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

Slowly in the ambience of this crown
Have many crowns been gathered, till, to-day,
How many people crown thee, who shall say?
Time and the ocean and some fostering star
In high cabal have made us what we are,
Who stretch one hand to Huron's bearded pines,
And one on Kashmir's snowy shoulder lay,
And round the streaming of whose raiment shines
The iris of the Australasian spray.

—Sir William Watson.

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"The King is Dead; Long Live the King!"

THESE words are a maxim of our Constitution, and they stand rocklike in its substantive law, the permanence of which they succinctly express. Their significance has been brought home to us in these last two weeks in the death of His late Majesty King George V and in the accession of our present Gracious Majesty, King Edward VIII. But, leaving aside constitutional fundamentals, the twenty-five years during which the Throne was occupied by our late monarch were a period of almost continual constitutional development. And in his dying hours, the presence of those changes made themselves felt, even in the privacy of his family circle.

Many and eloquent have been the heartfelt tributes paid in these last sad weeks to His late Majesty as King and Emperor, as the father of a world-wide family, as the best type of an English gentleman. But here we must confine ourselves to consideration of the part he played in the developing constitution of his Empire. We have learnt to realize that even the Crown, in its place in the British Constitution, has itself developed through the centuries from the ideal of personal ascendancy of the ruler, until, in our own day, we have seen it reach its highest idealism as a conception of personal service. In King George was our modern ideal of kingship perfectly realized. As was said last year at the time of his Silver Jubilee, "Encouraged and aided in every way by his Consort, Queen Mary, he has played unerringly the part of a constitutional monarch in a democratic community. Without parade and without magniloquent phrase, he has worked for us all bravely and simply."

Even before he came to the Throne, our late King was introduced to changes in the government of the overseas Dominions over which he was later to rule. He had not yet been created Prince of Wales when he represented his father, King Edward VII, at the opening of the first Parliament of the Commonwealth of Australia. To this event, we owe the visit to our own shores of the Duke and Duchess of Cornwall and York, as they then were, in 1901.

Although its happy conception belonged to the reign of his predecessor, the completion of the Union of South Africa and its official inauguration took place on May 31, 1910, a few weeks after King George succeeded to the Throne.

Changes in our system of Parliamentary Government, more particularly in that which subsists in the Mother of Parliaments at Westminster, came early in King George's reign with events which have left a permanent mark upon English constitutional law. He came to his inheritance of duty at a time of party-warfare in which a king of less even temper and of less sound wisdom might easily have precipitated a serious crisis. The coolheadedness of King George, combined with the exercise of that practical wisdom which was to mark every act of his as a sound constitutional monarch, turned what might have been a serious deadlock into a personal triumph. Then, as he often did later, he trusted his people.

Only a week before the death of Edward VII, the commencement of the Asquith Government's programme for social amelioration crystallized in the Finance Act, which with its new land-value duties had been the subject of a bitter struggle in the previous year, and which had received the Royal Assent as the Finance Act, 1909-10. But, while this controversy was out of the way, the Mother Country was in the throes of the still-keener controversy of the veto of the House of Lords.

The Parliament Bill, the measure for limiting the veto of the House of Lords, had been running its appointed course since the general election in the previous January. The proposal was that if a Bill passed the Commons in three sessions within two years, it should receive the Royal Assent, notwithstanding the Lords' dissent. The Die-Hards under the Earl of Halsbury were prepared to fight the measure to the last ditch, and attention became centred on the question whether the exercise of the Royal prerogative by the creation of peers enough to swamp the Opposition was a firm and certain possibility. The situation forced the position of the Crown into agitating and dangerous prominence, and this prominence inflamed both sympathetic concern for the young and untried Sovereign and resentment against the Government.

His Majesty suggested that the opposing forces should confer. Four representatives from each side accordingly met. Speaking of this request of the new King, Mr. Asquith told the House of Commons that "the nation witnessed an incident unparalleled in the annals of party warfare. The two combatant forces, already in battle array, piled their arms while the leaders of both sides retired for private conference." But on November 11 it was reported that there was no possibility of agreement.

It was apparent that if the Lords remained obdurate, the Government would have no option but to go to the country again. If the ensuing election gave them a further popular mandate, then, on the rejection of the Bill by the House of Lords, the Government would have to resign, unless the Crown exercised the royal prerogative and created 500 new peers to outvote the Opposition. Failing this, there would be the resignation of the Government, and a Conservative Ministry could not command a majority in the Commons. In the further seemingly-inevitable election, the Crown would become the subject of debate, and the kingship of which the monarch was the trustee would be gravely compromised. What did King George do? He assented to the Cabinet's advice that it was his duty to create the new Peers so that the deadlock should

be avoided. But the time had come for the King to exercise—in Sir Wilfred Laurier's words—"the privilege and duty of advising his advisers." He advised the Government first to go to the country on the issue of the veto; and he said he would give effect to the people's wish as they expressed it at the polls. He made one proviso, that the Parliament Bill should again be submitted to the House of Lords before the election. The Bill was submitted, and rejected; and the election took place. The Government was returned with a majority of 126 in the Commons. The King, after the rejection by the Commons of amendments made to the Bill by the Lords, authorized the Government to inform the House of Lords that if the Bill should be defeated, "His Majesty will consent to the creation of peers sufficient in number to guard against any possible combination by which the Parliament Bill might be exposed a second time to defeat." In the end, the majority of the Peers refrained from voting, and the measure became law by 131 votes to 114, thirty-seven Conservatives and thirteen Bishops voting with the Government. The Bill received the Royal Assent as the Parliament Act, 1911.

In India there were considerable constitutional changes during King George's reign—from the time when the King-Emperor at the Delhi Durbar in December, 1911, made his declaration of changing relationships which was inspired "by that rare thing in policy, imagination," until the closing days of his reign when even greater changes were being forged on the anvil of constitutional development. Throughout these reforms, there was graduated expansion of the policy, declared by His Majesty's Ministers early in his reign, of increasing the association of Indians in every branch of the administration, and the gradual development of self-governing institutions "with a view to the progressive realisation of responsible government in India as an integral part of the British Empire."

Constitutional development in the Colonies during the reign included the granting to Malta, in 1921, of responsible government with certain reservations among which are military, naval, and air defence matters. In 1923, Southern Rhodesia received responsible government with modified powers. In 1931, a constitution was granted to Ceylon in a form wherein the Council of State includes a number of elected members and has conjoint legislative and administrative powers.

A ruler less sensitive than King George to the niceties of constitutional practice might have easily found difficulties confronting him

Beyond that fatal wave, that from our side
Sunders the lovely and the lonely Bride
Whom we have wedded but have never won.

Early in his reign there were voices on the other side of the Irish Sea speaking treasonably amid their protestations of the highest loyalty; again, and once again, there were present all the elements of civil war. But the King, without in the least degree overstepping the limits of constitutional propriety, found words that were not his Ministers' in which to speak of conciliation. In one of his finest speeches, delivered at the opening of the Parliament of Northern Ireland, he said:

> "I speak from a full heart when I pray that my coming to Ireland to-day may prove to be the first step towards an end of strife among her people, whatever their race and creed. In that hope I appeal to all Irishmen to pause, to stretch out the hand of forbearance and conciliation, to forgive and to forget, and to join in making for the land they love a new era of peace, contentment, and goodwill. . . . The future lies in the hands of the Irish people themselves. May this historic gathering be the prelude of a day in which the Irish people, North and South, under one Parliament or two, as these Parliaments may themselves decide, shall work together in common love for Ireland upon the sure foundation of mutual justice and respect."

That was said in June, 1921, and no one could disregard such an appeal. The Conference with the Irish leaders followed, and the treaty under which the Irish Free State came into being was signed on the following December 6. A constitution framed in the territory outside the six Ulster countries was declared by a Constituent Assembly to be the Constitution of the Irish Free State by a Constituent Act passed late in 1922. Southern Ireland became, by statute, a self-governing Dominion when the Royal Assent was given to the Irish Free State Constitution Act on December 5, 1922.

But, in an all-embracing way so far as Great Britain and the several Dominions were concerned, the reign of the late King was of exceptional constitutional importance. One of the effects of the Great War was to bring the Dominions into closer relations and to terms of equality with the Mother Country. Those Dominions in being at the time of the signing of the Treaty of Versailles obtained recognition of their status as nations, separately and as equals of the United Kingdom. They were called in to advise and to assist in the making of the peace, and this led to the holding of a series of Imperial Conferences. The Conference of 1926 affirmed the declaration formulated by Lord Balfour, which attempted a definition of the newly-developed relationship of Great Britain and the Dominions:

> "They are autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

After the report of the Conference of 1930 on Dominion legislation, this status of equality was definitely established in the Statute of Westminster of 1931. This, the latest, development of Imperial doctrine, has, in its special relation to the Dominion of Canada and to the Irish Free State been so recently discussed in this place, that we now merely refer to it as one of the major constitutional landmarks of the reign of his late Majesty.

From great constitutional occasions, we come to two smaller ones. Both are typical of changes in the character of constitutional relationships. In 1911, the absence of King George from Great Britain, for the purpose of celebrating in his Indian empire the solemnity of his coronation, required the creation of a Council to administer the Government of the United Kingdom. In the Hanoverian times, the administration of the kingdom in the sovereign's absence was entrusted to fourteen or more Lords Justices, including the Archbishop of Canterbury, the Lord Chancellor, and the Lord President of the Council. In 1911, these three, with the addition of a royal prince, were deemed sufficient under the style and title of Counsellors of State to exercise the royal prerogatives of government. The change in numbers was accompanied by a change in powers, partly by extension, partly by limitation. The Council of State was empowered by His Majesty "to do in Our behalf any matter or thing which appears to them necessary or expedient to do in Our behalf in the interests of the safety and good government of Our realm." The

older instruments conferred on the Lords Justices the power of dissolving Parliament, but the new body was limited in that behalf: it could neither dissolve Parliament nor create any new peer or vary the existing ranks of the peerage.

Twenty-five years later, the Statute of Westminster being in force and His Majesty lying stricken with mortal illness, it became necessary to create another Council of State. This time, none of His Majesty's Ministers in Great Britain was called upon to function on his behalf, for those Ministers were now merely the King's advisers in but one of his kingdoms. So, his part as "the symbol of the free association of the members of the British Commonwealth of Nations" was delegated to his Queen and to his sons, as a Council of State, in which would centre (alas! so briefly, as it happened) the unity of common allegiance to the Crown shared by the nations of that Commonwealth.

Lastly, King George saw more changes in the party-affiliations of his Governments than any of his predecessors had done; we remember that it was in his reign that the Crown was first advised in Great Britain by a Labour Ministry. But, whoever may have been at the wheel and responsible for the safe carriage of the passengers and cargo of the Ship of State, the King as the experienced but unobtrusive pilot was ever at hand with warnings and suggestions, both timely and wise, for those who were successively called upon to steer Britain's destinies through the troubled waters of the last quarter-century.

To summarize the period of constitutional change and development, we cite the words of Mr. John Buchan of the Middle Temple (now Lord Tweedsmuir) in *The King's Grace*, published last year:

> "To cast the mind back over the last twenty-five years is to survey changes such as no other quarter-century in our record can show. Never before has the nation faced such stupendous 'varieties of untried being.' But in a season of startling breaches with the past one thing has been unbroken; one ancient institution has provided the cord on which mutations have been strung—a cord stretching back to our earliest annals. That cord, which has often been thin and sometimes frayed, is now a sevenfold cable. What has become of the solemn nineteenth-century flirtings with republicanism? The whole nation, the whole Empire, is royalist to-day, not only in constitutional doctrine but in personal affection."

We have faith in our Constitution to know that this confidence and affection for their Sovereign, which is the common bond of the peoples of the British allegiance, will endure. This is already shown by the acceptance by our new monarch, King Edward VIII (whom may God long preserve) of the example bequeathed to him by his father. In his first words as King to that Aula Regis of our own times which received and acclaimed him on his succession to the Throne, he made his declaration of faith in constitutional and democratic government. And his subjects hail him as the traditional bulwark of the nation, "broadbased upon his peoples' will" and ramparted around with their affection.

The new reign may see further developments in our constitutional practice and in the inter-relationships of the members of a world-wide empery. But, with the Crown always adapting itself to the changing characteristics of our people, as in the years that have passed into history, there is nothing for fear in the future from the constitutional viewpoint. Because, as Lord Tweedsmuir pointed out elsewhere in the work to which reference has already been made, the Crown is the point around which coheres the nation's sense of a continuing personality. In any deep stirring of heart, the people turn from the mechanism of government (which is their own handiwork and their servant) to "that ancient abiding thing behind popular government which they feel to be the symbol of their past achievement and their future hope."

In this faith, we join all others of His Majesty's subjects in praying for him a long, happy, and peaceful reign. And to him, as our Sovereign and Liege Lord, we say with respectful loyalty,

Proud from the ages are we come, O King;
Proudly, as fits a nation that hath now
So many dawns and sunsets on her brow,
This duteous heart we bring.

Summary of Recent Judgments.

JUDICIAL COMMITTEE
1935.
Oct. 28, Dec. 9.
Lord Alness
Lord Roche
Sir Sidney Rowlatt

TRICKETT v. THE QUEENSLAND INSURANCE CO., LTD. AND OTHERS.

Insurance — Motor-vehicles — Comprehensive Policy — General Exceptions—"Driven in a damaged or unsafe condition"—Car being driven without Lights when Driver Killed—Whether Knowledge of Driver essential Ingredient of Exceptions—No Analogy with position of Ship at Sea—Insurer not Liable.

Appellant, as assignee of the executor of her late father, who was killed when driving a motor-car owned by him, claimed to recover £1,000 under a policy of insurance covering deceased's car and providing an indemnity to that extent in the case of deceased's death while driving the car. At the trial it was proved to the satisfaction of the trial Judge that immediately before the collision which caused deceased's death he was driving his car on the wrong side of the road, without lights, and the policy contained an exception in the case of the insured car being driven in a damaged or unsafe condition.

Appellant claimed under a clause in a comprehensive policy of insurance, which was in the following terms:

> "Provided always and it is hereby expressly agreed and declared that no liability shall attach to the company under this policy in respect of any loss, damage, or liability occurring or any personal accident to the insured occurring—
>
> "(1) While any motor vehicle in connection with which indemnity is granted under this policy is—
>
> (*e*) Being driven in a damaged or unsafe condition."

On appeal from the Court of Appeal of New Zealand, affirming by a majority the decision of *Myers*, C.J., in the respondents' favour, reported [1932] N.Z.L.R. 1727,

Chappell, K.C., and **A. T. Denning,** for the appellant.
Hon. S. O. Henn Collins, K.C., and **John Buckley,** for the respondents.

Held, 1. That the terms of the proviso were unambiguous and plain, the car was actually and *de presenti* unsafe to drive because a necessary appliance was not functioning, and the question of the knowledge by the driver of the damaged or unsafe condition did not arise.

2. That an analogy between the position of a ship at sea and that of a motor-car on land is imperfect and misleading.

Barrett v. London General Insurance Co., [1935] 1 K.B. 238, considered, and *dicta* disagreed with.

Judgment of the Court of Appeal of New Zealand affirmed.

Solicitors: Montagu's and Cox and Cardale, London, agents for **Webb, Richmond, Swan, and Bryan,** Wellington, for the appellant; **Wray, Smith, and Halford,** London, agents for **Leicester, Jowett, and Rainey,** Wellington, for the respondents.

FULL COURT
Auckland.
1935.
Nov. 28;
Dec. 19.
Myers, C.J.
Callan, J.

IN RE NATHAN, DECEASED.

Practice—Probate and Administration—Graduated Scale of Fees of Sealing—Validity of Rules 581 A and 581 B of the Code of Civil Procedure—Judicature Act, 1908, s. 51 (2)—Judicature Amendment Act, 1930, s. 3 (1).

Section 51 (2) of the Judicature Act, 1908, empowered the Governor-General in Council, with the concurrence of two or more of the Judges, to alter or revoke the rules (thereby including power to establish a graduated scale of fees as contained in Table D of the Third Schedule to the Code of Civil Procedure). Section 3 (1) of the Judicature Amendment Act, 1930, repealing s. 51 (2) of the principal Act, recognised the existence and validity of new or altered rules made under the said s. 51 (2), including the graduated scale of fees payable on sealing probate or letters of administration, which validity it became too late to challenge after the passing of the Amendment Act, 1930.

Counsel: Barrowclough, for the executors, in support of motion to remit or dispense with payment of fees; **Hubble,** for the Supreme Court Registrar, to oppose.

Solicitors: Russell, McVeagh, Macky, and Barrowclough, Auckland, for the executors; **Meredith, Hubble, and Meredith,** Auckland, for the Supreme Court Registrar.

NOTE:—For the Judicature Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Courts*, p. 60; Judicature Amendment Act, 1930, *ibid.*, p. 96.

COURT OF ARBITRATION
Wellington.
1935.
Dec. 18, 23.
Page, J.

TEMPLETON v. GEORGESON.

Industrial Conciliation and Arbitration—Practice—Judge of Arbitration Court stating Case for Court of Appeal on Question of Law—Whether Appeal from Magistrate "before the Court" prior to Sitting at which can be heard—Whether Interpretation of Award "a Question of Law" referable to Court of Appeal—Industrial Conciliation and Arbitration Act, 1925, ss. 105, 78 (c).

Section 105 of the Industrial Conciliation and Arbitration Act, 1925, is as follows:

"The Judge of the Arbitration Court may in any matter before the Court state a case for the opinion of the Court of Appeal on any question of law arising in the matter."

A matter may be "before the Court" before the stage at which the action is heard in open Court.

When an application from a Stipendiary Magistrate had been duly filed in the Court of Arbitration, a specific application for the stating of a case under s. 105 had been made by counsel for both parties, and the matter had been discussed and considered by the Court, the matter at the time the case was stated was "before the Court" within the meaning of s. 105.

Semble, On an appeal from a Magistrate, the interpretation of an Award is a question of law that can be referred to the Court of Appeal by way of case stated.

Inspector of Awards v. Fabian, [1923] N.Z.L.R. 109, distinguished, and the obiter dicta therein on this point discussed.

Counsel: A. J. Mazengarb, for the appellant; **A. E. Currie,** for the respondent.

Solicitors: Mazengarb, Hay, and Macalister, Wellington, for the appellant; **Crown Law Office,** Wellington, for the respondent.

NOTE:—For the Industrial Conciliation and Arbitration Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Industrial Disputes*, p. 939.

FULL COURT
Auckland.
1935.
Dec. 16, 19.
Fair, J.
Callan, J.

RE MARTINOVICH.

Criminal Law—Probation—Breach of Conditions of License—Jurisdiction as to Commitment and Sentence—Offenders Probation Act, 1920, ss. 7, 10 (g), 13, 14.

Section 13 of the Offenders Probation Act, 1920, to which there was no corresponding section in the 1908 Act, has not effected a change in the meaning of the language employed in the present s. 14, which, therefore, authorizes (*a*) the commitment of a person to prison without his having been convicted of a breach of the conditions of his probationary license under s. 13, and (*b*) the imposition of a sentence in respect of the offence for which he was originally released on probation, not merely of a sentence only in respect of the breach of the probationary license.

Counsel: A. Hall Skelton, for the prisoner, in support of application for writ of habeas corpus; **Hubble,** for the Gaoler of Mt. Eden Prison, to oppose.

Solicitors: Hall Skelton and Skelton, Auckland, for the prisoner; **Crown Solicitor,** Auckland, for the Gaoler of Mt. Eden Prison.

NOTE:—For the Offenders Probation Act, 1920, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Criminal Law*, p. 493.

SUPREME COURT
Auckland.
1935.
Dec. 12, 17.
Callan, J.

TRANSPORT MUTUAL AND GENERAL INSURANCE COMPANY, LIMITED (IN LIQUIDATION) v. WEBBER.

Statute—Statute enabling Court to determine Appointment of Public Trustee as Receiver on Application made—Proceedings commenced by competent Parties—Late Statute enacted determining Appointment as Receiver and appointing Public Trustee Liquidator—Whether latter Statute unconstitutional and void—Companies (Temporary Receivership) Act, 1934, s. 11—Companies (Special Liquidations) Act, 1934-35, ss. 3, 5 (1)—Colonial Laws Validity Act, 1865 (26 & 27 Vict., c. 63), s. 2.

The Companies (Temporary Receivership) Act, 1934, appointed the Public Trustee the Receiver and Manager of certain named companies, and, by s. 11, enabled the Supreme Court to determine that appointment on application by interested parties. After the passing of that statute, proceedings were commenced in the Supreme Court for the determination of the appointment of the Public Trustee as Receiver. While such proceedings were pending, the Legislature enacted the Companies (Special Liquidations) Act, 1934-35, which provided that certain of the companies should be wound up by the Court and the appointment of the Public Trustee as Receiver under the former statute should be determined on the commencement of the winding-up of any of the said companies, and that the Public Trustee, without further appointment, should be the liquidator of every such company.

Defendant, in an action for failure to account, contended that the Legislature by enacting the latter statute had taken away the right of appeal to the Judicial Committee of the Privy Council in respect of the pending proceedings, and that, therefore, the statute was unconstitutional, void, and inoperative.

On argument of the question of law so raised,

Hubble, for the plaintiff; **M. H. Hampson,** for the defendant.

Held, 1. That it was within the competence of the New Zealand Legislature to make new law, the making of which had rendered a further continuance of certain legislation useless or impossible.

2. That the statute in question was not unconstitutional, as it did not purport to deprive a litigant of his right to ask the Judicial Committee of the Privy Council for leave to appeal, and was, therefore, not repugnant to the Judicial Committee

Act, 1833 (3 & 4 Will. 4, c. 41) and the Judicial Committee Act, 1844 (7 & 8 Vict., c. 69), of the Imperial Parliament.

The Companies (Special Liquidations) Act, 1934-35, was accordingly held not to be unconstitutional or void, but to be operative.

Solicitors: Public Trust Office Solicitor, Wellington, for the plaintiff; **Hampson and Wiseman,** Auckland, for the defendant.

SUPREME COURT Auckland. 1935. Dec. 4, 17. *Fair, J.*

MEREANA PEREPE AND ANOTHER v. ANDERSON.

Natives and Native Land—Confirmation by Board—Land Transfer—Registration—Alteration in terms of Lease by Confirmation Orders—Effect of Registration of Lease—Whether question of Ultra Vires thereby precluded—Native Land Act, 1909, ss. 217, 298 (*b*)—Native Land Amendment Act, 1913, s. 88.

Where a lease which required confirmation by a Maori Land Board had an alteration made in its terms by the confirmation orders of the Board, and there was no evidence establishing fraud or mistake on the part of lessor, lessee, or Board, the registration of the lease under the Land Transfer Act, 1915, precluded the raising of questions as to whether the alterations or the confirmation was *ultra vires*.

Harris v. McGregor, (1912) 32 N.Z.L.R. 15, and **Wolters v. Riddiford,** (1905) 25 N.Z.L.R. 532, followed.

Counsel: Cooney, for the plaintiff; **C. G. Lennard,** for the defendant.

Solicitors: Cooney and Jamieson, Te Puke, for the plaintiff; **Lennard and Lennard,** Auckland, for the defendant.

SUPREME COURT Auckland. 1935. Dec. 12, 13. *Fair, J.*

MARCROFT v. INGER.

Negligence—Statutory Negligence—Live Detonators left on Shelf in Disused House—Plaintiff, ignorant of Danger, injured while cleaning out Detonator with Needle—Whether Statutory Negligence—Whether Defence of Contributory Negligence available—Explosive and Dangerous Goods Act, 1908, s. 9 (1) (*c*)—Regulations, *1914 New Zealand Gazette* 2922, Regs. 2, 4.

Plaintiff, aged nineteen years, was employed by defendant as a farm-labourer. Walking across the farm to his work, he took shelter from the rain in a disused house standing on the farm and found on a shelf in a back room a small tin box containing live detonators. Not knowing what they were, or that they were dangerous, he cleaned out one of them with a needle, to use the top for his pencil. While he was pricking a second detonator, it exploded in his hand and caused him injury.

In an action for damages for the injuries sustained,

Haigh, and **T. E. Henry,** for the plaintiff; **J. F. W. Dickson,** and **Bone,** for the defendant.

Held, That the defendant was guilty of negligence by leaving the detonators where he did, and such negligence was the cause of the injuries suffered, and that there was no contributory negligence.

McAlister (or Donoghue) v. Stevenson, [1932] A.C. 562, referred to.

Semble, The plaintiff had a statutory right of action against the defendant for a breach of statutory duty in respect of the provisions of the Explosive and Dangerous Goods Act, 1908, and the regulations made thereunder; and contributory negligence is available as a defence to such an action based on statutory negligence.

Solicitors: F. H. Haig, Auckland, for the plaintiff; **Sellar, Bone, and Cowell,** Auckland, for the defendant.

Case Annotation: *M' Alister (or Donoghue) v. Stevenson,* E. & E. Digest, Supp. No. 10, title *Negligence,* No. 364a.

SUPREME COURT Wellington. 1935. May 29; Oct. 4; Dec. 23. *Smith, J.*

HERBERT v. GREATHEAD.

Company Law—Partnership Formed in 1906 of Twelve Persons for Acquisition of Gain—Prohibited by s. 5 of the Companies Act, 1903 and 1908—Effect of s. 372 of the Companies Act, 1933, Substituting Twenty instead of Ten as Limit for Unregistered Partnership—Whether Partnership could be Wound Up under Part XI of the Act of 1933—Whether in Winding-up Court would take Cognizance of Internal Arrangements of Partnership—Which law should be Applied as to Validity of Acts Done and Enforcement of Rights Accrued prior to Operation of Act of 1933—Companies Acts, 1903 and 1908, s. 5—Companies Act, 1933, s. 372, Part XI—Acts Interpretation Act, 1924, s. 20 (i) (iii).

Section 5 (1) of the Companies Act, 1903 and 1908, prohibited a partnership of more than ten persons for the acquisition of gain unless it was registered as a company under the Act or formed in pursuance of an authority specified therein, but provided by subsection 2 that the members of such partnership should be jointly and severally liable for the whole of its debts, and by subsection 3 that it might be wound up under the provisions of the Act.

The Companies Act, 1933, repealed the said s. 5, and s. 372 re-enacted in substance subsection 1 of s. 5, substituting twenty persons for ten persons, and by Part XI provided for the winding-up of unregistered companies; and see s. 326 (3).

A partnership of twelve persons for the acquisition of gain was formed in 1906. After the coming into operation of the Companies Act, 1933, the plaintiff brought an action against the other members of the partnership, asking for a decree of dissolution, taking accounts and winding up.

Cooper, for the plaintiff; **Hallett,** for the defendant Frederick John Tonkin.

Held, That the partnership came within the provisions of the said s. 5, the true construction of which was that if a partnership was in fact formed notwithstanding the prohibition the Court would, in civil proceedings at least, take no legal cognizance of it, except (*a*) when individual members were sued for the debts of the partnership for the purpose of ascertaining whether the person sued was a creditor of the partnership for an amount which he claimed and whether the person sued was a member and (*b*) for the purpose of winding up the partnership.

Quaere, Whether in such a winding up the Court would have regard to the other provisions of the partnership agreement for the purpose of adjusting the rights of the members.

Held, further, That on the coming into operation of the Companies Act, 1933, the partnership which then consisted of more than seven members became one which could be wound up as an unregistered company under Part XI of the Companies Act, 1933, but as the action was not an appropriate proceeding to obtain such an order, it must be dismissed.

Quaere, Whether in view of s. 20 (e) (i) and (iii) of the Acts Interpretation Act, 1924, the validity of that which had been already done and the enforcement of rights which had already accrued should be determined under the law as it existed prior to the coming into force of the Companies Act, 1933.

In re Padstow Total Loss and Collision Assurance Association, (1882) 20 Ch. D. 137, and **Henshall v. Porter,** [1923] 2 K.B. 193, referred to.

Solicitors: A. C. Major and Co., Masterton, for the plaintiff; **A. S. Tonkin,** Hastings, for the defendant Frederick John Tonkin.

Case Annotation: *In re Padstow Total Loss and Collision Assurance Association,* E. & E. Digest, Vol. 29, p. 433, para. 3368; **Henshall v. Porter,** *ibid.,* Vol. 42, p. 705, para. 1220.

NOTE:—For the Companies Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Companies,* p. 827; Acts Interpretation Act, 1924, *ibid.,* Vol. 8, title *Statutes,* p. 568.

Cross-Examination of Accused

As to Previous Convictions and Acquittals.

By L. F. Rudd, LL.B.

What advice should Counsel, briefed for the defence in a criminal trial, give as to whether or not the accused should go into the witness-box and give evidence for himself, *if the accused has a previous conviction* ?

One gathers from a recent biography of the late Sir Edward Marshall Hall that he required prisoners for whom he appeared on capital charges themselves to sign a statement for him to retain, instructing him as to their going intot he box or not. That signature would appear to lighten the load of afterthoughts and vain regrets that insist on plaguing Counsel even after the final responsibility has really gone from him to the jury: and the same precaution is doubtless worth taking by less eminent counsel. It is, however, little help to a man in prison whilst remanded for trial, unable to see his case in its true proportions, to have a form placed in front of him by his counsel in reply to his request for advice, and to be asked to strike out one line or the other. In shaping the case, the responsibility of advising on this vital point is in fact assumed by counsel; and in New Zealand the want of certain knowledge as to whether cross-examination relating to previous convictions will or will not be permitted by the Court makes the giving of advice to an accused so encumbered unduly difficult.

There is no uncertainty in England about the matter—the accused must not be asked any question tending to show that he has committed, or been convicted of, or charged with, any offence other than that with which he is then charged, or that he is of bad character: (*a*) unless the proof that he has committed, or been convicted of such other offence is admissible to show that he is guilty of the offence with which he is then charged, or (*b*) unless he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character or has given evidence of his good character, or (*c*) unless the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution, or (*d*) unless he has given evidence against any other person charged with the same offence: Criminal Evidence Act, 1898, see *9 Halsbury's Laws of England*, 2nd Ed., 189, 215-7.

So long, therefore, as the defence steers clear of these rocks, all is plain sailing and there will be no possibility of the jury being influenced by knowledge of previous conviction.

If an accused is improperly questioned in cross-examination as to a previous conviction—or, for that matter, a previous acquittal—the Court of Criminal Appeal, (and, on occasion, the House of Lords), is alert to quash the conviction. Three notable appeals of this nature are reported in 1934.

In *Maxwell v. Director of Public Prosecutions*, 24 Cr. App. Rep. 152, the appellant was found guilty of causing a woman's death by performing on her an illegal operation. He appealed from that conviction to the Court of Criminal Appeal, which dismissed the appeal. From that decision he appealed to the House of Lords. The question at issue was whether, where the accused's character had been put in issue, he could be cross-examined regarding a previous charge of which he had been acquitted. In the result the House of Lords decided that, as a general rule, it is not permissible to cross-examine as to a previous acquittal: and the Lord Chancellor, giving the reasons for reversing the order of the Court of Criminal Appeal and ordering the prisoner to be released, discussed the history of the rule. After remarking that a prisoner could not, in general, give evidence on his own behalf until the passing of the Criminal Evidence Act, 1898, His Lordship at p. 169 proceeds:

> "When Parliament by the Act of 1898 effected a change in the general law and made every person a competent witness, it was in an evident difficulty, and it pursued the familiar English system of a compromise. It was clear that if you allowed a prisoner to go into the witness-box it was impossible to allow him to be treated as an ordinary witness. Had that been permitted, a prisoner who went into the box to give evidence on oath could have been asked about any previous conviction, with the result that an old offender would seldom, if ever, have been acquitted. This would have offended against one of the most deeply rooted and jealously guarded principles of our criminal law, which, as stated in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, 65, is that it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his conduct or character, to have committed the offence for which he is being tried. Some middle way, therefore, had to be discovered, and the result was that a certain amount of protection was accorded to a prisoner who gave evidence on his own behalf. As it has been expressed, he was presented with a shield, and it was provided that he was not to be asked, and that, if he was asked, he should not be required to answer, any question tending to show that he had committed, or been convicted of, or been charged with any offence other than that wherewith he was then charged, or was of bad character. And again, at p. 173, the Lord Chancellor remarks ' . . . indeed the question whether a man has been convicted, charged, or acquitted, even if it goes to credibility, ought not to be admitted, if there is any risk of the jury being misled into thinking that it goes, not to credibility, but to the probability of his having committed the offence with which he is charged.' "

The second case, *R. v. Waldman*, 24 Cr. App. Rep. 204, dealt with an appellant who was charged with receiving property knowing it to have been stolen, and who had been asked in cross-examination about a previous conviction, (in 1920), and a previous acquittal two years later for the same offence. The appellant had put his character in issue, and not only himself put it in issue, but called a witness to testify as to his good character. The Court dismissed the appeal on the ground—as reported at p. 208—that the question about the previous acquittal could not have turned the scale against the appellant by "one pennyweight or one dram, much less by an ounce."

The third and most recent case, *R. v. Tomasso*, 25 Cr. App. Rep. 18, had to do with an appellant who was charged with possessing counterfeit coins with intent to utter them. He did not put his character in issue. He was cross-examined as to a previous conviction for a similar offence, which he admitted: and for that reason the conviction was quashed on appeal. The judgment, at p. 18, reads:

> "In our opinion, that question was clearly improper and vitiates the conviction which followed. It was very unfortunate that the question was asked . . ."

The attitude of Judges of the High Court towards such questions may fairly perhaps be gathered from the remarks of the present Lord Chief Justice, delivering the judgment of the Court of Criminal Appeal in *R. v. Dunkley*, [1927] 1 K.B. 323, 134 L.T. 632.

> "One cannot help thinking that counsel for the prosecution would be well advised, even where the occasion for such cross-examination appears to arise, to refrain from embarking upon it unless the circumstances are such as to make it appear to the mind of the learned counsel to be a positive duty that he should enter upon that somewhat invidious task."

It is noteworthy that some, at least, of Australian States have adopted the provisions of the English Statute. Western Australia, in 1906, enacted in its Evidence Act provisions substantially the same as the English provisions above referred to; and similar provisions are contained in the South Australian Evidence Amendment Act, 1925, (now apparently the Evidence Act, 1929); and in the Victorian Crimes Act, 1928, s. 432.

In New Zealand our Evidence Act, 1908, gives no guide as to the principle that will actuate the Court, s. 5 stating:

> "So far as the cross-examination relates to any previous conviction of the accused or to the credit of the accused the Court may limit such cross-examination as it thinks proper although the proposed cross-examination might be permissible in the case of any other witness."

Rules were made on November 3, 1909, under s. 354 of the Crimes Act, 1908, as to the practice that is to be followed in asking for the presiding Judge's permission so to cross-examine and these are to be found set out in detail in *Garrow's Crimes Act*, 2nd Ed., 233; but the rules do not, nor probably could they, under the section in pursuance of which they are made, do more than prevent the jury from being able to come to the conclusion that previous convictions were the subject-matter of the application in a case where a Judge has refused permission. They give no indication of any principle on which the Judge is to give or refuse his permission, and are specifically rules of practice only. They formed in the case of *R. v. Pool*, [1920] N.Z.L.R. 409, the subject-matter of a memorandum by Chapman, J., who remarked:

> "Apart from the rules of 3rd November, 1909, a prisoner who gives evidence on his own behalf is subject to be cross-examined like any other witness. Those rules are not the authority for cross-examining him; they were made purely in the interest of the accused person and their object is to secure, first that a man shall not be convicted by means of a false issue which may be raised by such a cross-examination—that is to say, by a process which might induce a jury to argue that because he was guilty of former offences he ought now to be convicted on the present charge. It cannot be denied that there is some danger of this. On this subject our law is chivalrous to a degree unknown to any of the foreign systems. In Scotland, as in France, the whole past history of the prisoner is given in evidence. And, secondly, the object of the rules is to secure that the application shall be made, that if the Judge refuses to allow the cross-examination the meaning of the application and refusal shall not be known to, or appreciated by, the jury."

In view of the decisions in *R. v. Weston*, (1912) 32 N.Z.L.R. 56, and *R. v. Johnston*, [1931] G.L.R. 565, that the opinion of the Court of Appeal cannot be obtained under s. 442 of the Crimes Act on questions of practice, the trial Judge's decision—given perforce without opportunity for consideration—is in point of fact final. Despite the strong arguments of a number of leading practitioners collected in the JOURNAL (1933), Vol. 9, pp. 24-26, we are still without a Court of Criminal Appeal. In the absence of such a Court, and also of statutory provisions on the lines of the English Act, it can hardly be expected that the practice of the various Judges should be uniform when their only guide is their individual sense of fair play. Without reflecting in any way on our Bench, it cannot be denied that this must vary like the proverbial Chancellor's foot. Nor is the English common law of any assistance save as to the most general principles; for until statutory provisions were made, commencing in 1861, and consolidated in the Act above-mentioned in 1898, every accused person was incompetent to testify.

After letting in cross-examination of this nature, the Judge directs the jury that the previous conviction does not assist in proving the present offence, but it may be considered in determining the credibility or otherwise of the witness. How it can assist a jury to judge the credibility of an accused, charged with indecent assault, to learn that some years previously he had been convicted of drunkenness and prohibited, or of an accused, charged with receiving stolen goods, to know that eight years previously—of course within five years in this case it would, under s. 284, have been different—he had been convicted of failing to account, it is difficult to see; and both these are comparatively recent instances. It is impossible to estimate the effect on any particular jury: one jury may resent "old, unhappy, far-off things, and battles long ago" being brought in, and they may be swayed by sympathy for the accused in consequence; whilst another may be disposed to act on the maxim "give a dog a bad name, and hang him."

However dangerous it may be for the accused with convictions to stay out of the box and let the jury think their worst—though nothing may be said—about his failure to give evidence, this would seem to be the course to advise until the Evidence Act is amended so as to provide with certainty in what circumstances the accused's previous convictions may be brought up against him.

Judicial and Forensic Mourning.

The Judges of the higher Courts are "the King's Judges," and thus are attached to the royal court so far as to obey the injunctions as to mourning issued on the occasion of the death of his late Majesty. As each King's Counsel when about to be called from the inner Bar makes his declaration that he "will serve the King as his counsel learned in the law and truly counsel the King in his matters, when I shall be called, and duly minister to the King's matters and sue the King's process after the course of the law after my cunning," he, too, is subject to the same injunctions as to Court mourning.

Chief Baron Pollock is authority for the jesting statement that "the Bar went into mourning at the death of Queen Anne, and never came out again." The basis of the Chief Baron's remark was the fact that the full-bottomed wig and black gown and Court dress, which is still the official costume of King's Counsel, dates from the expression of the wish by William III that the mourning apparel worn by barristers at the funeral of Queen Mary II should be continued after the Queen's death as a mark of respect.

Now-a-days, additional signs of mourning are adopted by the Judges and King's Counsel on the solemn occasions when Court mourning is ordered to be worn, and for the period during which such mourning continues. These take the form of "weepers," which are white lawn cuffs attached to the sleeves of the Court coat, and of mourning bands which replace the bands usually worn and are of a pattern different from them.

The indicia of judicial and King's Counsel's mourning may be observed in our higher Courts at the present time.

London Letter.

By Air Mail.

Temple, London,
January 2, 1936.

My dear N.Z.,

It is really remarkable how often my monthly letter to you falls to be written in holiday times. I think I have said before that you must think that a member of the English Bar scarcely ever does any work, but we are not really so slack as it may appear. It is because Christmas comes at the end of December that it is vacation-time when my December letter is due. So also I am almost bound to strike the short Easter or Whitsun vacation when I write at the end of March, April, or May. At the present time then we are, like you, enjoying our Christmas holiday. The Courts rose on Friday the 20th and most of us left the Temple that day for the country. It seemed as if we were going to have a sort of Christmas that is usually depicted on Christmas cards, for snow had fallen over most of the country at the beginning of that week and continuous frost had kept it hard and crisp throughout the week. Skating had already begun on the Lincolnshire fens and during the week-end the ice was bearing in many other places. But on the evening of the Monday before Christmas, a sudden change took place. The temperature rose, rain began to fall, and in less than twenty-four hours almost all signs of winter had gone. Christmas Day itself was unusually warm for the time of the year. Since then much rain has fallen and now there are floods. What a climate!

Cases of the Month.—The case to attract most public attention during this month has, of course, been the trial of Lord De Clifford in the House of Lords. The result seemed a little disappointing. I do not mean to infer that I should like Lord De Clifford to have been found guilty, but after all the elaborate preparation for the trial, after all that had been written and said about it, after collecting together most of the finest legal brains in the country to plead and to advise, things did seem to fall a little flat when their Lordships upheld the submission of counsel for the accused that there was no case to answer. It is understood that a Bill is shortly to be introduced to abolish trials in the House of Lords on the ground that they have outlived their usefulness. Most people, I think, agree with this, although from the correspondence that is being published in the *Times* on the subject, it seems that there are some dissentients, while one suggestion has been made that such a method of trial should be restricted to cases of high treason.

A will case that may be of interest to you came before Mr. Justice Langton this month. In *Re Finn* the Court was asked to approve a thumb impression as a good signature of a testator. It seems that the thumb impression was made at the instigation of one of the witnesses, a clergyman, who had been a missionary, and accustomed to natives signing documents in this manner. Unfortunately in this case the impression was so blurred that it was scarcely recognizable as a thumb-mark at all, but it was argued that even so it was acceptable as the testator's mark. Langton, J., after some hesitation, approved it, remarking, however, that he only did so in the peculiar circumstances of the case and that it was not to be taken as a precedent.

Another interesting case decided during this month was *Jennings v. Stevens*, where the question was what was a performance of a play in public. An amateur Dramatic Society had presented a performance of the plaintiff's play "The Rest Cure" without her consent at a monthly meeting of a branch of the Women's Institute. Except for the performers, only members of the Institute were present at the performance. The plaintiff contended that this constituted a performance in public, but the Court held that it was not.

Retirement of the Editor of the Law Reports.—Sir Frederick Pollock, Bart., K.C., the Editor of the *Law Reports*, is retiring. His name will be well known to you, if not as Editor of the *Law Reports*—for strangely enough such a post does not carry great publicity—at least as the author of the text-books bearing his name on *Law of Contract* and the *Law of Torts*, and possibly as part author of Pollock and Maitland's *History of English Law*. Sir Frederick Pollock may be said to have led a full life, for he was born in 1845. He was at one time Professor of Jurisprudence at University College, London; and later Corpus Professor of Jurisprudence at Oxford. He became Editor of the *Law Reports* in 1895. Many other publications besides those that I have already mentioned are the work of his pen, one of the latest being *For My Grandson*, which was published in 1933. Sir Frederick Pollock is, of course, one of the famous Pollock family. Chief Baron Pollock was his grandfather, and Lord Hanworth is his cousin.

A Diversion on Politics.—Although my letters to you are theoretically restricted to legal news, politics are so closely associated with law that I feel justified in including a few comments on the political situation when it affects the legal profession in particular, or when, as in the case of the recent crisis, it is of interest not only to the general public here but to the whole world. I am, of course, referring to the Paris proposals for the settlement of the Italo-Abyssinian conflict. The general feeling here was that the proposals could not be supported on any ground and that the Government had committed a breach of faith in even considering them. Feeling ran so high that I heard more than one staunch Conservative say that he would definitely vote against the Government on this question, while another asserted that he would rather have Mr. Atlee and his Labour supporters governing the country than a Government who would adopt such proposals. There is, I think, little doubt that only the resignation of Sir Samuel Hoare and the frank confession of mistake made by Mr. Baldwin in the House of Commons saved the Government. Even so, their reputation has suffered severely and their actions in this regard will take a lot of living down. It is perhaps fortunate for them that this should have happened at the beginning of their term of office. There are probably several reasons why public opinion should have been so strong against the Paris Proposals, but I think the basis of it was the British spirit of fair play. Whatever may be said about Italy and Abyssinia, Italy has been proved to be the aggressor. She is without just cause using all the might of modern armaments to conquer an ill-equipped, savage nation, and British opinion therefore naturally favours the under-dog. The same thing was manifested at the beginning of the Great War with respect to Belgium. The invasion of Belgium may not have been the real reason why we declared war on Germany, but I am convinced that it largely accounted for the enthusiasm with which the public greeted the declaration of War.

Yours ever,

H. A. P.

New Zealand Law Society.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on December 13, 1935, the President, Mr. H. F. O'Leary, K.C., being in the Chair.

The following District Societies were represented: Auckland, by Messrs. A. H. Johnstone, K.C., J. B. Johnston, and S. R. Mason (Proxy); Canterbury, Messrs. A. S. Taylor and A. F. Wright; Gisborne, Mr. C. A. L. Treadwell; Hamilton, Mr. J. F. Strang; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. W. T. Churchward (Proxy); Nelson, Mr. W. V. Rout; Otago, Mr. R. H. Webb; Southland, Mr. J. C. Prain; Taranaki, Mr. J. H. Sheat (Proxy); Wanganui, Mr. R. A. Howie; Westland, Mr. A. M. Cousins; and Wellington, Messrs. H. F. O'Leary, K.C., C. H. Treadwell, and G. G. G. Watson. The Treasurer, Mr. P. Levi, was also in attendance. An apology for absence was received from Mr. P. S. Anderson, who forwarded the regrets of the Otago Society that no delegate from Dunedin was able to attend.

The Attorney-General.—The President reported that he had congratulated the new Attorney-General on behalf of the Society, and had expressed to Mr. Mason the satisfaction of the profession at the office being once again held by a practising member. These sentiments were heartily endorsed by the meeting.

Welcome to New Delegates.—The President extended a welcome to Messrs. Mason, Churchward, and Prain, who were taking their seats for the first time as delegates, and he expressed his pleasure at the full attendance at the meeting.

Stamp Duty on Transfers of Mortgages.—The following report was received:—

"The President (Mr. H. F. O'Leary, K.C.), with Mr. G. G. G. Watson, and the Secretary, interviewed the Commissioner of Stamp Duties in this connection.

The Commissioner stated that his predecessor (Mr. J. Murray) had obtained the opinions of his District Officers on the points raised by the Society, and that the general view seemed to be that the *ad valorem* duty on transfers of mortgages should be abolished, but that the duty should be retained on the transfer of mortgaged property to the mortgagee.

The Commissioner stated, however, that the Treasury had to be consulted in these matters, and he would therefore obtain their opinion and write to the Society later."

Safeguards as to Granting and Exercise of Judicial and Quasi-Judicial Powers by Ministers of the Crown.—The following reply was received from the Prime Minister:—

"Wellington,
22nd October, 1935.

"Dear Sir,

I have the honour to acknowledge your letter of the 8th instant, communicating the terms of a resolution of the New Zealand Law Society relative to the report of the Donoughmore Committee.

I desire to thank your Society for its offer to assist the Law Officers of the Crown, or myself, in giving effect to the resolution, and in preserving what you very properly refer to as 'those constitutional landmarks and safe-guards which mean so much to English-speaking peoples. . . .'

Should the need arise, I shall be pleased to avail myself of the assistance so generously offered by your Society.

Yours faithfully,
Geo. W. Forbes,
Prime Minister."

Life Insurance Act, 1908, s. 77.—The following report was received from Mr. C. H. Treadwell:—

"Referring to the Life Insurance Act, 1908, s. 77, and my undertaking to give an opinion with reference to the question raised by Mr. Ziman in his letter to the Secretary of the Auckland District Law Society of the 8th August, 1935, as to the desirableness of introducing amendments of the Act so as to make the effect of s. 77 clear, my view is that it is desirable that that should be done.

The introduction, however, of legislation amending s. 77 is quite a small matter compared with the general amendment of the Life Insurance Act, and it seems to me that if the Act is going to be amended then such important sections as those that refer to the protection of Life Insurance Policies from creditors, say, s. 66 and other sections, should be also dealt with by legislation.

I have, time after time, brought this matter up before the Government Insurance Department with the object of getting an amending statement introduced or a consolidating Act introduced so that these flagrant defects in the Act should be remedied. It is absurd to try and amend s. 77 without getting provisions introduced to put the provisions with reference to the protection of creditors on a sound basis.

If the Council would like me to undertake an attempt to get this legislation introduced, I shall be quite pleased to endeavour to do so. The Government Insurance Commissioner, I feel sure, would only be too pleased to have the legislation introduced. The legislation wants to be drafted by one who is an expert in this class of legislation."

The President pointed out that what was wanted was a general amendment of the Act, which was continually being criticised by the Supreme Court Bench.

It was decided that an Auckland committee, consisting of Messrs. A. H. Johnstone, K.C., J. B. Johnston, and G. P. Finlay, should interview the Attorney-General, draw his attention to the defects in the Act, and point out the need for a comprehensive amendment, particularly in connection with s. 77, and also ss. 65 and 66.

Life Insurance Act, 1908, ss. 65 and 66.—The Hawke's Bay Society wrote as follows:—

"Hastings,
5th November, 1935.

"Since the Mortgage Corporation of New Zealand has been in existence, its Manager appears to have adopted the practice of reminding the personal representatives of deceased borrowers from the State Advances Office that the statutory protection afforded life insurance policy moneys under the sections quoted above does not bind the Crown and calling for provision to be made thereout to meet the claims of the Corporation as mortgagee.

My Council considers that this privilege of the Crown is quite indefensible on humanitarian or moral grounds and tends in many cases to throw an extra and unforeseen responsibility upon executors and administrators. There seems to be no honest reason why in such circumstances the Crown in general and the Corporation in particular should be in any better position than any other secured creditor of a deceased policy holder, and I am directed to ask that this matter be given consideration by your Council at the first opportunity with the view of procuring an amendment of the law to remove the injustice."

The Committee appointed, *supra*, was instructed to bring this matter to the attention of the Attorney-General also.

War Regulations Continuance Act, 1920.—The following letter was received from the Prime Minister:—

"Wellington,
2nd October, 1935.

"Dear Sir,

I am in receipt of your letter of the 26th ultimo in reference to the War Regulations Repeal Bill.

I note the request of your Council and am going into it.

Yours faithfully,
Geo. W. Forbes."

It was decided to ask the new Government to undertake the repeal of the Regulations.

Costs for Extra Days in Court of Appeal.—The Secretary of the Rules Committee wrote as follows :—

" 24th October, 1935.

" At the request of the Wellington District Law Society the above question was considered by the Rules Committee at its meeting on 16th instant when the enclosed amendment was tentatively adopted. It was resolved that the tentative amendment be referred to the New Zealand Law Society for an expression of its views.

I should be glad if you would be good enough to lay the matter before your Council and advise me in due course of its views as to the desirability of the amendment."

Proposed Amendment of Court of Appeal Rules.

Rule 26 is amended by deleting the words " If case is from a distance : £50 per centum extra," and substituting the following :—

" If case is from a distance : In the discretion of the Court a sum not exceeding fifty per centum extra in the foregoing items.

" For every day of hearing after the first :—

" (*a*) A sum to be fixed by the Court not exceeding £15/15/- ; and

" (*b*) If second counsel appears and the Court so directs a further sum to be fixed by the Court not exceeding £10/10/-."

Rule 22 is amended by adding thereto the following words :—

" The amount for which security is to be given shall unless the Court of first instance otherwise orders be fixed without reference to costs allowable for any day of hearing after the first. An application to the Court of first instance under this Rule may be made before or after notice of appeal has been given. Security under this Rule shall not be required for the performance of the judgment appealed from but this provision is without prejudice to the power of the Court of first instance to require security on granting a stay of execution."

It was decided that the following amendments should be made :—In (*a*), £15/15/- to be altered to £26/5/- ; and in (*b*), £10/10/- to be altered to £15/15/- ; and that the scale should be approved as amended, the Rules Committee to be asked to take the necessary steps to have the scale put into operation.

Mortgagors Final Adjustment Act, 1934-35, Death Duties Act, 1921.—The following letter to the Secretary from the Attorney-General was received :—

" Wellington,
18th October, 1935.

" Dear Sir,

I have your letter of the 27th ultimo in this matter.

Section 74 of the Death Duties Act, 1921, referred to by you (and with it the next succeeding section), refers to duty paid in excess under the Act—that is to say, duty paid under an erroneous assessment—and enables the recovery of moneys paid in those cases where assessment was made in error and the person assessed has paid duty which he was under no obligation to pay. This would appear reasonably obvious from the wording of the sections themselves, but the position is put beyond doubt by the decision of the late Sir John Salmond in *Public Trustee* v. *Minister of Stamp Duties*, [1924] N.Z.L.R. 328. The representations made by your Council are apparently based upon the erroneous assumptions, first that the sections mentioned operate to enable a refund of duty in cases where, by reason of events happening subsequent to the date of death, the value of the assets comprising the dutiable estate is reduced below the value placed upon such assets by the Commissioner for death duty purposes ; and, secondly, that the ' writing down ' pursuant to the provisions of the Rural Mortgagors Final Adjustment Act, 1934-35, of principal sums payable under a mortgage operates to reduce the ' final balance ' of a deceased estate.

While I appreciate that reductions of the nature mentioned may be made many years subsequent to the death of a mortgagee, there does not appear any present necessity for amendment of the law. Death duty is by its very nature a tax levied upon values ascertained as at the date of death ; the Act so provides, and it has on more than one occasion been held, as well by the New Zealand as by the English Courts, that what has to be ascertained is the actual value of the property in question as at death. In the normal case the value of a mortgage forming part of the dutiable estate is in the first instance assessed by the administrator when making his returns, and frequently this assessment is accepted by the Commissioner. Where the Commissioner is unable to accept such assessment, he normally estimates the value of the mortgage after obtaining a special valuation of the mortgaged land and after taking into account such relevant factors as the worth of the personal covenant given by those liable under the mortgage, and the amount secured by existing prior mortgages. The Commissioner's estimate is, however, not automatically binding upon the administrator, who has his remedy if he considers such estimate too high. If he does not avail himself of that remedy he cannot afterwards be heard to complain that subsequent events have proved that both he and the Commissioner were mistaken as to the value as at the date of death : nor is he entitled at any subsequent date to ask for a refund of duty paid merely because of the fact that a mortgage or some other asset has become depreciated in value by reason of circumstances or conditions arising subsequent to the death of the deceased, and no longer represents the value as at which it was assessed for death duty purposes. This rule of law is based upon the fact that death duty is levied upon the value of assets as at death, and operates with equal force against the Commissioner where the value of assets is increased by reason of subsequent events—vide *re Jameson*, [1925] V.L.R. 244.

In the circumstances detailed above, it would seem that any existing risk of injustice to the subject by reason of inaccurate valuations of mortgages for death duty purposes is inevitable, but is in any event slight and neither different from nor greater than the risk involved in the case of shares, debts, and other assets ; and that the subject is already adequately safeguarded by the existing statutory provisions.

Yours faithfully,
Geo. W. Forbes,
Attorney-General."

It was stated that the Canterbury Society had received a letter from a practitioner criticising the above reply, and the matter was therefore held over until next meeting to allow consideration of the criticism.

Disciplinary Committee.—The Council, having decided that the number of members should be seven, proceeded with the appointment of the members of the Disciplinary Committee under s. 2 of the Law Practitioners Amendment Act, 1935. As nine nominations were received, a ballot was then taken, and the following members were declared elected :—Messrs. H. F. O'Leary, K.C., F. B. Adams, A. T. Donnelly, A. H. Johnstone, K.C., H. B. Lusk, G. G. G. Watson, and C. H. Weston, K.C.

Designation as " Dr."—Whether Barrister Holding Doctorate Should be Referred to in Court as " Dr." or " Mr." The following letter was received :—

" London,
29th October, 1935.

" Dear Sir,

In reply to your letter of the 26th September, in the Courts in England holders of legal degrees entitling them to the use of the prefix ' Dr.' are not so addressed in Court.

Upon a previous occasion the Council has ruled that the degree of Doctor of Law does not confer any right of precedence in Court.

It follows therefore that the differentiation is not existent in Court.

The actual degree at Oxford entitled to the social use of the prefix is D.C.L. (Doctor of Common Law) and unless a member of the University has attained to that he would not be entitled to its use on any occasion.

Yours faithfully,
E. A. Godson,
Secretary, General Council of the Bar."

It was decided to adopt the above ruling and to circulate it among the District Law Societies.

(*To be concluded*).

Practice Precedents.

The Administration Act, 1908.

Letters of Administration to Attorney of Guardian of Minor Durante Minore Aetate.

If the sole executor is a minor, administration *durante minore ætate* may be granted to his guardian for his use and benefit until he shall attain the age of twenty-one years.

It appears the minor elects a guardian himself for the purpose of obtaining letters of administration: see *Mortimer on Probate Law and Practice*, p. 363 *et seq.*

A grant may be made to the attorney of a person residing out of New Zealand: see R. 531E of the Code of Civil Procedure: *Stout and Sim's Supreme Court Practice*, 7th Ed., 335. The grant is made to the attorney for the use and benefit of the minor until he attains the age of twenty-one years or the guardian himself applies: *Mortimer, op. cit.*, p. 361.

An appropriate form of bond in a case of this nature and used in the Supreme Court of New Zealand is found in *In the Estate of G. J. G. Tancred*, (1913) 32 N.Z.L.R. 991.

Attention is drawn by way of general interest to R. 198 of the Code, (*op. cit.*, p. 169) and to the case of *In re Gaetano Vadala*, [1922] N.Z.L.R. 449, where an affidavit sworn in New South Wales did not properly describe in the jurat the person who took the affidavit. In this case it is sworn before "a Commissioner of the Supreme Court of New Zealand for taking affidavits in New South Wales."

MOTION TO LEAD GRANT OF LETTERS OF ADMINISTRATION TO ATTORNEY OF MINOR.

IN THE SUPREME COURT OF NEW ZEALAND

.....District.

.....Registry.

IN THE ESTATE OF A.B. &c.

deceased.

Mr. of counsel for C.D. of the applicant herein TO MOVE before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Courthouse on day the day of 19 at o'clock in the forenoon or so soon thereafter as counsel can be heard for an order that letters of administration of the estate effects and credits of A.B. of deceased situate or outstanding or recoverable in New Zealand be granted to the said C.D. as attorney for E.F. of in the Commonwealth of Australia the duly elected guardian of G.H. for the use and benefit of the said E.F. until the said G.H. attains the age of twenty-one years or until the said E.F. applies for and obtains letters of administration of the estate of the said A.B. deceased UPON THE GROUNDS:

(*a*) That the said A.B. died intestate.

(*b*) That the said G.H. is one of the next-of-kin of the said deceased and is a minor who has elected his uncle E.F. to be his guardian for the purpose of obtaining letters of administration.

(*c*) That the said E.F. and G.H. are the only next-of-kin of the said A.B. deceased.

(*d*) That the said G.H. being a minor has elected his uncle E.F. to be his guardian for the purpose of obtaining letters of administration.

AND UPON THE FURTHER GROUNDS appearing in the affidavits of and filed herein.

Dated at this day of 19 .

Solicitor for applicant.

Certified pursuant to the Rules of Court to be correct.

Counsel moving.

MEMORANDUM BY COUNSEL.

A person may elect a guardian for the purpose of obtaining letters of administration: *Mortimer, op. cit.*, 2nd Ed., p. 865.

A grant may be made to the attorney of a person residing out of New Zealand: R. 531, Code of Civil Procedure, p. 335.

A grant may be made to the attorney of the guardian of minors until one of them attains the age of twenty-one years or the guardian himself applies. *Mortimer, op. cit.*, 2nd Ed., p. 361.

As to the form of administration bond, see *In The Estate of G. J. G. Tancred*, (1913) 32 N.Z.L.R. 991.

Counsel.

AFFIDAVIT OF TO LEAD GRANT OF LETTERS OF ADMINISTRATION.

(*Same heading.*)

I C.D. of make oath and say as follows:—

1. That I knew A.B. of now deceased when alive and that the said A.B. was resident or was domiciled at within this Judicial District and that the nearest Registry Office of this Court to the place where the said A.B. resided or was domiciled is at .

2. That A.B. abovementioned died at on or about the day of 19 as I am able to depose from having seen his dead body after death.

3. That the said A.B. was at the time of his death a widower having been married once only and left him surviving one son namely born on .

4. That the only other next-of-kin of A.B. deceased is a brother E.F. resident in in the Commonwealth of Australia.

5. That the said G.H. has elected his uncle E.F. to be his curator or guardian for the purpose of obtaining letters of administration of the estate of the said deceased to be granted to him for the use and benefit of the said G.H. and until he attains the age of twenty-one years.

6. That I am the duly appointed attorney of the said E.F. under and by virtue of a power of attorney bearing the date the day of 19 under the hand of the said E.F. a true copy of which power of attorney is hereunto annexed and marked "A."

7. That since the death of the said deceased I have had access to his papers and repositories and that I have searched diligently therein for any will or testamentary writing made or signed by the said deceased and that I have been unable to find any such will or testamentary writing and I have been unable to learn that the said deceased ever made or signed any such will or testamentary writing.

8. That I do verily believe that the said deceased died intestate and that the said E.F. and G.H. are one of the next-of-kin of the said deceased.

9. That to the best of my knowledge information and belief the estate effects and credits of the said deceased to be administered by me are under the value of £ .

10. That I will well and truly administer the personal property according to law or assign pay over and account for the same to the said or to any other person or persons appointed administrator of the said deceased after the appointment of me this deponent as attorney for the said E.F.

11. That I will exhibit unto this Court a true full and perfect inventory of all the estate effects and credits of the deceased within three calendar months after the grant of letters of administration hereof to me and that I will file a true account of my administratorship within twelve calendar months after the grant of such letters.

Sworn &c.

LETTERS OF ADMINISTRATION.

(*Same heading.*)

TO C.D. of as the duly appointed attorney of E.F. of the duly elected guardian of G.H. a minor and one of the next-of-kin of the said A.B. deceased.

WHEREAS the said A.B. departed this life intestate on or about the day of 19 AND WHEREAS G.H. one of the next-of-kin of the said A.B. deceased is a minor and has duly elected his uncle E.F. as his guardian for the purpose of obtaining letters of administration of the estate of the said deceased AND WHEREAS you are the duly appointed attorney of the said E.F. and have applied to this Honourable Court for letters of administration to be granted to you as such YOU ARE THEREFORE FULLY EMPOWERED and authorised by these presents to administer the estate effects and credits

of the said deceased situate or outstanding in New Zealand and to demand and recover whatever debts may belong to his estate and pay whatever debts the said deceased did owe so far as such estate effects and credits extend you having been already sworn well and faithfully to administer the same and to exhibit a true and perfect inventory of all his estate effects and credits unto this Court on or before the day of next and also to file a true account of your administration hereof on or before the day of 19 AND YOU ARE THEREFORE by these presents constituted administrator of all the estate effects and credits of the said deceased situate or outstanding or recoverable in New Zealand for the use and benefit of the said E.F. as such guardian as aforesaid and until the said E.F. or some other person or persons legally entitled hereto shall apply for and obtain letters of administration of the estate of the said deceased or until the said G.H. shall attain the age of twenty-one years.

Given under the seal of the Supreme Court of New Zealand at this day of 19 .

Registrar.

ADMINISTRATION BOND.

(*Same heading.*)

KNOW ALL MEN BY THESE PRESENTS that we C.D. of and of and of are held and firmly bound unto Esquire Registrar of the Supreme Court for the said District at in the sum of £ for which payment well and truly to be made to the said or to such Registrar for the time being at we do and each of us doth bind ourselves and each of us and the executors and administrators of the said C.D. and jointly and severally firmly by these presents.

WHEREAS by order of this Court of the day of 19 it is ordered that letters of administration of the estate effects and credits of A.B. late of deceased be granted to C.D. of as attorney for E.F. of the duly elected guardian of G.H. a minor on his giving security for the due administration thereof

AND WHEREAS the said C.D. has sworn that to the best of his knowledge information and belief the said estate effects and credits are under the value of £

NOW the condition of the abovewritten bond is that if the above bounden C.D. exhibits unto this Court a true and perfect inventory of all the estate effects and credits of the said deceased which shall come into the possession of the said C.D. or any other person by his order or for his use on or before the day of 19 and well and truly administers the same according to law or duly conveys transfers assigns pays over or accounts for the same to the said E.F. the guardian of G.H. a minor or to the administrators of the said deceased after the appointment of the said C.D. as attorney for the said E.F. and renders to this Court a true and just account of the said administratorship on or before the day of 19 then this bond shall be void and of none effect but otherwise shall remain in full force.

Dated at Wellington this day of 19 .

Signed by the said in the presence of .

AFFIDAVIT OF JUSTIFICATION OF SURETIES.

(*Same heading.*)

We of and of severally make oath and say :—

1. That we are the proposed sureties on behalf of C.D. in the intended administrator of the estate of the above-named A.B. deceased in the penal sum of £ for his faithful administration of the said estate of the said deceased.

2. That I the said for myself make oath and say that I am after payment of all my just debts well and truly worth in real and personal estate the sum of £ .

3. That I the said for myself make oath and say that I am after payment of all my just debts well and truly worth in real and personal estate the sum of £ .

Severally sworn etc.

ELECTION BY MINOR.

(*Same heading.*)

WHEREAS A.B. of deceased died on or about the day of 19 at a widower leaving G.H. his lawful child and only person entitled to share in his estate being now a minor of the age of years

NOW I G.H. of in the State of New South Wales a minor DO HEREBY MAKE CHOICE OF and elect E.F. of my uncle to be the curator or guardian for the purpose of obtaining letters of administration of the estate of the said A.B. deceased to be granted to him for my use and benefit and until I attain the age of twenty-one years.

IN WITNESS WHEREOF I have hereunto set my hand this day of 19 .

Signed by the said G.H. in the presence of :—

Name :

Address :

Occupation :

AFFIDAVIT OF .

(*Same heading.*)

I of make oath and say as follows :—

1. That on the day of one thousand nine hundred and I read over the election by minor of guardian to take grant of letters of administration and hereunto annexed and marked with the letter " A " to G.H. and explained the purport of the document to him.

2. That prior to his execution thereof he informed me that he understood the contents thereof and that he desired his uncle E.F. to be his guardian in connection with the above estate.

3. That the said G.H. thereupon signed the said election in my presence and the signature G.H. thereon is in the proper handwriting of the said G.H.

4. That I know and am well acquainted with the said E.F. and the said G.H. and that I acted for a number of years as solicitor for the said E.F. in connection with his business as estate agent.

Sworn at this day of 19 before me : a Commissioner of the Supreme Court of New Zealand for taking affidavits in New South Wales.

Rules and Regulations

Companies (Bondholders Incorporation) Act, 1934-35. Regulations under s. 40.—*Gazette*, No. 1, January 9, 1936.

Friendly Societies Act, 1909. Temporary exemption granted from provisions of s. 50 (4).—*Gazette*, No. 1, January 9, 1936.

Mortgagors and Tenants Relief Act, 1933. Rural Mortgagors Final Adjustment Act, 1934-35. Amending Regulations : Rural Mortgagors Regulations, 1935 (No. 2).—*Gazette*, No. 1, January 9, 1936.

Defence Act, 1909. Financial Instructions and Allowance Regulations for the New Zealand Military Forces : Amendment No. 42.—*Gazette*, No. 1, January 9, 1936.

Noxious Weeds Act, 1928. Special Order declaring certain noxious weeds within the Borough of Taihape.—*Gazette*, No. 1, January 9, 1936.

Judicature Act, 1908. Sittings of the Supreme Court, 1936.—*Gazette*, No. 1, January 9, 1936.

Friendly Societies Act, 1909. Temporary exemptions granted fron the provisions of s. 50 (4).—*Gazette*, No. 2, January 16, 1936.

Customs Act, 1913. Prohibition of importation of certain insects, etc.—*Gazette*, No. 2, January 16, 1936.

Finance Act, 1935. Post and Telegraph Officers' Sick-Benefit Fund Regulations.—*Gazette*, No. 2, January 16, 1936.

Defence Act, 1909. Regulations for the N.Z. Military Forces : Amendment No. 49.—*Gazette* No. 2, January 16, 1936.

Customs Acts. Minister's Decisions.—*Gazette*, No. 2, January 16, 1936.

Sales Tax Act, 1932-33. Minister's Decisions.—*Gazette*, No. 2, January 16, 1936.

Health Act, 1920. Application of the Drainage and Plumbing Regulations to the Borough of Waipukurau.—*Gazette* No. 8, January 23, 1936.

Orchard-tax Act, 1927. Special orchard-tax payable in the Waimea Commercial Fruitgrowing District, revoked.—*Gazette* No. 8, January 23, 1936.

Land and Income Tax (Annual) Act, 1935. Income-tax payable on February 10, 1936.—*Gazette* No. 8, January 23, 1936.

Customs Acts. Minister's Decision.—*Gazette* No. 8, January 23, 1936.

Judicature Act, 1908. Court of Appeal Amendment Rules.—*Gazette* No. 9, January 30, 1936.

Unemployment Amendment Act, 1931. Exemption of certain classes of persons from payment of General Unemployment Levy.—*Gazette* No. 9, January 30, 1936.

Noxious Weeds Act, 1928. Certain plants declared to be noxious weeds in Rangiora County.—*Gazette* No. 9, January 30, 1936.