New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The background of the law is the background of the nation's history; and old books, often rather repellent to look at, contain a rich mine of ore from which can be extracted sound, interesting metal."

—LORD MACMILLAN.

Vol. XI. Tuesday, August 6, 1935. No. 14

The Statute of Westminster Entrenched.

ON June 6, the Judicial Committee of the Privy Council delivered two judgments of great constitutional importance, as they emphasize the right of any British Dominion to enact what legislation it pleases without any control by the Government or Parliament of Great Britain. The ultimate Court of appeal of the British overseas Dominions has thus shown that in the legal view, as in the political, the British Commonwealth of Nations is a free association of partners enjoying equal rights to legislate each one for itself, as its local sentiment or circumstances dictate. For these reasons, the two recent judgments deserve careful and detailed consideration.

One of these judgments dealt with the objection that the Legislature of the Irish Free State had no power to terminate the right of appeal—by means of special leave granted by His Majesty in Council—from the Supreme Court of that Dominion to the Judicial Committee: *Moore v. Attorney-General of the Irish Free State* (*The Times*, June 7). The other judgment determined whether the Legislature of the Dominion of Canada had power to enact a provision that in criminal cases there should be no appeal from Canadian Courts to the Judicial Committee: *British Coal Corporation v. The King* (*The Times*, June 7). As will be seen, each of these cases has its distinct legal background; and both fell for decision in the light of the Statute of Westminster.

Though the right of appeal to His Majesty in Council has been regulated by a number of Imperial Statutes, of which the Judicial Committee Acts of 1833, 1844, and 1915 are examples, and by Imperial Orders in Council of application to the older Dominions, in its origin it may have been

> "no more than a petitory appeal to the Sovereign against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions":

per Viscount Cave, L.C., in delivering the judgment of the Judicial Committee in a Canadian appeal to which further reference will be made, *Nadan v. The King*, [1926] A.C. 482, 491. The Judicial Committee Acts, therefore, merely gave legislative sanction to a jurisdiction which had previously existed.

In *Nadan's* case, the Judicial Committee expressly stated that, if the prerogative was to be excluded, this must be accomplished by an Imperial statute; and, in fact, the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way: Commonwealth of Australia Act, 1900, s. 74; Union of South Africa Act, 1909, s. 106. Express words were held to be necessary, even in an Imperial statute, to exclude the prerogative: *In re the Will of Wi Matua*, [1908] A.C. 448, an appeal from our Native Appellate Court.

I.

To take the case of *Moore v. Attorney-General of the Irish Free State* first:

It is necessary in order to appreciate the scope and effect of the recent judgment of the Privy Council in this case to recall the relevant legislation of the Irish Free State, and the past history of appeals from that Dominion to the Judicial Committee.

By an agreement or Treaty, made on December 6, 1921, between representatives of the British Government and certain leaders of the Irish people, whereby the Irish Free State received Dominion status, the new Dominion was endowed

> "with a Parliament having powers to make laws for the peace, order, and good government of Ireland and an Executive responsible to that Parliament."

By cl. 2, the position of the Irish Free State

> "in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice, and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."

These "Articles of Agreement for a Treaty," as the agreement was termed, were enacted by the Parliament of Great Britain in the Irish Free State (Agreement) Act, 1922, and were annexed as a schedule to the Constituent Act of the Irish Constituent Assembly in 1922, which was then declared the Constitution of the Irish Free State by the Irish Free State Constitution Act, 1922 (Gt. Britain). Article 66 of such Constitution is as follows:

> "The Supreme Court of the Irish Free State (Saorstat Eireann) shall, with such exceptions (not including the cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal, or Authority whatsoever:
>
> Provided that nothing in this constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

It is important here to note that, as the Preamble to the Irish Free State Constitution Act, 1922 (Gt. Britain), recites, the Irish Constituent Assembly in passing the Constituent Act made it [by s. 2] subject to the following provisions, namely:—

> "The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as the Scheduled Treaty) which are hereby given the force of law, and if any provision of the said Constitution or if any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the

extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and do all such other things as may be necessary to supplement the Scheduled Treaty."

And by Art. 50 of the Constituent Act (Irish Free State), passed as a matter of English law by being scheduled to the Irish Constitution Act, 1922 (Gt. Brit.), the power of the Free State Parliament (the Oireachtas) to amend the Constitution was confined to

"amendments of this Constitution within the terms of the Scheduled Treaty."

The first petitions from the Irish Free State for leave to appeal to His Majesty in Council were heard by the Judicial Committee in July, 1923: *Hull v. McKenna*, [1926] I.R. 402. A statement of general principles governing such applications, and a comparison of the Dominion status of Canada, Australia, and South Africa with that of the Irish Free State was made by Viscount Haldane, L.C. His Lordship, at p. 404, said:

"The Sovereign, as the Sovereign of the Empire, has retained the prerogative of justice, but by an Imperial Statute to which he assented, that was modified as regards constitutional questions in the case of Australia. That is the only case.

"In Ireland, under the Constitution Act, by Art. 66, the prerogative is saved, and the prerogative therefore exists in Ireland just as it does in Canada, South Africa, India, and right through the Empire, with the single exception that I have mentioned—that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes in Australia. That being so, the Sovereign retains the ancient prerogative of being the supreme tribunal of justice."

Following this statement of general principles, the Judicial Committee dismissed the three petitions before their Lordships on their merits.

Leave was refused by the Judicial Committee in *O'Callaghan v. O'Sullivan*, [1925] 1 I.R. 90. It was granted in *Lynam v. Butler*, [1925] 2 I.R. 23, but the Irish Free State Legislature, before the hearing of the appeal, enacted that the correct interpretation of the statute under notice was that held by the Free State Supreme Court, thus nullifying in advance any contrary decision of the Judicial Committee. Then in *Performing Right Society v. Bray Urban District Council*, [1930] A.C. 377, it was held under Art. 66 (*supra*) of the constitution enacted by the Irish Free State Constitution Act, 1922, construed (as directed by the Preamble) with reference to Art. 2 of the Scheduled Treaty (*supra*), that the Judicial Committee had jurisdiction to hear an appeal from the Supreme Court of the Irish Free State to His Majesty in Council by an appellant who had been granted special leave so to appeal. As Viscount Sankey, L.C., at p. 385, said:

"The proviso [to Art. 66] specifically ensures that the right to petition His Majesty in Council shall subsist by stipulating that nothing shall impair it."

Writing in 1928, Professor Berriedale Keith said: "The suggestions that no appeal [from the Irish Free State] lies are absurd": *Responsible Government in the British Dominions*, 1089. So far, this appeared to be the constitutional position.

In 1931, the Statute of Westminster was passed by the Parliament of Great Britain to ratify and confirm certain declarations made by the Delegates to the Imperial Conferences of 1926 and 1930. Section 2 is as follows:

"(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

"(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule, or regulation, in so far as the same is part of the law of a Dominion."

Under s. 1, the expression "Dominion" includes Canada and the Irish Free State, both of which have adopted s. 2 of the Statute. The Irish Free State unconditionally accepted the full application of the Statute.

In 1933 the Oireachtas, by means of the Constitution (Removal of Oath) Act, 1933, repealed s. 2 of the Constituent Act of 1922—set out in the Preamble to the Irish Free State Constitution Act, 1922 (Gt. Britain), (*supra*)—which section provided that any legislation by the Oireachtas which was repugnant to the terms of the Treaty should be null and void, and by s. 3 struck out of Art. 50 (*supra*) the words which limited its power of amending the constitution to "within the terms of the Scheduled Treaty" Act 6, 1933. By the Constitution (Amendment No. 22) Act, 1933, the Oireachtas abolished the right to petition for leave to appeal to His Majesty in Council from the Supreme Court of the Irish Free State, thereby amending Art. 66 of the Constitution (*supra*).

In 1929—to go back a little from the time the legislation last mentioned was passed—the plaintiffs in *Moore v. Attorney-General for Saorstat Eireann*, [1929] I.R. 191, obtained in the High Court of the Irish Free State a declaration that they were entitled to a several fishery for salmon and all other fish in the entire tidal portion of the River Erne, County Donegal, within the limits specified in their statement of claim, and an injunction restraining the defendants and all other persons from trespassing upon the said fishery, fishing therein, or taking fish thereout, and from obstructing the plaintiffs in their exclusive use and enjoyment of such fishing. On appeal, a majority of the Supreme Court reversed that decision. Application for leave to appeal was made to the Judicial Committee of the Privy Council, and was granted in October, 1933; but in the following month the Oireachtas passed the statute of 1933, which abolished the right of appeal from the Supreme Court of the Free State, making the prohibition retrospective; and it received the Royal Assent on November 16. When the sealed copy of the Erne Fishery judgment was presented to the Registrar for transmission to the Privy Council in pursuance of the leave to appeal granted, he refused to deal with the matter—unless so directed by the Supreme Court—owing to the intervening legislative prohibition of such appeals.

The appellants then approached the Privy Council direct, with the desire of challenging the constitutional propriety of the 1933 statute, and prayed for an audience thereon. The Judicial Committee postponed the hearing of the appeal, but advised His Majesty to make an order under the Judicial Committee Act, 1833, directing the main question—the right of the Oireachtas to pass the prohibiting statute—to be argued and decided as a preliminary objection.

We propose in our next issue to consider the effect of the historic and far-reaching judgment in this case, as well as that in the recent Canadian appeal to which reference has been made.

Summary of Recent Judgments.

COURT OF APPEAL
Wellington.
1935.
July 8, 12.
Myers, C.J.
Blair, J.
Smith, J.
Kennedy, J.

THE KING v. LUCINSKY.

Criminal Law—Receiving—Stolen Bank-notes of High Denominations—Prisoner opening Account with Thief with Bank-notes of Smaller Denomination—Requirements of Statute to create Offence of receiving Stolen Property—Crimes Act, 1908, s. 284 (1).

Section 284 (1) of the Crimes Act, 1908, which enacts that:

"Everyone is liable to seven years' imprisonment with hard labour who receives anything obtained by any crime . . . knowing the same to have been dishonestly obtained,"

requires, in order to create the offence of receiving stolen property, the receiving of the thing stolen or part thereof, and not of something else which was not in itself stolen, but may have been the proceeds of, or something exchanged for, or (if it were money stolen) purchased with, the property actually stolen.

Every case, however, must be considered in the light of its own circumstances.

So held by the Court of Appeal on a case stated by *Smith*, J.

R. v. Walkley, (1829) 4 C. & P. 132, 172 E.R. 640, applied.

Counsel: Solicitor-General, Cornish, K.C., for the Crown; **Relling,** for the accused.

Solicitors: Crown Law Office, Wellington, for the Crown; **T. F. Relling,** Palmerston North, for the accused.

NOTE:—For the Crimes Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Criminal Law*, p. 182.

Case Annotation: *R. v. Walkley*, 15 E. & E. Digest, title *Criminal Law and Evidence*, p. 964, para. 10,765.

SUPREME COURT
Wellington.
1935.
July 10, 15.
Reed, J.

TRUTH (N.Z.), LIMITED v. CAMPIN.

Printers and Newspapers Registration—Deposit made of Affidavit with Information as to Printers and Publishers, etc., of Newspaper—Whether Registration of Printing Press also required—Printers and Newspapers Registration Act, 1908, ss. 3, 9, 10, 18.

Section 3 of the Printers and Newspapers Registration Act, 1908, requires every person who has a printing-press to give notice thereof to the Registrar of the Supreme Court, who is to give to the person giving such notice a certificate. Section 18 makes a person not complying with s. 3 liable to a fine.

Section 9 requires the publisher of a newspaper to deposit with the Registrar an affidavit with certain particulars as to the intended printer, publisher, place of printing, registered office of the company, etc.

On appeal from a conviction for non-compliance with s. 3,

O'Leary, K.C., with him **J. H. Dunn,** for the appellant; **Evans-Scott,** for the respondent.

Held: Compliance with s. 9 does not exempt from compliance with s. 3.

Solicitors: Alexander Dunn, Wellington, for the appellant; **Menteath, Ward, Macassey, and Evans-Scott,** Wellington, for the respondent.

NOTE:—For the Printers and Newspapers Registration Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 6, title *Press and Printing*, p. 954.

COMPENSATION COURT
Wellington.
1935.
July 19.
Blair, J.

TAWA CENTRAL, LTD. v. MINISTER OF PUBLIC WORKS. HOARE v. MINISTER OF PUBLIC WORKS. (No. 2).

Public Works—Compensation—Enhancement in Value at Time of Entry to Land taken in common with other Lands consequent upon Execution of Public Work—Value, howsoever caused, to be taken—Public Works Act, 1928, ss. 79, 80.

The value of land for compensation purposes must be taken as its value, howsoever caused, as at the date when the land was first entered upon for the purposes of a public work.

So held by *Blair*, J., as President of a Compensation Court.

The judgments of *Reed* and *Johnston*, JJ., in **Tawa Central, Limited v. Minister of Public Works, Hoare v. Same,** [1934] N.Z.L.R. 841, adopted.

Counsel: F. W. Ongley, for the claimants; **A. E. Currie,** for the respondent.

Solicitors: Ongley, O'Donovan, and Arndt, Wellington, for the claimants; **Crown Law Office,** Wellington, for the respondent.

NOTE:—For the Public Works Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Public Works*, p. 622.

SUPREME COURT
Auckland.
July 9, 15.
Callan, J.

HOEY AND ANOTHER v. PUBLIC TRUSTEE.

Will—Life-tenant and Remainderman—Death Duties—Interest incurred thereon and on Moneys borrowed to pay same—Incidence of payment of Interest as between Life-tenant and Remainderman—Death Duties Act, 1921, s. 31.

Where there is delay in payment of death duties, liability is incurred for interest thereon, the necessary money is borrowed for the payment of the duties, and interest is paid to the Crown and to the lender, and the testator's will contains no direction as to the incidence of death duties but creates a life-interest and an interest in remainder, the life-tenant should bear the whole burden of interest payable for delayed payment and of interest on the money borrowed.

In re Holmes, Beetham v. Holmes, (1912) 32 N.Z.L.R. 597, and **Caldwell v. Fleming,** [1927] N.Z.L.R. 145, applied.

Counsel: F. W. Thorne, for the plaintiff; **Cocker,** for the defendant.

Solicitors: Wilson, Day, and Thorne, Whangarei, for the plaintiffs; **Hesketh, Richmond, Adams, and Cocker,** for the defendant.

NOTE:—For the Death Duties Act, 1921, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Public Revenue*, p. 354.

SUPREME COURT
In Chambers.
Auckland.
1935.
July 19.
Fair, J.

SMYTHEMAN v. CLARK.

Practice—Joinder of Parties—Plaintiff deceased since Final Judgment—Joinder of Executor—Code of Civil Procedure, R. 457.

An order may be made under R. 457 of the Code of Civil Procedure after final judgment joining a new party, *e.g.*, the executor of a deceased plaintiff.

Salt v. Cooper, (1880) 16 Ch. D. 544, and **Collings v. Wade,** [1903] 1 I.R. 89, applied.

Counsel: Smytheman, in support.

Solicitors: Brookfield, Prendergast, and Schnauer, Auckland, for the applicants.

Case Annotation: For *Salt v. Cooper*, see E. & E. Digest, Vol. 16, p. 172; and for *Collings v. Wade*, *Ibid.*, *Pleading and Practice*, p. 466.

SUPREME COURT
Blenheim.
July 20, 24.
Reed, J.

IN RE A MORTGAGE, C. TO STATE ADVANCES SUPERINTENDENT.

Mortgagors' and Tenants' Relief—Jurisdiction—Application for Leave to issue Execution against Farmer-Mortgagor Defendant —"In relation to every application for relief"—Sole Jurisdiction to grant such Leave in Court of Review—Mortgagors and Tenants Relief Act, 1933, s. 16—Rural Mortgagors Final Adjustment Act, 1934-35, ss. 5, 35—Order in Council, *1933 New Zealand Gazette*, 1738.

The only Court that has jurisdiction to grant leave to issue execution against a mortgagor of land "used exclusively or principally for agricultural purposes" is the Court of Review of Mortgagors' Liabilities constituted under the Rural Mortgagors Final Adjustment Act, 1934-35.

Counsel: Scantlebury, in support of motion for leave; **Macnab,** to oppose.

Solicitors: A. C. Nathan, Blenheim, for the plaintiff; **A. A. Macnab,** Blenheim, for the defendant.

NOTE:—For the Mortgagors and Tenants Relief Act, 1933, see *Kavanagh and Ball's New Rent and Interest Reductions and Mortgage Legislation*, 2nd Ed., and for the Rural Mortgagors Final Adjustment Act, 1934-35, see *Ball's Rural Mortgagors Adjustment Legislation*, p. 7.

COURT OF APPEAL
Wellington.
1935.
June 20.
Myers, C.J.
Herdman, J.
Blair, J.

IN RE AINGER, DECEASED, WHEELER AND ANOTHER v. BANK OF AUSTRALASIA AND OTHERS.

Insurance—Life—Will—Mortgaged Policies—"Policyholder"—How Construed—Electing Priority in Protection of Policies—Life Insurance Act, 1908, ss. 65, 66—Life Insurance Amendment Act, 1925, s. 3.

On originating summons to determine the question: Where a person insured under a life-insurance policy mortgages his policy and dies insolvent, is the estate (or family) of the deceased entitled in respect of the policy-moneys, after payment of the amount of the mortgage, to the protection afforded against debts and legacies by ss. 65 and 66 of the Life Insurance Act, 1908, as amended by the Life Insurance Amendment Act, 1925.

A. C. Stephens, for the plaintiffs; **Mowat,** for the defendant Bank of Australasia; **Paterson,** for all other defendants.

Held, *per Curiam*, That the intention of the Legislature was to confer upon insured persons and their families a real and not an illusory protection, and that, therefore, s. 65 (2) of the Life Insurance Act, 1908, and s. 3 (*c*) of the Amendment Act, 1925, taken together, should read as follows:—

"Where an insured person dies leaving a will the policy-moneys shall not be applied in payment of his debts or of any legacies payable under his will . . . Where . . . the policyholder as defined by the said s. 41 is a person to whom the policy has been mortgaged, transferred, assigned, or otherwise disposed of, then, on the death of the person insured, the protection afforded to policyholders by ss. 65 and 66 of the principal Act shall operate only for the protection of the person insured or of the wife or husband or any lineal ancestor or descendant of the person insured to the extent of any residual or other interest that any such person may have in the policy."

The protection, therefore, being under s. 3 (*c*) of the Amendment Act, 1925, applied in favour of the widow or children of the insured who had attained or should attain a vested interest under his will in respect of and to the extent of the residual interest in respect of which the protection exists, *i.e.*, the proceeds of the elected policy or policies after payment of the mortgage debts.

Under s. 66 (4) of the Life Insurance Act, 1908, which provides for the event, as happened in this case, that the policies are greater in value than the protected amendment (£2,000, plus profits), and for the assured electing priority in the protection of policies, the executors of the will of the deceased insured are entitled to exercise the right of election and must do so within a reasonable time, considering the best interest of the persons entitled to the protection.

In re Tremain, Tremain v. Public Trustee, [1934] N.Z.L.R. 369, and **National Bank v. Official Assignee of Claridge,** [1925] N.Z.L.R. 305, discussed.

Salmon v. Duncombe, (1886) 11 App. Cas. 627, and **In re Greenaway,** (1910) 30 N.Z.L.R. 293, referred to.

In re Adeane, Guardian Trust and Executors Co. of New Zealand, Ltd. v. Adeane, [1933] N.Z.L.R. 489, followed (as to the principle regarding costs).

Solicitors: Mondy, Stephens, Munro, and Stephens, Dunedin, for the plaintiffs; **Gallaway and Mowat,** Dunedin, for the Bank of Australasia; **Lang and Paterson,** Dunedin, for the other defendants.

Case Annotation: *Salmon v. Duncombe*, E. & E. Digest, Vol. 42, title *Statutes*, p. 676.

NOTE:—For the Life Insurance Act, 1908, and the Amendment Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 4, pp. 78, 127.

FULL COURT
Wellington.
1935.
June 25, 26;
July 12.
Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

WILSON v. BARRETT. FAIRHURST v. ROBINS AND OTHERS.

Transport Licensing—Transport (Goods) Order—Whether *ultra vires*—**Application to "controlled areas" of Transport Licensing Act, 1931, with "modifications"—Whether provision for imposing Penalty a "modification"—Whether Provisions of Order severable—Transport Licensing Act, 1931, Parts II and III, s. 47—Transport (Goods) Order, 1933-34 (***1933 New Zealand Gazette*, p. 3413), **ss. 36 (4) (c), 43 (2) (g).**

Part II of the Transport Licensing Act, 1931, regulates passenger-services. Part III relates to goods-services. Section 45 enables the Governor-General by Order in Council to declare a transport district a "controlled area," while s. 47 enables him to apply to the "controlled area" such of the provisions of Part II, with such modifications, as he thinks fit, "but in every such case the provisions of s. 43 of that Part shall be applied."

The Transport (Goods) Order, 1933-34, 1933 *New Zealand Gazette*, Vol. 3, 3413), made under s. 47 of the Act, purported to apply to certain "controlled areas" certain of the provisions of Part II of the Act, with various modifications.

On appeals (*a*) from a conviction by a Magistrate and (*b*) from the dismissal by another Magistrate of an information, on charges of carrying on goods-services otherwise than in pursuance of a goods-service license granted under the Act, and contrary to the said Order,

P. L. Dickson, for the appellant Wilson; **Baylee,** for the respondents Robins and others; **A. E. Currie** and **Bain,** for the respondent Barrett, and the appellant Fairhurst.

Held, *per Curiam*, That s. 43 of the Transport Licensing Act, 1931, applied, with the modifications therein, to the Order, is valid, except for section 36 (4) (*c*) of the Order which sub-clause purported to give power to impose a penalty in lieu of or in addition to suspending a license, which is not a modification within s. 47 (*1*) of the statute and is ultra vires. But, applying the doctrine of severability to statutory regulations, that sub-clause can be severed and with its deletion the Order in Council is valid.

***Solicitors:* P. L. Dickson,** Wanganui, for the appellant Wilson; **Baylee and Brunton,** Dunedin, for the respondents Robins and others; **Bain and Fleming,** Wanganui, for the respondent Barrett; **Adams Bros.,** Dunedin, for the appellant Fairhurst.

NOTE:—For the Transport Licensing Act, 1931, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Transport*, p. 832.

SUPREME COURT
Auckland.
1935.
June 25.
Fair, J.

IN RE HOLLYWOOD (DECEASED), HOLLYWOOD AND OTHERS v. PUBLIC TRUSTEE.

Will—"Survive"—Whether Primary or Secondary Meaning.

By the will of an elderly testator, whose son was unmarried and twenty-nine years of age at the time of its making, a fund was left upon trust, subject to a life interest to testator's widow, for his son, should the latter survive the testator and be alive twenty-one years after testator's decease. The will continued:—

"And should my said son predecease me or survive me and die before the expiration of twenty-one years from the date of my decease leaving a child or children who survive me then and in any such case such child or children shall take and if more than one equally between them the share which his her or their father would have taken under this my will had such father survived me and been alive at the expiration of twenty-one years from the date of my decease."

On originating summons for determination of questions arising out of the foregoing direction,

Inder, for the plaintiffs; **Cocker,** for the defendants.

Held, That in the circumstances the words "who survive me" after "a child or children" had the secondary meaning—*viz.*, a person who comes into existence after the death of the person whom he is said to survive—and therefore included those children of testator's son who might come into existence after the death of the testator, as well as those who might have been in existence at the time of his death.

Re Clark's Estate, (1864) 3 DeG. J. and S. 111, 46 E.R. 579, applied.

Solicitors: McGregor, Lowrie, Inder, and Metcalfe, Auckland, for the plaintiffs; **Hesketh, Richmond, Adams, and Cocker,** Auckland, for the defendant.

SUPREME COURT
Auckland.
1935.
May 17, 18, 21; July 4.
Reed, J.

HORNING v. SYCAMORE AND FLEXMAN.

Negligence—Contributory Negligence—Light of Motor-bus Failing owing to Defect Known to Driver—Bus proceeding by Understanding of Passengers by Light of Electric Torches held by two of them—Bus too near Edge of Road Skidding in Loose Gravel on Slope and Overturning, owing to Driver having only One Hand on Wheel—Torch-holding Passenger (perceiving Proximity of Bus to edge) Injured—Whether Engaged in Joint Enterprise with Driver, Guilty of Contributory Negligence, had Last Opportunity, or was Volens.

The defendant F., a carrier of passengers for hire, driver of a passenger motor-bus, of which the defendant S. was the owner, knew that the lighting system of the bus was defective when beginning the journey upon which the accident occurred from which the plaintiff sustained injury. The lights on the bus failed on a dark, wet night when the bus was within a quarter of a mile of a well-lighted concrete road. Whether the bus proceeded or remained stationary, F. would be breaking either Reg. 3, subs. 14, or subs. 18 of the Regulations under the Motor-vehicles Act, 1924. By general understanding of the ten passengers in the bus, some of whom were anxious to catch a train at Papakura, some four miles off, it was decided to proceed in the dark, a male passenger on each dashboard holding an electric torch. The plaintiff volunteered to hold, and held, a torch on the near dashboard. So lit, the bus proceeded along a cross-road of loose metal, badly lighted, and thoroughly known by defendant. The plaintiff observed, in time to warn the driver and enable the latter to avoid the accident, that the bus was proceeding too close to the left-hand side of the road, but to him "the road seemed perfectly level." Plaintiff gave no such warning. There was, however, unknown to plaintiff but known to F., a dangerous slope in the road, and loose gravel, constituting a trap, and the bus skidded in the gravel and slipped over the near side of the road and overturned, the plaintiff was pinned beneath the bus and suffered injury. The decisive cause of the accident was F.'s negligence in driving into the loose metal on the slope in the road with only one hand on the wheel, while he was trying with the other to get the lights to work.

Gatenby, and **H. A. Steadman,** for the plaintiff; **Meredith,** and **McCarthy,** for the defendants.

Held, (1) That the original negligence of defendant in beginning the journey knowing the defective condition of the lighting system must be treated as continuing, supplemented by the further negligence of proceeding without proper lights and the specific act of driving with only one hand on the wheel which was the decisive cause of the accident.

(2) That the passengers, being in no way identified with the negligence that occasioned the lights failing, were not identified with the defendant in his negligence in proceeding onwards with the bus in an unlighted condition, there being apparently no danger in adopting that alternative except that of collision with something on the road, and a good lookout being kept by the driver.

(3) That, while plaintiff by holding a torch assumed a moral if not a legal duty to warn the driver of any danger he saw, there was no obvious danger in the proximity of the bus to the edge of the road that reasonably necessitated any warning.

That therefore the plaintiff had not embarked with the defendant in a joint enterprise and was not a joint tort-feasor, that he was not guilty of contributory negligence, that he had not the last opportunity of avoiding the accident, and that the doctrine of *Volenti non fit injuria* did not apply.

(4) That, whether or not the plaintiff had made himself a party to defendant's act in proceeding onwards with defective lights, the decisive cause of the accident was the defendant's final act of negligence in driving into the loose metal on the slope in the road with only one hand on the wheel, and upon that principle also the plaintiff was entitled to succeed.

The Generous, (1818) 2 Dods. 322, 323, 324, 165 E. R. 1501: and **Mills v. Armstrong, The Bernina,** (1888) 13 App. Cas. 1, 7, 13, applied.

Bourke v. Jessop, [1933] N.Z.L.R. 806, 1418, on app. [1934] N.Z.L.R. s. 81, [1935] N.Z.L.R. 246; **Delaney v. City of Toronto,** [1921] 64 D.L.R. 122; **Brooke v. Bool,** [1928] 2 K.B. 578, distinguished.

British Columbia Electric Railway Company, Limited v. Loach, [1916] 1 A.C. 719, 727, applied.

Solicitors: Gatenby and Eddowes, Auckland, for the plaintiff; **Meredith, Hubble, and Meredith,** Auckland, for the defendants.

Case Annotation: *Mills v. Armstrong, The Bernina,* E. & E. Digest, Vol. 41, p. 787, para. 6480; *Brooke v. Bool, ibid.,* Vol. 42, p. 976, para. 69; *British Columbia Electric Railway Company, Limited v. Loach, ibid.,* Vol. 36, p. 117, para. 781.

SUPREME COURT
In Chambers,
Wellington.
July 19, 23.
1935.
Smith, J.

WARNER v. FORTUNE.

Practice—Interrogatories—Death from Injuries caused by Motor-car driven by Defendant—No Independent Evidence of Defendant's Negligence available to Plaintiff—Interrogatories to Defendant on Question of his Negligence—Disallowed.

Interrogatories, proposed to be delivered to a defendant in a running-down action for damages under the Deaths by Accidents Compensation Act, 1908, on the question of his negligence, of which plaintiff was unable to obtain any independent evidence, and objected to by the defendant on the ground that the answers to the questions might incriminate him, were disallowed on the ground that, as in New Zealand there is no distinction between negligence as the foundation of criminal liability and of civil liability, if defendant's answers proved negligence against him in the proposed action, they would constitute admissions of negligence which might be used against him in criminal proceedings.

The King v. Storey, [1931] N.Z.L.R. 417, applied.
Griebart v. Morris, [1920] 1 K.B. 659, referred to.

Counsel: P. J. O'Regan, for the plaintiff, in support; **Parry,** for the defendant, to oppose.

Solicitors: P. J. O'Regan and Son, Wellington, for the plaintiff; **Buddle, Anderson, Kirkcaldie, and Parry,** for the defendant.

Judicial Committee of the Privy Council.

Baron Thankerton of Thankerton.

In our legal history there have been many illustrations of the hereditary principle. The great legal families of Chitty, Pollock, and Macnaghten afford numerous examples; and we have seen three successive generations of Coleridges on the High Court Bench. In Scotland, a country famous for its law and lawyers, the legal tribe or clan of Watson is now, as it has been for generations, numerous and formidable. It is true that one cannot always trace the connection or the degree of cousinship between one lawyer Watson and another. But Watsons abound in the law of Scotland, and there is little doubt that they had a common ancestor, probably a great lawyer, or at least a Baillie of note, in his day and generation.

Baron Thankerton of Thankerton.

As for the subject of this article, he is now sixty and looks about half that age—he affords the most uncanny example not only of this hereditary principle, but of what appears to be the imitative faculty sometimes observed in the son who is said to follow in his father's footsteps. Lord Russell of Killowen, finding himself in this perilous position was at great pains to diverge from his father's path, and chose the Chancery Division when his gifts and his friends indicated that the King's Bench Division was the place for him; and that if he kept to the old man's track he would travel almost as far. So he went to the Equity side, and emerged at last a Lord of Appeal in Ordinary.

But William Watson, now Baron Thankerton of Thankerton, was guilty of no deviation from the paternal example, and his career is almost a replica of that of Baron Watson of Thankerton, his sire. Both, soon after their admission to the Faculty of Advocates, acquired large practices of very much the same kind; and each of them became in due course, Solicitor-General for Scotland, a Lord Advocate (whose functions are rather like those of the Attorney-General, the Public Prosecutor, and the Grand Jury of England) and Lord of Appeal in Ordinary.

It will be observed that Lord Thankerton departed a little from the way of his father in selecting his title: Thankerton of Thankerton, instead of Watson of Thankerton. But Scotsmen have pointed out that this is but another example of filial respect. The judgments of Lord Watson had won an established reputation when the son stood on the threshold of the Lords; the judgments were cited confidently; and almost universally followed. The son desired, naturally enough, that his father should have full credit for his own work; and that the confusion which might result from the existence of two Lord Watsons, so near in point of time, and, it might be, so similar in style and merit, should be avoided. It was also desirable that the son's peculiar triumphs should be regarded as his own. Thus we have in the Law Reports (A.C.) a Watson and a Thankerton. The peerage in each case, it will be observed, is a life peerage; had it been hereditary there could have been no such convenient change of title. I may say that the "Thankerton" in each case is the name of the village in Lanarkshire, near which the family have lived for generations.

He is now one of the three Scottish Lords of Appeal in Ordinary who have chosen a territorial title—the others were Duncan McNeil, who became Lord Colonsay, and Andrew Graham Murray, who is perhaps better known as Lord Dunedin.

Young Watson had an orthodox English education. He went to Winchester, one of the most famous of our public schools, and from there to Jesus College, Cambridge. At sports he was a fair all-rounder; as a scholar he was industrious, rather than brilliant. He left Cambridge with the B.A. and the LL.B. degrees; went to Edinburgh; and for two years joined himself to a notable law firm of that place: Messrs. Tods, Murray, and Jamieson, Writers to the Signet. Here he worked hard and was admitted to the Faculty of Advocates in 1899 when he was twenty-six years of age.

Why is it, that on examining the record of any successful Scot one always finds that he was industrious, indefatigable, punctual, and persevering? It has been the writer's lot to examine the careers of many Scots and many Englishmen. Of every successful Scot the foregoing adjectives or something like them have been used; the number of seemingly lazy but successful Englishmen is, on the other hand, amazing. Is it a pose on the part of the Sassenach? I have known some, who at the University, acquired a reputation for learning without toil. But I discovered that they worked hard in the night while honester men were asleeping. Watson, at any rate worked hard during and beyond the ordinary working hours as did his father before him; as Lord Shaw and Lord Dunedin worked; as Lord Macmillan did, the most brilliant lawyer of them all.

Mr. Watson won, by his industry and his ability as a lawyer and advocate, a big practice at the Bar. A

much more unusual achievement for a successful lawyer, he was also successful and very useful in Parliament. He entered the House of Commons in 1913 as Conservative member for South Lanarkshire and he was a member for that constituency throughout the War and until the "Kill the Kaiser" election of 1918. He was made Scottish Solicitor-General and a Privy Councillor in 1922. He became Lord Advocate in the outgoing Conservative administration of 1924, and after the brief Labour interlude of that year was reappointed to the same office in Mr. Baldwin's Conservative Ministry in November. He had been elected M.P. for the famous border borough of Carlisle and represented that city until he was appointed Law Lord in 1929 on the retirement of Lord Shaw of Dunfermline.

In Parliament, without "setting the Thames on fire," or displaying any remarkable gifts as an orator, he was able, efficient, and popular. Excellent in debate, he always knew his facts and how to make the best use of them; he was ever ready to explain and to conciliate. That his services were of unusual value to the Government in the piloting of Bills relating to Scotland is everywhere acknowledged; and to him is mainly due the passing into law of the Scottish Church Act and the Local Government (Scotland) Act. He was always keenly interested in the good government of his own country; and in the business of the church of Scotland Assembly; and was Procurator of that body, in succession to Lord Sands, from 1918 to 1922. He was over forty when the War broke out and was too old for active service according to the military standards of that time, but he gave up his lucrative practice at the Bar and served in the Ministry of Munitions. Later he served his country in various capacities; and when Mr. Shortt was appointed Chief Secretary to the Lord Lieutenant of Ireland Mr. Watson took his place as a member of the Defence of the Realm Losses Commission.

He has now been Lord Thankerton of Thankerton and a Lord of Appeal in Ordinary, for six years; fourth in order of seniority of the seven Law Lords. In the Lords and in the Judicial Committee he has shown, as he did at the Bar and in Parliament, abilities of a high order. One cannot say that his judgments as yet have attained to the excellence of his father's or those of some of his contemporaries; but they are good.

He is a keen sportsman—a good golfer; an artist with rod and gun; and a particularly good shot. A bowman also and a prominent member of the Royal Company of Archers.

Unnecessary Authorities.—As a preface to his speech in a recent Scottish appeal in the House of Lords, *Blackie v. Blackie*, Lord Tomlin said: "Before I put the question to their Lordships' House, I want to make one observation about these books which are in front of me. I understand that a list was furnished to the Librarian of some seventy authorities, with some ten text-books, for use in this case. I cannot conceive that any case requires the mass of authorities with which I find myself surrounded. I think it is only right to say that it is the duty of those who have the conduct of cases in this House to see not only that their Lordships are furnished with the books which are necessary, but that they are not encumbered with books which are not necessary. I hope that this will be borne in mind in future."

Merchantable Quality.

The Test to be Applied.

By A. L. Haslam, B.C.L., D.Ph. (Oxon.), LL.M. (N.Z.).

In *Jones v. Bright*, (1829) 5 Bing. 533, 130 E.R. 1167, Best, C.J., remarked:

> "If a man sells generally he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

These general propositions of law are now to be found, with certain modifications, embodied in s. 16 of our Sale of Goods Act, 1908, the former having its modern counterpart in para. (*b*) of that section, which reads:

> "Where goods are bought by description from a seller who deals in goods of that description (whether he is a manufacturer or not) there is an implied condition that the goods shall be of merchantable quality . . ."

What then is the precise meaning to be given to the phrase "merchantable quality"?

Farwell, L.J., in *Bristol Tramways, &c., Carriage Co., Ltd.*, [1910] 2 K.B. 831, lays down the definition: "that the article is of such quality and in such condition that a reasonable man, acting reasonably, would after full examination accept it . . . in performance of his offer to buy that article, whether he buys for his own use or to sell again."

But in matters of commerce the conduct of the reasonable man is as vague and uncertain a yardstick as the reactions of the one time economic man or the dimensions of the Chancellor's foot.

It is not of much practical assistance to know that goods are merchantable when a reasonable man would regard them as "good tender." As was remarked in *Canada Atlantic Grain Export Co. v. Eilers and Co.*, (1929) 35 Com. Cas. 90, the precise meaning of the phrase under discussion is not easy to ascertain from the authorities, and the Legislature has, perhaps wisely, made no attempt at definition.

From the last-mentioned case it is clear that where goods are capable in the ordinary way of being used for several purposes they are merchantable if they answer one of such purposes, even although they are unfit for use in the particular manner which the buyer intended.

This principle was applied by Lord Wright in *Cammell Laird and Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.*, [1934] A.C. 402, where the respondent had sold to the appellants two propellers for ships numbered 972 and 973. The propeller supplied for the former ship proved totally unsatisfactory for that particular vessel. When dealing with the question of merchantable quality, Lord Wright held that the problem was "whether the defective propeller could be used not merely on 972 but on any vessel." As the appellants had not established that the propeller was of "no use for anything" but scrap, they failed on this particular point.

But the vendor cannot insist on acceptance if the goods are of use only for a purpose which is foreign to their customary user. In *Asfar and Co. v. Blundell*, [1896] 1 Q.B. 123, dates were held to be umerchantable as dates because they had been submerged in the Thames and impregnated with sewerage, although they were still of considerable value for distillation into vinegar.

Apparently merchantable quality does not include the virtue of being legally saleable in the intended market.

In *Sumner Permain and Co. v. Webb and Co.*, [1922] 1 K.B. 55, manufacturers of mineral waters sold a quantity of tonic to the plaintiffs, which to the knowledge of the manufacturer was to be shipped to the Argentine. Unknown to the plaintiffs it contained a percentage of salicylic acid, which made it illegal for sale by Argentine law. The tonic was duly condemned when it arrived in the Argentine. The Court of Appeal rejected the defence that the goods were not merchantable, and Scrutton, L.J., remarked with his usual vigour, "if you sell vestings of a particular fancy pattern for sale in China, you do not warrant that the Chinese buyer will like that pattern and will buy it when it goes out there; if the goods are vestings of the pattern contracted for, they are merchantable although nobody likes the pattern or is willing to buy."

Atkin, L.J., found no apparent difficulty in distinguishing the position of the purchaser in *Niblett, Ltd. v. Confectioners' Materials Co., Ltd.*, [1921] 3 K.B. 387, to which decision he was a party. In that case condensed milk was bought in tins with a label marked "Nissly" which would expose the purchaser to an action for breach of copyright on the part of Nestle's, Ltd.

Atkin, L.J., remarked that in *Niblett's* case the purchaser, if compelled to accept, would be practically buying a law suit, and that the goods were unsaleable "not merely in this country, by reason of a law peculiar to this country, but unsaleable anywhere."

One would be inclined to think that the distinction between the two cases is somewhat refined and that a cynical foreigner could with reason suggest that there is one law for the English exporter and another for the foreign exporter.

Even in these enlightened days of semi-international copyright, this statement seems rather sweeping, for there was no evidence that the goods might not have been saleable in China or Peru. If, however, *Niblett's* case is to be accepted as sound, the *ratio decidendi* of *Sumner Permain and Co. v. Webb and Co.* is all the more difficult to accept. One would have thought that where goods are legally unsaleable in the market which both parties know to be the place of resale, they should be regarded as unmerchantable in the colloquial and technical connotation of the term.

One might conclude by repeating the test laid down by Sir John Salmond in *Taylor v. Combined Buyers, Ltd.*, [1924] N.Z.L.R. 627, which is perhaps the most satisfactory summary to all the conflicting opinions :—

> "Are the goods of such a quality or in such a state and condition as to be saleable in the market, as being goods of that description, to buyers who are fully aware of their quality, state, and condition, and who are buying them for the ordinary purpose for which goods so described are bought in that market ?"

Costs as a Partial Indemnity.—"It is an indefensible thing," said Lord Justice Greer recently, "that the man who wins should have anything to pay at all. If he cannot get his costs out of the other side, they ought to be borne by the country."

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Deed of Assignment between brothers of intestate of first part, widow of intestate (the administratrix) of second part, and surety of third part, whereby brothers (1) give to widow their shares in estate, and (2) release surety.

THIS DEED made the day of 19 BETWEEN A.B. of etc. C.B. of etc. and D.B. of etc. of the first part E.B. of etc. widow of the second part and X.Y. LIMITED a duly incorporated company having its registered office at (hereinafter called "the company") of the third part

WHEREAS F.B. late of (hereinafter called "the deceased") died at on or about the day of 19 intestate leaving him surviving his widow (but no children) the said E.B. his brothers the above-named A.B. C.B. and D.B. and G.B. his sister J.K. and his nieces L.N. and M.N. being together the sole persons entitled by virtue of the Administration Act 1908 to share in the distribution of his estate

AND WHEREAS letters of administration of the estate effects and credits of the deceased were granted to the said E.B. by the Supreme Court of New Zealand District at on the day of 19

AND WHEREAS upon the grant of the said letters of administration the company became bound to the Registrar of the Supreme Court of New Zealand at in the sum of as surety for the due and proper administration of the estate effects and credits of the deceased

AND WHEREAS the said A.B. C.B. and D.B. (hereinafter called "the assignors") having all attained the age of twenty-one years have and each of them hath agreed fully to give and assign unto the said E.B. (hereinafter called "the assignee") in their entirety the respective shares in the estate of the deceased to which they the said A.B. C.B. and D.B. are and each of them is entitled as aforesaid

AND WHEREAS the shares of each of the assignors in the said estate is estimated to be of the value of £ as shown by the Statement L under the Death Duties Act 1921 relating to the estate of the deceased filed by the assignee as administratrix in the office of the Assistant Commissioner of Stamp Duties at

AND WHEREAS the assignors have agreed to release and discharge the company from all actions suits claims and demands which they or any of them might have against the company as such surety as aforesaid

NOW THIS DEED WITNESSETH that in consideration of the premises the assignors DO and each of them DOTH HEREBY FREELY GIVE ASSIGN TRANSFER RELEASE AND SET OVER unto the assignee all and singular the respective shares or interests of and in the real and personal estate of the deceased to which the assignors are respectively entitled as aforesaid TO HOLD the same unto the assignee for her own sole use and benefit absolutely freed from all claims and demands of the assignors or any of them respectively to the intent that the said shares or interests of them the assignors and each of them shall be deemed by virtue of these presents to vest in the assignee absolutely

AND THIS DEED FURTHER WITNESSETH that in consideration of the premises the assignors DO and each of them DOTH HEREBY RELEASE AND DISCHARGE the company

from and against all actions suits claims and demands which they or any of them might now or at any time hereafter have against the company as such surety as aforesaid TO THE INTENT that the company shall BE and the same IS HEREBY DISCHARGED from all liability to the assignors in relation to their shares in the estate of the deceased hereby purported to be assigned.

IN WITNESS WHEREOF etc.

SIGNED etc.

New Zealand Law Society.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, June 28, 1935. The following Societies were represented :—

Auckland : Messrs. G. P. Finlay, A. H. Johnstone, K.C., and J. B. Johnston ; Canterbury : Messrs. A. S. Taylor and A. F. Wright ; Gisborne : Mr. C. A. L. Treadwell ; Hamilton : Mr. J. F. Strang ; Hawke's Bay : Mr. H. B. Lusk ; Nelson : Mr. P. B. Cooke ; Marlborough : Mr. W. V. Rout ; Otago : Mr. P. S. Anderson ; Southland : Mr. S. A. Wiren ; Taranaki : Mr. J. C. Nicholson ; Wanganui : Mr. R. A. Howie ; Westland : Mr. A. M. Cousins ; and Wellington : Messrs. H. F. O'Leary, K.C., C. H. Treadwell, and G. G. G. Watson. The Treasurer, Mr. P. Levi, was also present.

The Vice-President (Mr. A. H. Johnstone, K.C.), occupied the chair in the early stages of the meeting until the return of the President (Mr. H. F. O'Leary, K.C.), from the Court of Appeal. The Chairman welcomed Messrs. J. F. Strang (Hamilton), A. S. Taylor and A. F. Wright (Canterbury) who were taking their seats as delegates for the first time.

Later in the meeting, the President paid a tribute to the excellent work done by Mr. F. A. Swarbrick as delegate for Hamilton for many years, and expressed the keen appreciation of the Council for the active interest Mr. Swarbrick had always displayed in matters concerning the Society.

During the meeting, Mr. J. B. Johnston expressed to the President the hearty congratulations of the Council on his appointment as King's Counsel.

At the conclusion of the meeting Mr. A. S. Taylor stated that, as a new member, he desired to express his congratulations to the Secretary on the way in which the subjects for discussion had been placed before the meeting, thus tending to expedite matters very considerably.

The late Mr. D. G. A. Cooper.—Prior to commencing the business of the meeting, the following motion by the Chairman was carried, members standing in token of their respect :—" That this Society expresses its deep sympathy with the relatives of the late Mr. D. G. A. Cooper, who for many years was Registrar of the Supreme Court and Court of Appeal at Wellington, and whose death occurred on the 26th inst. He was a man who won the respect and affection of all who knew him."

Costs of Obtaining Mortgagee's Consent to Memorandum of Lease.—The following report was received from the Auckland Committee :—

" We have considered the question referred to us by the Council of the New Zealand Law Society at its last meeting concerning the liability for the cost of obtaining the mortgagee's consent to a memorandum of lease.

" It appears to us to be sound law supported by authority that under an open contract a Lessor is bound to provide a perfect lease, that is to say a lease of the whole interest in the property concerned. If the property is mortgaged he must (in the absence of any stipulation to the contrary, obtain the consent of the mortgagee (*Wingfield v. Rayne*, [1916] N.Z.L.R. 157).

" We can see no reason why the Lessor should not bear the cost of obtaining this consent. In our opinion that he should do so is in accord with the law and also with general practice."

After a discussion in which Mr. C. H. Treadwell stated that he thought the report was incorrect, and in any event concerned only a question of law which the Council should not consider, the following motion, was carried unanimously :—

" That where a lessee is entitled to require the consent of a mortgagee to a memorandum of lease, the costs of obtaining such consent must be paid by the lessor."

Reciprocity with Victoria.—The following report was received and approved :—

" We think it would be difficult to obtain reciprocity with Victoria while we in New Zealand neither have articles nor any statutory provision requiring practical experience before admission.

" As our Amendment provides for a definite period of practical experience we think we should await the passing of the Act before taking up the question of reciprocity further with Victoria.

" We therefore propose holding the matter over meantime."

Companies Act, 1933, s. 56—Exempting Private Companies from the Section.—On the motion of Mr. Finlay, the following report was adopted :—

" The Committee has fully discussed this matter and recommends that no action be taken relative to the amendment of Section 56.

" The Section is copied verbatim from the English Statute, and the mischiefs at which it was aimed were doubtless as prevalent in England as they were in New Zealand. It is suggested that private companies should be exempted from the Section, but in our opinion the mischiefs referred to were at least as rife in the case of private companies as in the case of public companies.

" The Section is certainly widely worded and during our discussion cases were mentioned which fell within the Section but did not seem to be aimed at by it. We were unable to find any satisfactory principle which would cover such cases while retaining the effectiveness of the Section. We did consider a relaxation of the Section in the case of private companies under safeguards protecting the greater part of the assets for such companies' creditors, but we came to the conclusion that such relaxation was not worth while and it was better to keep our law conforming exactly with the English law.

" We might point out that in the case mentioned by the firm of solicitors in Invercargill there is nothing in the Section to prevent the shareholder himself borrowing from the Bank on the security of shares to be taken over by him from the outgoing shareholder as well as his own shares and other assets."

Rule 319.—Code of Civil Procedure.—The following letter was received from the Secretary of the Rules Committee :—

Binding Effect of Charging Order.

" With reference to your letter addressed to the Under-Secretary of Justice dated 11th May, 1932, forwarding a letter from Mr. C. C. Chalmers of the same date suggesting an amendment of Rule 319 of the Code of Civil Procedure, I have to say that the proposal was considered by the Rules Committee on the 2nd ultimo, and that it was resolved to recommend to the Government the enactment of the following :—

" Rule 319 is amended by deleting the words 'six months after judgment has been signed in the action', and substituting the following words :—'six months after such order has been sealed.' "

It was decided to thank the Committee for their action.

(*To be continued*)

Australian Notes.

By WILFRED BLACKET, K.C.

The Severed Arm.—Stranger than all the incredible coincidences related by female writers of detective stories are the absolutely true happenings in the case of James Smith, a billiardmarker of Gladesville, New South Wales. He went out fishing to Cronulla on April 8, and on the 22nd of that month had not returned to his hearth, and home, and billiard-saloon. His friends seem not to have noticed his absence, but on or about April 22—a fortnight after James had gone fishing at Cronulla—two men went out fishing for sharks off Coogee, about ten miles north of Cronulla. They caught several of the "monsters"—even a five-foot shark is a "monster" in the late editions—but one was fourteen feet long, so they saved it up for sale to the Coogee Acquarium. At the Acquarium the shark refused to eat. It swam round the pool for a week and then wearily vomited the arm of James Smith. Certain tattoo marks afforded evidence that the expelled arm was that of the late James Smith, and finger prints provided further evidence of identification.

But to return to our coincidences—how was it that this shark out of the number caught by these fishermen was sold to the Aquarium, and why was it this one of the thousands in the sea between Coogee and Cronulla that was caught, and how was it that this one shark had such a pallid sort of digestion that it could not assimilate a man's arm, tattoo marks and all, in a week, or may be three weeks, for no one can tell how soon after April the eighth it acquired the arm? A shark is said to eat and digest its own weight in fish every day; why then did it keep James Smith's arm as Exhibit A for a week or much more? A whale feeds on brill, and so Jonah might be indigestible, but a shark is popularly supposed to be able to assimilate anything from salmon to sheet-anchors. The New Zealand case of the "severed hand" years ago was not so astonishing as the Cronulla case of the "severed arm."

The Season's Novelties.—A very interesting novelty in Sydney autumn fashions now being displayed in the Police Courts is the practice of fitting starting price betting men with charges of "loitering." Many of these "sports" used to wait about in the street for their patrons and then take them into some hotel or shop, where the proverb that "a punter and his money are soon parted" might have full force and effect. The offence of loitering is so easily proved that the fashion is certain to have very considerable vogue throughout the year, and especially in the spring and autumn seasons.

Mr. Cookson, S.M., of Sydney, has introduced a new method in the prosaic business of dealing with "drunks." Defendants within this category are informed that if they will sign the pledge in a little book kept by Mr. Creagh, the Salvation Army Missioner, a conviction and penalty of ten shillings or forty-eight hours will not be recorded against them. Then when each defendant's name is called he makes choice of his preferred alternative, and is dealt with accordingly, but is warned that if he signs the pledge and is again brought before the Court he will find that the way of the transgressor is very hard. About one-third of the men charged sign on in the little book for twelve months at least, some even for life, and the police report that with but few exceptions they stand to their pledge.

Crafty Females.—I am not aware of the practice in the Dominion as to the swearing of witnesses, but in New South Wales Courts now the witness holds the Bible and verbally affirms the oath. Anciently, the witness had to "kiss the Book." In his Court recently Mr. Justice Halse Rogers, upon hearing a female witness being told by the officer administering the oath to "take off her right glove," asked for the reason of this direction, but the only reply given was that it was "always done." And in olden times there was reason in the direction, for it was thought by some ladies that if they did not "kiss the Book" the oath was not taken and that false evidence given thereupon involved no penalty in the hereafter. Therefore it was that a lady who wished to serve her friends without peril to her soul, would, if allowed to wear a glove, kiss her thumb and proceed to win the action by her wicked words. There is now no reason for the direction, but it will probably endure for ever in the practice of our Courts.

Maintenance Orders after Decree Absolute.—In *Ex parte Radley, Re Dean* (Divorce Court, New South Wales), the question was whether a maintenance order ceased to have effect after the making of a decree absolute in divorce. *Turner v. Kelly*, (1913) 13 N.S.W.S.R. 445, and certain dicta of New Zealand Judges, said that it did: *Bragg v. Bragg*, in a Divisional Court, and *Booth v. Booth* (decided in Victoria, but not yet reported), seemed to look the other way. I say frankly that I do not know the New Zealand law relating to the point, and so do not propose to criticize the arguments or decisions in the matter, but mention *Radley's case* here because the judgments contain much learning that will be helpful when the question recurs, as it is certain to recur, in New Zealand.

A Point in Divorce.—In *Thorpe v. Thorpe* the wife was petitioner for divorce on the ground of desertion. The suit was undefended, the decree *nisi* was granted, and then she, being a woman, changed her mind. She said that she only wanted a decree for judicial separation. Mr. Justice Stephen said that he could not grant that unless there was re-service of the petition. She naturally rebelled against such man-made law, but the Full Court decided that Stephen, J., was quite right. It seemed to think that a husband might be quite willing to have a decree for divorce marked up against him, and yet be unwilling to confess his sins of desertion if the consequence of desertion was that he only deserted her to a certain extent. The unfortunate position of Mahomet's coffin may seem to support the judgment of the Full Court.

The Searchlight that Failed.—Alfred Vockler, "turf journalist," for some years in Melbourne, before and after 1916, was a man of high repute as a racing tipster. His paper, *The Searchlight*, was sold at 1/-, and, as it gave all the winners for each Saturday's meeting, was bought by thousands weekly, and an extra special edition, sold at 10/-, also had very many buyers. And after this trade had continued for a long time the gifted seer became bankrupt, and the copyright of his paper was sold for £2 10s. 0d., and still the ordinary issue and the extra special edition of *The Searchlight* found numerous and eager buyers. Then he came to Sydney, but his turf advising there was on a much smaller scale. Now, at seventy-one, he has been convicted of an indecent assault, and has been found to be insane. But he was the "Queen of Sheba" in his time.

Wellington District Law Society.

Annual Dinner.

After a lapse of some years, the annual dinner of the Wellington District Law Society was revived on the evening of Wednesday, July 24. The President of the Society, Mr. W. H. Cunningham, presided. The Chief Justice, the Rt. Hon. Sir Michael Myers; Mr. Justice Herdman; Mr. Justice Smith; the Hon. Sir Frederick Chapman; the Solicitor-General, Mr. H. H. Cornish, K.C.; the President of the New Zealand Law Society, Mr. H. F. O'Leary, K.C.; and its Treasurer, Mr. P. Levi; Mr. E. D. Mosley, S.M.; Mr. H. P. Lawry, S.M.; Mr. J. H. Luxford, S.M.; and Mr. W. F. Stilwell, S.M., were present, as were some seventy members of the Society from the City and provincial towns, including the Rt. Hon. Sir Francis Bell, K.C., and Mr. C. H. Weston, K.C. Apologies were received from all absent members of the Supreme Court Bench.

"The Guests."

The President of the Wellington District Law Society in proposing the only toast of the evening, that of the Guests, welcomed the Judges, Sir Frederick Chapman, and the Magistrates, and expressed his regret at the fact that more members of the Judiciary had not been able to be present.

"I should like to express the pleasure of the Council," he continued, "at the very full number of members dining here to-night. (Laughter). We are particularly pleased to see present some of our country brethren. I understand that, save for the dinner held on the sixtieth anniversary of Sir Francis Bell's call to the Bar, it is some six years since the Wellington District Law Society had its annual dinner. A dinner such as this is not a luxury. It is a heaven-sent opportunity for Judges, Magistrates, and members of the Bar to mix in friendly concourse and to get to know one another."

Mr. Cunningham pointed out that it was necessary to remember that the Judges, too, were once at the Bar, and he was sure they must welcome the opportunity to enjoy the genial atmosphere that always pervades a Bar gathering.

"Of recent years, a very great responsibility has been placed on the members of the Judiciary," he proceeded. "After the Napier earthquake the Adjustment Court was constituted, and we all know the great work that the Chief Justice performed there. Sir Francis Frazer has recently been placed in charge of the primary industries of the Dominion. The Court of Review has been constituted, and Mr. Justice Johnston appointed to it. These appointments indicate that the Judges have the complete confidence of the public of the Dominion. I can assure them of the great esteem and respect in which we hold them."

The President said he wished to refer especially to Sir Alexander Herdman, who had come a long way to be present that evening. "He retires very shortly, after many years' service on the Bench. May I say that the profession in Wellington sincerely regrets his impending departure. For years he practised in Wellington and was an active member of the Wellington Bar," the speaker said. He then referred to Sir Alexander's honourable Parliamentary and Judicial record, wishing him on behalf of the Wellington Bar very many years of happy retirement.

The toast was supported by Mr. H. F. O'Leary, K.C., President of the New Zealand Law Society, who also expressed the general pleasure at the presence of the Judges, Sir Frederick Chapman, and the members of the Magisterial Bench.

"We in Wellington," he said, "have been a very happy family for many years, the result of mutual trust and confidence, and this has been added to by the fact that we have always been on the best of terms with the Bench. Occasions such as this serve to cement that good relationship."

In particular, Mr. O'Leary added, he had been asked to say a few words concerning the approaching retirement of Sir Alexander Herdman, and in doing so he spoke on behalf of the practitioners throughout New Zealand. There could be no doubt but that the retirement of Sir Alexander was a matter of regret throughout the whole of the Dominion. As a Judge, he had always commanded the profession's sincerest respect; and Mr. O'Leary wished him success and happiness in whatever paths his feet might lead him.

The Chief Justice.

It fell to the Chief Justice, the Rt. Hon. Sir Michael Myers, to reply to the toast. "First of all, let me express for myself and on behalf of the other guests," his Honour said, "our thanks for your kind hospitality and our pleasure at being present to-night. It is indeed a pleasure to be here, and to have present Sir Frederick Chapman, who, so long as he can walk, will always be present at these gatherings, Sir Francis Bell, the hero of so many leading cases, and Mr. Levi and Mr. C. H. Treadwell, each over fifty years a member of the Society. (Applause). We have also Mr. Justice Herdman, for seventeen years a Judge, whose untiring industry, courtesy, and force of character have earned the admiration of the public throughout New Zealand."

Continuing, the Chief Justice said that over a period of recent years the legal profession had been through most difficult times. It had been the first to suffer, and was one of the last to recover, from the depression. The dinner was one indication of returned cheerfulness. His Honour then passed on to tell, with many humorous anecdotes, the lighter side of a Judge's work. He also told of incidents in the early days of the Wellington Bar, and referred to several Judges known to the older generation.

Mr. Justice Herdman.

Sir Alexander Herdman, on rising, was greeted with sustained applause. Those who knew him realized that he was deeply affected by the warmth of his reception and by the obvious regret that his impending departure had created.

"Gentlemen, it is impossible adequately to thank you," he said. "I feel overwhelmed. I have never had an experience like it before. I feel almost tempted to withdraw my resignation."

Sir Alexander added that during his forty years' association with the profession he had had nothing but a multitude of kindnesses done to him. His seventeen years on the Bench had proved extraordinarily interesting and instructive. He would never forget the kindness with which the members of the Bar had treated him in his judicial office. Sir Alexander then told of happy reminiscences of his experiences at the Wellington Bar, of the great courtesy of the late Mr. Justice Williams, of the late Sir Robert Stout, and Mr. Justice Cooper, and of many who were present at the dinner and of many whose faces he missed. And, in conclusion, he said:

"Many times, Gentlemen, I have been disturbed by incidents in the community, but I have been comforted by the thought that the Bench and the Bar were always there."

Before the diners dispersed to spend the remainder of the evening in social foregathering, three hearty cheers were given for Sir Alexander Herdman.

On all sides, the dinner was voted a great success, not least on account of the happy family atmosphere in which the evening was spent.

Practice Precedents.

The Administration Act, 1908, s. 37.

Appointment of Administrator in place of Administrator, deceased.

By s. 37 of the Administration Act, 1908, the Court may, *inter alia*, appoint any person to be administrator in place of another administrator on such terms and conditions in all respects as the Court thinks fit.

This section, *mutatis mutandis*, extends to the case where an administrator dies and the powers and authorities hereby conferred may be exercised, and takes effect accordingly: See *Garrow's Law of Wills and Administration*, 560, 561, 562-600.

The following forms provide for the appointment of an administrator where an administrator has died before the completion of the administratorship.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.

IN THE MATTER of the Administration Act 1908

AND

IN THE MATTER of A.B. late of farmer, deceased.

MOTION PAPER IN SUPPORT OF PETITION.

TAKE NOTICE that Mr. of counsel for C.D. the petitioner herein WILL MOVE this Honourable Court (in Chambers) before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Courthouse at on day the day of 19 at the hour of 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER that the said C.D. be appointed administrator of the estate effects and credits of A.B. deceased late husband of E.F. deceased in place of the said E.F. AND FOR AN ORDER that sureties to the administration bond pursuant to sections 21-22 of the Administration Act, 1908, be dispensed with And for A FURTHER ORDER that the costs of and incidental to these proceedings be paid out of the estate of the said A.B. deceased UPON THE GROUNDS that the said E.F. being the administratrix of the said A.B. is now deceased AND UPON THE FURTHER GROUNDS set out in the petition and affidavits filed herein.

Dated at this day of 19 .

Solicitor for petitioner.

Certified pursuant to rules of Court to be correct.

Counsel moving.

To the Registrar.

Memorandum: His Honour is respectfully referred to section 37 of the Administration Act, 1908.

As to dispensing with sureties all the children are *sui juris* and have consented to the grant to C.D. There are no debts.

See *In the Estate of Sixtus (decd.)*, (1912) 14 G.L.R. 440; *In re Morrison*, (1931) 7 *New Zealand Law Journal*, 115.

PETITION.

(*Same heading.*)

To the Honourable the Supreme Court of New Zealand.

The humble petition of C.D. of the City of accountant showeth as follows:—

1. That the above-named A.B. late husband of E.F. deceased was resident or was domiciled at within this Judicial District and that the nearest Registry of this Court to the place where the said A.B. resided or was domiciled is at .

2. That the said A.B. died on or about the day of 19 and letters of administration of his estate effects and credits were granted to E.F. aforesaid by this Honourable Court at on the day of 19 .

3. That the said A.B. was married once only and left him surviving his widow E.F. and two children namely

X. born on the day of 19 and

Y. born on the day of 19

4. That the said E.F. died at on the day of 19 and probate of her last will was on the day of 19 granted by this Honourable Court at to your petitioner the executor in the said will named.

5. That since the death of the said A.B. your petitioner has had access to his papers and repositories and to the papers and repositories of the said E.F. deceased and that I have searched diligently for any will or testamentary writing made or signed by the said A.B. deceased and that I have been unable to find any such will or testamentary writing.

6. That so far as your petitioner can ascertain there are no debts owing by the estate of the said A.B.

7. That the only assets of the said A.B. unadministered is a vacant section of land comprising (*description of land etc.*) and valued at the sum of £ .

8. That one Z. of etc. is desirous of purchasing the said piece of land at or for the price of £ and the beneficiaries X. and Y. who are the only persons interested in the said land have requested your petitioner to obtain letters of administration of the estate of the said A.B. deceased in place of the said E.F. deceased in order that a sale of the said land may be effected by your petitioner as administrator.

9. That your petitioner is the paternal uncle of the said X. and Y. and has for the past five years conducted all their financial business and supervised their business operations generally.

10. That the said X. and Y. have consented in writing to the proposed grant to your petitioner and have consented to an order that sureties to the bond be dispensed with.

WHEREFORE your petitioner humbly prays for an order:

1. That your petitioner be appointed administrator of the estate effects and credits of the said A.B. in place of E.F. deceased.

2. That sureties to the administration bond pursuant to sections 21 and 22 of the Administration Act, 1908, be dispensed with.

3. That the costs of and incidental to these proceedings be paid out of the estate of the said A.B. deceased.

And your petitioner will ever humbly pray etc.

Dated at this day of 19 .

(Petitioner).

Witness to signature:
Name.
Address.
Occupation.

VERIFYING AFFIDAVIT.

I C.D. the petitioner herein make oath and say that so much of the foregoing petition as relates to my own acts and deeds is true and so much thereof as relates to the acts and deeds of other persons I believe to be true.

Sworn etc.

(*To be concluded.*)

"There is no humorous comment to be made upon a barrister—unless it is to call him 'my learned friend.'"

—A. A. MILNE.