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*"It may be that out of the rack and welter of the great conflict may arise a general consciousness that it is the people who are to be considered, their rights and liberties to govern and be governed for themselves rather than for rulers' ambitions and policies of aggrandisement. If that be so, our hopes will be realized, for autocracy can protect itself by arbitrary power, but the people can protect themselves only by the rule of law."*

—ELIHU ROOT.

Vol. XV. Tuesday, September 19, 1939. No. 17.

# For Law and Order.

REVERENCE for law and order in everyday life is inherent in the British character. This is not surprising when we remember that His Majesty's subjects, in their own immediate surroundings, live and conduct their own affairs under the rule or supremacy of law, which is founded on justice and reason; and they are accustomed to the thought and belief that there can be no interference with their rights or their true liberties except by due process of law. On this fundamental constitutional principle our individual peace and tranquillity depend.

It follows that the consciences of all who are used to the security given by the rule of law in British communities the world over are affronted by an infraction of the rule of law in the wider sphere of international relations through aggression applied with brute force by a strong State upon a weaker neighbour. Consequently, the issues for which we have drawn the sword in the present conflict are crystal clear to every person of British nationality.

The war to-day is being fought for the restoration of the rule of law in international affairs: the recognition of certain fundamental obligations as binding on nations in their dealings with one another. As Dr. E. C. S. Wade says in his introduction to the recent edition of *Dicey's Law of the Constitution*: "The tragedy to-day is not the absence of international law, but the fact that there are some members of the family of nations who are prepared to rely on force rather than on the accepted methods of international law for the settlement of their disputes." For instance, in dealings between man and man, every one recognizes that the law conserves the sanctity of contractual obligations freely entered into. Our declaration of war against Germany is a national recognition of this principle applied in a larger sphere, and our attitude towards Poland, fortified by our armed forces, shows to the world the manner in which an honourable nation fulfils its contractual obligations, and proves that a cynical disregard of solemn treaty obligations, and by no means straightforward diplomatic methods, can find no place in the comity of nations.

The state of national emergency has given rise, as would be expected, to the enactment of a number of measures under the Public Safety Conservation Act, 1932, for dealing with the abnormal situation. In an emergency, all minor laws give way to the necessity of preserving the safety of the Commonwealth. *Salus republicae suprema lex.* But, here again, the elasticity of our Constitution and our respect for the rule of law coalesce in achieving this supreme object. The rule of law and the sovereignty of Parliament, the two principles which Professor Dicey regards as the leading feature of our Constitution, provide the means of curtailing drastically the freedom of the individual, while at the same time ensuring, as far as possible, the ultimate freedom of every citizen of the State. Hence, although the ordinary civil law is partially superseded to such extent as may be necessary in the face of a national danger, it is suspended by virtue of the law itself—namely, under the authority of an Act or Acts of Parliament.

We have always distrusted absolute monarchies and their modern equivalent, the dictatorships which have arisen in totalitarian States. To conserve our national resources and to place things that are subject to private ownership at the disposal of the people as a whole needs no despotic decree in our free democracy. Every requisition of supplies, ships, transport, and the like has been made lawful and effectual by legislative authority, either in particular instances by new direct legislative enactment of by subordinate legislative powers conferred by express enactment. This phenomenon of constitutional practice, subject to the rule of law, is common to Great Britain and to every one of His Majesty's Dominions overseas. The fact emerges that in a free country, such as our own, an unwritten Parliamentary Constitution, when tested by the emergencies of national danger, is capable of maintaining the rule of law while at the same time of meeting effectually all the demands to which sudden and grave emergency gives rise.

While every one to-day has an appreciation of the issues involved in our entering into and pursuing hostilities with the enemy aggressor, these are particularly well understood by members of the legal profession. Their attitude was well expressed two months ago by the recent Lord Chancellor, Lord Maugham, when responding to the toast of His Majesty's Judges at the customary dinner given by the Lord Mayor of London to members of the Judiciary. He concluded his speech by saying that the Judges and the lawyers from the highest to the humblest throughout the Empire have a single philosophy and a single creed. They stand for the ancient traditions of law and order. These, he said, are the ultimate reasons for their existence, and they must of necessity make every effort and every sacrifice to retain those traditions unimpaired.

Now that the defence of the rule of law has passed from the pen to the sword, the legal profession in New Zealand, united in this single philosophy and in subscribing to their common creed, enter upon this wartime period, however long and arduous it may be,

resolved to co-operate whole-heartedly in every way towards the common end—the maintenance of our ancient liberties to which all our national endeavour is now being directed.

As we all know, those who followed the law in the time of the last War with Germany vied with every profession and trade in doing actual service in all the fighting forces and on all the hostile fronts. Their valour and their sacrifice provide a glorious chapter in our legal history. We do not intend to be mere inheritors of a great tradition. To-day, the members of the profession in New Zealand are also ready and anxious to give of their best in helping the successful prosecution of a struggle to maintain the rule of law in international relations, and to pass on unimpaired all the British principles which spring from our ancient tradition of peace, order, and justice, and love of honest dealing in international as well as in private affairs.

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# Summary of Recent Judgments.

SUPREME COURT. Dunedin. 1939. May 31; August 9. *Blair, J.*

**BLACK v. UNITED INSURANCE COMPANY, LIMITED.**

**Insurance—Fire—Sale of Stock-in-trade by Father to Son—Policy in Name of Vendor—Endorsed that Policy stood in Names of Father as Vendor and Son as Purchaser—Insurable Interest—Estoppel.**

A father, who had sold stock-in-trade to his son on which there was a balance owing, for which he had no security, disclosed the position to an insurance company, which endorsed a policy on such stock in the father's name that it was noted and allowed that the policy stood in the names of the father as vendor and the son as purchaser. Both the manager of the company and the father believed that the latter had an insurable interest in the stock capable of being protected by such endorsement.

**E. J. Anderson** and **D. A. Solomon,** for the plaintiff; **A. N. Haggitt,** for the defendant.

**Held,** That, by the father's disclosure of his precise interest to the company's manager, the company's endorsement, and the acceptance of premiums paid by the father in the belief that his interest as vendor as described by him was covered, the company was estopped from denying such interest.

**Quaere,** Whether the father had an insurable interest in the stock (a combination of insurance against fire and a guarantee of payment of a debt by a third party).

**Lucena v. Craufurd,** (1806) 2 Bos. & Pul. (N.R.) 269, 127 E.R. 630; **Stock v. Inglis,** (1884) 12 Q.B.D. 564, aff. on app. (1885) 10 App. Cas. 263; **Holdsworth v. Lancashire and Yorkshire Insurance Co.,** (1907) 23 T.L.R. 521; and **Pearl Life Assurance Co. v. Johnson,** [1909] 2 K.B. 288, applied.

**Mollison v. Victoria Insurance Co.,** (1883) N.Z.L.R. 2 S.C. 177; **Macaura v. Northern Assurance Co., Ltd.,** [1925] A.C. 619, distinguished.

**Solicitors: Solomon, Gascoigne, Solomon, and Sinclair,** Dunedin, for the plaintiff; **Ramsay and Haggitt,** Dunedin, for the defendant.

**Case Annotation:** *Lucena v. Craufurd,* E. and E. Digest, Vol. 29, p. 97, para. 555; *Stock v. Inglis, ibid.,* p. 109, para. 651; *Holdsworth v. Lancashire and Yorkshire Insurance Co., ibid.,* p. 61, para. 205; *Pearl Life Assurance Co. v. Johnson, ibid.,* p. 355, para. 2865; *Macaura v. Northern Assurance Co., Ltd., ibid.,* p. 312, para. 2572.

SUPREME COURT. Napier. 1939. June 19; July 18. *Smith, J.*

*In re* **BOOTHMAN.**

**Trusts and Trustees—Removal of Absent Trustee—Trustee appointing a Delegate—Trustee then departing from and continuing away from New Zealand—"Remains out of New Zealand"—Whether Absence abroad, when Delegate appointed, relevant on Petition for Removal of absent Trustee—Trustee Act, 1908, ss. 41, 78, 104.**

A trustee, who is absent from New Zealand for twelve months but who before his departure duly appoints a delegate to act for him under s. 104 of the Trustee Act, 1908, does not "remain out of New Zealand" within the meaning of those words in s. 78 of the Act.

The absence abroad of a trustee for more than a year, even though he has appointed a delegate, and the nature and extent of that absence, are relevant facts for consideration by the Court in dealing with an application under s. 41 of the Trustee Act, 1908, to remove such absent trustee from his trusteeship.

**In re Mai,** (1852) 21 L.J. Ch. 875; **In re Watson,** (1899) 18 N.Z.L.R. 368, 2 G.L.R. 18; and **In re James Jackson,** [1926] N.Z.L.R. 499, G.L.R. 349, considered.

**Counsel: Willis,** for the petitioner; **Mason,** to oppose.

**Solicitors: Mayne and Runciman,** Napier, for the petitioner; **Mason and Dunn,** Napier, for L. A. Rogers.

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COURT OF ARBITRATION. Dunedin. 1939. June 28; July 17. *Callan, J.*

**BELL v. JOHN MILL AND COMPANY, LIMITED.**

**Workers' Compensation—Liability for Compensation—Payment of Compensation ended on Ground of Return to Work—"Actually returned to work"—Such return by way of Experiment—"Liable" to pay—Employer's absolute Obligation to pay Double Amount of Payments improperly ended—Workers' Compensation Act, 1922, s. 5 (7) (8), 57—Statutes Amendment Act, 1938, s. 62 (2), (4).**

A worker has not "actually returned to work" within the meaning of that expression in s. 62 (2) (*a*) of the Statutes Amendment Act, 1938, where his return to work was merely temporary and undertaken by him as an experiment and he did not remain at work, claiming that the experiment had demonstrated that he was not fit to resume work, although his own lodge doctor expressed a contrary view and he produced no medical certificate supporting his contention.

**M'Dougal v. Singer Manufacturing Co., Ltd.,** [1931] S.C. 47, 23 B.W.C.C. 616, followed.

Section 62 (4) of the Statutes Amendment Act, 1938, compels the Court, on the application of the worker, to enforce the double payment, where there was default in payment of compensation.

Thus where the worker had been receiving total-incapacity payments up to the date of his "experimental" return to work, and the employer discontinued payments as from that date, without being able to rely upon s. 62 (2) (*b*), (*c*), or (*d*) of the Statutes Amendment Act, 1938, the worker, even though he was only partially incapacitated during part or possibly the whole of the time between the discontinuance of the payments and the hearing by the Court of his claim for compensation, was held entitled to the undiminished total-incapacity payments and the doubling of these payments.

**In re Hill, Hill v. Pilcher,** [1896] 1 Ch. 962, applied.

**Counsel: F. B. Adams** and **Deaker,** for the plaintiff; **Haggitt,** for the defendant.

**Solicitors: Adams Brothers,** Dunedin, for the plaintiff; **Ramsay and Haggitt,** Dunedin, for the defendant.

**Case Annotation:** *M'Dougal v. Singer Manufacturing Co.,* E. and E. Digest, Supp. Vol. 34, p. 126, note oi; *In re Hill, Hill v. Pilcher, ibid.,* Vol. 40, p. 740, para. 2697.

COURT OF APPEAL.
Wellington.
1939.
June 23, 26, 27, 28;
July 29.
*Myers, C.J.*
*Blair, J.*
*Johnston, J.*
*Northcroft, J.*

**ATTORNEY-GENERAL** (*Ex rel.* **NORTH AUCKLAND ELECTRIC-POWER BOARD**) **v. WILSON'S (N.Z.) PORTLAND CEMENT, LIMITED.**

**Public Works—License to use Water for Generating Electricity—License for Electric Lines—Whether Holder of both Licenses limited to Transmission of Hydro-generated Electricity—Attorney-General's Fiat—Declaration and Injunction sought by Attorney-General on relation of Power Board in respect of alleged unlawful and unauthorized Transmission and Distribution of Steam-generated Electricity—Principles relating thereto discussed—Public Works Amendment Act, 1908, s. 5—Public Works Amendment Act, 1911, s. 2—Public Works Act, 1928, s. 319.**

The license to construct and use an electric line contemplated pursuant to the powers given the Governor in Council by s. 2 of the Public Works Amendment Act, 1911, or s. 319 of the Public Works Act, 1928, is not limited to the transmission of electricity generated in any particular way.

The nature of the generating power is immaterial for the purpose of the said sections.

The respondent company was granted two licenses contained in one Order in Council in 1913, (i) to use the water of a river to generate electricity for transmission and distribution within a named area of supply pursuant to s. 5 of the Public Works Amendment Act, 1908; and (ii) to erect and maintain electric lines for lighting and power purposes pursuant to s. 2 of the Public Works Amendment Act, 1911. It generated on its own premises by steam power electricity, which during portions of the year, when the supply of water from the river was irregular, it transmitted over the electric lines for which it held the said license and distributed in the named area.

In an action by the Attorney-General on the relation of an Electric-power Board (hereinafter called the relator) within whose district lay the said area in which the respondent was operating, *Fair*, J., granted an injunction restraining the respondent "in the circumstances shown to exist at the date of the hearing of this action" from transmitting and distributing over its electric lines electricity generated by a steam-driven plant, the use of which lines for the purpose of such distribution and transmission in such circumstances he declared to be unlawful.

On appeal and cross-appeal,

**North** and **Astley**, for the appellant; **Rogerson** and **Terry**, for the respondent.

**Held, per totam Curiam,** 1. That, as agreed by counsel, the judgment as formulated could not be supported, as it did not render plain what it permitted and what it prohibited.

**Low v. Innes,** (1864) 4 DeG. J. & S. 286, 46 E.R. 929; **Cother v. Midland Railway Co,** (1848) 2 Ph. 469, 41 E.R. 1025; **Attorney-General v. Staffordshire County Council,** [1905] 1 Ch. 336; and **Ellerman's Lines, Ltd. v. Read,** [1928] 2 K.B. 144, applied.

2. That no license was required for the generation of electricity by steam power and that there had been no breach of s. 319 of the Public Works Act, 1928.

3. That the appellant was entitled neither to the declaration that the transmission and distribution of electricity was unlawful and in excess of the authorities granted by the license, nor to an injunction restraining such transmission and distribution.

On the following further grounds respectively, per *Myers*, C.J., and *Blair*, J., That the transmission and distribution of steam-generated electricity was not in excess of the authorities granted by the license and that the power to transmit steam-generated electricity over the lines was impliedly permitted by the license.

**Semble,** per *Myers*, C.J., and *Blair* and *Northcroft*, JJ., That, so far as breach of the license was concerned, the license itself afforded an adequate and effective remedy; and the case was one of contract between the Crown and the respondent so that the remedies depended upon the terms of the contract. The Governor-General was the sole judge as to compliance with the requirements of the license and his decision was final.

**Semble,** per *Northcroft*, J., That what was alleged to be in breach of the license had been done over a long period with the full knowledge of and without objection from the Crown, the license and circumstances which would make the Court reluctant to grant an injunction.

**Semble,** per *Johnston*, J., 1. That on the facts there was no positive interest susceptible of enjoyment by His Majesty's subjects as of common right to be protected by injunction.

2. That the relator had no right to ask for an interpretation or to claim any relief in respect of terms of the contract made between the Crown and the respondent company, nor the Court any right to interfere by way of an injunction with the discretion Parliament had given the Governor in Council in determining the conditions and terms of licenses it had authorized.

3. The Court should not determine questions dependent on the construction of the contract unless the Crown was actively represented, which was not the case where the Attorney-General acted on the relation of a private individual and claimed to maintain a neutral attitude.

4. That there was in the license no indication that a limitation on the transmission and distribution of steam-generated electricity was intended.

**Attorney-General v. Sharp,** [1931] 1 Ch. 121; **Attorney-General v. Premier Lines, Ltd.,** [1932] 1 Ch. 303; and **Attorney-General v. North-eastern Railway Co.,** [1915] 1 Ch. 905, distinguished.

**Cooper v. Whittingham,** (1880) 15 Ch.D. 501; **Ramsay v. Aberfoyle Manufacturing Co. (Australia) Proprietary, Ltd.,** (1935) 54 C.L.R. 230; and **Attorney-General and Lumley v. T. S. Gill and Son Proprietary, Ltd.,** [1927] V.L.R. 22, applied.

**Solicitors: Astley and Worsley,** Dargaville, for the appellant; **Nicholson, Gribbin, Rogerson, and Nicholson,** Auckland, for the respondent.

**Case Annotation:** *Low v. Innes*, E. and E. Digest, Vol. 28, p. 511, para. 1154; *Attorney-General v. North-eastern Railway Co., ibid.*, p. 495, para. 976; *Cooper v. Wittingham, ibid.*, p. 368, para. 39; *Ellerman Lines, Ltd. v. Read, ibid.*, Supp. Vol. 11, para. 1135a; *Attorney-General v. Sharp, ibid.*, Supp. Vol. 28, para. 36a; *Attorney-General v. Premier Lines, Ltd., ibid.*, para. 36b.

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SUPREME COURT.
Auckland.
1939.
August 10, 11.
*Ostler, J.*

*In re* **HENDRY (DECEASED), HENDRY AND ANOTHER v. CUBITT AND OTHERS.**

**Will—Devisees and Legatees—Gift to Children—Division on Death or Marriage of last surviving unmarried Child—Substituted Gift to issue of Children dying during or after Lifetime of Testator of original or accrued Share, which Parent would have taken but for Parent's Death—Whether Share of each Child vested on Testator's Death.**

A testatrix directed her trustees upon the death or marriage (which event should happen first) of her last surviving unmarried child to sell and convert property and to divide the proceeds of such sale and conversion between all her children in equal shares, and her will contained the following subsequent provision:—

"If any of my children shall die (whether during or after my lifetime) leaving issue which shall survive me such issue shall take by substitution (and if more than one equally between them) the share whether original or accrued which his or her or their parent would have taken but for such parents death."

On originating summons for interpretation of the will,

**Milliken,** for the plaintiffs; **A. K. Turner,** for the defendants; **H. A. Steadman,** for the infant defendant.

**Held,** That the share of each child did not vest upon the death of the testatrix.

**Browne v. Moody,** [1936] A.C. 635, [1936] 2 All E.R. 1695, and **Greenwood v. Greenwood,** [1939] 2 All E.R. 150, distinguished.

**Public Trustee v. Walker,** (1912) 15 G.L.R. 22, referred to.

**Solicitors: Baxter, Shrewsbury, and Milliken,** Auckland, for the plaintiffs; **Turner and Kensington,** Auckland, for the defendants; **H. A. Steadman,** Auckland, for the infant defendant.

**Case Annotation:** *Browne v. Moody*, E. and E. Digest, Supp. Vol. 44, para. 9210a.

# Breach of Statutory Duty.

## Contributory Negligence as a Defence.

By T. A. Gresson, B.A. (Cantab.).

Section 16 of the Inspection of Machinery Act, 1928, provides that the moving parts of all machinery shall be so guarded as to afford adequate protection to all persons working the machinery, and in *Brady v. Rowe*, [1922] G.L.R. 62, Stringer, J., held that a civil action will lie at the suit of any person injured as a result of a breach of this section.

In almost every case under this section the question arises "Was the worker guilty of contributory negligence"? If yes, it has generally been considered that he is barred from recovery, and *Dew v. United British Steam Ship Co., Ltd.*, (1928) 98 L.J. K.B. 88, is usually cited for this proposition, where Scrutton, L.J., states, at p. 91:

> "I think that it is clearly established by authority that contributory negligence, properly defined, if properly proved, prevents the plaintiff from recovering, though there is a continuing statutory breach up to the time of the accident."

This passage was specifically adopted by Adams, J., in *Dunne v. New Zealand Refrigerating Co.*, [1932] N.Z.L.R. 1040, 1045, so that the generally accepted position both in England and New Zealand has been that contributory negligence is a good defence to breach of a statutory duty.

However, until the recent cases of *Craze v. Meyer-Dumore Bottler's Equipment Co.*, [1936] 2 All E.R. 1150, and *Lewis v. Denye*, [1939] 1 All E.R. 310, many have contended that mere carelessness or negligence in the ordinary sense will not debar a worker from recovery, but that something additional in the nature of wilful disobedience to orders must be proved. This view found support in *Sowter v. Steel Barrel Co., Ltd.*, (1935) 154 L.T. 85, where Lord Hewart hit out very strongly on the purpose of this type of protective legislation.

In *Sowter's* case a workman had injured his hand when working a Rhodes double-action power press, and, in getting his hand caught in the machinery as he did, he was disobeying his employer's instructions. An Inspector of Factories laid an information against the Steel Barrel Company for breach of s. 10 (1) (c) of the Factory and Workshop Act, 1901, which is similar to our s. 16, Inspection of Machinery Act. True, the case was a prosecution, not a civil claim by the injured workman, but Lord Hewart, C.J., in the course of his judgment, at p. 87, made the following observations:

> "It is not necessary to re-read the case. The statements which it contains show that the Justices here coquetted with nearly all, though not quite all, the fallacies which this Court for some years past has been endeavouring to destroy in such cases. It is not material that the workman who was injured was a left-handed man. . . . Nor is it material that, if this admittedly dangerous and unfenced machine had been used in accordance with instructions, the accident might not have happened. One of the excellent reasons for this legislation relating to dangerous machinery is precisely the fact that, by reason of carelessness, indolence, or haste, workmen sometimes omit to observe instructions. Where machinery is dangerous they are to be saved even from themselves. . . . Much is said, or suggested, in the case about the difficulty of making this particular machine safe. But if in fact this machine could not possibly be made safe, the conclusion would be that it would have to be scrapped."

Again, in *Flower v. The Ebbw Vale Steel, Iron, and Coal Co., Ltd.*, [1936] A.C. 1, Lord Wright, after stating that the question was expressly reserved for decision in the House of Lords if it should ever arise in the future, went on to encourage the view that mere error of judgment or carelessness on the part of the worker was not enough to disentitle him. That some such additional fact must be found as that

> "the proximate cause of the accident was the worker's own disobedience to orders without any good reason."

That this is the opinion of the High Court of Australia is shown by *Bourke v. Butterfield Lewis, Ltd.*, (1926) 38 C.L.R. 354, 360, where it said that

> "The employer is responsible for the negligence, but not for the misconduct of his employee. Whether the conduct of an employee goes beyond mere thoughtlessness or want of care and amounts to misconduct is in every case a question of fact."

Relying upon Lord Wright's observations in *Flower's* case, it was argued in *Craze v. Meyer-Dumore Bottler's Equipment Co., Ltd.* (*supra*), that before contributory negligence could be availed of as a defence by an employer the worker must be proved to have been guilty of something more than what is ordinarily understood by contributory negligence, something, that is, amounting to either wilful disobedience of orders or some act right outside the scope of his employment. This argument was rejected by a strong Court of Appeal consisting of Lord Justices Greer, Greene, and Scott, and, at p. 1154, Lord Justice Greene stated that

> "In view of the state of the authorities this is an argument, whatever attractions it may have, which must be addressed not to this Court, but to the House of Lords."

In *Lewis v. Denye*, [1939] 1 All E.R. 310, a boy aged sixteen and a half years met with an accident while working at a circular saw, and it was proved by the employer that although the saw was not securely guarded, yet the effective cause of the accident was the infant plaintiff's failure to use the "push-stick" which was provided.

It was again contended on plaintiff's behalf that contributory negligence in the ordinary sense was not sufficient to disentitle him. This contention was unanimously rejected by the Court, and a summary of the legal principles applicable is found in the judgment of Lord Justice Du Parcq, as follows:—

> "(1) A plaintiff who has been injured by reason of the defendant's breach of a statutory duty is not entitled to recover damages if it be proved that there was contributory negligence on the part of the plaintiff.
>
> "(2) The words 'contributory negligence' when used in relation to a workman whose employer has broken a statutory obligation have the same meaning as in an ordinary action for damages for negligence.
>
> "(3) In order to establish the defence of contributory negligence, the defendant must prove first, that the plaintiff failed to take ordinary care for himself, or in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident."

(*Concluded on p. 236.*)

# The Indeterminate Sentence.

## And Penal Reform.

By A. M. FINLAY, Ph.D. (London), LL.M. (N.Z.), Research Fellow at Harvard Law School.

One of the chief grievances against the criminal law at the beginning of the century was the grossly disproportionate sentences inflicted by different Judges for similar crimes. The setting up of the Court of Criminal Appeal in England has done much to remedy this, and has gone a long way towards creating a rough scale of penalties for various offences. There is no evidence that this has been the aim of all or any of the many members who have sat in that Court, but, in so far as it has curbed the multifarious and in many cases unreasonable idiosyncracies of individual Judges, it is a very desirable result. If, however, this end has been in view, it must be admitted that it can be justified only on the theory that the principal purpose of a criminal sentence is punishment of the offender. Without going into a question that is now hardly controversial, it may be stated that this view of penology, which produced the savagery of English criminal law one hundred years ago, is now largely outmoded, and has given place to the principle that the aim of criminal justice should be the protection of society. True, one of the minor elements of this rather vague term is still punishment, but not punishment for its own sake: rather is it part of the complex process known as reformation. Almost without exception penologists to-day believe that the aim and justification of the sentence of a criminal Court, and particularly a sentence of imprisonment, is the rehabilitation of the offender, resulting in a mental, moral, and physical strengthening, so that he may be more able, when he returns to society, to resist the temptations that will beset him.

One means of facilitating this policy is by the use of the indeterminate sentence, unanimously recommended for world-wide adoption by the representatives of fifty-three nations attending the International Prison Commission in London in 1925, and for many years practised by the great majority of the States of the United States of America. Thus s. 796 of Chapter 38 of the Revised Statutes of Illinois, referring to crimes other than treason, murder, rape, and kidnapping, states that the sentence "  .  .  . shall be a general sentence of imprisonment and the Courts of this State imposing such sentence or commitment shall not fix the limit or duration of such imprisonment," and goes on to state that the term shall not be less than the minimum nor greater than the maximum term provided by law in regard to the particular offence concerned, and that it shall be deemed part of every sentence that the term may be terminated earlier than the maximum by the Department of Public Welfare. To take a random example, the statutes of Ohio provide that a person convicted of forgery "shall be imprisoned in the penitentiary not less than one year nor more than twenty years," and likewise the penalties for arson and assault with intent to kill are two to twenty and one to fifteen years' imprisonment respectively. The practice varies slightly from State to State, and in a few cases Judges have power to narrow the limits set—*e.g.*, to give a sentence of two to ten years where the statute provides for a one to fifteen years' term, but in most cases the exact language of the Act is followed.

The principle of this is that the Judge cannot determine in advance the probable reformative effect of imprisonment and is therefore not in a position to assess the length of the term. Moreover, a Judge at the time of sentencing is like a man confronted with a picture that has accumulated the dirt and grime of centuries. One small part has been cleaned and restored and stands out in sharp detail, dominating the whole thing and distracting attention from the rest. What valuation can be made of the picture as a whole in that state? And what judgment can be passed upon a prisoner until something more than a hasty police report is available, and careful observations extending over a period of some weeks have been made so as to form a background into which his crime will fall in the right place and proportion? The man whose demeanour at his trial would immediately label him as a hardened criminal may well turn out very responsive to intelligent reformative treatment when the circumstances of his case are adequately investigated, and the meek, apologetic first-offender on the other hand prove quite obdurate. The philosophy behind the indeterminate sentence is that the punishment should be made to fit the criminal rather than the crime.

The indeterminate sentence is, of course, only one part of the modern scientific approach to the treatment of crime. By itself it can do nothing, and there are two other vitally important factors which must go with it. They are individualized prison treatment and an intelligent parole system. (In New Zealand we would say probation, but in the United States this term is limited to the surveillance imposed on persons in lieu of and not following imprisonment.) For many years reformers have been pointing out that the population of a prison is a segment of the outside world, probably rather differently constituted, but nevertheless representative of all sections and divisions of mankind, who cannot all be expected to respond in the same way and at the same rate to the same treatment any more than the patients in a general hospital can be expected to derive equal benefit from the one bottle of medicine. The average prison houses good men and bad men, intellectuals and idiots, patrician and proletariat, persons of all creeds, temperaments, and backgrounds. Is it reasonable to expect that we can shake all these up in the one bag and get perfection? Every man cannot, of course, expect his own nurse, but at least some degree of individualization is essential: individualization based on a proper knowledge of the past and directed towards the future release of the prisoner. From the point of view of administration the best inhabitant is the good prisoner, sullenly obedient to a rigid and unimaginative routine, lacking interest in his deadening work or equally deadening leisure, and gradually having all initiative regimented away. And unless the traditional prison system is overhauled in the light of modern thought it will continue to turn out good prisoners, persons who are, in many cases, fit for little else than to return and continue to be good prisoners, and not good citizens.

If a penal system which has adopted the indeterminate sentence is to give its best results, individualized prison treatment is essential. Imprisonment cannot, under this system, be regarded as expiation, as the end of a chapter of life, but rather as the beginning of a new one, the rearming of a prisoner for his return to society. In the best American prisons this is realized by pre-

paring the offender, right from the time of his entry, for the second stage of his treatment—parole. At the end of his minimum term he is allowed and encouraged to apply to the Parole Board, a body of five or six men generally appointed by the Governor, and usually including a Judge, a criminologist, an alienist, and the Superintendent of Police. This Board, after studying all the relevant reports, interviews the prisoner and decides whether his detention has had sufficient reformative effect for him to be released on parole. At first sight this might appear to be almost indistinguishable from the functions of the New Zealand Prisons Board, but there is in fact a wide difference, for in the United States of America the guiding consideration is not the length of time served, but evidence of rehabilitation. Moreover, the release of a prisoner on probation in New Zealand seems to be a reward for docile behaviour during his incarceration, a sort of reduction for good conduct. In America, however, parole is, as I have said, merely the second step in the process of reformation. The first is in prison where he is (or should be) carefully studied and his past conduct analysed and explained to him, and sheltered from temptations; as a parolee he is returned to the battleground of life, benefiting by the lessons of his period in prison, and still enjoying a certain amount of protection from the parole officer, who must obviously be something more than a mere policeman. This, in fact, is the crucial stage of his treatment, and the testing-point of the whole system. If the prison authorities and the Parole Board do their jobs properly, the professional or deliberate criminal (and there are very few of them) will be detained for a long period, not as a punishment, but on congenial work and with a reasonable amount of leisure, for the protection of society, while the "criminal by circumstances" will be placed on parole as soon as there appears to be a reasonable chance that he can cope with such of those circumstances that cannot be removed. For a period, of course, he will be unobtrusively but carefully supervised, but as time goes on and he continues to make good he will be to all intents a free man.

This system which I have described as being in operation in the United States of America is not really the true indeterminate sentence, which should in theory have neither maximum nor minimum limits to the duration of the imprisonment. No doubt it was felt that the power to release one man immediately after conviction and to keep another in prison for life was too potentially oppressive to place in the hands of an executive body, and that some limits, however wide, were necessary. Complaints have been made, however, that in practice the minimum sentence has come to be regarded as the actual sentence, and that at the end of this period the prisoner is automatically paroled. In general this is not so, but it may have been this consideration which led New York to drop the minimum sentence in the case of certain prisons and to give the Parole Board unfettered discretion as to when a prisoner should be released. This is particularly important with regard to lesser misdemeanours, and may eventually pave the way to the total abolition of all short sentences of six months or thereabouts. Prison authorities are united in condemning anything less than a year as useless for training and reformation, and statistics seem to show that two years is the optimum period. For the craftsman who is not really criminal but makes an occasional slip, a fine is often sufficient, though some advocate a short term, say, of a month for reflection, or, more important, for examination and study of the case. For the real criminal and the man without a trade a longer term than six months is obviously necessary, and for the prostitute, the drug addict, the habitual drunkard—*i.e.*, primarily medical cases—a mere term of imprisonment as such is useless, and a short term probably worse than a long one. The beauty of the indeterminate sentence in such cases is that it takes away the responsibility from the Judge or Magistrate, who can usually regulate the sentence at best by intuition, and places it on the shoulders of those who after a careful and unhurried examination of the prisoner and of the circumstances are in a position to decide, and usually very accurately, into which class the prisoner falls, and what is the best treatment for him.

As in every other country, American progress in modern penal methods has been slow, owing to lack of public interest. The United States of America has some of the best and some of the worst prisons in the world, but even more depressing, perhaps, than some of the barbarous institutions in the South is the sight of others where the enterprise and ingenuity of many intelligent workers are going to waste because of the conditions in which they have to work. In the Massachusetts State Prison at Charlestown a capable staff of social investigators turns out a superb case-history of every inmate simply packed with suggestive material, shortly after arrival, but the condition of the one-hundred-and-fifty-year-old buildings precludes anything but the smallest variation from the same dull routine for every one. Others have splendid equipment, but no case-histories, and grope vaguely around without any rational basis for their actions. Nevertheless, there is much that is good, and it can hardly be disputed that most of the acute thinking and writing on these problems to-day is done in America. Kenny (*Criminal Law*, 14th Ed. 547) makes a remark unworthy of his great reputation when he says, in reference to indeterminate sentences, " . . . the persistent increase of crime in the United States does not prepossess us in favour of Transatlantic penal methods," and goes on to make some strangely pointless criticisms. Apart from such notable exceptions as the Webbs and one or two others, this seems, unfortunately, to be typical of English opinion during the last twenty years or more, but there is evidence that at any rate the official attitude, under the reforming zeal of Sir Samuel Hoare, is rapidly changing.

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# "Devil's Own" Golf Tournament.

**Palmerston North: September 23-25.**

It has now been decided that the annual "Devil's Own" Golf Tournament will take place next week-end.

The Tournament is being held under abnormal conditions, consequently entry forms are not being issued, and the entry fee of £1 will be collected at Palmerston North.

Unlike the tournaments of other years, this one is not being advertised; but it is hoped that a large attendance will make it the conspicuous success it has always been.

Wellington practitioners intending to take part are asked to communicate with Mr. A. T. Young, or Mr. George Phillips, during the present week.

# Theobald Mathew.

### The Author of "Forensic Fables."

Theobald Mathew—he was known as "Theo" to all Judges and legal practitioners—was born on December 6, 1866, and died on Tuesday evening June 20, 1939; and his life and death are of great moment in the legal world. Great-nephew of Father Theobald Mathew, the Apostle of Temperance in Ireland, and eldest son of a famous Lord Justice, Theo himself did not in quality of mind and greatness of character suffer by comparison with either of them. His life and example were those of a good Christian, and he had all the qualities which would have made him a great Judge.

Educated at the Oratory School and at Trinity, Oxford, he was called to the Bar by Lincoln's Inn in 1885. Resolving to practice at the Common Law Bar he joined the Middle Temple *ad eundem*, became a pupil of Joseph Walton, who was then a junior in big commercial practice and who afterwards was appointed Judge when Sir James Mathew was promoted from the Commercial Court to the Court of Appeal. Theo joined and travelled the South-eastern Circuit, and was a most satisfactory member; and as junior, treasurer, and practitioner maintained and upheld the best traditions of the Home Circuit. His loyalty to the Mess did not prevent him from assailing, as he did, throughout his life, the anomalies and absurdities of the Circuit System as he knew it; and many a biting comment he made on the time wasted by judicial visits to causeless towns such as Mold and Presteign while arrears of important cases were accumulating in London.

For the work done by his father and Bowen in founding what he called "that unchartered and unregistered tribunal, the Commercial Court," he had a great admiration, and he followed its fortunes and its cases with the greatest interest. He wrote *The Practice of the Commercial Court*, and for some years was editor of *Commercial Cases*; he acquired a substantial common-law practice in the High Court and was frequently briefed in Commercial Court cases. His last and most successful period began when Lord Robert Cecil (now Viscount Cecil), Malcolm Macnaghten (now Macnaghten, J.), and he were together in Chambers at 4 Paper Buildings.

In the years following the War and before Canada had adopted the principle and practice of legal nationalism, Sir Malcolm Macnaghten and Theo appeared frequently in Canadian appeals before the Judicial Committee. In later years he became more and more the leading specialist in libel; and he had more work in the last six months than at any corresponding period of his long and successful practice at the Bar. He worked with amazing speed and sureness; but towards the end he was greatly troubled by failing eyesight. In the art of drawing pleadings, old and new, he had no superior, and he was a master in the strategy of litigation. The *Wright* v. *Gladstone* libel action is an example, showing how the law as it stands may be used to vindicate the dead. One of the most learned counsel even of his own learned generation, he excelled as a lawyer rather than as an advocate: in addressing a jury he could not assume an emotion which he did not feel or make a submission which his intellect did not endorse. Yet he could, and sometimes did, for the delectation of his friends, deliver a speech of the kind which some of his colleagues were able to use with successful solemnity.

Theo's pupils, as one of them has publicly declared, were indeed fortunate. He took pains to instruct them; and it is not surprising that he always had a long waiting list, and never less than four in the pupils' room. I may mention three of them who are not only legal practitioners, but politicians of note—Kingsley Griffith, Liberal; Quintin Hogg, Conservative; and C. R. Attlee, Leader of the Labour Opposition.

Throughout his life, in addition to his legal work, Theo found time to write articles, literary and historical, but all of legal flavour. A few of the best are to be found in his last book, *For Lawyers and Others*. For many years before the War he contributed a weekly commentary on matters of legal interest to the *Daily Telegraph*. His knowledge and admiration of Dickens and Dr. Johnson—and of Mr. Gladstone—was profound, and his contributions to the knowledge and appreciation of these great men are admittedly of great value. His writing, like his speech, was pointed and in style approached perfection: he never wasted or misused a word; and it was said of his writing that a phrase could not be altered without spoiling it. Amongst lawyers he was unsurpassed in his mastery and use of English, and by reason of this and of his humanity and his wit he was, of lawyers, one of the two best after-dinner speakers of his time. As a legal caricaturist he stood and stands alone; admittedly the superior of Sir Frank Lockwood, his only rival in that kind, and for whom Theo had a great admiration, tempered by a critical appreciation of his shortcomings. It took Lockwood a long time to learn, he once observed, that "the figure 3 is not an adequate representation of the human ear." His *Forensic Fables*, which first appeared in the *Law Journal* (London), and later, on the suggestion of Messrs. Butterworth, were published in volume form, are his best but not his only work. There is in his Chambers an enormous pile of notebooks, and on almost every page, opposite the notes of evidence, are caricatures of Judges, counsel, solicitors, and witnesses; and they include almost every Judge and silk and junior in practice during the last thirty years—not excluding a humorous representation of himself in the act of receiving an unwelcome message from "Sydney"—then his junior clerk. During the great controversy between Lords and Commons in or about the year 1910, he contributed two series of caricatures to the *Westminster Gazette*, uncomplimentary to the Peerage, entitled *The Story of An Ancient Line* and *The Press and the Budget: Why Some of Them Voted Against It.* They were described as "the cleverest caricatures the campaign has produced."

Theo was the law's greatest wit, and the stories of his comments and conversation are numberless. He was always reluctant to admit the authorship of the good stories attributed to him, possibly because they had lost accuracy in course of circulation. I did, however, obtain from him a direct admission that he was responsible for the famous "Dr. Livingstone, I presume?" story. He did so at a time when, after receiving from him the first volume of *Forensic Fables*, I hastened to buy the second and asked him to put his name therein. Rebuking me for foolish extravagance, he quickly wrote as follows: "Purchased by ——— and presented to him by his friend, T. Mathew." "A lunatic, a great friend of mine," was how he described a prominent and unusual member of the Bar; and he caused harmless merriment concerning a friend who, owing to dental difficulties, is not always able to

withhold particles of moisture when giving expression to certain consonants. He had, said Theo, put out a fire which had broken out in his chambers "with a few well-chosen words."

Why Theo, who had all the qualities of a great Judge, was never appointed to the Bench is, and will probably remain, one of the unsolved mysteries of the law or of the Lord Chancellor's office. The fact that he had never taken silk does not explain it, nor the suggestion that Theo's reputation as a wit was an insuperable bar in the view of those Chancellors who reigned during the years when Theo was not ineligible by reason of his age. Judicial joking and jesting was a habit he abhorred; and as arbitrator in countless commercial arbitrations, and as Recorder of Margate and of Maidstone, he showed himself wholly free from that abominable vice, and was not only quick and courteous, but right. The following comment, written by him when he was thirty-three, gives an indication of his attitude and is also a fair example of his style:

> "Jokes are still made in County Courts, and at coroners' inquests the fun waxes fast and furious. But jesting, so far as in the superior Courts of the law are concerned, is a thing of the past. The House of Lords does not approve of it. It is said that Lord Morris once made a joke in the hearing of Lord Shand, but his effort happily escaped detection. Nor has the Court of Appeal encouraged it since the time of Lord Justice Bowen. Among the puisnes the practice is nearly extinct. Even Mr. Justice Darling manfully resists the inclination to sparkle—and only breaks out when, in the course of the proceedings, a mother-in-law is mentioned."

While I knew that the spontaneous offer of a Judgeship would have been a source of great satisfaction to him, the fact that it was never made did not embitter him nor does it detract one iota from his reputation or affect the memory, love, and esteem in which he is held by the whole legal profession, and of which striking testimony was given by the greatness of the company of Judges and lawyers who on a working-day of term attended the Requiem Mass at Brompton Oratory on the day of his burial. They all knew not only of his brilliance but of his abounding generosity and humanity. No man knows, or was allowed to know, the number of his good deeds or of those who in trouble came to him for help and advice and never in vain. His good works are "as the stars in the heaven for multitude and as the sands of the seashore, innumerable."

To his widow, and to his sons and daughters, the legal world offer congratulations on his life and deep sympathy in his death.

## Breach of Statutory Duty.

(*Concluded from p. 232.*)

These three propositions, in the opinion of Lord Justice Du Parcq, are unassailable in the Court of Appeal, though perhaps criticism might usefully be directed against the first two of them in the House of Lords.

It is interesting to note that leave to appeal to the House of Lords was granted, and it is to be hoped that the House of Lords will clarify the present difficult position, for it is submitted that there is great weight in Lord Hewart's view that "One of the excellent reasons for this legislation is precisely the fact that by reason of carelessness, indolence, or haste, workmen sometimes omit to observe instructions, and where machinery is dangerous they are to be saved even from themselves."

# Correspondence.

### The Profession and the War.

The Editor,
NEW ZEALAND LAW JOURNAL.

SIR,—

Another bitter and probably long struggle is before us, and although we cannot yet foresee what part New Zealand will be called upon to play in it, the legal profession, with the experience of the Great War in mind, should take early steps to consider in what ways it can best help the State and those members of the profession and their staffs who are called away from their business or training.

I suggest that the New Zealand Law Society convene a meeting at an early date for the purpose of considering the organization of the profession on a war-basis, and of inviting the co-operation of the District Law Societies and members of the profession generally.

It goes without saying that whatever system the Government adopts, the call for recruits will be promptly responded to by the profession.

Assuming that New Zealand should send an expeditionary force overseas or be called upon to defend her own shores from an attack, the profession will have to consider such questions as these, apart from services associated with the actual waging of war:

1. How to help the Government's legal Departments by furnishing substitutes for those on active service.

2. How to carry on the business of a solicitor in practice by himself, or of a firm where all the members are called up or the staff of which is depleted.

3. What special provision should be made for those killed or injured and their dependants in addition to pensions, &c., from the State.

4. Whether some insurance fund for the purpose should form part of the scheme furnished by a levy on those members of the profession continuing their practice.

5. Whether, consistently with their duties to the State, arrangements could be made for the completing of their law examinations by those students who are about to finish their course. My extensive experience on the University Senate in endeavouring to ease the way for returned-soldier students whose course had been interrupted, in administering the New Zealand University Amendment Act, 1915, which I drafted enabling the Senate to confer degrees, &c., and grant passes to soldier-students without being bound by the University statutes and regulations, and the handicap imposed in after life on students called up on the eve of their final examinations, impressed me with the advisability, wherever possible, of permitting the student to complete his course, or, if possible, some stage of it. The University will be found as sympathetic and helpful as it was in the Great War, but, in fairness to the public, it must require a reasonable standard of proficiency from those in the profession.

Many of these matters will no doubt be settled by private arrangements, and the question of financial assistance will depend largely upon the provision made for soldiers and their dependants by the State; but

the Law Society might give a lead, invite discussion, and indicate the general line of a scheme for the organization of services of the legal profession upon a war footing.

Yours, &c.,
H. F. VON HAAST.

41 Salamanca Road, Wellington,
September 6, 1939.

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**Running-down Actions: Statements of Parties and Witnesses, procured by Police.**

The Editor,
NEW ZEALAND LAW JOURNAL.

SIR,—

Mr. A. K. Turner, in Vol. 11 of this JOURNAL, pp. 229, 245, and 257, deals exhaustively and ably with this troublesome question. I make a plea for a reform of the law, so that statements obtained by the Police, and traffic officers, will, as a matter of course, be available to the parties involved in the collision. Frequently, in one of these accidents, a pedestrian, or driver, is either killed, or rendered unconscious, outright. There is no one, on his behalf, to make the necessary, immediate inquiries of eye-witnesses and to prepare the usual plan; and, if he is a pedestrian, there is no insurance company to prepare his case. But the other uninjured party is capable of protecting himself in these respects, and, if he was driving a car, his insurance company, with its expert organization, is also soon on the spot to take matters in hand for him. Shortly after the accident, a constable (or traffic officer) arrives as a result of the reporting of the accident to him, and he is usually first on the scene. Now, if, as is generally the case, litigation (police or civil proceedings) follows, the Court naturally attaches the greatest importance to the position of the vehicles, skid-marks, &c., and the accounts of the accident by eye-witnesses, recorded immediately thereafter by the Police. Why, in the interests of justice, should not all this officially recorded evidence become available, at once, to both parties involved, so that they may make copies? The fact that a Police prosecution may follow should make no difference. But I think that for this privilege of making copies, the parties should pay a fee to the Crown of so much per folio, for copies of statements, and a separate charge for a copy of the plan. Let the parties, if preferred, make these copies themselves, at police-stations, on payment of the same fees. It is frequently objected that, if witnesses' statements are to be available to others than the Police, it will make the work of the Police difficult in procuring them. But why? Either the witness saw the accident or did not; and in the former case, since he may be subpoenaed as a witness, it is in his interests to have an early record made of his observations. In any case, why should not eye-witnesses whose impartial evidence is of greater value than that of the parties themselves, be compelled to give statements to the Police and traffic officers?

It is true that the parties may obtain an independent statement from a witness, but surely the earlier statement to the Police is of more value? Under existing conditions it must frequently be referred to. Why should a witness have to be worried about making a second statement, particularly when the former is not available with which to refresh his memory? Alternatively, why cannot each witness who makes a statement to the Police be provided, simultaneously, with a certified copy, with an obligation, if called upon, to produce this to the parties to the accident, to be copied if desired; the names of the witnesses being supplied by the Police in the first instance? The same method could be applied to the parties' statements to the Police; except that, in the interests of truth and justice, each party should make his statement available to the other, viewing the matter of these motor collisions as one which concerns the State, as well as the parties involved. Frequently, also, there is no, or little, other evidence available. This would leave only the plan to be copied at the police-station. I venture to suggest that some such reform of this branch of the law is long overdue; in order that the best evidence is thus made available, as a matter of course, to the parties, and to the Courts, in civil as well as in criminal cases.

Yours, &c.,
C. C. CHALMERS.

Auckland,
August 17, 1939.

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# Legal Literature.

**Police Law in New Zealand.** By J. H. LUXFORD, S.M., assisted by J. J. GALLAGHER; pp. xl × 604. Butterworth and Co. (Aus.), Ltd., Wellington and Auckland.

Still another volume has been added to the growing collection of useful New Zealand legal text-books. Mr. J. H. Luxford, S.M., the author of *Liquor Laws of New Zealand*, has just completed, with the assistance of Mr. J. J. Gallagher, the formidable task of publishing *Police Law in New Zealand*. He points out in his preface that the book is capable of development. That may be so, but, in the meantime, members of the legal profession and Police officers will have the advantage of a comprehensive work which embraces practically every phase of the criminal and quasi-criminal law in New Zealand.

A number of references in the earlier chapters, dealing with procedure, arrests, and confessions, indicate that the book is intended, primarily, for Police officers; but as one passes from chapter to chapter it becomes apparent that each subject dealt with in the 560 pages of text is equally important to the practitioner as to the Police officer. Indeed, the many subjects are so comprehensively discussed and well indexed that the practising lawyer will quickly come to regard the book as one of the volumes he should always have at hand.

It is unfortunate, perhaps, that case references have been omitted from the text. The author has explained in the preface that the omission is deliberate, and that full references have been given in the table of cases. It is true that most of the English criminal cases appear in as many as five or six different Reports, but lawyers are accustomed to a reference to the principal report in the text. It is to be hoped that this will be remedied in subsequent editions. On the other hand, the author has limited citations to important cases and has given full quotations of relevant passages of the judgments. This is to be commended. There is a tendency in some text-book writers to cite far too many cases, which when looked up in the Reports are found to have very little bearing on the point in issue. The author has avoided this fault; he has shown a very wise

discretion in his selection of cases, and the apposite quotations he has taken from the judgments will for the most part save practitioners the necessity of referring to the Reports.

In reviewing a legal text-book, it is not possible to subject each chapter to a minute examination. In a first edition of a work of this nature, it would be too much to expect that it is free from all errors; or that each and every subject coming within the scope of criminal law has been fully covered. Whatever errors or omissions there may be, the foundation has been laid for one of the most useful books in New Zealand legal literature, and the author is to be congratulated on the patience and industry he has employed in the preparation of a very comprehensive and useful work.

# Practice Precedents.

## Criminal Law: Motion for Leave to Appeal to Court of Appeal against Conviction.

The ground of the motion under notice is that evidence was wrongly rejected, and wrongful direction was given by presiding Judge.

Sections 442 and 443 of the Crimes Act, 1908, give an accused person the right of appeal to the Court of Appeal, where, respectively, a question of law is reserved by the presiding Judge, or where the Court refuses to reserve the question. If the question is reserved, a case is stated for the opinion of the Court of Appeal (s. 442 (6)). In any case where leave is refused by the Supreme Court and a motion for leave to appeal has been granted by the Court of Appeal, a case is similarly to be stated for the opinion of the Court of Appeal (s. 443 (5)).

An application for leave to appeal should be made promptly, while the material facts are fresh in the minds of those concerned, and particularly of the trial Judge.

On the hearing of any appeal, the Court of Appeal may direct a new trial (s. 445 (1) (*d*)).

In this precedent it is assumed that the prisoner had been charged on two counts of arson and mischief under ss. 329 and 339 of the Crimes Act, 1908. (As to what constitutes mischief, see s. 328.) Here the accused admitted setting fire to two stacks of hay on leased land belonging to himself and his sister of which he had retaken possession, and, being the owner of the land, he thought he could do what he liked with it and everything on it. Evidence was adduced to show that the act on which he was indicted was done under an honest, though mistaken, belief that he was entitled to do it. This evidence was not admitted by the trial Judge, who directed the jury that the only question they had to decide was whether prisoner had committed the act. On a motion for leave to appeal against the conviction on the ground that such evidence was admissible, it was held that the evidence was improperly rejected and there must be a new trial.

For a consideration of the law and facts and the sections of the Crimes Act, 1908, dealing with this precedent, see *The King v. Hakiwai*: [1931] N.Z.L.R. 405.

The judgment of the Court of Appeal takes the form of a certificate signed by the Chief Justice, and sealed. It is prepared by the Registrar of the Court of Appeal and forwarded by him to the Court of first instance.

IN THE COURT OF APPEAL
OF NEW ZEALAND.

IN THE MATTER of the Crimes Act 1908
AND
IN THE MATTER of an indictment between His Majesty the King and A. B. [*Name of accused.*]

TAKE NOTICE THAT Counsel for the above-named A. B. (hereinafter called "the prisoner") WILL MOVE this Honourable Court at the Supreme Court House on day the day of 19 at o'clock in the forenoon or so soon thereafter as Counsel may be heard FOR AN ORDER GRANTING LEAVE TO APPEAL from the refusal of the Supreme Court at on the day of 19 to reserve for the opinion of the Court of Appeal the questions following namely:—

1. Whether the learned Judge was wrong in holding during the said trial that he would not admit any evidence except such as tended to prove or disprove the allegation that the accused burnt the stacks of barley mentioned in the indictment herein.

2. Whether the learned Judge was wrong in directing the jury in words following: "What you have to decide is whether he burnt the stacks or not. Whatever was his reason for doing so has nothing to do with the case. Your duty is to find him guilty if you consider he burnt the stacks down."

3. Whether the learned Judge was wrong in directing the jury that the only question before them was whether or not the accused burnt the stacks and all other matter was extraneous and merely affected what was to happen after the verdict meaning thereby that all other matter merely affected the sentence that might be imposed on the accused.

4. Whether the learned Judge was wrong in refusing the application of the accused's Counsel that he direct the said jury to consider the defence submitted under s. 328 (2) of the Crimes Act 1908 and whether such non-direction amounted to a misdirection.

5. Whether the learned Judge was wrong in intimating to the jury that there should be no need for them to leave the jury-box to consider their verdict thereby having regard to the previous remarks of the learned Judge virtually directing the jury to find a verdict of guilty.

UPON THE GROUNDS:—

1. That during the trial Counsel for the prisoner made application to the Court to reserve for the opinion of the Court of Appeal the questions set out above but such application was refused.

2. That the prisoner was prejudiced in his trial by being precluded from proceeding with the defence available to him under s. 328 of the Crimes Act 1908 AND UPON THE THE FURTHER GROUNDS appearing in the affidavit of filed in support herein.

Dated at this day of 19 .
Counsel moving.

*This notice of motion is filed by, &c.*

To the Crown Solicitors at and to the Registrar of the Court of Appeal, Wellington.

AFFIDAVIT IN SUPPORT OF MOTION.
(*Same heading.*)

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

1. That the above-named A. B. (hereinafter referred to as "the prisoner") was tried at the Supreme Court at on the day of 19 on an indictment copy of which is hereunto annexed and marked "A" on the .

2. That Counsel for accused desired to lead evidence both by cross-examination and by examination in chief to support the prisoner's allegation that he believed he was justified in the course of action he took because the former lessee was openly defying the prisoner's right to possession of the land but the learned Judge refused to allow such evidence to be given and the Judge mentioned during trial that if the prisoner was dissatisfied he could refer the matter to another Court meaning that he could appeal to this Court of Appeal.

3. That Counsel requested the learned Judge to allow the evidence he was excluding to be given so that the Court of Appeal could see the defence that the prisoner desired to set up but the Judge refused to do so. Copy of the notes of evidence given at the trial is hereunto annexed and marked "B."

4. That Counsel in his address to the jury desired to submit an argument to the jury that they should consider whether they thought the prisoner had a defence under s. 328 of the Crimes Act 1908 but the learned Judge refused to allow the jury to consider any defence but a denial that the prisoner

had set fire to the stacks whereas the prisoner had already openly admitted on oath in giving evidence during the trial that he had set fire to the stacks.

5. That numerous cases relevant to these matters were cited by Counsel to the learned Judge during the said trial.

6. That the learned Judge was requested to direct the jury as to the prisoner having a defence available under the said s. 328 but the learned Judge refused and stated that he would direct the jury that the only question before them was whether or not the accused burnt the stacks and that all other matter was extraneous and merely affected what was to happen after the verdict.

7. That the jury returned a verdict of guilty on the count charging the prisoner with mischief and recommended him to the Court's mercy as they considered he had done the act under great provocation.

8. That on the day of 19 the prisoner was sentenced to but before sentence Counsel again requested the learned Judge to reserve certain questions pursuant to s. 442 of the Crimes Act, 1908 for the opinion of the Court of Appeal. Such request was refused.

9. That the prisoner has been prejudiced in his trial and desires that he be granted leave to appeal by this Honourable Court.

Sworn &c.

# Supreme Court Emergency Rules.

The *New Zealand Gazette*, September 13, 1939, contains "The Supreme Court Emergency Regulations, 1939," which came into force on September 14.

The Code of Civil Procedure set forth in the Second Schedule to the Judicature Act, 1908, is amended by inserting therein following Rule 531CC thereof the following additional rules:—

"531DD. Upon any application to the Supreme Court for a grant of probate or letters of administration or for the resealing in New Zealand of a probate or letters of administration within the meaning of Part II of the Administration Act, 1908, the applicant shall file his affidavit stating whether he is or is not an alien enemy within the meaning of the Enemy Property Emergency Regulations, 1939, or any regulations for the time being in force replacing those regulations, and in the former case shall set out that the written consent of the Attorney-General has been given to the making of the application, and that consent shall be annexed to the affidavit.

"531EE. Upon any application to the Supreme Court for a grant of probate or letters of administration or for the resealing in New Zealand of a probate or letters of administration as aforesaid there shall also be filed an affidavit, made by some person with a knowledge of the facts stating to the best of the deponent's knowledge, information, and belief whether the deceased person was or was not at the time of his death an alien enemy within the meaning of the Enemy Property Emergency Regulations, 1939, or any regulations for the time being in force replacing those regulations, and in the former case the affidavit shall set out that the written consent of the Attorney-General has been given to the making of the application, and that consent shall be annexed to the affidavit."

# Acts Passed, 1939.

No. 5. Imprest Supply Act (No. 2), August 31.
No. 6. Property Law Amendment Act, 1939, September 8.
No. 7. Land Transfer Amendment Act, 1939. September 14.
No. 8. Emergency Regulations Act, 1939. September 14.

# Bills before Parliament.

**Emergency Regulations.** — Cl. 2. Interpretation. Cl. 3. Emergency regulations. Cl. 4. Extra-territorial operation of emergency regulations. Cl. 5. Validation of certain emergency regulations. Cl. 6. Validation of acts done in anticipation of emergency regulations. Cl. 7. Protection of persons acting under authority of this Act or of emergency regulations. Cl. 8. Publication in *Gazette*, &c., to be notice to all persons concerned. Cl. 9. Liability for breach of emergency regulations. Cl. 10. Procedure in prosecutions.

**Legal Aid.**—Cl. 2. Power to make regulations providing for legal aid to poor persons: (*a*) Defining the term "poor person" for the purposes of the regulations, and prescribing the classes of persons qualified to receive legal aid as poor persons: (*b*) Authorizing the New Zealand Law Society to establish committees and panels of legal practitioners for the assistance of poor persons, and for this purpose to require practitioners to serve on those committees and panels and to undertake the advising of poor persons and the conduct of litigation on behalf of poor persons; and empowering the New Zealand Law Society to delegate any of its functions under the regulations to any District Law Society: (*c*) Prescribing the nature and extent of the legal aid that may be granted, and the conditions upon or subject to which it may be granted: (*d*) Prescribing the manner in which legal aid shall be provided and administered: (*e*) Providing for the remission of fees payable under any Act, rules, or regulations in relation to Court proceedings to which poor persons are parties and for the non-allowance or remission of costs payable by poor persons (whether to other parties or to solicitors) and for the non-allowance, remission, or disposal of costs payable to poor persons. (2) Any regulations made under this section may apply generally with respect to all legal matters, whether relating to proceedings in any Court or otherwise, or may apply with respect to specified classes of matters or proceedings. (3) Nothing in the Judicature Amendment Act, 1930, shall apply to any regulations made under this section.

**Municipal Association.**—Cl. 2. Association incorporated. Cl. 3. Membership of Association. Cl. 4. Rules of Association. Cl. 5. Application of certain provisions of Incorporated Societies Act, 1908. Cl. 6. Officers of Association. Cl. 7. Payments by the Association. Cl. 8. Authority for members to pay subscriptions to Association. Cl. 9. Expenditure of moneys in connection with annual meeting of the Association. Cl. 10. Repeals and saving.

**Nurses and Midwives Registration Amendment.**

**Small Farms Amendment.**—Cl. 2. Altering Titles of the Small Farms (Relief of Unemployment) Amendment Act, 1933, and the Small Farms (Relief of Unemployment) Amendment Act, 1935. Cl. 3. Small Farms Board. Cl. 4. Settlement land may be declared subject to principal Act. Cl. 5. Land to be disposed of on renewable lease. Repeals and saving. Cl. 6. As to acquisition of fee-simple under leases already granted. Repeal.

# Magistrates' Court Decisions.

## Recent Cases.

DESTITUTE PERSONS.

Maintenance—Cancellation, Variation, or Suspension of Orders—Supreme Court Order against Father for Son's Maintenance—No Limitation of Age—Construction—Magistrates' Court—Whether Attainment by Son of age of Sixteen Years ground for Cancellation of Order in Magistrates' Court—Jurisdiction—Concurrent Jurisdiction of both Courts to cancel, vary, or suspend Orders made by Supreme Court—Destitute Persons Act, 1910, ss. 26 (5), 39—Destitute Persons Amendment Act, 1926, s. 8—Destitute Persons Amendment Act, 1930, s. 2.—LLOYD *v.* LLOYD, **M.C.D. 210** (Goulding, S.M.).

Maintenance by Near Relatives—Effect of Social Security Legislation—"Destitute person"—"Adequate maintenance"—Destitute Persons Act, 1910, ss. 5, 33—Social Security Act, 1938, ss. 72 (2), 94.—RANSON AND OTHERS *v.* RANSON, **M.C.D. 236** (Goulding, S.M.).

HARBOURS.

Master Boatman's or Waterman's License—"Drive or ply for hire"—"Use"—Taupo Harbour Regulations, 1926 (*1926 New Zealand Gazette*, 3430), R. 41.—KEAN *v.* MCCAULEY, **M.C.D. 199** (Miller, S.M.).

HUSBAND AND WIFE.

Tenement—Contract—Arrangement for Wife to occupy House owned by Husband free of Rent during Separation—Whether an Enforceable Contract—Jurisdiction—Value of Tenancy—Whether Husband's Action against his Wife for Possession of the Property Maintainable—Magistrates' Courts Act, 1928, s. 27 (*f*) (i) (ii)—Law Reform Act, 1936, s. 12—Married Women's Property Act, 1908, s. 23.—THOMPSON (HUSBAND) *v.* THOMPSON (WIFE), **M.C.D. 191** (Lawry, S.M.).

INFANTS AND CHILDREN.

Child placed by Father in Orphanage—No Maintenance paid by him for Five Years—No Interest taken in Child by Visiting or Writing—Father refusing to Consent to Child's Adoption—Whether a "deserted child"—Infants Act, 1908, s. 15.—*In re* S. (AN INFANT), **M.C.D. 188** (Stilwell, S.M.).

Contract—Agreement by Infant to purchase Land—Deposit paid—Subsequent refusal to complete Purchase on Ground of Infancy—Whether Infant entitled to recover Amount of the Deposit.—E. AND J. HOUGH *v.* PUBLIC TRUSTEE, **M.C.D. 233** (Luxford, S.M.).

LICENSING.

Offences—Disposal of seized Liquor—Proof that convicted Person "Owner or occupier"—Search-warrant—Whether any Constable may execute same—Lawfulness of more than one Seizure of Liquor under same Warrant—Constable's Authority to seize Liquor Alleged to be Property of Third Person—Licensing Act, 1908, ss. 143, 228, 229—Police Force Act, 1913, s. 29.—POLICE *v.* BEATTIE, **M.C.D. 183** (Walton, S.M.).

Offences—No-license District—Package of Liquor not labelled as such—Purchaser taking it for his own Use into No-license District—"Deliver"—Licensing Act, 1908, s. 146 (*a*) (iv).—POLICE *v.* DANIEL, **M.C.D. 202.** (Lawry, S.M.).

MAGISTRATES' COURT.

Jurisdiction—Claim for Possession of Land—Subdivisional Plan indicating Boundaries—Sale of Section by reference thereto—House built thereon—Encroachment on Adjoining Section—Claim for Order for Possession of Land encroached upon—Whether maintainable—Whether Person in possession a Trespasser—"Without right, title, or license"—"Reasonable cause"—Magistrates' Courts Act, 1928, s. 183 (1) (2)—Judicature Act, 1908, s. 97.—WYNDRUM ESTATES, LIMITED, AND HADWIN *v.* MORRIS, **M.C.D. 207** (Goulding, S.M.).

# Rules and Regulations.

**Fisheries Act, 1908.** Trout-fishing (Waimate) Regulations, 1937, Amendment No. 1. August 23, 1939. No. 1939/118.

**Education Act, 1914.** University National Bursary Regulations, 1937, Amendment No. 1. August 30, 1939. No. 1939/119.

**Education Act, 1914.** Teachers' Salaries Regulations, 1938. Amendment No. 2. September 6, 1939. No. 1939/149.

**Industrial Efficiency Act, 1936.** Industry Licensing (Footwear-manufacture) Notice, 1939. September 5, 1939. No. 1939/150.

# War Regulations.

**Under the Public Safety Conservation Act, 1932.**

**Censorship and Publicity Emergency Regulations, 1939.** September 1, 1939. (*1939 New Zealand Gazette*, p. 2273—Serial No. 1939/121.)

**Price Stabilization Emergency Regulations, 1939.** September 1, 1939. (*1939 New Zealand Gazette*, p. 2285—Serial No. 1939/122.)

**Defence Emergency Regulations, 1939.** September 1, 1939. (*1939 New Zealand Gazette*, p. 2289—Serial No. 1939/123.)

**Naval Mobilization Emergency Regulations, 1939.** September 1, 1939. (*1939 New Zealand Gazette*, p. 2293—Serial No. 1939/124.)

**Naval Mobilization Emergency Regulations, 1939.** Amendment No. 1. September 1, 1939. (*1939 New Zealand Gazette*, p. 2297—Serial No. 1939/125.)

**Shipping Control Emergency Regulations, 1939.** September 1, 1939. (*1939 New Zealand Gazette*, p. 2299—Serial No. 1939/126.)

**Dependency Emergency Regulations, 1939.** September 1, 1939. (*1939 New Zealand Gazette*, p. 2307—Serial No. 1939/127.)

**Overseas Passengers Emergency Regulations, 1939.** September 2, 1939. (*1939 New Zealand Gazette*, p. 2313—Serial No. 1939/128.)

**Shipping Requisitioning Emergency Regulations, 1939.** September 2, 1939. (*1939 New Zealand Gazette*, p. 2315—Serial No. 1939/129.)

**Shipping Transfer Emergency Regulations, 1939.** September 2, 1939. (*1939 New Zealand Gazette*, p. 2317—Serial No. 1939/130.)

**Supply Control Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2323—Serial No. 1939/131.)

**Alien Control Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2327—Serial No. 1939/132.)

**Oil Fuel Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2337—Serial No. 1939/133.)

**Aviation Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2343—Serial No. 1939/134.)

**Passport Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2345—Serial No. 1939/135.)

**Shipping Detention Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2349—Serial No. 1939/136.)

**Shipping Detention Emergency Regulations, 1939.** Amendment No. 1. September 4, 1939. (*1939 New Zealand Gazette*, p. 2352—Serial No. 1939/137.)

**Change of Name Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2353—Serial No. 1939/138.)

**Enemy Trading Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2355—Serial No. 1939/139.)

**Motor-vehicles Impressment Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2365—Serial No. 1939/140.)

**Sugar Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2379—Serial No. 1939/141.)

**Wheat and Flour Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2381—Serial No. 1939/142.)

**Factory Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2385—Serial No. 1939/143.)

**Medical Supplies Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2389—Serial No. 1939/144.)

**Foodstuffs Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2393—Serial No. 1939/145.)

**Electricity Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2395—Serial No. 1939/146.)

**Mining Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2399—Serial No. 1939/147.)

**Timber Emergency Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2403—Serial No. 1939/148.)

**Notice to Mariners No. 480, 1939—Public Traffic Regulations, 1939.** September 4, 1939. (*1939 New Zealand Gazette*, p. 2409.)

**Export Prohibition Emergency Regulations, 1939.** September 7, 1939. (*1939 New Zealand Gazette*, p. 2427.)

**Contraband Emergency Regulations, 1939.** September 7, 1939. (*1939 New Zealand Gazette*, p. 2461.)

**Suspension of Apprenticeship Emergency Regulations, 1939.** September 8, 1939. (*1939 New Zealand Gazette*, p. 2475.)

**Enemy Property Emergency Regulations, 1939.** September 7, 1939. (*1939 New Zealand Gazette*, p. 2463.)

**Under the Judicature Amendment Act, 1930.**

**Supreme Court Emergency Rules, 1939.** September 13, 1939. (1939 *New Zealand Gazette*, p. 2483.