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"*In his first interview with the Governor of St. Helena, Napoleon said emphatically: 'Egypt is the most important country in the world.'*"
—ROSE, *Life of Napoleon*, Vol. I, p. 356.

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Belligerents and the Suez Canal.

FOR our shortest trade-routes and means of communication with our principal markets, we in New Zealand are dependent on the freedom of passage through two canals—the Suez Canal and the Panama Canal. Consequently, it is of great interest to us at this time to review the international position in regard to the Suez Canal, which world events have brought into a position of particular significance.

Canals, being artificially-constructed waterways, are parts of the territories of the adjacent States. As a general principle of international law, canals do not differ in point of law from other territorial waterways, and this holds good for those which are, as a matter of grace, thrown open to the navigation of ships of other States, but which can be closed at the will of the territorial Power—*e.g.*, the Corinth Canal: *Hall's International Law*, 8th Ed. 176.

The Suez Canal and the Panama Canal are in a different category in international law: "The question of keeping these waterways open at all times, and under all circumstances, becomes one of paramount importance to countries which have no direct connection with the States wherein the canals are situated. In theory, Egypt and the newly-constituted Republic of Panama ought respectively to have absolute control over the Suez and Panama Canals; but the interests of other countries in these works are so vast and far-reaching, that it is found practically impossible to admit any such rights": *Wheaton's International Law*, 6th Ed., 405. Consequently, special regulations have at times been made in regard to the Kiel Canal (Treaty of Versailles, 1919, Arts. 380-6), the Panama Canal (Hay-Pauncefote Treaty, 1901; Act of Congress, 1914, and Proclamations, November 13, 1914, May 23, 1917). And the Suez Canal has been similarly the subject of agreement between the Powers, according to the circumstances prevailing in different periods. As difficult questions arose, they were settled or reconsidered: in other words, its position in international law is determinable only by recourse to special conventions or treaties which lay down a voluntary or positive law of nations by establishing new rules for international observance.

Proposals for its neutralization were made by Prince Metternich and by de Lesseps before the construction of the Suez Canal was begun, but they did not result in any acceptance by the Powers. Constructed by a French company under a concession from the Khedive of Egypt, confirmed by his suzerain, the Sultan of Turkey, the canal was opened for traffic in 1867. In 1875 the British Government, as the result of Disraeli's foresight, purchased the shares in that company which were the private property of the Khedive. In 1882, during the revolt of Arabi Pasha, Great Britain occupied the canal under the Khedive's authority, and in his interest; and traffic was temporarily suspended. Three years later a Commission was appointed by several European Powers for the purpose of ensuring freedom of navigation in and through the canal, and, after much negotiation, a treaty, known as the Suez Canal Convention or the Convention of Constantinople, was made in 1888 by Great Britain, France, Germany, Austria-Hungary, Russia, Italy, Spain, the Netherlands, and Turkey.

Before considering the Convention and subsequent treaties, it may be well to remember that at present Great Britain holds less than half the shares in the Canal Company, and these have a present value of about £80,000,000. France holds the greatest number of shares and the permanent directors comprise one Dutchman, ten Englishmen, and twenty-one Frenchmen. The canal is, in fact, the property of a commercial corporation, though situated entirely within the territories of defined nations. Yet three-fifths of the traffic passing through it is British, and the maintenance of communications with the Dominions in the Southern Hemisphere makes the position of the canal in international law of vital importance to the British Empire.

By its first article, the Suez Canal Convention, 1888, provides:

> "The Suez Maritime Canal shall be free and open in time of peace as in time of war to every vessel of commerce or of war without distinction of flag. The canal can never be blockaded."

Other articles provide that in time of war, even if Turkey is a belligerent, no acts of hostility are to be committed in the canal or its ports of access or within three maritime miles therefrom; no permanent fortifications are to be erected on the canal; belligerent warships may not embark or disembark troops or munitions of war within it or its ports, or revictual or take in stores, or remain more than twenty-four hours, save in case of distress or necessity, and the same provisions apply to prizes; if vessels of different belligerents are in the canal or its ports, then twenty-four hours shall elapse between the departure of any vessel belonging to one belligerent and that of any vessel belonging to the other; no warships shall be stationed within the canal, but each non-belligerent Power may station two warships in the ports; and if the canal is threatened Egypt is to take the necessary measures to enforce these provisions, and in case of need may appeal to Turkey, and through Turkey to the signatory States; and the Consuls of the Powers in Egypt are charged to watch the execution of these articles. The territorial rights of the Sultan and the Khedive were reserved, subject to the terms of the Convention.

Great Britain made reservations against any provisions that might fetter her liberty during her military occupation of Egypt. These, however, were withdrawn by the Anglo-French Declaration respecting Egypt and Morocco, April 8, 1904, the British Government declaring its adherence to the Convention of Constantinople, 1888, and agreeing to the application of its provisions to her as in the case of the other signatory Powers.

When the Great War broke out, the Egyptian Government declared, on August 5, 1914, that merchant vessels,

even of belligerents, should have free passage and be exempt from capture in the canal if they did not delay unduly; that they could receive supplies, including coal of the amount normally necessary for the voyage; and that generally the naval and military forces of the British Government could exercise belligerent rights, and establish a Prize Court in Egypt. (On December 8, 1914, Egypt became a British protectorate.) In May, 1915, the Turkish Government notified neutral Powers that it intended to institute hostilities on the canal, in view of fortifications erected by the British and the landing of troops by the French. The Suez Canal Convention, 1888, then for the first time came to be interpreted in British Courts, chiefly in regard to the condemnation as prizes of a number of German vessels which sought to remain in the canal ports, on the assumption that they were neutral.

The Judicial Committee of the Privy Council, in *The Sudmark*, [1917] A.C. 620, 622, an appeal from a judgment of His Majesty's Supreme Court in Egypt sitting in Prize, stated the main features of the Convention applying during the Great War, while the Ottoman Empire was still an existing entity:

> "The Convention, which is an international agreement, imposes on the contracting Powers a number of obligations which, except in the case of the Egyptian Government and the Imperial Ottoman Government, are negative. On the Egyptian Government and the Imperial Ottoman Government alone is any positive obligation imposed. . . . the Egyptian Government . . . to take the necessary measures for insuring the execution of the Convention, and in case it has not the necessary means at its disposal, to call on the Imperial Ottoman Government, and the latter Government is then to take the necessary measures giving notice thereof to and concerting with the Powers therein referred to."

In *Procurator of Egypt v. Deutsches Kohlen Depot Gesellschaft*, [1919] A.C. 291, their Lordships of the Judicial Committee said:

> "As was pointed out in *The Sudmark* ([1917] A.C. 620, 623) this Convention does not stipulate any penalty for its infraction . . . Again, their Lordships cannot forget that long before the seizure in the present case took place, the canal generally has been made a field of battle by the armies of the Sublime Porte, acting in alliance with the German Empire; and for want of mutuality alone the Convention could not be used to protect the property of an enemy whose Sovereign had fundamentally disregarded it."

The judgment went on to discuss the relevant facts. Prior to April, 1916, the German company had carried on under license the business of coaling steamers using the canal by means of lighters, tugs, and motor-boats, in harbours exclusively. In that month the General Officer Commanding in Egypt revoked the license, and appointed a liquidator of the business who thereafter had possession of the craft so far as they were not in use by the naval and military authorities. It was contended the seizure was bad, as being in breach of the Suez Canal Convention, 1888. Their Lordships proceeded:

> "There is, however, on the facts a simpler means of disposing of the point under the terms of Art. IV: 'Aucun droit de guerre ne pourra être exercé dans le canal et dans ses ports d'accès.' In the present case the exercise of any right of war in the canal was carefully avoided. What was done, though constituting seizure for the purposes of Prize jurisdiction, was done ashore by word of mouth, and involved no belligerent conduct in the canal or its ports of access contrary to the Convention. The *de facto* tranquillity, which in the interests of neutrals the Convention secures, was fully respected. The interests of neutrals do not demand that acts done in Egyptian territory, which do not affect the canal or its ports of access, should be invalidated on the mere ground that they took part in its neighbourhood."

In *The Derfflinger*, (1916) 85 L.J.P.C. 150, the Judicial Committee considered it was justification for seizure of a German ship lying in Port Said on August 4, 1914, that she was using her wireless for communicating information to the *Goeben* and the *Breslau*. And, in their judgment in *The Pindos*, *The Helgoland*, *The Rostock*, [1916] 2 A.C. 193, 196, they said, in regard to the terms of the Convention (which provided that the canal must remain open in time of war as a free passage, even to the ships of war of belligerents, according to Art. 1. *supra*), whereby, in terms of Art. 4,

> "The High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers,"

that it was plain that Convention was not applicable to ships using Port Said, not for the purpose of passage through the canal, or as one of its ports of access, but as a neutral port in which to seclude themselves for an indefinite time, in order to defeat belligerents' rights of capture.

Article 152 of the Treaty of Versailles, 1919, provided as follows:

> Article 152. Germany consents, in so far as she is concerned, to the transfer to His Britannic Majesty's Government of the powers conferred on His Imperial Majesty the Sultan by the Convention signed at Constantinople on October 29, 1888, relating to the free navigation of the Suez Canal.

When recognizing the independence of Egypt in March, 1922, Great Britain, after consultation with the Governments of Canada, Australia, New Zealand, and South Africa, reserved to herself the security of the communications of the British Empire in Egypt, and the defence of Egypt against all foreign aggression and all foreign interference, direct and indirect. The Treaty of Lausanne, July 24, 1923, between Turkey and the Allied Powers, to which Greece, Roumania, the Serb-Croat-Slovene State, Bulgaria, Russia, and Portugal were also parties, recognized the new position in Egypt. By this Treaty the Convention of Constantinople, 1888, was revived.

Consequently, as the result of the various treaties, Great Britain, subject to her special relationship with Egypt, now occupies the juridical position given to the Ottoman Empire by the Convention of Constantinople. According to the Convention of Constantinople, the canal was to be open even when Turkey was at war: it is not clear whether this applies now to Great Britain or to Egypt, or to both: "The present status of Egypt is anomalous and defies legal classification": *Oppenheim's International Law*, 4th Ed., Vol. I, p. 192. Turkey has renounced, as from November 5, 1914, all rights in and over Egypt by Art. 17 of the Treaty of Lausanne, and the Allied Powers, as well as Germany by her being a party to the Treaty of Versailles, have recognised that Great Britain, under the Convention of Constantinople as revived, is the direct agent to bring about protection of the rights of the nations, in time of peace and of war, under that Convention. It is, therefore, interesting to note the references made to the Suez Canal by the Judges in the Court of International Justice.

In *The Wimbledon*, (1923) P. C. I. J., Series A., No. 1, the Court was asked to give judgment in relation to the denial of passage in the Kiel Canal to a vessel carrying munitions consigned to Poland then in a state of war with Russia, in breach of Art. 380 of the Treaty of Versailles. In the course of the judgment of the majority of nine Judges, reference was made to the Suez and the Panama Canals, the use of which, they said, is not regarded as incompatible with the neu-

trality of the riparian sovereign in war-time, whether such use is the passage of belligerent war-vessels or of belligerent or neutral merchant ships carrying contraband. These canals

> "are merely illustrations of the general opinion according to which, when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural States in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie."

The dissenting Judges considered that the Kiel Canal was not neutralized by the Treaty of Versailles, in the same sense as the Suez and Panama Canals, which were governed in the event of war and as a guarantee against belligerent action by special provisions which were absent in the case of the Kiel Canal.

In his *International Law*, 6th Ed. (1927), the late Earl of Birkenhead says that in some respects "internationalization" is a more appropriate term than "neutralization" to describe the status of the Suez Canal. In his *Modern Egypt*, Vol. 2, p. 384, the late Lord Cromer says on this point, when referring to the preliminary discussions which led to the Suez Canal Convention of 1888:

> "In the words of Lord Pauncefote, an excellent authority on this subject, the word as applied to the proposals made in connection with the Suez Canal 'had reference only to the neutrality which attaches by international law to the territorial waters of a neutral State, in which a right of innocent passage for belligerent vessels exists, but no right to commit any act of hostility.' The definition of the term is important. Lord Granville was evidently apprehensive lest the mere use of the word 'neutrality' should carry him farther than he intended. With commendable prudence, therefore, he directed that, in dealing with this subject, its use should be avoided and that the words 'freedom' or 'free navigation' should be substituted in its place."

The Kellogg Pact, or Pact of Paris, of August 27, 1928, was signed by sixty-six nations, including the United States and the U.S.S.R. It was expressly stated, by Art. 4, that the new treaty or pact in no way touched the rights and obligations arising out of any previous international agreement. It is apparent, therefore, the nations of the world have accepted the provisions of the Convention of Constantinople, as amended by the Treaty of Versailles and revived by the Treaty of Lausanne. The internationalization of the Suez Canal, and the rights of passage by belligerents and of access to its ports, are accordingly recognized by the civilized world, so that, in time of war, the canal is in a position analogous to that of a neutral port, open to every vessel of commerce or of war, without distinction of flag, and free from exercise of the right of blockade.

The foregoing considerations must now be examined in the light of the Covenant of the League of Nations and the Kellogg Pact. It seems that if an economic boycott were imposed in terms of the Covenant on a recalcitrant nation, all existing trade treaties with it would be superseded or overridden. If that be so, then the signatories of the Treaty of Lausanne, who are also parties to the Covenant of the League, must have intended by necessary implication that the Treaty shall be read as subject to the possible imposition of the sanctions provided by the Covenant. If such contention be sound, then the relevant clauses of the Treaty of Lausanne, reviving the provisions of the Suez Canal Convention, 1888, may be suspended during hostilities in regard to the nation refusing to honour its obligations under the Covenant; and such nation would accordingly be deprived of the benefits in regard to the Suez Canal to which it would otherwise be entitled under positive international law.

Summary of Recent Judgments.

SUPREME COURT
Gisborne.
1935.
Sept. 2, 5.
Blair, J.

LYSNAR v. NATIONAL BANK OF NEW ZEALAND, LIMITED (No. 3).

Practice—Appeal to Privy Council—Execution—Judgment for Defendant and Costs awarded in Privy Council and Court of Appeal—Litigation in Supreme Court not Concluded—King's Order and Allocatur as to Costs in Privy Council and Court of Appeal Filed in Court of Appeal—Whether Jurisdiction vested in Registrar of Supreme Court—Whether Stay of Execution should be granted pending Completion of Litigation—Principles on which Inherent Jurisdiction exercised—Privy Council Rules, 1910, R. 27.

If execution in the Supreme Court is required in respect of an order of His Majesty in Council made in respect of an appeal from a judgment of the Supreme Court or Court of Appeal, an allocatur under the Court of Appeal seal embodying a certificate that the judgment of the Privy Council has been filed in the Court of Appeal should be endorsed on a true copy of the King's Order and filed in the Supreme Court, whereupon, in terms of R. 27 of the Privy Council Rules, execution can issue without any further entry of judgment.

There is no power in the Supreme Court to order a stay of execution on such a judgment, except in exercise of its inherent jurisdiction, which, after judgment, must, if at all permissible, be exercised only in the clearest cases involving impropriety or grave abuse of the procedure of the Court.

The fact that it might happen, at the conclusion of the uncompleted litigation between the parties, that the defendant may have, as against the plaintiff, who was successful in the Privy Council in another branch of such litigation, judgment for a greater sum than plaintiff recovers against such defendant, is not a ground for granting stay of execution in respect of the amount shown by the allocatur as owing to the plaintiff in pursuance of the Privy Council judgment obtained by him.

Counsel: **L. K. Wilson,** for plaintiff; **Powles,** for defendant.

Solicitors: **Bell, Gully, Mackenzie, and Evans,** Wellington, for plaintiff; **Brandon, Ward, Hislop, and Powles,** Wellington, for defendant.

SUPREME COURT
Wellington.
1935.
May 22, 23, 24;
June 14;
Aug. 3.
Myers, C.J.

DUFFY v. THE KING.

Damages—General Damages claimed for Inability to Follow Occupation as Dairy-farmer and for Permanent personal Disability—Special Damages claimed for Loss of Goodwill of Customers in Milk-round and Loss of Crops through non-sowing—Double Claim in respect of named Items claimed as Special Damages.

A dairy-farmer, who had suffered injury through accident, prayed and was awarded special damages for, *inter alia*, loss of goodwill of milk-customers and loss of crops through inability to sow because of the injuries he had received, and he also prayed and was awarded general damages on account of being unable to follow his occupation as a dairy-farmer and for permanent disability as the result of the accident.

The special damages relating to the items mentioned were disallowed, the jury having been directed to take into consideration when assessing general damages the incapacity of suppliant to carry on his business, as those items could not be separated from the business and treated as distinct and separate matters of special damage.

Counsel: **O'Leary,** for suppliants; **C. A. L. Treadwell** and **James,** for the Crown.

Solicitors: **Bell, Gully, Mackenzie, and O'Leary,** Wellington, for the suppliant; **Treadwells,** Wellington, for the Crown.

SUPREME COURT
Wellington.
1935.
July 15;
Sept. 2.
Smith, J.

CARROLL v. NORTH ISLAND MOTOR UNION MUTUAL INSURANCE CO.

Insurance—Motor-vehicles—Comprehensive Policy—Death of Assured—Use for "Private Purposes"—Warranty—Proposal and Declaration as to Truth and Correctness—Basis of Contract—Exceptions providing No Liability if Vehicle Used for Purposes other than "Private Purposes"—Car Used in and for the Business of another Person—Whether Used for "Private" Purposes.

The use of a private car by the assured in and for the business of another person is not a use for "private" purposes, even though the car be driven by the assured himself and he be paid for its use, or though that other person is a private company (not a one-man company, the equivalent of the assured), in which he has a substantial though separate interest.

So held as a special case stated for the decision of the Court pursuant to s. 20 of the Arbitration Act, 1908.

Counsel: Rollings, for Agnes Carroll; **O'Leary,** K.C., and **Blundell,** for N.I.M.U.M. Insurance Co.

Solicitors: W. P. Rollings, Wellington, for Agnes Carroll; **Bell, Gully, Mackenzie, and Evans,** Wellington, for the N.I.M.U.M. Insurance Company.

FULL COURT
Wellington.
1935.
June 27;
Aug. 23.
Myers, C.J.
Blair, J.
Smith, J.
Kennedy, J.

NATIONAL SPORTING CLUB (INC.) v. WOHLMANN AND ANOTHER.

Police Offences—Wrestling Contest—Permit required by Statute from Inspector of Police—Regulation that Granting of Permit in "absolute discretion" of Inspector—Effect of Statute—Whether Regulation Valid—Police Offences Act, 1927, s. 72 (2) (5)—Police Offences (Wrestling Contests) Regulations, Reg. 8, *1931 New Zealand Gazette,* 2998.

Section 72 (2) of the Police Offences Act provides that no "wrestling contest" as defined in s. 72 (1) shall be held except in pursuance of a permit granted by the Inspector of Police of the district in which it is held, and every such contest shall be conducted in accordance with any regulations which may be made under this section.

Section 72 (5) enables the Governor-General from time to time to make such regulations as he thinks necessary for any of the following purposes:

"(*a*) Prescribing rules for the conduct of wrestling contests;

"(*b*) Prescribing fines for the breach of any such regulations;

"(*c*) Generally making such provisions as he thinks necessary in order to give effect to this section."

Regulation 8 made by the Governor-General in Council (*1931 New Zealand Gazette,* 2998) says that "The granting or withholding of a permit shall in all cases be in the absolute discretion of the Inspector."

Spratt, for the plaintiff; **Solicitor-General, Cornish,** K.C., and **Willis,** for the defendants.

Held, per *Blair, Smith,* and *Kennedy,* JJ., *Myers,* C.J., dissenting, That the regulation was valid as the power granted both by the Statute and by the Regulation was not a judicial but an unfettered discretion and (per *Blair* and *Smith,* JJ.) to be exercised on the merits of each particular case for the sole purpose of furthering the purposes of the section.

Per *Myers,* C.J., dissenting, That s. 72 (2) does not confer upon the Inspector of Police discretion to refuse a license, but that the object of requiring a permit is no more than to secure that the Police shall have a record of wrestling contests, knowledge of the time and place at which such contests are to be held, and the power to attend and supervise and control the conduct of the contests, and that the Regulation was *ultra vires.*

Jorgensen v. Minister of Customs, [1931] N.Z.L.R. 127, **Ex parte Kaye,** (1910) 10 N.S.W. S.R. 350, and **Randall v. Council of the Town of Northcote,** (1910) C.L.R. 100, referred to.

Solicitors: S. C. Childs, Wellington, for the plaintiff; **Crown Law Office,** Wellington, for the defendants.

NOTE:—For the Police Offences Act, 1927, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Criminal Law,* p. 500.

SUPREME COURT
Napier.
1935.
July 9, 24.
Myers, C.J.
Blair, J.
Smith, J.

KASSLER v. BYRNE AND ANOTHER.

Damages—Broken Leg—Abnormal Delay of Healing Processes—Possibility of further Easy Break—Circumstances Justifying Higher Damages than in Normal Case.

In an action for damages for a broken leg, the abnormal delay of the healing processes and the possibility of a further easy break within six months of the jury's verdict with its attendant economic loss and physical pain make it not unreasonable for the jury to award damages which in a normal case might seem to be excessive.

The Arpad, (1934) 152 L.T. 521, referred to.

Counsel: Parry, for the defendants, in support of motion for a new trial; **Nash,** to oppose.

Solicitors: C. W. Nash, Napier, for the plaintiff; **Humphries** and **Humphries,** Napier, for the defendants.

Case Annotation: *The Arpad,* E. & E. Digest, Supp. No. 10, Vol. 41, para. 3821*a*.

SUPREME COURT
Wellington.
1935.
July 26;
Aug. 15.
Smith, J.

PATIENCE v. MARRIS AND CAMPBELL, LTD.

Practice—Costs—Infant Plaintiff by his Guardian *ad litem* **Recovering Special and General Damages—Father in Own Right Recovering Special Damages—Verdict Covering both Claims—Method of Payment of Costs—Form of Order made—Public Trust Office Amendment Act, 1913, s. 13.**

An infant plaintiff sued by his father as guardian *ad litem* for special damages (loss of wages, £11; damage to clothes, £5) and general damages, and his father sued in his own right for special damages. The jury gave a verdict covering both claims, which were dealt with as one. The special damages recovered by the father represented an exact compensation for the amount incurred on behalf of his son.

In settling the order to be made under s. 13 of the Public Trust Office Amendment Act, 1913, the Court ordered that the general and special damages recovered by the infant, plus the whole of the party and party costs in the action, be paid to the Public Trustee to be held by him as directed by that section, subject to the following special directions: (*a*) The special damages recovered by the infant to be paid to him by the Public Trustee, and (*b*) the taxed costs to which the solicitors for the plaintiff were entitled on the whole action to be paid to them by the Public Trustee out of the total of the damages and party and party costs received by the Public Trustee in terms of the order.

Counsel: O. C. Mazengarb, for the plaintiffs; **O'Leary, K.C.,** with him **Blundell,** for the defendant.

Solicitors: Mazengarb, Hay, and Macalister, Wellington, for the plaintiffs; **Bell, Gully, Mackenzie,** and **Evans,** Wellington, for the defendant.

NOTE:—For the Public Trust Office Amendment Act, 1913, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Trusts and Trustees,* p. 972.

SUPREME COURT
Napier.
1935.
Aug. 16, 24.
Reed, J.

GOBEY v. MOORE.

Husband and Wife—Liability of Husband whose Wife has left him without Reasonable Ground for Cost of Medical Services in Delivery of his Child and in Saving her Life.

A husband, whose wife has left him without any reasonable ground and against his wish, cannot avail himself of that fact against a claim for reasonable and proper charges for medical services rendered to her in the delivery, either alive or dead, of the husband's child; more particularly when the wife's condition is such that the medical services were necessary to save her life.

Jones v. Newtown and Llanidloes Guardians, [1920] 3 K.B. 381, and **Bradshaw v. Beard,** (1862) 12 C.B.N.S. 344, 142 E.R. 1175, referred to.

Counsel: Hallett, for the appellant; **Holderness,** for the respondent.

Solicitors: P. W. Dorrington, Dannevirke, for the appellant; **Logan, Williams, and White,** Hastings, for the respondent.

Case Annotation: *Jones v. Newtown and Llanidloes Guardians,* E. & E. Digest, Vol. 27, p. 76, para. 601; *Bradshaw v. Beard, ibid.,* Vol. 12, p. 523, para. 4353.

SUPREME COURT
Auckland.
1935.
Aug. 13, 14, 15, 16; Sept. 3.
Callan, J.

SCOTT v. WAITEMATA COUNTY.

Public Works—Subdivision of Land—Subdivisional Plan—Formation of Roads—Delay therein—Local Authority Requiring Roads to be Metalled in Addition to Original Requirements—Refusal to Accept Dedication and to Give Certificate required by District Land Registrar—Duty of Local Authority—Delay in Proceedings by Owner—Effect thereof—Whether Preliminary Notice and Action within Six Months as required by Counties Act Necessary—Form of Mandamus Applicable—Public Works Act, 1928, s. 125 (5), (6), (7)—Counties Amendment Act, 1927, s. 14—Code of Civil Procedure, RR. 461, 473.

Plaintiff in 1925 subdividing land for sale submitted pursuant to what is now s. 125 (5) of the Public Works Act, 1928, to the defendant's Council a plan, that was approved by the Council, which did not require any of the roads to be metalled. S. proceeded with the formation of the roads but, owing to the fault of the contractor to whom he entrusted the work, the formation was not completed so to comply with the original requirements of defendant until July, 1930, when the County Engineer certified as to such formation. In the meantime the defendant, in April, 1930, unjustifiably required the roads to be metalled and declined to accept dedication of the roads and to certify that they had been formed in accordance with the provisions of the Public Works Act to its satisfaction.

In an action for a declaration that S. had complied with the defendant's requirements as to the formation of roads and a writ of mandamus to compel it to accept the dedication of roads and to certify that its requirements had been complied with,

Stanton, for the plaintiffs; **Barrowclough,** for the defendant,

Held, 1. That, on the facts, the delay in completing the formation was not so great as to disable plaintiff from relying on the original approval.

District Land Registrar v. Brightwell and Findlay, (1912) 31 N.Z.L.R. 707, referred to.

2. That the defendant could not in 1930 add to the requirements that it had laid down in 1925, and that it was, since July, 1930, defendant's duty to give the certificate in the form required by the District Land Registrar.

Flood v. Lower Hutt Borough Council, [1930] N.Z.L.R. 132, applied.

3. That no equity in favour of the defendant could arise from the fact that the plaintiff did not commence the action until 1935.

4. That the defence invoking the benefit of s. 14 of the Counties Act, 1927, requiring a preliminary notice and imposing a time limit of six months was inapplicable, as the duty sought to be enforced was imposed not by the Counties Act but by the Public Works Act.

Fleming v. Walker, (1910) 29 N.Z.L.R. 989, applied.

Semble, Unless an action for damages would lie against the defendant for non-performance of its statutory duty under s. 125 (5) of the Public Works Act, the prerogative writ under R. 461, and not the statutory writ that issues under R. 473, which the plaintiffs appeared to be claiming, was the appropriate remedy.

Searl v. South British Insurance Co., Ltd., [1916] N.Z.L.R. 137, applied.

Solicitors: J. Stanton, Auckland, for plaintiffs; **Russell, McVeagh, Macky, and Barrowclough,** Auckland, for defendant.

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; Counties Amendment Act, 1927, *ibid.,* Vol. 5, title *Local Government,* p. 274.

SUPREME COURT
Napier.
1935.
Aug. 16, 19.
Reed, J.

IN RE NAIRN, DECEASED, LOGAN AND ANOTHER v. NAIRN AND ANOTHER.

Will—Construction—Powers of Trustees—Trust for Sale and Conversion with Power at discretion to Postpone—Investment of Income of Proceeds for Wife's lifetime with Life interest to her—Proviso that Rents and Profits from Unconverted Estate payable to Person for time being entitled to Income had Conversion taken place—Sheep-farming business carried on by Trustees until better Market-conditions should prevail—Profits made during first, second, and sixth years—Losses sustained during third, fourth, and fifth years—Whether Trustees entitled to set-off Net Profits against Losses in carrying on the Sheep-farming Business—Whether such Profits payable without Deduction to Life-tenant.

Testator gave, devised, and bequeathed to his Trustees the residue of his real and personal property, including a sheep-station and sheep-farming business, upon trust for sale and conversion, with power in their discretion to postpone such sale and conversion, and upon further trust to invest the proceeds and pay the income thereof to his wife during life and after her death in trust for his children in equal shares. He provided that the rents, profits, and income to accrue from such part of his estate as should remain unconverted should, after payment of incidental expenses and outgoings, be paid to the person who would have been entitled to the income for the time being had conversion taken place.

In exercise of the discretion conferred upon them by the will, the trustees postponed conversion of the sheep-station until better market conditions should prevail. In the years 1929 and 1930, they made substantial profits, which were paid or credited to the life-tenant; during the years 1931, 1932, and 1933 the trustees' sheep-farming operations resulted in substantial loss, and in 1934 in a profit.

On originating summons for determination of the question whether the trustees were entitled to set-off the net profits made from farming operations carried on by them pursuant to the will against losses made or to be made by them, or whether such profits were payable without deduction to the life-tenant,

M. R. Grant, for the plaintiffs; **H. B. Lusk,** for the first defendant; **A. L. Martin,** for the third defendants,

Held, That the trustees were not entitled to set-off the net annual profits made or to be made from the said farming operations against losses, but such annual profits were payable without deduction to the life-tenant pursuant to the will.

In re Mountain, deceased, Public Trustee v. Robson, [1934] N.Z.L.R. 399, approved and followed.

Solicitors: Sainsbury, Logan, and Williams, Napier, for the plaintiffs; **Kennedy, Lusk, and Morling,** Napier, for the first defendant; **Sainsbury, Logan, and Williams,** Napier, for the second defendants; **Carlile, McLean, Scannell, and Wood,** Napier, for the third defendants.

SUPREME COURT Auckland. 1935. Aug. 9, 10, 23. *Callan, J.*

THE GUARDIAN TRUST AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. THE REGISTRAR-GENERAL OF LAND.

Land Transfer Act—Mortgage—Submortgage thereof—Submortgagee selling Freehold through Registrar of Supreme Court and buying in—Refusal of Registrar-General to register Transfer—Whether Submortgagee an "assign" of Mortgagee with such Power of Sale—"Mortgage"—Land Transfer Act, 1915, ss. 102, 116 (4), 222—Fourth Schedule, para. 13.

C. gave L. a registered memorandum of mortgage. L. gave the company a registered submortgage thereof, containing provisions expressing the intention that if and when C. made such default under the head mortgage as enabled C. to sell the freehold, and L. made such default as entitled the company to exercise its power of sale under the submortgage, then the company might sell the freehold. The company sold the freehold through the Registrar of the Supreme Court and bought in, but the Registrar-General, upholding the decision of the District Land Registrar, refused to register the transfer.

On appeal by way of summons to the Registrar-General of Land to substantiate and uphold the District Land Registrar's decision,

Barrowclough, for the plaintiff; **Hubble,** for the defendant,

Held, That assuming that s. 222 and para. 13 of the Fourth Schedule to the Land Transfer Act, 1915, were applicable, and that the power of sale contained in the head mortgage was thereby made exercisable by the "assigns" of L., the company was not an entity in which the estate or interest of the mortgagee had become vested, but had merely a charge or security over L.'s charge or security.

Hence the remedy of the company was first to sell L.'s interest as mortgagee, and, if it became the purchaser, then as mortgagee under the head mortgage to sell the fee-simple, its process of "short-circuiting" was ineffective and the transfer should not be registered.

Solicitors: Russell, McVeagh, Macky, and Barrowclough, Auckland, for the plaintiff; **Meredith, Hubble, and Meredith,** Auckland, for the defendant.

NOTE:—For the Land Transfer Act, 1915, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Real Property and Chattels Real*, p. 1162.

SUPREME COURT Auckland. 1935. June 25; July 8, 12. *Callan, J.*

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

Will—Specific Legacy—Misdescription—Gift of "All moneys held by the Public Trustee for me at my death"—Moneys held in Savings Bank at Death of Testatrix—Extrinsic Evidence—Admissibility—*Falsa Demonstratio*—Application of Maxim.

Testatrix by her will gave and bequeathed free of duties "all moneys held by the Public Trustee for me at my death to my granddaughter L.M. should she survive me."

Neither at the date of the will nor at the date of the death did the Public Trustee hold any money for the testatrix; but he had held a sum for her which she had paid into the Auckland Savings Bank and which had been reduced at her death to £150.

When the solicitor who drew the will took instructions from testatrix she was on her death-bed and uncertain where the money was; and on the instructions-form the solicitor at first recorded £150 as in an Auckland Savings Bank account, and then struck that out and substituted the Public Trust Office as the place where the money was held.

Ziman, for the plaintiff, Lola McAnnalley; **Cocker,** for the Public Trustee; **Milne,** for the defendant, Percy Martin McAnnalley; **J. J. Sullivan,** for the defendant, Francis McAnnalley.

On originating summons to determine what gift (if any) passed to the granddaughter,

Held, 1. That extrinsic evidence of the foregoing facts was admissible, and the principle, *Falsa demonstratio non nocet, cum de corpore constat*, applied,

In re Jameson, King v. Winn, [1908] 2 Ch. 111, and **In re Price, Trumper v. Price,** [1932] 2 Ch. 54, followed.

In re Nathan (deceased), Nathan v. Hewitt, [1933] N.Z.L.R. s. 141, applied.

In re Atlay, Atlay v. Atlay, (1912) 56 Sol. Jo. 444, discussed.

2. That the property passing to the granddaughter was the money in the Auckland Savings Bank account of testatrix.

Solicitors: R. L. Ziman, Auckland, for the plaintiff; **Hesketh, Richmond, Adams, and Cocker,** Auckland, for the Public Trustee; **Milne and Meek,** Auckland, for defendant, Percy Martin McAnnalley; **J. J. Sullivan,** Auckland, for defendant, Francis McAnnalley.

Case Annotation: *Re Jameson, King v. Winn*, E. & E. Digest, Vol. 44, p. 637, para. 4706; *Re Price, Trumper v. Price, ibid.*, Supp. No. 10, Vol. 44, para. 5532*a*; *Re Atlay, Atlay v. Atlay, ibid.*, Vol. 44, p. 687, para. 5285.

SUPREME COURT Auckland. 1935. July 3; Sept. 4. *Fair, J.*

HORNE v. POLLARD AND ANDERSON.

Partnership—Whether Agreement constituted a Partnership between Parties—Whether £1,000 Recited thereby to be Lent by one to the other was Capital of Partnership and not a Loan.

H. and P. entered into an agreement which recited that H. had acquired a lease of the G. Hotel and that in consideration of P. advancing to H. for the purpose of acquiring the said lease, stock-in-trade, furniture, etc., H. agreed to execute in favour of P. a Bill of Sale over the furniture and to secure to P. the payment of the said £1,000 together with interest as specified, and to execute "these presents."

The agreement embodied the terms usually included in a partnership agreement with a dormant or sleeping partner for the conduct of an hotel business conducted in premises held on lease. Clause 18 of the agreement, however, was as follows:

"18. Provided always and it is hereby expressly agreed that nothing herein contained shall make the said Charles Pollard a partner with the said Frederick Vernon Horne in the said hotel business or confer on him the rights or impose upon him the liabilities of a partner."

On an argument of preliminary questions of law in an action by H. against P. under s. 3 of the Money-lenders Act, 1908, to set aside the agreement and to reopen accounts between the parties,

Anderson and **Bainbridge,** for the plaintiff; **Richmond** and **Wilson,** for the defendant,

Held, That, notwithstanding Clause 18, the agreement constituted a partnership between H. and P. in which P.'s liability was limited to the £1,000 contributed by him.

In re Megevand, Ex parte Delhasse, (1878) 7 Ch.D. 511, and **Paterson v. MacKenzie,** [1921] G.L.R. 43, applied.

Jones v. Allison, (1915) 17 G.L.R. 786, **Re Beard and Co., Ex parte The Trustee,** [1915] H.B.R. 191, and **Hollom v. Whichelow,** (1895) 64 L.J.Q.B. 170, distinguished.

Solicitors: Anderson and Snedden, Auckland, for the plaintiff; **Goldstine, O'Donnell, and Wilson,** Auckland, for the defendants.

Case Annotation: *In re Megevand, Ex parte Delhasse*, E. & E. Digest, Vol. 36, p. 337, para. 150; *Re Beard and Co., Ex parte The Trustee, ibid.*, p. 320, para. 32; *Hollom v. Whichelow, ibid.*, p. 336, para. 140.

The New Law Practitioners Amendment Bill.

Some of the Provisions Considered.

On Tuesday last, 10th inst., notice was given by the Rt. Hon. the Prime Minister to introduce the Law Practitioners Amendment Bill, thus commencing the final stage of the efforts of the New Zealand Law Society to improve existing conditions relating to practitioners with a view to a better protection of the general public as well as of the interests of the profession.

The provisions of the Bill may be summarized under four headings: The Disciplinary Committee, Restriction on Commencement of Practice, the Guarantee Fund, and Miscellaneous Provisions.

The Disciplinary Committee.

The legal profession has long lagged behind the other learned professions in its manner of dealing with those members whose conduct warrants disciplinary action. Perhaps owing to the everyday familiarity of the profession with the Court and its procedure, disciplinary action has been centred in and around the Supreme Court and Court of Appeal, while in the other professions the public interest is properly safeguarded by the respective professions themselves, with, of course, the common right of any person who feels he has been unfairly or improperly treated to appeal to a higher body or to the Courts.

The Law Society has remedied the present position by proposing the establishment of a Disciplinary Committee, to be appointed by the Council of the New Zealand Law Society, and to consist of not less than five nor more than seven members of the Society of whom three members of such Committee shall form a quorum (Cl. 2). The chief function of the Committee will be to deal with applications to strike the names of barristers or solicitors off the roll. The Committee will also have power to inquire into any charge of professional misconduct made against a barrister or solicitor by the New Zealand Law Society or by any District Law Society. If, after making such inquiry, the Committee is of opinion that the practitioner in question has been guilty of professional misconduct, it may, if it thinks fit, recommend to the New Zealand Law Society that an application be made that he be struck off the roll of barristers or solicitors, in which case such an application shall forthwith be made; or order his suspension from practice for any period not exceeding three years; order him to pay a penalty not exceeding £100 to the Society; censure him; order him to pay any costs or expenses of and incidental to the inquiry; or it may do any one or more of the foregoing (Cl. 3).

The grounds on which the Disciplinary Committee may make an order of striking-off or suspension are limited to three:

(*a*) Conviction of a crime involving dishonesty as defined by s. 237 of the Crimes Act, 1908, *Public Acts of New Zealand (Reprint)*, 1908-1931, Vol. 2, p. 250;

(*b*) Such professional misconduct that he is not fit to practise as a barrister or solicitor;

(*c*) Such grave impropriety or infamous conduct that he is not a fit person to practise as a barrister or solicitor.

At least five members of the Disciplinary Committee must be present to hear an application for striking-off or suspension that is opposed by the practitioner concerned, and at least five members must vote in favour of such order (Cl. 6). No practitioner may be punished without the Disciplinary Committee giving him a reasonable opportunity of being heard in his own defence (Cl. 7).

In accordance with rules to be made, any barrister or solicitor who has been struck off the roll may apply to the Disciplinary Committee for restoration (Cl. 8).

Machinery provisions relate to the making of preliminary inquiry, the taking of evidence, the payment of witnesses' expenses, the payment of costs, and the making of rules. Witnesses and counsel appearing before the Disciplinary Committee or the Council of a District Law Society will have the same privileges and immunities respectively as in a Court of law.

It must not be thought that the creation of a Disciplinary Committee involves any suppression of fact that would lead to any injury to the public or to any member of the profession. Every order for striking-off or suspending made by the Disciplinary Committee is to be filed in the office of the Supreme Court at Wellington, and a notice stating the effect of the order is to be published in the *New Zealand Gazette*, and a copy forwarded to the Registrar of the Court in whose office the practitioner was enrolled (Cl. 15).

Appeal, by way of rehearing, will lie against any order or decision of the Disciplinary Committee to the Supreme Court at the instance of the barrister or solicitor to whom the order relates, or at the instance of any applicant other than such barrister or solicitor, as the case may be (Cl. 16). The jurisdiction of the Court, as conferred by the Law Practitioners Act, 1931, or by any other Act, is not to be limited by the provisions of this year's Amendment.

It will be seen, therefore, that the procedure as to disciplining members of the profession closely follows the provisions in force in England and administered by the Law Society there through its Disciplinary Committee. The new provisions regularize, in the practitioners' interest, the procedure so as to give him a fair trial and a right of appeal to the Court, while, at the same time, put in motion inquiry and disciplinary action when, at the instance of a member of the public, complaint is made as to a practitioner's conduct in his professional capacity. The medical, pharmacy, and accountancy professions have long had their own Disciplinary Committees which have functioned well, and the legal profession now comes into line with a similarly salutary organization.

No present application is instituted except by a District Law Society, and this will remain the body to set in motion the machinery for disciplinary action.

The present cumbrous method, involving as it does expense and delay, provides for notice of motion, hearing of application for a rule *nisi*, the rule *nisi* (in the Supreme Court), the reservation of the rule *nisi* to the Court of Appeal, and the final hearing in the Court of Appeal on the motion to make the rule absolute.

The whole of this procedure had to be followed in the case of a practitioner who had been found guilty of a criminal offence; now the provision in Cl. 6 (2) that a certificate containing the substance of the conviction of a crime involving dishonesty, signed by the Clerk of Court or Registrar where the offender was convicted, will be sufficient evidence of such conviction; and such offender can at once be struck off by the Disciplinary Committee. This is surely a great improvement in procedure.

Again, the present cumbersome procedure must be undergone in the case of a practitioner who is willing to consent to be struck off or suspended. Now, he can file his consent with the Disciplinary Committee, who can at once make the appropriate order.

Another defect in the present method of placing a case before the Court respecting a practitioner's conduct is that only evidence on affidavit is presented, and every lawyer knows how unsatisfactory affidavit evidence can be. If the practitioner is able to put in affidavits in reply to the *prima facie* case made out by the District Law Society, he is under the disadvantage of being unable to cross-examine the Society's witnesses except upon a special application made for that purpose and then before some Judge or official other than the Court of Appeal, which is therefore unable to observe the demeanour of the deponents on either side. The power given to the Disciplinary Committee to take evidence *viva voce*, and to pay witnesses' expenses, as well as the right given to the practitioner to appear by counsel and cross-examine, is a decided improvement on the present procedure, and the safer way in which to discover where the truth lies.

Furthermore, there is only one way in which a practitioner may at present be dealt with—by bringing him before the Court of Appeal—whatever may be the nature of the misconduct with which he is charged. As a result, it may be that some practitioners have had to answer in the Court of Appeal charges which merited censure alone: but the same formalities had to be gone through however relatively trivial the misconduct. Now, a practitioner may be dealt with by the Disciplinary Committee in any of the ways provided by Cl. 3 of the Bill.

It follows that the most serious objections to the present practice of disciplinary action are completely overcome. At the same time, the interests of the public are better safeguarded. The work of the Disciplinary Committee of the English Law Society, with powers and duties similar to those provided in the present Bill, has given general satisfaction to the public and to practitioners alike.

Restriction on Commencement of Practice.

The Bill makes a decided advance in protection of the interests of the public in restricting any person qualified to be admitted as a solicitor from commencing practice on his own account, in partnership or otherwise, unless he has had at least three years' legal experience in a law office (Cl. 33 (1)).

It is within the experience of most practitioners that solicitors who have commenced practice on their own account without practical work in a law office are found generally to be quite incapable of attending properly to their clients' business. Examinations are a test of theoretical knowledge only. It must be applied to practical problems, and supplemented by actual experience; until this has continued for a reasonable period, theoretical knowledge can prove a dangerous and expensive guide to all persons concerned.

The Bill provides, however, that any solicitor, who is debarred by the provisions of Cl. 33 (1) from commencing practice without the prescribed three years' office experience, may apply to the Court for leave to commence practice on his own account; and the Court may grant him leave if it is satisfied he is a fit and proper person to be permitted to practice on his own account, subject to such conditions (if any) as in the circumstances it thinks proper (Cl. 33 (2)).

It has long been felt that five years' active practice as a solicitor is not a proper qualification for admission as a barrister, and is a lowering of professional standards. His Honour the Chief Justice (Rt. Hon. Sir Michael Myers) gave expression to the profession's opinion at the Third Annual Legal Conference at Auckland in 1930, when he said:

> "Of fifty-one applications last year for admission as barristers from applicants who were already admitted to practise as solicitors, no fewer than thirty-seven were based on five years' practice as a solicitor. It is thus seen that 74 per cent. in one year, and I suppose it may be regarded as typical of what has been going on, were prepared to enter the Bar by the back door. It is not creditable to them and it is not creditable to the profession . . .
>
> "The profession of the barrister and of the solicitor are really distinct professions. Although we may practise them together it does not in the least follow that the qualities required are the same in the one as they are in the other. We know they are not. Perhaps many a young man goes into Court and takes cases when he should remain in his office and instruct counsel. It is not a good thing for the Bar, the solicitor, or the public.
>
> "I want to remind you of what has happened in other professions. Every profession has had its status improved—accountants, dentists, architects—every profession; the only one which has had its status lowered is the profession of the law."

In his address to the Conference the then Attorney-General (Hon. Sir Thomas Sidey, M.L.C.) said in regard to the provision under which a solicitor with five years practice is entitled to practise as a barrister:

> "I agree that it is a blot on our legal education. In this country, with all our educational facilities, including free places in our secondary schools and bursaries and scholarships giving practically free education in our University, there is no reason why anyone desiring to qualify as a barrister should not pass the necessary examinations."

The Bill repeals the provision in the Law Practitioners' Act, 1931—s. 4 (2) (*e*)—permitting admission as a barrister after five years' practice as a solicitor, without the passing of any barristerial examination (Cl. 36 (2)). Existing rights are preserved. Every person who, at the time of the passing of this year's Amendment Act, is a solicitor or is qualified for admission as a solicitor, shall be qualified to be admitted as a barrister if, on the date of his application for such admission, he has been a solicitor for five years, and has been for the five immediately preceding years continuously engaged in active practice in New Zealand or Western Samoa, or as managing clerk to one or more solicitors in active practice, or he has been partly engaged in active practice or as managing clerk over the whole of that period (Cl. 36 (1)).

(*To be concluded.*)

Fourth "Devil's Own" Tournament, Palmerston North.—Entries are coming in well for the tournament to be held next Saturday and Monday (Dominion Day). The Law Journal Cup, given by Messrs. Butterworth and Co. (Aus.), Ltd., for competition at the annual legal conferences was competed for at this tournament last year, and will again be available for competition this year. The winners will have their names engraved on the Cup and miniature cups will be given to them. The District Law Society to which the winners belong will hold the Cup until next Easter, when the Law Journal Cup will revert for competition at the annual legal conference then to be resumed at Dunedin. An 18-hole stroke handicap will be played on Saturday, the 18-hole bogey handicap on the following day, and the 18-hole foursome (medal handicap), the final of the Cup contest, on Dominion Day. A team's match will be played in conjunction with the 18-hole stroke handicap.

The Production of Police Statements.

In Civil Actions.

By A. K. Turner, M.A., LL.B.

(*Continued from p. 230.*)

The *Marconi Wireless* case was followed by others. In *Queensland Pine Co., Ltd. v. Commonwealth of Australia*, [1920] St. R. Qd. 121, it was successfully invoked by a plaintiff who desired the production of a bundle of documents to which objection was made by an "official," pursuant to a written authority in the following words:

> "I Edward John Russell the Minister of State . . . hereby certify that I have personally examined the reports minutes and communications contained in the bundle now produced . . . and that in my opinion it would be detrimental to the public interest to produce any of such reports minutes and communications in this action. . . ."

Nevertheless Chubb, J., following on the *Marconi* case, ordered all the documents to be produced to him for examination and inquiry, and the next day ordered them to be produced in evidence.

The question was again raised in the High Court of Australia in 1925 in *Griffin v. State of South Australia*, (1925) 36 C.L.R. 378. In this, the *Marconi* case was carefully considered, and it is distinguished as having been decided on the ground that there an inspection was necessary to determine whether the apparatus was really a "state document" at all. But in cases where it is clear that the document in question is a state document it was held the certificate of the Minister is conclusive. In *Griffin's* case, Isaacs, J., "entirely accepted" the rule laid down in *Admiralty Lords Commissioners v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1909] S.C. 335, that

> "a department of Government, to which the exigencies of the public service are known, as they cannot be known to the Court, must . . . determine a question of this kind for itself."*

In a later passage, at p. 393, Isaacs, J., rejects the *dictum* of Field, J., in *Hennessy v. Wright*. In *Griffin's* case, however, the "extreme instances" referred to by Martin, B., in *Beatson v. Skene* (*supra*) are still expressly referred to and reserved by Isaacs, J., and Rich, J., at p. 397,

> "Exceptional cases may arise where the claim is obviously futile and the Minister has misconceived the case and taken a mistaken view."

Griffin's case was not the subject of an appeal, and the action was discontinued before actual trial. In 1930, however, the same set of facts was again before the High Court of Australia, and this time went as far as the Privy Council in *Robinson v. State of South Australia*, [1931] A.C. 704. Here objection was taken to the production of some 1,800 documents in respect of which the Minister said:

> "I have considered the documents . . . I direct you that the disclosure of the said documents (including the said minute book) is contrary to public policy, and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said documents."

The Privy Council held that the Court could go behind this certificate and inspect the documents, for the reason, in the first place, that the certificate was inconclusive and insufficient, in that it did not specifically state that the Minister had read and considered each of the documents separately and that the production of each one was contrary to the public interest. But this was not the only ground of their Lordships' decision. They expressly upheld the inherent power of the Court to inspect in cases of this kind. *Marconi's* case was expressly approved, and their Lordships, at p. 717, observed that

> "the propriety of Field, J.'s, own practice in the matter, as described by him in *Hennessy v. Wright*, ((1888) 21 Q.B.D. 509) has, *pace* the observations upon it of Isaacs, J., in *Griffin's* case, not been challenged."

At a later stage in their judgment their Lordships expressly approve of *Queensland Pine Co., Ltd. v. Commonwealth of Australia* (*supra*), and the practice followed in this case was commended.

Meanwhile in 1929 the matter came again before the English Court of Appeal in *Ankin v. London and North Eastern Railway Co.*, [1930] 1 K.B. 527, where it was decided that the Ministerial certificate was conclusive. In this case the defendants objected to producing a copy of a statutory notice furnished to the Government after an accident, and submitted in support of their objection a letter from the Minister of Transport reading as follows:

> ". . . I am directed by the Minister of Transport to state that in his view the notices of accidents furnished to him by Railway Companies in pursuance of s. 6 of the Regulation of Railways Act, 1871, are furnished for his own information and guidance in the performance of his duties, and that their utility in this respect might be prejudiced if they were compiled by Railway Companies with the knowledge that any information contained in them might be used by individual members of the public for the purpose of prosecuting their private claims against the Railway Companies concerned. In these circumstances it is the practice of the Minister to decline, in the public interest, to comply with any request which he may receive for permission to inspect or to obtain copies of such notices."

In giving judgment Scrutton, L.J., at p. 532, said:

> "I take this affidavit to mean that the respondents decline to produce these notices, and that the reason for their refusal is that it is contrary to the public interest that documents of this class should be shown to anybody outside the Ministry of Transport without the consent of the Minister. It is the practice of the English Courts to accept the statement of one of His Majesty's Ministers that production of a particular document would be against the public interest, even though the Court may doubt whether any harm would be done by producing it. I have been informed on very high authority that the practice in Scotland is different; that there the Judge looks at the document and orders it to be produced if he does not agree with the Minister's reasons for considering its production to be against the public interest. No harm seems to have resulted from this practice. But that is not the law in England. Here if the Minister says that it would be against the public interest to produce a particular document the Court accepts his statement upon his responsibility."

This may, therefore, be taken as the position of the law in England at the present time where a Minister has examined a particular document and has personally certified that the production of this particular document would prejudice the public interest.

It remains to consider what is the position where the Minister does not go so far as this, but objects to the whole class of documents being produced. This objection has been taken in a number of cases, but it had not been distinguished in principle from the case where the Minister certifies as to his objection to the

* It should be noted that the case of *Admiralty Lords Commissioners v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1909] S.C. 335, had perhaps hardly the authority in Scotland which was given it by Isaacs, J.: see the later Scots case of *Henderson v. McGown*, [1916] S.C. 821, where the Court held that it had inherent power to order production.

production of a particular document, until the recent case of *Spigelmann v. Hocker and Austin,* (1933) 50 T.L.R. 87. One of the classic cases in which the objection had been raised was *Smith v. East India Company,* (1841) 1 Ph. 51, 41 E.R. 550. Here Lyndhurst, L.C., held that communications passing between the Company and the Commissioners of India were privileged from production on the ground of public policy "inasmuch as they cannot be communicated without infringing the policy of the Act of Parliament and without injury to the public interests." The question was not raised, however, as to whether there was any distinction in principle between an objection to a particular document and objection to a class of documents. This question came up specifically in *Spigelmann's* case, where the Attorney-General himself appeared to support the claim of Crown privilege. The case was the ordinary case of a statement made by a driver to the police immediately after a motor accident, and it was sought to have it produced in the subsequent civil litigation. In cases of this kind the Department's objection can hardly ever be genuinely based on a perusal of the actual document; but this point is considered in the conclusion to this article. The objection must be based on the general principle, and in *Spigelmann's* case it was so founded. The actual words of the Crown objection were:

> "I am satisfied that the production of the particular document referred to above *as of other documents of the same class* would be contrary to the public interest,"

Macnaghten, J., held that, although where a certificate was entered in respect of a particular document the matter was concluded, yet where it was sought to base the objection on the fact that the document was one of a class which should not be produced, then the Court should inspect the document itself and decide whether the public interest would in fact be prejudiced by its production. This was ordered to be done, and the Judge, having perused the statement, at p. 90, said:

> "I can see nothing in this document which can conceivably be injurious to the public interest."

and the statement was ordered to be produced. This decision was respectfully approved in the editorial columns of the *Law Journal* (London), Vol. 76, p. 313: see also *Solicitors' Journal* (London), Vol. 78, p. 823. It was discussed in the N.Z. LAW JOURNAL, Vol. 10. p. 41.

It may be argued that Macnaghten, J., was not on very safe ground when he distinguished the facts in *Spigelmann's* case from those in *Ankin's* case on the ground that in the latter the Minister had objected to the production of a particular document. For, as a matter of fact, the Minister had not done this: he had certified that the document was one of a class which should not be produced. But no attempt was apparently made in the argument in *Ankin's* case to distinguish between the general and the particular objections in law, and *Ankin's* case was accordingly decided as if the Minister had inspected the particular document and given his certificate in respect of it. In the interval between the two cases the Privy Council had given judgment in *Robinson v. State of South Australia* and this was cited before Macnaghten, J.

Although the matter has not been the subject of any fully reported decision in New Zealand, it has been touched upon in several judgments. A consideration of these, and a summary of all cases to date on the various aspects of the subject will, it is hoped, be useful; but these will have to remain for the concluding instalment.

(To be concluded.)

London Letter.

Temple, London,
August 1, 1935.

My dear N.Z.,

This is the last day of the Summer Term and the holiday spirit is abroad in the Temple. Some have already left, while others are to be found consulting time-tables and hotel guides or discussing the merits of various holiday resorts. In a few days practically the whole of the English Bar will be scattered over Europe, anywhere but in London.

Frivolities in the Temple.—On the other hand there has been an unusual amount of social activity in the Temple—possibly because it is Jubilee Year. A large Ball was given in the Middle Temple by the Treasurer, Sir Lynden Maccassey, and Master Lord Rothermere, which I believe exceeded in size and magnificence any previous function of the kind. The ancient Hall of the Middle Temple and the Benchers' apartments were apparently quite inadequate to accommodate the guests who were invited (to the number of over 1,000, I believe), and two large marquees, besides a number of smaller tents and covered ways, were erected over Fountain Court and the Middle Temple Garden and were lavishly furnished and decorated. The preparations went on for over a week, and formed an object of great interest to passers-by and also a subject of some annoyance to those members of the Bar whose chambers happen to look out upon the chosen sites. Anyhow, I am told that Ambrose's Band played delightfully, and that the evening was a great success.

A ball was also given by Gray's Inn, which seems to have been equally successful. Gray's Inn possesses a Hall about as ancient as the Middle Temple. Both these buildings have associations with Queen Elizabeth, and both make a wonderful setting for a dance.

Following this, the Benchers of the Middle Temple gave a Garden Party, which was favoured by lovely weather and looked as if it were a most enjoyable function.

Finally, the Benchers of the Inner Temple gave an evening reception, combining both music and dancing. The former took place in a marquee erected in Tanfield Court, while the music for the latter was provided by the Welsh Guards String Band, which played in a small marquee in the Inner Temple Garden. The garden and the Hall were floodlit, but unfortunately the weather changed on that particular evening, and from the first a chilly breeze made sitting outside in evening clothes a doubtful pleasure, while later in the evening a shower of rain made it impossible. The music was not completely lost, however, as the organisers had thoughtfully had it relayed to the Hall, where refreshments were served. During the evening the choir of the Temple Church gave an hour's excellent performance of part-singing in the library, the only criticism of which was that their auditorium was too small to accommodate all those who wished to hear them.

One other social event may be mentioned, and that is the dinner given to Paul Bennett, V.C., M.C., who was recently appointed a Metropolitan Police Court Magistrate. Paul Bennett is young, as Police Court Magistrates go, but should do well. Although perhaps not otherwise in the public eye, he has the distinction, I believe, of being one of the only two V.C. members of the Bar.

This Month in Parliament.—Of the Bills before Parliament at the present time, the most interesting to lawyers

is the Bill which deals with the position of married women and the liability of joint tort-feasors, and which I think I mentioned to you last month. This Bill was originally known as the Law Reform (Miscellaneous Provisions) Bill, but as a result of representations that there might be confusion, in view of the fact that there is already on the Statute-book an Act with that title, and in view of the possibility of other similar Acts in the future, I understand that its title has been changed to the Law Reform (Married Women and Tort-feasors) Bill.

Another Bill of interest which has recently been referred to the Standing Committee is the Ribbon Development Bill, designed mainly to prevent that fast-growing evil which we have in this country of having our arterial roads lined with houses. The new arterial roads were, of course, built with the object of getting away from houses, and so making for safety in the case of fast-moving traffic on main roads. But the speculative builder saw his opportunity, and as fast as new roads were built he bought up strips of land by the side and built as many houses upon them as he could. Thus in many cases the whole object of the new roads has been defeated, and, except that the new roads are somewhat wider and straighter than the old, we are back again where we were. To me the most remarkable feature of this practice is the apparent desire of people to live on a main road. A main road is noisy, dusty, difficult to cross, and dangerous to children, while its only merit, so far as I have been able to discover, is that it probably carries a bus-service. And yet houses on main roads are frequently sold before completion, while houses a short way off stand empty for months. Can it be that people are now too lazy to walk a few hundred yards to catch a bus? However, the new Bill, when it becomes law, will do much to improve matters, since it provides that no buildings are to be erected within 220 ft. of certain classes of roads without the consent of the highway authority, and further gives power to local authorities to acquire land within 220 yds. of the middle of such roads for carrying out any improvements or otherwise preserving their amenities.

The Highway Code.—A further effort to improve the safety of our roads has been made by the Minister of Transport, who has recently had sent to every house in the Country a copy of the Highway Code. The Highway Code occupies a curious position, as, although it has no statutory force in so far that no prosecution can be brought for breach of its provisions, yet it is recognised in the Road Traffic Act, 1930, by the provisions of which any breach of the Code may be relied on in any proceedings as tending to establish or to negative any liability which is in question. In any case it is an interesting document and there is no doubt that if all users of the road observed its provisions the number of casualties would be negligible.

It is not often that motoring prosecutions are unjustly brought, but a case occurred recently where a motorist was accused of dangerous driving in a restricted area (*i.e.*, where the 30 m.p.h. limit is in force) it being alleged against him that he was travelling at 40 to 45 m.p.h. His defence was that his car—an old Morris Cowley—was incapable of attaining that speed, and he asked for an adjournment in order that the Police might themselves test the car. This was granted and on the test being carried out the highest speed attained was 28 m.p.h. Result: case dismissed with costs against the Police.

Yours ever, H. A. P.

Criminal Justice.

Three Points in Administration.

By F. A. DE LA MARE, B.A., LL.B.

The case of *R. v. Scott*, tried before *Herdman*, J., on November 21 and 22, 1934, had some features which may be of interest to practitioners. In truth, the case had many points of great interest both legal and forensic, although it is intended here to deal only with three points upon which, it is thought, some discussion may be of immediate value. The facts of the particular case are irrelevant to an academic consideration of the points raised, but it may be said that the prisoner, who had no Court record whatsoever, was tried for breaking, entering, and theft; that his defence was an *alibi*; that the Crown case rested solely on two "identification" witnesses; that, finally, on the second day of the trial, the real culprit was produced from Mt. Eden Gaol, and his evidence completely exonerated the prisoner.

The first matter concerns the propriety of the charge made by the Court for copies of depositions. It is clear that a copy of the depositions is necessary for the defence, as necessary as the indictment itself. It contains the details of the charges made and the source and substance of the accusation. The Clerk of the Court invariably takes an extra carbon copy and the Crown is put to no expense in the matter. When the attention of the Minister of Justice was called to this matter he made the following explanation:

> "I have to advise that every accused person is entitled to be supplied with a copy of the depositions concerning the case, but the Justices of the Peace Act prescribes for the payment of a reasonable sum for the cost thereof. The underlying theory of such charge would appear to be that the accused, having been adjudged as one with a case to answer by the fact of his having been committed for trial, is deemed to be responsible for the necessity for the preparation of the depositions. To ensure that every accused person is enabled to obtain a copy, and so suffer no disadvantage in defending himself, if any Justice is satisfied that an accused person is unable to pay for a copy, such person is supplied with a copy without charge."

To this it may be observed: (1) That the concession to poverty is practically useless because accused persons, even though on relief, will not plead what is to them an additional humiliation. They borrow from their friends or sacrifice their chattels. (2) That, although a man is innocent until he is proved guilty, the statute in this particular case *deems* him responsible, whether he is, in fact, guilty or not. (3) If an accused is to be mulct in costs, the appropriate time to levy them is at sentence. (4) The Minister does not deal with the real issue, *viz.*, whether justice requires that an accused person should be fully—and gratuitously—informed of the charge preferred against him.

The second matter concerns the procedure of the Police in its use of identification parades. No one knows better than the Police that the identification of people with whom we are very casually brought into contact is a very difficult process attended by grave dangers. Enquiry has elicited that the ordinary procedure is open to serious criticism, and the following propositions seem to be worthy of study:

(1) Identification parades have their chief value as corroboration. In the *Scott* case the Crown did not investigate the *alibi*, though this was set up, first, on arrest; and, secondly, at the preliminary hearing.

(2) The identifier should, before the parade, be required to state the characteristics upon which he relies.

(3) The identifier should, after the parade, point out the characteristics upon which he has relied.

Identification at Police instigation by persons who, by the nature of their business, are in close touch with the Police, opens up psychological problems which might well be the subject of report by experts. A better practice will be forced upon the authorities if these considerations are kept in mind in cross-examination.

The third and final matter concerns the payment of expenses in cases where an accused person has been *proved innocent*.

In the case in question, the Chairman of the Committee of the House which reported on the Petition of H. T. Scott, quotes the official view (*Hansard*, 1935, No. 26, p. 652)—with which it " whole-heartedly agrees "—as follows :—

> " There seems no reason in this case why the usual practice that the Crown does not bear the costs of prisoners charged with crime, or compensate them when the charge fails, should be departed from. Even where a person clearly proves his innocence, this practice is adhered to. The rule has always been in force throughout the British Empire, and in most civilized countries. There are, as might be expected, very good reasons for such a rule. The granting of compensation to every person charged with crime, but not convicted, would result in a great number of criminals, of whose guilt there was not conclusive evidence, being recompensed, would impose a heavy burden on the State generally for the benefit of an undeserving class, and would result in cases of grave suspicion not being brought before the Courts for investigation."

It will be observed : (1) That the Crown does not differentiate in its reasons between the cases of *not guilty* and *proved innocent*. The identity, it seems, is established by resorting to the doctrine (apparently ignored when payment is required for copies of depositions) that a man is innocent until he is proved guilty. A prisoner, according to this argument, found " not guilty " would be equally entitled to costs and compensation with one *proved innocent*. (2) The reason actually advanced, *i.e.*, the burden which would fall on the Crown if costs were paid in *not guilty* cases, would not apply to *proved innocent* cases, which have been, and, it is hoped, will always be, extremely rare.

It may be surmised that lawyers will not advocate paying out in *not guilty* cases. Lawyers have too keen an appreciation of the value of advocacy, and are, possibly, as a race, too sceptical of the unadulterated virtue of the clients of their professional brothers.

The only case for discussion is, then, the case of *proved innocent*. It is submitted, and on this point it is hoped that some discussion will follow, that the view of the Crown is fundamentally narrow and lacking in justice. The following points are submitted against the Crown view :—

(1) The essential business of a Department of Justice is to do justice. A citizen is, by hypothesis, falsely accused. His trial involves costs. The State—not necessarily to be blamed—puts that citizen to untold trouble and distress and some one has to pay. The State is, of course, better able to pay. But the real question is—where lies justice ?

(2) The argument concerning the identity of the two cases *not guilty* and *proved innocent* is purely technical. Only from a technical point of view has it any validity. In actual fact there is a world of difference, as any one who can enter into the mentality of a man in the dock will observe. It is the difference between a positive and a negative.

Parliament is the Court of Appeal where there is no legal remedy. It is the Court to which the ordinary citizen may look for justice apart from legal refinements and technical quibbles. It is curious how easy it becomes, under certain circumstances, for laymen to swallow whole the Civil-Service point of view.

His Majesty the King by virtue of his office is placed, as litigant, in some curious positions. He is, as the late Mr. Justice Alpers said at the end of a characteristic judgment, " the first gentleman in the realm, and yet he may at any time be made to appear to do such things . . . " *

If it is important that the name of the Crown should be associated, in civil cases, only with things honourable and decorous, it is even more important that scrupulousness and generosity should characterise the criminal jurisdiction. Is not " *Decus et tutamen* " the Royal Motto ?

The above article was submitted to the Department of Justice, whose official reply is as follows :—

" The facts in this case are that the accused Scott was proved to have been canvassing in the locality where, and on the afternoon on which, the thefts took place. The police also satisfied themselves, by means of a test carried out by a constable, that it was possible for the accused, by using his bicycle, to have proceeded to the business part of the town and disposed of the stolen articles at the times they were actually sold to two second-hand dealers, who definitely identified the accused as the man with whom they dealt. Further, the accused threw suspicion on himself by making an untrue statement to the police as to his whereabouts on the afternoon on which the crimes were committed. Upon the evidence in their possession it appears to be beyond question that the police were fully justified in charging the accused with the offences.

" With regard to Mr. de la Mare's complaint as to the supply of depositions, it is pointed out that in addition to the provisions under the Justices of the Peace Act, as quoted in the Minister's letter, to ensure that an accused person shall suffer no disability, there is a definite instruction to Registrars that if a prisoner *in custody* (irrespective of whether he is impecunious or not) applies for a copy of depositions he is to be supplied free of charge. There is accordingly very little point in Mr. de la Mare's criticism. To speak of ' humiliation ' to a person charged with a crime, in applying for a free copy of depositions, is rather absurd. If an accused person is a man of means and can afford to employ a solicitor to defend him, there appears to be no reason why he should not pay for the depositions as part of the cost of his defence, if the solicitor requires a copy to be supplied. Every facility has been placed in the way of an indigent prisoner obtaining free legal aid by the Poor Persons Defence Act, 1933. Under that Act a copy of the depositions is required to be supplied free of cost. As to the statement that ' *justice requires* that an accused person should be fully informed of the charge,' it is hardly necessary to point out that the accused person in every case is present at the hearing, and is fully informed of the charge preferred against him and of the evidence.

" The Department cannot agree with Mr. de la Mare's assertion that the argument concerning the two cases ' not guilty ' and ' proved innocent ' is ' purely technical,' and that ' only from a technical point of view has it any validity.' Members of what Mr. de la Mare has been pleased to call the ' race ' of lawyers will have no difficulty in discerning the fallacy of this proposition, which, if given effect to, would introduce an entirely new principle into the administration of our criminal law. If the principle of paying compensation to acquitted persons were established, every person claiming would be entitled to be regarded as innocent, and it would be impossible to differentiate between those in fact innocent and those who have been fortunate in securing an acquittal. If, however, the onus were thrown on the petitioner of affirmatively establishing his innocence before the Petitions Committee, this would mean that an acquitted person who might not be in a position positively to establish his innocence would be at a great disadvantage as against one who could. In such cases the police would be placed in the position of endeavouring to disprove the petitioner's innocence, notwithstanding that he had already been found not guilty by a jury of his own fellowmen.

" There is ample precedent for granting compensation to a person *wrongfully convicted* and imprisoned, and in case of

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* *The Tasman Fruit Packing Association Ltd. v. The King* [1927] N.Z.L.R. 518, 533.

malicious prosecution the accused has his legal remedy; but the principle of granting compensation to an *acquitted* person has never been accepted in any British country. There may be hardship in rare cases, but 'hard cases make bad laws' and the risk of an innocent person being brought before the Court is a risk incident to the administration of justice to which every citizen is subject. The important matter is that there should be a fair trial. The police must, and, in fact, do, use reasonable care to see that innocent persons are not charged, but if compensation were granted it would seriously prejudice the administration of the criminal law."

Correspondence.

[*It is to be understood that the views expressed by correspondents are not necessarily shared by the Editor.*]

Judicial Detachment.

THE EDITOR,
NEW ZEALAND LAW JOURNAL.

Sir,—It seems to the writer that your contributor of this article in your issue of August 20, goes much too far when he says that there is widespread regret in the legal profession that Sir Alexander Herdman has stepped from the Bench to politics. There are fortunately two sides to every question; but this fact is lost sight of frequently. What is there immoral, or improper, or destructive of confidence in the Bench, about a Judge resigning his office and entering politics, so long as, while he was a Judge, he was true to his oath? And no one questions Sir Alexander Herdman's fulfilment of his obligations in this respect.

The false assumption of your contributor is that a Judge who resigns his office and enters politics "descends" from the Bench in doing so. It is untrue. There is no more important position in the State than that of legislator; and who better should know it than legal practitioners? Why, the judicial office itself is in this country created and provided for by statute, *i.e.*, by the legislator! Who, to take an example, would dare say that Mr. Baldwin's position as Prime Minister of Britain is inferior to that of the Lord Chancellor of England? And this English reference brings one to a still more striking comparison. Some occupants of that most exalted judicial office have not only stepped from it to (not down to) politics, but have also passed back again from politics to the Lord Chancellorship! Lord Hailsham is a recent instance: first Lord Chancellor in 1928, then Minister for War, and now once again, in 1935, Lord Chancellor. What would your contributor say if Sir Alexander Herdman were to step from politics on to the Bench again later? But this reference to the Lord Chancellorship really carries the matter further, because the office is, at the same time, semi-political! No! a Judge has a perfect right, if he feels he can serve his country more effectively, whether in politics or in any other capacity, to do so. And where, as here, he resigns before reaching his age limit, and also makes a financial sacrifice, this is evidence of high purpose, and deserving of commendation, not condemnation. The fact that Sir Alexander Herdman takes over with him a pension has nothing to do with the matter. Pensions are not confined to Judges, and are not given on the understanding that the recipients shall remain idle. They are for services previously rendered, and in most cases the pensioner himself contributes to them. This is not a case of a Judge returning to the Bar. That is an entirely different matter.

Auckland, Yours, &c.,
Sept. 1, 1935. C.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Restrictive Covenants.

3. Covenants which "touch and concern" the land.

For convenient statement of the principles governing the annexation of covenants to land it is necessary to consider the position at law and in equity with regard to both leasehold and freehold lands, and also to distinguish between certain classes of covenants.

For this purpose covenants are divided into, (1) those which in the language of the common law touch and concern the land, and (2) those which on the other hand are personal merely to the parties or relate to collateral matters: *Spencer's case*, (1583) 3 Co. Rep. 16a, 77 E.R. 72. Attempts to explain the meaning of touching and concerning the land do not seem to carry the matter much further. In *Mayor of Congleton v. Pattison*, (1808) 10 East. 130, 103 E.R. 725, Lord Ellenborough, C.J., speaking of a covenant in which an assignee was named, said "... it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it." Le Blanc, J., said in the same case that the question was "... whether the thing covenanted to be done or not to be done immediately affected the land itself or the mode of occupying it." Bailey, J., there said: "In order to bind the assignee the covenant must either affect the land itself during the term such as those which regard the mode of occupation; or it must be such as, *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term." But in *Dewar v. Goodman*, [1909] A.C. 72, Lord Loreburn, L.C., said in regard to covenants running with the land, "The words which describe them as 'touching or concerning the thing demised' are familiar and no nearer approach to certainty is attainable, though in their application difficulty may arise." And the statutory allusions are to covenants "having reference to the subject-matter": Property Law Act, 1908, ss. 88, 89: Law of Property Act, 1925, (Imp.), ss. 141, 142.

Examples of covenants touching and concerning the land are:—

1. By the lessee:—
   (1) to pay the rent reserved and rates in respect of the demised premises: *Parker v. Webb*, (1693) 3 Salk. 5, 90 E.R. 939;
   (2) to repair buildings upon the demised land: *Wakefield v. Brown*, (1846) 9 Q.B. 209, 115 E.R. 1254; *Fleming v. Blyth*, (1907) 26 N.Z.L.R. 500;
   (3) not to assign the demised premises: *McEachearn v. Colton*, [1902] A.C. 104;
   (4) to consume on the demised land all hay and spread on the land all manure produced on the farm: *Chapman v. Smith*, [1907] 2 Ch. 97;
   (5) to insure against loss or damage by fire buildings upon the demised land: *Vernon v. Smith*, (1821) 5 B. & Ad. 1, 106 E.R. 1094;
   (6) to reside on the demised premises: *Tatem v. Chaplin*, (1793) 2 H. Bl. 133, 126 E.R. 470;

(7) to contribute to the cost of a sea-wall not on the demised premises, but built for the protection of both the demised premises and other property adjoining: *Lyle v. Smith*, [1909] 2 I.R. 58;

(8) to pay compensation for damage by subsidence caused by lessee's working of mines the subject of the demise: *Dyson v. Forster*, [1909] A.C. 98;

(9) (in the case of a demise of a public-house) to buy all beer from the lessor: *Clegg v. Hands*, (1890) 44 Ch.D. 503.

2. By the lessor:—

(10) for quiet enjoyment: *Campbell v. Lewis*, (1820) 3 B. & Ad. 392, 106 E.R. 706;

(11) to pay compensation for improvements to demised premises at end of term: *Bates v. Casey and Milne*, (1915) 34 N.Z.L.R. 714;

(12) to renew the term: *Muller v. Trafford*, [1901] 1 Ch. 54.

Examples of covenants which are personal to the parties merely or relating to collateral matters are:—

1. By the lessee:—

(1) to build on land other than the demised premises: *Spencer's case*, (1583) 5 Co. Rep. 16a, 77 E.R. 72;

(2) to pay rates not only on demised premises but also on other land not demised: *Gower v. Postmaster-General*, (1887) 57 L.T. 527;

(3) to deliver up stock at end of term: *Spencer's case* (*supra*).

2. By the lessor:—

(4) not to build or keep another public-house within half a mile of the demised public-house: *Thomas v. Hayward*, (1869) L.R. 4 Ex. 311;

(5) giving an option of purchase of the demised premises: *Woodall v. Clifton*, [1905] 2 Ch. 257;

(6) to give the lessee a right of pre-emption of land adjoining the demised premises: *Collison v. Lettsom*, (1815) 6 Taunt. 224, 128 E.R. 1020.

It is only those covenants which touch and concern the land which are capable of running with either the land or the reversion. A covenant which is personal merely to the contracting parties or relates merely to matters which are collateral and not usual to the relationship of lessor and lessee cannot be annexed to the land or the reversion so as to bind the assigns of either party. But a covenant relating to land, whether expressed or implied, is deemed to be made with the covenantee, his executors, administrators, and assigns, and has effect accordingly: Property Law Act, 1908, s. 47. A successor in title of the covenantee seeking to enforce such a covenant will not fail, therefore, by reason merely that the covenant was not in the deed, or in the enactment by virtue of which it is implied, drafted expressly to include the representatives and assigns of the covenantee.

In England since 1925 a covenant relating to land is, apart from express intention to the contrary, deemed to be made by the covenantor on behalf of himself, his successors in title, and persons deriving title under him or them; a provision which extends to a covenant relating to land notwithstanding that the subject-matter is not in existence when the covenant is made: Law of Property Act, 1925 (Imp.), s. 79.

There is no corresponding statutory rule in New Zealand impliedly widening all similar covenants to embrace the executors, administrators, and assigns of the covenantor. Indeed, covenants for title are by statute limited to the acts and defaults of the conveying party, those through whom he claims otherwise than for value, and those claiming under him: Property Law Act, 1908, s. 56 (2). Specifically, however, covenants of a lessee and mortgagor respectively under the Property Law Act system embrace executors, administrators, and assigns of the covenantor: *Ibid.*, s. 84; Fourth Schedule, cl. 13.

Adverting to the Land Transfer Act, s. 222, the description of a party in any form of instrument thereunder is deemed to include his executors, administrators, and assigns. The effect is the same as if an interpretation clause were included in the instrument extending the description to cover the representatives and assigns of the party: *White v. Akroyd*, [1919] N.Z.L.R. 813.

(*To be continued.*)

Practice Precedents.

Admission as Barrister after Five Years' Practice as a Solicitor.

Section 4 of the Law Practitioners' Act, 1931, provides that

> (1.) Subject to the provisions of section five hereof, every person, male or female, of the age of twenty-one years or upwards coming within any of the descriptions specified in the next succeeding subsection shall be qualified to be admitted and enrolled as a barrister of the Court.
>
> (2.) The descriptions referred to in the last-preceding subsection are— . . .
>
> (*e*) Any person who is a solicitor of the Court and for at least five years continuously next preceding the date of application has been in active practice as such solicitor or as managing clerk to a solicitor of the Court, and has himself been a solicitor of the Court during such period.

As to the meaning of "in active practice as a solicitor," see *In re Lynch*, (1913) 33 N.Z.L.R. 428, and *In re Carrad*, [1927] N.Z.L.R. 429.

As to the meaning of "managing clerk to a solicitor," see *In re Chalmers*, [1918] N.Z.L.R. 561.

In accordance with the regulations prescribed—see Reg. XVIII (4), *1926 New Zealand Gazette*, p. 1175—an applicant must give to the Registrar of the Supreme Court at the place where he intends to apply for admission notice of such application. Every such notice shall be in duplicate, and shall state the qualifications in respect of which the application is intended to be made. Upon receipt of every such notice the Registrar to whom the same shall be given shall forthwith send one copy thereof to the secretary of the District Law Society for the district within which such Registrar shall reside.

As to the meaning of "two months' notice," see *In re Heyting*, [1928] N.Z.L.R. 233, wherein it is stated that the applicant must be possessed of the qualification at the time of giving notice.

As evidence that the Law Society does not object to the admission, a certificate under the hand of the Secretary or the President is exhibited.

The oaths of allegiance and of demeanour are not required, these having already been taken on admission as a solicitor.

NOTE.—Section 4 (2) (*e*) of the 1931 Act, *supra*, will be repealed by the Amendment Bill, 1931 (to which detailed reference is made on p. 243, *ante*), if it becomes

law, cl. 33 thereof removing the qualification of five years' active practice as a solicitor or managing clerk. Existing rights are safeguarded, however, and any person, who *at the time of his application for admission as a barrister* can show that at the time of the passing of this year's Amendment Bill he was admitted as a solicitor or was then entitled to be so admitted, and that when applying for admission as a barrister he had during the then preceding five years been continuously engaged in New Zealand or Western Samoa in active practice on his own account or as managing clerk to a solicitor or a firm of solicitors, or partly in practice and partly as managing clerk during the named period, will be entitled to apply for admission as a barrister.

NOTICE OF INTENTION TO APPLY FOR ADMISSION AS A BARRISTER.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.
.....Registrar.

IN THE MATTER of the Law Practitioners Act, 1931, and the rules and regulations thereunder

AND

IN THE MATTER of an intended application by A.B. etc., for admission as a barrister.

To the Registrar of the Supreme Court of New Zealand at and to the Secretary of the District Law Society at .

TAKE NOTICE that I A.B. etc. intend to apply to a Judge of this Honourable Court at after the expiration of two calendar months from the date of this notice for admission as a barrister of this Honourable Court UPON THE GROUNDS :—

(1.) That I have for a period of at least five years continuously next preceding the date of this application that is to say from the day of 19 last down to the present time been in active practice as a solicitor of this Honourable Court as managing clerk to a firm of solicitors of this Honourable Court namely, Messrs. C. and D. of etc. .

(2.) That during that period I have been a solicitor and have taken out an annual practising certificate as a solicitor.

(3.) That I am a fit and proper person to be a barrister of this Honourable Court.

Dated at this day of 19 .

Applicant.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.
.....Registry.

IN THE MATTER of the Law Practitioners Act, 1931, and the rules and regulations thereunder

AND

IN THE MATTER of an application by A.B. of , solicitor, for admission as a barrister.

Mr. of counsel for the said A.B. TO MOVE before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Courthouse on day the day of 19 or so soon thereafter as counsel may be heard FOR AN ORDER that the said A.B. be admitted and enrolled as a barrister of this Honourable Court UPON THE GROUNDS :

(1.) That the said A.B. has for a period of at least five years continuously next preceding the date of this application been in active practice as managing clerk to the firm of G. and D. of , barristers and solicitors.

(2.) That the said A.B. has been a solicitor during the whole period of such five years and has each and every year taken out a practising certificate as a solicitor.

(3.) That the said A.B. is of good character and is a fit and proper person to be admitted and enrolled as a barrister of this Honourable Court.

Dated at this day of 19 .

Certified pursuant to rules of Court to be correct.

To the Registrar. Counsel for applicant.

AFFIDAVIT OF APPLICANT.

I A.B., of the City of solicitor make oath and say as follows :—

(1.) That I was admitted as a solicitor of this Honourable Court at on the day of 19 by the Honourable Mr. Justice .

(2.) That I have been in active practice as a solicitor of this Honourable Court at continuously since the said day of 19 and have not carried on any other calling whatsoever during the period from the said day of 19 down to the date of the swearing of this my affidavit.

(3.) That for a period of over five years namely from the day of 19 until the day of the swearing of this my affidavit I have been employed as managing clerk for C. and D. of the City of barristers and solicitors.

(4.) That I have in each and every year since the said day of 19 taken out the prescribed annual certificate entitling me to practise as a solicitor of this Honourable Court.

(5.) That on the day of 19 I gave to the Registrar of this Honourable Court at written notice in duplicate of my intention to apply to be admitted as a barrister of this Honourable Court in accordance with the provisions of the above-mentioned Act.

(6.) That hereto annexed marked "A" is a certificate under the hand of the Secretary of the Law Society as to fitness to be admitted as a barrister and that I am the A.B. therein referred to.

(7.) That hereto annexed marked "B" is a receipt from the Secretary of the said Law Society for the sum of five guineas being the fee payable for admission as a barrister by me this deponent.

Sworn etc.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I C. of the City of barrister and solicitor make oath and say as follows :—

(1.) That I am a barrister and solicitor and am a partner in the firm of C. and D. barristers and solicitors practising at .

(2.) That the above-named A.B. has been employed by my firm continuously since the day of 19 as and with the title of managing clerk down to the date of the swearing of this affidavit.

(3.) That as managing clerk of my firm the duties of the said A.B. consist in interviewing and advising clients common-law work conveyancing and the settlement of various transactions conducting cases in the Magistrates' Court instructing exercising control over and supervising the work of the employees of my firm and generally accepting the management and responsibility for the work of the clerks in my firm's employ.

(4.) That in all matters he exercises his own discretion except when he may have deemed it expedient to consult with myself or my partner and in cases where special instructions may have been given to him by myself or my partner.

(5.) That during the period of five years the experience the said A.B. has gained in Magistrates' Court work and in all other legal work has in my estimation put him in a position wherein he is well qualified to practise as a barrister of this Honourable Court.

(6.) That I knew the said A.B. for four years prior to his being admitted as a solicitor he having been employed as a law clerk to my knowledge at by the firm of for that period.

(7.) That in my opinion the said A.B. is a person of strict honour and integrity of good fame character and reputation and is a fit and proper person to be admitted as a barrister of this Honourable Court.

Sworn etc.

ORDER FOR ADMISSION AS BARRISTER.

(*Same heading.*)

day the day of 19 .

FORASMUCH as the above-named A.B. has applied to me to be admitted and enrolled as a barrister of this Honourable Court under the provisions of the fourth section of the Law Practitioners' Act 1931 AND FORASMUCH as it has been proved to my satisfaction that the said A.B. was on the

day of 19 duly admitted and enrolled as a solicitor of this Honourable Court under and by virtue of an order made by the Honourable Mr. Justice on that date in this Honourable Court at AND FORASMUCH as it has been proved to my satisfaction that the said A.B. is of good character and that for at least five years continuously next preceding the date of his application for admission as a barrister he has been in active practice as a managing clerk to a firm of solicitors of this Honourable Court during the said period and that the said A.B. is entitled to be admitted and enrolled as a barrister of this Honourable Court under the provisions aforesaid. NOW THEREFORE I HEREBY ADMIT the said A.B. as a barrister of this Honourable Court AND DO ORDER his name to be enrolled by the proper officer of this Honourable Court at accordingly.

Judge.

Enrolled accordingly at this day of 19 .

Registrar.

Bills Before Parliament.

Commercial Trusts Amendment.—This Bill is an amendment of the Commercial Trusts Act, 1910, and provides that in proceedings under s. 3 or s. 4 of that Act it shall be a sufficient defence if the defendant proves that the acts charged were not unfair to the person immediately affected and were not prejudicial to any New Zealand Industry, or to the public welfare, and that the acts if commonly practised or repeated would not in similar circumstances be so unfair or prejudicial.

Judicature Amendment.—The immediate necessity for cl. 2 of this Bill (which authorizes the permanent appointment of an additional Judge of the Supreme Court) arises from the appointment of one of the present Judges to be the Judge of the Court of Review of Mortgagors' Liabilities, while he continues to hold his office as a Judge of the Supreme Court. Clause 3 is consequential on the appointment of an additional Judge in accordance with cl. 2. While any Judge is absent on leave or, by reason of being engaged on duties other than his judicial duties as a Judge of the Supreme Court or for any other reason, is not available to sit in the Court of Appeal, the constitution of the two Divisions of the Court of Appeal will remain as at present—that is to say, each Division will consist of five Judges. When, however, all the Judges are available to sit in the Court of Appeal, provision is made to permit of the appointment of six Judges to one of the Divisions. Clause 4 provides that in actions before a Judge and jury questions of foreign law are to be decided by the Judge. The clause is an adaptation of s. 15 of the Administration of Justice Act, 1920 (Imperial). It was enacted in New Zealand as s. 8 of the Administration of Justice Act, 1922, which has been repealed by the Reciprocal Enforcement of Judgments Act, 1934.,

Masseurs Registration Amendment.—This Bill provides that nurses who are the holders of certificates from the Director-General of Health to the effect that they have received an approved course of instruction in actinotherapy may engage in the practice of actinotherapy and may be engaged in hospitals as masseurs.

Mental Defectives Amendment.—This Bill contains miscellaneous amendments to the Mental Defectives Act, 1911. Clause 6, which replaces s. 131 of the principal Act, provides for the protection from civil or criminal liability of persons acting under the authority of the principal Act.

Products Export Amendment.—This Bill provides for the amendment of s. 2 of the Products Export Act, 1908, by adding "timber" to the definition of "products."

Rabbit Nuisance Amendment.—This Bill authorizes Rabbit Boards to deal in poisons and ammunition intended for the destruction of rabbits.

Rent Restriction.—This Bill provides for the further extension for one year, to October 31, 1936, of the law relating to restriction of rents as contained in Part I of the War Legislation Act, 1916.

Shipping and Seamen (Safety and Load Line Conventions).—This Bill proposes to give the Governor-General power to make regulations to give effect to two Conventions (the Safety Convention and the Load Line Convention) to which the Government are parties, which are designed to promote the safety of life and property at sea.

Whaling Industry.—The object of this Bill is to enable effect to be given to an International Convention relating to the whaling industry, which was signed at Geneva on September 24, 1931, and to which the Government of New Zealand is a signatory. The terms of the Convention are to be found in the *New Zealand Gazette*, August 29, 1935. The Bill follows closely the provisions of the Whaling Industry (Regulation) Act, 1934 (Imperial), which has been passed, for the same purpose, by the Parliament of the United Kingdom. By virtue of s. 15 of that Act the legislative authority of the Parliament of New Zealand is expressly extended to enable legislation having extra-territorial operation to be passed for the purpose of giving effect to the Convention. The Bill provides for the licensing and control of whaling-ships and whale-oil factories.

Rules and Regulations.

Exhibition Act, 1910. Suspending Operation of certain statutes in connection with the Canterbury Winter Show and Exhibition of Industries.—*Gazette* No. 60, August 20, 1935.

Chattels Transfer Act, 1924. *Adding certain Chattels to the* Seventh Schedule to the Act.—*Gazette* No. 61, August 22, 1935.

Sales Tax Act, 1932-33. Exempting certain Goods from the Sales Tax.—*Gazette* No. 61, August 22, 1935.

Electrical Wiremen's Registration Act, 1925, and Amendment Act, 1934. Amendment No. 2 under the Electrical Wiremen's Registration Regulations, 1925.—*Gazette* No. 61, August 22, 1935.

Customs Act, 1913, and Amendment Act, 1921. Revoking the Prohibition of the Exportation of Coined Copper, and prohibiting the Exportation of any Bronze or Copper Coin or any kind of Coin inferior in value to Silver.—*Gazette* No. 61, August 22, 1935.

Fisheries Act, 1908. Regulating Trawling and Danish Seine-netting in Kennedy Bay, Coromandel Peninsula.—*Gazette* No. 61, August 22, 1935.

Fisheries Act, 1908. Amending Regulations for Trout-fishing in Feilding and District Acclimatization District.—*Gazette* No. 61, August 22, 1935.

Fisheries Act, 1908. Amending Regulations for Trout and Perch Fishing in the Wellington Acclimatization District.—*Gazette* No. 61, August 22, 1935.

Fisheries Act, 1908. Amending Regulations for Trout, Perch, or Tench Fishing in the Southland Acclimatization District.—*Gazette* No. 61, August 22, 1935.

Fisheries Act, 1908. Amending Regulations for Trout, Perch, or Tench Fishing in the Lakes District Acclimatization District.—*Gazette* No. 61, August 22, 1935.

Sale of Food and Drugs Act, 1908. Amending Regulations under the Act.—*Gazette* No. 61, August 22, 1935.

Seeds Importation Act, 1927. Declaring Rye-grass Seed to be subject to the Provisions of the Act.—*Gazette* No. 61, August 22, 1935.

Naval Defence Act, 1913. Regulations amended.—*Gazette* No. 63, August 29, 1935.

Poultry Act, 1924. Regulations relating to the Marketing of Chilled Eggs.—*Gazette* No. 63, August 29, 1935.

Customs Act, 1913, Customs Amendment Act, 1921. Restricting the Importation of Poultry into New Zealand from any Country.—*Gazette* No. 63, August 29, 1935.

Animals Protection and Game Act, 1921-22. Extending the Open Season for taking and killing Opossums in Hawke's Bay, Taranaki, Stratford, and Feilding and District Acclimatization Districts.—*Gazette* No. 63, August 29, 1935.

International Convention for the Regulation of Whaling.—*Gazette* No. 63, August 29, 1935.

Motor-vehicles Act, 1924. Amending the Regulations as to the use of Heavy Motor-vehicles.—*Gazette* No. 64, September 5, 1935.

Fisheries Act, 1908. Amending Regulations for Trout-fishing in the Nelson and Auckland Acclimatization Districts.—*Gazette* No. 64, September 5, 1935.

Fisheries Act, 1908. Amending Regulations for Trout, Salmon, Perch, and Tench Fishing in the Otago Acclimatization District.—*Gazette* No. 64, September 5, 1935.

Nurses and Midwives Registration Act, 1925. Regulations under the Act amended.—*Gazette* No. 64, September 5, 1935.

Fisheries Act, 1908. Prescribing a Close Season for Oysters in Port Underwood.—*Gazette* No. 64, September 5, 1935.

Public Works Act, 1908. Electrical Supply Regulations, 1935.—*Gazette* No. 65, September 6, 1935.

Public Works Act, 1908. Electrical Wiring Regulations, 1935.—*Gazette* No. 65, September 6, 1935.