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A YEAR OF LEGAL ACHIEVEMENT.

AT the national level, the year 1957 closes on a threefold note from the legal point of view, and if the general situation is one of prospect and intent rather than of faits accomplis, it is none the less interesting for that. Three changes are pending in the ensuing year. The long-awaited permanent Court of Appeal will commence its Sittings in February; a new Crimes Bill is drafted, and will come up for Parliamentary consideration in 1958 (political portends permitting); and orthodox and accepted principles of income-tax policy will give way to the pay-as-you-earn system of assessment and collection. Each in its own way has a special significance for practitioners.

The most important innovation may well be the establishment of a permanent Court of Appeal, if only because the necessary legislation has been passed and the transition from the out-of-date Supreme Court divisional system to a full-time appellate Court has been effected. The achievement of a permanent Court of Appeal represents the fulfilment of a professional ambition that may be said to have had its genesis in the Bill sponsored fifty years ago by the then Attorney-General, Mr (later Sir John) Findlay. At that time, it was little more than an idea; but the goal was further pursued six years later by Sir Alexander Herdman who compromised, perforce, with the two divisions of the existing Court of Appeal. Once again change waited on necessity; and it was many years later, at the retirement of Sir Michael Myers from the Chief Justiceship in 1946, that the question was again seriously canvassed. His Honour commended the notion to the profession, and, in the following year, in the face of judicial differences of opinion, the New Zealand Law Society accepted the proposal in principle. A third Bill got no further than the drafting stage; but, in 1954, the Legal Conference at Napier affirmed the principle of a separate Court of Appeal in most emphatic fashion. Two years later, all-round agreement on the subject was reached; and, at the Conference in Christchurch at Easter this year, the Attorney-General (the Hon. J. R. Marshall) announced the Government's intention to legislate for a permanent Court. The Act has since been placed on the Statute Book.

A new milestone in the legal history of the Dominion has been passed, and there will be general satisfaction in the profession that this country has aligned itself with England, Canada, Australia, and Eire, in the adoption of an appellate system which cannot fail to serve both convenience and expedition. Not only will the appointment of permanent Appellate Judges produce the better service that specialization always ensures, but it must have a beneficial effect on the work of both the Supreme Court and the Court of Appeal, to say nothing of the health and wellbeing of the Judiciary. If there is one aspect of the new development, apart from general principles, that is worthy of special mention, it is the appointment, direct from the Bar, of the learned and highly esteemed president of the New Zealand Law Society, Mr T. P. Cleary, to the Bench of the new Court. The news of his appointment was received with acclaim and appreciative satisfaction by the profession in every part of the Dominion.

The proposed new Crimes Bill, even with the political reversal that has taken place since its introduction late in the last Session of the thirty-first Parliament, must command widespread professional attention. While recognizing the need for a comprehensive revision and consolidation of an Act based on the codification of 1893, the profession generally welcomed the deferment of the measure until next year for the fullest possible consideration. Social development in the past three or four decades, with a shift of emphasis from the preservation of property to the sanctity of personality, has created a demand for formidable and material alterations in the law as it stands today. The members of the profession most closely associated with criminal proceedings have long been aware of the need for a new standard of penalties and procedures, but it has happily preserved a proper appreciation of the need for the most closely reasoned and judiciously planned approach to the question of amendments. The decision to avoid unduly hasty action in the matter has consequently been hailed widely as a prudent one.

The Income Tax Assessment Act 1957 comprises the third major innovation of the year. It provides, under the style of "P.A.Y.E.", for the collection of what will in future be known as "social security income tax" on a "pay-as-you-earn" basis. Although the Act legislates only for a new system of collection, and involves no serious departure from established principles of tax assessment and tax gathering, it represents a revolutionary change in procedure that must have an important effect on the financial processes of the community, and, in turn, on the business of a substantial section of the law practitioners of the Dominion. Intricate adjustment will call for the most careful study, and the profession may well find that the new enactment is one of the most important legislative developments for many years.

SUMMARY OF RECENT LAW.

ARBITRATION.

Award—Setting aside—Umpire going to Office of Solicitor of One Party after making up His Mind as to Award—Umpire, at Such Office, expressing His Previously-unexpressed Thoughts and having Them put into Legal Form by Such Solicitor—Award set aside for Non-observance of Ordinary Rules for Administration of Justice—Order referring Arbitration back on Terms, owing to Delay in bringing Motion before Court. An umpire had in fact completely made up his mind as to what he was about to do and say before he entered the office of a solicitor actively engaged on one side of the arbitration; and he then put into words his thoughts, which previously had lacked expression, and these words were put into legal form by the solicitor concerned. On motion to set the award aside. *Held*, That the arbitrator must observe the ordinary well-understood rules for the administration of justice, which requires something more than the care which was given to the proceedings in this case; and that the award must be set aside and referred back to the arbitrators. An order was made setting the award aside and referring it back to the arbitrators upon terms, owing to the long delay in bringing the motion before the Court. *In re and Arbitration between Moore and MacGregor.* (S.C. Auckland. October 23, 1957. Turner J.)

CONVEYANCING.

Release of Restrictive Covenants. *107 Law Journal*, 451.

"Settlement" by Surrender of Life Interest. *224 Law Times*, 7.

INDUSTRIAL UNION.

Nomination to Office of Secretary-Treasurer—Nomination rejected by Executive of Union before Annual Meeting—Rule Stating Candidate for Such Office should be "a member qualified to carry on the business of the Union"—Executive members acting in Excess of Jurisdiction in Bona Fide but Mistaken View of Extent of their Powers—Court's Power to protect Contractual Rights of Union Members—Industrial Conciliation and Arbitration Act 1954, s. 57. P. had been a financial member of the defendant Union since 1943. In May, 1957, in conformity with the Union rules, he was duly nominated more than three days before the annual meeting for the position of secretary-treasurer. He was informed by the secretary, S., that the nomination would be brought to the notice of the Union members at their annual general meeting on June 26. Without any prior notice to P., the Union executive met before the annual meeting; S., who was the only other nominee, was present at the meeting of the executive which decided that P. was not qualified for the position, and his nomination was refused. At the general meeting, the Union's president told the meeting that the nomination was not accepted by the executive because of P.'s lack of qualification. S. was declared elected by default. Rule 12 of the Union's rules provided that "subject to the control of the Union, the Union should be governed and its funds invested by the executive . . .". Rule 15 set out the duties of the holder of the office of secretary-treasurer, who should be "a member qualified to carry on the business of the Union". P. sought an injunction to compel the Union to take a postal ballot of its financial members for the election of a secretary-treasurer. *Held*, 1. That Rule 15 did not state that the secretary-treasurer should be qualified "in the opinion of the Executive", and the Executive purported to refuse P.'s nomination at a time when P. had the right to a postal ballot 2. That the executive assumed a jurisdiction they did not possess and acted in a bona fide but mistaken view of the extent of their powers under the Rules. 3. That the Court could intervene to protect the contractual rights of members under their Rules by which, under s. 57 of the Industrial Conciliation and Arbitration Act 1954, all members are bound, and could grant an injunction against an executive which, on a misconstruction of a Union rule, had refused to let P.'s nomination go forward to election for office. (*Lee* v. *Showman's Guild of Great Britain* [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175, and *Watson* v. *Smith* [1941] 2 All E.R. 725, followed. *Craddock* v. *Davidson* [1929] St. R. Qd. 328, referred to.) An injunction to compel the Union to take a postal ballot of its financial members for the election of a secretary-treasurer was granted. *Prior* v. *Wellington United Warehouse and Bulk Store Employees Industrial Union of Workers.* (Supreme Court. Wellington. 1957. October 8, 18. Haslam J.)

INSURANCE.

Indemnity Policies: Mixed Claims for Negligence and Dishonesty. *107 Law Journal*, 437.

LANDLORD AND TENANT.

Lease—Relief against Forfeiture—Lease with Right of Renewal and Option to Purchase—Required Notice of Renewal out of Time—Court's Unfettered Discretion to grant Relief to Lessee—Matters Moving Court to grant Relief to Applicant—Property Law Act 1952, ss. 120 (3) (a) (ii), 4. The Court, by virtue of s. 120 (4) of the Property Law Act 1952, has a wide and unfettered discretion to grant relief to a lessee under a lease giving him a right of renewal and an option to purchase. (*Evans* v. *Bartlam* [1937] A.C. 473, applied). The lease contained a right of renewal and an option to purchase. The lessor, who was the lessee's father, died after the expiration of the time for giving notice of renewal, but before the term of the lease had come to an end. Notice of renewal was given to the lessor's solicitor fourteen days late, and the trustee of the lessor's estate refused to waive the strict requirements of the lease. The lessee applied, under s. 120 of the Property Law Act 1952, for relief against forfeiture of his right of renewal and his option to purchase. *Held*, granting the relief sought on payment of costs, That the several factors having sufficient cogency and weight to cause the Court to exercise its discretion in the lessee's favour, included the following: (*a*) The property itself was in no way jeopardised by the lessee's conduct; (*b*) The property had been well-farmed and considerably improved since the lessee had taken it over. (*c*) The breach was trifling and the passage of time was short; and, as a result of the breach the lessee was likely to be a heavy loser not only of valuable rights, but also of substantial sums of money he had expended on improving the property in reliance on his right ultimately to acquire the property. (*d*) The close relationship of father and son between the lessor and the lessee, and the likelihood that strict technical compliance between them would not be insisted upon. *In re Lease, McNaught to McNaught.* (S.C. Invercargill. September 6, 1957. Henry J.)

Termination of Tenancy—Tenant without Continuing Lease—Onus on Tenant to prove Tenancy not terminable by Month's Notice—Property Law Act 1952, s. 105. Tenancy—Notice to Quit—Year's Notice under s. 17 (1) of Tenancy Act 1955 taking Premises out of Provisions of Part IV and Relevant Sections—Notice to Quit also required to terminate Tenancy—Possession—Property required by Local Authority for Public Work—Rongotai Airport Development Scheme—Wellington City Corporation authorized to undertake a "public work"—Wellington City and Empowering Amendment Act 1929 (L.) *s. 9 (1)—Tenancy Act 1955, s. 17 (1).* The giving by a landlord of a year's notice under s. 17 (1) of the Tenancy Act 1955 does not more than render Part IV and ss. 45, 46, and 47 of that statute not applicable to the premises. To terminate the tenancy, a notice to quit is required. The notice that the premises are required for a public work and the notice to quit may properly be combined. Once it appears that a tenant has no continuing lease, it is for him, under s. 105 of the Property Law Act 1952, to allege and prove that the tenancy was not one terminable by one month's notice, and not for the landlord to allege and prove that it was. (*Card* v. *Bilderbeck* [1951] N.Z.L.R. 296, followed. *Hodge* v. *Premier Motors Ltd.* [1946] N.Z.L.R. 778, distinguished.) The improvement of the aerodrome under the Rongotai Airport Development Scheme was, on the material date, a work which the plaintiff corporation was authorized to undertake by virtue of s. 9 (1) of the Wellington City and Empowering Amendment Act 1929 (L.), it was a "public work" within the Public Works Act 1928, and accordingly a "public work" under s. 17 (1) of the Tenancy Act 1955. *Wellington City Corporation* v. *Aircraft Engineering Co. of New Zealand Ltd.* (S.C. Wellington. September 2, 1957. Hutchison J.)

LICENSING.

Offences—Found on Premises after Closing-hours—Onus of Proving any Person to be a Lodger on Person alleging the Fact—Standard of Proof—"Satisfies the Court"—Licensing Act 1908, ss. 192, 194 (1). Proof beyond reasonable doubt is not required under s. 192 of the Licensing Act 1908 (where the normal burden of proof is reversed) to displace the presumption that the accused was not a lodger; and the burden

may be discharged by satisfying the Court of the probability (as distinguished from the mere possibility) of that which the accused is required to establish. In order to succeed, the accused must induce the Court to accept his allegation that he was, in fact, a lodger as being probably true. The mind of the Court does not need to reach that degree of certainty which is necessary where the onus rests on the prosecution, but it must weigh the probabilities, and may accept the conclusion which arises therefrom even though some element of doubt may remain. Under s. 194 (1) the prosecution is under no obligation to adduce even prima facie proof that the accused was not a lodger and was not otherwise entitled to be on the premises; it rests on the accused to " satisfy " the Court—that is to say, the mind of the tribunal must arrive at the required affirmative conclusion by acceptance of, and belief in, the allegation—but the decision may rest on the reasonable probabilities of the case, which may satisfy the Court that the fact was as alleged, even though some reasonable doubt may remain; and, if probabilities (when considered in the light of all such doubts as may arise with regard to them) do in fact persuade the Court, that is all that is necessary to entitle the Court to say that it is " satisfied " of the fact. (*R.* v. *Carr-Briant* [1943] 1 K.B. 607; [1943] 2 All E.R. 156, followed. *Willis* v. *Burnes* (1921) 29 C.L.R. 511, *Ex parte Patmoy* (1944) 44 S.R. (N.S.W.) 351, referred to.) *Robertson* v. *Police.* (S.C. Greymouth. October 3, 1957. F. B. Adams J.)

LIMITATION OF ACTION.

Actions against Crown and Public Authorities—Third Party—Writ issued against Defendant served within Year of Accrual of Cause of Action—Third-party Notice issued within Such Year by Defendant against Third Party—Six Months later, Plaintiff moving for leave to join Third Party as Second Defendant—Third Party not prejudiced in its Defence or otherwise by Delay in Application to join it as Defendant—Leave given to bring Action against Third Party by Joinder as Second Defendant—" As soon as practicable "—" Delay in bringing the action "—Limitation Act 1950, s. 23 (1) (a), (2). The words " as soon as practicable " in s. 23 (1) (*a*) of the Limitation Act 1950, mean as soon as the claimant and his advisers either know or ought to have known or to have ascertained the circumstances which provide the alleged cause of action relied upon. The words " the delay in bringing the action ", as used in s. 23 (2), are to be construed in the same manner as the identical words in s. 4 (7), i.e., as referring to the period since the end of a year from the date when the cause of action accrued. (*William Cable & Co. Ltd.* v. *Trainor* [1957] N.Z.L.R. 337, referred to.) In the present case, the cause of action founded on alleged negligence accrued on December 15, 1955. On December 5, 1956, the plaintiff issued a writ against the defendant, which, on December 12, 1956, filed its statement of defence. On December 18, 1956, the defendant, with leave, issued a third-party notice against the third party. The third party filed its defence on January 24, 1957. The action was eventually set down for trial at the Sittings commencing on July 23, 1957; but on July 19, the plaintiff filed a motion for leave to join the third party as second defendant and notified the third party of the filing of such motion and enclosed a copy of the amended statement of claim which it would file if leave to join the third party as defendant were granted. The action was not heard at those Sittings. On motion by the plaintiff, brought on for hearing at the Sittings in October, 1957, for an order granting leave under s. 23 (2) of the Limitation Act 1950 to bring an action against the third party by the process of joining it in the action, *Held*, 1. That no failure to give notice as soon as practicable arose until December 18, 1956; but in the circumstances set out in the judgment, the third party was not materially prejudiced in its defence or otherwise by the delay since that date in commencing action against it; because, since approximately December 13, 1956, it had been a party to the action confronted with the allegations sought to be made against it, and it had been engaged upon the task of meeting those allegations in its capacity as third party in the action. 2. That, having regard to all the circumstances of the action, and giving considerable weight to the unusual circumstances that the third party was already a party to this action, confronted with and bound to meet and contest the very allegations on which the plaintiff sought to rely to support his claim against the third party, it was just to grant the leave sought, subject to the condition that the plaintiff must proceed against the third party on the draft statement of claim produced to the Court without amendment. 3. That an order joining the third party as second defendant in the action should be made. *McIvor* v. *Brown & McCheane Ltd.* (*Te Awamutu Electric Power Board, Third Party*). (S.C. Hamilton. October 29, 1957. Shorland J.)

MAGISTRATES' COURTS.

Practice—Referee—Building Dispute referred to Referee for Inquiry and Report—Proceedings not in Accordance with Rules—Duty of Referee—Failure of Party to give Three Days' Notice of Intention to vary Report—Party not precluded from challenging Validity of Report for Non-compliance with Statute and Rules—Rehearing granted—Magistrates' Courts Act 1947, ss. 62, 77—Magistrates' Courts Rules 1948, rr. 184-187. A Magistrate, on hearing a claim in a building dispute, of his own motion, referred the proceedings to a referee for inquiry and report pursuant to s. 62 of the Magistrates' Courts Act 1947. The referee, a building contractor, submitted his report in two parts. When the matter again came before the Court, counsel for the appellant, for whom the respondent company had built a house, expressed dissatisfaction with the referee's report and requested leave to call further evidence. The Magistrate declined to hear evidence from the appellant, notwithstanding that the appellant had a counterclaim of £295 at stake. The respondent's counsel asked for a further reference back to the referee as to questions raised by him, and not adequately dealt with by the referee in his final report. This was declined by the Magistrate, who gave judgment for the respondent company on the basis of the referee's report. The appellant sought a rehearing pursuant to s. 77 of the Magistrates' Courts Act 1947, on the ground that the reference was not conducted according to the Magistrates' Courts Rules 1948, on the ground that the reference was not conducted according to the Magistrates' Courts Rules 1948, and was defective. *Held*, 1. That the reference was invalid for the following reasons: The referee did not fix a day and place for hearing the inquiry and give notice thereof in the prescribed form to all parties entitled to attend; and the inquiry was not conducted in the same manner, as nearly as circumstances will permit, as if the inquiry were the hearing of an action. 2. That the referee's duty was not to report back to the Court in the capacity of an expert witness or as an arbitrator, but to conduct a quasi-judicial hearing involving the taking of evidence; and it was doubtful, on the evidence, whether any formal order of reference appointing the referee was ever made, and uncertain whether the Registrar on the filing of the original report, gave notice of it to all parties. (*Freeman* v. *Dartford Brewery Co. Ltd.* [1938] 3 All E.R. 120 and *Ell* v. *Harper* (1886) N.Z.L.R. 4, C.A. 141, followed.) 3. That failure to give three days' notice of intention to vary the referee's report did not preclude the appellant from challenging the validity of the whole report for non-compliance with the relative statute and Rules, more particularly as the appellant's counsel had expressed to the Magistrate dissatisfaction with the report before the Magistrate gave judgment upon the basis of the report. An order was made directing directing the case to be reheard in the Magistrates' Court. *Stewart* v. *Speight Pearce Nicoll Davys Limited.* (S.C. Hamilton. 1957. September 5. T. A. Gresson J.)

PRACTICE.

Payment into Court—Payment of Amount less than sum claimed with Denial of Liability—Defendant not Estopped from proving no Liability beyond Sum so paid—Magistrates' Courts Rules 1948, r. 132 (3). A payment into Court of a sum less than the amount claimed is an admission of liability for the amount paid in and no more; and the defendant, by any such payment, is not estopped from proving that he had no liability beyond the sum he has paid in, even though the notice and payment were beyond the seven days referred to in the Rule. *Gibson* v. *Wells.* (Whangarei. 1957. July 30. Herd S.M.)

Trial—Notice requiring Trial before Jury—Notice to be given before Each Session at which Action, if set down, will come to trial—Judicature Amendment Act (No. 2) 1955, s. 2 (2), 3. A notice by either litigant requiring an action to be tried before a jury, under s. 2 (2) of the Judicature Amendment Act (No. 2) 1955, must be given before each Session at which the action, if set down, will come to trial. *Kay* v. *Baker.* (S.C. Hamilton. July 25, 1957. Finlay A.C.J.)

PROPERTY LAW.

Partition—Action between Tenants-in-Common—Court required to order Sale unless Good Reason to Contrary—Proof of Disadvantage to Defendant if Partition ordered—Sale by Public Auction at which Parties may bid—Court not empowered to Order Valuation and Compulsory Sale of One Party's Interest—Property Law Act 1952, s. 140. A property, consisting of a Native leasehold of twenty-four acres, four of which were in orchard, and an adjoining leasehold block (the Wakarewa Block) containing eight acres, seven of which were in orchard, was operated

as an orchard by the father of P. with the assistance of P.'s husband, and R. By the father's will, the Native leasehold was devised to P., and the Wakarewa Block was devised to P. and R. as tenants-in-common in equal shares. After death, the whole orchard continued to be run as one unit under the management of P.'s husband, and R. was paid a rental in respect of his interest in the Wakarewa Block. In an action by P. for partition, R. resisted the application and prayed for an order for sale pursuant to s. 140 (1) of the Property Law Act 1952. *Held*, 1. That. as the defendant was interested in the property to the extent of one moiety, s. 140 (1) of the Property Law Act 1952 requires the Court to order a sale unless there is good reason to the contrary, the proof whereof is on the plaintiff (*Pillar* v. *John Odlin & Co. Ltd.* [1951] N.Z.L.R. 220, followed.) 2. That, on the facts, the plaintiff had not discharged that onus, as the defendant would be disadvantageously affected by the making of an order for partition; that there was no sufficient reason to refuse his application for a sale (the sale to be by public auction at which the parties would be entitled to bid); and that it was not open to the Court to direct a valuation and compulsory sale of one party's interest. *Quaere*, Whether the physical partition sought by the plaintiff would be a breach of the Local Subdivision in Counties Act 1946. (*Patel* v. *Premabhai* [1954] A.C. 35, referred to.) *Polden* v. *Rowling*. (S.C. Wellington. September 4, 1957. McCarthy J.)

PUBLIC SERVICE.

Appointment -Appeal by Clerk receiving yearly Salary of £695 against Appointment of Clerk at yearly Salary of £460—Appeal successful—Appellant given Such Clerk's Position and Salary—Voluntary Acceptance thereof—Appellant's Future Rights as Officer of Public Service governed by Statutory Provisions governing accepted New Appointment—Public Service Act 1912, s. 21—Public Service Amendment Act 1927, s. 17 (1) (c)—Public Service Amendment Act 1951, s. 4 (3)—Public Service Regulations 1950 (S.R. 1950/216), Reg. 126 (1). The plaintiff was employed in the Inland Revenue Department at Dunedin as a clerk at a salary of £695 per annum. On May 10, 1954, one P. was appointed as a cadet in the same office. The plaintiff appealed successfully, under s. 17 (1) (c) of the Public Service Amendment Act 1927, against B.'s appointment, whereupon the plaintiff was appointed to the position held by B. who received a salary of £460 a year. Upon the plaintiff's appointment, her salary was fixed at £460. The Public Service Commissioner informed her by letter that there was no objection to her remaining in her previous position. She did not reply. After a few days in B.'s position, she was promoted to other duties. She claimed the difference between the salary of B. and what she had been receiving. *Held*, That the Commissioner and the plaintiff had assumed that the successful determination of the appeal in her favour necessarily set aside or vacated B.'s appointment, and had proceeded on that basis; the plaintiff had voluntarily accepted such appointment which expressly placed her on the salary offered for it, and thenceforth her rights as an officer of the Public Service were governed by the statutory provisions regulating the new appointment. *Parker* v. *Attorney-General*. (S.C. Dunedin. November 1, 1957. Henry J.)

PUBLIC REVENUE.

Income Tax—Purchase of Trading Stock—Livestock bought at Public Auction as Part of Farm sold as Going Concern—Commissioner apportioning as the consideration Attributable to a Definite Part of Whole Consideration—Such Figure finally "deemed to be the price paid for the trading stock" by the Purchaser—Commissioner not entitled to fix Another Figure to be deemed "the market price which the stock realized"—Land and Income Tax Amendment Act 1926, s. 5 (1)—Land and Income Tax Amendment Act 1949, s. 9 (1). (Land and Income Tax Act 1954, ss. 101 (1), 102 (1).) Section 5 (1) of the Land and Income Tax Amendment Act 1926 (s. 101 (1) of the Land and Income Tax Act 1954) and s. 9 (1) of the Land and Income Tax Amendment Act 1949 (s. 102 (1) of the Land and Income Tax Act 1954) cannot be used cumulatively as they operate for entirely different sets of facts. When the Commissioner, under s. 5 (1) of the Land and Income Tax Amendment Act 1926, for the purposes of the Land and Income Tax Act 1926, has attributed to the livestock sold with other assets of a farming property for one comprehensive and global figure a definite part of the consideration which was less than the market price or true value at the date of the sale, he has fixed finally and for all the purposes of the statute a figure which is "deemed to be the price paid for the trading stock" by the purchaser, subject to an appeal, where the determination is erroneous in fact. It is not open to the Commissioner to move to s. 9 (1) of the Land and Income Tax Amendment Act 1949 to fix another and new figure which is to be deemed to be the market price which the stock realized on the day of the sale. *So held* by the Court of Appeal.

On September 24, 1952, the mortgagee of a farm, who also had securities over the live and dead stock, sold the same through the Registrar of the Supreme Court under his powers of sale by public auction as a going concern for £21,000. The taxpayer was the highest bidder, and became the purchaser. There was no separate price for the livestock. A week before the sale, the livestock was valued by stock auctioneers at £6,471. In his income-tax return in respect of the income derived by him during the year ending March 31, 1953, in which the sale was held, the taxpayer returned the cost of the stock to him as £6,471. Pursuant to s. 5 of the Land and Income Tax Amendment Act 1926, the price of the stock acquired by the taxpayer was determined by the Commissioner of Inland Revenue as being £4,711 14s. 7d. This sum was determined by apportioning the total price realized at the auction sale for the farm land, plant, and stock, sold as a going concern, in proportion to the Government valuation of the land, the market value of the plant, and the market value of the stock if it had been sold separately by auction in the local sale-yards. On an appeal from the decision of a Magistrate on a Case Stated by the Commissioner, Henry J. held that the Commissioner's assessment under s. 5 (1) of the Land and Income Tax Amendment Act 1926, was correct, since, as the livestock was not sold for a consideration "less than the market price or the true value thereof on the day of the sale", s. 9 (1) did not apply; and the taxpayer was not entitled to enter the figure of £6,471 in his return of income. On appeal to the Court of Appeal from that judgment, *Held*, per totam curiam, 1. That the assessment made by the Commissioner, invoking s. 5 (1) of the Land and Income Tax Amendment Act 1926, was soundly made and no objection could be taken to it. 2. That, in any case, applying s. 9 (1) of the Land and Income Tax Amendment Act 1949, the price realized by the livestock on the day of the sale by public auction of the farm as a going concern was "the market price . . . on the day of the sale" in the light of the circumstances in which the sale was made. Per Turner J., Section 9 (1) applies only to voluntary transactions in the nature of a gift and not to ordinary business transactions: it does not apply to a sale by public auction of a farm (including livestock) as a going concern made by a mortgagee through the Registrar of the Supreme Court. (*Finch* v. *Commissioner of Stamp Duties* (1929) N.Z.P.C.C. 600, and *Commissioner of Stamp Duties* v. *Card* [1940] N.Z.L.R. 637, applied.) Appeal from the judgment of Henry J. [1956] N.Z.L.R. 799, dismissed. *Edge* v. *Commissioner of Inland Revenue*. (C.A. Wellington. October 11, 1957. Hutchison J. Turner J. McCarthy J.)

Income Tax—Race-winnings—"Assets" Method of Assessment—Proof of Extent to which Such Winnings increased Assets taken into Account—Land and Income Tax Act 1954, s. 32. Where a taxpayer claims that the Commissioner when applying the "assets" method of assessing his income, has included race-winnings in the assessable income, it is not sufficient for the taxpayer to show that his betting has resulted in his winning a certain sum from his betting in the income year. He must show the extent to which such winnings went to increase the assets which the Commissioner took into account when assessing the income in that year. Unless this is showing, the taxpayer completely fails in discharging the onus of proof which the statute places on him to show that the Commissioner's assessment was wrong, and, if so, what amendment should be made to that assessment. *Barrett* v. *Commissioner of Inland Revenue*. (S.C. Invercargill. 1957. August 9, 27. Henry J.)

PUBLIC WORKS.

Compensation for Land taken—Commercial Orchard—Method of Valuation of Fruit Trees—Measure of Compensation for Disturbance and Temporary Loss of Production—"Market value"—Finance Act (No. 3) 1944, s. 29 (1) (b). Where compensation is claimed for the loss of an orchard or arises from injurious affection in respect of an orchard, the trees are a part of the land concerned in the claim. Section 29 (1) (*b*) of the Finance Act (No. 3) 1944, which provides that the value of the land for the purposes of compensation is its market value, applies to land planted with trees, and, if the trees are to be separately valued, to the valuation of the trees themselves. The trees should be valued by reference to the prices paid on recent sales of orchards in the open market, so as to determine what part of the total price was paid for the trees, and so to arrive at the average price paid per tree. By the analysis of a sufficient number of orchard sales, it should be possible to arrive at a "market value" for trees lost through the taking of the land

The Church Army in New Zealand

(Church of England)

(A Society Incorporated under The Religious and Charitable Trusts Act, 1908)

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The Church Army.

FORM OF BEQUEST:

"I give to the CHURCH ARMY IN NEW ZEALAND SOCIETY of 90 Richmond Road, Auckland, W.1. [*Here insert particulars*] and I declare that the receipt of the Honorary Treasurer for the time being or other proper officer of the Church Army in New Zealand Society, shall be sufficient discharge for the same."

or injurious affection. A claimant is entitled to recover any expense or loss to which he has been put by reason of being disturbed, in addition to the value of his land. He is also entitled to be compensated for incidental loss—including loss of production and of profit—incurred in connection with a business carried on upon the land, but only to the extent of his unavoidable net losses after allowing for taxation. (*Horn* v. *Sunderland Corporation* [1941] 2 K.B. 26, applied.) *Pomona Orchard Ltd.* v. *Minister of Works and Poverty Bay Catchment Board.* (Land Valuation Ct. Gisborne. October 17, 1957 Archer J.)

TRANSPORT.

Offences—Motor-vehicle without Current Registration Sticker—Period of Grace given to Persons otherwise observing obligations before end of Previous Year—Transport Act 1949, s. 15 (1) (b)—Motor-vehicles Registration and Licensing Regulations 1949, R. 15 (1) (a). The proviso to s. 15 of the Transport Act 1949 approves a period of grace for the fixing of a licence-label to those who in all other respects have observed their obligations before the expiry of the last licensing period. *Auckland City Corporation* v. *Brady.* (Auckland. 1957. August 15. Spence S.M.)

Notification of Change of Ownership—Motor-vehicle hired under Hire-purchase Agreement—Hirer the new "Owner"—"Owner"—Transport Act 1949, ss. 2, 26. The effect of s. 26 of the Transport Act 1949 is that a person who has hired a motor-vehicle to another person under a hire-purchase agreement must notify the name and address of the hirer as the new "owner" of the motor-vehicle. *Police* v. *Cocurullo.* (Whangarei. 1957. July 29. Herd S.M.)

Offences—Penalties—Deterrent Effect—Desirability of Uniformity in Penalties imposed for Similar Offences—Duty of Magistrates in imposing Penalties for Transport Offences. It is never possible to say that a penalty imposed in any one case, or even in a series of cases, is other than a very tentative indication of what the penalty should be in any other. In maintaining the independence of judgment of every Magistrate, it is inevitable that there will be some degree of variation in the conclusions reached by different judicial officers. (*Ambard* v. *Attorney-General of Trinidad* [1936] 1 All E.R. 705,; *British Fame* v. *MacGregor* [1943] 1 All E.R. 33, and *Jamieson* v. *Jamieson* [1952] 1 All E.R. 875, referred to.) Every Magistrate, in imposing penalties, is entitled to the exercise of an independent judgment, but it must be a controlled judgment. He must act, not only with impartiality, but also with detachment and without feeling. Only the minimum penalty imposed by way of punishment which will operate as a deterrent is justified, and any excess is unjustified. Consequently, the least penalty that will operate as a deterrent is the proper penalty. It is desirable, even necessary, that there should be some uniformity in the penalties imposed in respect of similar offences. The circumstances pertaining to each case, and to each offender, should alone determine the quantum of the penalty. However wide a scope may be allowed to judicial independence, a Magistrate should take notice of, and be influenced by, the penalties imposed by his brethren in cases of similar or almost similar character so as to secure uniformity of administration. (*Lawrence and Bullen* v. *Aflalo* [1904] A.C. 17 and *Rushton* v. *National Coal Board* [1953] 1 All E.R. 314, applied. *Waldo* v. *War Office* [1956] 1 All E.R. 108, referred to.) *Fleming and Others* v. *Commissioner of Transport: Wheeler* v. *Police.* (S.C. Hamilton. September 27, 1957. Finlay J.)

Third-party Risks Insurance—Claim for Contribution—A Common-law Claim to pay Damages on Account of the Accident—Holder of Licence driving on Owner's Orders or with Owner's Permission indemnified as if He were Owner, subject to Exceptions applying to Him personally—Transport Act 1949, s. 67 (1)—Law Reform Act 1936, s. 17 (1) (c). A claim for contribution by one tortfeasor from another under s. 17 (1) (c) of the Law Reform Act 1936 is not an equitable claim, but is a common-law claim under the statute. (*Stevens* v. *Collinson* [1938] N.Z.L.R. 64; [1938] G.L.R. 12, overruled.) Once it is established that the original claim was one for damages for personal injury, a claim for contribution under s. 17 (1) of the Law Reform Act 1936 is itself, for the purposes of s. 67 (1) of the Transport Act 1949, a claim "to pay damages on account of the accident", i.e., that the person against whom the claim for contribution is made should pay such share of the damages of the injured person as the Court should hold to be just and equitable as between himself and the other tortfeasor. (*N.I.M.U. Insurance Co. Ltd.* v. *Viles* [1939] N.Z.L.R. 981; [1939] G.L.R. 616, and *McManaway* v. *Aird* [1947] N.Z.L.R. 90; [1946] G.L.R. 441, applied.) The words "indemnified to the same extent as if he were the owner" in s. 67 (1) of the Transport Act 1949, give the holder of a motor-driver's licence who is driving "with the authority of the owner" an indemnity that is particular to such driver, arising, as it were, on a separate statutory contract of insurance in his favour, and, subject to the exceptions which apply to him personally; it is the same indemnity as the owner was originally given, subject to exceptions attaching personally to him. (*Digby* v. *General Accident Fire and Life Assurance Corporation Ltd.* [1943] A.C. 121; [1942] 2 All E.R. 319, and *Richards* v. *Cox* [1943] 1 K.B. 139; [1942] 2 All E.R. 624, applied.) *Collinson* v. *Wairarapa Automobile Association Mutual Insurance Co.* (C.A. October 11, 1957. Hutchison J. Turner J. McCarthy J.)

TRUSTS AND TRUSTEES.

Duties of Trustees—Income or Capital—Trustees with Powers of Absolute Owners—Sale of "scoria stone and rough soil" from Land forming Part of Estate—Net Proceeds of Such Sale to be regarded as Capital and distributable accordingly. The testatrix by her will provided for the sale and conversion of her estate and gave to her trustees "all the powers of absolute owners". She empowered them to postpone sale and conversion, and provided that "the rents interest profits and income" of her unconverted estate were to be paid and applied in the same manner and to the same persons entitled to the income from the proceeds of the conversion—namely, all her grandchildren living at her death who should attain or had attained the age of twenty-five years in such manner that the share of each grandson should be double the share of each granddaughter. Part of the assets of the estate was a property containing large deposits of scoria. The executors, with the approbation of all the grandchildren, entered into an agreement with a company whereby it agreed to buy scoria stone and rough soil from the property at 3s. a cubic yard for a period of three years with a right of renewal, which was later exercised. On originating summons to determine whether the moneys received from the company should be regarded as capital or income, *Held*, 1. That the contract with the company was a grant of a profit a prendre, and in essence, a sale out-and-out of a portion of the land, so that the moneys received by the trustees represented purchase moneys received in the course of the sale and conversion of the land by a method which commended itself to the trustees who had been given the powers of absolute owners. (*Campbell* v. *Wardlaw* 8 App. Cas. 641; *Gowan* v. *Christie* (1873) L.R. Sc. & Div. 273, and *Duke of Sutherland* v. *Heathcote* [1892] 1 Ch. 475, applied.) 3. That, accordingly, the net proceeds of the scoria stone and soil were to be regarded as capital and were distributable accordingly. *In re McLennan (deceased), McLennan and Others* v. *McLennan and Others.* (S.C. Auckland. September 6, 1957. North J.)

WILL.

Construction—Trust for "re-establishment in civil life . . . of men who have been or are about to be discharged from His Majesty's Military, Naval, or Air Force and/or their children"—Clearly expressed Intention to benefit Men who, by Discharge had terminated or were about to terminate War-service—Children of Those Servicemen within Trust. The primary gift of residuary estate in a will was given to trustees upon trust "for the re-establishment in civil life of or otherwise howsoever as my trustees shall think fit for the benefit of men in New Zealand who have been or are about to be discharged from His Majesty' Military Naval or Air Force and/or their children." On originating summons whether the trust constituted a valid charitable trust and whether it was applicable for the benefit of children of servicemen who had died while in service, McGregor J. held (a) that the trust was a valid charitable trust, and (b) that provision could not be made pursusnt to the trust for the benefit of the children of men who died while serving as members of His Majesty's Military, Naval, or Air Force. On appeal from the latter part of that judgment, *Held*, by the Court of Appeal, That there was a clearly expressed intention in cl. 9 of the will that the primary intention of the trust was the re-establishment in civil life of servicemen who were discharged or who were about to be discharged, the servicemen entitled to benefit comprising men in New Zealand who by discharge had terminated or were about to terminate their war-service; and that the children who were within the bounty were the children of those particular servicemen. Appeal from part of the judgment of McGregor J. (relating to the construction of cl. 9 of the will of the deceased), dismissed. *In re Elgar (Deceased), Rhodes and Others* v. *Pharazyn and Another.* (C.A. Wellington. 1957. September 19; October 11. Hutchison J. North J. Turner J. Henry J. McCarthy J.)

(Concluded on p. 388.)

INTERNATIONAL LAW: APPLICATION TO OUTER SPACE.

By Sir Leslie Munro, K.C.M.G., K.C.V.O.*

Mankind is now observing and pondering two astounding developments, the use of atomic power and the propulsion of the so-called sputnik. An atomic-propelled submarine has moved beneath the ice of the Arctic. Two satellites continue to circle a wondering world.

I propose, in the light of the developments of modern science, to discuss with you their impact on international law in respect of the law of the sea and of such law as should apply to outer space.

The circling of the world by a satellite launched by man marks an epoch in scientific achievement. It is indeed one of the most marvellous in his long ascent from the limitations of his existence. Man through his own skilful creation has penetrated a part of the universe not, it is true, beyond the range of his dreams but certainly hitherto beyond his powers of investigation. It is a moment for humility and hope. Achievements such as this should rightly benefit all humanity. To Russian scientists all praise will go for their success. To mankind their success is a challenge to further ventures into the unknown for the good of all. The beneficent use of this astounding development opens new visions to new fields of knowledge, indeed of access to the moon and perhaps eventually to the stars.

One thing we have learnt from the experience of recent years: the word "impossible" no longer belongs to the dictionary of scientists. Achievement has outrun the caution of prophecy.

Let us hope that in this time of suspicion and division we can all learn to share the benefit of the discoveries and achievements which in good and wise hands can benefit us all and in bad hands can ruin us all.

At this time, Arnold Toynbee's observations are of particular pertinence: "Man's intellectual and technological achievements have been important to him, not in themselves, but only in so far as they have force him to face, and grapple with, moral issues which he might have managed to go on shirking. Modern science has thus raised moral issues of profound importance but it has not and could not have made any contribution towards solving them."

Accordingly, the more through science we gain knowledge and some control of the universe, the greater and more compelling the necessity for us to learn—nations, men and women—the art of living together in toleration and understanding. Law must play its part.

One area in which the problems created by technological achievement urgently require international co-operation is the law of the sea. It is natural to think of the law of the sea as one of the older, more stable parts of international law, going back to medieval times at least. Though its foundations do lie deep in the past, the development of modern techniques makes it necessary to develop new legal principles if we are to avoid international friction.

Governments and peoples more than ever before can exercise effective control over the surface of the sea, and exploit the fisheries and other living resources in the sea, and use the natural wealth in the sea-bed and its subsoil. These advances have produced a set of new problems and needs somewhat different from those which were met by the old-established rules of international law. If the exercise of the new techniques is not to become a source of confusion and international tension, rules must be worked out which will adequately balance the interests of individual countries against the interests of the international community as a whole.

One important problem is the width of the territorial sea. Fifty years ago it seemed to many legal scholars that international law contained firm rules on this point, laying down precisely how far States could go from their coasts in exercising their sovereignty, and what kinds of exercises of sovereignty were permissible. Since then, however, many countries have found it both possible and desirable to extend their control beyond what the old writers considered they were entitled to. The result has been a growing body of national legislation claiming a greater width of the territorial sea than was usually the case in the past. These claims sometimes conflict, and tend also to limit the principle of freedom of the seas, which has been enshrined in international law at least since the time of Grotius.

Another new problem is the continental shelf, which as a legal concept has been brought into being since the end of the Second World War. It is now possible in some areas of the world to exploit the resources of the sea-bed and its subsoil even beyond the limits of the territorial sea. In this field the body of international legislation has grown with an almost explosive rapidity but the growth has been disorderly. In the absence of any accepted legal limitations on international claims, there have been conflicting claims which must be a source of future friction unless something is now done to regularize the situation.

The development of modern techniques also makes necessary the development of new rules on the conservation of the living resources of the sea. It used to be assumed that fisheries resources were boundless, and that men could never substantially reduce them. But as fishing techniques have improved, this assumption has proved wrong; the sea, like any other storehouse of natural wealth, can be exhausted. To prevent such a serious loss, international and national action on the high seas, as well as on the territorial sea, on the basis of recognized rules, is essential.

It is encouraging that steps are now being taken in the United Nations toward the solution of these and other problems of the law of the sea. Early this year the General Assembly called a diplomatic conference to meet in Geneva between the end of February and the end of April 1958, to examine the law of the sea. The Conference will have before it a report of the International Law Commission containing articles, with commentaries, on the various parts of the international law of the sea. The conference has been asked to embody

* An Address to the Jersey State Bar Association at Hotel Berneley-Carteret, Asbury Park, New Jersey, on November 22.

the results of its work in one or more international conventions or such other instruments as it may deem appropriate. Its mandate is to take account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and thereby to arrive at sound and durable solutions.

The Conference on the Law of the Sea will be the first time the United Nations has used the method of a special diplomatic conference to clarify a field of international law. The method has, however, been used before, notably at the Hague Conference of 1930 for the Codification of International Law, which was called under the auspices of the League of Nations. The Hague Conference had before it a considerable number of different fields of international law for codification. Though the work done in connection with it was valuable, the Hague Conference was not a success in terms of drafting conventions or having them generally accepted. It is too early to make predictions about the Geneva Conference of 1958, but there are reasons for hoping it will achieve a greater measure of success than the Hague Conference.

The discussion of the law of the sea leads naturally to an analogous question that is now uppermost in our minds and which arises out of the fact that the Union of Soviet Socialist Republics has recently propelled two satellites into space. I have referred to this as a great achievement, which it unquestionably is, and have at the same time pointed out that it raises even greater problems in the field of international understanding.

The same human mind which has conceived and developed the instruments for investigation and exploration with which we are now preoccupied must not fail to find solutions for the problems in the art of toleration and understanding evoked thereby. Thus, while scientists intensify their efforts to exploit fully the newly-uncovered pathways to greater understanding of our universe, it behoves us as lawyers to ponder what those problems might be, how previous concepts must be adapted to new developments and what new ones must be developed.

This, then, is the problem now before us: to determine the legal order which should apply to outer space. In approaching a new problem, we tend to look around for similar situations to see how they were dealt with and the extent to which the solution adopted might apply to the present problem. Although we probably will not find much guidance in the rules which have been laid down for the selection of a Miss Universe, an event which I understand regularly takes place in Long Beach, California, we are perhaps fortunate that extensive thought has been given to the problem of sovereignty over the air space above the territory of a state and the question of the regime of the high seas.

This brings us first to the principles which have developed concerning sovereignty over the air. [*Dominion or ownership over the air space has long been* a subject of interest to man.] It seems quite natural that a landowner should want to know whether the air above his property belongs to him. Ancient Roman law had an answer to this question, and the answer was yes. The question was probably pointless for the most part in early days, but came to have significance for states with the Wright Brothers' first flight. At the beginning of this century, a convention was drafted by Paul Fauchille which would have made the air free to commerce and travel in the same way as the sea. Provision was made for national security measures, but there was no intention to give any nation plenary rights over the air.

The proposal, although adopted in modified form by the Institute of International Law at its 1906 meeting, never became an international convention, and was disregarded by states during the First World War. Sovereignty over the air space above its territory was claimed by each nation, and the Netherlands, acting on this basis, went so far as to intern German airships and their crews when forced down in Netherlands territory. The Netherlands Government acted with the acquiescence of the German Government, at least as to incidents occurring later than December 1916.

After the First World War, absolute sovereignty over air space came to be recognized in the Paris Convention for the Regulation of Air Navigation (1919), which declared that " . . . every Power has complete and exclusive sovereignty over the air space above its territory." The question assumed even greater importance during the Second World War as a result of the decisive role played by aircraft in that war. In December 1944, toward the end of the Second World War, a Convention on International Civil Aviation was concluded in Chicago. It provided that " every state has complete and exclusive sovereignty over the air space above its territory ", and that " no aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting state without special authorization by that state and in accordance with the terms of such authorization." This Agreement has so far been ratified by 69 nations.

It seems well-established in contemporary international law that every state has sovereignty over the air space above its territory, thus setting a general limit on the upper extent of state sovereignty. It also seems clear that no generally-accepted legal basis presently exists for a state to claim sovereignty over outer space. However, the question of the precise upward limit of sovereignty does not end there, for the term " air space " itself has yet to be precisely defined.

Since the term is used in aviation treaties, the proposal has been made that it be defined in the light of the purposes and intent of those treaties. Under this proposal, " air space " would be understood as referring to that part of the atmosphere which contains enough air to " lift " aircraft, with state sovereignty extending to that height. Others have proposed that sovereignty should extend upward to 300 miles, the part lying above " air space " to be designated " contiguous space." Still another proposal would have sovereignty extend to the limits of all flight, a proposal based on the danger asserted to subjacent states. However, most of those who have expressed views on this point have tended to the theory that outer space should be excluded from national sovereignty for such reasons as the difficulty of defining areas in outer space which would correspond to the territory of a state on the earth. Those who hold this view usually suggest that outer space should be made subject to a legal order similar to that applying to the high seas.

Aside from outer space itself, questions will undoubtedly arise as to sovereignty over celestial bodies which may be reached by man in the foreseeable future. Consideration would need to be given to whether or not such celestial bodies should be regarded as subject to claims of sovereignty and if so as to whether the rules

of international law regarding discovery and occupation, conquest and cession should be made applicable to such celestial bodies. Space ships too would presumably need to be subjected to some legal order, and this raises the question of the applicability of present laws, both national and international, regarding aircraft and seagoing vessels.

If nations can willingly meet to discuss the law of the sea, as in the Conference on the Law of the Sea referred to above, it seems reasonable to expect that they can do the same with respect to outer space. This view finds support in the fact that a scientific conference was held recently in Geneva on the subject of atomic energy, and that nations are co-operating and have agreed to exchange information on the subject known as the International Geophysical Year. The International Geophysical Year is significant not only as a demonstration of how much co-operation may be expected between states on the scientific aspects of problems affecting outer space but also as evidence of the extent to which recognition has been given to the principle that sovereignty over air space does not extend to outer space. The intention of some of the participating nations to fire satellites which would orbit around the earth were widely publicized; it does not require much imagination to realize that the orbits of such satellites would take them over most or all of the states of the world. Yet this possibility has not evoked any protests that the firing of such satellites would involve violations of the sovereignty of the terrestrial states over which they would pass.

As to the actual convening of states on problems raised by recent and imminent ventures into outer space, I believe that the United Nations is the proper forum for necessary discussion. First of all, it is peculiarly equipped to provide small powers with an opportunity to be heard. Although it is undeniable that primary responsibility for the settlement of such matters rests on the Great Powers, any steps taken by them would necessarily affect the smaller ones and I therefore believe, both personally and as representative of a small power, that they definitely should be heard. Public opinion throughout the world must not be overlooked, and citizens of a small country must be given an equal chance as citizens of a big country to make their feelings known on such important matters.

Choice of the United Nations as the forum for the consideration of problems relating to outer space is also supported by the identity between its purposes and principles and the purposes and principles which must govern any international consideration of such problems. If one or more nations have achieved something which can take us into outer space, the peaceful use of such a device must be assured, and this through some programme of international control. Further, the benefits derived from such devices must be shared by all nations, in keeping with the growing tendency of international sharing of advances in the scientific field, a tendency which has been accentuated in the field of atomic energy and in the arrangements adopted for the International Geophysical Year.

I believe that the near future will see us proceeding, whether out of necessity or free choice, along the lines I have suggested. Failure to do so would surely lead to spatial anarchy and render futile all the advances in science we are witnessing today. The realization that progress in international toleration and under standing must not be permitted to lag behind our advances in science will, I am sure, result in the timely achievement of a proper balance between the two.

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

IV. Title to the Bed of the Arahura River: Fishing Rights of Maoris.

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

It will be recollected that in the second article of this series I dealt with *Leighton's* case [1955] N.Z.L.R. 750, where the Court of Appeal thought that, in the absence of any special statutory provision, the District Land Registrar should not, in a certificate of title for land bounded by a river or stream, insert a note as to whether or not the title extended to the middle of the river or stream—*ad medium filum aquae*. The Court based its opinion on the difficulties occasioned by s. 206 of the Coal-mines Act 1925, the provisions of the River Boards Act 1908, and of s. 35 of the Crown Grants Act 1908. In *Inspector of Fisheries* v. *Ihaia Weepu* [1956] N.Z.L.R. 920, the Supreme Court had to deal with the title to the bed of the Arahura River of which the Public Trustee was registered proprietor by virtue of a statutory direction, s. 62 of the Native Land Amendment and Native Land Claims Amendment Act 1927. As stated by counsel for the informant, this statutory provision "was motivated by fears that had arisen in regard to the possible effect, in relation to the bed of the Arahura River, of s. 206 of the Coal-mines Act 1925", the section which came so much under discussion, with so little result, in *Leighton's* case. For those fears, I can personally vouch, for at the time of the first application by the Maori Trustee for a title to the bed of the Arahura River and at the date of the issue of the certificate of title thereto I happened to be the District Land Registrar for Westland. I think that *Leighton's* case shows that the doubts and fears were fully justified.

The Arahura River, of a total length of 35 miles, flows north-westwards from the Southern Alps to the Tasman Ocean, where it enters the sea about five miles north of the town of Hokitika. The river is famous for its treasures of greenstone, and is renowned in Maori tradition.

For the earlier history of the reserve, reference may be made to the judgment of Sir Robert Stout C.J. in *In re Beare and Perry's Application* (1900) 2 G.L.R. 242, in which the learned Chief Justice held that the bed of the Arahura River within the Reserve was not

then Crown land, and accordingly could not be the subject of licences or leases granted under the Mining Act 1898. In the course of his judgment, he outlined the position of the then title to the Arahura Maori Reserve as at 1900:

> It is clear that the river is not either a public highway or such a navigable river as makes the bed of the river Crown lands. At places and at times a canoe or boat may be used on the river but that is all. At the mouth of the river the tide backs the flowing stream, but even near the mouth it is a shallow river, only fit to be used occasionally by boats or canoes. The Native Reserve is on both sides of the river, from its mouth up to Mount Tuhua, and the Public Trustee* has exercised proprietary rights in the river, leasing the islands, etc. It has been held in the Colonies that the English law as to watercourses applies and *that the bed of an unnavigable stream belongs to the proprietors on each side.* . . . The bed of the stream or non-navigable river within the reserve is not therefore Crown land, and not being Crown land, the Warden cannot issue any licences or leases to mine in the bed of the river within the said Reserve by dredging or otherwise.

aquae. But in navigable rivers the proprietors of the land on either side have it not; the fishing is common; it is *prima facie* in the King, and is public.

At common law, too, the right to take fresh water fish is a recognized *profit a prendre*: *Stroud's Law of Easements*, 14, 15, 185; *12 Halsbury's Laws of Engldnd* 3rd ed., p. 620, para. 1350. But, in New Zealand the common law appears to have been altered in his, respect; for s. 89 of the Fisheries Act 1908, provides that it shall not be lawful for any person to sell or let the right to fish in any waters.

The question before the Court in *Inspector of Fisheries* v. *Ihaia Weepu*, (*supra*), was:

> Whether or not the Fisheries Act 1908 applies to that part of the Arahura River which is situate within the bounds of the Arahura Native Reserve No. 30 which is part of the land included in Certificate of Title Volume 30, Folio 36, Westland Registry.

The Regulations in question, the Whitebait Fishing Regulations 1951 (S.R. 1951/198), were made under the Fisheries Act 1908. The defence relied wholly on s. 77 (2) of that Act, which reads as follows:

> Nothing in this Part of this Act shall affect any existing Maori fishing rights.

The question before the Court therefore narrowed down to this. What, then, are "existing Maori fishing rights?" There is no definition to be found in that Act or elsewhere. The only kind of right suggested in the argument was based on the allegation that a Maori fishery existed in the Arahura Reserve at the time of the Treaty of Waitangi in 1840, to which defendants had become entitled as successors to ancestors by whom it was then exercised, and which was preserved by the Second Article of the Treaty: *6 Reprint of the Public Acts of New Zealand*, 1908 *to* 1931, 101. That article confirmed and guaranteed to the Maoris

> the full exclusive and undisturbed possession of their Lands and Estates Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

As pointed out, however, the nature of the rights arising from the Treaty of Waitangi are not legal rights in the full sense of those words, and to describe

Christmas Message to the Profession

From the ATTORNEY-GENERAL.

UPON resuming the honourable office of Attorney-General at a time when practitioners are looking forward to the close of a year of hard work, I gratefully accept the opportunity afforded me by the NEW ZEALAND LAW JOURNAL *to wish them all a Happy Christmas and New Year.*

That membership of the legal profession constituted a happy brotherhood is the most enduring memory of my previous term of office, and the knowledge that I shall have the goodwill and assistance of all members causes me to take up the work with especial pleasure. It is hard to think of other work so intimately related to the whole framework of society as is the law.

I have always found the profession ready to ensure that the traditions and experience of which it is the especial repository are made available for the public well-being; and I assure members of my best endeavours in co-operation with them to that end.

H. G. R. MASON.

Attorney-General's Office,
Wellington.

The Arahura River may not be a navigable river like its nearest neighbour, the Hokitika River; but, like all rivers in Westland, it breeds whitebait in good measure, and whitebait is a tasty morsel to most of us and of great commercial value to the West Coasters. And this case, *Inspector of Fisheries* v. *Ihaia Weepu*, was about whitebait (a prosecution under the Whitebait Fishing Regulations 1951 (S.R. 1951/198)), and, once again, the nature and effect of the Treaty of Waitangi had to be considered by the Court.

There were three informations against the defendants, two Maoris, who, it is reasonable to suppose, were both beneficially entitled to receive a share of the rentals coming in from the Reserve. They were accused of using in the course of fishing for whitebait, nets, contrivances and devices not in accordance with the Regulations.

Lord Mansfield thus stated the common law as to the rights of fishing or piscary:

> The rule of law is uniform. In rivers not navigable the proprietors of the land have the right of fishing on their respective sides; and it generally extends *ad medium filum*

* Now, the Maori Trustee exercises authority over Maori reserves.

them as rights is really a misnomer. F. B. Adams J., at p. 925, continued :

> It is trite law that the Treaty of Waitangi confers no rights cognizable in a court of law : *Waipapakura* v. *Hempton* (1914) 33 N.Z.L.R. 1065, 1071 ; 17 G.L.R. 82, 86 ; *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* [1941] N.Z.L.R. 590, 597. For some purposes the Courts may take a cognizance of rights preserved by the Treaty : *Nireaha Tamaki* v. *Baker* (1901) N.Z.P.C.C. 371 ; but, in the absence of statutory provision, a legal claim against the Crown cannot be founded on the Treaty. It is now expressly so enacted in s. 155 of the Maori Affairs Act 1953 in regard to the Maori customary title to land. It may be open to doubt whether a mere right of fishery comes within that provision ; but, whether it does or not, the rule is the same. So long as any lands over which Maoris possess customary rights protected by the Treaty remain vested in the Crown, the Crown permits the exercise of those rights, and the Maori title rests on the sufferance of the Crown as proprietor of the lands. The continuing existence of such rights must necessarily depend upon the continuing power of the Crown as proprietor to give effect to them ; or where the title to the lands has passed from the Crown, upon their preservation by statute or by some other device.

Therefore, His Honour thought that, so long as the banks and bed of the Arahura River had remained vested in the Crown, the Crown could have, by its leave and licence, permitted the exercise thereover of Maori fishing rights (if any) coming within the provisions of the Treaty, and it could well be said that such rights were " existing Maori fishing rights " within the meaning of s. 77 (2) of the Fisheries Act 1908. But, since at the latest the title to the banks and bed of the Arahura River passed to the Maori Trustee from the Crown when the certificate of title was issued to the Maori Trustee, s. 77 (2) of the Fisheries Act 1908 cannot be construed as rendering *Maori fishing rights* existing when that Act came into force *indestructible*, or as permitting Maoris to fish in contravention of that statute after they have ceased to possess any right that can properly be described as an " existing Maori fishing right ".

It followed, therefore, that the defendants in the instant case were bound by the Whitebait Fishing Regulations, unless, indeed, they could substantiate the existence of fishing rights of a kind not yet revealed but founded on some title other than the Treaty of Waitangi and this they could not do.

Counsel for the defendants had submitted that the purpose of the issue of the certificate of title to the Maori Trustee was merely to protect the Maoris in respect of their rights in and to the soil and minerals, and that fishing rights were of a different character, being only a minor incident of the ownership of the lands and capable of a separate existence after the issue of the certificate of title. But the learned Judge, at p. 926, rejected that contention. He said :

> All rights of fishery must in my opinion be regarded as included in the title to the lands conferred by the certificate. A fishing right can no doubt become dissevered from the ownership of the soil, but it is " in its nature a profit of the soil and dependent upon, and an incident of the ownership of the soil " : *15 Halsbury's Laws of England*, 2nd ed., 47.
>
> Viewing the matter from a more technical point of view, the estate of the registered proprietor named in the certificate of title is paramount, and overrides any pre-existing estate or interest in the land (Land Transfer Act 1952, s. 62). A Maori fishing right, resting solely on the Treaty of Waitangi, cannot well be an " easement " which might be regarded as " omitted " within the meaning of para. (*b*) of that section. The certificate has the force and effect of a Crown grant : s. 12.

Thus His Honour solves the problem by applying one of the fundamental principles of the Torrens system—the indefeasability of the estate of the registered proprietor. To my knowledge, this is the first time that s. 62 of the Land Transfer Act 1952 has been applied to the " rights " conferred by the Treaty of Waitangi. This point will immediately be recognized by the conveyancer and real property lawyer as of great importance, and there can be no doubt that His Honour's application of the section is the correct one.

The definition of " Land " in the Land Transfer Act 1952 is certainly rather quaint :

> " Land " includes messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon, or thereunder lying or being, unless specially excepted.

And s. 62 (*b*) of the Land Transfer Act 1952 provides that :

> 62. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for that Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of that Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,
>
> (*b*) *except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land.*

Therefore, the position appears to be that whatever rights of fishing riparian owners of land may have in New Zealand pass with their certificates of title and are included therein, but such rights are subject to statutory obligations and disabilities, for example, the obligation to obey the Whitebait Regulations, and the disability (s. 89 of the Fisheries Act 1908) to grant rights of piscary to third persons.

THE NEW COURT OF APPEAL.

Sittings : February to April.

Sittings of the Court of Appeal will be held in the Supreme Courthouse, Wellington, at 11 a.m. on the following days :

Monday, February 17, 1958 ;

Monday, March 17, 1958 ;

Monday, April 21, 1958 ;

and on such other days and at such other times as the Court may from time to time appoint.

Rule 9 of the Court of Appeal Rules 1955 sets out the time and mode of setting down appeals for hearing at those Sittings.

PAGES FROM THE PAST.

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

By R. J.

(*Concluded from p. 370.*)

The Bar's View.

But that was not the whole of the sorry recital. With his second petition barely in the hands of the Colonial Secretary, and after a lapse of nearly a year from the date of Mr Barton's former contretemps in Court, a representative gathering of the Bar presented a motion in one of the Chief Justice's Courts. This was in August, 1877. The spokesman for the Bar assured the Court that the petition had been lodged without previous consultation with the Bar in Wellington, and that members had no sympathy with such a proceeding. There was a great deal more in what was said; but, in effect, Wellington practitioners, like Gallio, " cared for none of these things."

The Chief Justice said he desired to say nothing to deprecate the conduct of any person who took a proper constitutional course to secure redress.

Mr Justice Richmond, who was also on the Bench, and by this time was co-defendant with Sir James Prendergast C.J. in Mr Barton's indictment, was a trifle more rhetorical. " I glory," he said, " in our liability to have our conduct investigated at any time. At the proper time and in the proper place I shall be ready to meet any accusation."

The motion was an unfortunate intrusion into what was, to all intents and purposes, a private fight, and it could be regarded as an incredible and indefensible move on the part of men credited with legal minds. A moment's reflection should have persuaded the protesting constituency of the Wellington Bar that such an indiscretion must subject both parties to unpleasant and unnecessary suspicions. At the very least it disclosed a lack of esprit de corps, and it could have been construed as a spirit of jealousy towards one of their number who happened to be getting practice. If a petition were being presented to the Queen for the removal of a Governor, it would be natural enough for the vice-regal footman, groom, butler, cook and coachman to offer sympathy and condolence; but it must have been passing strange to see members of the Bar animated by the sentiments of flunkeys in such circumstances.

But in the meantime a responsive chord had been struck in Government circles. The Attorney-General addressed the House on the petition, and in a speech containing a wealth of authorities that were no doubt of the greatest value in future discussions on law reform, clearly acknowledged and defined the Government's duty in the matter for the first time. It was a notable performance, but its effect was undoubtedly marred by the fact that the Government had not recognized its responsibility until the last minute, when the mischief had been done and it was too late to remedy it.

Mr. Whitmore, the Colonial Secretary, who only a few months previously had laid it down that the conduct of a Judge was " mere routine of the Court," was now instructed by the Attorney-General to ask the Judges for observations on the Barton complaints. If the Government had in the first instance adopted the principle expounded by Mr. Whitaker, the unfortunate petition would never have been presented. Clearly the eyes of the Executive at last had been opened to the need for some form of control of the administration of justice in all its departments.

The Attorney-General told the House that this was the first petition of its kind ever received. He reminded members that, by the Supreme Court Act 1858, a Judge could be removed by the Governor on an address by both Houses, but that the Act of 1862 reserved that right to the Queen alone. He quoted *Todd on Parliamentary Government* and the Attorney-General in the House of Commons, Sir Frederick Pollock, to show that no Government should support a petition for an inquiry into the conduct of a Judge without a prior investigation to discover whether grounds existed for the removal of such Judge. Anyone could petition, he said, but it was for the House to decide upon the grounds.

Thus the " mere routine " angle of the controversy disappeared once and for all. The petition asked that " the House should go into a Committee of the Whole " to consider the matter; but, as the Government was of opinion that there were no grounds for removal, it left it to the House to decide whether a Select Committee should be set up, or whether it should sit as a Committee of the Whole.

The Attorney-General cited the case in which Disraeli, when the House of Commons was considering the cause of Sir Alexander Cockburn C.J., after quoting precedents, moved: " That the order ' The petition do lie on the table ' be read and discharged," and moved an amendment accordingly. He said he recognised Mr Barton's rights, and imputed to him no impropriety, but he felt that no case had been made out. The amendment was carried, and it may be conjectured that Mr Barton realised finally how much better he would have been served by the particular than by the personal he had employed.

Quarrel Snowballs.

Even now the situation could have been salvaged, but there was much to follow. At the end of the Christmas vacation, the Court of Appeal sat on January 30, 1878, to hear the case, *Spence* v. *Pearson*, which involved an application for leave to appeal to the Privy Council. Mr Barton was appearing for the defence on the retainer of Messrs Sievwright and Stout, of Dunedin, and the issue under discussion was whether the Court of Appeal could grant leave to appeal to the Privy Council from its own decision on any matter referred to it by consent of the parties.

It was an extraordinary day. The Court sat all morning, listened to some heated passages between the Bench and Mr Barton, heard the barrister fined £50 for contempt, and then watched the dissipation of the entire proceedings following a luncheon adjourn-

ment discovery that the Court had been sitting " in erroneous circumstances." Failure to adjourn two days earlier made that day's sitting informal, as the Court in the circumstances could sit again only by an Order in Council or by proclamation from the Governor.

It was Mr Stout, afterwards Sir Robert Stout, Chief Justice, Attorney-General, and Premier of the Colony, who had asked for the leave to appeal. In his behalf, Mr Barton argued that the Court of Appeal was the proper Court in which to apply, and he added that if the Court refused jurisdiction he had instructions to apply for leave to plead to the declaration, the defendants having a defence on the merits. Actually the action was being defended by the Government, though the nominal defendants were the members of the Waste Lands Board. Moreover, the issues involved were regarded as being of great importance to the public.

The Chief Justice, after consulting with Mr. Justice Richmond, said the Court would refuse leave to appeal to the Privy Council. As to the request for leave to plead, that was another matter, and the Court would grant leave, provided the defendants paid up all costs to date. In granting such leave, said Prendergast C.J., the Court did so at the peril of the defendants. The order should be taken for what it was worth. Personally, he considered it was worth precisely nothing, and the parties could take it or leave it.*

And so it began all over again. Mr Barton demanded to know whether their Honours were deciding the matter as something within their jurisdiction, in which case the next move must be a petition to the Privy Council. On the other hand, if the Court was dismissing his application for want of jurisdiction, the parties would have to return to the Supreme Court in Dunedin before going to the Privy Council. Although repeatedly asked for elucidation on this point, the Court steadfastly refused to make any reply. Not unnaturally counsel, with as much heat as accuracy, charged that the Court was improperly withholding from him an answer to which he was entitled.

The stage was set for an explosion, and the fuse was lighted when Mr Barton said: " I cannot but see the spirit and intent of the Court, and the feeling that actuates it."

The Chief Justice's reaction was immediate. What did counsel mean by the words he had just used? Did he mean to impute to the Chief Justice and his brother Judge that they were not actuated by those principles which were required for the impartial administration of justice?

Mr Barton: What I have said, I have said. If your Honours choose to put such a meaning as that on my words, it is no fault of mine.

Counsel continued to insist that he had asked the Court a plain question which must be answered if justice were to be done. Their Honours refused to answer that question, and he could only speculate whether the Court knew the bounds of its own jurisdiction.

" The question I have put to the Court, " counsel declared, " is one which I have a perfect right to ask. I am entitled to have it answered. I have done my duty and no more, and I must complain of the manner in which I am treated by the members of the Court."

The Chief Justice: Did you mean to impute to the Judges a partial administration of justice in this Court?

Mr Barton: I have explained my attitude, and I adhere to it.

Followed a pregnant silence, at the end of which the Chief Justice announced a fifteen-minute adjournment. Their Honours returned to the minute, and the President of the Court addressed himself immediately to Mr Barton.

" It is with considerable pain," he said, " that I have to announce that the judgment of the Court is that you have committed a grievous contempt, such as cannot be passed over."

Mr Barton: I cannot dictate what meaning the Court shall attach to any words of mine.

Ignoring the interruption, the Chief Justice said that the Court must vindicate and protect the course of proceedings. Mr Barton would be fined fifty pounds.

There was a buzz of excitement in the Court, through which Mr Barton was heard to say that he respectfully declined to pay. What, he asked, would be the consequence of non-payment?

Suggesting that the course of events would answer such a query, the Judge said the Court would proceed with the business set down. The luncheon adjournment followed soon afterwards; and it was when the Court resumed that their Honours announced that, as the Court had been sitting in error, the morning's proceedings were informal.

Mr Barton was on his feet in an instant to ask how such a development affected what had taken place earlier concerning himself.

The Chief Justice: Mr Barton, I was not addressing you. Sit down, sir.

Mr Barton: I must ask the Court to address me in a proper fashion, and not as " sir." But putting that aside, if there was no Court, then it could not fine me fifty pounds.

The Chief Justice: Certainly not.

When the Bench was asked to take the necessary steps to cause the Court to sit properly so that *Spence* v. *Pearson* could be proceeded with, the Chief Justice retorted: " There is nothing before the Court. The Court of Appeal is not sitting now. The Supreme Court is just about to sit."

The Last Straw.

Unfortunately, it was in that same Supreme Court, in less than an hour, that Mr Barton moved a motion for an injunction to restrain. Almost in the twinkling of an eye, Bench and counsel were at it again. Everything that ensued conformed to a now almost monotonously familiar pattern. It could be that counsel was too keenly on the alert for evidence of that discriminatory treatment which had become a veritable obsession with him. Also, it is far from unlikely that the Bench was itself smarting under an acute sense of indignity. Whatever the situation was, Mr Barton's restraint was almost at an end, and the Bench's concern for the dignity and persons of the Court was bearing heavily on its patience.

Mr Barton stigmatised the procedure of one of the opposing counsel as " rascally ", much to the vocal disgust of Richmond J., and the position deteriorated still further when the Chief Justice ordered Mr Barton to hold his tongue, and once again used the term " sir." There was a horrified protest from counsel, who prophesied an early crisis and straightway employed the greatest resolution in creating one. Violently challenging

* For subsequent proceedings, see (1879) N.Z.P.C.C. 222.

the facts of the case as cited by the Chief Justice in his judgment, Mr Barton moved swiftly from one vigorous interjection to another until the judgment was concluded and tersely concurred in by Richmond J.

And even then counsel's importunity continued until Prendergast C.J. burst out that he would no longer sit there in the face of counsel's continual and unbridled interruptions. Mr Barton's only recognition of His Honour's distress was an insistence that if their Honours made decisions on data contrary to facts, he must be permitted to correct the Court as to such data. Then all dignity fled the proceedings. Counsel was peremptorily ordered to resume his seat and hold his tongue. But he merely repeated his assertion of "my rights and the rights of my client." Why, he demanded should the Court studiously ignore a jury's verdict on a vital issue? When ordered once more to hold his peace, he flung away from counsel's table with the remark that he might as well walk out of the Court if facts were to be cast aside in the way their Honours were doing.

Then it came.

In a voice, tense but deadly quiet, Prendergast C.J. said: "Mr Barton, please have the goodness to remain. I wish to say just this. Unless you see fit to apologize to the Court and express regret for your transgressions, you will be adjudged guilty of contempt."

Mr Barton (pausing on the way to the door): This mode of procedure must end sometime. That is perfectly clear. I know what the Court means, and I hope it knows what I mean.

Of apology or withdrawal there was not the slightest whisper, though His Honour paused for some moments before continuing.

The climax was inevitable.

"The Court adjudges you guilty of contempt, and commits you to the public prison in Wellington for one month," said the Chief Justice.

Counsel merely asked that other cases in which he was interested might be adjourned, and then turned on his heel and retired to the robing-room, where he remained for two-and-a-half hours while the Judges considered their form of procedure. At half-past four, accompanied by the Deputy-Sheriff and an Inspector of Police, he walked to the gaol. He was delivered over to the gaoler, with a warrant simply stating that he had been found "guilty of contempt," and with the verbal statement of the officers delivering him.

In intriguing contrast, considering his strong views on the subject of contempt of Court, was the forbearance exhibited by Prendergast C.J. in Napier less than two months later. It was a theft trial. The complainant threw all restraint aside, refused to answer questions, called defending counsel a liar, with a variety of adjectives, snapped his fingers at him, turned his back on him, and finally demanded a chair.

The Chief Justice who, all things considered, might have been expected to let the hothead cool off in gaol for forty-eight hours, accommodated the offender at counsel's table, and allowed proceedings to continue. He could just as reasonably have invited the man to take a seat on the Bench

Mr Barton's committal was without precedent in the history of the Bar. In none of the cases reported at that time had any of the penalties carried imprisonment, except in default of payment of a fine.

In *Smith* v. *Justices of Sierra Leone* (1841) 3 Moo. P.C. 361, a barrister was fined £20, with imprisonment in default, for refusal to answer an interrogation by the Chief Justice. By a subsequent order he was struck off the rolls, but the order was reversed on appeal.

Then, again, in *Smith* v. *Justices of Sierra Leone* (1848) 7 Moo. P.C. 174, the penalty for disrespectful demeanour was removal from the rolls, but once again the order was reversed.

In *Rainy* v. *Justices of Sierra Leone* (1852) 8 Moo. P.C. 47, a barrister was fined £20, £50, £10, and £50 for disrespectful remarks in Court, with imprisonment as default, but the fines were reduced to £60.

In *Ex Parte Pater* (1864) 5 B. & S. 299, a barrister was fined £20 for disrespectful language at the Middlesex General Sessions; and in *In re Pollard and the Chief Justice of Hong Kong* (1886) L.R. 2 P.C. 106, a barrister was fine 200 dollars and suspended for a fortnight for disrespectful address, but the order was discharged and the fine remitted.

It will be noted that most of the cases cited referred to small Colonial Courts where Judges were animated by very different feelings in asserting their judicial dignity from those that were manifest on the English Bench. Lord Denman had remarked in *Carus Wilson's Case*, (1845) 7 Q.B. 984; 115 E.R. 759: "We must always feel unwilling to interfere in this way; indeed, the practice has almost been discontinued for a century, as there is no Judge who would not feel extremely aggrieved at finding himself compelled to exert the power."

At the risk of seeming, at this distance, over-critical, it is difficult to avoid the conclusion that in those days Colonial Judges were needlessly thin-skinned, and were inclined to exercise their powers with incredible severity. In Mr Barton's case there was no option of a fine, although on the morning of the same day he had been fined fifty pounds for complaining about partiality, which Sir James Prendergast had construed as contempt. That penalty actually lapsed owing to the Court not being properly constituted. There is something ironical about the suggestion contained in that interlude that Judges of the Court of Appeal could be insulted with impunity simply because, by an oversight, they had omitted formally to adjourn the Court at a previous sitting.

A Two-year Struggle.

Nevertheless Mr Barton's gaol sentence must be read in conjunction with his abortive fine of fifty pounds, his petition to Parliament, and the Rule nisi directed to issue by the Chief Justice in the first case of alleged contempt two years before. Viewed in this light, the sentence becomes intelligible as the outcome of a long and bitter struggle between the Bench and Mr Barton. But a dispassionate viewer of the circumstances today may well discern in the affair a cruel and irrational excess of authority, justified by neither practice nor necessity.

Whatever error there was in Mr Barton's demeanour, there appears to have been as much to be regretted in the attitude of the Bench. When the Rule nisi was directed to issue by Sir James Prendergast C.J., two years earlier, there was more than a suspicion that the Chief Justice had allowed his feelings to outrun discretion. But if irritability and want of judgment could be charged in 1876, the indictment must have seemed still more obvious when Mr Barton was com-

mitted to the public prison. The still uncowed Irishman went contentedly to gaol, and before his term of imprisonment had expired he found himself elected as a member of Parliament for Wellington City—a fact which could be regarded as the deliberate verdict of the public in a matter that so far had done nobody any credit.

If the Chief Justice had followed his own precedent and directed a Rule nisi to issue against Mr Barton, calling on him to answer for his contempt, he could have served his reputation without any undue sacrifice of his dignity, but he took no time to consider what he should do, merely passing sentence in terms unknown to the law of contempt—an error in sentence, but worse than that, an error in procedure.

Mr Barton's application for leave to appeal in *Spence* v. *Pearson* was a proper one, and when he asked why it was refused—whether it was want of jurisdiction or not—the Court declined to answer. When a proper question in proper form is so received, the provocation cannot fail to be extreme, and it would have been surprising, considering the parties, if the subsequent passages had not been marked by fierce bitterness of temper. Mr Barton interrupted delivery of judgment on the recognized principle that it is a barrister's duty to correct the Court as to matters of fact. And when a conflict arose between himself and the Bench as a result of the discharge of that duty, he could well have quoted as he had done two years earlier, the words of Erskine :

> " Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct."

As was only to be expected Mr Barton, in March, 1878, before Richmond J., moved for a Rule to quash the warrant of commitment. He cited *In re Pollard* (1866) L.R. 2 P.C. 106 and relied on the following grounds :

(i) The alleged contempt should have been stated.
(ii) Notice of it should have been given him.
(iii) Time should have been allowed him to answer the charge. It was a semi-criminal charge, and no one could be convicted without an opportunity of defence.

Mr Justice Richmond said that if he had the slightest doubt as to what his decision ought to be in the case, he would take time to consider, " but I cannot say I have the shadow of a doubt." Basing his judgment on the doctrine that " all the Superior Courts may punish instanter contempt committed in praesentia ", he said that all decorum in Courts of Justice would be done away with if, after every interruption of the business of the Court, it was necessary to proceed by Rule.

> " I am satisfied that the Judicial Committee never meant to lay down any such doctrine. If it were true that such a contempt as was here committed could not be repressed and punished otherwise than by the tardy process supposed, our Courts would be in danger of being turned into bear-gardens. There will be no Rule in this case." (1878) 3 N.Z. Jur. Jo. (N.S.) 67, 68.

Mr Barton had in the meantime forwarded to the Premier, Sir George Grey, the texts of resolutions by the Christchurch and Dunedin Bars which, " without expressing any opinion on the circumstances ", called for an inquiry into the whole affair.

When Sir George Grey countered with the suggestion that Mr Barton should ask Parliament for an inquiry, Mr Barton referred him to the observation of the English Attorney-General, Sir Frederick Pollock on the necessity for an investigation before an official inquiry (*ante*,p. 383). He urged that a preliminary investigation was indispensable to a proper handling of the case, and complained that the Government would neither conduct such an investigation nor decide that it was unnecessary. In fact, Mr Barton declared, the Government had emboldened Judges to act fearlessly in accordance with their public defiance—" We care for neither Press nor Parliament "—and had deterred any private person, layman or lawyer, from the folly of becoming the mark for judicial vengeance by resisting or exposing any injustice, oppression or tyranny whatsoever.

But the fray had not been all in vain. Before the year 1878 was more than six months old, the Judicial Commission Bill was introduced in the House of Representatives, providing for the appointment of a tribunal " to make such inquiries as may enable Parliament to define the powers of the Judges of the Courts of New Zealand in respect of contempts of such Courts, and the relations of the said Judges to Parliament."

Such a development caused the raising of many eyebrows. The appointment of a Royal Commission to answer questions which might be answered by the Attorney-General in the House was not unnaturally regarded as a peculiar conception of the subject. There was actually no problem to solve which the payment of an ordinary fee to learned counsel could not have disposed of. Very noticeable was the growing body of opinion which believed that the matter should have been dealt with by the Government on Mr. Barton's first application for an inquiry, and there were many who were convinced that if the question were now, even at so late a stage, remitted to the Government, it would lead to a more satisfactory issue than the appointment of a special Commission.

An Untimely Revival.

The Judicial Commission Bill died aborning. Unfortunate alike in both content and intent, it was rejected by Parliament. A very dangerous and unpleasant topic had been practically shelved. Mr. Barton's case—which, before the House met, promised fireworks during the session—was to all intents and purposes a dead issue. The session was approaching its end, and once ended, there was an end of the whole question raised by Mr Barton.

He had carefully refrained from alluding to his grievances in the debates that were over. Powerless to restrain himself before the Judges, where self-restraint was imperatively required, he succeeded effectively in restraining himself before Parliament, where he was under a grave obligation to speak out. It appeared that everything that could possibly be done to weaken the case, whether by his friends or his enemies, had been accomplished, and no suit could have appeared more hopeless.

But apparently Richmond J. had other views. The situation was complicated once again, and its unhappy possibilities were revived when the learned Judge fell into the folly of superfluous correspondence, a weakness which harasses old age as well as youth, and against which no amount of experience or wisdom seems to provide adequate insurance.

(*Concluded on p. 388.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Christmas Revels at Gray's Inn.—14th December, 1954. The gentlemen at Gray's Inn, after many consultations, have now determined to hold revels this Christmastide, and more especially as these pastimes have been discontinued for three or four years. They make choice of Mr Henry Helmes, a Norfolk gentleman, one accomplished with all good parts, a very proper man of personage, and very active in dancing and revelling, to be elected their " Prince of Purpool " and to govern the state for the duration of the revels. Privy Councillors and all Officers of State, of the Law, and of the Household are assigned to him, and an invitation in the form of a privy seal dispatched to the Gentlemen of the Inner Temple, bidding them appoint an Ambassador to be a minister of correspondence between the two houses or kingdoms. Memo.: The " Prince of Purpool " at the revels held on December 20 made, inter alia, an award " for every maid in Islington continuing a virgin after the age of fourteen years, one hundred thousand million sterling."

Conveyancer's Tale.—Informed that his client's prospective purchase was cheap, the solicitor nevertheless advised strongly against it because the house was known to be infested with white ants. " It will fall down in twelve months," he predicted. That was five years ago and when the solicitor was there the other day he was amazed to see the place still standing, and, to all appearances, perfectly sound. Swallowing his pride, he asked the client how he had dealt with the menace. Did you kill the ants, he asked. The client gave him a cunning, if somewhat distraught, look. " No," he replied, " I trained them, and taught them to hold hands."

The Conduct of Counsel.—

Counsel for Plaintiff: " My learned friend's idea of entertainment is knocking them back as fast as he can, yelling out to his host to fill them up, and then passing out cold—the still life of the party."

Counsel for Defendant: " A few drinks from time to time would at least infuse counsel for the plaintiff with a spark of humanity. He is a mealy-mouthed humbug, as mean as cat's meat and looks like something dredged up from a disused sewer."

This imaginary piece of cross-reference may be of the kind vizualised by the compilers of " The Code of Trial Conduct " now adopted by the American College of Trial Lawyers in which lawyers are urged to abstain from reference to the personal peculiarities or idiosyncrasies of opposing counsel. There is an injunction also in the Code from showing unusual hostility to a Judge—presumably a reasonable degress of hostility is on occasions pleasing to the litigant—nor from fawning on or currying favour with the jury. And while the Court is in session, counsel is " not to smoke, assume an undignified posture or without the Judge's permission remove his coat in the courtroom." Educated as we are to concepts of dignity and decorum in Court practice, the necessity for any such warnings appears amusing, but too much complacency on our part is misplaced. An older generation of practitioners would recoil in surprise at some of the grey, brown, and pastel shades of attire that are seen these days in the Supreme Court and at the double-decker effect of a stiff collar and bands superimposed upon the soft collar of everyday wear.

Licensing Notes.—A user of Ames's *Magistrate's Court Cases Index* draws our attention to the heading to the second column on page 158—" Licensing—Offences—Supplying Intoxicating Persons." Such amenities as these, he feels, are more appropriate to the " call girl " racket. On the other hand, we notice that the New Zealand Licensed Hotels' Employees Award, by cl. 6 (*d*) now interprets the provisions of the " Pubic " Holidays Amendment Act 1948. Under the hotels' roster system, there does not seem any justification for holidays of this sort.

The Objective View.—The public confession recently of one of our Magistrates that he tries to steer a course between the subjective and the objective approach to reformative punishment reminds Scriblex that Edward Lipscombe, an American expert on cotton, at a lunch given for him by Sir Charles Hambro and the Dollar Exports Council, said in his speech that he always believed in taking an objective view of any task, adding that he supposed that he had inherited this habit from his grandfather, a famous figure in Columbus, Mississipi, who had written a book called " An Unbiased History of the Civil War from the Southern Point of View."

From My Notebook.—" It must be borne in mind that decisions in negligence cases are determined upon evidence, and in medical cases this means expert evidence by doctors. The Courts would be doing a disservice to the community if they were to impose liability on hospitals and doctors for everything that can happen to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of perspective requires the Courts to have regard to the conditions in which hospitals and doctors have to work. They must insist upon due care for the patient, but must not condemn as negligent that which is only misadventure."—Mr Justice Lloyd-Jacob in an address on October 4.

" I hope to make it very clear by repetition that this judgment does not question the accuracy and reliability of radar in traffic speed detection nor the wisdom of its use by police authorities. I respectfully repeat the suggestion, however, that if our legislators feel that radar-graph recordings are reliable and accurate and should be accepted in evidence in our Courts at face value, they should so provide by appropriate statutory enactment. I also respectfully suggest that no police officer ought fairly to be detailed for radar detection duties unless and until he has been properly instructed in the principles involved as well as in the practical use of the radar equipment which he is expected to operate."—Sullivan J., allowing an appeal in the Supreme Court of British Columbia.

PAGES FROM THE PAST.

(*Concluded from p. 386.*)

The echoes of the debate which killed the Judicial Commission Bill had hardly died away when Mr Justice Richmond addressed himself at great length to the Colonial Secretary where there was no occasion for any correspondence at all. The burden of it all was that Mr Barton was "thoroughly without ground of complaint."

By a curious recondite chain of reasoning, to which he was considered to be addicted, the Judge seemed to have argued himself into the belief that the House was concerned solely with points of law argued by the Judges, and that the little matter of the committal to gaol for one month was merely an incident of the case of no particular interest to anybody. The question of the committal itself—its justice or injustice—the learned Judge did not trouble himself to consider.

It was all futile enough to be ignored, except for the fact that it stung the Irish in Mr Barton quickly to life again. He suddenly realized that the opportunity he had jettisoned at the outset was fortuitously offered to him again—and he seized it vigorously.

With a new feverishness he produced a fresh catalogue of the charges he had to make against the Judges, and presented it in the form of a speech in reply to Richmond J.'s letter. The business now stood before the House in a totally new shape. There were charges in abundance. Two Judges, one of them the Chief Justice, were formally charged in Parliament by a Member of Parliament, with a series of offences which could be neither passed over nor smoothed over. An inquiry must be held. But in what form?

After two years the Government was back to the point at which it started. Two years before Mr Barton had made his complaint to the Government and demanded an inquiry. The Government referred him to Parliament. He petitioned Parliament, but acting on the advice of the then Attorney-General, the House rejected the petition through lack of specific indictments. For a long twelvemonth the contest between Mr Barton and the Bench had dragged on, reaching its climax in the committal. Mr Barton again demanded an inquiry from the Government, and was again referred to Parliament. A second time his request for an investigation was declined, but now his claim had become suddenly more peremptory, simply because of the lack of a little moral courage on the part of the Government twenty-four months earlier. The Government had a duty from the first to act promptly, as well for the sake of the Judges as their accuser, but most of all for the sake of the public.

Mr Barton concluded his address to the House confidently:

> "And now I have done. I make no motion, I ask for no redress. I am content to leave it to time. I have not the shadow of a doubt that redress will come."

And straightway he sat down and wrote to the Colonial Secretary again, listing twelve clear charges in a two thousand word document.

The Colonial Secretary replied at even greater length, with a wealth of appendices, and offered as his last word a pious expression of regret: "After a careful and calm review, I am bound to say that I regret you should have made the charges, and I feel assured that you will yet acknowledge that they were made under some temporary irritation or without due consideration."

Mr Barton rang down the curtain on the drama of the irreconcilables with a reply which ended on the following note:

> "Your letter reveals to me, as a lightning flash in the darkness, the precipice on whose brink I have been standing. I now see the destruction that would have befallen me had I succeeded in forcing an inquiry, and I am humbly thankful to Providence for so shaping events that I am at least spared that crowning disaster—an inquiry predestined to fail(!), and whose failure would be the more crushing by reason of having been held under the auspices of the people's Government."

The Colonial Secretary's summary closing of the correspondence at this juncture could only have been the sheerest anti-climax.

SUMMARY OF RECENT LAW.

(*Concluded from p. 377.*)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Company Director—Company comprising Two Directors being only Shareholders—One Director employed by Company—Both Directors forming Quorum at Meetings—No Control and Direction of Working Director—Such Director not a "worker"—Workers Compensation Act 1956, s. 3 (1). The fact that a person is a director of a company does not prevent him from being regarded as a servant of the company in appropriate circumstances but, if the necessary elements of a contract of service, including control and direction, are absent, the director cannot maintain a claim for worker's compensation against the company. (*In re Beeton & Co. Ltd.* [1913] 2 Ch. 279; *Re K. K. Footwear Ltd. (In Liquidation), ex parte Kitchener* [1935] N.Z.L.R. s. 153; [1935] G.L.R. 679; *Simmons* v. *Heath Laundry Co.* [1910] 1 K.B. 543; 3 B.W.C.C. 200, and *Performing Right Society Ltd.* v. *Mitchell & Booker (Palais de Danse) Ltd.* [1924] 1 K.B. 762, referred to.) B. claimed compensation for injuries resulting from an accident which occurred on the company's farm. B. held 5,000 £1 shares in the company and S. held the remaining 7,000 £1 shares. B. and S. were the directors of the company which had acquired a farm property on Great Barrier Island. B. worked on the property to develop it for farming purposes, and he drew a weekly living wage of £12 10s. There was no resolution in the company's books and no written agreement concerning the arrangement under which B. was working on the property. At the time of B.'s accident, S. did not live on the property or work on the farm. In terms of the company's articles, the presence of B., though a minority shareholder, was necessary at any meeting of the directors or of the company called to consider any question of issuing directions to him or of dismissing him for failure to conform to any directions. If he absented himself from any meeting there was no quorum which could effectively act on behalf of the company. *Held*, 1. That although the company was a separate legal entity, the substantial position was that it was an incorporated partnership and that the relationship of B. and S. was rather that of two partners than that of a managing director, in the person of S., exercising powers of control, and a servant of the company, in the person of B. 2. That the necessary elements of control and direction did not exist and the arrangement under which B. was working at the time of his accident was not a contract of service, and, that consequently, B. was not a "worker" for the purposes of the Workers' Compensation Act 1956. (*Ross* v. *Ross & Bowman Pty. Ltd.* [1942] W.C.R. (N.S.W.) 37; *Hanson* v. *Hansons Ltd.* [1937] W.C.R. (N.S.W.) 165, and *Dugan* v. *Wagga Publications Pty. Ltd. (In Liquidation)* [1955] W.C.R. (N.S.W.) 219, applied. *Blennerhassett* v. *Blennerhassett's Institute of Accountancy Pty. Ltd.* [1954] W.C.R. (N.S.W.) 50, referred to.) *Brown* v. *Okiwi Farms Ltd. and Others.* (Comp. Ct. Auckland. August 14, 1957. Dalglish J.)