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THE PARLIAMENTARY COMMISSIONER FOR INVESTIGATIONS

WE have just received a copy of the Parliamentary Commissioner for Investigations Bill. As was to be expected it is good in parts but in our opinion is subject to some very grave defects. These we propose to deal with in some detail, using the term "the Commissioner" for the lengthy title given by the Bill to the officer in question.

Terms of Appointment

Perhaps one of the most unsatisfactory features of the Bill is the provision specifying the Commissioner's term of office. It was understood from Ministerial statements made from time to time that the Commissioner would have security of tenure comparable with that given to the Controller and Auditor-General under the Public Revenues Act. In fact he is given such security *but only for the term of the Parliament in which he is appointed.*

This matter is dealt with in cl. 4 of the Bill, which provides that the recommendation for the appointment of the Commissioner shall be made in the first or second session of every Parliament, the first recommendation to be made during the current session. Unless his office sooner becomes vacant, which would occur by reason of his death, resignation or removal for cause, the Commissioner holds office until his successor is appointed, but may be reappointed. He retires on attaining the age of 72 years.

The Commissioner's position then is that he is virtually appointed for a term of three years with power of reappointment. This, we suggest, is most unsatisfactory. If the Commissioner is to hold the confidence of the country he should be in a position of complete independence and able to carry out his functions without fear or favour. As the Bill stands a Commissioner who does operate without fear and thus gives offence to the Government of the day through the proper performance of his duties can be quietly dropped at the end of three years and a different person appointed in his place.

Another defect arising out of this provision is that on a change of Government there may also be a change of Commissioner, however satisfactorily the previous appointee has carried out his duties. We have in fairly recent years seen this tendency operate in the case of certain overseas posts. It would be unfortunate if the position of Commissioner should become a political "plum" to be awarded by the party in power for the time being to one of its supporters, but this is exactly what the Bill allows.

Restrictions on Other Employment

We have yet another complaint about this provision. Clause 3 of the Bill provides that the person holding office as Commissioner shall not be capable of being a Member of Parliament and shall not without the approval of the Prime Minister in each particular case, hold any other office of trust or profit or engage in any occupation for reward outside the duties of his office. We would expect that the approval of the Prime Minister would be granted sparingly. How, then, does the Government expect to secure the services of any suitable man for the position when he must strip himself of all other occupation and yet is given security of tenure of office for only three years? How many practitioners would accept appointment on these terms? We suggest very few, and those few would be the least suitable for appointment.

Appointment of Staff

Clause 9 of the Bill contains provision for the appointment of staff to assist the Commissioner. Power of appointment is vested in the Commissioner subject only to the right of the Prime Minister to determine the number of persons to be employed. Here again is a dangerous provision with the Commissioner subject to political control, as we have shown him to be.

The Public Service Act was designed to prevent political appointments to the Service yet here is a provision which cuts across the principles of that Act. Under cl. 9 of the Bill a complaisant Commissioner, fearful of not being reappointed when his term was up, would be subject to all sorts of political influence to find jobs for those who had endeared themselves to the party in power. If the Commissioner himself were removed from any possibility of political control, much of the force of the objections to cl. 9 would be lost. As the position is, however, the clause is open to objection.

Functions of Commissioner

Clause 11 of the Bill sets out the functions of the Commissioner, the principal one of which is to investigate

> any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organisations named in the schedule to this Act, or by any officer, employee, or member thereof in his capacity as such officer, employee, or member.

Certain sections of the daily Press have criticised this provision on the ground that it relieves from investigation any decision or action of a Minister. We are not at all sure that it does.

As the clause is drawn, the question whether or not the decision or actions of a Minister can be investigated depends on whether or not the Minister is a part of his department. We cannot quote any direct authority in support of our view, but we have always held the opinion that at common law the Minister, as political head of his department, was part of it. In fact we had heard it said that the department was no more than "an extension of the Minister's personality". There are some *dicta* in *Carltona Ltd.* v. *Commissioners of Works* [1943] 2 All E.R. 560, 563 and *Lewisham Borough Council* v. *Roberts* [1949] 1 All E.R. 815, 822, which seem to support this view, although we must agree that the matter is arguable.

Assuming, however, that our interpretation of the common law is correct, that is not the end of the matter. In cl. 11 of the Bill the Commissioner is expressly directed to investigate "any recommendation made to a Minister of the Crown". The inclusion of this direction immediately leaves open the argument that, on the basis of the maxim *inclusio unius est exclusio alterius*, decisions of Ministers are exempt from investigation.

Express Statutory Provisions

Now let us assume again that this latter argument is put up and fails, does this make the position clear? We say that it does not. Many departments have been set up as a matter of practice and are not creatures of statute. In fact they do not possess even any statutory recognition. Examples are the Customs Department and the Mines Department. The existence of others is recognised by statute, but the statute contains some such provision as the following:

> There shall be a Department of State to be called which shall be the same department as that existing under the name of at the coming into force of this Act.

On reference to the preceding Act it is found that no provision for a Department of State is included in it, and the common-law rule as to the Minister's position would apply. The Post Office is an example of this class.

Then there is another group of departments expressly set up by statute where the statute gives the composition of the department. The New Zealand Army Act is one of these, the Department consisting of:

> an officer of the Public Service to be called the Army Secretary, and such other officers of the Public Service as may from time to time be appointed to the Department.

Here the Minister is not a part of the Department. But turn now to the Forests Act 1949 which contains the usual provision that the Forest Service

> shall be the same Department as that existing under the name of the State Forest Service at the coming into force of this Act.

Reference to the preceding Act, the Forest Act 1921-22, shows that the State Forest Service consisted of (*inter alia*) the Commissioner of State Forests, who was the Minister in charge of the Department. Since s. 3 (3) of the Forests Act 1949 expressly provides that all references to the Commissioner of State Forests in any Act shall be read as references to the Minister of Forests we can say with confidence that the Minister of Forests is part of his Department and his decisions are examinable by the Commissioner, whatever may be the position in regard to other Ministers.

The Commissioner's rights in relation to Ministerial decisions are delightfully vague and although we have not carried our investigations very far, they have gone far enough to show that the provisions of the Bill are anomalous in some respects. It cannot have been intended that the actions of the Minister of Forests and possibly other Ministers should be subject to review while those of the Minister of Defence, and possibly others, are not reviewable.

Such vagueness in legislation is most undesirable. The Government must know whether or not it desires the decisions and actions of Ministers to be subject to review. Why not then come into the open and say so? As the Bill stands it is an invitation to any aggrieved person to enter on litigation if the Commissioner should hold himself to have no jurisdiction to review a Ministerial decision.

The next question is whether it is desirable, not politically but in the public interest, that a Minister's decision should be subject to review by this Commissioner. Constitutionally we should say not. The country is to be governed by the Government and not by the Commissioner; but the appointment of such a Commissioner is constitutionally quite new, and, if he is to achieve anything, then he must have the power to review and criticise the decisions of Ministers. It is, perhaps, not generally recognised that most of the decisions to which exception is taken by individuals are decisions of the Minister in question and not of his department, although, of course, generally the decision is based on the recommendation of the department. For example, the decision to take land under the Public Works Act is one that generates more heartburning than most, yet in every case is made by the Ministers. Certainly the recommendations are subject to review but is this going to achieve anything after the decision has been reached? We doubt it.

Then, of course, freedom of the Minister from investigation would provide an admirable escape route for the departmental head who is notified that a matter is to be investigated. If he has not already obtained the Minister's approval he will now be able to do so and then shelter behind it.

Conclusion

This Bill is an important one, and there are still a number of matters on which we have comment to offer. This article will therefore be continued in our next issue.

Editor

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THE EFFECT OF LAWYERS ON THE INCIDENCE OF CRIME

Distrust all in whom the impulse to punish is strong—Nietzche.

The muddled, sentimental thoughts on corporal punishment expressed by the leading article in the NEW ZEALAND LAW JOURNAL of 23 May 1961 demonstrates the great gulf fixed between those whose education includes some training in scientific method and those whose education does not. It also emphasises the curious difference in attitude manifest by the community towards the medical profession in comparison with that shown towards the legal profession.

If a medical practitioner prescribes for a patient treatment which has been shown by investigation to be likely to worsen this patient's condition, and render him more liable to recurrence of his disease, he is likely to be found negligent; especially if a group of reputable medical colleagues have reviewed the available evidence about this treatment and after considering current opinion pronounced it as being of no value as a remedy. Yet doctors undergo a course of training in pharmacology and therapeutics laid down by statute and have passed examinations in the subject before being allowed to practise. They have the opportunity of following up patients and observing the effects of their treatment. The community (in contrast to its insistence on the training of doctors) is apparently unconcerned that legal practitioners may be entirely ignorant of the effects of varying methods of punishment, and that those who prescribe sentences have no formal training in penology and do not usually learn the results of the treatment of individual cases by following them up.

A follow-up in U.K.[1] of about 3,000 flogged persons showed a slightly higher re-conviction rate than where corporal punishment was not used, but could have been. The number of offences known to the police of robbery with violence (in practice the only offence for which flogging was ordered during this century) decreased steadily during the seven years following its abolition in 1948.[2] Yet almost all members of the Bench who publicly bewail their inability to order corporal punishment are ignorant of these facts. They may have read that the widely based Advisory Council on the Treatment of Offenders in U.K. in 1960, after initial disagreement, unanimously advised the U.K. Home Office against the re-introduction of corporal punishment. If so they are likely to explain that their enthusiasm is for a "good whipping" not a return to the "bad" days of flogging—again ignoring that the Cadogan Committee were assured by witnesses with experience of both methods that birching, as administered, was almost if not quite as painful as flogging.[3] If some unfortunate psychiatrist should be unwise enough to be persuaded by a defendant's counsel to write to a Magistrate pointing out any of these facts, and remind him that certain forms of treatment may be inappropriate for a particular defendant[4], the Magistrate may again publicly complain of the impertinence to which the Court is subjected.[5] This behaviour is apparently approved of and given wide publicity by the Press. If anyone reading these statements about the efficacy of corporal punishment should politely inquire about the evidence on which they rest, he is likely to be referred to the opinion of Lord Goddard, the previous Lord Chief Justice, who quoted statistics in favour of corporal punishment[6] which on examination proved to be quite misleading.

The fact that Judges and Magistrates, like doctors, need to learn from their errors (and from their successes) has recently received belated recognition in the U.K. The report of the Inter-Departmental Committee on the Business of Criminal Courts[7] suggests that the "sentencer" should receive a comprehensive account of what each form of sentence entails, what it is designed to achieve, what in fact it has achieved, and the results of the latest research. He would be expected to visit institutions and besides being given detailed information about the circumstances and life of each offender, he would receive periodically reports on the progress of each offender under treatment and of further convictions. The newly qualified medical graduate who must now work one year in a hospital before being granted registration may justly feel discriminated against.

This ignorance on the part of the legal profession about matters which the community expects them to deal with expertly would be bad enough if its effect was limited to courtroom and prison. However the influence of their views extends widely and tends to obstruct the efforts of workers who, by a rational approach, based on some understanding of the problem, would otherwise have some chance of salvaging aggressive and delinquent boys and girls.[8] Because of the prestige and influence of lawyers the damaging effect on the community of this is too little known. Thus when a Magistrate, in all sincerity, advised parents to beat their children and thus reduce the likelihood of their appearing before him, this statement[9] also is afforded wide publicity. Yet careful investigations[10,11] into the methods of upbringing of children who subsequently commit criminal offences has shown clearly that their parents use physical punishment as a primary method of discipline much

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[1] Corporal Punishment. Cmnd 1213 H.M.S.O. 1960.

[2] Hansard (U.K.) 26 April 1956.

[3] Report of Departmental Committee on Corporal Punishment. Cmnd 5684 H.M.S.O. 1938 (Cadogan).

[4] MacLay, D. T. Brit. J. Delinq. 1952 : 3 : 1 : 34.

[5] Harlow, W. A. N.Z.P.A. message. November 1960.

[6] Paterson, S. L. N.Z.P.A. 16 March 1956.

[7] Report Inter-Departmental Committee on Business of Criminal Courts. Cmnd 1289 H.M.S.O. 1961.

[8] Relieving Stresses of Living on Council Estates. Bristol Social Project. The Council House, Bristol. 1961.

[9] Barry, B. S. N.Z.P.A. 17 February 1961.

[10] Unravelling Juvenile Delinquency. E. & S. Gleuck N.Y. 1950.

[11] Origins of Crime. W. & J. McCord N.Y. 1959.

more frequently than the parents of those children who do not become delinquent. This effect of different disciplinary methods was found in homes where the atmosphere was otherwise conducive to the production of criminals, and led one pair of authors to deduce that "a valuable method of crime prevention is the education of parents in the use of non-punitive yet consistent methods of discipline". For years doctors have discussed the problem of iatrogenic disease, yet the adverse effect that lawyers may have on the crime rate appears unnoticed.

The comments made about Detention Centres in the same leading article show likewise a failure to understand their purpose (in spite of the Minister of Justice's careful and detailed explanation) and one can predict with a fair degree of certainty that (as in U.K.) the results of Detention Centre treatment will be unsatisfactory, because (for reasons explained) lads unsuited for their regime will be sent there. As the White Paper[12] in 1959 reminded us—the Gladstone Committee concluded after a long experience firmly based on punitive deterrence that the deterrent effect of imprisonment is not reinforced if a period of loss of liberty is used in a merely repressive and punitive way. The Paper affirms that nothing in the experience of the last 60 years has pointed to a different conclusion.

We are unlikely to begin to solve the problem of crime until the legal profession gives up its splendid isolation from the facts of life, and the community insists that all members of the Bench are at least as knowledgeable about the treatment of crime as is the medical practitioner who reads the annotations on this subject in his general medical journal. Only then can we expect the methods of science to be applied to the treatment of offenders.

Contributed by a Medical Practitioner.

[12] Penal Practice in a Changing Society. Cmnd 645 H.M.S.O. 1959.

SUMMARY OF RECENT LAW

BANKRUPTCY.

Bankrupt's earnings—Order for payment of fixed weekly sum to Official Assignee—Order made without jurisdiction—Bankrupt not to be fined or imprisoned for non-observance—Bankruptcy Act 1908, ss. 62, 156. The Court has no jurisdiction under s. 62 of the Bankruptcy Act 1908 to order a bankrupt to pay a fixed periodical sum to the Official Assignee for application towards payment of his debts. (*In re Burney* [1955] N.Z.L.R. 1071, followed). It is not proper to fine or imprison a bankrupt under s. 156 of the Bankruptcy Act 1908 for contempt arising from wilful disobedience of an order which had been made without jurisdiction, even where the order was made with the consent of the bankrupt and no step has been taken to have it set aside. *In re Te Rangi (A Bankrupt).* (S.C. Wellington. 1961. 28 April; 14 June. Barrowclough C.J.)

CONTEMPT OF COURT.

Bankruptcy—Disobedience of order made without jurisdiction—Bankrupt not to be fined or imprisoned for non-observance—Bankruptcy Act 1908, s. 156—See BANKRUPTCY (*supra.*)

COSTS.

Third Party added by defendant—Full indemnity sought—No allegations by plaintiff against third party—Third party succeeding in defence—Basis on which costs to be allowed.—See PRACTICE (*infra*).

GOVERNMENT RAILWAYS.

Level crossing—Duty of driver of railway vehicle to keep look-out—Government Railways Act 1949, s. 65. The driver of a vehicle proceeding on the railway line is entitled to make the assumption specified in s. 65 of the Government Railways Act 1949 but is not absolved under any circumstances from the duty of keeping a reasonable look-out for road traffic at level crossings. The words "so long as such care as is reasonable in the circumstances is taken in each case" used in the section include reasonable care by way of look-out for road traffic at level crossings; but what is reasonable in that behalf may vary greatly according to the type of railway vehicle involved and all the other circumstances. (*Dictum* of McGregor J. as to the meaning and effect of s. 65 in *Bird* v. *Hammond* [1959] N.Z.L.R. 1349, 1352, adopted). On the hearing of motions by the parties to an action after trial of the action before a jury, if there is no express agreement between counsel that the Judge should decide questions of fact other than those decided by the jury, such an agreement must be implied. (*Brown* v. *Bennett* (1891) 9 N.Z.L.R. 487 and *Brett* v. *Schneideman Bros. Ltd.* [1923] N.Z.L.R. 938; [1923] G.L.R. 291, followed). *Frampton* v. *Hart and Attorney-General* (S.C. Christchurch. 1960. 19 September. 1961. 15 June. *Macarthur J.*)

LANDLORD AND TENANT.

Lease—Oral agreement for lease with giving of possession to prospective lessee expressed to be subject to completion of formal contract—No lease until contract signed—Monthly tenancy not automatically arising—Prospective lessee holding under licence—Licence terminating on refusal to complete contract—No need for notice of termination—Property Law Act 1952, s. 105. Where a person has been given possession of premises belonging to another the question whether he is a tenant or licensee depends on the intention of the parties; even exclusive possession is not necessarily decisive to constitute a tenancy. (*Isaac* v. *Hotel de Paris Ltd.* [1960] 1 W.L.R. 239; [1960] 1 All E.R. 348, applied). Whether any notice requires to be given to a licensee before his licence is revoked is a question dependent on the nature of the licence and the circumstances surrounding its grant. Where the licensee was under the terms of his licence allowed the occupation of the premises conditional on his signing a tenancy agreement by a specified date and refused to sign the agreement the licence came to an end and the licensee was not entitled to notice of the licensor's intention to revoke the licence. *So held* by the Court of Appeal (Gresson P., Cleary and North JJ.) affirming the judgment of Turner J. [1960] N.Z.L.R. 936. *Further held,* (per North J.) a prospective lessee of premises let into possession prior to the signing of a contract for a lease for a term does not automatically become a monthly tenant subject to the provisions of s. 105 of the Property Law Act 1952. *Baikie* v. *Fullerton-Smith and Another.* (C.A. Wellington. 1960. 30 November, 1, 2 December; 1961. 6 June. Gresson P. North and Cleary JJ.)

MALICIOUS PROSECUTION.

Damage necessary to support action—Costs of defence and appeal—Actual costs less lump sum costs awarded by quarter sessions—Whether sufficient to support an action. The plaintiff was convicted by a Magistrates' Court on a charge brought by the defendants of contravening s. 22 of the Regulation of Railways Act 1868, by pulling the communication cord on a train without reasonable and sufficient cause; but her appeal to quarter sessions against conviction was allowed and she was awarded fifteen guineas costs under s. 5 (1) of the Summary Jurisdiction (Appeals) Act 1933. She brought an action against the defendants for damages for malicious prosecution, alleging as special damage the difference between the aggregate of the actual costs of her defence at the Magistrates' Court and of her appeal and the 15 guineas costs awarded to her, the amount of the difference being £64 2s. On a preliminary point of law, that

the statement of claim disclosed no damage which the plaintiff was entitled to claim in law, and thus disclosed no cause of action. *Held*, the costs awarded by the recorder in the case should not be regarded as compensating the plaintiff; accordingly the special damage alleged was sufficient in law for the purposes of a cause of action for malicious prosecution, and the statement of claim disclosed such a cause of action. (*Quartz Hill Gold Mining Co.* v. *Eyre* ((1883) 11 Q.B.D. 674) considered). Per Devlin L.J.: the rule of the law of damages that if costs were awarded in hostile civil litigation nothing beyond the taxed amount could be recovered by the successful party from the unsuccessful party rested on the presumption that the award of costs (as between party and party) gave compensation for the cost of the litigation so far as the law allowed, and the reason for the rule was that the law could not permit the question of the amount of costs to be litigated a second time between the same parties in new proceedings; it was however a fiction that costs taxed between party and party were the same as costs reasonably incurred and the law should recognise that an assessment of damage and a taxation of party and party costs were two different things. The rule should not be extended to criminal cases, because the principles governing the award of costs in civil and criminal cases were not the same; for in criminal cases a successful defendant had no *prima facie* entitlement to an award of costs, as the prosecution was brought in the public interest and an award of costs need not be directed to quantifying the damage and indemnifying the accused according to a conventional measure. (*Barnett* v. *Eccles Corpn.* [1900] 2 Q.B. 104 and dictum of Phillimore L.J. in *Wiffen* v. *Bailey and Romford Urban Council* [1915] 1 K.B. at p. 610, considered and explained). *Berry* v. *British Transport Commission* (Court of Appeal. Ormerod, Devlin and Danckwerts L.JJ. 22, 23, 24 February. 23 June 1961 [1961] 3 All E.R. 65).

NEGLIGENCE.

Negligence—Duty to take care—Proximity of relation—Statements—Careless statements causing damage to persons or property—Statements actionable under principle in M'Alister (or Donoghue) *v.* Stevenson—*Instructions negligently issued by architect to bricklayer resulting in bricklayer's personal injuries. Clayton v. Woodman and Son (Builders) Ltd. and Others.* (Queen's Bench Division Salmon J. 19, 20, 21 June 5 July 1961. [1961] 3 All E.R. 249.)

PRACTICE.

Appeals to Supreme Court—Motion for leave to appeal out of time—Grounds to be shown—Magistrates' Courts Act 1947, s. 73 (1). Where a party to an action in the Magistrates' Court has made a deliberate decision not to appeal against the Magistrate's decision and then, after the time for appeal has gone by, changes his mind, leave to appeal under s. 73 (1) of the Magistrates' Courts Act 1947 should be refused in the absence of special circumstances. *In re Helsby, ex parte The Trustee* [1894] 1 Q.B. 742 and *Pitcher* v. *Dimock* (1913) 32 N.Z.L.R. 1127; 16 G.L.R. 57, applied). The fact that a warrant to issue pursuant to the Magistrate's judgment cannot be executed until a later date is not sufficient circumstance to bring an applicant within the cases where leave has been granted. *Barnard* v. *Pollock and Another* (S.C. (In Chambers). 1961. 16, 26 June. Hardie Boys J.)

Jury—Jury adding explanatory matter to answer to issue—Not necessarily to be treated as surplusage—Circumstances under which such explanatory matter will render verdict defective—Code of Civil Procedure R. 276 (h). There is no general principle whereby the Court is required to treat as mere surplusage matter added by a jury by way of qualification, explanation or addition to an answer given by it either on the general issue or to a specific issue of fact capable of being answered "yes" or "no". If, however, the complete answer to an issue considered in the light of the evidence and of the direction of the presiding Judge raises a substantial doubt whether or not the jury applied their mind properly to the only question raised by the issue the finding is defective for the purposes of R. 276 (h) of the Code of Civil Procedure and a new trial should be ordered. If on the motion of the defendant in an action there is added a third party against whom no allegations have been made by the plaintiff and the defendant claims full indemnity from the third party, the third party, if successful in his defence, is entitled to his costs from the defendant calculated on the full amount claimed by the plaintiff even though such amount is excessive. (*Dictum* of Stanton J. in *Legg* v. *J. J. Craig Ltd.* [1954] N.Z.L.R. 258, applied.) *Hoare* v. *Frames Carrying Co. Ltd., and Another.* (S.C. Timaru. 2, 3 May; 13 June. Richmond J.)

Motion—Motion following trial by jury—Power of Judge to decide questions of fact not decided by jury—See GOVERNMENT RAILWAYS (*supra*).

Striking out pleadings and proceedings—Motion to strike out for want of prosecution—Principles applicable—Code of Civil Procedure R. 273. On 23 January 1957 the plaintiff issued a writ against one O. claiming an account and damages. The writ was served on 14 February 1957 and a statement of defence was filed. The plaintiff took no further steps in the action until after the death of O. in August 1960 but he then obtained an *ex parte* order under R. 475 of the Code of Civil Procedure granting leave to continue the action against the executors of O. and substituting them as defendants. He also set the action down for trial. The defendants moved to discharge this order or in the alternative for an order dismissing the action for want of prosecution, alleging also that the continuation of the action would be vexatious and an abuse of the process of the Court. *Held*, 1. That despite the inordinate delay on the part of the plaintiff in bringing the action to trial it should not be struck out because prior to the filing of the defendants' motion the plaintiff had taken active steps to continue the action and the period of limitation within which the action could have been brought had not expired. *Krakauer* v. *Katz* [1954] 1 W.L.R. 278; [1954] 1 All E.R. 244 and *Mahon* v. *Broughton* [1899] P. 211; [1900] P. 56 C.A., distinguished). 2. When an *ex parte* order has been obtained under R. 457 and later comes under review pursuant to R. 459 the onus is still on the party seeking to uphold the order to show that its making was necessary or desirable. In the present case the plaintiff had failed to discharge that onus and the order should therefore be discharged. *Greening* v. *Ormond and Others.* (S.C. Napier. 1961. 23 May; 28 June. McGregor J.).

PRINCIPAL AND AGENT.

Default consisting in lack of knowledge which agent held out to possess—Defeat of right to reimbursement of expenses. A default which consists in a lack of knowledge or skill on the part of an agent which the agent is held out to his principal as possessing is fundamental and defeats the agent's right to reimbursement of expenses which would never have been incurred had the agent possessed that knowledge or skill. *New Zealand Farmers' Co-operative Distributing Co. Ltd.* v. *National Mortgage and Agency Co. of New Zealand Ltd.* (S.C. Palmerston North. 1961. 20 April; 26 June. Barrowclough C.J.)

PUBLIC REVENUE.

Death Duties (Estate Duty)—Annuity granted by deceased's employer to deceased's wife in consideration of covenant by deceased in his lifetime to serve employer—Annuity "purchased or provided" by deceased—Effect of consideration not diminishing deceased's estate—Annuity accruing or arising on death of deceased—Death Duties Act 1921 s. 5 (1) (g). It is not always necessary for the Commissioner of Inland Revenue to establish that there has been in any real sense of the word a subtraction of money or money's worth from the estate of a deceased person in his lifetime before a transaction can attract duty under s. 5 (1) (g) of the Death Duties Act 1921. In the case of the purchase of an annuity at all events, so long as the transaction is of a *bona fide* nature the Court is not concerned with anything more than the reality of the consideration. If the consideration given by a deceased person in return for a promise to pay an annuity to his wife is regarded as adequate by the person undertaking the obligation it can properly be said that the deceased "purchased or provided" the annuity even although the purchase or provision did not involve, in any substantial sense, the subtraction of money or money's worth from the means of the deceased during his lifetime. Where an interest is conferred contingently upon a beneficiary surviving the settlor, and that interest becomes vested on the death of the settlor, then a beneficial interest has accrued or arisen by survivorship on the death of the settlor. (*D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 1 All E.R. 403 and *Westminster Bank Ltd.* v. *Inland Revenue Commissioners* [1958] A.C. 210; [1957] 2 All E.R. 745 distinguished.) *So held*, by the Court of Appeal (Gresson P., North and Cleary JJ.), reversing the judgment of Haslam J. *Commissioner of Inland Revenue* v. *Taylor* (Supreme Court. Wellington. 1959. 3 November. 1960. 22 August. Haslam J. Court of Appeal. Wellington. 1961. 10, 11 April; 6 June. Gresson P., North and Cleary JJ.)

CASE AND COMMENT

Contributed by Faculty of Law of the University of Auckland

Arbitration—Partiality of Arbitrator

Section 16 of the Arbitration Amendment Act 1938 in effect enacts that where an agreement provides that future disputes shall be referred to an arbitrator named or designated in the agreement and, after a dispute has arisen any party applies, on the ground that the named arbitrator is not or may not be impartial, for leave to revoke the submission or for an injunction to restrain the continuance of the arbitration proceedings, it shall not be a ground for refusing the application that the party at the time he made the agreement knew, or ought to have known, that the arbitrator by reason of his relation to any other party to the agreement or his connection with the subject referred might not be capable of impartiality. If, in consequence, the Court has power to order that an agreement shall cease to have effect or to give leave to revoke a submission, the Court may refuse to stay an action brought in breach of the agreement.

Heretofore this section and its United Kingdom counterpart, formerly s. 14 of the Arbitration Act 1934, now s. 24 of the Arbitration Act 1950, have not, so far as counsel and the Judge (in the instant case) were able to discover, been the subject of judicial interpretation. It fell to Richmond J. in *Canterbury Pipe Lines Ltd.* v. *Attorney-General* (judgment 30 May 1961) to determine the proper meaning of the section in the circumstances, with the immediate aid only of a statement in a textbook (*Russel on Arbitration*, 16th ed., p. 111) which, in its turn, was based on an obscurely reported and barely relevant decision of the House of Lords.

The facts were that the plaintiff company entered into a contract with Her Majesty the Queen under which it agreed to construct certain works for the New Zealand Ministry of Works. The contract incorporated certain standard conditions adopted by the Ministry of Works with some particular amendments the purpose of which was to render the general conditions more particularly applicable to cases where the Housing Division of the Ministry of Works was concerned. The condition of the contract, material in the particular circumstances, provided for disputes to be referred to the Engineer-in-Chief who had power to refer any dispute to the Engineer for his decision. An amending clause provided that references to the Engineer-in-Chief should be deemed to be references to the Director of Housing Construction or a person duly authorised to act in that capacity. The Director had authority to delegate his powers to the District Supervisor of Housing Construction, but he had not exercised that authority. In effect, therefore, the Director of Housing Construction was sole arbitrator in respect of disputes which might arise under the contract. Was he a person who might not be impartial? If so, should the defendant be refused a stay of proceedings? These were the questions which Richmond J., had to answer when, the plaintiff having issued a writ claiming moneys alleged to be due under the contract, the defendant applied for a stay of proceedings.

His Honour answered those questions in the affirmative and consequently refused a stay. Counsel for the plaintiff conceded that, had the application for a stay been made before the Amendment Act of 1938 came into operation, it must have succeeded. The ultimate question therefore was: what did s. 16 of the Act of 1938, in the circumstances, mean and did it apply to the present application? To answer those questions, the learned Judge found it necessary to examine the law as it stood immediately before the passing of the amending section, so as to determine the purpose and effect of the section in accordance with the resolutions in *Heydon's* case (1584, 3 Co. Rep. 7A).

After reviewing a large number of English decisions and one Scottish decision on the question of bias on the part of an arbitrator and on the position where a party has agreed to the appointment of a named arbitrator who was known as likely to be biassed, his Honour enunciated three propositions which may be summarised as follows: (1) *Prima facie* an arbitrator should not be a party or closely identified with a party to a dispute; (2) if parties to a contract agree that a person disqualified under (1) shall nevertheless be an arbitrator, their agreement derogates from the *prima facie* rule, to the extent of any interest possessed by the arbitrator of which they knew or ought to have known at the time of the agreement; (3) accordingly a stay of the arbitration proceedings will only be granted if the Court is satisfied that to allow the dispute to go to arbitration would result in one of the parties being bound by the decision of an arbitrator whose probable bias exceeded in a material degree that which ought to have been contemplated when the contract was made.

The learned Judge then considered the amending section against the background of the pre-existing law and reached the following conclusions: (1) The section recognises actual or possible partiality as a ground for revoking or restraining arbitration proceedings; (2) the section applies only to agreements to submit *future* disputes to arbitration; (3) the section eliminates as a ground for refusing the application knowledge which the applicant had or ought to have had, at the time when he made the agreement, that the arbitrator might not be capable of impartiality by reason either (a) of his relation towards any other party, or (b) of his connection with the subject-matter.

Applying these conclusions to the facts before him, his Honour refused the application for the stay of proceedings.

The decision of Richmond J., is, with respect, welcome. It throws much light on a point in the law of arbitration which has hitherto been obscure. The interpretation is, it is submitted, in accordance with the duty enjoined on the judiciary to give to statutes such fair, large and liberal construction as will best ensure the attainment of the object of the Act. It is of current importance in these days when so many contracts are made with the Crown in which a public servant—usually a member

LEGAL ANNOUNCEMENTS

Concluded from p. i.

VACANCIES FOR LEGAL STAFF

Qualified barristers or solicitors, whether recently qualified or well experienced, are invited to apply for appointment as Legal Officers in the Public Trust Office, Maori Affairs Department, Land and Deeds Division of Justice Department, Ministry of Works, Inland Revenue Department and State Advances Corporation in various localities. The salary payable will be dependent on the experience of the applicant, but will in any case be in the salary range of £940 to £1,300. Opportunities exist for advancement to a salary of £2,300. Superannuation benefits are available.

Duties in the various departments mentioned would be in general:

Public Trust Office: Estates administration and general legal work, conveyancing, Court appearances.

Maori Affairs Department: Conveyancing, Maori estates administration, Maori land tenure.

Land and Deeds Division: Administration of the Land Transfer Act, general conveyancing.

Ministry of Works: Conveyancing, Workers' Compensation, compensation for land acquired, contracts, tenancies.

Inland Revenue Department: Taxation and estate duty. State Advances Corporation: Conveyancing, debt recovery.

Applications on form P.S.C. 17A (obtainable from Post Offices) stating preferences as to departments and localities should be forwarded to the Secretary, Public Service Commission, P.O. Box 8004, Wellington.

Alternatively, any inquiries for further information may be directed to the Secretary and will be gladly answered.

of the contracting Department—is named as arbitrator. Finally it recognises the fundamental principle of the common law that a man is not to be a judge in his own cause.

A.G.D.

Protection of Trade Union Funds

The restraints imposed by the rules of a Union, registered under the Industrial Conciliation and Arbitration Act 1954, cannot be ignored by the majority of the members attending a general meeting of a Union. This was established by the Court of Appeal in *The Wellington Amalgamated Watersiders' Industrial Union of Workers* v. *Wall* (8 May 1961). The case involves no new principle. It merely illustrates the application of the *ultra vires* rule to a trade union, incorporated in terms of the Industrial Conciliation and Arbitration Act, which had authorised a payment from its funds for the benefit of two of its members who had recently been defendants in a successful libel action.

A member who was opposed to the making of the payment sought a declaration that the payment was not authorised by the rules and an order that the persons for whose benefit the payment had been made should refund the money to the Union.

The Court of Appeal upheld Barrowclough C.J., on both points. The payment, it was decided, was neither expressly authorised by the rules nor could it be said to have been reasonably incidental to the objects stated. The connection between the objects and any benefit the union and its members might have derived from it was too indirect and remote to fall within them. The general words of Rule 2 (b) that the union could "protect and further in any lawful way the interests of members (and of other workers in the industry) in relation to conditions of employment in the industry" were quite different from those cases, such as *Stevens* v. *Keogh* (1946) 72 C.L.R. 1, where one of the stated objects was to expend its funds in securing the redress of grievances of members.

Moreover, in accordance with the principle stated by Lord Davey in *Burland* v. *Earle* [1902] A.C. 83, 93, it was competent for a member to bring proceedings in his own home where a body corporate had engaged in *ultra vires* activities. The rule that it is for the body corporate, not a member, to bring proceedings has no application where *ultra vires* acts have been committed. He was also entitled to an order for the refund of the payment by the members to whom it had been made. A similar order had been made in *Maddams* v. *Millars (Invercargill) Ltd.* [1938] N.Z.L.R. 490; [1938] G.L.R. 278.

As stated, the case involves no new principle, but it does illustrate the application of well-recognised principles of company law to a body which is not commonly thought of as a corporation. It emphasises the fact that the privilege of incorporation secured in terms of a statute is accompanied by certain obligations or restrictions—in this case the need to ensure that the union engages only in the activities authorised by its rules.

J.F.N.

Workers' Compensation: Claim by Contractor

Ever since workers' compensation legislation was first introduced into New Zealand in 1900, the trend has been to widen the scope of the legislation and to extend the classes of persons entitled to benefit under the Act. One of the most notable advances was made in 1903 when the benefits of the Act were extended to certain types of contractor—persons who were engaged in work of a dangerous nature such as coal mining, tree-felling and scrub clearing and who, by the terms of their contracts, rendered services rather than service. This amending legislation is now contained in s. 2 (6) of the Workers' Compensation Act 1956 and provides that when a contract to perform any work in any . . . coal mine . . . is let directly to one or more contractors who do not either sublet the contract or employ wages men, or who, though employing wages men, actually perform any part of the work themselves, those contractors shall for the purposes of the Act be deemed to be working under a contract of service with an employer, and the person with whom the contractor has entered into the contract shall, for the purposes of the Act, be deemed to be that employer.

In *Maguigan* v. *Attorney-General* (judgment 21 June 1961) Dalglish J. had to decide whether the plaintiff who, while working as a member of a co-operative party of miners in a coal mine in Westland, had suffered personal injury by accident, could under s. 2 (6) of the Act claim compensation from the Crown. In a judgment which gave a useful and detailed review of workers' compensation legislation in this country and of the relevant legal decisions, the learned Judge held that the plaintiff was not entitled to compensation.

The plaintiff, with three other miners, was a party to a coal mining agreement made under Part III of the Coal Mines Act 1925, under which the Minister of Mines let to the plaintiff and his co-workers (called the Grantees) mines, veins, layers and strata of coal, with the liberty to work the coal and to carry away and dispose of the coal from the seams or beds for the Grantees' own use and benefit.

The Grantees were required to pay a royalty of 1s. per ton for marketable coal taken from the land, the amount payable as royalty being not less than £20 in any one year. A further clause of the agreement provided that the Grantees, if and when required to do so by the Minister of Mines, should supply coal to the Crown at wholesale current prices; but at no time had they been called on to supply any coal under that clause.

Dalglish J. said that the general effect of the document—obviously a lengthy one—was to grant to the Grantees the right of exclusive occupancy of the seams and strata of coal, with the liberty to work the coal and to remove and dispose of it for their own use and benefit subject to the payment of royalties, with a prescribed minimum royalty, and a prescribed minimum amount of coal to be removed each year.

After a review of the authorities in which s. 2 (6) and its forerunners had been discussed, Dalglish J. said that he agreed with the view that it was not the intention of the Legislature to cover every case where work in a mine was performed under some contractual obligation. In the instant case, the contract was a lease of the coal mine which permitted the Grantees to remove and dispose of the coal for their own benefit;

the work was not to be performed for the Crown; the Crown was not to get any direct benefit from the work. The Grantees were not working under a contract of service and they were not working under a contract for services or anything analogous thereto. In no sense could it be said that the plaintiff and his partners were " contractors " to whom a " contract to perform any work in a . . . coal mine . . . is let ". Consequently, the plaintiff's claim failed.

In the course of the hearing it was stated that the claim was unique. Counsel for the plaintiff was unaware of any case where a co-operative miner had ever claimed compensation from the Crown in similar circumstances. The latter fact is not, in any sense, conclusive. The absence of any such claim does not mean that no such claim could be substantiated; but its absence is significant. The failure of the plaintiff's claim is, it is submitted, in accord with the spirit and intention of the legislation. In the light of the fact that the Crown, unlike a farmer who directly benefits from scrub-cutting carried out by a contractor, received no direct benefit from the plaintiff's work, it surely could not be expected that the Crown should have to carry the burden of premiums to insure itself against claims such as that of the plaintiff.

A.G.D.

MILLER *v.* THE MINISTER OF MINES

Part II

There was once a Judge—but that part is the same as before, only this time the highly-capable solicitor knew all about *Miller* v. *The Minister of Mines*; in fact the Judge walked in just after he had finished dictating that office instruction last hereinbefore referred to.

So the highly-capable etc., solicitor said to himself, " I'll just show the boys around this joint how these matters should be done ". Accordingly he wrote full instructions to his agent in Blenheim to make search in the Warden's Office and to give him an assurance that no licence under the Mining Act affected the section the Judge had bought. Then he began to think again. How could he be sure Blenheim was the right office anyway? Mining Districts had wobbled about, and for all he knew the nearest office today may not have been the nearest office a dozen years ago.

Where had all the mining districts been anyway, and where were all the Warden's Offices? Suppose it were not registered in the nearest office but in the second nearest and haven't the Warden's records been moved about and weren't some of them reposing in the loft at Parliament House? A telephone call to the Mines Department convinced him that his guess was as good as anybody's.

However, the task was not insuperable and by careful perusal of the *New Zealand Gazettes* and the *Wellington and Malborough Provincial Gazettes* since 1866 he was able to compile a list of where Warden's Offices had at some time or another been located within 100 miles of Wellington—perhaps he had better go a little bit further, the jolly thing might be tucked away in Nelson. The Mines Department now came to his aid and told him where the records of those offices were now concentrated (theoretically), though they were kind enough to add that some of the records had gone astray, or disappeared, or been destroyed. Still the net result was that he knew at least where search was possible.

By this time his agent in Blenheim had written him a most unkind letter which translated into brutal language meant something like this, " Send fifty quid to start with and if you think I am going to guarantee the completeness of this search you've got another think coming ". While he was taking time to consider his decision on this turn of events his agent walked into his office (unannounced as is customary with agents). So he said to his agent, " I just don't appreciate the difficulties you appear to envisage over that mining search ", and his agent said " That's why I'm here, and if you have a minute to spare I'll tell you something," and the highly-capable-etc., solicitor said " Tell on ".

" Well it's like this ", said the agent, " the Mining Act has been messed about by experts since 1866 and they have made a pretty thorough job. To start with most of the licences issued were not licences at all—just certificates—very like an old-fashioned receipt—the leaf issued to the consumer and the stub retained. The stubs were supposed to be written up in registers and a lot of them were—a lot weren't—particularly the non-rent ones. Where the Registrar had to collect rent he had to have a record, but if no rent were payable he could not care less. Then again many Registrars were quite unlearned people and some of the early Wardens were not much better. Later, when it was realised that the stubs contained the roots of title to many licences, it was found that many books of stubs had been destroyed. Accordingly you can't eliminate the possibility of some of these old certificates being still around.

There was no great danger in the early days, as pretty well all certificates had to be annually renewed. But the Act was not left at that and, at a later stage, annual renewal was abolished and licences held by annual certificate, or without specified terms, were deemed to be licences granted for a term expiring on 1 February 1941. They ought to have been renewed since then but they don't go bad if they are not renewed. There seems to be no limit to the time at which they can be renewed, provided the holder can (or will) declare that they have been *bona fide* occupied and used, and are not liable to forfeiture or abandonment, and that failure to renew was due to inadvertence, mistake, or accident. In short, the records of the Warden's Office are not complete and if you read every scrap of paper in the whole outfit you still may not have the whole story.

" But that is only the beginning of your trouble. The records themselves can conceal rather than reveal the very information you want. The official record in a Warden's office consists of a series of ledgers in which the Registrar enters the names of persons to whom licences are granted and also a description of the grant,

including the land affected thereby. But for many years, ordinary claims of up to one acre could be taken up without licence and there was nothing to put in the ledger. (The holder could apply to have his claim registered if he wished, but I never knew anyone do so).

" The catch is that the name registered generally has nothing to do with the owner or occupier of the land and the description seldom has any reference to the connotation, such as section and blocks, used in ordinary conveyancing. If you want to know whether any licence affects Section 1 Block XII Tarras Survey District you just can't tell—even if you read every word in the Registers.

" The method of describing the land applied for as a licence is peculiar to the mining fraternity and runs something like this :

> ' That area of Crown lands on the north side of Roaring Billy Creek 100 yards up from the white gate 69 yards by 70 yards 1 acre '.

After a few years, Roaring Bill Creek has changed its name to the Swiftburn, or some such, or lost its name altogether, and the white gate has been removed half a mile further upstream. So what ?

" The descriptions, such as they are, are not summarised or indexed, except in the case of water-race licences. For these, there is an index of the creeks out of which they are granted, but you can't be sure they are all there. What you know today as Dunstan Creek may have been known as No. 2 Creek of the Dunstan Range 40 years ago, and everyone has forgotten that.

" The Mining Registrar seldom knows the history of these creeks. Then there are often several different creeks with the same name and a number of creeks with no names. Anyone who relies on the Creek index is just asking for trouble. Local knowledge and a big lot of it is the only thing that will keep you right. Even if there is not a mark on the ground, you can still be in the cactus. There may be a licence held by the Crown ; there may be a licence granted under s. 58 ; there may be an ordinary licence. This latter may be liable to forfeiture or abandonment, but it does not follow that a decree would be made ; it could be fined and restored to its pristine vigour.

" Finally if you think you can pin your faith on the original nominal index you are in for a rude shock. The name of the registered holder is in the index attached to each ledger, but they are not always up-to-date and there are omissions. " Roberts and party " was good enough. If your man Brown happens to be one of the " and party " you will look in vain. Then, of course, you don't know whom you are looking for—the licensee could be anyone. In other words, to search by this method you are required to know in advance the very matter you are searching to find.

" Furthermore, the beneficial owner today may be someone entirely different from the person in whose name the licence is registered. To give just one instance of what happens : licences like Water Races, Dry Races and Special Sites are often acquired and used in conjunction with farming properties. Frequently these properties are transfered by highly-capable-etc., solicitors and it never occurs to them that these ancillary rights require to be transferred. And that happens time and again, until the holder of the farm today is using licences which are still in the name of some previous owner. Nevertheless, the licences may well be quite good licences. But you won't find them in a search, unless you guess what has happened and search the names of the previous land owners. When it is a case of licences crossing a property, the matter is further complicated still.

" As I stated previously (or perhaps I didn't), the Registrar is supposed to enter upon the ledger page the transactions registered against the licence ; but he merely cites a number—say transfer, mortgage or whatever it may be—and gives brief parties. Generally this duty is faithfully carried out but you can't be certain. Omissions have been known to occur, but above all you can't take the brief description literally. A transfer may be a sublicence or a fractional interest or even a transmission or an exchange. I have seen a transfer to the Crown which turned out to be a surrender for the purposes of exchange. You have to get out all the documents as indicated by the numbers. Then you find that some of them are not there and nobody knows where they are. Some of the numbers never had any documents anyway—they may be exchanges or Warden's orders.

" And that brings up another matter about these ledger entries. They record at least three matters of an official nature in addition to the party and party transactions : first, the grant itself ; secondly, renewals ; thirdly, Warden's orders for exchanges, extensions, alterations, and the like. You have to be satisfied that the Warden had jurisdiction to do all the things he has done. You can rely on s. 433 if you are game but Judges before today have been pretty dubious about it. All you can do is ask for the file of the proceeding and see what you can find there. Here again you will frequently be told there is no file. You may be almost certain that the grant was invalid through lack of jurisdiction, but the evidence you want is on the missing file.

" So there you have it. No wonder few bother to search in the Warden's Court. The local solicitors are pretty safe as their local knowledge keeps them right. They know where the licences have been granted in their own districts, and by and large that is what they depend on. But they are as helpless as anyone else when called to act beyond the scope of their local knowledge. None of them is insane enough to guarantee any search.

" Perhaps you had better make it a hundred guineas, but mind you the risk is yours not mine."

By this time the highly capable city solicitor had reached some very definite conclusions. The office memorandum was well on the way to the waste paper basket and he was looking up the number of that nsurance company that specialised in professional practice policies.

Miller v. *Minister of Mines* makes one thing certain. The recording of licences under the Mining Act must be put in order so that (a) all licences are recorded ; (b) all lands affected are recorded by ordinary conveyancing references ; (c) a recorded licence is indefeasible except for fraud (excess of jurisdiction notwithstanding) ; (d) accurate indices are established ; and (e) no licence is valid unless recorded.

J. C. PARCELL.

MEDICO-LEGAL SOCIETY OF WELLINGTON FIRST ANNUAL DINNER

The above-mentioned society was eatablished at a meeting of 12 members of the medical profession and seven legal practitioners held on 26 April 1961. On the motion of Dr P. P. Lynch, seconded by Mr H. R. C. Wild Q.C. it was resolved that there be founded a Medico-Legal Society of Wellington with those present as the foundation members. The following officers were then elected :

President : Mr J. Kennedy Elliott.
Vice-President : Mr E. D. Blundell.
Secretary : Mr J. T. Eichelbaum.
Executive : Mr A. W. Beasley, Mr J. B. O'Regan, Dr P. C. Skinner.

The Society proposes to hold an Annual Dinner and, in addition, other informal functions for purposes of talks and discussions on topics of mutual interest to the two professions. The first Annual Dinner was held on 17 August at the Wellington Club, the attendance of Lord Parker of Waddington, Lord Chief Justice of England, making the function an occasion to be long remembered.

Over 60 members of the two professions were present, and to the casual observer it appeared that the representation was fairly evenly balanced, with perhaps the lawyers doing more of the talking. Among those present, apart from the guest of honour, were Mr J. Kennedy Elliott, President of the society ; Mr E. D. Blundell, Vice-President ; Mr D. Perry, President of the New Zealand Law Society ; Mr J. C. White, President of the Wellington District Law Society ; Mr R. A. Elliott, Chairman of the Wellington Division of the British Medical Association ; Mr J. W. E. Raine, Honorary General Secretary of the New Zealand Branch of the British Medical Association, with many other distinguished members of the two professions.

During the informal " get-together ", which preceded the dinner, Lord Parker mingled freely with those present and most, if not all, had the opportunity of conversation with him. Once again he showed the friendliness and ease of manner which had already endeared him to those of his own profession who had met him on other occasions during his visit to New Zealand.

The President, Mr J. Kennedy Elliott, told those present that the only doubts he had of the Society were that it could never live up to its beginnings. Never in his wildest hopes had he thought that it would start out so auspiciously as it had, through the presence at its first dinner of the Lord Chief Justice of England. Mr Elliott went on to refer to the co-operation between the professions and the part they had played in the early history of New Zealand.

The toast of the guest of honour was proposed by Mr E. D. Blundell. Mr Blundell expressed the pleasure of all in Lord Parker's presence at the dinner, and for the benefit of the medical profession he referred to some of the multifarious duties the Lord Chief Justice was called on to perform, and the reasons why he was regarded with such esteem by lawyers throughout the Commonwealth. On a lighter note, he suggested to Lord Parker that he might have difficulty in such a gathering in distinguishing who were doctors and who were lawyers. As a rough guide, he would suggest that all those (with the possible exception of the speaker) who had the " lean and hungry " look were of our profession.

" It was, I believe, something over 2,000 years ago ", said Lord Parker in reply, " that the Chinese abolished the custom of giving after-dinner speeches on the ground that it was a barbaric custom, and I agree with them. I would prefer giving an *ex tempore* judgment to a six minute speech.

" I would take your Vice-President up on one matter. He referred to Lord Chief Justices in the past who died with large fortunes. I see no signs of that today, but I am reminded of one Chief Justice who started life as a highwayman, waylaying coaches on their way to London. He made a fortune at his trade, but later abandoned it and was called to the bar, eventually becoming Chief Justice. As Chief Justice he was hard on criminals, especially on highwaymen. Everyone thought he was a good fellow, but when he died it was found that his fortune had doubled, and they suspected he must have carried on with his youthful profession."

Lord Parker said his only knowledge of the medical profession was derived through the Courts. Both professions had this in common, that there was a long period of training during which there was little remuneration. He paid tribute to the impartiality of medical witnesses. He found that he sometimes had to remind himself when on the Bench, on which side a particular witness had been called to give evidence. In England, in 90 per cent of cases, medical reports were agreed. " We of the legal profession are in very great debt to the medical profession ".

Lord Parker went on to make reference to certain recent cases in England which had aroused more than usual public interest. He concluded by expressing his pleasure that he had been able to be present, and his appreciation of the welcome he had received on his visit to this country. " You in New Zealand ", he said, " have the priceless gift of making visitors like ourselves so much at home ".

MAORI BLACK MAGIC

We have an inquiry from a medical man who is seeking information regarding Makutu or Maori black magic for the purpose of a book which he is writing. In particular our inquirer asks for details of a civil action brought about 1928 in the Rotorua-Taupo area in which one Maori alleged that another had bewitched him. He would also be grateful for any information concerning any prosecutions, successful or otherwise, brought under the Tohunga Suppression Act 1908 or concerning any crime in which Makutu was a factor.

If any of our subscribers can supply information on these topics it will be sent on to our inquirer.

EDITOR

OBITUARY

Mr J. S. Barton S.M., C.M.G.

The death occurred at Lower Hutt on 2 September 1961 of John Saxton Barton S.M., C.M.G., who was well known and respected for many years as a Stipendiary Magistrate and Chairman of a number of Commissions of Inquiry. Mr Barton was living in retirement at Lower Hutt at the time of his death. He was 86 years of age.

Mr Barton was born and educated in Melbourne. He first studied accountancy, qualifying as a public accountant in 1900, and came to New Zealand in 1903 where he founded Banks Commercial College at Wellington. In 1906 he became a fellow of the New Zealand Institute of Accountants and was president of the New Zealand Society of Accountants.

In 1910 Mr Barton qualified in law and entered legal practice the following year, founding the firm which is now Macalister, Mazengarb, Parkin and Rose. For five years he lectured in accountancy at Victoria University College (as it then was) and in 1918 was appointed to the Magisterial Bench, on which he served in Wanganui, Gisborne and Wellington. He was also a member of the Auckland Transport Commission, and Chairman of the Napier Harbour Commission and the Economic Pensions Commission. After the Napier earthquake in 1931 Mr Barton was appointed as one of the two managers of the Napier municipality and was also Chairman of the Napier Rehabilitation Commission. He was awarded his C.M.G. in 1933.

Despite a busy life Mr Barton was the author of two books, *20th Century Commerce and Bookkeeping* and *New Zealand Company Secretary*.

Dr H. A. Cunningham

We regret to learn of the death at Surfers' Paradise, Australia, of Dr Herbert Adam Cunningham, one of New Zealand's leading experts on taxation law and author of the work which, now in its fourth edition, is known as *Cunningham's Taxation Laws of New Zealand*. Dr Cunningham was 69 years of age.

Born and educated in Dunedin, Dr Cunningham qualified in law and accountancy. He first joined the Public Trust Office, but served overseas in the Mounted Signals Corps of the 1st N.Z.E.F., being invalided home in 1916. He then joined the legal firm of Aslin and Bedford, becoming resident partner in Palmerston North, but in 1918 he entered into partnership in Masterton with the late Mr H. C. L. Robinson. Dr Cunningham graduated Master of Laws in 1922 and Doctor of Laws in 1930.

Dr Cunningham remained in Masterton until 1930 when he removed to Auckland and entered into practice, specialising as a taxation consultant. He was on holiday in Australia at the time of his death.

Mr W. G. Wood

One of Napier's best-known personalities, Mr William George Wood, died at Napier on 7 June 1961 at the age of 85. He had been in active practice for over 60 years and was the city's oldest practising barrister and solicitor.

Mr Wood was born in London in 1876, being the son of the late William Wood who was for many years headmaster of the Napier Boys' High School. He began his education at Dulwich House School, Upper Norwood, England, and, after arriving in New Zealand with his parents, continued it at Parnell Grammar School, Auckland, and Napier Boys' High School. He took a keen interest in athletics and was an accomplished runner.

In 1894 Mr Wood entered the service of the Napier legal firm of Carlile and McLean in Napier. He qualified and was admitted to the Bar in 1900, and after spending three years in Wanganui as managing clerk to Messrs Fitzherbert and Marshall, he returned to Napier and entered into partnership with the late Mr P. S. McLean, under the name of Carlile, McLean and Wood. The firm later amalgamated with that of Mr D. Scannell, who practised in Hastings, and continued the practice in Napier under the name of Carlile, McLean, Scannell and Wood. About 15 years ago the firm's name was changed to Carlile, McLean, Wood, and Sorrell, and in 1950 the firm of Humphries and Dobson amalgamated with it. Since then, the firm has continued practice under the name of Carlile, McLean, Wood, Sorrell and Dobson. Mr Wood was senior partner up to his death.

Mr Wood was interested in cricket, golf, fishing and bowls and was a foundation member of the Napier Repertory Players. He served for several terms as president of the Hawke's Bay District Law Society.

Mr Wood had distinguished service in the war of 1914-1918. He was commissioned as a lieutenant in the 2nd Wellington Batallion and later became Officer in Charge of the 2nd Wellington Transport. For 15 months he was aide-de-camp to Major General Sir Andrew Russell.

Estoppel by Res Judicata—" In *Bell* v. *Holmes* [1956] 3 All E.R. 449 McNair J. came to the conclusion that 'it is not right to say that the plea of *res judicata* cannot be founded on a judgment given after the issue of the writ in the action in which it is sought to raise the plea of estoppel.' But apart altogether from the decided cases, McNair J. held that *res judicata* was a matter of evidence, and he could see no reason at all why he should be limited in considering evidence consisting of a judgment to a case where that judgment had been given before the issue of the writ in the present action. The Court of Appeal in *Morrison Rose and Partners* v. *Hillman*, decided on June 7, 1961, expressly agreed that *Bell* v. *Holmes* was rightly decided on this point. There is no ground, as Holroyd Pearce L.J. observed, for creating so artificial an exception from the general rule of estoppel by *res judicata* or for distinguishing *res judicatae* that followed the issue of a writ from those that preceded it: 'The principles which make the latter desirable have no less application to the former and should be applied to both alike.' "—(1961) 111 L.J. 398.

DISPUTED LAND TRANSFER BOUNDARIES

Relief Against Unintentional Encroachment of Buildings

The recent judgment of his Honour Mr Justice McCarthy in *Cable* v. *Roche* [1961] N.Z.L.R. 614, will be of much interest and use to real property lawyers, conveyancers and land surveyors. The Torrens system of land registration has minimised disputes as to title boundaries but it has not by any means abolished them. Surveying of land, although it has been brought to a very high standard in New Zealand, is nevertheless not yet an exact art.

The plaintiffs were successors in title to their mother who purchased the property some 75 years ago, namely in 1886 : the first plaintiff, who is 79 years of age, has lived in the house continuously since she was four years of age ; the second plaintiff has lived there all her life. The case was an action for a declaration defining the true boundary line between the properties of the plaintiffs and the first defendant, a neighbour residing in Levy Street, Wellington. The first defendant was for some time a tenant of the neighbouring property, to the plaintiffs' west. She purchased it in 1958. To complete the purchase a new deposited plan was called for which was prepared by a licensed surveyor and was deposited as D.P. 19930. This showed an encroachment in the occupation of the plaintiffs. When this came to the knowledge of the plaintiffs some time later, they denied emphatically that there was any such encroachment and pointed to the long uninterrupted and unchallenged occupation of themselves and their mother to the small area in dispute.

The first defendant relied *inter alia* on the indefeasible provisions of the Land Transfer Act 1952 as enacted in ss. 62 and 64. Section 62 provides that the estate of the registered proprietor shall be paramount " (a) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act ". Section 64 of the Act provides that after land has become subject to the Land Transfer Act, no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor. However, in view of the evidence, his Honour did not find it necessary to decide the case on this submission but eventually held that an alternative submission by the second defendant's counsel prevailed. I would, however, like to interpolate here that, if counsel is asked his opinion on a case of disputed Land Transfer boundaries he should make sure first as to whether or not the title to the land encroached upon has at any time been a *limited* title issued either under the Land Transfer (Compulsory Registration of Titles) Act 1924 or Part XII of the Land Transfer Act 1952. The law is that notwithstanding the provisions of s. 64 of the Act, the issue of a limited certificate of title for any land shall not stop the running of time under the Limitation Act 1950 in favour of any person in adverse possession of that land at the time of the issue of the certificate, or in favour of any person claiming through or under him. (It is obvious in the instant case neither title ever having been *limited* that the plaintiffs could not take advantage of that provision). If the case is one in the Hawke's Bay Registry, counsel should also have a look at the Land Transfer (Hawke's Bay) Act 1931. Recently I came across a title with the following endorsed thereon : " This certificate has by effluxion of time become ' conclusive ' as defined by section 2 of the Land Transfer (Hawke's Bay) Act 1931, as to all matters except the description and delineation of the land ".

The alternative submission of counsel for the first defendant which proved successful and the main contention of counsel for the plaintiffs are thus stated by his Honour :

> Mr Peacock, for the plaintiffs, relies on the long and unchallenged occupation of the plaintiffs as convincing evidence of his clients right to the disputed area in the absence of original pegs or natural features determining the exact positioning of D.P. 240. He refers to the statement of that principle by Richmond J. in *Equitable Building and Investment Co.* v. *Ross* (1886) N.Z.L.R. 5 S.C. 229, a statement which has been approved in a number of subsequent decisions ; see for example, *The Solicitor-General* v. *Bartlett* (1899) 18 N.Z.L.R. 142 ; 1 G.L.R. 271 ; *Moore* v. *Dentice* (1901) 20 N.Z.L.R. 128, and *Russell* v. *Mueller* (1905) 25 N.Z.L.R. 256 ; 7 G.L.R. 451. A similar principle appears to have been accepted in New South Wales, *Turner* v. *Myerson* (1917) 18 S.R. (N.S.W.) 132 and *Turner* v. *Hubner* (1923) 24 S.R. (N.S.W.) 3.
>
> Mr McIlroy, on the other hand, whilst not disputing that general principle, contends that it is only to be applied in the absence of countervailing evidence. He adopts the statement of Sir Charles Skerritt C.J., in *Attorney-General* v. *Nicholas and Others* [1927] G.L.R. 340, which I shall now set out and italicise the words on which Mr McIlroy relies particularly :
>
> > " It appears to me the rule laid down by Mr Justice Richmond in *The Equitable Building and Investment Co. Ltd.* v. *Ross* (5 N.Z.L.R. S.C. 229) should be applied. That rule appears to be that where the granted land cannot be fixed from the original survey, or where there are no natural boundaries and the original survey marks are gone, a long occupation, acquiesced in throughout the period by the surrounding owners, is evidence of a convincing nature that the land so occupied is that which the grant conveys in *the absence, of course, of striking differences in admeasurement, or some significant countervailing circumstances.* In that case the learned Judge referred to the occupation being authorised by the proper public authority. But this requirement is, I think, by no means an essential part of the rule. It is enough that there should have been a long occupation acquiesced in by surrounding owners *in the absence of countervailing circumstances.*" (*ibid.*, 341).

After a minute examination and a careful consideration of the evidence given in the case his Honour held that there were countervailing circumstances put forward on behalf of the first defendant which precluded the Court from holding that the plaintiffs' long and undisturbed possession as being decisive as to the true boundaries between the two properties concerned. To set out this evidence in detail in this article would only add unduly to its length. Suffice it to say that old plans in the custody of the Lands and Survey Department and the Land Registry Office were put in as evidence. The difficulties which faced his Honour may be realised from this statement from the judgment :

> The question here turns, I think, on the precise positioning on the ground of the western boundary line of Section 315. As I have said, all the original pegs have disappeared and there is no agreement as to the piecing of plan 240 on the ground. Moreover, that plan gives the impression of being,

perhaps, a little rough, or rather not prepared with the care and precision which are demanded today.

I may add that four licensed surveyors gave evidence —two for the plaintiffs and two for the first defendant, one of the latter two being the local Land Transfer Surveyor.

Between 1900 and 1914, the plaintiffs' predecessor in title built a brick and concrete garage hard against the title boundaries, and in the upshot his Honour held that this garage was situated on land belonging to the first defendant. This, however, did not dispose of the matter completely. The first defendant conceded that having regard to the acceptance by her predecessors in title of the present boundary fence for at least 60 years and probably much more, the plaintiffs could invoke s. 129 of the Property Law Act 1952, and, indeed, she was willing to consent to an *easement* being created over the land encroached upon.

Let us have a look therefore at s. 129 of the Property Law Act 1952. The original s. 129 was repealed by s. 5 of the Property Law Amendment Act 1957 and the following much more comprehensive provision substituted therefor. In (1954) 30 N.Z.L.J. 181, and 309 will be found two articles written by me pointing out what I considered defects and shortcomings in the original s. 129. As enacted by s. 5 of the Property Law Amendment Acts 1957 s. 129, now reads as follows :

129. (1) Where any building on any land encroaches on any part of any adjoining land (that part being referred to in this section as the piece of land encroached upon), whether the building was erected by the owner of the first-mentioned land (in this section referred to as the encroaching owner) or by any of his predecessors in title, either the encroaching owner or the owner of the piece of land encroached upon may apply to the Supreme Court, whether in any action or proceeding then pending or in progress and relating to the piece of land encroached upon or by an originating application, to make an order in accordance with this section in respect of that piece of land.

(2) If it is proved to the satisfaction of the Court that the encroachment was not intentional and did not arise from gross negligence, or, where the building was not erected by the encroaching owner, if in the opinion of the Court it is just and equitable in the circumstances that relief should be granted to the encroaching owner or any other person, the Court, without ordering the encroaching owner or any other person to give up possession of the piece of land encroached upon or to pay damages, and without granting an injunction, may in its discretion make an order :

(a) Vesting in the encroaching owner or any other person any estate or interest in the piece of land encroached upon ; or

(b) Creating in favour of the encroaching owner or any other person any easement over the piece of land encreached upon ; or

(c) Giving the encroaching owner any other person the right to retain possession of the piece of land encroached upon.

(3) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest so vested to be free from any mortgage or other encumbrance affecting the piece of land encroached upon, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, or contract affecting or relating to that piece of land.

(4) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment by the encroaching owner or any other person of any sum or sums of money, or the execution by the encroaching owner or any other person of any mortgage, lease, easement, contract, or other instrument, or otherwise.

(5) Every person having any estate or interest in the piece of land encroached upon or in the adjoining land of the encroaching owner, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, contract, or easement affecting or relating to any such land, shall be entitled to apply for an order in accordance with this section, or to be heard in relation to any application for or proposal to make any order under this section. For the purposes of this subsection the Court may, if in its opinion notice of the application or proposal should be given to any such person as aforesaid, direct that such notice as it think fit shall be given to that person by the encroaching owner or any other person.

(6) Any Magistrate's Court shall have jurisdiction to exercise the powers conferred upon the Supreme Court by this section, and application may be made to a Magistrate's Court accordingly, in any case where the value of the piece of land encroached upon (without the buildings thereon) does not exceed the amount to which the jurisdiction of the Magistrate's Court is limited in civil cases, and in any case where a Magistrate's Court would have jurisdiction in accordance with section thirty-seven of the Magistrates' Courts Act 1947 :

Provided that a party intending to invoke the powers given to a Magistrate's Court by this subsection shall, except in any case where the Court derives its jurisdiction under that section, give notice of his intention to all other parties before the hearing, and in all cases any party shall be entitled as of right to have the action or proceeding or application transferred to the Supreme Court, or to appeal to the Supreme Court against any order purporting to be made by the Magistrate's Court under this section.

(7) Every order vesting any estate or interest in any person under this section shall for the purposes of the Stamp Duties Act 1954 be deemed to be a conveyance, and shall be liable to stamp duty accordingly.

(8) Any order under this section may be registered as an instrument under the Land Transfer Act 1952, or the Deeds Registration Act 1908 or the Mining Act 1926, as the case may require.

Note how wide is the ambit of s. 129 (1). Where there is encroachment by a building on land, either the encroaching owner or the owner of the piece of land encroached upon may apply to the Supreme Court, whether in any action or proceeding then pending or in progress and relating to the piece of land encroached upon or by an originating application, to make an order in accordance with the section in respect of that piece of land. In the instant case it will be remembered that the nature of the proceedings was an action for a declaration defining the true boundary between the two properties concerned.

In granting a vesting order under s. 129 his Honour thought that in the circumstances an easement for the plaintiffs would not be sufficient.

The garage in question is a solid structure of a permanent nature. The plaintiffs are now of good age and it may be desirable to dispose of their property in the not too distant future. The granting of a mere easement now might discourage a purchaser.

His Honour therefore thought the justice of the case called for a vesting under subs. (2) of an estate in fee simple of the land occupied by the garage, *this to be without any condition as to payment.*

To my knowledge this is the first reported case on s. 129 of the Property Law Act 1952, and I am sure that it will be a very useful precedent on a very novel section. I respectfully submit that his Honour, in his broad and liberal interpretation, has carried out the direction of the Legislature, as expressed in s. 5 (j) of the Acts Interpretation Act 1924, that an Act is to be construed according to " its true intent, meaning, and spirit ".

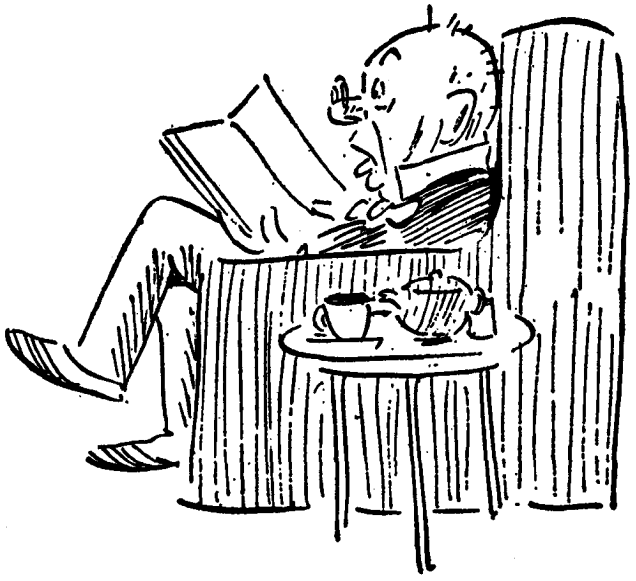
E. C. ADAMS.

FORENSIC FABLE

By "O"

The Sound Lawyer Who Made A Good Resolution

There was Once a Sound Lawyer who was Firmly Resolved that if he should ever Receive Judicial Honours he would Avoid the Errors and Failings of Some of his Predecessors. In Particular he would not Indulge in Foolish Jokes, Give Vent to Irrelevant Observations about Men and Things, or Hint that the Bar had Sadly Deteriorated Since he had Ceased to Adorn its Ranks. In Due Course the Sound Lawyer (Whose Brother-in-Law was a Personage of Some Importance) was Invited by the Authorities to Accept a County Court Judgeship. By Return of Post the Sound Lawyer Intimated that he was Ready and Willing to Grapple With the Job. Grimly Determined to Adhere to his Good Resolution, he Took his Seat on the Bench. Did he Adhere to his Good Resolution ?



He did not. Before the Year was Out the Reporters in his Court had Recorded that a Plymouth Brother could not be Believed upon his Oath; that it was Common Knowledge that a Married Woman was either a Slave or a Tyrant; that while at the Bar the Sound Lawyer had Frequently been so Overworked that he had not been in Bed for a Week; that the Moral Standards of Artists and Literary Men were Extremely Low; that the Legislators of the Country were Obviously Half-Witted; and that Anybody who Read Boccaccio could Understand why the Latin Races were so Greatly Inferior to the Inhabitants of These Islands. They had also Taken Down a Variety of Time-honoured Jests Turning upon the Thrifty Habits of Scotchmen and the Irritating Ways of Mothers-in-Law. And the Sound Lawyer had so often Cited Apposite Extracts from the Works of Cicero, Ben Johnson, Rabelais, Tennyson, and Other Authors, both Ancient and Modern, that in Order to Get them Down Correctly each of the Reporters had been Compelled to purchase a Copy of the "Book of Quotations", in which the Sound Lawyer Discovered them.

Moral—*Make Good Resolutions.*

BILLS BEFORE PARLIAMENT

The Bills now before the House are as follows:

Agricultural and Pastoral Societies Amendment
Apprentices Amendment
Auckland Electric Power Board Amendment
Births and Deaths Registration Amendment
Child Welfare Amendment
Chiropractors Amendment
Cinematograph Films
Coal Mines Amendment
Cook Islands Amendment
Crimes
Criminal Justice Amendment
Education Amendment
Electric Power Boards Amendment
Engineering Associates
Estate and Gift Duties Amendment
Family Benefit (Home Ownership) Amendment
Gas Industry Amendment
Government Railways Amendment
Harbours Amendment
Hydatids Amendment
Industrial Conciliation and Arbitration Amendment
Judicature Amendment
Land and Income Tax Amendment
Land and Income Tax (Annual)
Land Settlement Promotion Amendment
Land Transfer Amendment
Law Reform (Testamentary Promises) Amendment
Lincoln College
Local Elections and Polls Amendment
Local Government Commission
Magistrates' Courts Amendment
Maori Education Foundation
Maori Social and Economic Advancement Amendment
Massey College
Mental Health Amendment
Mining Amendment
Monetary and Economic Council
Motor Spirits Duty
Municipal Corporations Amendment
Nature Conservation Council
New Zealand Army Amendment
Parliamentary Commissioner for Investigations
Penal Institutions Amendment
Poultry Amendment
Public Revenues Amendment
Public Works Amendment
Quarries Amendment
Republic of Cyprus
Staff Superannuation (Private Member's Bill)
Stamp Duties Amendment
State Advances Corporation Amendment
Summary Proceedings Amendment
Transport
Universities
University of Auckland
University of Canterbury
University of Otago Amendment
Victoria University of Wellington
Wool Commission Amendment
Workers' Compensation Amendment.

STATUTES ENACTED

Dairy Production and Marketing Board
Imprest Supply
Imprest Supply (No. 2)
Imprest Supply (No. 3)
Imprest Supply (No. 4)
International Finance Agreements
Social Security Amendment
War Pensions Amendment

IN YOUR ARMCHAIR—AND MINE

By SCORPIO

Out of Context—I venture to suggest that rather too many people allow their language, and sometimes even their thought, to be enslaved by the accidental word combinations of mere mechanical quotation or maybe misquotation, often quotations which are metaphors, but which they have forgotten are metaphors, images or pictures, which only make sense in their proper context, but which are torn out of their context to plug any old hole in a faulty argument. Poor Shakespeare is a constant victim of that sort of misappropriation. It was, for example, in a most unfortunate moment that he penned the phrase: "The lady doth protest too much, methinks". This (with the "methinks" generally transposed to the start of the sentence) is regularly used to buttress the notion that indignant repudiation of a derogatory suggestion is, somehow or other, in itself a suspicious circumstance which confirms the truth of the charge. The implication is that under a false accusation an innocent person will always sit icily calm, contemptuous and confident that truth will prevail, indifferent to the insult and utterly urbane. No doubt there are in the world people capable of this sort of superhuman self-control, but a misplaced quotation from a seventeenth century play has nothing to do with the case. Anyhow, which play was it? "Hamlet?" Right. And which lady in "Hamlet" had protested too much? Not the guilty Gertrude, but the Player Queen. And what was she protesting about? She was not protesting about anything; she was rather over-emphatically protesting her love of her husband—a very different matter. Shakespeare seems to have preferred women capable of understatement in their affections—Cordelia, for instance, or Viola. As for protesting against a false accusation, Desdemona rightly protested like anything against the slanders of Iago and there was never any suggestion that she was overdoing it. Human temperaments are infinitely various but, as a general rule, I should have thought that the greater the innocence the greater the indignation. Yet I have heard the stale old quotation dragged in to back up the suggestion, for instance, that the anger displayed by the man accused by the police in the "Kiss in the car" case was tantamount to an admission of guilt. In that case, anyhow, the argument was distinctly double-edged, since the lady concerned had remained calm.

Rogues' Gallery—Even the civil law has its rogues' gallery. The words of Iago recall such romantic names as Blenkarn, Edward Gandall, Wallis, Frank Cullis and the mysterious Esme Ellison, purported wife of Van de Borgh; they may lack the glamour and publicity of Crippen, Heath, Christie and their Chamber of Horrors friends, and never inspire "musicals" in their honour, but they all have a place of affection in the hearts of common lawyers. They are those "personable strangers" who play a brief and fleeting but disastrous part in the lives of the plaintiff and defendant and then are gone, some to prison and some for good, leaving behind a pleasant tangle of affairs that happily only lawyers can unravel. Usually left behind are the two victims of the rogue's fraud, one to be plaintiff and one to be defendant and neither deserving to lose. As Lord Cairns said in *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459 at p. 463: "My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall".

The Courts have been so anxious to see that justice is done in each particular case according to its facts that there is now a labyrinth of apparently conflicting authority through which only the keenest academic minds can detect a consistent rule. Even Sellers L.J. gloomily remarked in the recent and important case of *Ingram* v. *Little* [1960] 3 W.L.R. 504, 513; [1960] 3 All E.R. 332, 338: "I am conscious that our decision here will not have served to dispel the uncertainty".

Hunting Witches—Another word combination that has done remarkable service in vitiating thought is "witch-hunt". In some political quarters any attempt to detect and root out secret subversive activities or espionage on behalf of a foreign power has long been a "witch-hunt" and therefore superstitious, obscurantist and utterly ridiculous and retrograde. But on what does the *sens pejoratif* of the expression "witch-hunt" rest? On the suggestion that there never really were any such beings as witches. But if witches, with all their secret malevolent powers, did exist the most eminently sensible thing in the world would be to hunt them and the only possible controversy would be as to the best and most effective means of distinguishing between a diabolical agent and a harmless eccentric. The case of Blake (alias Behar) has raised a great howl of criticism against the Government for laxity in security, but if really effective means to forestall him and his kind had been taken before the current revelations, a louder and far more prolonged howl of "witch-hunt" would undoubtedly have been raised in calculated protest.

Not Guilty—"In his will your late employer has named you as his beneficiary", the solicitor explained to the secretary. "It was not me, sir", she protested. "I knew he had one, but it wasn't me, honestly."

Tailpiece—In civil proceedings recently taken, a Warrant of Committal was issued against the judgment debtor and a notice of non-execution of the warrant was subsequently received from the bailiff which read as follows:

"Take notice that the Warrant in this action has not been executed for the following reason:

The bailiff states that the debtor is due to go into the Maternity Home within the next 10 days. She cannot pay the amount claimed in full, and I am of the opinion that it would be wrongful for this woman to be placed under arrest and imprisoned for fear of a miscarriage (of justice)."

TOWN AND COUNTRY PLANNING APPEALS

The Proprietors of Puketapu 3a Block Inc. and Another *v.* New Plymouth City Council and Another

Town and Country Planning Appeal Board. New Plymouth. 1961. 1; 20 June.

Code of Ordinances—Conditional uses in rural zones—Timber mills etc.—Code to be based on broad concepts and not narrow ones—Amendment of code directed—Town and Country Planning Act 1953, s. 26.

Appeals under s. 26 of the Town and Country Planning Act 1953. The first-named appellant was the lessee and the second-named appellant was the owner of a property situated at Mangorei Road in the County of Taranaki, being subdivision 28, Puketotara being part MR3, Block V, Paritutu Survey District. Both appellants lodged objections to certain provisions in the Code of Ordinances relating to the respondent's proposed District Scheme. These objections were disallowed and these appeals followed. As they related to the same matter they were heard together. When the appeals came to hearing, counsel for the appellants intimated that it was only proposed to challenge the provisions of Ordinance 10, Clause 2, paragraph (d), as it then stood. At the hearing of the objections the respondent altered the then wording of this Ordinance to the following wording: "Timber mills, saw mills, timber processing and any undertaking which is ancillary to the forestry and timber industries necessary for the processing of material grown in the locality".

N. H. Moss, for the appellants.
J. P. Quilliam, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, the Board finds as follows:

1. The first-named appellant occupies part of the property in connection with its timber milling operations. In August 1959 application was made to the Taranaki County Council for a building permit and this was originally refused by the Council. The matter of the building permit then became the subject of negotiations between the parties and the Taranaki County Council reconsidered the matter and agreed to issue a permit for the erection of the proposed buildings on conditions which it is not necessary to set out for the purposes of this decision. The appellant accepted the conditions with one exception and the building has been erected. The purpose for which the building was to be put was for the storage of timber and the storage of joinery manufactured at the appellant's Eltham Mill, these products being available for sale both wholesale and retail. The appellant draws its timber supplies from large blocks in the King Country, which means that although it has been granted a building permit by the Council it cannot carry on its normal operations by reason of the restrictions imposed by the Ordinance 10 which is appealed against as it is not processing material grown in the locality.
2. The Board considers that the Ordinance as it stands is unduly restrictive. The respondent appears to have endeavoured to meet the situation by laying down a general rule on the circumstances of a particular case. Under the Code of Ordinances timber mills are "Conditional uses" in a rural area and the Board considers that that is a reasonable provision. It considers that Code of Ordinances should be, in the main, based on broad concepts not narrow ones, leaving the question of control of the operations of any industry operating under a conditional use to the local authority concerned by way of appropriate conditions attaching to the use.
3. The suggested Code of Ordinances, as set out in the Town and Country Planning Regulations 1960 (S.R. 1960/109) under the heading "Clause 2, Rural Zoning: (b) Conditional Uses" includes as conditional uses "timber mills, saw mills, timber processing and any undertaking which is ancillary to the forestry and timber industries not being one of the industries listed in Appendix I hereto or any other industry with noxious or dangerous aspects." The Board considers this wording more appropriate than the wording adopted by the respondent Council.

The appeals are allowed in part. The Board directs that Ordinance 10, Clause 2 paragraph (d) be amended by substituting the following wording: "Timber mills, saw mills, timber processing and any undertaking which is ancillary to the forestry and timber industries not being an industry with noxious or dangerous aspects".

Appeals allowed in part.

Self-Help Co-op Limited *v.* Waimairi County Council

Town and Country Planning Appeal Board. Christchurch. 1961. 11; 26 May.

Building permit—Permit to build block of shops on intersection refused—Council's plans for street widening—Advantages gained by street widening to be weighed against those resulting from building of shops—Town and Country Planning Act 1953 s. 38.

Appeal under s. 38 of the Town and Country Planning Act 1953. The appellant Company was the owner of a property containing 36 perches more or less, being Lot 1 on Deposited Plan No. 2930, part Rural Section 60. It applied to the respondent Council for a building permit to erect a block of shops on this property, which is situated on the north-eastern corner of Fendalton Road and Clyde Road. The respondent Council refused the permit in the first instance on the grounds that it proposed to widen Fendalton Road and to establish a traffic island in the centre of the interesection of Fendalton Road-Clyde Road-Memorial Avenue. The appellant Company's application was for a permit to build right up to the corner under consideration, whilst the Council's proposal would require a very substantial setting back of the corner.

Between the time the appeal was filed and the date of hearing, the respondent Council amended its proposals by abandoning the proposal for the erection of a traffic island in the centre of the intersection and deciding to erect traffic lights on each corner of the intersection. This would have involved some setting back of the frontages to the appellant's property, but the change in policy materially reduced the area of the appellant's property that would be affected.

Atkinson, for the appellant.
Hutchison, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, the Board finds as follows:

1. The intersection under consideration is already subject to a heavy density of traffic and with the residential development taking place in the Memorial Avenue area to the west and north-west of this intersection, this density of traffic is bound to increase. Traffic counts taken in 1960—one in January and one in October—showed a 20 per cent increase in volume of traffic in nine months.
2. The Board is satisfied that the respondent Council's proposal to widen this corner is in accord with Town and Country Planning principles and practice. The respondent Council also plans the ultimate widening of Fendalton Road by 33 feet and it has imposed a building line restriction 16 ft. 6 ins. wide on each side of Fendalton Road and each of the other roads leading into the intersection. The actual area of the appellant Company's property affected by the respondent Council's proposal, is an area of approximately 2.3 perches. The Board considers that the advantages to be gained by the street widening proposals of the respondent Council are of far greater importance, from a Town Planning angle, than the development of a shopping corner right up to the existing boundary line.

The appeal is disallowed.

Appeal disallowed.