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"There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour can start the pulse of an English Judge upon the Bench, or move by one hair's breadth the even equipoise of the scales of justice."

—LORD BOWEN.

Vol. XIV. Tuesday, October 4, 1938. No. 18.

In New Zealand's Final Appellate Tribunal.

THE celebration of the centennial of the commencement of British rule in this country will soon be upon us, and fitting preparations are already being made by the Government and people of the Dominion. Inseparable from British rule is the administration of British justice, and it is well at this stage of our national and legal development that the appeals from our superior Courts to the Sovereign in Council during the first century of our nation's legal life should now be collected together in one volume.* If for no other reason than its great historical interest, the appearance of *New Zealand Privy Council Cases*, for the period commencing in 1840, is opportune and welcome.

It is not our purpose here to consider the nature and legal effect of the opinions of their Lordships of the Judicial Committee of His Majesty's Privy Council that find permanent record in this volume, or to consider in detail the definitive pronouncements it contains. We propose merely to recall the human interest and the historical value that the new publication provides in its 816 pages.

In point of date, the first judgment is found to be a decision of the Supreme Court of New Zealand, Martin, C.J., and H. S. Chapman, J., *The Queen (on the Prosecution of C. H. McIntosh) v. Symonds*. Its inclusion is necessary, owing to its reference in opinions of the Judicial Committee itself, and in other judgments, for example, *Wi Parata v. Bishop of Wellington*, (1877) 3 N.Z. Jur. (N.S.) S.C. 72, where the only reference is "Parliamentary Papers, December, 1847." A perusal of *The Queen v. Symonds* shows its great constitutional importance, and the convenience of its reproduction in accessible form needs no stressing.

The first appeal from any New Zealand Court to the Judicial Committee, *The Queen v. Clarke*, came before the ultimate appellate tribunal from the Supreme Court in 1849, and their Lordships' opinion was given in 1851 by the Rt. Hon. Dr. Lushington, when the appeal was allowed.

From 1851, when *The Queen v. Clarke* was decided, until 1931, when *Benson v. Kwong Chong* was considered by their Lordships, fifty-one judgments of the Court of Appeal were affirmed, and thirty were reversed, while five were affirmed subject to variation, and one was varied by being reversed in part. During the same period, three Supreme Court judgments were reversed, and three appeals from the Native Appellate Court were dismissed. Since 1932, we find that the Judicial Committee has affirmed seven judgments of the Court of Appeal and reversed four, while one was varied. So that, from 1851 to the present date, fifty-eight judgments of the Court of Appeal have been affirmed, thirty-four reversed, and seven varied.

In glancing, however casually, over the pages of *New Zealand Privy Council Cases*, great names—of counsel as of Judges—pass in review before our eyes. As Lord Haldane said in an article in the *English Review* (July, 1927):

> "It is only what one might expect to find that a tribunal with such varied duties, and working in such an atmosphere, should have produced at times great personalities. Looking back over the interval since it was given its present form by the Act of William IV, the list of the names of its Judges contains those of a succession of impressive personalities. Lydhurst, Brougham, Cottenham, Kingsdown, Campbell, Westbury, Hatherley, Parkes, Willes, Cairns, Selbourne, Blackburn, Watson, Hobhouse, Herschell, Macnaghten, Davey, are among the names in that list."

With the exception of very few, all those great lawyers have been associated with appeals from the New Zealand Courts. Very often, in the eighty-year period covered, the foremost counsel of their day appear at their Lordships' Bar and reappear as members of their Lordships' Board. Lord Haldane himself appeared for New Zealand litigants at least a dozen times; and he delivered their Lordships' opinion on about half a dozen occasions. Sir Robert Reid, Maugham, Sir Robert Finlay, Cave, and Buckmaster, all future Lord Chancellors, made frequent appearances while at the Bar, and each of them delivered at least one opinion of the Board. Other great judicial figures appeared at their Lordships' Bar in New Zealand appeals: Davey, Hannen, Warrington, Tomlin, Cripps (afterwards Lord Parmoor), Farwell, Asquith, Younger (Lord Blanesburgh), Hamilton (Lord Sumner), Phillimore, Fitzjames Stephen, Romer, Cozens-Hardy, Boyd Merriman, Cockburn, Isaacs, Simon, and Wilfred Greene; and, several times, that great Victorian figure, Benjamin, Q.C. Alone among the great advocates of our time, F. E. Smith, K.C., did not appear in appeals from New Zealand.

The Earl of Halsbury, with three opinions in his name, Lord Buckmaster with four, Lord Loreburn with three, Lord Herschell, two, and Lords Selborne, Cave, and Hailsham with one each, represent the Lord Chancellors. Among the Law Lords we find the names of Finlay, Hobhouse, Merrivale, Atkinson, Farwell, Dunedin, Collins, Lindley, James of Hereford, Shaw of Dunfermline, Wrenbury, Watson, Shand, Blanesburgh, Russell of Killowen (the present one), Robertson, Thankerton, Sumner, Blackburn, Sankey, and Parmoor.

Lord Kingsdown, whom Lord Bowen considered to be supreme among the members of the Judicial Committee in the Victorian era, is represented by one opinion, written in 1862. According to the tradition

* *New Zealand Privy Council Cases, 1840–1932*, being appeals from the New Zealand Courts determined by the Judicial Committee of the Privy Council. Annotated. Edited by Mr. H. F. Von Haast, with a Foreword by Mr. Robert McVeagh, Barrister-at-Law. Pp. xxvii + 816. Wellington: Butterworth & Co. (Aust.), Ltd.

of Downing Street, he was three times offered the Lord Chancellorship, which he as often refused.

Lords Watson and Macnaghten, whom the present Chief Justice of Canada, in an article in the *Canadian Bar Review*, June, 1925, termed "the Scotsman and the Scotch-Irishman, both possessed by the very genius itself of law and judicature," are both well represented: Lord Macnaghten by six opinions and Lord Watson by four, though both were frequent members of the Board. It was, however, Lord Macnaghten who wrote the opinion of their Lordships in *Wallis v. Solicitor-General*, which provoked a strong protest by the Bench and Bar of New Zealand; and this, forming the Appendix to the volume, preserves the historic pronouncements of the Judges, and recalls the scene when the members of the Bar rose to support a ready endorsement voiced by their senior member.

After Sir Horace Davey, Q.C., had appeared six times as counsel, we find him, as Lord Davey, delivering at least four opinions of the Judicial Committee and sitting in many others. Lord Macnaghten called Lord Davey "the most accomplished lawyer of his day," and no one was better qualified to express an opinion, because it has been said, too, that to appreciate Lord Davey "a man should be a lawyer, and not only a lawyer but a highly trained one—for Lord Davey's argument moved on a high plane of scientific principle in a rarefied atmosphere of pure law, where few but the elect can live and breathe." As Sir Courtenay Ilbert said, "Davey's keen, subtle, analytic intellect threw a piercing white light on the problem before it, marshalled the relative facts in their logical order, disentangled from facts the principles with mathematical precision, and deduced from them the inevitable conclusions."

Then there is Lord Wrenbury, whom in Sir Lyman Poore Duff's words, "all men of his time counted a genius"; Lord Selborne, whose name is always rightly coupled with Lord Cairns in judicial renown; and Lord Lyndhurst, who is said to have had "the finest judicial intellect our race has produced." All these great Judges have served the cause of the administration of justice in New Zealand in its highest appellate tribunal. And it is well that we should be reminded of that fact.

The Imperial nature of the Judicial Committee is prominently before us: one Board comprised the Earl of Halsbury, L.C., Lord Herschell, both Englishmen; Lord Macnaghten, a Scotsman; Lord Morris, an Irishman, and Sir Richard Couch, formerly Chief Justice of Bombay and, later, of Calcutta; or, again, Viscount Cave, L.C., an Englishman; Viscount Haldane, a Scotsman; Lord Carson, an Irishman; and Sir Lyman Poore Duff, a Canadian. Lord Villiers, of South Africa, and Sir Samuel Griffith, of Australia, appear at times as members of the Board, as does Lord Ashbourne, a former Lord Chancellor of Ireland.

There have been three New Zealand members of the Judicial Committee: Sir Joshua Williams (1914–15), Sir Robert Stout (1921–26), and Sir Michael Myers, whose appointment dates from 1931. None of them sat during the hearing of an appeal from New Zealand.

Mr. C. P. Skerrett (as he then was) appeared four times before the Judicial Committee; Sir Francis Bell led in four cases, and appeared in two others; Sir John Salmond in two, and C. B. Morison, K.C., and W. B. Rees, once each. There were several appearances by F. M. Ollivier and E. G. Jellicoe, who were members of both the New Zealand and English Bars.

A record that is unique—using that much-misused word in its strictly accurate sense—is that of the present Chief Justice, Sir Michael Myers. He had a bloodless victory at their Lordships' Board in 1911 in *Allardice v. Allardice*, and he crowned his career at the Bar with five successful appearances in 1926—an unbeaten record that will stand for a long time. He is the first New-Zealand-born member of the Judicial Committee, and the only member of the New Zealand Bar to have appeared before their Lordships and later to become one of their number. To him, *New Zealand Privy Council Cases* is very fittingly dedicated.

As the new work contains, for the first time, reports of New Zealand appeals that have not been hitherto reported, and as all the reported cases are not only referred to the relative judgments in other New Zealand *Reports*, but are also annotated with all cases in which reference to them has since appeared, the volume completes the series of New Zealand *Reports* which have appeared since the *Macassey Reports*, the *Jurist* series and the *Court of Appeal Reports*. From a practical viewpoint, therefore, it is a necessary adjunct to the library of any practitioner who desires to have the complete references to cases in New Zealand from the Supreme Court up to and including the highest judicial tribunal to which Dominion litigants have access.

Summary of Recent Judgments.

COURT OF APPEAL.
Auckland.
1938.
August 3, 4, 22.
Myers, C.J.
Kennedy, J.
Fair, J.
Callan, J.
Northcroft, J.

GODWIN v. WALKER.

Fugitive Offenders—Rendition to Australia from New Zealand—Provisional Warrant issued in State of Commonwealth of Australia for Offence against Law of State—"British possession"—"One part of Her Majesty's dominions"—"Legislature"—"Punishable by law in that possession"—Fugitive Offenders Act, 1881 (Imp.), s. 2, 3, 12, 13, 31, 39—Interpretation Act, 1889 (Imp.), s. 18 (7)—Commonwealth of Australia Constitution Act, 1900 (Imp.), s. 9, cls. 108, 109—Order in Council, 1925 (Imp.) (1926 New Zealand Gazette, 77).

The Commonwealth of Australia is one "British possession" and is "one part of Her Majesty's dominions" for the purposes of the Fugitive Offenders Act, 1881.

The Order in Council, 1925 (Imp.), in so far as it substituted the Commonwealth for the Australian Colonies that had become its constituent States, proceeded upon a proper interpretation of the statute and was a correct application of the statute to the existing facts.

"Punishable by law in that possession" in s. 13 of the statute, as applied to an alleged offence committed anywhere in the Commonwealth, means conduct that is punishable by the law in force in that part of the Commonwealth where the offence was committed, whether such law be that of the State within whose territory the offence was alleged to have been committed, a law of the Commonwealth, an Act of the Imperial Parliament, or the common law in force in such part of the Commonwealth.

Therefore, rendition of a fugitive offender may be obtained from New Zealand to the Commonwealth of Australia under Part II of the Fugitive Offenders Act, 1881 (Imp.), for an offence against the law obtaining in any part of the Commonwealth where such offence is alleged to have been committed.

So held by the Court of Appeal, granting a mandamus commanding a Magistrate to hear and determine an application for the endorsement of a warrant for the rendition to Sydney

in the Commonwealth of Australia of an alleged fugitive offender, if called upon so to do.

McArthur v. Williams, (1936) 55 C.L.R. 324, applied.
John Sharp and Sons, Ltd. v. Ship "Katherine MacKall," (1924) 34 C.L.R. 420, and **Westralian Powell Wood Process, Ltd. v. The Crown,** [1921] 2 A.C. 133, referred to.
McKelvey v. Meager, (1906) 4 C.L.R. 265, considered and not followed.
Re Munro and Campbell, [1935] N.Z.L.R. 159, G.L.R. 230, overruled.
Re Munro, [1935] N.Z.L.R. 271, G.L.R. 313, as to the reasoning, dissented from.

Counsel: Attorney-General, Hon. H. G. R. Mason, and **Evans-Scott,** for the plaintiff; **Henry** and **F. McCarthy,** for Regner, and interested party.

Solicitors: Crown Law Office, for the plaintiff; **Henry and McCarthy,** for Regner, an interested party.

Case Annotation: *McArthur v. Williams,* E. and E. Digest, Suppl. Vol. 24, p. 44, para. n. ii; *John Sharp and Sons v. Ship "Katherine MacKall," ibid.* 1, p. 46, para. sw; *Westralian Powell Wood Process, Ltd. v. The Crown, ibid.,* Vol. 36, p. 533, para. a; *McKelvey v. Meagher, ibid.,* Vol. 24, p. 889, para. n.

SUPREME COURT. Christchurch. 1938. August 26; September 9. *Northcroft, J.*

OGIER v. CHRISTCHURCH CITY CORPORATION.

Nuisance—Electric-power Pole—Erected by Local Authority—Site either Carriage-way or Footpath—Collision of Vehicle with Unlighted Pole—Liability of Local Authority—Municipal Corporations Act, 1933, ss. 173, 175 (4) (*f*), 287.

If an obstruction to a highway lawfully erected by the local authority be a nuisance—such as an electric-power pole unlighted at night—then, although it be upon that part of a street that has been determined, under s. 175 (4) (*f*) of the Municipal Corporations Act, 1933, as a footway only, the local authority is not absolved from liability for damage arising from a collision with such unlighted obstruction.

Polkinghorne v. Lambeth Borough Council, [1938] 1 All E.R. 339, and **Mayor, &c., of Oamaru v. Clarke,** [1927] N.Z.L.R. 464, G.L.R. 350, applied.

Counsel: C. S. Thomas, with him **Alpers,** for the appellant; **Lascelles,** for the respondent.

Solicitors: C. S. Thomas, Christchurch, for the appellant; **Weston, Ward, and Lascelles,** Christchurch, for the respondent.

SUPREME COURT. Napier. 1938. August 24; September 9. *Quilliam, J.*

IN RE **MOONEY AND HYDE (BANKRUPTS), OFFICIAL ASSIGNEE v. MARTIN.**

Chattels Transfer—Instrument by Way of Security—"Book or other debts"—Whether "Chattels"—Chattels Transfer Act, 1924, ss. 2, 31.

As book or other debts are not included in the definition of "chattels" in s. 2 of the Chattels Transfer Act, 1924, s. 31 of that Act is a manifest inconsistency and is of no effect.
In re Burton, Smith v. Montgomery, [1938] N.Z.L.R. 637, G.L.R. 343, on this point, dissented from.
Held, further, That the following letter from the bankrupts to the manager of a bank was an equitable assignment:—
"You are hereby authorized to utilize all or any part of the amount due from the Public Works Department in payment of cheque in favour of J. D. Martin for £105 (one hundred and five pounds)."

Counsel: Hallett, for the appellant; **H. B. Lusk,** for the respondent.

Solicitors: Hallett, O'Dowd, and Morrison, Napier, for the appellant; **Kennedy, Lusk, Morling, and Willis,** Napier, for the respondent.

SUPREME COURT. Dunedin. 1938. September 2. *Myers, C.J.*

CHALMERS AND OTHERS v. SMITH AND SMITH, LIMITED.

Industrial Conciliation and Arbitration—Award—Employment to be deemed a Weekly Employment—Work Rationed to give Employee Two Weeks' Work in Three—"Fault" of the Employer—Whether Breach of Award.

An award provided that "employment shall be deemed to be a weekly employment," and also that "no deduction shall be made from the weekly wage except for time lost through the worker's sickness, or default, or his absence from work through no fault o the empl.yer."
Owing to a slackening of trade, the defendant employer established a system of rationing the work, so that each worker lost one week in three.
On a claim for wages by employees who had been so employed, for the weeks so lost by them,

I. B. Stevenson, for the plaintiffs; **A. C. Stephens,** for the defendant.

Held, giving judgment for the plaintiffs, 1. That the award contemplated a continuous employment.
2. That the word "fault" implied something involuntary on the employer's part, and the absence from work in the week in which the workers were not employed was through "the fault of the employer," as the word "fault" must be read in an entirely non-technical sense.

Blenkiron v. Westport Stockton Coal Co., Ltd., [1934] N.Z.L.R. 474, G.L.R. 416, distinguished.

Solicitors: Sinclair and Stevenson, Dunedin, for the plaintiffs; **Mondy, Stephens, Munro, and Stephens,** Dunedin, for the defendants.

SUPREME COURT. Napier. 1938. August 19; September 9. *Quilliam, J.*

Re **R. McGAFFIN, LIMITED (IN LIQUIDATION),** *Ex parte* **LORD.**

Company Law—Winding-up—"Wages"—Company's Agreement to pay Accommodation and Meals of its Servants when absent from Home—Whether Claim for such Expenses ranks as Preferential Claim for "Wages"—Companies Act, 1933, s. 258 (i) (*a*).

Where a company, in addition to a fixed rate of wages, agrees to pay the living or other expenses of a servant when the latter is on the company's business, a claim for such expenses is entitled to rank under s. 258 (i) (*a*) of the Companies Act, 1933, as a preferential claim for wages in the event of the liquidation of the company.
Re Corson Shoe Co., [1934] D.L.R. 555, and **In re Earles Shipbuilding and Engineering Co.,** [1901] W.N. 78, referred to.

Counsel: Nash, in support of motion; **Bate,** for the liquidator, to oppose.
Solicitors: C. W. Nash, Napier, for the creditor; **Simpson and Bate,** Hastings, for the liquidator.

Case Annotation: *Re Corson Shoe Co.,* E. and E. Digest, Suppl. Vol. 4, p. 36, note sr: *In re Earles Shipbuilding and Engineering Co., ibid.,* Vol. 4, p. 475, para. 4286.

SUPREME COURT. Wellington. 1938. September 7. *Myers, C.J.*

RE **PHILLIPS.**

Criminal Law—Reformative Detention—Review of Sentence—Matters for Consideration—Crimes Amendment Act, 1910, s. 5 (1)—Statutes Amendment Act, 1937, s. 6.

In considering a sentence of reformative detention, regard should be had to the nature of the previous convictions rather than their mere number, and also to the mental condition of the prisoner.

SUPREME COURT. (In Chambers.) Wellington. 1938. August 24. *Blair, J.*

IN RE **ODLIN (DECEASED).**

Practice — Probate and Administration — Company — Powers — Memorandum empowering Commercial Company to Act as Executor for any Shareholder—Testatrix, a Shareholder, appointing Company her Executor—Grant of Probate to Company refused—Code of Civil Procedure, R. 518.

The memorandum of association of a company, which had no statutory power to act as executor, specifically empowered the company to act as executor of the will of any of its shareholders. Testatrix, a shareholder, appointed the company as her executor, and its managing director, her husband, as advisory trustee. The company applied for grant of probate to it as the executor in the will named.

Buxton, in support.

Held, That the Court had no power to appoint the company the executor of the will of the testatrix.

In re Atkinson (deceased), [1936] N.Z.L.R. 34, G.L.R. 81, distinguished.

Semble, Application could successfully be made for administration with will annexed to a syndic for the company or, alternatively, to the husband of the testatrix.

Solicitors: Bell, Gully, Mackenzie, and Evans, Wellington, in support of the motion.

SUPREME COURT. Auckland. August 29, 31. *Callan, J.*

IN RE **PARKINSON (DECEASED), McNAMARA AND OTHERS v. PUBLIC TRUSTEE.**

Will—Devises and Bequests—Construction—Clause by which (considered alone) an Equal Fourth Interest in Remainder, subject to Husband's Life Interest, vested on the Death of the Testatrix in each of the Children who survived her—Substitution, in Case of Children predeceasing Testatrix and her Husband, of Issue who should survive her—Capricious Result of literal Interpretation—Whether Construction should be given changing and reducing the Nature of such Vested Interests.

Testatrix, after leaving the whole of her estate to trustees upon trust for her husband for life and after his death or if he predeceased her upon trust for all of her children in equal shares absolutely, made the following provision for substitution:—

"6. In case any of my said children shall predecease me and my said husband leaving issue who shall survive me and my said husband then such issue shall take by substitution and if more than one equally between them the share property or estate whether original or accrued which his her or their parent would have taken but for such parent's death as aforesaid but in case any of my said children shall predecease me without leaving issue as aforesaid then the survivors of my said children shall take equally between them the share or shares whether original or accrued to which such deceased child or children would have been entitled hereunder and if there shall be only one such surviving child as aforesaid then such surviving child shall be entitled to and shall take the whole of my said property and estate."

Testatrix was survived by her husband and by four children, all of whom had attained the age of twenty-one. There were also grandchildren, all born after the death of the testatrix.

Held, That, despite the capricious results following from the conclusion that the interests of the children vested indefeasibly on their mother's death and from reading the phrase "shall predecease me and my said husband" literally—instead of construing "and" as "or," and holding that the interests of the children did not vest indefeasibly until they survived both their father and mother—the four children became entitled upon the death of the testatrix to indefeasibly vested shares in remainder in her estate.

Day v. Day, (1854) Kay 703, 69 E.R. 300, applied.

Counsel: Mahony, for the plaintiffs; **Leary,** for the Public Trustee, the executor of the will—who was also directed to represent infant and unborn grandchildren.

Solicitors: Mahony, Dignan, and Foster, Pukekohe, for the plaintiffs; **Solicitor to the Public Trust Office,** for the defendant.

SUPREME COURT. Auckland. 1938. July 7, 8, 11, 12, 13; Aug. 15. *Reed, J.*

WHATATIRI v. THE KING.

Statutes of Limitation—Crown Grant to Trustee—Impracticability of Performances of Objects of Grant—Permissive Occupation by Natives—Grantee's Successors empowered by Statute to sell Land to the Crown—Alleged Adverse Possession—Claim by Native of Prescriptive Ownership as against the Crown—Effect of Statute—Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1925, s. 7—Real Property Limitation Act, 1833 (3 and 4 Will. 4, s. 27) ss. 2, 3.

Land was given by certain Natives to the Crown upon trust to grant the land to the Anglican Bishop of New Zealand for a church and burial-ground and for a school in pursuance of s. 169 of the New Zealand Native Reserves Act, 1856. By Crown grant that land was granted to the Bishop of New Zealand and his successors for ever upon trust, as a site for a church and burial-ground, and as an endowment for schools for the benefit of the aboriginal inhabitants of New Zealand. After a time, owing to the movement of a large body of Natives to other ancestral lands, it became impracticable to carry out on that site the specified objects of the trust, the land could not be turned to any useful purpose, and descendants of the donors were permitted to occupy the land which had been administered by trustees (the General Trust Board of the Diocese of Auckland). The trustees had no power of sale until the passing of s. 7 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1925, which, after reciting the trust and that it was desired that the General Trust Board of the Diocese of Auckland should be empowered to sell the said land to His Majesty, empowered the Board to sell the said land to His Majesty; and it was enacted that on such sale the land should be deemed to be freed from the said trust.

The suppliant claimed to have acquired in respect of the said land a title by prescription.

Sullivan, for the suppliant; **Meredith** and **Smith,** for the respondent.

Held, That it could not be inferred from s. 7 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1925, that the Legislature knew that a Native claimed ownership by prescription and that the statute was intended to destroy that claim, as the Legislature did not purport to say that the land was the property of the trustees, and the statute was not imperative but permissive.

Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd., [1919] A.C. 744, and **Metropolitan Asylum District v. Hill,** (1881) 6 App. Cas. 193, applied.

Labrador Co. v. The Queen, [1893] A.C. 104; **In re Native Land Court Act, 1894, and the Native Land Laws Amendment Act, 1895,** (1908) 28 N.Z.L.R. 646, 11 G.L.R. 263; and **Solicitor-General v. Tokerau District Maori Land Board,** (1913) 32 N.Z.L.R. 866, 15 G.L.R. 524, distinguished.

Held, further, on the facts, That the suppliant had not proved that the trustee was ever dispossessed or that at any time the suppliant or those through whom she claimed had exclusive possession of the land.

Semble, If the claim had been framed as a claim for a title by prescription to the general body of Natives belonging to the *hapu* instead of for the rights of one individual, they would have been met by the insuperable objection that the trustee had never gone out of possession; that the occupation of the Natives was consistent with the purpose to which the trustee intended to devote it; and there had been no entry into possession adverse to the title of the trustee with the intention of making a title against them.

Solicitors: Sullivan and Winter, Auckland, for the suppliant; **Meredith, Meredith, and Kerr,** Auckland, for the respondent.

Case Annotation: *Central Control Board v. Cannon Brewery,* E. and E. Digest, Vol. 42, p. 705, para. 1217; *Labrador Company v. The Queen, ibid.,* p. 611, para. 118.

Suicide and Life Insurance.

The Principles of Public Policy.

It may be imagined that the decision of the House of Lords in the recent English case of *Beresford v. Royal Insurance Co.*, [1938] 2 All E.R. 602, has caused considerable perturbation to persons in that country who are the assignees or mortgagees of life policies, as well as to those who look on life policies of their own as a useful subject of security if they want to borrow money. The facts were that one Rowlandson effected life policies under which, in 1934, he was insured for £50,000. Being unable to pay premiums, and owing £60,000, including over £40,000 to personal friends, he shot himself a few minutes before the expiration of an extended time for payment of premiums. The policies provided for avoidance if the assured died by his own hand, whether sane or insane, within one year from the commencement of the assurance. The action was by the administratrix for payment of the policy-moneys. At the trial the jury found that deceased was sane when he shot himself.

Swift, J., gave judgment for the plaintiff, saying he was not satisfied that it was contrary to public policy that the insurance company should pay. In the Court of Appeal the decision was reversed, on the ground that it would be contrary to public policy that the Court should assist a man who had committed a felony, or his representative, to receive the fruits of his crime: [1937] 2 K.B. 197. The House of Lords upheld the Court of Appeal. In the final Court, as below, the decision turned entirely on the application of the principles of "public policy." As Lord Macmillan said:

> "There may truly be said to be a conflict of principles of public policy involved, for it is undeniably a principle of public policy that persons who enter into contractual engagements should be required to fulfil them."

The other and cohflicting principle was "that no Court ought to assist a criminal to derive benefit from his crime. It has also been put in this form: that no Court ought to enforce stipulations tending to induce the commission of a crime."

It is fair to observe that the unpleasant position of an assignee was assuaged by an obiter dictum of Lord Atkin's:

> "I cannot see that there is any objection to an assignee for value before the suicide enforcing a policy which contains an express promise to pay upon sane suicide."

Apparently, the same form of contract is to impose different liabilities on the insurer according to the person who seeks to enforce it. Apparently, also, a wife or child to whom the policy is assigned for good but not valuable consideration is not covered. Moreover, there will be one law for the secured creditor and another for the unsecured. If only the deceased's solicitor had been with him in the taxi and suggested a short assignment for the benefit of creditors! The result of retaining the law that suicide is a crime, and that though the criminal cannot be punished other people may be, produces the more anomalies the further its ramifications are traced.

It may be of value to consider whether the decision would be held to be good law in New Zealand. It is to be observed that the principle of public policy involved does not refer to suicide as suicide merely; but, in all the Courts, to suicide as a crime—*felonia de se*. It is suggested, therefore, that the decision has no application to a jurisdiction such as New Zealand in which suicide is not a criminal offence.

It is true that the common law by which certain acts on the part of an individual are pronounced in law to be a felony has not been repealed in New Zealand; so that a person who does those acts may still correctly be called a felon. But unless those acts are punishable under the existing law—the Crimes Act, 1908, or some other statute—they do not in our law amount to a crime; and to be a "felon," unless one is also a criminal, is to be in a position of which nowadays the law takes no notice. Section 7 of the Crimes Act says that an accusation of, or a conviction for, certain crimes shall have the same effect and entail the same consequences as an accusation of felony or a conviction for felony would have had or entailed immediately before the Criminal Code Act, 1893, came into force. The contrary, however, is not enacted; and it does not appear that an accusation of, or a finding of felony, *per se*, has any legal consequences. Suicide in New Zealand may or may not be sinful, according to the deceased's religious views. It may be morally justifiable or morally reprehensible according to the views of morals applied to the case. In no case, however, is it a crime. It would seem to follow that the substratum of the English decision does not exist in New Zealand law, and that the conflict of principles of public policy that had to be resolved cannot arise with us.

An attempt to commit suicide is indeed a crime, and it might be faintly argued that whenever a complete act of suicide is effected there has been a criminal stage at which a complete attempt has been reached. But even on this argument it is not the attempt, but only the completed act, that makes the insurance-money payable, and lets in the principle that if the act is criminal the wrongdoer cannot take a benefit from it.

Though the point has taken forty-five years to emerge, it is not the least important of the results that have followed the passing of the Criminal Code Act. Lord Macmillan may be quoted once more:

> "It is of the first importance . . . that policies of life assurance, which are among the most useful instruments of credit, should not be subject to any contingent invalidity, and the present form of clause was no doubt adopted by the respondents, an eminently reputable company, and presumably by other equally reputable companies, solely with a view to rendering their policies attractive by reason of their stipulated incontestability."

His Lordship's compliment to the insurance company might have been even more fully earned if the company had abstained, in view of the wording of the clause relating to suicide, from contesting its liability to pay. It is satisfactory to reflect that a life policy which has been entered into according to New Zealand law, and which must be construed according to that law, retains its security value; and the only principle of public policy to be considered in construing it is the principle "that persons who enter into contractual engagements should be required to fulfil them."

Learned counsel for the defence in addressing the jury in a running-down action, told them that the plaintiff had set up a number of bogeys. He proceeded to demolish them one by one. "And now we come to the fourth bogey . . .," he was proceeding. Then the learned Chief Justice interposed. "Well, Mr. Blankinblank," he remarked, "you should be satisfied. If what you have said is correct, you are already three up on Bogey."

"The Mind of the Juror."

And its Author.

By A. T. DONNELLY.

The author of this book* is an American living in New York. He is not a lawyer. He is by profession an examiner of disputed documents or what is called in this country "a handwriting or typewriting expert." The reviewer has had the privilege of meeting Mr. Osborn and seeing his methods both in Court and his office, so it may not be out of place before referring to the book to say something of the man, his life, and his work.

Mr. Osborn is now in his eighty-first year. *The Mind of the Juror* establishes that while Mr. Osborn has grown old in the pursuit of knowledge he has retained the mental vigour and freshness of his prime. For over forty years he has practised and "testified" as the Americans say before all sorts of judicial, administrative, and parliamentary tribunals in every State of the Union and throughout the length and breadth of Canada. He has a pontifical reputation all over the American Continent earned by his fairness, competence, and passion for justice during his long and honourable career. Some of his cases are known to us here, such as the famous trial of Hauptmann for the murder of the Lindbergh baby. The evidence of Mr. Osborn and his son, who is associated with him, helped the prosecution to convict Hauptmann for this brutal and unpardonable crime.

Serious disputes about documents and forgeries, while rare in this country, are more frequent in older countries such as the United States. The author probably has done as much as any man now alive to elevate to a science the detection of forgery and the identification of controverted writings and documents. He is a man of great charm, strong personality, and bewildering culture. He is steeped in English literature, Shakespeare most of all, and his reading has so polished and pointed his style that even when he is most technical in his writings he cannot be dull. It is always a pleasure to listen to a man who is a master of his craft, and in his office on Broadway a most instructive day can be spent as Mr. Osborn speaks of his methods and his cases, his successes, and his failures in the midst of his cameras, microscopes, chemical apparatus, instruments, records, and other tools of his trade. In one or two volumes on his desk are examples of the typing of every kind of machine ever made.

He has written three books. *Questioned Documents*, the classic work on this subject, was first published in 1910, and the feature of the book is its insistence upon the reasons for an expert opinion, not the bare opinion alone.

In the Hauptmann case it has been said that every one of more than one hundred capable and experienced newspaper representatives as well as the jury could see from the enlarged illustrations that Hauptmann wrote all the ransom letters. The testimony was not opinion, but demonstration evidence, and was so received and accepted. There was an entire absence in America of criticism of the verdict, largely due to the fact that the case was so thoroughly illustrated and so fully reported that the whole nation was convinced of the guilt of the accused.

As has already been said, the author's characteristic and guiding star during his professional career has been a passion for justice. He has never departed from the standard he set himself in the preface to the first edition of *Questioned Documents*, which standard is a model standard for any expert.

> "In a legal controversy regarding a questioned document the contention of one party must be right and the other wrong; there can be no middle ground. The one purpose of this book is to assist, as in a scientific inquiry, in discovering and proving the fact. Not a line has purposely been included in these pages to give aid and comfort to those on the wrong side whose interests impel them to attempt to prevent the truth from being discovered and shown in a Court of law."

On one occasion Mr. Osborn was consulted about a dispute which arose in New Zealand. He concluded his report in this matter with this useful statement:

> "As a rule incompetent examiners say any two writings are by the same writer. There are necessarily similarities in writings in the same language, and incompetent examiners construe the similarities as evidence of identity."

The second book, *Problem of Proof*, was published in 1922. It is a less technical work, has a wider scope, and some portions of it should be read more than once by any lawyer who in some degree lives for his profession instead of merely living on it.

Its purpose is set out in the preface as follows:—

> "To help the lawyer who has a case to try in which it becomes necessary to prove the facts relating to a disputed document. The lawyer works with facts, ideas, law, testimony, and argument. All of his preparation and all of his efforts finally focus on the central question of proof, and only when he is prepared to prove his case is he ready for trial. The attempt is made to show the necessity for adequate general, as well as technical, preparation, and also the importance of certain special study and training that apparently has been overlooked by many who are called upon as attorneys to protect the rights and interests of others."

The great American jurist, John Henry Wigmore, describes in an introduction to this book how well the author succeeded in his purpose.

> "This volume is a worthy successor of *Questioned Documents*. There is wisdom on every page. It is far more than a book of advice on Document Trials; its ripe wisdom ranges over a wide scope of the practitioner's field. Its emphasis on the study of facts in preparation for trial is pervasive. It contains varied and valuable warnings for both counsel and witnesses. Chapter XV, on Advocacy, is my favourite. It is the climax of the book. The rest could not surpass that mark. I would like to have written that chapter myself, only I could not. It should be read aloud every year before every law class."

The reference by Wigmore to the chapter on "Advocacy" is high praise, but not too high. There is no finer account in our language of the rights and duties of an advocate.

The chapter "Bibliography" contains a list, splendidly annotated, of books recommended by the author to lawyers,

> "which books properly used are in effect intellectual gymnasiums where the girth of the mental biceps can be increased."

Most of these books are English, and many not so well known as they should be.

This book also contains a statement which is worth quoting for two reasons. First, because of the sound-

* *The Mind of the Juror as Judge of the Facts*, by Albert S. Osborn, with Introduction by Professor John H. Wigmore (author of *Wigmore on Evidence*), pp. 239. Albany, N.Y.: Boyd Printing Co.

ness of the statement of general principle, and, secondly, because when the author speaks as he does of evils in the law peculiar to the United States we must remember that the United States inherited the common law of England just as we did, and in some times and places debased and adulterated and neglected it, and so there they have the evils from which we are free.

> "It is the fashion to find fault with the administration of the law, and there certainly are faults and abuses, but now and then let it be said there is more to be thankful for than to criticize. Won by the devotion and sacrifice of thousands through the long years of history that which we vaguely call 'The Law' still stands as the citadel of human freedom. Its menace in some lands during recent days makes Conservatives of many who while in favour of reform are opposed to Anarchy.
>
> "In spite of over-technical procedure and the flood of perjury, of incompetent lawyers and the shortcomings of the Bench, of the weaknesses of the jury system and the abuses of expert testimony, of able attorneys on the wrong side and the debasing contingent fee, of lying experts and the great mass of conflicting precedents, justice prevails in the great majority of cases in the United States. There are grounds for the belief that the stars in their courses are still in league with justice and it behoves the young and aspiring lawyer to see to it that he is on the side of the stars."

The Mind of the Juror was written at intervals over a period of eleven years between 1926 and 1937. The author says in his preface that it is an attempt by him to report some of the operations of the mind of the ordinary citizen called upon to witness the law in actual operation and become an active instrument in what is called the administration of justice. The author goes on to say that it is not to be understood

> "that some juror said everything that is set down in these chapters. It can reasonably be asserted, however, that some juror somewhere if he had reported accurately what was in his mind would have said it."

There is another introduction by Wigmore, who says that

> "This is a book which not only lawyers but citizens at large may profit by reading."

Wigmore goes on to make an observation which applies to us in New Zealand :

> "Jury trial is soon itself to come on trial. A bill of complaint against it is already gradually being framed to bring it before the bar of legislation. Before the cause can be properly heard much more statistical evidence must first be gathered, but in the meantime we now have waiting for us in this book an intelligible accumulation of first-hand impressions supplying that psychological element which mere statistical facts could never reveal."

The author discusses aspects of the jury system which have been under consideration in New Zealand. He emphasizes one serious curable disability of the jury system to be found in the principle of exemption which excuses the best brains in our community from jury service. There is no harsher critic of the jury system in New Zealand than the prominent citizen who has evaded jury service all his life. The State can fairly ask any citizen of any status or occupation to give a few days every few years to assist in the solemn function of the administration of public justice.

He also discusses such questions as the number of jurors and unanimous verdicts. The arguments in favour of the acceptance of verdicts of eleven to one and ten to two in criminal cases are happily not so strong when examined in the light of our working-conditions as they apparently are in the United States.

Some of the chapter headings indicate the nature of their contents :

> "The Lawyer looks at the Jurors."
> "The Jurors look at the Lawyers."
> "The Jurors look at the Witnesses."
> "The Lawyer and the Defence of Crime."

On almost every page any lawyer can find some vigorous statement of interest and importance, although some statements may fail to convince him or may apply only to the administration of justice in the United States generally or in some States of the Union. The following quotations give some idea of the character of the book :—

> "That classical repudiation of old Falstaff by King Henry V, when the kingly office came, is a true expression of the higher human nature and, from the humble juror and the faithful police officer to the highest positions of trust, is repeated over and over in every civilized community. Those elevated to positions of responsibility in many instances surprise their critics by the unexpected qualities that the new duty develops. Like the King, more than one has cast off some low Falstaff, a representative of an unworthy past."
>
> "No doubt one of the reasons for the much more efficient administration of the law in England is the fact that more than ninety-five per cent. of English jurors are Englishmen who are *trying Englishmen*. In cosmopolitan America there often are four or more races in the jury-box, and it is foolish to contend that this is not dangerous especially where a unanimous verdict is required."
>
> "There must, however, have been some fundamental deficiencies, as well as manifest confusion, in that jury that brought in the uncertain, but perhaps correct, verdict : 'We find the defendant almost guilty'."
>
> "The 'crooked' client, however, sometimes is partly to blame for the acts of the lawyer who is somewhat curved."
>
> "There are, however, in every considerable group, and in every court-room, a few of these marked men whose college course covers not four years but forty years."
>
> "With all the criticism of lawyers therefore, something should be said for the good lawyers. Some of us know that it is not in court-rooms alone that human rights are safeguarded by these competent technical men, but in thousands of offices, dingy as well as palatial, yesterday and to-day and to-morrow faithful guardians of justice advise, encourage, admonish, and caution.
>
> "Much of this is not a spectacular service ; it wins little applause, but it protects, it reassures, and greatly adds to human happiness. For much of it no compensation is asked and, except good will, none given. Notwithstanding the common gibes about fees, there are but few merchants on any street who give away so much valuable merchandise as is given by the wise and trustworthy lawyer."
>
> "The honest and intelligent minority jurors in conference do not meekly surrender to the majority and should not do so, but present their view and stand by it if not convinced, but they do not take false pride in their singularity. Juries should sometimes disagree.
>
> "Among the twelve on many juries there is apt to be one man who does take pleasure in differing from others and is especially pleased when he can stand alone.
>
> "There is a tendency to put with Socrates any one who stands alone instead of putting him where he most likely belongs, with the lunatic fringe that surrounds every generation 'the long-haired neurotics or the dancing dervishes'."
>
> "There is no doubt whatever that criminals are in favour of the old rules as well as unanimous verdicts."
>
> "It needs to be said, however, and said with the utmost emphasis, that the administration of law is not by any means the private business of lawyers. It does not deal with wood and iron and lead and brass, but with human rights and liberty and happiness."
>
> "Some superficial psychologists, after a few experiments with immature boys and girls in class-rooms, have presumed to tell Judges and lawyers just how to try all kinds of lawsuits."
>
> "There are many competent men who are appreciative of the subject who, however, are not yet quite ready to put all government, legal, and social affairs into the hands of the psychologists."
>
> "By three or four o'clock in the afternoon in some Courts, through weariness and impatience, many jurors become in effect at least half deaf and half blind."

"There is probably more wool-gathering in jury-boxes than in any other place on earth, although churches may furnish a close second."

"Because of the difficulty of being understood I wonder why some of these lawyers will persist in saying 'prior' instead of 'before' and will always have a document 'executed' instead of having it only 'signed.' 'Did you see Mr. Brown subsequently?' the witness is asked, and he promptly answers 'No, afterwards'."

"Those who seek to improve things meet with many discouragements. Reformers in all ages and in all places have been impatient and often disappointed men. As a rule they are an unpopular tribe, and it is probably fortunate for the world that most of them did not have their way. It seems cruel to say it but it no doubt is true that the reason many so-called prophets were stoned is that many of them deserved it."

"Sometimes this practical man, so-called, is hardly in the human class. He is a useful animal perhaps, but is living only the life of a horse or of a cow. He works, he eats, he sleeps, he dies, and that is all; his world is only a stall, a manger, and a treadmill. Now and then he is a juror and sometimes he is a lawyer."

"An observing newspaperman once said that a noted defence attorney never thinks of, cares for, nor calls on God except when defending some guilty wretch or while helping some rank fraud to succeed. When thus employed, this man who never sees anything of a church except the outside, quotes scripture like a Doctor of Divinity."

"The most powerful appeal is that of sympathy, for it is true that there are jurors who could frankly confess that they have been so near to crime that they have felt its scorching breath and they have a continuing pity for those who have fallen by the wayside."

"All deposition testimony is inclined to be weak and ineffective as compared with testimony by a living witness, but it can be made more interesting and valuable if given in the form of a dialogue. If one person reads both the questions and the answers, the testimony may not even go into one ear and out of the other for the reason that it does not go into one ear."

"Jurors would not be so slow to bring in verdicts of guilty if they were sure that the particular culprit would be dealt with fairly, as the particular individual merits. Jurors are told that the matter of punishment is none of their business, but they often make it their business by seeing to it that the accused is not punished."

In conclusion, it may fairly be said that Mr. Osborn has been successful in achieving the purpose set out in his preface.

"If the book helps a little in bringing about certain law reforms it will have accomplished the main purpose for which it is written, and it is also hoped that the young attorney whose definite ambition it is to make the law an instrument of justice will be somewhat encouraged and assisted by these discussions."

"**Without Lawyers.**"—"Those who have to administer justice," said Lord Atkin, proposing "The Profession of the Law" at the banquet to His Majesty's Judges, "know full well this year's pitiful sight of a layman struggling to make known the real case that he had. They saw the faltering lips and heard the faltering tongue." Judges, in such a case, are habitually indulgent; but the more rope a layman is given in the conduct of his own case, the more he seems to coil it around his neck. Indeed, a man can no more be his own lawyer than—save in the simple affairs of life—he can be his own doctor. Nor can the world of commerce dispense, with impunity, with the man of law. "Judges were also familiar," Lord Atkin continued, "with the wealthy merchant who had to struggle in some commercial dispute with a document which he had signed but which he had either not read or, having read, had not understood, or which he had prepared himself and conceived to bear an entirely different meaning from that which the law attached to it. In those straits he has to call upon the man of the law."

New Court-house at Ashburton.

Opened by the Attorney-General.

The new Magistrates' Court building was recently opened by the Attorney-General and Minister of Justice, the Hon. H. G. R. Mason, in the presence of a large gathering of practitioners, including members of the Council of the Canterbury District Law Society, and of the general public.

The Mayor of Ashburton, Dr. G. I. Miller, who presided, welcomed the Minister.

On behalf of the local practitioners, Mr. R. Kennedy spoke of the pleasure it gave them all to welcome the Hon. Mr. Mason, to whom, on behalf of the legal profession in Ashburton, he paid a tribute for the work that the Attorney-General had done in connection with law reform. The speaker said that the closing of the old Court-house brought back many memories. He referred particularly to a lawyer of earlier days, Mr. Quinnell, whom he described as a very able man, of high intellect, and very courteous. On one occasion Mr. Quinnell was committed for contempt of Court and was taken to the lock-up. This, said Mr. Kennedy, showed his courage.

Ashburton's Legal History.

The Minister of Justice, the Hon. H. G. R. Mason, then addressed the gathering. He said that, shortly after assuming office, he had been particularly struck by a remark by a Magistrate who informed him that when visiting Ashburton to take a special fixture he had occasion to inquire for the Court-house. He was instructed to proceed along the main street until he came to the most dilapidated building in the street.

In relating the history of the administration of justice in Ashburton, Mr. Mason said: "The needs of a Court did not arise in Ashburton until the 'seventies. Prior to that time all matters of dispute in the district were heard in Christchurch. Ashburton was proclaimed a township in 1864, and, shortly after that date, the law, in the person of Constable Heineman, made its appearance. As the occasion arose, Courts presided over by Justices were held; but no actual Court was established until 1874.

"The first Clerk of the Court was Mr. Poyntz, who acted in the dual capacity of Clerk of the Ashburton Road Board and Clerk of Court. His duties were carried out in the Road Board Offices, which premises were subsequently acquired by the Ashburton County Council. The first Resident Magistrate to visit Ashburton was Mr. Mellish, whose headquarters were in Christchurch.

"Efforts were made in 1878 to have Ashburton placed in the circuit of the District Judge for Canterbury. The rapidly increasing importance of the borough and county, and the large increase of work which was beyond the jurisdiction of the Magistrates' Court, were urged in support of the petition.

"In October, 1878, District Judge Ward visited Ashburton with the object of ascertaining whether it would be desirable to hold sittings of the District Court in Ashburton. Upon Judge Ward reporting favourably on the suggestion, it was decided by the Government to commence such sittings in January, 1879. For the following ten years Judge Ward presided over the Circuit Court in Ashburton.

"In 1879 the Magistrates' Court offices were removed to the Good Templars' Hall, where they remained until the old Court-house was built in 1880. In connection with the occupation of the Good Templars' Hall by the Court, it is interesting to note that, owing to the tardiness of the Justice Department in paying the rent for the premises, the bailiffs took possession of the Court furniture to satisfy the debt—a case of 'the biter bitten.'

"The old Court has occupied the site in East Street continuously since it was opened in 1880. During that time five charges of murder, one of criminal libel, and one case of breach of promise have been heard within its precincts. The Magistrates' chair is the one on which the first Magistrate sat; and, like the building, it is an antiquated relic of the past.

"The new structure is in marked contrast both in simplicity of design and in respect of convenience of layout. Particular consideration has been given to the lighting and ventilation, and I think the people of Ashburton will have a building which, in addition to being of the utmost utility, will contribute to the architectural dignity of your town."

The Canterbury Law Society.

The President of the Canterbury District Law Society, Mr. J. D. Hutchison, spoke of the pleasure given him by the opportunity of appearing on behalf of the Society in Canterbury towns outside Christchurch with the members of the profession who practice there.

"The Minister said at the laying of the foundation-stone in Christchurch that the provision of proper conditions in Court-houses has a great bearing on the proper administration of justice, and so it must have," the President continued. "We lawyers have, or think we have, moved on from the days of Dickens. We have our offices bright and clean and reasonably tidy and not the aged, cobwebby dens of Dodson and Fogg, and we have come to appreciate that better work can be done in better surroundings. So it is precisely with the Courts. The provision of better accommodation for the Magistrate and the officials, and for counsel who appear in the cases, all helps in the due administration of justice."

Mr. Hutchison joined with his friend, Mr. Kennedy, in paying a respectful tribute to the work the Minister had done since he took office; the improvement of the Courts showed one side of his work; and another side, his setting up a permanent Committee on Law Revision was a work that could not fail to be beneficial to the community as a whole.

"While Ashburton had only the old Court-house it would not have been very becoming on the part of a visitor to criticize it," the speaker continued; "but now it is open to me to say that we who came to the old Court-house occasionally to attend sittings of the Court or the Adjustment Commission were inclined to think that, to say the least, the Court-house was inadequate; and, if we who came here but seldom felt that, how much more must those have felt it who worked in it day after day. So that our first congratulations on the opening of the new Court-house are for those Court officials who are enabled to move from their old quarters into the new and well-appointed quarters."

After congratulating His Worship the Mayor and the citizens on the acquisition of a building which took its place amongst the other public buildings of the Borough, Mr. Hutchison concluded with an expression of respectful gratitude to all those who through the years have built the edifice of the British system of justice under which New Zealanders are proud to live and which they owe to the wisdom of those who have shaped the laws in the past—legislators, Judges, and others. It had been handed on to them by their forefathers in trust, and it was their bounden duty to preserve that system and hand it on with its essentials unchanged.

Mr. H. Morgan, S.M., on behalf of the Court-house staff, expressed sincere thanks for the provision of such a splendid and well-equipped building in which they were to carry on their duties in the future. Only those whose business frequently demanded their attendance in the old Court-house could fully realize the inconveniences and discomfort that the staff of the Court-house, the Justices, and the solicitors, the Police, and those who had had to attend, put up with. They had waited patiently for this building, and were very grateful to the Government for providing it. His Worship congratulated the Mayor and the citizens of Ashburton on the acquisition to their town of the Court-house, and the opportunity to get rid of the old dilapidated building which was a disfigurement to their otherwise beautiful town. He would be very pleased to be the first Magistrate to preside in the new Court-house.

Bar Luncheon.

Mr. R. Kennedy, the senior member of the profession in Ashburton, presided at a Bar Luncheon given in honour of the Attorney-General's visit to open the new Court-house. He welcomed the Hon. Mr. Mason, and his greetings were supported by Mr. J. D. Hutchison on behalf of the Canterbury District Law Society; and Mr. Herring, M.P., Mid-Canterbury, for the people of the district, added a further tribute to Mr. Mason's work since assuming the office of Attorney-General.

The Attorney-General, the Hon. H. G. R. Mason, in reply, said it was always a happy occasion for him to meet members of the Bar, and not least in a town outside the main cities; for by far the greater part of his life had been spent in towns not as big as Ashburton, and, he had, therefore, a fair idea of the life of the ordinary country solicitor. He felt in not the least degree remote from the members of the profession, not in any way separate as a leader. His work had been the ordinary work of the rank and file member of the profession. It was accordingly a delight to meet country solicitors; and, in saying that, he did not want to fail in appreciation of the courtesy on the part of those who come from distant towns to rejoice with them on that occasion. As regards the Court-house, it was most essential justice should be administered in a building where acute discomforts did not interfere with efficiency, and he believed the new Court-house would be a contribution to the administration of justice accordingly. He was trying to improve matters in many centres in that direction. He thanked them most sincerely for the kind way he had been received, and also for the kind provision made to make Mrs. Mason's visit to the town a happy one.

Court of Review.

Summary of Decisions.*

By arrangement, the JOURNAL is able to publish reports of cases decided by the Court of Review. As decisions in this Court are ultimately determined by the varying facts of each case, it is not possible to give more than a note of the actual order and an outline of the factual position presented. Consequently, though cases are published as a guide and assistance to members of the profession, they must not be taken to be precedents.

CASE No. 118. Motion by a mortgagee to set aside the order of an Adjustment Commission, upon the grounds that the application for adjustment, which was made in respect of a deceased mortgagor's estate, was not made in conformity with the provisions of s. 60 (3) of the Mortgagors and Lessees Rehabilitation Act, 1936; and at the date on which it was heard by the Adjustment Commission it had therefore lapsed.

The deceased mortgagor died intestate before the passing of the Mortgagors and Lessees Rehabilitation Act, 1936; but her widower made an application for adjustment of the liabilities of her estate on January 30, 1937—that is, within the time prescribed by the statute. The widower did not, however, obtain a grant of letters of administration of her estate until December 1, 1937, and, consequently, it was contended there was, and should be, no confirmation of the original application within three months of the date of its filing as required by the section. Upon this ground counsel for the mortgagee moved to have the order of the Adjustment Commission discharging the mortgage set aside.

Held, dismissing the motion, 1. That the "personal representatives" mentioned in s. 60 are those persons who are by law authorized to administer the estate after death—that is, either the executors or administrators, and no others.

2. That where, as in the present case, the application for adjustment is made in the first instance by any of the class of persons designated in s. 60 (3), and a grant of administration is subsequently made to such person so applying, it is unnecessary that any confirmation be made of the application beyond an option of it as if it were originally made by him, with the result that the application becomes, *ab initio*, an application under s. 60 (2).

In the course of its judgment, the Court said:

It is established both by the context of s. 60 (3) itself, and also by the ordinary principles of the construction of terms, that, where the Legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted. And the same rule applies to words with well-known legal meanings, even though not theretofore the subject of judicial interpretation: *Reg. v. Slator*, (1881) 8 Q.B.D. 267.

Counsel for the applicant points out that in many cases it would be impossible to obtain a grant of letters of administration within three months of the filing of applications, and that a strictly literal interpretation of the subsection would in such cases result in a total defeat of the obvious purpose of the section, notwithstanding no blame or default could be attributed to the applicants. Such would clearly seem to be the case, as it is within the knowledge of every conveyancing lawyer that it is frequently impossible to complete all the steps necessary to obtain a grant of letters of administration within a period of three months. Counsel, however, relies on the principle by which the title of an administrator relates back to the time of death so that an act done prior to the grant of letters of administration becomes the act of the administration.

Section 4 (2) of the Administration Act, 1908, provides that "the title of every administrator shall, so far as relates to a person dying after this Act comes into operation, relate back to and be deemed to have arisen immediately upon the death of the deceased person, as if there had been no interval of time between such death and the grant of administration," and it was submitted that at the time the widower made the application he was, by the provisions of the above section, in fact the administrator or personal representative of the deceased mortgagor, and, therefore, was under no obligation to confirm his application after the actual grant of administration.

Apart from s. 4 (2) of the Administration Act, 1908, it was laid down in *Baker v. Blaker*, (1886) 55 L.T. 723, that the general rule is that an administrator can do nothing until administration is granted. Yet, notwithstanding that rule, the administration when granted relates back to an act that has been done for the benefit of the estate, when the administrator is willing to adopt that act. It is true that *Baker v. Blaker* was a case of contract, but there appears to be no sound reason or principle whereby the principle of relation back of administration should be available in respect of rights created by contract but not in respect of rights created by statute. Nothing is more clear from the very provisions of s. 60 itself of the Mortgagors and Lessees Rehabilitation Act, 1936, than that the Legislature intended that the rights conferred upon mortgagors should enure for the benefit of their estates. If it were held that the provisions of s. 4 (2) of the Administration Act, 1908, did not apply in cases such as the present, the whole intention of the Legislature would be defeated in many instances and under circumstances in which no blame or laches could be laid against the applicants for relief.

The limitations in respect of the time within which applications for adjustment under ss. 29 and 30 may be filed by mortgagors, lessees, and guarantors (s. 29), and by mortgagees and lessors (s. 30), do not expressly apply in respect of applications made on behalf of deceased persons' estates under s. 60. It is, however, not necessary in order to dispose of the matter now under consideration, for the Court to discuss whether such can support a contention that applications under s. 60 are not subject to the same limitations in regard to the time in which they must be filed as those made under ss. 29 and 30.

CASE No. 119. Appeal from the order of an Adjustment Commission.

A preliminary point was taken by counsel for a co-guarantor that the appellant was not a "guarantor" within the meaning of the Mortgagors and Lessees Rehabilitation Act, 1936, inasmuch as the guarantee was not given in respect of any mortgage, but was merely a guarantee of a bank overdraft.

The bank agreed to advance moneys to a company in October, 1920, and on October 29, 1920, the following documents were executed in favour of the bank: (*a*) A cash credit bond by the company, expressed to be collateral with a guarantee signed by some five guarantors; and (*b*) a mortgage to the bank by the company of its uncalled capital of 10s. in the pound. These documents recited that the mortgagee (the bank) agreed to allow cash credits up to £4,000 and the company covenanted to observe the provisions of the cash credit bond and assigned to the bank by way of mortgage the uncalled capital of the company. This security was expressed to be collateral with (*a*) the cash credit bond; (*b*) the said guarantee; (*c*) a memorandum of mortgage of certain land. A subsequent guarantee, dated December 5, 1932, was given to the bank for £4,000 in substitution for the original guarantee and executed by the original guarantors (save one) and also, in addition, by the appellant; and it was expressed to be without prejudice to all securities held in relation

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to the prior guarantee, such securities to be continuing securities and to take effect as if the subsequent guarantee had been executed in place of the prior guarantee.

Upon these facts, it was submitted on behalf of the appellant: (*a*) That the mortgage of uncalled capital was a mortgage of property within the definition in s. 2, and that the uncalled capital was a thing in action within the definition, and that the company, being the owner of property subject to a mortgage, was a mortgagor within the meaning of the Act; (*b*) that a guarantor is defined, by the Act, as a person who has guaranteed the performance by the mortgagor of any covenant, condition, or agreement expressed or implied in a mortgage whether the guarantee is expressed in the mortgage or in any other instrument.

Held, That a mortgage of uncalled capital is an adjustable security; and that, as the liability of the appellant was in respect of the debt secured by such adjustable security and was, therefore, an adjustable debt under s. 54 of the Mortgagors and Lessees Rehabilitation Act, 1936, the Court had jurisdiction to hear and to determine the application.

The Western Samoa Bar.

Farewell to Chief Judge Morling.

The members of the Bar practising in Western Samoa, together with those officials most intimately connected with the High Court, assembled for dinner on Saturday, September 10, at the Central Restaurant, Apia, to bid farewell to Chief Judge Morling.

In addition to the guest of honour those present were Mr. C. McKay, Commissioner of the Court; Mr. R. V. Kay, Crown Solicitor; Mr. R. Tattersall, Registrar; Mr. E. T. Pleasants; Mr. G. T. Jackson; and Mr. T. V. Fitzpatrick—all being accompanied by their wives; and Miss Olive Nelson.

In proposing the health of the Chief Judge, Mr. Pleasants mentioned that this was the first function of its kind in Samoa. He referred to the difficulties of practice in that isolated spot, and hoped that the New Zealand practitioners who appeared before His Honour would come to Court better equipped with books and plans than was possible here. He expressed the regret of the practising members at the Judge's departure, but wished him continued happiness in his new sphere of work.

His Honour thanked the members for their good wishes and for the help given him in discharging his duties. There were many virtues which a Judge was called upon to exercise, the chief being, in his opinion, deafness and blindness—deafness in hearing asides made by counsel such as the comment made by one as to his particular choice of tie, blindness to the charms of female witnesses, and, particularly, to those of the lady member practising before him.

Mr. Kay proposed the health of the Profession and the New Zealand Law Society in appropriate manner. He also thanked His Honour for help extended to all members of the Court.

Practice Precedents.

Grant of Probate to Executor According to the Tenor.

A testator may expressly nominate a person an executor to administer his estate, or the appointment may be merely by implication. In the latter case, if the duties of an executor, or some of them, are laid upon the person named in the will, and one or more of these duties of an executor may be impliedly seen from a fair and reasonable examination of the will, the Court will grant probate to such person as executor according to the tenor. For instance, where a testatrix, after bequeathing certain pecuniary legacies, said "I desire John Goodrich to pay all my just debts," and then bequeathed all her furniture and effects and all moneys she possessed, but did not appoint any one her executor, probate was granted to Goodrich as her executor according to the tenor: *In bonis Cook*, [1902] P. 114. *In bonis Kirby*, [1909] P. 188, a testator directed the payment of his debts and funeral and testamentary expenses by his "executors hereinafter named." No executors were named. The testator expressed his wishes, *inter alia*, as to the advancement and education of children, and he appointed trustees, who received bequests for their services. It was held the trustees were executors according to the tenor.

In all cases there must be some general direction to administer the estate, and, if there is no direction to pay debts, but the distribution of the estate cannot take place without the debts are first paid, the direction to pay debts is implied: for the application of these principles, see *In the Goods of Jones*, (1861) 2 Sw. & Tr. 155, 164 E.R. 952; *In the Will of Levi*, (1877) 3 N.Z. Jur. (N.S.) S.C. 12; *Re Cooney*, (1915) 17 G.L.R. 313; *In re Rylatt*, [1916] N.Z.L.R. 1160; *In re Cosgrieff*, [1917] N.Z.L.R. 839; and *In re Wilkie*, [1918] G.L.R. 249. In *In the Goods of Marshall Brown*, (1912) 31 N.Z.L.R. 272, where a testator gave all his property to his wife with absolute authority to collect all moneys lying to his credit and "absolute control over whatever matters that might require any special attention," but he failed to name any person as executor, probate was granted to the wife as executrix according to the tenor.

It would seem that there may be an appointment of an executor according to the tenor during the minority of an infant: see *Brightman v. Keighley*, (1585) Cro. Eliz. 43, 78 E.R. 307.

In the following precedent no will is set out; but the words constituting the person executor according to the tenor are assumed to be as follows: "I appoint A. B. to execute all debts." The attestation clause is defective, and so an affidavit as to due execution, pursuant to R. 519, is furnished.

MOTION FOR PROBATE ACCORDING TO THE TENOR.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

In the Estate of A. B. &c. deceased.

Mr. of Counsel for C. B. TO MOVE in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court House on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER that probate of the last will of the said deceased dated the day of 19 be granted to C. B. the executor according to the tenor of the said will UPON THE GROUNDS that the said C. B. is the executor

according to the tenor of the said will and upon the further grounds appearing in the affidavit of the said A. B. filed herein.

Dated at this day of 19 .

Certified pursuant to the rules of Court to be correct.

Council for applicant.

MEMORANDUM FOR HIS HONOUR.—It is respectfully submitted that the appointment of C. B. the son of deceased "to execute all debts" constitutes him executor of the will of deceased according to the tenor thereof. His Honour is respectfully referred to the following cases: *In the Goods of Marshall Brown*, (1912) 31 N.Z.L.R. 272; *In re Rylatt*, [1916] N.Z.L.R. 1160; and *In re Wilkie*, [1918] G.L.R. 249. In each of these cases it was held that there was an executor according to the tenor.

AFFIDAVIT OF DUE EXECUTION.

(*Same heading.*)

I, X. Y. of &c. make oath and say as follows:—

1. That I knew the above-named A. B. when alive and had known him for about ten years prior to his death.

2. That my brother Y. Y. of the City of carrier and I are the subscribing witnesses to the last will of the said A. B. bearing date the day of 19 now produced and shown to me.

3. That on the day of my brother and I were called to the residence of deceased to witness the said will which is written in deceased's own handwriting on the two pieces of paper which comprise the will.

4. That my brother and I duly witnessed the will after the testator signed it in our presence both of us being present at the same time.

5. That the signatures X. Y. and Y. Y. appearing at the end or foot thereof of the said will are in the proper handwriting of my said brother and myself.

6. That I remember the date of the signing of the said will because on that date just before witnessing the will I was preparing to take my brother to pay for the purchase of a motor-car and the witnessing delayed our appointment. The date of the payment from a perusal of the receipt coincides with the witnessing of the will.

Sworn &c.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I, C. B. of &c. make oath and say as follows:—

1. That I knew A. B. &c. 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 the said A. B. died at on or about the day of 19 as I am able to depose from having been present at his funeral.

3. That I believe the written document now produced and shown to me bearing date the day of 19 to be the last will and testament of the said deceased and that I am the executor therein according to the tenor thereof.

4. That I will faithfully execute the said will by paying the debts and legacies of the said deceased so far as the property will extend and the law binds.

5. That according to my knowledge and belief the estate and effects of the said deceased in respect of which probate is sought to be obtained are under the value of £ .

Sworn &c.

PROBATE.

(*Same heading.*)

BE IT KNOWN TO ALL MEN that on the day of 19 the last will of A. B. &c. who died on or about the day of 19 a copy of which is hereunto annexed has been exhibited read and proved before the Honourable [*full Christian names and surname*] a Judge of the Supreme Court of New Zealand and administration of the estate effects and credits of the deceased has been and is hereby granted to C. B. of the City of clerk the executor in the said will according to the tenor thereof being first sworn faithfully to execute the said will by paying the debts and legacies of the deceased as far as the property will extend and the law binds.

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

Registrar.

NOTE.—In addition to the above probate a further original copy of the probate with an original copy of the will is required for sealing. A separate copy of the will which may be a carbon is also required to be furnished to the Registrar.

Acts Passed and in Operation, 1938.

Session of 1938.

No. 1. Imprest Supply Act, 1938. June 30.
No. 2. New Zealand Council of Law Reporting Act, 1938. August 18.
No. 3. Municipal Corporations Amendment Act, 1938. August 18.
No. 4. Surveyors Act, 1938. August 18.
No. 5. Imprest Supply Act (No. 2), 1938. September 1.
No. 6. Arbitration Amendment Act, 1938. September 1.
No. 7. Social Security Act, 1938. September 14.
No. 8. Land and Income Tax (Annual) Act, 1938. September 14.
No. 9. Carter Observatory Act, 1938. September 14.
No. 10. Dairy Industry Amendment Act, 1938. September 14.
No. 11. King George the Fifth Memorial Fund Act, 1938. September 14.
No. 12. Agricultural Emergency Regulations Confirmation Act, 1938. September 14.
No. 13. Finance Act, 1938. September 14.
No. 14. Education Amendment Act, 1938. September 16.
No. 15. Stock Amendment Act, 1938. September 16.
No. 16. Stallions Act, 1938. September 16.
No. 17. Native Housing Amendment Act, 1938. September 16.
No. 18. Local Legislation Act, 1938. September 16.
No. 19. Reserves and Other Lands Disposal Act, 1938. September 16.
No. 20. Statutes Amendment Act, 1938. September 16.
No. 21. New Zealand Centennial Act, 1938. September 16.
No. 22. Samoa Amendment Act, 1938. September 16.
No. 23. Native Purposes Act, 1938. September 16.
No. 24. Appropriation Act, 1938. September 16.

Rules and Regulations.

Education Act, 1914. Teachers' Salaries Regulations, 1938. September 21, 1938. No. 1938/111.

Explosive and Dangerous Goods Act, 1908. Dangerous Goods Regulations, 1928. Amendment No. 3. September 21, 1938. No. 1938/112.

Dentists Act, 1936. Dentists' Advertising Regulations, 1938. September 14, 1938. No. 1938/113.

Customs Amendment Act, 1921. Customs Tariff Amendment Order 1938, No. 3. September 21, 1938. No. 1938/114.

Motor-spirits (Regulations of Prices) Act, 1933. Motor-spirits Prices (Gisborne) Regulations, 1938. September 21, 1938. No. 1938/115.

Dairy Industry Act, 1908. Farm-dairy Instruction Regulations, 1938. September 21, 1938. No. 1938/116.

Health Act, 1920. Drainage and Plumbing Regulations Extension Order, 1938, No. 3. September 19, 1938. No. 1938/117.

Post and Telegraph Act, 1928. Radio Amendment Regulations, 1938. September 23, 1938. No. 1938/118.

Fisheries Act, 1908. Trout-fishing (Whangarei) Regulations, 1937. Amendment No. 1. September 21, 1938. No. 1938/119.

Fisheries Act, 1908. Trout-fishing (South Canterbury) Regulations, 1936. Amendment No. 2. September 21, 1938. No. 1938/120.

Fisheries Act, 1908. Trout-fishing (Hobson) Regulations, 1938. September 21, 1938. No. 1938/121.

Fisheries Act, 1908. Trout-fishing (Westland) Regulations, 1938. September 21, 1938. No. 1938/122.

Fisheries Act, 1908. Trout-fishing (Mangonui and Whangaroa) Regulations, 1938. September 21, 1938. No. 1938/123.

Fisheries Act, 1908. Trout-fishing (Bay of Islands) Regulations, 1938. September 21, 1938. No. 1938/124.

Fisheries Act, 1908. Fresh-water Fisheries (Southland) Regulations, 1937. Amendment No. 1. September 21, 1938. No. 1938/125.

Fisheries Act, 1908. Trout-fishing (Waitaki) Regulations, 1937. Amendment No. 1. September 21, 1938. No. 1938/126.

Samoa Act, 1921. Samoa Legislative Council (Elective Membership) Amendment Order, 1938. September 21, 1938. No. 1938/127.

Agricultural Workers Act, 1936. Agricultural Workers' Wage-fixation Order, 1938. October 6, 1938. No. 1938/128.