

" A Judge assesses the importance of a particular document in the case that he is hearing, and his inclination would be to allow or to disallow a claim for privilege according to the contents and the relevance of the document, rather than to consider the effect on the public service of the disclosure of the class of documents to which it belongs. The result would be that the same kind of document would sometimes be protected and sometimes disclosed which would, as I have said, be destructive of the whole basis of the class claim.

" I would emphasize that claims of Crown privilege are made in respect of all documents falling within the class, irrespective of whether their production would be favourable or unfavourable to the Crown's interests.

" The proper way to strike a balance between the needs of litigants and those of Government administration is, in our opinion, to narrow the class as much as possible by excluding from it those categories of documents which appear to be particularly relevant to litigation and for which the highest degree of confidentiality is not required in the public interest. We have carried out an extensive survey of the field, and have certain proposals to make along these lines.

Road Accidents.

" A very large part of present-day Crown litigation consists of actions arising out of road accidents and other accidents involving Government employees, and accidents on Government premises. Where such an action is brought against a Government department, the most relevant documents are the reports of the employees involved and of other eye witnesses, and also subsequent reports made by the foreman, superintendent or other official as to such matters as the state of the machinery, premises or vehicle involved in the accident. In our opinion Crown privilege ought not to be claimed for these documents, and we propose not to do so in the future.

[1] [1942] A.C. 124 ; [1942] 1 All E.R. 587.
[2] [1956] S.L.T. 41.

"I ought perhaps to make it clear that I am not referring to the report of a Government inspector, such as a factory inspector or mines inspector investigating an industrial or mining accident. In the case of such a report the department is not concerned as an employer or an owner of property, but is exercising governmental functions, and different considerations arise. We think that in this case the report should be privileged, but that the inspector should be allowed to give evidence on matters of fact.

"Secondly, we have considered medical reports and records. In the recent case of *Ellis* v. *The Home Office*,[3] judicial criticism was directed at a claim for privilege for reports made by a prison doctor which might have been relevant to the claim for negligence against the Crown. Here we have two proposals to make. The first is that ordinary medical records kept by departments in respect of the health of civilian employees should not be the subject of Crown privilege. In the case of medical reports and records in the fighting services we consider that privilege should still be claimed, so far as proceedings between private litigants, usually matrimonial proceedings, are concerned. Service doctors owe a special duty to the commanding officer, and frank reports are essential. It is also important in the services that a man should report readily to the medical officer, who is a doctor not of his choice but in whom he must have confidence; this is especially so in the case of venereal disease.

"Some of these considerations apply to prison doctors who owe a special duty to the prison governor, and their reports and records should still be privileged in proceedings between private litigants.

"Where, however, the Crown or the doctor employed by the Crown is being sued for negligence, we propose that privilege should not be claimed. I should add, with regard to both proposals, that there may be reports of special confidentiality which ought still to be privileged.

"We also propose that, if medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege should not be claimed. At present many of these documents are only made available in the case of the more serious crimes such as murder, manslaughter and rape.

"In the *Ellis* case criticism was also made of a claim of privilege for a statement made to the police. This would not occur under the procedure now established. Statements made by witnesses to the police are produced in court on subpoena in civil cases and may be furnished earlier with the consent or at the request of the witnesses themselves. The only exception, made for obvious reasons, is for statements by 'informers', i.e., persons volunteering information about the commission of crimes.

Contract Cases.

"In contract cases, the documents passing between parties are the most relevant and are always disclosed. Other documents which affect the legal position, e.g., an authority to an agent, are also disclosed. Sometimes, however, reports on matters of fact, as distinct from comment and advice, may be relevant to the issues in Government contract cases, and we propose that, where such a distinction can be clearly drawn, factual reports should be excluded from the privileged class.

[3] [1953] 2 Q.B. 135; [1953] 2 All E.R. 149.

"It may be that in other fields, in addition to accident and contract proceedings, it will be possible to evolve new categories of documents of a factual nature, which, without prejudice to the public interest, can also be excluded.

"We believe that our proposals may eliminate many of the grounds of complaint that have arisen in the past. I am assured by those responsible for Crown litigation that they will apply to the majority of cases coming before the courts. In the *Glasgow Corporation* case[4] three earlier cases were criticized, and two of these would not have arisen under our present proposals: *Ellis* v. *The Home Office*[5] and *Smith* v. *Lord Advocate*,[6] which concerned a lorry driver's report. The third case, *Broome* v. *Broome*,[7] concerned reconciliation work carried out by welfare officers acting for the service authorities. This work is of the highest importance, especially where men are serving abroad, and in the Government's view it would be very unfortunate if it ceased to be protected by Crown privilege.

Departmental Minutes.

"I come now to the category of departmental and interdepartmental minutes and memoranda containing advice and comment, and recording decisions, the documents by which the administrative machine thinks and works. Here we consider that Crown privilege must be maintained. An important type of case in which documents of this kind may be relevant is where the vires or legality of a Minister's decision is challenged, and the plaintiff may seek to show that the Minister proceeded on wrong principles. In such a case it is right that a Minister should be prepared to defend his decision, but if it became possible to challenge Government action, by reference to the opinions expressed by individual civil servants in the necessary process of discussion and advice prior to decision, the efficiency of Government administration would be gravely prejudiced.

"Minutes may also be relevant to proceedings because they may contain comments upon the issues in the case and the question of liability. They are not of high evidential value, although admittedly they may be used effectively in cross-examination. It can hardly be said that their non-disclosure prejudices the administration of justice, and their disclosure would in our opinion prejudice government administration. For example such actions as wrongful imprisonment, malicious prosecution or defamation may easily be concerned with events of public interest which give rise to comment in the Press and questions in Parliament. It is necessary and right that advice should be given at a high level in such cases, and that the advice should be entirely frank. It could not easily be given if it were subject to discovery in the subsequent proceedings.

"It is often said that a big commercial company is in much the same position as a Government department. In so far as this resemblance exists, our proposals recognize it. In many fields, however, the Minister's responsibility to Parliament and the governmental nature of his functions inevitably results in very different methods from those of a commercial company. As Sir Ernest Gowers has said, in a somewhat different context,

[4] *Supra.*
[5] *Supra.*
[6] [1953] S.L.T. (Notes), 74.
[7] [1955] 1 All E.R. 201.

Civil Service methods are often contrasted unfavourably with those of business. But to do this is to forget that no board of directors of a business concern have to meet a committee of their shareholders every afternoon, to submit themselves daily to an hour's questioning on their conduct of the business, to get the consent of that committee by a laborious process to every important step they take, or to conduct their affairs with the constant knowledge that there is a shadow board eager for the shareholders' authority to take their place. The systems are quite different and are bound to produce different methods.

"I now turn briefly to oral evidence. It is plainly established and accepted that oral evidence of the contents of privileged documents cannot be admitted. As regards evidence of oral communications, Crown privilege is claimed, much more rarely, on the same principles as in the case of written communications. It would be absurd, for example, if privilege could be claimed for a confidential minute passing from one official to another but not for a confidential conversation between them. The proposals that we are making for reducing the scope of privilege for documents would apply to oral communications of the same kind.

THE RIGHT OF ASSEMBLY.

By Ivor L. M. Richardson,
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There are several aspects of the right of assembly but it seems that the two most important practical applications relate to meetings held in public places and processions.[1] This is so not only because minority groups, owing to local prejudice or lack of finance, sometimes have difficulty in hiring halls for their meetings, but also because they have to recruit their audiences from the passers-by. Thus minorities must rely on the streets and parks of their cities in order to disseminate their views effectively.

The method of approach will be to consider meetings in public places; then, to note the two types of restrictions placed on assemblies in public places—namely, previous restraints and sanctions after the event—and, finally, to examine separately the right to hold public processions.

General.

In the United Kingdom and New Zealand the courts have always asserted that the right of free speech is a separate thing from the question of where that right is to be exercised,[2] and English law does not recognize any special right of public meeting for political or other purposes.[3] The courts have gone so far as to say that a meeting is not necessarily unlawful because held on the highway;[4] but the cases certainly do not establish any right to meet there. Nor has it been suggested, either in New Zealand or in the United Kingdom, that a municipality must in some adequate manner provide places for public meetings, let alone that both its streets and its ordinary parks must be made available.

So far as streets are concerned, it would seem that every public meeting constitutes both a trespass against the municipality and a public nuisance. The rights of the public in respect of the highway are simply to pass and repass at their pleasure for the purpose of legitimate travel, though these include the right to reasonable rest and recreation by the wayside.[5] As Lord Dunedin said in *M' Ara* v. *Magistrates of Edinburgh*,[6] "The primary and overruling object for which the streets exist is passage, and there is no such thing as a right in the public to hold meetings as such in the streets".

It follows from the fact that a public meeting cannot be considered an exercise of one of the rights of passage, that it must always constitute a trespass against the person who is the legal owner of the highway[7] unless he (or it) has expressly or tacitly licensed the holding of such a meeting.[8] In New Zealand the soil of the highway is vested in the local authority in the case of highways in boroughs,[9] and in other cases it is vested in the Crown.[10]

Again, any meeting which obstructs the highway

[1] The two other main aspects of the right of assembly relate to private armies and public meetings held in private halls. The latter aspect is of some importance in New Zealand because of the startling implications of the decision in *Thomas* v. *Sawkins*, [1935] 2 K.B. 249 (relating to the rights of entry into private premises which the Police have when they suspect a breach of the peace will occur).

[2] Lord Dunedin in *M' Ara* v. *Magistrates of Edinburgh*, [1913] S.C. (Ct. Sess.) 1059, 1073.

[3] Lord Hewart L.C.J. in *Duncan* v. *Jones*, [1936] 1 K.B. 218, 222.

[4] E.g., *Stanley* v. *Scott*, [1935] N.Z.L.R. s. 15; [1935] G.L.R. 85, applying *Burden* v. *Rigler*, [1911] 1 K.B. 337, and *R.* v. *Graham and Burns*, (1888) 16 Cox C.C. 420. In *Hazeldon* v. *Mc Ara*, [1948] N.Z.L.R. 1087, 1111, Fair J. said: "... it is not unlawful to make a public speech in a public place and the exceptional remedy of injunction will not be granted against the continuance of such addresses which do not tend to provoke breaches of the peace or cause a nuisance [that is, because the issuing of an injunction is a discretionary function of the Court]. ... But this is not a right to require the use of such a place at the will of the person wishing to speak. No person has the right to claim to be entitled to address a public gathering when and where he likes on a public reserve or place." Again, in *Llandudno Urban District Council* v. *Woods*, [1899] 2 Ch. 705, the Court admitted that the defendant had committed a trespass in holding a meeting on the foreshore which was vested in the Council, but refused an injunction as this was a "trivial occasion".

[5] In *Hickman* v. *Maisey*, [1900] 1 Q.B. 752, and in several other cases the courts have explained that this must be interpreted in a reasonable manner and, for instance, that the right to rest beside the highway is necessarily incidental to the right of passage.

[6] [1913] S.C. (Ct. Sess.) 1059, 1073. The language of Wills J. in delivering the judgment of the Court in *Ex parte Lewis*, (1888) 21 Q.B. 191, 197, is just as strong.

[7] In *Harrison* v. *Duke of Rutland*, [1893] 1 Q.B. 142, it was held that the plaintiff committed a trespass when he walked along the highway in such a fashion as to scare the grouse on the adjoining property to the detriment of a grouse shooting party as that was not a "reasonable and ordinary" use of the highway. *Hickman* v. *Maisey* (*supra*) was a similar case in which the earlier decision was applied. However, in England, owners of land adjoining a highway have certain rights therein; but, as this is not the case in New Zealand, the only form of trespass on the highway would be against the local authority in which it is vested.

[8] See *Llandudno Urban District Council* v. *Woods* (*supra*, n. 4).

[9] Municipal Corporations Act 1954, s. 170.

[10] Public Works Act 1928, s. 111.

constitutes a public nuisance at common law[11] and it is no defence that part of the highway is left clear for other users.[12] And by statute it is an offence wilfully or negligently to encumber or obstruct a public place,[13] a public place being defined[14] to include and apply to " every road, street, footpath, footway, court, alley and thoroughfare of a public nature, or open to or used by the public as of right, and to every place of public resort so open or used ".

Whereas a public meeting would prima facie constitute a nuisance whether held in a street or on a highway, it does not always constitute a trespass when held in an open place. This is because the right of user on the part of the public depends upon the construction of the dedicatory grant of the land in each case.[15] Thus, although the rights of the public are simply to pass and repass on the highways, they may be more extensive with regard to other public places, depending always on the terms of the dedication.

However, although in theory the public has virtually no right of meeting in public places, in practice the law is not rigidly enforced. Public meetings are usually tolerated by the Police unless the Department considers that a public meeting is likely either to lead to a breach of the peace or to interfere with the paramount use of the street or other public place where it is held.

Previous Restraints.

Since there is no right of meeting in public places, ordinances imposing restraints on assemblies cannot be considered unconstitutional. But municipal by-laws are invalid if they (i) are repugnant to the laws of New Zealand; or (ii) are ultra vires, that is, if they exceed the powers given to the municipality by statute; or (iii) are unreasonable.

In the United Kingdom the courts are slow to hold that a by-law made by a public body is void for unreasonableness unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.[16] However, the New Zealand courts have frequently held[17] that they will deal with by-laws with a freer hand than they are dealt with in the United Kingdom where there are certain checks[18] in the public interest against unreasonable and improper by-laws which do not exist in New Zealand. In the leading case, *McCarthy* v. *Madden*,[19] Denniston and Edwards JJ. said:

> The reasonableness of a by-law can be ascertained only by relation to the surrounding facts, including the nature and condition of the locality in which it is to take effect, the evil, danger or inconvenience which it is designed or it professes to be designed to remedy, and whether or not public or private rights are unnecessarily or unjustly invaded.[20]

But, the enabling statutes give extremely wide powers to local authorities. Municipalities are empowered to make by-laws " concerning streets and the use thereof " and

> Regulating the use of any reserve . . . recreation ground or other land and any public place vested in the Corporation or under the control of the Council,[21]

and no by-law is invalid because it requires anything to be approved or leaves anything to be determined in any particular case by the local authority or by one of its officers.[22]

Thus, in *Hazeldon* v. *Mc Ara*,[23] the Full Court held valid a by-law which prohibited the holding of any public meeting, gathering or demonstration or the making of any public address in any street or other public place within the city of Wellington except with the prior written authority of the Town Clerk. The Council's sole power in this respect was of " regulating " the use of any reserve. Nevertheless, the Court concluded that although this did not empower the total prohibition of the use of the reserve it did empower prohibition in certain cases, one of which was in the case of public meetings and addresses. Nor was the discretion given to the Town Clerk to issue permits considered unreasonable—indeed all of the Judges thought it most satisfactory for the Town Clerk as chief executive officer to have what was virtually unfettered control over all meetings in public places in the city. Nor did the Court consider that the absence of standards to be applied by the Town Clerk in examining the applications to hold such meetings was of any great importance.

In view of the wide powers given to local authorities to regulate control of public places, and the benevolent attitude of the Court in *Hazeldon's* case to the stringent control over the use of public places exercised by the Council, it seems clear that there is in fact no such thing as a right of assembly in public places.

There is another method of restraint which has been used most effectively to prevent the holding of public meetings in New Zealand. Any Justice of the Peace may bind over any person to keep the peace if the Justice is given satisfactory evidence that the person from whom surety is sought has used provoking or insulting language or exhibited any offensive writing or object or done any offensive act publicly and to the common annoyance of Her Majesty's subjects; or by work or writing has incited or attempted to incite any other person to commit any breach of the peace.[24] It has been held by the Court of Appeal that taking part in an unlawful assembly is an offensive act within the statute.[25] All that is necessary to have a person bound over to keep the peace is to allege that there

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[11] The doing of an unlawful act by which the public are obstructed in the exercise of some common right is a public nuisance (see *Davis, Law of Torts in New Zealand*, (1951), 84). The proper remedy is criminal proceedings or an information by the Attorney-General on behalf of the public asking for an injunction. However, the Courts do not in practice grant an injunction unless there is an appreciable obstruction (see note 5, *supra*). In *Lyons, Sons, and Co.* v. *Gulliver*, [1914] 1 Ch. 631, a theatre queue was in the circumstances held to be a nuisance actionable at the suit of a trader whose premises adjacent to the theatre were obstructed by the queue.

[12] *Homer* v. *Cadman*, (1886) 16 Cox C.C. 51.

[13] Police Offences Act 1927, s. 4 (1) (*p*).

[14] Police Offences Act 1927, s. 2.

[15] *M' Ara* v. *Magistrates of Edinburgh* (*supra*, n. 6) at 1073, 1074.

[16] *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, 99 (per Lord Russell of Killowen).

[17] E.g., *Grater* v. *Montagu*, (1904) 23 N.Z.L.R. 904; *McCarthy* v. *Madden*, (1914) 33 N.Z.L.R. 1251, 1267.

[18] Under the enabling Act considered by the Judicial Committee of the Privy Council in *Kruse* v. *Johnson* (*supra*, n. 16) antecedent publication of the by-law was necessary and it had no force if disallowed by the Queen within forty days after being forwarded to the Secretary of State. That appears to be common practice in England and also there is a much greater use there of " model " by-laws.

[19] (1914) 33 N.Z.L.R. 1251.

[20] *Ibid.*, 1269.

[21] Municipal Corporations Act 1954, s. 386 (11) and (12).

[22] By Laws Act 1910, s. 13 (1).

[23] [1948] N.Z.L.R. 1087.

[24] Justices of the Peace Act 1927, s. 13.

[25] *Goodall* v. *Te Kooti*, (1890) 9 N.Z.L.R. 26.

was an incitement to commit breaches of the peace generally—no particular person need be put in bodily fear.[26] This power to bind a person over to keep the peace is very wide and obviously may be a very effective restraint upon the holding of meetings in public places by speakers with unorthodox views.

[26] *Lansbury* v. *Riley*, [1914] 3 K.B. 229, 235.

(To be concluded.)

THE MEANING OF "POUND".

In Respect of Obligations to be Discharged Abroad.

By E. J. HAUGHEY, M.A., LL.M., B.Com.

II.

As a result of the foregoing cases,* it was regarded for many years in New Zealand as being authoritatively settled that the principal and interest payable abroad in respect of securities, expressed in "pounds" at large, without any particular type of pound being specified, must be discharged in the currency of the place of payment. The legal and financial position in respect of such securities was aptly summarized by Blair J. in the following passage in his judgment in *Auckland City Corporation* v. *Alliance Assurance Co., Ltd.*, [1936] N.Z.L.R. 413, 457:

> Sometimes lending institutions in New Zealand, such as large insurance companies, are not prepared to lend as a New Zealand loan, but stipulate that the principal and/or interest is to be payable out of New Zealand, thus making it a foreign loan so far as New Zealand is concerned. Sometimes the place of payment is optional to the lender. Sometimes—and particularly so when the loan is for a very large sum—resort is had to the London market. The question of the amount and the terms and the time when the loan is launched on the London market will depend upon the advice of the local body's financial advisers. The loan may be issued at a premium or at a discount. It will thus be seen that the New Zealand ratepayer when asked to approve a local body loan does not necessarily know whether he is to get New Zealand or foreign money. An English loan of a million pounds will not necessarily net a million pounds in New Zealand. All those considerations contradict the suggestion of the defendants that the New Zealand ratepayer assumes he is borrowing only in New Zealand currency and is liable only to repay in New Zealand currency. I would suggest that not only is that not the case, but the New Zealand ratepayer knows full well that if he goes on the London market to borrow he has to go back there again to repay.

However, as a result of a fresh analysis of the law which was made in three recent Australian cases (two of which went to the Privy Council) certain new factors emerged which had the effect of again unsettling the legal position with regard to loans of this nature.

In Goldsborough Mort & Co., Ltd. v. *Hall*, [1948] V.L.R. 145, a question arose as to whether certain debenture stock was redeemable in English or Australian currency. The stock had been issued by a company incorporated under the law of Victoria in 1893. Its business was carried on, and its property was situated, in Australia, but it had been formed as part of a scheme of reconstruction under which it took over the business liabilities of a pre-existing company which had been largely financed in England and which was indebted in a large amount to the debenture holders there. The new company issued to the debenture holders and other creditors of the old company debenture stock secured by a trust deed entered into in 1895—and in 1939 by a further deed which superseded that of 1895—with trustees in England.

In course of his judgment in the Supreme Court of Victoria Fullagar J. (i) drew a distinction between "money of account", to describe the money which was the measure of the obligation, and "money of payment", to describe the money which was the means of discharging the obligation; and (ii) came to the conclusion (despite the views to the contrary expressed in the cases referred to above) "that, as from 1931 at any rate, the English pound and the Australian pound have denoted not merely different means of discharging a contract to pay money but different moneys of account". As two different moneys of account were involved the question for determination was, in the opinion of Fullagar J., one of the substance of the obligation and was to be decided as a matter of construction; and in view of the absence of any provision fixing any place for the redemption of the stock, little reliance could be placed upon any place of payment as affording an indication of the money of account by which the obligation was to be measured.

From a consideration of the whole of the circumstances, Fullagar J. was forced to the conclusion that the money of account by reference to which the parties had contracted was English money; and accordingly he held that the company owed English pounds, and must pay, in whatever country the payment was made, a sum of money calculated by reference to the English pound and by application of the appropriate rate of exchange.

This judgment was upheld by the High Court of Australia (Rich, Dixon and McTiernan JJ., Latham C.J., and Starke J. dissenting) ([1949] 78 C.L.R. 1). Despite the dissenting judgments given by them, the minority judges, like the majority judges, accepted the distinction between "money of account" and "money of payment" and the viewpoint that the curriences of England and Australia represented separate moneys of account.

These views were also adopted in *Bonython* v. *Commonwealth of Australia*, (1948) 75 C.L.R. 589; on app. [1951] A.C. 201, and in *National Bank of Australasia, Ltd.* v. *Scottish Union and National Insurance Co., Ltd.*, (1951) 84 C.L.R. 177; on app. [1952] A.C. 493. In the latter case, at p. 512, the Privy Council made the following pronouncement upon this point:

> Mr Menzies, for the respondents, invited their Lordships to treat the case as one in which there was in 1897 the same money of account in England and Queensland. He based his argument on some *obiter dicta* of certain of their Lordships in the *Adelaide* case (*supra*), and on some observations of Lord Simonds in *Bonython's* case, where Lord Simonds, delivering the judgment of the Board, said: "though there were in a real sense two monetary systems, the money of account was the

* The first part of this article appears at p.246, *ante*.

same and the money of payment substantially the same in the two countries."

These observations lend some colour to Mr Menzies' argument, but their Lordships think that reading the judgment, as a whole, the Board was expressing the view, which their Lordships believe to be correct, that if, as the Board found to be the case in *Bonython's* case, there were in 1897 different monetary systems in England and Queensland, it necessarily follows that there were different moneys of account.

In *Bonython* v. *Commonwealth of Australia*, the appellants were the holders of several sums of consolidated inscribed 3½ per cent. stock of the Commonwealth of Australia which had been issued by the Commonwealth in 1932 against the surrender of certain Queensland Government debentures when, under the terms of a financial agreement, the public debt of Queensland, which included the liability of the State under debentures, was taken over by the Commonwealth. The inscribed stock was issued subject to the condition that it conferred on the registered holders rights which conformed in all particulars with those conferred by the Queensland Government debentures. Those debentures, which were issued in 1895 for varying amounts in "pounds sterling", stipulated, inter alia, that "the principal sum will be payable on January 1, 1945, either in Brisbane, Sydney, Melbourne or London at the option of the holder." The appellants claimed that on redemption in respect of each debenture of £1,000 they were entitled to be paid £E.1,000 in London or the equivalent in Australian currency if the debentures were payable in Australia.

On a case being stated in the High Court of Australia for the opinion of the Full Court ((1948) 75 C.L.R. 489) it was held by the majority Judges, namely, Rich, Dixon and McTiernan JJ.: (1) that the proper law of the obligation of the debenture was the law of Queensland; (2) that the obligation of the debenture could not be described by reason of the words "pound sterling", as an obligation to pay £E.1,000, or the equivalent in Australian currency; (3) that the obligation was expressed in the money of account that was common to Great Britain and Australia; and (4) that the monetary systems having subsequently diverged the obligation belonged to the Australian system and that the obligation would be discharged by payment of £A.1,000 if the debenture was payable in Australia or the equivalent in English currency, if payable in London. Latham C.J. and Starke J. dissented. Latham C.J. held that by reason of the use of the word "sterling" the appellants were entitled to be paid in Australia the equivalent in Australian currency of the principal sum expressed in English currency. Starke J. held that if a debenture was payable in London £E.1,000 must be paid but if it was payable in Australia £A.1,000 would discharge the obligation.

On appeal to the Privy Council, the majority decision of the High Court was affirmed ([1951] A.C. 201). Their Lordships held (i) that it was impossible to infer from the mere use of the word "sterling" in conjunction with the word "pound" in a document of 1895 that the currency of England rather than that of Queensland was intended; (ii) that the substance of the obligation created by the debenture was the same whatever the place of payment, and must be determined by the proper law of the contract, that was, the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connection; (iii) that on the assumption that no express reference was made to the proper law of the contract, that question became a matter of implication to be derived from all the circumstances of the transaction; (iv) that, applying that test to the case under consideration, there was overwhelming evidence that it was to the law of Queensland that the parties looked for the determination of their rights, and that law accordingly governed the contract and determined the meaning of the word "pound"; (v) that the government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system whether or not those terms were apt to refer to another system also; and (vi) that in the absence of anything to rebut that presumption it must prevail, and it would then follow that in the instant case the obligation to pay would be satisfied by payment of whatever currency was by the law of Queensland valid tender for the discharge of the nominal amount of the debt.

In the course of the Board's judgment, [1951] A.C. 201, the *Adelaide* case was referred to and distinguished, at pp. 220, 221, in the following terms:

There was in [the *Adelaide* case] considerable diversity of view on what appears to be a question of fact, namely, the identity or similarity of the English and Australian pound similarity of the English and Australian pound at different periods of their history, and it is clear that some at least of the learned Lords who heard the case found a greater degree of identity and similarity than a further examination of the facts appears to their Lordships to justify. But the decision itself can be fairly rested on the fact that under the altered articles of the Adelaide Company payment of dividends on its stock was to be made in Australia only. It was, therefore, easy to conclude that on the true construction of the contract the place of performance determined the substance of the obligation, i.e., the currency by which the obligation was to be measured.

This appears to have been the view taken of this case by this Board in *Payne* v. *Deputy Federal Commissioner of Taxation* ([1936] A.C. 497), see per Lord Russell of Killowen (*ibid.*, 509), "The actual decision was this: that an obligation to pay a preference dividend of (say) £5, which was originally payable in England, but which by an alteration of the Company's articles, binding on the preference stockholder, had been made payable only in Australia, was effectively discharged by a payment in Australian currency although the stockholder in England received, owing to the rate of exchange, less than £5 in English currency."

The same view of the case appears to have been taken in the *Auckland* case, where Lord Wright, delivering the judgment of the Board, said: "It is quite clear that the whole problem arose because of the divergence in value of the two currencies, and it was solved, as a question of construction, by determining what currency, on the true construction of the contract, was connoted by the use of the word 'pound'." It is true that in the latter case, where alternative places of payment, one of them London, were provided, it was decided that the creditor who elected to be paid in London was entitled to be paid the nominal amount of his coupon interest in English currency without any allowance for exchange. But the relevant principle had already been correctly stated in the passage just cited, and was further emphasized in a later passage of the judgment where in reference to the *Adelaide* case it was pointed out that the mode of performance of a contract is to be governed by the law of the place of performance but "that principle, no doubt, is limited to matters which can fairly be described as being the mode or method of performance, and is not to be extended so as to change the substantive or essential conditions of the contract." If the Board, nevertheless, found it possible to hold that as a matter of construction of the contract the nature of the substantial obligation was determined by the place of performance, that decision can only be rested on the words of the particular contract and the surrounding circumstances as the Board found them to exist.

In the present case it is clear that, if it had been provided that payment would be made in London only, that would have been an important factor in determining the substance of the obligation, though other features, not present in the *Adelaide* case, could not be ignored. But payment in London was only one of four alternative modes of performance, and the fact that London might be chosen as the place of payment becomes a factor of little or no weight.

The following were the facts in *National Bank of Australasia, Ltd.* v. *Scottish Union and National Insurance Co., Ltd.*, [1952] A.C. 493. Pursuant to a scheme of arrangement between the Queensland National Bank and its creditors, which was sanctioned in 1897, the bank created interminable inscribed deposit stock which the registered holders of existing securities of the bank, which had arisen from deposits made either in London or in Australia, accepted in satisfaction and discharge of such securities. The scheme further provided, inter alia, that registers of the stock were to be kept at specified offices of the bank in Australia and London, and that any registered holder was entitled at his option to have his stock transferred from one register to another. Under the scheme the principal moneys were to be immediately repayable in the event, inter alia, of the bank being wound up. In 1947, the appellant bank, the National Bank of Australasia, became the holder of all shares in the Queensland National Bank, and the latter went into voluntary liquidation. At that date there was £729,269 of its stock registered on the Australian registers, and £1,829,817 on the London register, and the question arose whether the Bank's liability on redemption was for the nominal face value of the stock in English or in Australian pounds or partly in one currency and party in the the other.

The Supreme Court of Queensland held that the place of registration in 1897 was the governing factor, and that accordingly stock originally registered in London was expressed in English currency, any transfer from one register to another being immaterial ([1950] Q.S.R. 264). The High Court of Australia (Dixon, Williams, Webb and Fullagar JJ., Latham C.J. dissenting) held that the place of registration at the commencement of the winding-up in 1947 was decisive ([1951] 84 C.L.R. 177). The Privy Council (who agreed with the conclusion reached by Latham C.J. in his dissenting judgment in the High Court) held that both Australian Courts had been wrong, that the place where the stock was at any time registered was irrelevant, and that the whole of the stock sounded in Australian currency only.

Their Lordships considered that while the terms of the scheme must be looked at as a whole in the light of the relevant surrounding circumstances, the real question was one of the construction of the words creating the stock. The most significant feature was that it could be moved from register to register, which went far to establish that it did not give a different right of repayment according to where it might for the time being be registered. That view was further supported by the facts that, inter alia, the stock was created by a Queensland Bank; the governing order sanctioning the scheme was that of the Queensland Court; and certificates of stock, wherever registered, were in the same form and certified that the stock was created pursuant to the scheme sanctioned by the Supreme Court of Queensland. Looking at the scheme as a whole, the liability of the bank in respect of the stock was for a fixed amount in Australian pounds, and was and always had been limited on redemption to paying to each registered holder Australian pounds equal to the nominal value of the stock held by him, and in the meantime to paying interest in Australian pounds on the principal moneys.

It was pointed out by the Board that in view of the right to transfer from register to register the facts were essentially different from those in the *Adelaide* case and the case was more like the *Auckland* case and *Bonython's* case.

A lengthy note on the *National Bank* case, written by J. H. C. Morris (who, presumably, is the same person as Dr J. H. C. Morris, the General Editor of the sixth edition of *Dicey's Conflict of Laws*) was published in *2 International and Comparative Law Quarterly*, (April 1953) 300-303. The author concluded this note with the following observations:

> In *Bonython's* case, Lord Simonds came perilously close to arguing that because Queensland was the proper law of the contract, therefore the Australian pound was the money of account ([1951] A.C. 201, 221). The conclusion obviously does not follow. As Latham C.J. pointed out in the *National Bank* case (84 C.L.R. 208, 209), the role of the proper law is merely to furnish the necessary canons of interpretation and presumptions: it cannot itself determine the money of account without the assistance of some rule or presumption. In arguing the appeal to the Privy Council, counsel for the appellants is reported to have said that "the proper law of the contract must be found, and having found it, *prima facie* these currency expressions in the document will be referring to the currency of the proper law". There is much to be said for such a presumption, though Dr Mann prefers the presumption in favour of the currency of the place of payment (Mann, *The Legal Aspect of Money*, p. 179). Unless every case of this kind is to be litigated, a presumption one way or the other there must be. *Its authoritative formulation for English (and Australian) domestic law is one of the most urgent tasks availing appellate tribunals in this difficult branch of law.*

The italics are not in the text of the note.

(To be concluded.)

Writ of Account.—"There has not been in this case a sufficient investigation of the ancient law and practice on the subject of account. It seems to have been conceived that the common law had provided sufficient means for calling to account all persons liable to account. But it was found by experience that the writ of account was a very imperfect and inefficient mode of proceeding. In the case of an individual, there can be no doubt that if a person had received the rents of an estate belonging to a minor for which he would be accountable, the law provided a writ to call such person to account, and to compel payment of what should be found due upon the account. Yet it is every day's practice, although the common law has provided this remedy, for Courts of Equity to take upon themselves the investigation of accounts on behalf of infants suing by their next friends. The writ of account at common law did not exclude, but rather was superseded by, the jurisdiction of the Courts of Equity on this subject; because the proceeding in Equity was found to be the more convenient mode of calling all parties to account—partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of Courts of Equity." Lord Redesdale in *Attorney-General for Ireland* v. *Mayor, etc. of Dublin*, (1827) 1 Bligh N.S. 312, 336; 4 E.R. 888, 898.

THE NEW COMPANIES ACT 1955.

Changes in Administration, Memoranda and Articles of Association.

By E. C. ADAMS, I.S.O., LL.M.

In this article, I shall deal briefly with the changed designations of some of the officials who administer the Companies Office, and with the new provisions of the 1955 Act affecting the memorandum of association and the articles of association.

NEW SET-UP OF THE COMPANIES OFFICE.

As under the present 1933 Act there is provision in the new statute for the appointment of a Registrar of Companies and a Deputy Registrar of Companies. On the occurrence from any cause of a vacancy in the office of Registrar (whether by reason of death, resignation, or otherwise), and in case of the absence from duty of the Registrar (from whatever cause arising), and so long as any such vacancy or absence continues, the Deputy Registrar shall have and may exercise all the powers, duties, and functions of the Registrar.

It is specifically provided that the fact that the Deputy Registrar exercises any such power, duty or function shall be conclusive evidence of his authority to do so, and no person shall be concerned to inquire whether the occasion has arisen requiring or authorizing him to do so.

DISTRICT AND ASSISTANT REGISTRARS OF COMPANIES.

A new designation is that of District Registrar of Companies: hitherto, there have been Assistant Registrars of Companies but no District Registrars. Some District Offices have had more than one Assistant Registrar; but in these offices, by convention, the senior Assistant Registrar has been in charge of the District Office. In the smaller offices, such as Hokitika and Blenheim, there has been only one Assistant Registrar.

The new Act provides for a much better and more logical set-up. Section 5 of the 1955 Act provides that there shall also from time to time be appointed under the Public Service Act 1912 as many District Registrars of Companies and Assistant Registrars of Companies as may be found necessary for the purposes of the Act.

Subject to the control of the Registrar, every District Registrar shall have and may exercise all the duties and powers of the Registrar. *Subject to the control* of the Registrar and of the District Registrar, every Assistant Registrar shall have and may exercise all the duties and powers of the Registrar. The fact that a District Registrar or an Assistant Registrar exercises any powers or functions conferred by the Act on the Registrar shall be conclusive evidence of his authority to do so.

DISTRICT OFFICES AND A CENTRAL OFFICE.

The set-up therefore will be the Registrar and Deputy Registrar always stationed at Wellington, exercising a supervisory jurisdiction over all the District Offices, to whom by Departmental convention a right of appeal lies from a decision of any District Office. In each District Office (including Wellington) there will be a District Registrar, the controlling officer for his particular district. In the larger centres, there will also be one or more Assistant Registrars subject to the immediate control and direction of the District Registrar.

Certain matters necessarily have to be referred to a central authority (who will be the Registrar in Wellington) such as approval of names, consent of the Governor-General to certain names, change of name (which, before the 1933 Act, could be done only by the Supreme Court), change of registry of office of a registered company, and any matter of unusual complexity or difficulty.

NEW PROVISIONS AS TO MEMORANDUM AND ARTICLES.

There are several new provisions as to the memorandum of association and articles of association.

Certain instruments to be Exempt from Stamp Duty.—First, and perhaps foremost from a practice point of view, on or after January 1, 1957, the memorandum and articles of association will be exempt from stamp duty: hitherto they have both been liable to stamp duty of 15s., as deeds not otherwise chargeable. To make up for the loss of revenue there will be a slight increase in the registration fee of every company.

In 1950, consequent on the absorption of the Stamp Duties Department by the newly-called Inland Revenue Department, the work of company registration, which had been performed for many years by the Stamp Duties Office, was transferred to the Land Transfer Division of the Justice Department. One criticism of the change was that, whereas before 1950 every act connected with the registration of a company could be performed at the Stamp Office, thereafter every registration involved two visits—one to the Stamp Office to stamp the memorandum and articles, the other to the Companies Office which also had in due course to stamp the certificate of incorporation at the Stamp Duties Office.

The stamp duty on the original certificate of incorporation will also be removed as from January 1, 1957, for the Fifteenth Schedule to the Companies Act 1955 repeals, inter alia, s. 148 of the Stamp Duties Act 1954, which at present prescribes the stamp duty on the original certificate of incorporation. In lieu thereof, one will notice in the third part of the First Schedule to the Companies Act 1955 (Table of Fees to be paid to the Registrar of Companies) the following new items:

	£	s.	d.
For the first certificate of incorporation—			
Where the company has a nominal share capital exceeding £5,000	10	0	0
In every other case	6	0	0
For any certificate of incorporation after the first	0	5	0

In the result, everything incidental to the registration of a company after January 1, 1957, will be able to be performed at the District Companies Office, except

(*Continued on p. 272.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Adage and Advice.—At the recent dinner tendered by the Lord Mayor of London to Her Majesty's Judges, the Lord Mayor told the story of the plaintiff who was conducting his own case and concluded his address by saying: "I am aware of the old adage which says that a man who is his own lawyer has a fool for his client. My case is such that I leave it with confidence in the hands of a British judge." He asked the Court usher to send him a wire of the case as he could not personally attend to hear the judgment. The telegram, on its arrival, read: "Old adage confirmed—but with costs." And, by way of contrast, Scriblex is reminded of a story related by the late Sir Patrick Hastings in his autobiography. "I had defended a man at the Old Bailey," he says, "and no doubt partly as the result of my own efforts he received a sentence of twelve months. I was not particularly distressed as my client was a bumptious little man and I did not like him, and he obviously did not like me. Some twelve months or so later in the High Court a witness was called against me in whom I immediately recognized my bumptious friend. He was beautifully dressed in frock coat and tall hat, and was clearly determined to be offensive, so much so that I was unwise enough to say to him: "You will not give answers like that, if you take my advice." He drew himself up to his full pompous height. "I will not take your advice," he said. "I took it once and as a result I went to prison for twelve months. I shall never take your advice again."

How to Become a Good Lawyer.—In May, 1954, a twelve-year-old boy, living in Alexandria, Virginia, sent a letter to Mr Justice Frankfurter in which he wrote that he was "interested in going into law as a career" and requested advice as to "some ways to start preparing myself while still in junior high school". He received this reply.

My dear Paul:

No one can be a truly competent lawyer unless he is a cultivated man. If I were you I would forget all about any technical preparation for the law. The best way to prepare for the law is to come to the study of the law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget all about your future career.

With good wishes,
Sincerely yours,
Felix Frankfurter

Master M. Paul Claussen, Jr.

From "Of Law and Men" by Felix Frankfurter (Harcourt, Brace).

Plaint.—At the end of a tiring day, the typist has just looked in with a document she has engrossed "Deed for Execution", and inquired whether it has to be signed by the Trial Judge. Scriblex suggests she put on her little black hat and go home.

Where Innocence is Bliss.—Scriblex is informed that the English mistress of one of our schools called for an essay on Happiness from her girls. One, aged eleven, administered a slight shock as a denouement to her effort. "I am very happy usually," she wrote, "I am happy at home, with my mother and father, my brother and sisters, and our cat. I am also happy at school, where I have many nice friends. I am not very old, but so far I have been very happy, and I hope I shall be happy when I am a bigger girl. I also hope that I shall be when I am older than that. And I hope, too, that I shall have a very happy adultery."

Compensation Corrective.—A minor diversion in the Court of Compensation was created recently by a new constable-orderly who, in stentorian tones, announced the entry of Judge Dalglish with "Silence, for Her Majesty the Queen!". Realizing quickly, however, that any resemblance between the two was more superficial than real, he announced, in even louder tones, "Silence, for Her Honour, the Judge!". Silence did not reign: it poured.

A Necessary Safeguard.—Readers of Canadian Law Lists, who are surprised at the preponderance of Q.C.'s in many of the larger firms of that Dominion, will be relieved to know of the vigilance exercised by the Legislative Assembly of Quebec which, on February 14, 1956, replaced section 35 of its Notarial Act with a new section, reading "Canadian citizens of both sexes only shall be admitted to study for the notarial profession".

The High Cost of Corkage.—In his judgment in *Winders* v. *Taylor*, a lengthy appeal heard by Henry J. at Invercargill in August, the Judge has some strictures to pass on the looseness of certain Governmental practices. "That there has grown up a practice of the Customs officials taking for their own consumption unclaimed bottles of liquor, as well as other items, I have no doubt. The practice is a pernicious one and can lead to dishonesty as well as depriving the country of revenue. It permits uncustomed goods to be taken home or consumed in the Customshouse. It results in gifts being made by the persons from whom revenue officers have to extract revenue after making decisions as to the classification of goods—decisions which should be made only by persons who are completely independent and not under a sense of obligation as the result of receiving favours. Moreover, if the importer does not claim his tested goods they become, in effect, the property of the Crown, and this system deprives the Crown, which is the employer of the Customs officers, of its property in unclaimed goods. The practice is, of course, a clear breach of the Customs Acts and Regulations, and is in every way obnoxious." The appellant who had been convicted in the Lower Court on eighteen charges of theft of specific bottles of liquor, had his convictions quashed, but only after he had again publicized the melancholy fact that, for the purposes of the charges, a reputed quart bottle of a standard brand of Scotch whisky was valued at a mere 7s.

THE NEW COMPANIES ACT 1955.

(*Continued from p. 270.*)

any preliminary contracts in the form of deeds or liable to *ad valorem* duty, such as agreements of sale, agreements to lease, which must, as heretofore, be stamped at a Stamp Duties Office. Agreements not by deed and not liable to *ad valorem* stamp duty, may be stamped by the parties themselves by attaching one shilling and three pence in adhesive stamps and duly cancelling same under s. 140 of the Stamp Duties Act 1954.

Authority of Agent Signing Memorandum or Articles to be in Writing.—The Companies Act 1955 contains more detailed provisions than preceding Acts as to the signing of memoranda of association and articles of association. The memorandum of every company must be signed by each subscriber, or his agent *authorized in writing*, etc.: s. 15 (1). Articles must be signed by each subscriber of the memorandum, or his agent *authorized in writing*, etc.: s. 23 (1) (*c*).

In each instance, the words which I have placed in italics are new.

In any case; where a corporation, whether a company within the meaning of the Act or not, is a subscriber of the memorandum of a company, the memorandum may besigned on behalf of the corporation by any person or persons acting under its authority *expressed in writing*, etc.: s. 15 (2).

At the present time, both in England and in New Zealand, a person who has only been *orally* appointed may sign the memorandum of association and the articles of association: see, for example, *Re Whitley Partners, Ltd.*, (1886) 32 Ch.D. 337, cited in *6 Halsbury's Laws of England*, 3rd Ed., 109 (*d*).

It has been the practice of some District Companies Offices in New Zealand, when registering a company to which a corporation is a subscriber, to ask for proof that that corporation has power to take shares in the class of company about to be incorporated. This appears a safe and wise practice and presumably will be continued under the new Act.

Certain Incidental and Ancillary Objects and Powers to be implied in Memoranda of Association.—In respect of a company incorporated in New Zealand on or after January 1, 1957, certain incidental and ancillary objects and powers will be implied, *unless expressly excluded or modified.* There is no similar provision in the Companies Act 1948 (U.K.), although the writer understands there is something similar in Canada.

The purpose of this novel and interesting provision is of course to save typing. Section 16 (1) provides that every company registered after the commencement of the Act shall have as incidental and ancillary to the objects specified in its memorandum the objects and powers set forth in the Second Schedule to the Act, and those objects and powers shall be implied in the memorandum accordingly, except in so far as they are expressly excluded or modified by the memorandum. When the new Act comes into operation, therefore, it will be necessary for every solicitor registering a new company to examine the Second Schedule; and, if that Schedule contains any object or power which it is not desired that the company should have, he must see to it that any such undesired power or object is expressly excluded in the memorandum of association.

A glance at the Second Schedule, however, shows that it contains only incidental and ancillary objects and powers which nowadays are usually included in every public company. It will still be necessary to state at length the leading or primary objects of the company: in this connection useful reference may be made to *Morison's Company Law in New Zealand*, 2nd Ed., 808 *et seq.* There may in some cases be a few powers set out in the Second Schedule which it would not be desired to give to a small private company.

The articles of association of a New Zealand company usually contain some reference to Table A. Section 21 of the 1933 Act provides that articles of association may adopt all or any of the regulations contained in Table A; and that, in the case of a company limited by shares and registered after the commencement of that Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations contained in Table A, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as they were contained in duly registered articles. The new Table A contains several new articles, but the following statement in *Morison's Company Law*, 2nd Ed., 852, will still apply after the 1955 Act comes into force:

> "Many of the articles contained in form No. 2 [a precedent given by *Morison* for the Articles of Association of a public company] and in Table A are inapplicable to a private company] by reason of the special provisions of the Act affecting such companies. Other articles, although applicable, are found in practice to be unsuitable."

The same remarks will apply to the new Table A.

Common Form of Articles with reference to Table A.—A common form of articles used in New Zealand begins thus:

> Articles Numbers . . . of the regulations contained in Table A in the Second Schedule to the Companies Act 1933 shall not apply to this company, but the remaining Articles of Table A are hereby adopted, and with the following articles constitute the company's regulations:—

For example, that is the form adopted by the late Mr Goodall in the New Zealand Supplement to the *Encyclopaedia of Forms and Precedents*, Vol. I, p. 139.

It is predicted that that will remain a common form after the Companies Act 1955 comes into force. Practitioners will have to be careful to alter the number of their excluding clauses so as to harmonize with the new and somewhat enlarged Table A. If a solicitor has drafted his memorandum and articles with the 1933 Act in view, he should see to it that the company is registered before January 1, 1957. A mistake in the numbering of the excluding clauses could very well be catastrophic.

The new Table A (like its predecessors) will not supply those special articles which it is customary in New Zealand to include in small private companies of a family nature; e.g., restrictions on transfers of shares, rights of pre-emption given to remaining members, appointment of governing directors.