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INDUSTRIAL UNION: CONSTRUCTIVE NOTICE OF RULES.

A QUESTION of general importance to people entering into contractual relations with an industrial union was answered by Shorland J. in *Progress Advertising (N.Z.) Ltd.* v. *Auckland Licensed Victuallers Industrial Union of Employers* [1957] N.Z.R.L. 1207, when he held that constructive notice of the contents of the rules of an industrial union to any person dealing with the union results from the requirements of the Industrial Conciliation and Arbitration Act 1954 that the rules of a registered and incorporated industrial union, which contain its constitution and the powers given to its officers, must be recorded and must be made available to any person.

As the learned Judge pointed out in the course of his judgment, the foregoing proposition partly derives its effect from a change in the wording of the consolidation effected by the Industrial Conciliation and Arbitration Act 1954, which omitted, in s. 56, relating to registration of a union, the words formerly contained in s. 7 of the now-repealed Industrial Conciliation and Arbitration Act 1925 "solely for the purposes of this Act."

Section 53 of the new Act sets out the conditions precedent to the registration of a union, including the requirement that the rules of an industrial union must be deposited with the application for registration.

Section 55 of the Industrial Conciliation and Arbitration Act 1954 is as follows:

> 55. (1) On being satisfied that the society is qualified to register under this Act, and that the provisions of this Act have been complied with, the Registrar shall, without fee, register the society as an industrial union pursuant to the application, and shall issue a certificate of registration, which, unless proved to have been cancelled, shall be conclusive evidence of the fact of the registration and of the validity thereof.
>
> (2) The Registrar shall at the same time record the rules, and also the situation of the registered office.

Sections 56 (1) and 57 read as follows:

> 56. (1) Every society registered as an industrial union shall as from the date of registration become a body corporate by the registered name, having perpetual succession and a common seal, until the registration is cancelled as hereinafter provided.
>
> 57. The effect of registration shall be to render the union, and all persons who are members thereof at the time of registration, or who after the registration become members thereof, subject to the jurisdiction by this Act given to a Council and the Court respectively, and liable to all the provisions of this Act, and all such persons shall be bound by the rules of the union during the continuance of their membership.

In the *Progress Advertising* case, the plaintiff claimed damages from the defendant, which was a registered industrial union, in respect of alleged breach of contract.

The plaintiff alleged that on or about December 21, 1956, the defendant and the plaintiff entered into a contract whereunder the plaintiff would print and publish free of all cost to the defendant, programmes for the annual picnic to be held by the defendant for blind and crippled children, in consideration of the plaintiff's having the right to sell advertising space in the programmes and have the revenue therefrom.

The defendant denied that any binding contract was entered into, and further denied that its President had authority to make any such contract on its behalf; and finally alleged fraudulent misrepresentations and breach of the Secret Commissions Act 1910.

It was common ground between the parties that on December 11, 1956, Toomey, the managing director of the plaintiff, by appointment attended before the committee of the defendant in support of a letter submitting an offer to enter into a contract upon the terms above alleged. It was common ground that the committee resolved (as its minutes recorded) to delegate to its President and Secretary the power and task of deciding (after making further inquiries) whether or not the offer should be accepted.

On December 21, 1956, Toomey called on one Parker, who was President of the defendant union. The learned Judge found that Toomey sought from Parker information as to the decision on Toomey's proposal, and some authority to proceed with the proposal. His Honour also found that Parker in the first place informed Toomey that the matter had been left to him (Parker) as President and Ellerington, the Secretary, and that, after making telephonic inquiry, Parker informed Toomey that the Secretary, Ellerington, was out of town. Further, His Honour found, that, after telephoning two members of the committee, Parker finally agreed to Toomey going to the office of the defendant Union to have prepared an authority in writing to proceed.

At the defendant's office Toomey dictated to a typist a letter which was typed on the official letterhead of the defendant.

Although his letter was addressed to the plaintiff's bank, the letter purported to record a contract between the plaintiff and the defendant. After having this letter typed, Toomey returned to Parker and succeeded in having him sign it as President of the defendant Union. Toomey claimed that Parker orally accepted the terms of contract before signing the letter.

Relying on the letter, the plaintiff immediately after the holidays put four salesmen to the task of selling the advertising. The sales campaign was conducted by telephone. Its effect was to conceal from potential customers the knowledge that the approach was from an advertising company motivated solely by the desire for monetary gain, and to cloak it with an appearance of service to others. The activities of the plaintiff came to the notice of the defendant, and the defendant repudiated the alleged contract and refused to have any programmes printed by the plaintiff.

The learned Judge said that, it being clear that Parker had no express authority from the Committee of Management to enter into this contract on the defendant's behalf, and no authority from the members to whom the Committee had delegated the power and duty of deciding whether or not the plaintiff's offer should be accepted or rejected, the question of his authority to bind the defendant became a crucial question in this action.

The plaintiff relied upon ostensible authority, and cited *1 Halsbury's Laws of England*, 3rd ed., 208. His Honour said :

> The defendant is an industrial union of employers duly registered under the Industrial Conciliation and Arbitration Act 1925 (since repealed) ; but by virtue of s. 224 of the Industrial Conciliation and Arbitration Act 1954 is now to be regarded as if it had been registered under the 1954 Act.
>
> The effect of registration under the 1925 Act was (according to s. 7 thereof) that as from the date of registration, " *but solely for the purposes of* " the Act, it became " a body corporate by the registered name having perpetual succession and a Common Seal . . . ".
>
> Section 56 of the 1954 Act, under which the registration of the defendant Union enures, omits the words of restriction " but solely for the purposes of this Act ", with the result that registration under the Act of 1954 constitutes the Union a body corporate having a Common Seal without restriction as to the purposes for which it is in law a body corporate.
>
> The Act requires the Union to have rules, which rules must be registered, and s. 66 of the Act specifies those matters with which the rules must deal. These include inter alia :
>
> The powers and duties of the Committee and of the President and Secretary and of any other officer.
>
> Before leaving the statutory provisions regarding rules, it is convenient to record that s. 54 requires the rules to be deposited with the application for registration. Section 69 requires all amendments to be recorded by the Registrar. Section 71 requires that a copy of the rules must be delivered by the Secretary of any Union to any person requiring the same on payment of two shillings (or such less sum as the Committee of Management may fix). In the present case the rules fix 1s. as the cost.

The rules of the defendant were proved. The particular rules relevant for present purposes appeared to be Rule 12, in so far as it provided inter alia that the Committee of Management, which comprised eight members (one of whom is elected Treasurer) and a President and a Senior Vice-President " . . . shall conduct the affairs of the Union " ; Rule 14 which gave the President the power of presiding at all meetings, of being Chairman of Committee (when present), and of ruling with finality, and of exercising a deliberative as well as a casting vote ; but no other express powers.

There was no rule giving any power of delegation by the full committee to a sub-committee of a few of their number, analogous to the power of delegation given by Article 102 of Table A of the Companies Act 1955. His Honour continued :

> It is clear that no contract under the seal of the Union was entered into, and that the plaintiff seeks to rely upon a contract alleged to have been made by the President, purporting to act as agent for and on behalf of the Union.
>
> The evidence establishes that the Committee of Management purported to delegate to the President and the Secretary the power of entering into a contract between the defendant and the plaintiff, if they thought fit, after making further inquiries. The evidence establishes quite clearly that the Secretary had no part in the making of the alleged contract, with the result that the plaintiff is unable to invoke the purported delegation of authority to the President and Secretary.
>
> The evidence further establishes not only that the Committee of Management did not at any time authorize the President to enter into the contract, but so soon as it learned that it was claimed that the President had purported to enter into the alleged contract on its behalf it immediately repudiated.
>
> No question of ratification arises, and the plaintiff is driven to rely upon the submission that the President had ostensible authority to bind the defendant Union in contract with the defendant in the particular matter.

The general propositions submitted by counsel for the plaintiff were those stated in *1 Halsbury's Laws of England*, 3rd ed., p. 208, paras. 474, 475—namely :

(*a*) Where a principal gives an agent general authority to conduct any business on his behalf, he is bound, as regards third persons, by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority.

(*b*) Where a person has by words or conduct held out another person, or enabled another person to hold himself out, as having authority to act on his behalf, he is bound, as regards third parties, by the acts of such other person to the *same extent* as he would have been bound if such other person had in fact had the authority which he was held out as having.

There was no evidence of prior course of dealing in which the President was permitted by the defendant Union to make contracts on its behalf and no evidence of any statement or representation by the defendant Union that the President had such authority. The only basis for implication of authority was the simple fact that Parker was, and was no doubt held out as being, the President of the Union.

There was no resolution of the Union or the Committee of Management giving any authority to its President, and such authority as he had was conferred by the rules. The only rule conferring authority on the President was Rule 14 which provided as follows :

> The President shall preside at all meetings, and be Chairman of Committee, or, in his absence, a Vice-president shall preside. Should *neither* be present, a Chairman shall be elected by the members present. The ruling of the Chairman shall be final, and he may exercise a deliberative as well as a casting vote.

Under the rules it is the Secretary, but not the President, upon whom is conferred, inter alia, a power of conducting the general business of the Union.

His Honour proceeded to say :

> I do not think that the President of an industrial union which is a corporate body occupies a position analogous to that of manager of an incorporated trading company. The office of Secretary of such a Union would appear to be more analogous to that of manager of a company.
>
> There was no evidence suggesting that the President of the defendant Union in particular, or the Presidents of Industrial Unions in general, conduct the general day-to-day business of the Union.
>
> I have already stated my findings as to what transpired between Toomey and Parker on December 21, 1956. It follows from such finding that I hold that Toomey, at all relevant times, knew that any acceptance by Parker of the offer previously made was not in pursuance of the purported delegation by the Committee to Parker and Ellerington. It follows that the plaintiff is forced to rely solely upon ostensible authority on the part of the President of the defendant Union.
>
> The doctrine of constructive notice applies in respect of the registered Memorandum of Association and Articles of

Association of a company registered under the Companies Act. The principle or rule referred to is commonly known as the Rule in *Royal British Bank* v. *Turquand* (1856) 6 El. & Bl. 327; 119 E.R. 886.

In *1 Palmer's Company Precedents*, 15th ed., 70, the learned author formulates the rule as follows:

> This rule is that where a company is regulated by an Act of Parliament general or special or by a deed of settlement or Memorandum and Articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings—what Lord Hatherly called "the indoor management".

If the rule applies to an Industrial Union which is a corporate body, then no question of "indoor management" arises in the present case. There is no power of delegation by the Committee of Management to some or one of their number, and the President is not a person to whom, under the constitution and rules, the power of entering into this contract might have been delegated by the Union or the Committee of Management.

His Honour then referred to a comparatively modern statement of the principle, which is to be found in Lord Porter's judgment in *Mercantile Bank of India* v. *Chartered Bank of India* [1937] 1 All E.R. 231, 238 where he says:

> A person dealing with a company is entitled to accept the apparent authority of anyone with whom he deals who has an apparent authority given by the company but when considering whether a person has apparent authority or not, one of the matters which he is supposed to know and have in mind is the Memorandum and Articles, and therefore if apart from the Memorandum and Articles the person with whom he is dealing has apparent authority he would be entitled to act upon it; yet if by looking at the Memorandum and Articles he finds that that authority is limited and has not been given to the person concerned, then the person who is dealing with the company has knowledge of that limitation and cannot rely on the apparent authority of that person.

The learned Judge continued:

> The principle rests upon presumed knowledge of registered public documents available to the world, as distinct from actual knowledge of the contents of the Memorandum and Articles of Association.
>
> The rules of the defendant Union show that its management is vested in a Committee of Management, that there is no power of delegation by the Committee of its powers, that the Secretary is authorized to conduct the general business of the Union, and that the powers of the President are solely conferred by Rule 14, quoted above. A person fixed with notice of the rules is fixed with notice that there is no power given to the President to conduct business on behalf of the defendant, or to enter into contracts on its behalf, and is fixed with notice that authority to enter into contracts on behalf of the Union is not given to him. A person fixed with notice of the rules thus has notice of the limitations which they fix upon any ostensible authority which may spring from the fact that he is and is held out to be, President of the Union.
>
> The crucial question is whether the rule in *Royal British Bank* v. *Turquand* (1856) 6 El. & Bl. 327; 119 E.R. 886, applies to an industrial union registered under the Industrial Conciliation and Arbitration Act 1954. Such a union is a corporate body, the powers of which are limited by the Act under which it is registered and incorporated, and the rules which must be registered thereunder. As a corporate body it possesses a legal entity, separate and distinct from its members. It is the property and assets of its members, which are liable on its contracts. The liability of its members is confined to subscriptions and levies fixed by its rules.
>
> The rules must provide for certain matters specified by the Act, including the powers and duties of the Committee, and of the President and Secretary, and of any other officer (see Registrar of Industrial Unions, a public office appointed under s. 4 of the Act. On granting registration of the Union whereupon it becomes a body corporate, the Registrar must record the rule: s. 55 (2).
>
> There is no provision in the statute which expressly provides that the rules may be inspected at the office of the Registrar, but whether or not they can be inspected by the public at the Registrar's office, s. 71 of the Act requires that a copy of the rules, as for the time being amended, shall be delivered by the Secretary to any person requiring the same on payment of two shillings or such less sum as the Committee of Management may prescribe.
>
> Thus, the statute enabling an industrial union to be registered and to become an incorporated body makes provision whereby the rules which contain its constitution, and which must provide for and contain the powers inter alia of its President, are available to the public.

His Honour referred to an early case in which the doctrine of constructive notice to all the world of the registered documents of a company was finally accepted and stated by the House of Lords—*Ernest* v. *Nicholls* (1857) 6 H.L.C. 401, 418; 10 E.R. 1351, 1358. The Lord Chancellor said:

> The Legislature then devised the plan of incorporating these companies in a manner unknown to the Common Law with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind the shareholders by requiring the co-partnership deed to be registered, certified by the directors, and made accessible to all, and besides including some clauses as to the management as in Arts. 7 and 8 Vict. C. 110, s. 7, etc. All persons therefore must take notice of the deed and the provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors it is their own fault, and if they give credit to any unauthorized persons they must be contended to look to them only and not to the company at large. The stipulations of the deed which restrict and regulate their authority are obligatory on those who deal with the company, and the directors can make no contract so as to bind the whole body of shareholders for whose protection the rules are made unless they are strictly complied with.

Then, His Honour said:

> In my opinion, just as the statutory requirements that the documents of an incorporated company, which furnish its constitution and the powers of its officers, must be registered and be available for inspection by all people result in constructive notice of their contents to any person dealing with the company, so the requirements of the Industrial Conciliation and Arbitration Act 1954, that the rules of a registered and incorporated union which contain its constitution and the powers given to its officers must be registered and must be made available to any person, result in constructive notice of their conrents to any person dealing with a union.
>
> In the result, I hold that the managing director of the plaintiff company must be fixed with knowledge of the rules of the defendant, and with notice of the fact that those rules did not give the President power to make the contract on behalf of the defendant Union relied upon in the present action.
>
> Furthermore, I hold that the managing director of the plaintiff company was told that power to deal with the proposals he had put forward had been delegated to the President and the Secretary, and that he knew that the Secretary was not available for discussion, with the result that, in my opinion, when the President purported on behalf of the defendant to accept the offer the plaintiff had previously made, the managing director was put upon inquiry, as to the authority of the President to accept the offer, and inquiry, if pursued, would have revealed that no authority had been given to the President, either alone or in conjunction with any other person or persons, save the Secretary.

In the result, His Honour held that no contract binding upon the defendant was made by the plaintiff company, and he gave judgment for the defendant, with costs.

This is the first time that the doctrine of constructive notice in relation to a company's memorandum and articles has been assimilated to the rules of an industrial union registered under the Industrial Conciliation and Arbitration Act 1954, the terms of which, in contradistinction to its predecessors, make this application possible.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1957.

Public Acts:

Administration Amendments, No. 38.
Adoption Amendment, No. 10.
Aged and Infirm Persons Protection Amendment, No. 41.
Agriculture (Emergency Regulations Confirmation), No. 78.
Aliens Amendment, No. 42.
Apprentices Amendment, No. 43.
Appropriation, No. 85.
Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Amendment, No. 44.
Archives, No. 13.
Atomic Energy Amendment, No. 12.
Auckland Harbour Bridge Amendment, No. 96.
Auctioneers Amendment, No. 11.
Charitable Trusts, No. 18.
Civil List Amendment, No. 5.
Cook Islands Amendment, No. 103.
Counties Amendment, No. 45.
Dairy Board Amendment, No. 46.
Dairy Industry Amendment, No. 47.
Dairy Products Marketing Commission Amendment, No. 95.
Dangerous Goods, No. 20.
Diplomatic Immunities and Privileges, No. 21.
Education Amendment, No. 101.
Electric Power Boards Amendment, No. 48.
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Estate and Gift Duties Amendment, No. 31.
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Income Tax Assessment, No. 93.
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Land and Income Tax Amendment, No. 6.
Land and Income Tax Amendment (No. 2), No. 90.
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Land and Income Tax (Annual) (No. 2), No. 91.
Law Practitioners Amendment, No. 58.
Law Reform Amendment, No. 59.
Licensing Amendment, No. 105.
Local Authorities (Members' Contracts) Amendment, No. 60.
Local Elections and Polls Amendment, No. 61.
Local Legislation, No. 107.
Maori Purposes, No. 81.
Maori Soldiers Trust, No. 29.
Marlborough College Amendment, No. 62.
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Meat Export Prices Amendment, No. 84.
Medical Practitioners Amendment, No. 83.
Mental Health Amendment, No. 35.
Municipal Corporations Amendment, No. 63.
National Provident Fund Amendment, No. 94.
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New Zealabd Army Amendment, No. 32.
New Zealand National Airways Amendment, No. 97.
New Zealand University Amendment, No. 23.
New Zealand University Amendment, No. 23.
Nurses and Midwives Amendment, No. 15.
Oaths and Declarations, No. 88.
Pharmacy Amendment, No. 102.
Post andsTelegraph Amendment, No. 30.
Primary Products Marketing Regulations Confirmation, No. 79.
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Public Revenues Amendment, No. 65.
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Rangitaiki Land Drainage Amendment, No. 66,
Rating Amendment, No. 67.
Rehabilitation Amendment, No. 68.
Reserves and Domains Amendment, No. 69.
Reserves and Other Lands Disposal, No. 80.
Royal New Zealand Air Force Amendment, No. 34.
Royal New Zealand Institute of Horticulture Amendment, No. 70.
Samoa Amendment, No. 22.
Sharebrokers Amendment, No. 71.
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Soil Conservation and Rivers Control Amendment, No. 72.
Stamp Duties Amendment, No. 77.
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Taranaki Scholarships Trust Board, No. 108.
Tenancy Amendment, No. 100.
Town and Country Planning Amendment, No. 104.
Trustee Amendment, No. 37.
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Tuberculosis Amendment, No. 75.
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Valuation Equalisation, No. 17.
Vegetables Levy, No. 100.
Victoria University of Wellington Amendment, No. 24.
Visiting Forces Amendment, No. 32.
War Pensions Amendment, No. 99.
Water Supply Amendment, No. 76.
Wool Labelling Amendment, No. 73.

Local Acts:

Christchurch District Drainage Amendment, No. 5.
Hastings City Special Rates Consolidation, No. 2.
Hutt River Board Empowering, No. 8.
Onehunga Borough Vesting Amendment, No. 3.
Rangiora Borough Empowering, No. 7.
Taranaki Harbour Board Empowering Amendment, No. 6.
Wellington Harbour Board Loan and Empowering, No. 4.
Whangarei Borough Special Rates Consolidation, No. 1.

LICENSING.

Licensing Control Commission—Cancellation of Unnecessary Licence—Principles on which Compensation assessed—Licensing Amendment Act 1948, ss. 38, 39 (2). Where a publican's licence has been cancelled by the Licensing Control Commission pursuant to s. 31 of the Licensing Amendment Act 1948, the owner who was entitled to the reversion of the licence is entitled under s. 38 to compensation assessed upon the following principles: (1) The value to be ascertained is the value to the vendor, not its value to the purchaser. (2) In fixing the value to the vendor, all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account; but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked. (3) Market price is not a conclusive test of real value. (4) Increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded. (5) The value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor. (6) The true contractual relation of the parties—that of purchaser and vendor—is not to be obscured by endeavouring to construe it as another contractual relation altogether—that of indemnifier and indemnified. (*South Eastern Railway Co.* v. *London County Council* [1915] 2 Ch. 252, followed.) (7) For the ascertainment of "the market value", the principles enunciated in *Randall* v. *Licensing Control Commission* [1956] N.Z.L.R. 37, as to the assessment of compensation payable, under s. 38 of the Licensing Amendment Act 1948, to the owner on the cancellation of a licence. In view of s. 39 (2) of the Licensing Amendment Act 1948, the Court is entitled to adopt the principle that when property is taken arbitrarily and against the will of the owner, the value should be estimated liberally. The fact that business is being carried on at a loss does not disentitle the owner from claiming for trade loss, on the ground that, if he had not been expropriated, he would have had an opportunity of making his business profitable. (*Metropolitan District Railways* v. *Barrow* (1884) *The Times Newsp.*, November 22, applied.) *Poulton* v. *Licensing Control Commission.* (S.C. Wellington. October 14, 1957. McGregor J.)

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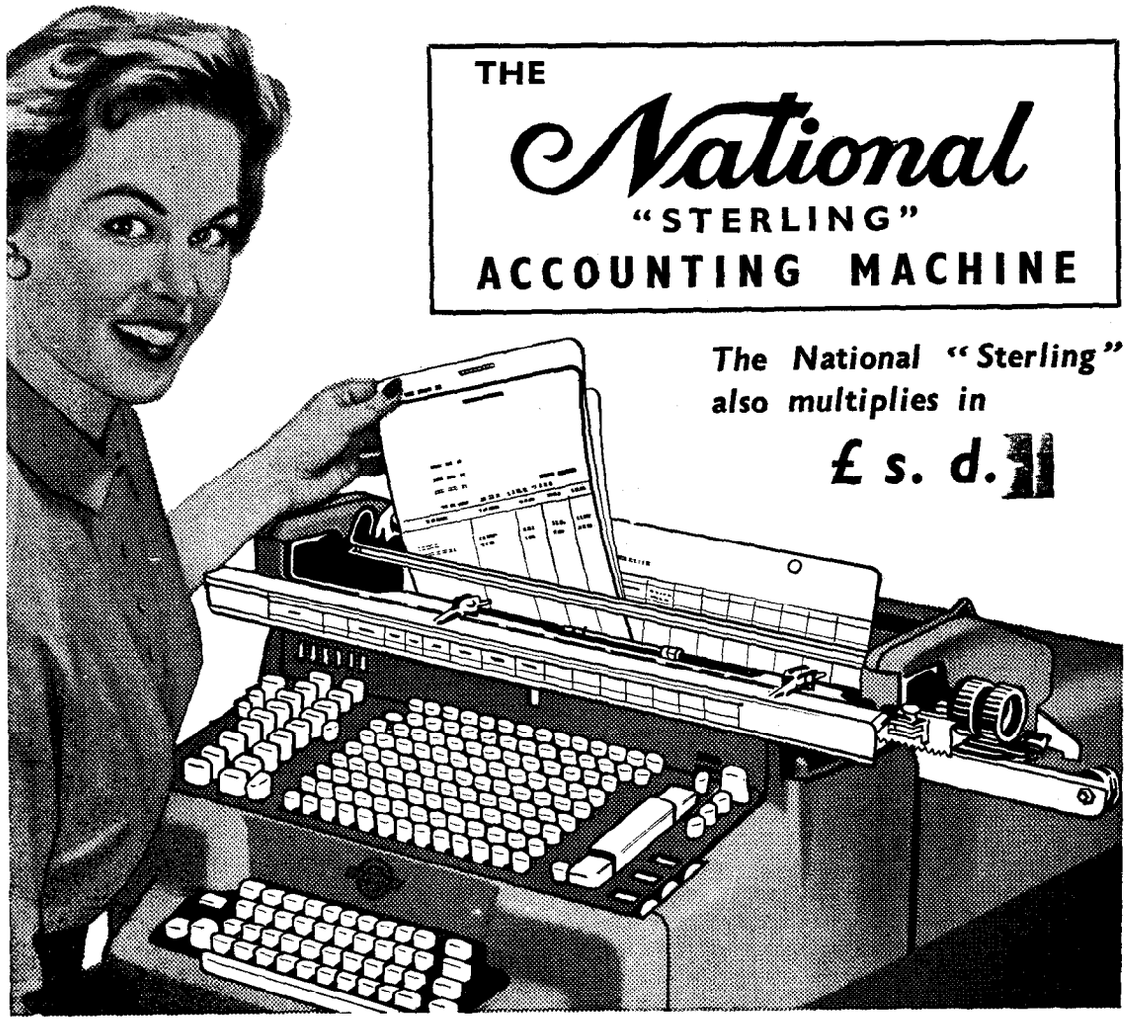

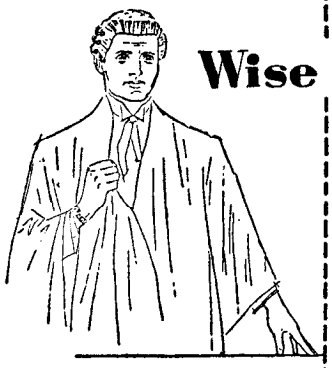

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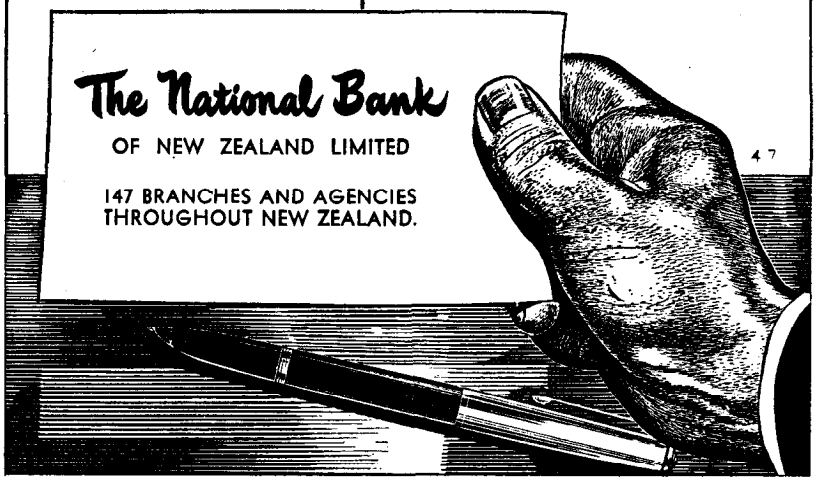

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MR JUSTICE STANTON RETIRES.

Auckland Practitioners Say Farewell.

The respect and genuine affection in which Mr Justice Stanton has been held throughout his judicial career by members of the profession were illustrated by the capacity attendance of practitioners at the Supreme Court in Auckland on October 18, when a farewell gathering was held to mark his retirement from the Bench after nine years as a Judge.

"Joe" Stanton was born in Auckland, was trained in the law there, and spent the whole of his professional life in that city. Among the various public offices he held was that of City Solicitor, in which capacity, at an uncommonly early age he succeeded his former principal and mentor, the able and colourful Tom Cotter K.C.

Mr Justice Stanton was a Judge of the Supreme Court from May 1948 until his official retirement on October 31 of this year, and his Court throughout that period was in Auckland. Consequently his retirement was a matter of special regret to all Aucklanders who, to bid him farewell, assembled in the largest numbers ever seen in the precincts of the handsome old Court.

Auckland's Tribute.

"It is fitting," said Mr B. C. Haggitt, President of the Auckland District Law Society, "that on this, the last occasion on which your Honour will sit as a Judge of this Court, the members of the Law Society of the District of Auckland should assemble before you in open Court to pay tribute to the services which your Honour has rendered to the profession and to the country, to express our gratitude to you for those services, and to wish you well in your retirement. It is also fitting that this ceremony should be held in this Courtroom which, for a country so comparatively young as New Zealand, has so long a history—a Courtroom which for over half a century has known your Honour as counsel and as presiding Judge."

The speaker said he first wished to convey the apologies of the Hon. the Attorney-General (Mr Marshall), and of the President of the New Zealand Law Society (Mr T. P. Cleary) for their inability to be present. Both the Attorney-General and Mr Cleary had sent letters and had asked him to read on their behalf messages on the occasion of His Honour's retirement. In his letter the Attorney-General explained that he would not be able to attend as the House was still sitting and he had to be on hand to deal with the flow of legislation. He regretted his inability to be present and asked that he be associated with Mr Haggitt's remarks in appreciation of His Honour's services.

Mr. Cleary's letter read as follows:

"I am very sorry that I am unable to attend your ceremony of farewell to Mr Justice Stanton on Friday next, but I have already promised to be in Masterton on that day for a Law Society function. May I be permitted to send, through you, this message on behalf of the New Zealand Law Society.

"There is no Judge to whom the members of our society would say farewell with greater feelings of regret than to Mr Justice Stanton. During his term of judicial office, now approaching ten years, he has manifested qualities of mind and of heart which have confirmed the high respect in which he has always been held by the profession and have won for him the increasingly warm regard of our members. His faculty for penetrating to the crucial points in the matters before him has enabled him to despatch business to the great satisfaction and admiration of all concerned with the work of the Courts, and this has invariably been done with the utmost consideration both to counsel and litigants.

"I am sure that both branches of the profession throughout New Zealand wish to join in the tributes you will be paying to His Honour; to express their really sincere regrets that the inexorable passage of time has brought his judicial work to a close, and to wish him every happiness during many serene years of retirement."

Mr. Haggitt said they also welcomed the vice-president of the Taranaki District Law Society (Mr J. H. Sheat) and the vice-president of the Hamilton District Law Society (Mr G. J. Foy). His Honour's duties on circuit had frequently taken him to New Plymouth and to Hamilton, and it was evidence of the esteem in which the members of those two District Societies held His Honour that they should be represented that day.

"Your Honour has had a long and distinguished career in the law," Mr Haggitt continued. "It commenced in 1900 when you entered the office of Mr Cotter, an outstanding barrister and solicitor of that day whose eminence in the profession led to his being granted silk when the patent was first introduced into New Zealand in 1907. In May, 1907, your Honour was admitted as a barrister and solicitor of the Supreme Court and as such became a member of that society on whose behalf I am speaking today. You were a member for 40 years until your Honour's elevation to the Supreme Court Bench in 1948."

Then, on Mr Cotter's death in 1913, said Mr Haggitt, His Honour commenced practice on his own account and continued to practise in Auckland until his elevation to the Bench; so that, except for a comparatively short period following his appointment to the Supreme Court Bench, His Honour's career had been pursued in Auckland. Up to the date of Mr Cotter's death he held the responsible office of City Solicitor, and it was one of the greatest tributes to His Honour's ability that, on his predecessor's death, His Honour, then a man of only 30 years of age, was immediately appointed City Solicitor in his stead. What was an almost equally outstanding acknow.edgement of Mr Justice Stanton's precocious ability (if he might use such a term) was the fact that three or four years before Mr Cotter's death, while he was away from New New Zealand for sime months on a trip overseas, His Honour acted as City Solicitor. For thirty-five years he held that office with disdinction to himself and to the great advantage of the city. In that capacity His Honour was for many years acknowledged as an outstanding master of local body law and the *Law Reports* afford a permanent record of the many and difficult cases in which he appeared as counsel in that branch of the law; but it was not only in that branch of the law that His Honour specialized. His

practice was always a large one, embracing all branches of the law, and again, the *Law Reports* reveal many cases on other branches of the law, such as company, trustee, and currency matters, in which he figured prominently as counsel.

"Despite the claims of an always busy practice," said the speaker, "your Honour found time to serve the Auckland Law Society for some years as a member of its council and as one of its delegates to the New Zealand Law Society, and such services met with their proper recognition when, from 1942 to 1944, you held the office of President."

"And now," said Mr. Haggitt, "I would turn to your Honour's career on the Supreme Court Bench during the past nine-and-a-half years. It is truly said that every man is moulded in a different pattern, and it is so with Judges. Every Judge, no matter how distinguished and able, possesses in some degree characteristics entirely his own. If the members of the profession were asked to name the two outstanding characteristics of your Honour as a Judge, I feel sure that most would single out the attributes of kindliness and of industry. Of your Honour's unfailing industry, all of us who practise in this Court have had repeated examples. On many occasions you have had to sit day after day, without respite, with one difficult case immediately followed by another: and yet, despite the strain and worry inevitable upon those sittings in open Court, you were always able to deal with chambers and ex parte matters with promptness, and deliver your reserved judgments with a minimum of delay. All of us have had experience of your Honour's willingness to deal at once with the inevitable matter of urgency, often at personal inconvenience to yourself; and we know from our own observations and also from what we have heard from your Honour's registrars and deputy-registrars of the great help you have given, and of your unsparing efforts to see that the administration of justice should not be delayed.

"For your unqualified kindness to all practitioners from the most senior down to the most junior, you have earned our grateful thanks. In hearings over which your Honour has presided, there has been a complete absence of what are euphemistically termed 'scenes in Court,' and we thank you for the courtesy and the patience which you have exhibited at all times. I venture to say that at no time has a disappointed suitor, who has lost his case before your Honour, been able to say other than 'Well, at any rate, I received a fair hearing from the Judge'".

"That, of course, is only as it should be, but your Honour has always striven to see that justice should not only be done, but that it should seem to be done, and in that you have succeeded. And now, in a few minutes, owing to the unrelenting progress of time, your Honour will step down for the last time from the Bench of the Supreme Court. Your services were recognised by Her Majesty when, to the great delight of the profession, in the last Birthday Honours the dignity of knighthood was conferred upon you.

"Your Honour retires at a time when you are still able both mentally and physically, to continue your duties, and so it was gratifying to us to read a few days ago that the Government has availed itself of your outstanding knowledge of local body affairs by appointing you as chairman of the Commission in that behalf, and that, by your acceptance of that position, the country will benefit further from your knowledge and judicial experience.

"On behalf of the members of my society, I thank you for all you have done for our profession and, not only for what you have done, but for the manner in which you have helped and assisted us. May the years of your retirement be long and happy, and marked with the recognition that you take with you not only our esteem and gratitude, but also our affection."

Taranaki and Waikato's Appreciation.

Mr Sheat said he was present that day because the Taranaki District Law Society wished that one of its own members should go to Auckland and associate himself with what had been said by the president of the Auckland Law Society.

"I am first charged," he said, "with the duty of conveying to your Honour the personal apologies of the president of the Taranaki Society (Mr McCarthy) at being unable to be present, but I will not say that I am sorry that he is not here, because the fact that he could not come has given me the great privilege of being present and of being able to associate myself with this gathering.

"In Taranaki we remember with gratitude and affection the numerous occasions on which your Honour sat there, particularly in the earlier years of your judicial career; and all that I wish to add to what has been said by Mr Haggitt is that the feeling of the practitioners of Taranaki this afternoon can, I think, be best expressed by saying that they hope that you may carry into your retirement the same feelings with regard to them that they will cherish with regard to you."

Mr. Foy, addressing His Honour, said it had long been accepted as being in the best traditions of British justice that the feelings of the members of the Bar towards individual Judges should be masked by an impersonal atmosphere. Consequently, those feelings could find oral expression only on special occasions. The president and the members of the Hamilton District Law Society welcomed the opportunity of being associated with the valedictory messages of goodwill that had been expressed to His Honour, for in the years that Mr Justice Stanton had presided over the Sessions of the Supreme Court in Hamilton, there had developed and grown in the hearts of the members of the Bar in that district a special place of affection for him.

"Many a counsel, young in Court experience, owes much to the kindly guidance and encouragement given to him by your Honour," said Mr Foy. "Many a counsel, more experienced in the practice of his art, has cause to remember the generosity with which your Honour has helped him over a hurdle. All who practised in your Honour's Court will long remember the quiet dignity and judicial calm with which its proceedings were invariably invested."

These were but a few of the reasons, both personal and professional, which had endeared His Honour to the practitioners of the district. It was against that background of kindliness and understanding that the members of his society desired that there should be expressed personally to His Honour their gratitude for forbearance and assistance to them in the past and their hope that, with the cares of office gone, His

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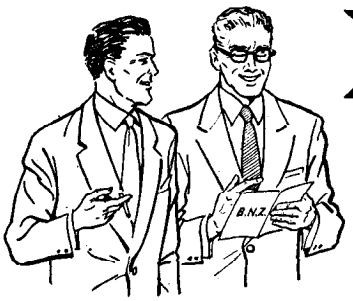

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HIS HONOUR'S REPLY.

His Honour said they would perhaps, realize how difficult it was for him to make an adequate reply to the generous expressions that had fallen from the lips of the speakers that day. He was, of course, grateful to the speakers for the sentiments expressed, and grateful to those who had attended in such numbers, giving up time to a function of this kind.

"I particularly appreciate," he said, "the action of the representatives from New Plymouth and Hamilton who have travelled far for this occasion. It is an added pleasure to know that in the circuit towns one was accustomed to visit, they were sufficiently interested to send personal representatives here today.

"Perhaps I may be allowed a few words to refer to the changes that have taken place in judicial matters since I became a barrister and solicitor. At that time there was one Judge in Auckland and, of course, but one Courtroom, and for many years that continued to be sufficient for this district. Later, another Judge came and when, somewhat later, it was suggested that two Judges were inadequate, an increase was strenuously opposed in Wellington, and it was not until my appointment in 1948 that there came to be three Judges resident in this district. Since then, under the sympathetic and benign administration of the present Chief Justice, it has been increased, first to four and now to five, although the sufficiency of that supply is, to some extent, discounted by the fact that those Judges have to sit, not only in Hamilton, but also in New Plymouth and Gisborne.

"One may, perhaps, be pardoned for making a few remarks about the practice of the law itself. You will all agree that the law is not an exact science. Too often we have had the spectacle of perhaps three Judges holding an opinion one way, and another three Judges—apparently equally qualified—holding an opposite view, and the final result, so far as the particular litigation is concerned, depends upon the accident of which Judges sit in which Court. It is to be hoped that it may be possible to evolve better methods for securing greater precision in the determination of the law; and it may be that the momentous change which has just taken place, the setting-up of a separate Court of Appeal, may contribute to that much-to-be-desired result. At any rate, we can only hope that the new procedure will so function as to be recognized as an improvement by the profession and the community generally.

"May I just take a few minutes to quote to you some words that were spoken by the Earl of Nottingham who was Lord Chancellor in the seventeenth century. It was in 1674 and the occasion was the installation of a new Lord Chief Justice of the Common Pleas, Sir Francis North, following the death of Lord Chief Justice Vaughan. His Lordship said:

> 'The death of the late Lord Chief Justice Vaughan hath deprived the King of an excellent servant, this Court of a learned Judge and the whole kingdom of a very useful Magistrate.'

"If I could feel that that could be truthfully said of me, I should desire no higher tribute.

"Addressing the incoming Lord Chief Justice, His Lordship said:

> 'I shall not need to put you in mind of the office and duty of a Judge, nor of the great examples of those great men who have sat here before you. I know you bring those excellent dispositions and endowments with you that you will deserve to be both a rule and an example to your successor. I know you will let the world see that patience is a great part of justice, that he who understands a cause at the first opening will understand it much better when he hath heard the other side. I know you will reform all delays and abuses in practice and punish all falsities and deceits in attornies.'

"In the period of nearly three hundred years since those words were spoken, the character of attorneys has vastly improved, and it would not now be normal for anyone to suggest that a Judge might be expected to punish deceits or falsities in attorneys.

"I have had the privilege of sitting in very many districts in New Zealand and I think the Dominion is to be congratulated upon the character and probity of the members of the Bar. I have had from them the greatest of assistance and co-operation, and I am sure they will realize, as the Bench also realizes, that such co-operation is of the greatest importance in the administration of justice. I have received so many expressions of appreciation, including very generous letters from the Attorney-General and the President of the New Zealand Law Society to which Mr Haggitt referred, that I leave the Bench with the feeling that my humble contribution to the great work of the administration of justice has been more appreciated than I could ever have hoped. I am glad to be able to carry the feeling into my retirement (and I hope for the rest of my life) that I have been one of the most fortunate of men.

"Again I thank you all. I do not say farewell. I shall hope to retain and renew existing friendships, and to have the opportunity of still being able to render some service to the community."

Sir Gerald Hurst.—A welcome characteristic of the legal profession in England has been the flourishing time out of number, of a humanist tradition among its exponents in all its spheres. Testimony to this is provided by the career of His Honour the late Sir Gerald Hurst, Q.C., whose death was recently recorded, says the *Law Journal* (London). A frequent contributor to the monthlies and quarterlies, mainly on topics associated with Constitutional History and Colonial History, Sir Gerald wrote books on subjects as various as *English Public Opinion after the Restoration*, the *Old Colonial System*, *With the Manchesters in the East*, and the *Manchester Politician* 1750-1912. A book of memoirs entitled *Closed Chapters* is suffused throughout with a genial humanism, full of mellow and at times nostalgic reflections on life at the Bar, in Parliament, and on the Judicial Bench. It was undoubtedly the wide range of human contacts which a Judge of County Courts makes in his daily work that gave to his duties in those spheres an especial interest, however much the consideration of the more intricate legal problems which the Chancery Courts encompass lost through his translation to the jurisdiction he was called upon to exercise. But of all his works pride of place must be given to those devoted to his beloved Inn of Court, Lincoln's Inn.

DIFFICULTIES AND COMPLEXITIES AS TO TITLE TO LAND IN NEW ZEALAND.

III. Acquisition of Title to Land by Adverse Possession as against the Crown.

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

Robinson v. *Attorney-General* [1955] N.Z.L.R. 1230, deals with a topic which has not often been before the New Zealand Courts—the acquisition of title to land by the subject, as against the Crown, by adverse possession.

The leading New Zealand case on this topic is *Riddiford* v. *The King* (1905) N.Z. P.C.C. 109. In that case the Crown brought an action in *1902* to recover possession of certain land from one Riddiford, who had been in possession of that land since 1885, having obtained possession and taken a conveyance from one B., who had been in possession since *1870*. As to the particular parcel of land concerned a search of the official records showed no claim under the New Zealand Company's Land Claimants Act 1892 *or any Crown Grant*. The parcel of land, it is true, was comprised in a grant from the Crown to the New Zealand Company in 1845; but, in 1850, on the surrender of the company's charters, the land had reverted to the Crown, under s. 19 of the Colonization Promotion in New Zealand Act 1847 (10 & 11 Vict., c. 112). Riddiford claimed that he had acquired title by operation of the Nullum Tempus Act 1769, but it was held that the right of the Crown to recover possession of the land was not barred by that Act (9 Geo. III, c. 16), unless continuous adverse possession by the occupier himself and parties under whom he claimed, for the period of sixty years mentioned in that Act was proved. The principles laid down in that Privy Council case are still applicable to New Zealand, although the Nullum Tempus Act has been repealed by s. 35 (1) of the Limitation Act 1950.

At common law, the maxim was *Nullum tempus occurrit regi*. Section 7 of the Limitation Act 1950 now provides that no action shall be brought by the Crown to recover any land after the expiration of sixty years from the date on which the right of action accrued to the Crown, or to some person through whom the Crown claims. Section 6 (3) of that Act provides that nothing in that Act shall affect the right of Her Majesty to any minerals (including uranium, petroleum, and coal). Therefore the title of the Crown to uranium, petroleum, and coal can never be barred by lapse of time. As in cases where a subject is claiming adversely against another subject, the Act does not confer title, except indirectly by barring any right of action on the part of the Crown or anyone claiming through the Crown. The party setting up the Act as a defence must prove continuous adverse possession for sixty years by himself and those under whom he claims. Occupation for a less period than sixty years is of no avail against the title of the Crown or that of its grantee in actual possession.

In *Robinson* v. *Attorney-General* [1955] N.Z.L.R. 1230, Robinson claimed a "declaration or order" that he had acquired a prescriptive title to a parcel of land adjoining the farm owned by him at Motueka.

F. B. Adams J. was satisfied on the evidence adduced that from the year 1893, and indeed from a much earlier date, the plaintiff and his predecessors in title had continuously and openly used "this almost direlict and unproductive piece of land as part of their adjoining farm". The writ was issued on June 4, 1954. Therefore, the land had been in possession by the plaintiff and his predecessors in title adverse to the Crown for the necessary period of sixty years. But, in view of the numerous and weighty submissions by counsel for the Crown, this finding of fact did not conclude the matter.

At pages 1234 *et seq.* His Honour explained at length, and disposed of a very novel submission by counsel for the Crown:

> Mr Brodie stressed the peculiar difficulties of the Crown with regard to the maintenance of possession of small fragments of land scattered along the course of rivers and streams throughout the country. He argued that there must be a discontinuance of possession on the part of the Crown before a subject can be deemed to be in possession, and said that the purpose for which the land was held and the nature of the land are all-important as to discontinuance, and that the Crown had no occasion to do the things which a private individual might do to maintain his right; that the land was unusable by the Crown for any practical purpose; that its officers would seldom or never visit it; and that the Crown would be tolerant of trespass by grazing of stock. He cited *Allen* v. *Smellie* ((1911) 31 N.Z.L.R. 305, 309) which shows that in such circumstances very little evidence may suffice to show that the rightful owner had not abandoned possession, and that tolerance of trespass not inconsistent with the purpose for which the land is held may not amount to discontinuance; *Leigh* v. *Jack* ((1879) 5 Ex. D. 264) which is, I think, much to the same effect and which was explained in *Marshall* v. *Taylor* ([1895] 1 Ch. 641, 645), as a case in which there was in no sense any exclusive possession; *Littledale* v. *Liverpool College* ([1900] 1 Ch. 19, 23)in which *Leigh* v. *Jack* is quoted as showing that, where possession or dispossession has to be inferred from equivocal acts, the intention is all important: *Lord Advocate* v. *Lovat* ((1880) 5 App. Cas. 273, 288) where it is said that every case of possession must be considered with reference to the peculiar circumstances, including the character and value of the property, and the suitable and natural mode of using it; and *Martin* v. *Brown* ((1912) 31 N.Z.L.R. 1084; 14 G.L.R. 407) which illustrates the same proposition. To these may be added *Whatatiri* v. *The King* ([1938] N.Z.L.R. 676, 690; [1938] G.L.R. 379), where some of them were discussed, and where Reed J., relied upon the absence of intention to exclude the owner. But, in my opinion, while these decisions are important for guidance where the acts are equivocal, they have no bearing where, as here, the facts lead to a clear inference.
>
> In this case there were no acts by the Crown. The intrusion was not occasional but persistent. If, as I think it did, it amounted to possession, it is irrelevant that the Crown knew nothing of it, or that the land was of little value and capable of only a limited user. There was no specific ulterior purpose for which the land might be expected to be used by the Crown, such as existed in *Leigh* v. *Jack*; and the only question arising here is whether the plaintiff and his predecessors did or did not take and maintain possession. If they did so in fact, and thus excluded the true owner by assuming the occupation to themselves, there is no need to inquire whether they had any more specific intention to oust or exclude him. It is not necessary that the possession should be "adverse" in such a sense: *20 Halsbury's Laws of England*, 2nd ed., 682; Limitation Act 1950, s. 13 (1); and, in general, the test of "exclusiveness" is whether an action for trespass would lie against a stranger to the title: *McDonell* v. *Giblin* ((1904) 23 N.Z.L.R. 660, 663). As to

the character and amount of possession necessary in a case such as this, and the extent to which possession must be exclusive, reference may be made to the remarks of Lord Watson in *Lord Advocate* v. *Young* ((1887) 12 App. Cas. 544, 553)—a case dealing with the foreshore of the sea. I do not think that what I have said conflicts with what Reed J., said in the passage referred to above—his point being that there was, in the circumstances, no *animus possidendi* as against the true owner. Possession with the *animus possidendi* automatically excludes the owner, even if it be possession with his consent, as in the case of a tenant, at will. As to " discontinuance " of possession by the true owner, it may occur even though he is unaware of the adverse possession : *Rains* v. *Buxton* ((1880) 14 C. D. 537).

While payment of rates by one party or the other may be strong evidence of possession (*Martin* v. *Brown* (1912) 31 N.Z.L.R. 1084, 1091-4 ; 14 G.L.R. 407, 410-412), the fact that none have been claimed or paid cannot negative a *de facto* possession.

The facts that members of the public passed to and fro over the land by way of access to fords, and that boys intruded in search of birds' nests, are, in my opinion, no answer to the claim, not being inconsistent with general possession by the plaintiff and his predecessors. It is equally immaterial that, when the plaintiff was told of the Crown's title in 1951, he endeavoured for a time to procure a grazing licence. Subject to questions yet to be discussed, his title had already accrued, though he did not then know his legal right. There is no estoppel.

His Honour discussed the topography of the land (a farm) to which the plaintiff had the documentary title and of the land claimed by him by adverse possession against the Crown. There was the Motueka River and a road running alongside the river, and there was an " old man " flood in February 1877. There usually is an " old man " flood in the history of the localities where these disputed and difficult questions of title boundaries obtrude themselves, for example. there was also such a flood in *Burrell's* case [1951] N.Z.L.R. 262, but it seems that from earliest living memory, the contour of the land has been substantially the same as it is now. His Honour, however, was definitely of the opinion that the parcel of land in dispute was " simply unalienated Crown land, unless, of course, it has become the property of the plaintiff." The case, therefore, is not an authority on acquisition of title to land by accretion : it is simply an authority on the acquisition of unalienated Crown land held by the Crown for no particular purpose, by the subject by virtue of possession adverse to the Crown, and there is still much land of that description throughout New Zealand.

His Honour continued, at p. 1239 :

> The accretion may still be, in whole or in part, a portion of the bed of the river. The evidence shows, I think, that it is submerged, in part at least, in normal floods and freshes. Possibly it may be completely submerged at times, but, on the material available, I would not care to hold that it would ever be so in normal floods or freshes. In my opinion, however, the fact that some or all of the land may still be river-bed is irrelevant for present purposes, as I see no reason to suppose that a prescriptive title may not be acquired in the bed of a river, whether the bed be owned privately or by unalienated Crown land, provided always that there are no special statutory provisions rendering it impossible. Apart from such provisions, there is nothing to prevent a subject from acquiring title to the bed of a river, whether by prescription or otherwise.

This is a most important pronouncement, coming as it did so soon after the case of *Attorney-General* v. *Leighton* [1955] N.Z.L.R. 750, which I discussed in the second article of this series.

Unfortunately, the question at issue between the plaintiff and the Crown could not be decided by merely considering the Limitation Act 1950, in which the old Nullum Tempus Act is now embodied. By s. 6 (2) of the Limitation Act 1950, that statute is made subject to the Land Act 1948, so far as it is inconsistent with anything contained therein. Counsel for the Crown relied on ss. 58 and 172 (2) of the Land Act 1948, and the respective predecessors of those sections, as provisions that would prevent the plaintiff from acquiring a title to all or some of the land. Thus there had to be considered by the Court the following statutory provisions :

> Under s. 172 (2) of the Land Act, 1948, no title may be acquired, or " be deemed at any time heretofore to have been acquired," by adverse possession or user, to, *inter alia*, any land : . . . that is deemed to be reserved from sale or other disposition in accordance with section fifty-eight of this Act, or the corresponding provisions of any former Land Act, . . .
>
> Section 58, in so far as it is relevant, directs that,
>
> (1) there shall be reserved from sale or other disposition of Crown land under this Act a strip of land not less than sixty-six feet in width— . . . along the banks of all rivers and streams which have an average width of not less than ten feet . . .

His Honour continued, at p. 1239 :

> But s. 172 (2) of the Land Act 1948, applies where land is *deemed* to be reserved ". The word " deemed " is inapt with reference to s. 58, and presents a difficulty. My impression is that it will include, both land actually reserved on sale or disposition, and also land that would have to be reserved on any subsequent sale or disposition. But, even so, it seems to me that s. 58 and its predecessors must be construed as referring only to cases where Crown land bordering upon a river or stream remains available for sale or disposition. That has never been the position here since the date of the Crown grant. I think it probable that the public road between granted land and the river may have been set aside in pursuance of some early progenitor of s. 58. But it is sufficient to say that I have been referred to no enactment applicable to this land at the date of the Crown grant ; that the Crown grant withdrew the land from the possibility of further sale or disposition by the Crown ; and that accordingly, in my opinion, s. 58 and its known predecessors could have no application. I may add that, had I thought otherwise no attempt could be made to apply s. 58 or any earlier similar provision without first ascertaining the precise position of the river-bank at some relevant time. I am far from being convinced that the bank of this river may not still be where it was at the date of the Crown grant, in which event the strip to be reserved would presumably be the existing public road and not any part of the land in dispute.

In the writer's opinion, the last word has not yet been said on the construction of these two very difficult provisions of the Land Act 1948.

In His Honour's opinion, the most formidable argument of the Crown was based on s. 176 of the Land Act 1948, and earlier similar enactments. Counsel for the Crown contended that no prescriptive title could be acquired by acts done unlawfully in breach of their provisions. The arguments for the Crown under this head appear to resemble those for the Crown by the late Sir John Salmond (then Solicitor-General) in *In re Bradley Brothers' Application*, [1920] N.Z.L.R. 339, which the Crown lost. But His Honour pointed out that title to land itself acquired by virtue of a Statute of Limitations is purely possessory, not resting on presumed grant but solely upon the statutory destruction of the true owner's remedy and estate. Such a title may be acquired notwithstanding the fact that the land is dedicated to charitable, public, or statutory purposes, or that the true owner is debarred by statute from alienating the land : *Bobbett* v. *South Eastern Railway Company* ((1882) 9 Q.B.D. 424) ; *Midland Railway Company* v. *Wright* ([1901] 1 Ch. 738) ; *Sampson* v. *New Plymouth Harbour Board* ((1908) 27 N.Z.L.R. 607 ; 10 G.L.R. 366) and *Whatatiri* v. *The King* ([1938] N.Z.L.R. 676, 689 ; [1938] G.L.R. 379, 386).

Now, the section makes it an offence—punishable under s. 182 by fine or imprisonment, and in the case

of continuing offences, by a further fine not exceeding £5 per day—to do various acts on or relating to " lands of the Crown ". These include, in subsections lettered as follows : (*a*) trespassing on, using, or occupying such lands ; (*b*) causing or allowing any cattle, sheep, etc., to trespass on such lands ; (*c*) removing or interfering with forest, wood, or timber ; (*d*) taking or removing any substance, including gravel. In the corresponding enactments contained in s. 39 of the Land Act, 1924, s. 33 of the Land Act 1908, s. 33 of the Land Act 1892, and s. 26 of the Land Act 1885, there were very similar provisions, including one making " unlawful trespass " an offence, but without mention of user or occupation. Accordingly, throughout the whole period covered by the evidence, it has been a statutory offence to trespass on the land, and the act of grazing cattle or sheep thereon—the only matter relied upon by the plaintiff in respect of the early years of the limitation period—has, at all times, been an offence. In all the statutes, however, from 1885 to 1948, it has been expressly provided that no one may be convicted except on the information of the Commissioner or of some person appointed in writing by him ; from which, His Honour thought, it might perhaps be inferred that the provisions were intended rather as a remedy available to the Crown than for general public protection.

After a thorough examination of the problem from all angles—including the *onus probandi*, His Honour, at p. 1242, concluded thus :

> It is clear, I think, on authorities cited above, that title may be acquired by adverse possession of land which the true owner is prohibited from alienating. The present is the converse case where the adverse occupier is prohibited from occupying. In the absence of authority, it seems to me that the same principle should apply in both cases. It is the fact of possession, and not its lawfulness, that is important ; and there can be no doubt that, in general, title may be acquired under the statute by virtue of unlawful occupation. The only difference here is that the illegality arises from express statutory prohibition. But it seems to me that there is no real difference in principle.
>
> The Limitation Act 1950, proceeds, as did the antecedent enactment, merely by prohibiting the bringing of an action after the expiration of the period, and by providing that, after its expiration, the title of the true owner shall be extinguished. There is nothing in the wording to suggest that these provisions are not to apply in the particular case where adverse occupation is unlawful because prohibited by statute. On the contrary, the wording, taken at face value, covers that case and the question is whether there must be some departure from the wording in pursuance of the principle that a man may not be heard to allege his own wrongdoing. Upon the best consideration I can give to the matter, I am not satisfied that the Legislature so intended, and I conclude that s. 176 is no answer to the plaintiff's claim.

There were two further complications involved. On May 5, 1953, the Crown had granted to the Highway Construction and Shingle Co. Ltd. a licence in pursuance of which the company had entered into possession of part of the land in dispute and proceeded to erect a gravel-crushing mill on the property. Since then, the company had continuously taken gravel from the bed of the river, transported it to the crusher, crushed it there, and transported it from the property. Although, as His Honour pointed out, once title is extinguished, it cannot be revived by resumption of possession or by any act of purported ownership on the part of the former owner (*Brassington* v. *Llewellyn* (1858) 27 L.J. Ex. 297), nevertheless the granting of the licence was, in His Honour's opinion, an assertion of ownership on the part of the Crown, which, carried into effect as it was, would have stopped time from running if done before the period of sixty years had lapsed. The awkward part was that the company had not been made a party to the proceedings against the Crown. This was the reason for the insertion by the Court of condition (c) (2) in its order, as hereinafter set out.

The second complication was the possibility that the Catchment Board, or some other local authority, might possess some form of proprietary interest in the land, on the footing that the land in question, or some portion of it, was part of the bed of the river, or was otherwise under the view, cognisance or management of such local authority : *Attorney-General* v. *Leighton* [1955] N.Z.L.R. 750 ; [This was most interesting to the writer, who has a recollection that some years ago the Catchment Boards approached the then Government, requesting that the law as to accretion be repealed—a request, I think that no Government is ever likely to accede to]. This difficulty was dealt with by the insertion of condition (c) (3) in the Court's order. In the result, the Court made the following declaration of title in favour of the plaintiff :

> " In pursuance of the Declaratory Judgments Act 1908, but not of s. 17 (1) (*b*) of the Crown Proceedings Act 1950, IT IS DECLARED in respect of the area of formed land approximately delineated in the plan Exhibit A and comprising approximately 23 acres lying to the north of the public road which is the northern boundary of plaintiff's property comprised and described in Certificate of Title Vol. 62 fo. 123 (Limited as to Parcels) (but in respect only of so much of the said formed land as lies between a continuation northwards in a straight line of the eastern boundary of the land comprised in the said Certificate of Title and a similar continuation of its western boundary)—
>
> (*a*) That the title thereto of Her Majesty the Queen is extinguished by s. 18 of the Limitation Act 1950, more than 60 years having expired since the right of action against plaintiff and his predecessors in possession first accrued ;
>
> (*b*) That plaintiff is in possession thereof with a possessory title for an estate in fee simple ;
>
> (*c*) That his estate and interest therein are subject to :
>
> (1) The right of Her Majesty in respect of any minerals within the meaning of s. 6 (3) of the Limitation Act 1950 ;
>
> (2) All rights whatsoever of Highway Construction and Shingle Company Limited under a licence granted to it by the Crown on or about the 5th day of May 1953, all of which rights (whether expressed or arising by any implication) are exercisable and enforceable in respect of the said land in the same manner and to the same extent in all respects as if plaintiff had himself granted the licence ; and
>
> (3) Any proprietary interests therein that may be vested in the Catchment Board or any other local authority by virtue of any statute."

Two important sub-rules are laid down in this case. They apply not only to claims by the subject against the Crown, but also to those by a subject against another subject.

(1) There may be adverse possession against the true owner of a whole block of land, even though it has been occupied by user of part of it only, if such partial user sufficiently evidences an *animus possidendi* as regards the whole.

(2) Although enclosure, such as fencing, is the strongest possible evidence of adverse possession, it is not indispensable. The evidence of occupation must vary with the character of the land, the use to which it may be put, and all the surrounding conditions : *Martin* v. *Brown* (1912) 31 N.Z.L.R. 1084, 14 G.L.R. 407. After the enunciation of the above sub-rule, His Honour said :

> In the present case, the evidence as to fencing throughout the period, and particularly in the earlier years, is unsatisfactory and inconclusive. But I am satisfied that, in the present case, owing to the configuration of the ground and the lie of the land in relation to the Motueka River, little was ever required in the way of fencing ; that what little was

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done was sufficient to meet the need; and that, throughout the period of occupation, there has been no material difficulty either in keeping stock within the confines or in keeping wandering stock off the property. The use made of the property by the plaintiff and his predecessors has been notorious, the neighbours looking on it as part of the farm, as, indeed, the plaintiff himself did until he was disillusioned, and as some of his predecessors may possibly have done before him.

Finally, it is perhaps apposite to mention an interesting point of Land Transfer practice touched on, but not decided, by His Honour:

> The Court is, however, in no way concerned with the questions, to some extent discussed at the hearing, whether or how the plaintiff can procure a certificate of title under the Land Transfer Act, or can register anything under the Deeds Registration Act; and nothing I may say is to be understood as having any bearing on the powers or duties of the officers who administer those Acts.

It has been the practice of the Land Transfer Department to accept voluntary applications to bring land under the Land Transfer Act, where an applicant proves sixty years' continuous adverse possession against the Crown, provided that the application has been approved by the Surveyor-General, or by some person appointed by him for the pyrpose, and has been assented to by the Governor-General. The last-named requirement has been insisted on because of ss. 19 and 185 of the Land Transfer Act 1952. Section 19 provides that land which has not become subject to that Act in any manner under the foregoing provisions of the Act may, if the same has been alienated or contracted to be alienated from the Crown in fee, be brought under the Act in manner thereinafter provided, but no application shall be received to bring under the Act land for which no Crown grant has been issued until the application has been approved by the Surveyor-General, or by some person appointed by him for the purpose, and has been assented to by the Governor-General. This procedure has in the past been availed of in cases such as adverse possession against a highway adjoining land in a Crown Grant, which has been formally closed by due process of law: *Mueller* v. *Taupiri Coal Mines Limited* (1900) 20 N.Z.L.R. 89, 110.

However, s. *10* (*b*) of the Act provides that the following land shall be subject to the provisions of the Act: All land hereafter *alienated or contracted to be alienated from the Crown in fee.* The words which I have italicized also appear in s. 19 previously cited.

It may be, of course, that these words have a different meaning in the two sections. If they have the same meaning then perhaps there has been a *casus omissus*: that certain land which the Act states is subject to the Land Transfer has had no machinery provided by which a certificate of title may be issued therefor. If that is the true position, then it is submitted that the Act should be amended by supplying the necessary machinery. Now that title as against the Crown is governed by the Limitation Act 1950, it may be that s. 16 supplies the answer. That section provides that no warrant shall be necessary for the issue of a certificate of title to any person in whom land has become vested, whether before or after the commencement of the Act, for an estate in fee simple in possession *by any Act of the General Assembly* or by any Proclamation or Order in Council under the express provisions of any Act since March 1, 1871. The point which I desire to make is that any person such as the plaintiff in *Robinson's case*, who has had a declaration from a Court of competent jurisdiction that he has an estate in fee simple, should be able, on the production of a proper plan of survey, to have issued in his favour a fully-guaranteed certificate of title.

CORRESPONDENCE.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Dear Sir,

Re THE ROMFORD ICE CASE.

May I suggest that both Professor Davis and Mr Salter Nicholls have missed the real point of social significance arising out of the *Romford Ice* case, at any rate as far as New Zealand is concerned viz: that the compulsory insurance in respect of employers' liability should extend to cover not only the employer against his own negligence (and that of his servant for which he is vicariously responsible), but also the personal liability of the negligent servant just as in the case of third-party motor-car claims, the negligent driver (who may be a servant) is covered for the consequences of his negligence equally with the owner.

It is surely an anomaly that in those cases in which the negligent servant is negligent in the driving of a motor-vehicle, he has with respect to third parties (and with respect to passengers as far as contribution is concerned) a statutory indemnity which he does not have if he is negligently operating some other machine.

It is as inevitable that workers will be negligent in the course of their work, as it is that drivers will be in the course of their driving, and the same considerations which lead some authorities to press for the doctrine of absolute liability for accidents on the highway apply to industrial accidents.

The quantum of the risk can be assessed and made a charge on industry, and it is contrary to the present day trend to hold that a worker should be stripped of his life's savings as a result of a moment's carelessness in the earning of his livelihood. There is no point in saying he can insure against risk. The fact that he faces this liability will no more deter the worker of means from negligent conduct or bring him voluntarily to insure against it, than it did the negligent driver in the days before compulsory car insurance.

It has also been argued that the liability of the negligent worker to an action for contribution is a potent weapon in ensuring truth, and that the issue of third-party proceedings against a worker will ensure that he is not a party to a collusive claim based on his own admitted negligence. If there were any truth in this, it would suffice to answer that there would be an equal inducement for a negligent workman falsely to deny his negligence when so sued.

Surely the true facts are as likely to emerge when the witness has no personal interest at stake as when he has? The plaintiff in a damages case always has an interest, but it could hardly be contended that all plaintiffs lie. This approach completely ignores the instinctive reaction of any man to clear himself of culpable conduct, as witness the hotly contested evidence in motor claims in which the witness for the defence is a driver who is insured.

This is, I suggest, a matter which well deserves the attention of the Law Revision Committee.

Yours, etc.,
J. L. CHARTERS.

Auckland,
November 7, 1957.

PAGES FROM THE PAST.

IV. The Irreconcilables. Barton v. The Bench or Vice-Versa ?

By R. J.

I.

" For myself, I hope the authorities are as I believe them to be—I believe that they ought to be if they are not—that the deprivation of the power to act in a professional capacity, with regard to barristers and solicitors, should be the appropriate punishment for contempt, and not imprisonment or a fine." (*In re G. E. Barton* (1876) 1 N.Z. Jur. Jo. (N.S.) 109.

With this remarkable dictum, persisted in despite *In re Wallace* (1867) 36 L.J.P.C. 9 ; 4 Moo. P.C. 157, which was cited to him, Sir James Prendergast C.J., in 1876, touched off a process of disputation, acrimony, and tu quoque-ism, not alone in his own Court but throughout the legal profession as a whole. Before the unseemly quarrel between himself and a Wellington barrister, Mr G. E. Barton, burnt itself out in a welter of judicial determination and Irish doggedness, the aggrieved practitioner had served a term of one month in the public prison, found himself a seat in Parliament, and pursued his cause, through the Premier, Sir George Grey, and the Attorney-General (Mr F. Whitaker), right into the House itself.

The matter reached a long-overdue conclusion, or at least achieved that stage of anti-climax which is the bedfellow of eclipse, when the Colonial Secretary (Mr G. S. Whitmore, later Sir George Whitmore) summarily closed a prolix correspondence with Mr Barton in a reply purporting to be the Government's last word on the subject of Mr Barton's demand for an inquiry into the conduct of Prendergast C.J. and Richmond J. The missive comprised " twenty-six closely printed Blue Book pages " which were described in Mr Barton's last epistle as " a mockery of an answer and a miserable farce." A now thoroughly impatient and umbrageous Irishman (Mr Barton had been admitted to the Bar in Ireland and Victoria before coming to New Zealand) charged that the Government had neither hand nor part in the authorship of the letter," and had not even read it before it went to the printer."

In fact, he told the Colonial Secretary that he was all too familiar with the judicial mentality that had conceived the text of the communication. He wrote :

> " Every sneer it contains, every turn of thought and form of expression, betrays the writer. I have had sixteen years' experience of his sneers, evasions habits of thought, and modes of expression, and I feel no doubt about them whenever I meet them, whether in newspaper articles, in Court judgments, or anywhere else."

The whole affair was regrettable in the first place ; but what was even more to be regretted was the inability of everyone concerned to dispose of it in a constitutional manner. When it finally got to Parliament it was obvious that the Government was ignorant of what the constitutional course was, and there was apparently no one in the House in a position to enlighten them. The result was that the action taken by Parliament, at the instance of the Government, was neither just nor wise. When the Attorney-General urged that the charges made by Mr Barton were not " sufficiently grave or specific " to warrant the removal of the two Judges, or either of them, and moved that Mr Barton's petition be not received, the motion was carried on the voices.

This left the Judges without means of vindication and the petitioner without prospect of redress. But it directed Mr Barton's belated attention to his prime folly A petition of a couple of dozen lines—the bare bones of his charges –might have succeeded. His three to four thousand word indictment merely bored and bewildered those it was intended to impress.

It may be that Mr Barton would have served his own interests and those of his numerous clients better if he had recalled to himself rather more often the warning given to litigants by one of his own countrymen. It was Jonathan Swift's view that one of the greatest disadvantages by which a suitor was hedged was that his lawyer must proceed with great caution and decorum if he did not want to be " reprimanded by the Judges and abhorred by his brethren as one who would lessen the practice of the law." The suggestion of the satirical Dean that *trop de zele* in a good cause could easily be construed as contempt of Court obviously found an echo in the mind of Prendergast C.J.

Long-standing Feud.

There can be no doubt that the Prendergast-Barton feud had smouldered for a long time before it flamed up for all to see. By his own reckoning the unhappy and outraged barrister had just about reached the end of his tether when he was the victim of a stinging rebuke from the Chief Justice, who complained that he had " with unpardonable discourtesy " kept the Court waiting. In spite of a sense of injury and humiliation he kept his tongue between his teeth, on his own admission to the detriment of his pleading. In fact, he spent the greater part of his time in Court, notably when he should have been addressing the jury, which in despair he refused to do, composing a letter of protest to the Colonial Secretary, with an urgent request for an inquiry into the wrongs which he alleged he had suffered over a long period.

Came the end of the hearing and Mr Barton forwarded his letter from the Courthouse. Later, back in his office in Brandon Street, he decided that the Judge should be informed of what he had done. He wrote to His Honour and instructed his clerk to deliver the letter to the Chief Justice " as I was leaving for my home at Petoni—an hour at which I considered that another case in which I was interested would have been concluded. In fact, I had been told that the jury had delivered its verdict."

Mr Barton's pangs of conscience, like the proverbial chickens of destiny, came home to roost in a most unexpected fashion. He immediately found himself facing a Rule of contempt. Arguing his own case, he endeavoured to explain the circumstances of the writing of the letter. It had been sent " from a sense of honour," and, although he addressed it to the Chief Justice in " the spirit of an accuser, without familiarity or the tone

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MR. C. MEACHEN, Secretary, Executive Council

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Active Help in the fight against TUBERCULOSIS

OBJECTS: The principal objects of the N.Z. Federation of Tuberculosis Associations (Inc.) are as follows:

1. To establish and maintain in New Zealand a Federation of Associations and persons interested in the furtherance of a campaign against Tuberculosis.

2. To provide supplementary assistance for the benefit, comfort and welfare of persons who are suffering or who have suffered from Tuberculosis and the dependants of such persons.

3. To provide and raise funds for the purposes of the Federation by subscriptions or by other means.

4. To make a survey and acquire accurate information and knowledge of all matters affecting or concerning the existence and treatment of Tuberculosis.

5. To secure co-ordination between the public and the medical profession in the investigation and treatment of Tuberculosis, and the after-care and welfare of persons who have suffered from the said disease.

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THE NEW ZEALAND FEDERATION OF TUBERCULOSIS ASSNS. (INC.)

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It teaches them services useful to the public, handicrafts useful to themselves, and promotes their physical, mental and spiritual development, and builds up strong, good character.

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In Peace, War or National Emergency the Red Cross serves humanity irrespective of class, colour or creed.

MAKING A WILL

CLIENT "Then, I wish to include in my Will a legacy for The British and Foreign Bible Society."
SOLICITOR: "That's an excellent idea. The Bible Society has at least four characteristics of an ideal bequest."
CLIENT: "Well, what are they?"
SOLICITOR: "It's purpose is definite and unchanging—to circulate the Scriptures without either note or comment. Its record is amazing—since its inception in 1804 it has distributed over 600 million volumes. Its scope is far-reaching—it broadcasts the Word of God in 820 languages Its activities can never be superfluous—man will always need the Bible."
CLIENT "You express my views exactly. The Society deserves a substantial legacy, in addition to one's regular contribution."

BRITISH AND FOREIGN BIBLE SOCIETY, N.Z.
P.O. Box 930, Wellington, C.1.

of former friendship," he submitted that he was " neither discourteous nor improper." He had made a request for an inquiry, and his letter contained no threat that he would demand an investigation, a circumstance which the Judge mentioned as possibly having some relation to causes pending before the Court.

It was a long and heated argument, longer even than the letter to the Colonial Secretary, and through it all the defendant barrister pleaded that he was " not guilty by word or deed of any disrespect to the Court in this matter." Was his letter to the Colonial Secretary libellous of His Honour ? Was it insulting to the Judge ? Was it intended to influence His Honour's judgment in a case pending before the Court ? He submitted with respect that nothing of the sort was involved.

" I am not craving mercy or anything of that kind in defending the rights of the Bar and suitors in my person," he declared.

The Chief Justice remarded caustically that he was not aware that Mr Barton's brother practitioners had asked him to defend them, and then commented on the strange lack of written authorities referred to him.

Mr Barton conceded his poverty in this respect, but turning to Lord Campbell's *Lives of the Chancellors* (Vol. 6, 414) he quoted Erskine's defence of the rights of the Bar. Some imperfect attempts at extemporaneous citation always found His Honour " of contrary opinion," and it now became apparent that the Chief Justice was strongly of the view that the proper penalty for contempt was not gaol or a fine, but professional ruin. In opposition to the Court's right to deprive a barrister of even a portion of his position at the Bar, Mr Barton cited *In re Wallace* (1867) 36 L.J. P.C. 9 ; 4 Moo. P.C. 157.

The Bench : That case is against you. It distinguishes between what is done as a suitor and what is done as a barrister in his professional character.

The only case the Chief Justice cited in support of his view was this same *In re Wallace*, which was clearly an authority against *him*, since Lord Westbury in giving judgment said : " To offences of this kind there has been attached by law, and by long practice, a definite kind of punishment—fine and imprisonment." Could it be more clearly stated that contempt committed by a barrister professionally could not be properly punished by suspending him from practice ? That penalty was reserved for crime or moral delinquency.

Yet His Honour the Chief Justice seriously stated as his opinion that the offence of writing a distasteful letter to a Judge should be punished as severely as a criminal act. That His Honour did not refer to this matter in the course of his judgment left his remarks concerning " the deprivation of power to act in a professional capacity " in the undeveloped condition of an obiter dictum—a fact which gains added significance from a later judgment.

He knew of no more damaging statement in the Supreme Court than a charge that justice was administered in that Court with habitual hostility to a particular practitioner, His Honour said in giving judgment. Not only the Judge's personal dignity, but the dignity of the Court was involved. No one, he said, could have doubted if Mr Barton had uttered in Court the words he had written and caused to be delivered [the letter was not read in Court] a gross insult was offered and intended. No person, he held, could be justified in writing to a Judge of the Supreme Court informing him that his conduct was complained of. Let him make his protest, and it would reach the Judge in the due course of time. He could only conclude that the letter was " offensive, disrespectful, insulting and a contempt of Court."

> " Nevertheless, I feel greatly impressed by the fact that Mr Barton repeatedly assured the Court that if the letter was insulting he did not intend it, and that, if the Court was, notwithstanding his arguments, of the opinion that it was insulting, he was ready to submit himself to the Court. I therefore accept Mr Barton's assurance that he intended no disrespect to the Court or to myself as a Judge of the Court. The Rule is discharged."

Mr Barton, thanking His Honour, said the Chief Justice in his judgment had " approached the subject in a spirit of perfect justice and propriety."

It Happened Before.

All things considered, it is not surprising that observers of the feud at this stage should have recalled another illustration of the extreme views held by Judges on this subject of suspension. Seven years earlier, Sir George Arney C.J., the predecessor of Sir James Prendergast, became embroiled over the same subject with the then Premier, Mr. William Fox (as he then was) a member of the English Bar, whose admission in New Zealand had been delayed for several years until 1868 because he refused to give proofs of previous good character on the grounds that such a requirement was an insult to a gentleman. On this occasion he had written a letter to a Wellington newspaper, couched in brilliant and vigorous language, and in terms of considerable sarcasm, deriding the Chief Justice and protesting against the affront he deemed to have been inflicted on the profession by the judicial recognition as a member of the Bar of a practitioner who had been convicted of forgery in England.

By complaining of what he called " contempt of the Bar," the Premier found himself threatened with contempt of Court with, in the words of the Chief Justice, a liability to be " struck off the rolls, or at least suspended from practice." A lively correspondence began between Arney C.J. and Mr. Fox, with a contribution from Acting Judge Ward, who had dissented in the strongest terms from the findings of the permanent Judges (Johnston, Gresson, and Richmond JJ.) who had ranged themselves alongside the Chief Justice. (16 *New Zealand Law Journal*, 4).

In the end, the Chief Justice decided that it would " ill correct . . . . the scandal by proceeding against a high political functionary in the mode which we have pointed out." Only public interest, he said, withheld his hand in a matter which he was confident " would have received the approval of the Privy Council." But it could be that he was to some extent swayed by Mr. Fox's warmly presented contrary views. The Premier wrote that His Honour " over-estimated the power of his Court," and ridiculed the idea of an apology to the Judges from one who was their " equal in social rank and a nice sense of honour." Such a violent and peremptory course as the Chief Justice proposed was " not law," notwithstanding His Honour's prophetic assurance concerning Privy Council reactions, said Mr. Fox. Such an intention would require only to be put to the Privy Council to ensure its immediate negation. Similarly Judge Ward laughed at the opinion

of the permanent Judges and warned that an appeal to the Privy Council would be " sharply reproved," and the order at once discharged.

It was surely singular that one Chief Justice after the other, in cases of an apparently harmless letter, should pronounce opinions on the law of contempt which were altogether unfounded. There was absolutely no precedent for striking off the rolls or suspension.

In all its essentials the story to date is as commonplace a tale as could well be conceived. If it is to be distinguished at all from the innumerable analogies it possesses in both private and public life, the distinction is to be found in the celerity with which the " kiss-and-make-up " atmosphere of the first episode was dissolved. No mystery enshrouds the second round. With the discharge of the Rule for contempt, the petition and its charges were withdrawn. Mutual friends of the petitioner and the Chief Justice induced a withdrawal by means of " certain representations to the effect that, upon such withdrawal . . . . the petitioner would henceforth have no cause for complaint." In the belief that he could rely upon the engagements given, Mr Barton expressed a willingness to bury the hatchet.

The truce was short-lived, and within a very brief period another petition was on its way to the Colonial Secretary with a dual explanation. The petitioner considered that he was still being exceptionally treated, and, in addition, he recognised as a challenge the opinion of the Colonial Secretary that his " alleged partiality and exceptional treatment " were not matters for the Government; that the " conduct of a Judge towards practitioners in his Court " was in the view of the Government " the mere routine of the Court in which the Government has no authority to interfere in any way." The conduct of the business of the Supreme Court was a matter for the discretion of the Chief Justice alone.

Irish ebullience and a strongly developed sense of personal justice could tolerate no more. Not only had the Colonial Secretary " caused the Judges to feel that they were practically beyond control," but Mr Barton sensed endeavours to cause him to " be looked on as a person to whom insults might be offered, and upon whom imputations might be cast in Court with impunity, not only without rebuke, but with the certainty that such conduct would not be displeasing to the Judge." Then Mr Justice Richmond arrived in New Zealand and Wellington, and joined with the Chief Justice in what the harassed barrister obviously regarded as an unholy alliance. Mr Barton displayed little restraint and absolutely no inhibitions in the story he poured out to the Colonial Secretary. " Sneers and disparagement " were his portion, " sapping his reputation for honesty and ability."

His petition explained how he feared to repel the insults that were tendered to him openly. Self-defence became increasingly futile, and clients began to believe that he could not succeed in Court. He declared that, where costs lay in the Judge's discretion, his clients could always expect to have to pay. In the unlikely event of success, costs were *almost* always refused, but he *was never awarded costs in Chambers.*

(To be concluded.)

FIFTY YEARS OF " HALSBURY."

Thursday, November 14, 1907 is a date unrecorded in any legal history, yet it saw an event which had a revolutionary effect upon the legal profession. On that day was published the first volume of the first edition of *The Laws of England*, under the general editorship of the eighty-two-year-old Earl of Halsbury, thrice Lord High Chancellor.

The name " Halsbury " connoted then the great lawyer, already a legend. From that date it meant also the work to which he gave his name and to whose genesis he contributed his wisdom and knowledge. Today the name " Halsbury " is recognised throughout the English-speaking world as a respected authority on the whole law of England.

In 1907 men who are now passing into legal history dominated the legal scene. Lord Loreburn was Lord High Chancellor, Lord Alverstone was Lord Chief Justice, and Sir H. H. Cozens-Hardy was Master of the Rolls. Contributors to the first edition included Sir Edward Carson (titles *Bonds* and *Clubs* and *Sherriffs and Bailiffs*), Sir Edward Clarke (*Extradition*), Lord Haldane (*Royal Forces*), Sir Rufus Isaacs (*Stock Exchange*), and Sir John Simon (*Trade and Trade Unions*).

Looking back now from the golden jubilee of *Halsbury* it is difficult to realise the conditions under which lawyers then practised. At that time their libraries comprised law reports and individual text-books, but no legal encyclopaedias, apart from *Forms and Precedents* of which publication had just begun. The solicitor faced with a legal problem of any magnitude at all was by circumstances compelled to send the papers to counsel who, in turn, had no alternative but to study the multitude of available text-books and browse amongst the reports and statutes. Every legal problem, in fact, involved a great deal of complex research.

With the publication of *Halsbury* all this changed. As the volumes appeared, one by one, on the solicitor's shelves, he found that he had now a key to the whole breadth of the law within the confines of a single work. Each proposition of law was digested and recorded, the authorities collected, and indices and cross-references supplied. A question which had hitherto involved hours of patient research on the part of counsel could now be answered in very much shorter time at the solicitor's desk. Even in the case of involved points incapable of positive answer it became possible to start the necessary research armed with a list of authorities and pointers.

Halsbury has thus had a fundamental effect upon the speed and ability of solicitors to solve their clients' problems, and whilst it has somewhat reduced the volume of opinion work it has made easier the work which must continue to be referred to counsel.

Lawyers were profoundly interested in the new venture, and asked themselves whether *Halsbury* was to be the prototype of a further attempt to codify English law. In 1866 a Commission had sat to consider the possibility of preparing a digest of the law, of " exhibiting in a compendious and classical form the law as embodied in judicial decisions ". The Commission recommended a digest of definite propositions arranged under titles,

(Concluded on p. 372.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Queen Elizabeth Building.—The Middle Temple with Fleet Street to the east and the Strand to the west makes a deep impression upon the practitioner visiting it from overseas. Its wonderful Hall, with its magnificent hammer-beam roof and oaken screen, its tables—one given to the Inn by Queen Elizabeth I,, and another made from the hatch of the *Golden Hind* in which Sir Francis Drake, himself a member of the Inn, sailed round the world—and its unrivalled set of royal portraits by Van Dyck and Kneller, make the Middle Temple not the least picturesque of the four Inns of Court. Here Goldsmith lived and Blackstone wrote, and amongst its members were Dickens, Thackeray, Cowper and Sheridan. Last month Queen Elizabeth the Queen Mother, a Royal Bencher of the Inn, revisited it to open the new building that bears her name and is constructed in the classical style and of red brick on the site of the former library damaged beyond repair by enemy action during the last war. This was opened in October, 1861, by the Prince of Wales, afterwards Edward VII, who was also a Royal Bencher of the Middle Temple. The new chambers are decorated with the armorial bearings of both the Queen Mother and Queen Elizabeth I, and the centre facade of the building has upon it a fine carving of the Temple's ancient emblem, the Lamb and Flag. One of the new tenants is Lord Goddard L.C.J., and he no doubt has had the option to acquire one of the four garages that add a modern touch and are the first to be erected in the long history of the Inne.

Happy Birthday.—The experience of John George Diefenbaker, Prime Minister of Canada, gives to the November-tired law student a glimmer of hope. According to *Time*, he " shot through " the Law School of the University of Saskatchewan in one year, and during the summer of 1919 he hung up his brand-new diploma in a 9 ft. by 9 ft. office in a tin-fronted building in nearby Wakaw (pop. 400), which was a town that drowsed six days a week, only to swarm on Saturdays with farmers in town to shop, socialize, swap drinks from common bottles, and sometimes blow smouldering feuds into bloody violence. Out of such a quarrel came the young lawyer's first case. The client : a farmer charged with shotgunning a neighbour to death. The trial came on John Diefenbaker's twenty-fourth birthday. The Crown Prosecutor made a solid case and the Judge issued a strong charge, all but directing the jury to convict. Instead, the jury returned a verdict of not guilty. Later, Diefenbaker met the foreman and asked how the jury reached its decision. " We talked it over," said the foreman, " and somebody said : ' After all, it's the kid's first case.' Then somebody else said : ' And it's his birthday.' That settled it. We all voted for acquittal.' "

The Freedom of the Press.—In an address to the 19th annual general meeting of the National Association of Justices' Clerks' Assistants, Lord Dening has some cogent observations upon abuse of the freedom of the Press and the value of our proceedings for contempt of Court in maintaining a high standard of newspapers. " The newspaper reporters," he says, " are present in Court to represent the public. They are there to see that everything is rightly and well done. They are indeed, in this respect the watchdogs of justice. But the free Press has its responsibilities. This freedom is not to be abused. In some countries it is abused, so much so that in every sensational trial, the Press see all the witnesses beforehand and get them to give statements at first-hand, second-hand, and fourth-hand and publish it all before the trial—so much so that the mental atmosphere of the community is such that a fair trial is almost impossible. Indeed, when I was in Chicago eighteen months ago I saw for myself. We arrived at the Union Station, as we were told that there was a murderer wanted there. He was alleged to have killed a policeman. Later I spoke to an American Judge who said : ' He won't be taken alive.' The next day there was this great headline in the press : ' Slayer of Cop captured,' which being interpreted means that the murderer of a policeman has been arrested. There were photographs of the man who had been beaten up. There were full statements of his so-called confession. There were lists of his previous convictions. All before his trial. That could not be contemplated here with our procedure and our attitude towards contempt of Court."

Reportorial Modesty.—" I was not present when the Court pronounced this rule ; being, at that time, confined with the gout. Therefore this is all that I can report, as from myself. But as I am informed that Lord Mansfield was very copious in delivering his opinion, and laid down several positions which well deserved to be kept in memory, I have, by the favour of a very eminent barrister and most excellent note-taker, procured the following account of what his Lordship said : which, being more accurately taken down than I should have been myself capable of taking it had I been present, must therefore be more satisfactory to the reader, than any report of my own could have been."—Note of the reporter, Sir James Burrow, Master of the Crown Office and a Bencher of the Inner Temple in *Alderson* v. *Temple* (1768) 4 Burr. 2235, 2237.

Punishment for Assault.—*The Yorkshire Post* has raised what it calls a problem of punishment—whether fines are sufficiently deterrent in cases where violent assaults have been committed. The most recent case referred to in the article, concerned a man aged twenty-one who pleaded guilty to assaulting a girl aged sixteen. It was said that he struck her in the face, knocked her over a low wall, and then kicked her in the face. The only provocation he alleged was some remark he said she had made, and the girl denied having said anything to offend him. The man was fined £10. The *Justice of the Peace and Local Government Review* (14/9/1957) makes this comment : " We entirely agree that it is right for Magistrates to hesitate before sending people to prison, especially if they are young and have not been to prison before, but we think the *Yorkshire Post* does a public service by raising the question of the best way of dealing with a type of offence that is all too prevalent—attacks by young and strong men upon elderly people or young girls. As it points out, the protection of the public, and of the police who are responsible for maintaining law and order are involved, and we would add that however anxious the Magistrates may be to consider the interests of an offender, the protection of the public may have to outweigh such considerations."

FIFTY YEARS OF "HALSBURY."

(*Concluded from p. 370.*)

with references and examples, but nothing came of it.

The *Law Journal* said that *Halsbury* "indicates a revival of interest in the great scheme of codification which was the dream of leading lawyers and publicists of the last generation, and it establishes by concrete evidence the possibility of an English Code". "It is the sort of project", observed the *Daily Chronicle*, "that the State might be expected to undertake. But no Government in this country has shown, or is likely to show, much zeal for such a project. Where the State hesitates private enterprise has stepped boldly in".

Of course the more conservative elements of the profession were less enthusiastic. "I don't think", a cautious barrister told a reporter, "that the work can abolish certain text-books on important and thorny subjects". A north-country solicitor who had been invited to subscribe was more forthright. "I beg to inform you", ran his curious warning to the publishers, "that if any more of these letters are sent to me or my wife I shall give up taking *The Times* newspaper".

Halsbury's Laws has naturally grown in size. When the first edition was announced it was expected to extend to twenty volumes; in fact it comprised thirty-one. The second edition, published between 1931 and 1942 under the editorship of Viscount Hailsham, added six volumes, and the third edition, which began to appear in 1952 under the guidance of Viscount Simonds, will occupy forty-two volumes.

The changes in the list of titles into which the work is divided in each edition mirrors the continually shifting pattern of life to which the law must mould itself. The first edition title *Dependencies, Colonies and British Possessions* became, in the second edition, *Dominions, Colonies, Possessions, Protectorates, and Mandated Territories*, and is now simply *Commonwealth and Dependencies*. *Compulsory Purchase of Land and Compensation* in the first two editions has now ominously changed to *Compulsory Acquisition of Land and Compensation*. There was no separate title *Divorce* in the first edition. The Edwardian flavour of *Electric Lighting and Power* sparked off the modern title *Electricity*. *Poor Law* is replaced by *National Assistance*. *Town and Country Planning* appeared for the first time in the second edition; *Workmen's Compensation* was born and died there. *Telegraphs and Telephones* is to have *Wireless* added to it. Aircraft, which in the first edition was afforded a page and a half of the title *Street and Aerial Traffic* now boasts 243 pages and a title of its own. *Fire Services*, and *Housing*, and *War and Emergency* are all new to the third edition. *Partition* and *Sewers and Drains* have disappeared.

The lawyer does not usually like statistics, but an occasional boggling of the imagination is a stimulating experience. As he surveys the volumes of the third edition on his shelves he may care to know that, when it is completed, he will have 25 million words covering 33,000 pages printed with 150 tons of type. If he has time to read a novel a week (which is unlikely) he could change over to *Halsbury* and read it comfortably in a year.

Whilst it is, of course, designed primarily for English use, the third edition of *Halsbury* is converted for use in Australia, Canada and New Zealand. *Every fifth volume is followed by a converter volume which contains, in the form of a supplement, a note of all the changes necessary to adapt the contents of the preceding five volumes for use in Australia or Canada* as the case may be. A similar system is operated for New Zealand subscribers. But even in its English form the work is used as a persuasive authority in courts wherever the English common law has taken root.

Upon this anniversary one looks instinctively forward to *Halsbury's* centenary. What will *Halsbury* be like in the year 2007? What form will it take: paperback, magnetic tape or micro-card? What new titles will it contain: *Atomic Power and Transport? Robots and Automation? Rockets and Space Navigation?* What law will be administered and practised by our grandchildren and great-grandchildren? One thing is certain, at least; *Halsbury's Laws of England*, which has survived and adapted itself to fifty tempestuous years of upheaval and change, will still be there to assist and guide them.

—R. P. M.

The Presentment of Good and Lawful Men.—There is no part in all the excellent frame of our Constitution which an Englishman can, I think, contemplate with such delight and admiration—nothing which must fill him with such gratitude to our earliest ancestors—as that branch of British liberty from which, gentlemen, you derive your authority of assembling here ont his day.

The institution of juries, gentlemen, is a privilege which distinguishes the liberty of Englishmen from that of all other nations; for, as we find no traces of this in the antiquities of the Jews, or Greeks, or Romans, so it is an advantage which is at present solely confined to this country; not so much, I apprehend, from the reasons assigned by Fortescue, in his book *de Laudibus, cap.* 29—namely, "because there are more husbandmen and fewer freeholders in other countries", as because other countries have less of freedom than this; and, being for the most part subjected to the absolute wills of their governors, hold their lives, liberties, and properties, at the discretion of those governors, and not under the protection of certain laws. In such countries it would be absurd to look for any share of power in the hands of the people.

And, if juries in general be so very signal a blessing to this nation, as Fortescue, in the book I have just cited, thinks it—"A method," says he, "much more available and effectual for the trial of truth than is the form of any other laws of the world, as it is farther from the danger of corruption and subordination;—what, gentlemen, shall we say of the institution of grand juries, by which an Englishman, so far from being convicted, cannot be even tried, nor even put on his trial in any capital case, at the suit of the Crown, unless, perhaps, in one or two very special instances, till twelve men at the least have said on their oaths that there is a probable cause for his accusation. Surely we may, in a kind of rapture, cry out with Fortescue, speaking of the second jury, "Who then can unjustly die in England for any criminal offence, seeing he may have so many helps for the favour of his life, and that none may condemn him but his neighbours, good and lawful men, against whom he hath no manner of exceptions" (Henry Fielding, A Charge Delivered to the Grand Jury at the Sessions of the Peace held for the City and Liberty of Westminster, on Thursday, June 29, 1749).