New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"The Judges take the view that the responsibility for infringements on the previous liberties of British citizens is with Parliament, who authorized these infringements, and with the Executive, who exercise the powers conferred on Parliament."

—LORD JUSTICE SCRUTTON, in an address in the University of London, February, 1918.

VOL. XVI. TUESDAY, MARCH 19, 1940 No. 5.

FREEDOM OF PUBLIC ASSEMBLY, AND ITS LIMITATIONS.

DEMOCRACY is a fundamental principle of the British constitution. Freedom to express opinions is essential to democracy, but reasonable limitations are likewise essential to the preservation of the rights of the State and of individuals who constitute it. The law relating to public meetings does not infringe these principles: its object is to prevent and to punish outbreaks of disorder. And, in attaining this object, the law draws a distinction between freedom to express opinions, and the liberty which the law allows as to time and place; so that, without denying liberty of speech, as such, it restricts the mode of its exercise in public places and where numbers of people congregate.

The propriety of the objects of a meeting, and the motives of those convening it or being present at it, are not in question. No matter how worthy the cause, the law requires that it be advocated in a peaceable way. Even a meeting which has originated in good motives becomes a public evil when there is the probability or a possibility of a disturbance of the peace resulting.

Section 101 of the Crimes Act, 1908*, in preventing an unlawful assembly, draws the line between a lawful meeting and an assembly, which is unlawful in its inception or which is deemed to have become unlawful either by reason of the action of those assembled, or by reason of the improper action of others having no sympathy with the objects of the meeting.

The Criminal Code Commission of England, 1879, was well aware that the section, now incorporated in our codified Crimes Act, 1908, as s. 101, went beyond the existing common law, for they said:

> In declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable occasion provoke other persons to disturb the peace tumultuously, we are declaring that which has not as yet been specifically decided in any particular case. (*2 Stephen's History of the Criminal Law*, 385.)

But, throughout, although there is no such statutory provision in Great Britain as that appearing as s. 101 of the Crimes Act, 1908, the common law does not differ in any material aspect from it.

Before the Criminal Code Act, 1893, became law, the Court of Appeal in *Goodall* v. *Te Kooti*, (1890) 9 N.Z.L.R. 26, adopted the definition of an unlawful assembly given in the report of the Criminal Code Commission (*supra*). The definition was cited by Charles, J., in his charge to the jury in *The Queen* v. *Graham and Burns*, (1888) 4 T.L.R. 212, 16 Cox C.C. 420, as being of the highest authority; and His Lordship stressed the point that the lawfulness of the purpose does not render lawful any assembly which, in fact, endangers the public peace.

In the course of his judgment, in *Te Kooti's* case (*supra*), Denniston, J., at p. 58, observed:

> The proposition of the respondent, that any number of men may assemble to do any act that is not unlawful, irrespective of the consequences, is pushing the doctrine of individualism and of the obligations of individuals to the body politic to an irrational extent. A leading duty, if not the leading duty, of a Government, is to preserve the public peace, and everyone has to sacrifice part of his individual rights and liberty for that object.

In an action for trespass against a Police officer who had taken the plaintiff in charge to prevent breach of the peace by others whom his presence provoked, *O'Kelly* v. *Harvey*, (1883) 15 Cox C.C. 435, there was a decision of two unusually strong Courts. Law, L.C., said, at pp. 445, 446:

*S. 101 (1). An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will, by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

(2) Persons lawfully assembled may become an unlawful assembly if they, with a common purpose, conduct themselves in such a manner that their assembling would have been unlawful if they had assembled in that manner for that purpose.

(3) An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit an indictable offence therein is not unlawful.

(4) Every member of an unlawful assembly is liable to one year's imprisonment.

> Even assuming that the danger to the public peace arose altogether from the threatened attack of another body on the plaintiff, and his friends, still if the defendant believed and had just ground for believing that the peace could only be preserved by withdrawing the plaintiff and his friends from the attack with which they were threatened, it was, I think, the duty of the defendant to take that course.

And the Lord Chancellor, at p. 447, said :

> I have always understood the law to be that any needless assembly of persons in such numbers and manner and under such circumstances as are likely to provoke a breach of the peace, was itself unlawful.

It was held in *Wise* v. *Dunning*, [1902] 1 K.B. 167, that a person who, in addressing meetings in public places, although he does not directly incite the commission of breaches of the peace, uses language the natural consequence of which is that breaches of the peace may be committed by others, may be bound over to be of good behaviour.

In the course of his judgment, Channell, J., at p. 179, said :

> The law does not as a rule regard an illegal act as being the natural consequence of a temptation which may be held out to commit it . . . but I think the cases with respect to apprehended breaches of the peace show that the law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct.

In *Lansbury* v. *Riley*, [1914] 3 K.B. 229, the Court (Bray, Avory, and Lush, JJ.), treat the question as finally settled by the decision in *Wise* v. *Dunning* (*supra*), and they held that, to justify binding over to keep the peace, it is not necessary to show that any one was " put in bodily fear."

If persons assemble to obstruct officers of the law, all parties so assembling are guilty of an unlawful assembly, whether a riot takes place or not—*The Queen* v. *McNaughten*, (1881) 14 Cox C.C. 576—and it is immaterial that the officers of the law may have been mistaken, or the regulation under which they acted may have been invalid, as that does not justify the use of force against constituted authority, or even against any other to the disturbance of the public peace : *The King* v. *Patterson*, (1931) 3 D.L.R. 267, 279.

It is the duty of a police officer to prevent breaches of the peace which he reasonably apprehends. In *Duncan* v. *Jones*, [1936] 1 K.B. 218, 222, Lord Hewart, C.J. (with whom Humphreys and Singleton, JJ., agreed), said that the English law does not recognize any special right of public meeting for political or other purposes. He went on to observe :

> The right of assembly, as Professor Dicey puts it [*Law of the Constitution*, 8th Ed. 499] is nothing more than a view taken by the Court of the individual liberty of the subject.

The Divisional Court held that, as it is the duty of a Police officer to prevent breaches of the peace which he reasonably apprehends ; and the appellant was guilty of wilfully obstructing an officer, when, in the execution of his duty, he told the appellant that she could not hold a meeting in the place in which she had intended, and she thereupon mounted a box placed on the roadway and started to address the people who were present.

A duty of " preventive justice " devolves on Magistrates and Police alike, an example being the dispersal of a meeting by the Police on belief on reasonable grounds that if a meeting be allowed to continue a breach of the peace would occur, and another example is the duty of Magistrates to bind a person to be of good behaviour to prevent the commission of reasonable apprehended breaches of the peace : *Lansbury* v. *Riley*, [1914] 3 K.B. 229. There is no distinction in principle between the two examples given : *Thomas* v. *Sawkins*, [1935] 2 K.B. 249, 236, per Avory, J. Accordingly, in the class of cases relating to unlawful assembly and breaches of the peace thereby occasioned, the action is preventive ; it is idle to wait until the mischief is done. The duty of the police is to preserve the peace unbroken ; and a police officer is entitled, and, in fact, bound, to intervene the moment he has reasonable apprehension of a breach of the peace being imminent, and therefore he must in such cases necessarily act on his own reasonable and *bona fide* belief as to what is likely to occur : *O'Kelly* v. *Harvey* (*supra*).

Freedom of public meeting does not, however, depend exclusively upon avoidance of the crime of unlawful assembly or the more serious crimes against public order.

Any Justice may call upon any person to enter into recognizance to the King, with or without securities, for keeping the peace,† where the Justice is required so to do by any person who gives him satisfactory evidence on oath that the person from whom surety is sought has used provoking or insulting language, or exhibited any offensive writing or object, or done any offensive act publicly and to the common annoyance of His Majesty's subjects ; or, by word or writing, has incited or attempted to incite any other person to commit any breach of the peace ; and, where, in time of war or public danger, the person from whom surety is sought has knowingly propogated false news to the obstruction of the Government of New Zealand or the alarm of His Majesty's subjects : Justices of the Peace Act, 1927, s. 13. In *Goodall* v. *Te Kooti*, (1890) 9 N.Z.L.R. 26, it was held by the Court of Appeal that taking part in an unlawful assembly is an offensive act within this section.

Furthermore, the Police may arrest without warrant any person who wilfully obstructs or incites or encourages any person to resist or obstruct any constable in the execution of his duty—Police Offences Act, 1927, s. 77—or the Police may charge such a person who in or in view of any public place, or within the hearing of any person therein, behaves in a riotous or disorderly manner, or uses any threatening, insulting, or abusive words—*ibid.*, s. 3 (*ee*). It is not necessary, before a disturber of the peace or an inciter of others to commit breaches of the peace can be bound over in sureties of good behaviour, that any one was put in bodily fear ; all that it is necessary to allege is that there was an incitement to commit breaches of the peace generally, not to commit them against any particular person : *Lansbury* v. *Riley*, [1914] 3 K.B. 229, 235.

It is no defence to a charge of disorderly behaviour at a public meeting to plead that the meeting was unlawful simply because it was held on a public street : this does not, *per se*, make the meeting unlawful, as in each case the question must be answered in the light of the particular circumstances : *Burden* v. *Rigler*,

† This section originated in the power given by the Statute (1360-61) 34 Edw. III, c. 1 : per Richmond, J., in *Goodall* v. *Te Kooti*, (1890) 9 N.Z.L.R. 26, 30, 41, 42 ; and see, as to that statute, *Lansbury* v. *Riley*, (*supra*).

[1911] 1 K.B. 337; and see *Aldred* v. *Miller*, [1924] S.C. (Jud.) 117.

Although meetings are sometimes held in the public street, and no action is taken, there is no right to hold a meeting there. Such meetings are sometimes tolerated if no inconvenience is caused to those having equal rights, and no breach of the peace is anticipated. In *M'Ara* v. *Magistrates of Edinburgh*, (1913) S.C. (Ct. of Sess.) 1059, 1073, Lord Dunedin said: "There is no such thing as a right for the public to hold meetings in the streets." It is an offence to obstruct the passage of any highway or footway, or wilfully to encumber or to obstruct a public place: Police Offences Act, 1927, s. 4 (*p*). "Public place," as defined in s. 2 of the Police Offences Act, 1927, includes and applies to every road, street, footpath, footway, court, alley, and thoroughfare of a public nature, or open to or used by the public as a right, and to every place of public resort so open or used. The same definition is reproduced in Reg. 1 of the Public Safety Emergency Regulations, 1940. In *Adams* v. *Horan*, (1906) 26 N.Z.L.R. 169, Edwards, J., treated the subsection as one prohibiting the user of a street for purposes other than as a thoroughfare. He said, at p. 172:

> It is sufficient if it is made to appear that the appellant was not using the highway as a highway but for some other purpose, and that his continued and repeated presence there did impede the lawful user of the highway by the general public.

It is no defence that part of the highway is left clear for the passage of other users: *Homer* v. *Cadman*, (1886) 16 Cox C.C. 420.

In *Ex parte Lewis*, (1888) 21 Q.B.D. 191, Wills, J., in delivering the judgment of the Court (Wills and Grantham, JJ.) at p. 1916, said:

> A great deal has been said about the right of public meeting—unnecessarily—inasmuch as it is a right which has long passed out of the region of discussion and doubt. As to the suggestion of a right on the part of as many of Her Majesty's subjects as may be so disposed to occupy Trafalgar Square, whenever and so often as they may wish, for a public meeting, or possibly for more than one public meeting, to be held by persons of conflicting views and sympathies (for the right, if it exist, must be common to every member of the public), all we wish to say is, that if the right is to be made out it must be established by materials and considerations very different from any that were laid before us.

Answering the contention that such rights depended upon "dedication," His Lordship said:

> The only "dedication" in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a "right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance." A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.

In *The Queen* v. *Graham and Burns*, (1888) 4 T.L.R. 412, it was again held that the law recognizes no right of public meeting in any public thoroughfare dedicated to the public for no other purpose than that of providing a means for the public of passing and repassing along it. A place of public resort is analogous to a public thoroughfare, and although the public may often have held meetings in a place of public resort, without interruption by those who have the control of such place, yet the public have no right to hold meetings there for the purpose of discussing any question, whether social, political, or religious.

Again, it is an offence unlawfully to obstruct in any manner the free passage of persons passing along the road: Public Works Act, 1927, s. 176; and any Municipal Corporation may from time to time make such by-laws as it thinks fit concerning the use of streets: Municipal Corporations Act, 1933, s. 364 (19).

A public procession has been described as "a public meeting in motion," and, as such, it is *prima facie* lawful, in that the participants are exercising their right to use the highway for passing and repassing; and, therefore, of itself, a procession does not constitute an unlawful assembly. But if obstruction by a procession is proved as a fact, the procession may constitute a common nuisance or an infringement of the common law, just as does a public meeting on the street; because a common nuisance is an unlawful act or omission to discharge a legal duty, such act being, *inter alia*, the act by which the public are obstructed in the exercise of any right common to His Majesty's subjects.

Warning by the Police could not merely of itself render the user of the highway unlawful so as to constitute a trespass, in the absence of an appropriate by-law; that is a matter for determination by the Court. But if the Police warning be based upon a reasonable apprehension that a breach of the peace would be committed, it is an offence to hold the meeting: the first consideration being, whether what is going on in the street is at all likely to interfere with the paramount use of the street, the right of passage; and, secondly, whether what is going on is likely to lead to a breach of the peace: *M'Ara* v. *Magistrates of Edinburgh* (*supra*), at p. 1074.

So, too, *prima facie*, a procession moving along in a peaceable manner would not be a nuisance; but it might become so if the right was exercised unreasonably or with reckless disregard for the rights of others: *Lowdens* v. *Keaveney*, [1903] 2 I.R. 82, 90, where Gibson, J., said:

> No body of men has the right to appropriate the highway and exclude other citizens from using it; and responsibility cannot be escaped on the pretext that they kept in motion. The question whether the user is reasonable or not is a question of fact to be determined by common sense, with regard to ordinary experience. Occasion, duration of the user, place, and hour, must be considered; and we must ask was the obstruction trivial, casual, temporary, and without wrongful intent. The matter is very much one of degree, and the whole circumstances must be kept in view before coming to a decision.

The duty of the police is to vindicate public right, and not to facilitate abuse of the street by any individual selfishly engrossing a public right for himself. If, therefore, obstruction is proved as a fact, a procession constitutes infringement of the law, just as much as a meeting. It is clear that the common-law remedies of trespass and nuisance in regard to processions are not in practice available to the police. There remain the criminal offences which may apply in the case of a public meeting or procession, such as criminal libel, the various offences comprehended under the title of sedition, blasphemy, obscenity, unlawful assembly, rout, riot, and obstruction of the Police, of which the most frequently charged are unlawful assembly and obstruction of the police. (In England, in the twelve months before July, 1937, there were 320 prosecutions arising out of public meetings, and processions, the bulk of these being charges

of insulting behaviour, obstructing the Police, or assault: (1937) *House of Commons Debates*, 326, 350.)‡

In the Public Order Act, 1936 (Gt. Brit.), powers are given to the chief officer of Police, having regard to the time or place at which and the circumstances in which any public procession is taking place, or is intended to take place, and to the route taken or proposed to be taken by the procession, may give directions as to such conditions as appear to him to be necessary for the preservation of public order, including conditions prescribing the route to be taken and conditions prohibiting the procession from entering any specified public place; or, he may apply to the local authority, if he fears serious public disorder, for an order prohibiting the holding of that or any other procession within a specified period.

This statute seems to imply that the Parliament at Westminster considered the existing law inadequate for the regulation and prevention of public processions.

Regulation 3 of the Public Safety Emergency Regulations, 1940, has somewhat similar provisions:

> (1) If the Commissioner of Police is satisfied that the holding or continuance in a public place or within the view thereof of any procession, or that the holding or continuance (whether in a public place or elsewhere) of any meeting, is likely to be injurious to the public safety, he may prohibit the holding or continuance of the procession or meeting.
>
> (2) Where the holding or continuance of any procession or meeting is prohibited under this regulation no person shall advise, encourage, organize, conduct, lead, or take part in the procession or meeting; and no person who is present at the procession or meeting shall continue to be present thereat after being requested by a constable to leave.
>
> (3) Any person found committing an offence against this regulation may be arrested without warrant.
>
> (4) If any Superintendent or Inspector of Police has reason to suspect that any place is being used or is about to be used for the holding of a meeting that may be injurious to the public safety, the Superintendent or Inspector, or any constable authorized by him in that behalf, may at any time of the day or night enter upon that place and upon every part thereof, using such force as may be necessary.

"Place" is defined in the Public Safety Emergency Regulations, 1940, as being: "Any house, building, land, ship, or other premises."

Where there is reasonable anticipation on the part of the Police that a breach of the peace is anticipated, the Police have the right to enter and remain even on private premises.

Regulation 3 (4) emphasizes the existing common law, which was declared by a Divisional Court (Lord Hewart, C.J., Avory, and Lawrence, JJ.,) in *Thomas v. Sawkins*, [1935] 2 K.B. 249. There, the appellant was one of the convenors of a meeting at Caeran, organized by the Communist Party in protest against a Bill then before Parliament in a private hall, hired for the purpose. The public were invited to attend, and no charge for admission was made. The respondent, a Police sergeant, and other Police officers were refused admission to the hall, but they insisted on entering and remaining there during the meeting, and it was shown in evidence that the Police officers (based on their experience and knowledge of previous meetings organized by the Communist Party at Caeran) anticipated that the meeting would become an unlawful assembly or a riot, or that breaches of the peace would take place, to the alarm of the residents, and that sedition and inflammatory speeches were likely to be made at the meeting. No criminal offence was committed by any person and no actual breach of the peace, apart from the offence alleged in the information occurred at the meeting. The convenor, the appellant, laid an information against the sergeant of police alleging that he had unlawfully assaulted the appellant. On appeal from Justices, who dismissed the information, it was contended that the premises on which the meeting was held were private premises to which neither the police nor the public had any right of access; that any police officer who entered, or remained at, the meeting against the convenor's will, was a trespasser; that the appellant was entitled to remove the respondent and other police officers, using no more force than was reasonably necessary; and that the respondent in resisting removal, committed an unlawful assault on the appellant.

In the course of his judgment, Lord Hewart, L.C.J. (with whom the other members of the Court concurred) at p. 254, said:

> Against that determination, it is said that it is an unheard-of proposition of law, and that in the books no case is to be found which goes the length of deciding that, where an offence is expected to be committed as distinct from when an offence is being committed or has been committed, there is any right on the Police to enter on private premises and to remain there against the will of those who, as hirers or otherwise, are for the time being, in possession of the premises. When, however, I look at the passages which have been cited from *1 Blackstone's Commentaries*, 8th Ed. 356, and from the judgments in *Humphries* v. *Connor* ((1864) 17 Ir. C.L.R. 1) and *O'Kelly* v. *Harvey* ((1883) 14 L.R. Ir. 105), and certain observations of Avory, J., in *Lansbury* v. *Riley* ([1914] 3 K.B. 229), I think that there is quite sufficient ground for the proposition that it is part of the preventive power and, therefore, part of the preventive duty of the Police, in cases where there are such reasonable grounds of belief as the Justices have found in the present case, to enter and remain on private premises. It goes without saying that the powers and duties of the Police are directed not to the interests of the Police, but to the protection and welfare of the public . . . I am not at all prepared to accept the doctrine that it is only when an offence has been, or is being, committed that the Police are entitled to enter and remain on private premises. On the contrary, it seems to me that a Police officer has, *ex virtute officii*, full right so to act when he has reasonable ground for believing that an offence is imminent or is likely to be committed.

It is the special trust and duty of the Crown to provide for the defence and security of the realm; and there is an implied agreement on the part of every citizen of the State that his own individual welfare should, in cases of national emergency, yield to that of the community; and that his life, property, and liberty, should, in such circumstances, be placed in jeopardy or even sacrificed for the public good. The powers of the Crown, in a national emergency, rely in these days upon statutory powers granted by Parliament with a view to the emergency in question; and, it was in pursuance of these powers, that the Public Safety Emergency Regulations, 1940, became law. As Chapman, J., said in *Gill* v. *Hollis*, [1916] N.Z.L.R. 1202, 1206:

> People may be allowed to have their own opinions on the subject of war, and within proper limits to propagate them, but they should consider in times of war whether there is any danger in so doing of inculcating something more than their opinions. . . . The expression of such opinions may become dangerous when it offends against the War Regulations and is likely to interfere with recruiting.

‡Mayor La Guardia, of New York, in a letter published in the January, 1940, issue of *The Voice*, the publication of a Committee for Human Rights, formed to oppose anti-Semitism, stated that in the past six months 238 people were arrested in New York for making inflammatory street speeches. "The City of New York will continue to remain free for all who wish to express their oponion," said the Mayor, "but the authorities will deal properly with any misguided trouble-makers who, under the guise of free speech, slander or vilify peaceful groups residing in this city."

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
In Chambers.
Napier.
1940.
Feb. 19, 22.
Ostler, J.

H. AND ANOTHER v. I.

Mortgagors and Tenants Relief—Mortgage—Exercise of Mortgagee's Powers—Notice—Notices required—Form of Notice—Mortgagors and Lessees Rehabilitation Amendment Act, 1937, s. 7—Property Law Amendment Act, 1939, s. 3.

War Emergency Legislation—Courts Emergency Powers—Leave of Court—Exercise of Mortgagee's Powers—Courts Emergency Powers Regulations, 1939 (Serial No. 176/1939) Reg. 4 (1).

The mortgagee under an "adjustable mortgage" within the meaning of s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, before exercising his power of sale must serve on the mortgagor a notice under that section, and also a notice under s. 3 of the Property Law Amendment Act, 1939.

Both notices may be combined in the one document, intituled under both statutes and giving notice to the mortgagor pursuant to the respective sections above mentioned.

The month's notice referred to in both sections may run concurrently.

The giving of such notice is not a condition precedent to an application under the Court's Emergency Powers Regulations, 1939, for leave to exercise a mortgagee's powers.

Counsel: *Humphries*, for the mortgagee, in support of motion for an order under the Courts Emergency Powers Regulations, 1939; *Runciman*, for the mortgagor, to oppose.

Solicitors: *Humphries and Humphries*, Napier, for the mortgagee; *Mayne and Runciman*, Napier, for the mortgagor.

FULL COURT.
Auckland.
1939.
Nov. 27, 29;
Dec. 19.
Smith, J.
Fair, J.
Callan, J.

HENDERSON TOWN BOARD v. JOHNSTON AND OTHERS.

Mortgagors and Tenants Relief—Mortgages—Application for Adjustment of Liabilities of Purchaser under Agreement for Sale of Land—Order of Court of Review remitting Rates in arrear and Penalties for Benefit of both Vendor and Purchaser—Whether Court of Review had Jurisdiction to relieve Vendor from Rates—"Not inconsistent with this Act"—Mortgagors and Lessees Rehabilitation Act, 1936, ss. 4 (1), 7, 10 (1), 27 (3), 41 (1) (d), 42 (3), 46, 48, 49, 71—Rating Act, 1925, s. 70.

The words "not inconsistent with this Act" in s. 71 of the Mortgagors and Lessees Rehabilitation Act, 1936, must have a wide interpretation.

Where a matter is properly before the Court of Review as being within the scope, purpose, and intention of the Act, and that Court does what it deems just and equitable in the circumstances, and in so doing, observes the principles of natural justice, the Supreme Court cannot say that such a determination is beyond the jurisdiction of the Court of Review.

S., the owner of land within the rating district of the plaintiff Board, agreed on September 6, 1935, to sell the land to E., under an agreement by which S. was liable for the arrears of rates then due, and E. agreed to undertake the liability for rates thereafter. S.'s name remained in the rate-book as the occupier of the land until March 19, 1937, when E. was entered in the book as the occupier. By that time the rates amounted with penalties to £117 8s. 6d. On July 17, 1937, the plaintiff Board recovered judgment against S. for these rates and costs.

E.'s application on January 26, 1937, for the adjustment of his liabilities under the provisions of the said Act came before an Adjustment Commission, whose order was appealed from by the plaintiff Board. The Court of Review made an order, the effect of which was:

"Order that applicant be entitled to retain possession up to May 31, 1939, on paying to his vendor the sum of 15s. per week. Vendor to pay rates from April 1, 1937. Penalties on rates and rates in arrear at April 1, 1937, remitted. Applicant to give up possession to his vendor on or before May 31, 1939."

This order was drawn up and sealed, but there was no dispute that it means (*a*) that E. was a farmer applicant; (*b*) that E. was not entitled to retain the property, and that it would revert to S. on or before May 31, 1939; (*c*) that, during the retention of the property by E., he should pay to S. 15s. per week; (*d*) that all rates in arrear at April 1, 1937, including penalties, were remitted and that this remission was to enure for the benefit of both S. and E., and was intended to have the effect of discharging the statutory charge created upon the making of each rate until its payment; and (*e*) that S. should pay the rates on the land from April 1, 1937.

On a motion for writ of certiorari to which the plaintiff sought to add a claim for a writ of prohibition,

Leary, for the plaintiff; *Matthews*, for the first defendant; *Goodall* and *A. C. Stevens*, for the second defendant.

Held, by a Full Court (*Smith*, *Fair*, and *Callan*, JJ.) dismissing the motion, That the Court of Review had jurisdiction to make the order, which was "not inconsistent with the Act."

Solicitors: *Brookfield, Prendergast, and Schnauer*, Auckland, as agents for *R. Elcoat*, Henderson, for the plaintiff; *Mathews and Clark*, Auckland, for the defendant; *Bruce Scott*, Auckland, for the second defendant.

SUPREME COURT.
Wellington.
1940.
February 14, 26.
Smith, J.

BUTCHER v. WELLINGTON CITY CORPORATION.
EASSON v. WELLINGTON CITY CORPORATION.

Practice—Juries—Special Jury—Two Actions with substantially similar Facts—Special Jury ordered in each Action—Whether Judge has power to order such Actions to be tried together with both Juries sitting together—Juries Act, 1908, s. 71 (3)—Code of Civil Procedure, RR. 210-12.

The Court has no jurisdiction under s. 71 (3) of the Juries Act, 1908, to make an order against the will of the plaintiffs requiring a special jury in one case to sit with a special jury in another case, though the facts are substantially common to both actions.

Bray v. *Doubleday* (*No. 1*), (1886) N.Z.L.R. 5 S.C. 3, distinguished.

Counsel: *O'Shea* and *Marshall*, in support; *O. C. Mazengarb*, to oppose.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiffs; *City Solicitor*, Wellington, for the defendant.

SUPREME COURT.
Hamilton.
1940.
February 15;
March 7.
Blair, J.

JOHANSON v. JOHANSON.

Divorce and Matrimonial Causes—Restitution of Conjugal Rights—Respondent a Soldier—Service of Petition while in New Zealand—Hearing while Overseas on Active Service—No Order made—Divorce and Matrimonial Causes Act, 1927, s. 8.

A respondent, who was served with his wife's petition for restitution of conjugal rights while he was an enlisted soldier due shortly to leave for service overseas, had actually left on active service at the time of the hearing of the petition.

N. Johnson, for the petitioner.

Held, That no order would be made for restitution of conjugal rights while the respondent was on active service, as his life was then regulated by the exigencies of the service.

Solicitors: *Bell and Johnson*, Hamilton, for the petitioner.

THE LAW RELATING TO MOTOR-VEHICLES.

Noteworthy Decisions of 1939.

By W. E. LEICESTER.

If we were asked to deduce, from the divergence of opinion to be found in this year's reports of decisions on motor-vehicle negligence, some principle upon which the members of our Courts have shown a united front, the choice would have to rest upon the observations of Stable, J., in *Daly* v. *Liverpool Corporation*, [1939] 2 All E.R. 142, 144 :—

> My view is that the sooner it is recognized as being the law that a person who drives a motor-vehicle under modern conditions is in precisely the same position as, for instance, that of a surgeon or a person who undertakes to perform an extremely difficult task, involving extremely dangerous consequences for other persons, the better. The standard of care and skill which the law must demand from the driver of a motor-car to-day is a very high one indeed. A motor-car has become a lethal weapon. It may be that pedestrians very often feel that it is so. We know that the motor-car kills thousands of pedestrians, but I have never heard of a single pedestrian, or of a thousand pedestrians combined, who killed one motor-car. The standard of care and skill which the law requires to-day in the driver of a motor-vehicle is very high indeed.

Four cases involving questions of negligence reached the Court of Appeal, in three the Court was not unanimous in its decision, and it is likely that these may reach the Privy Council. In *Brott* v. *Allan*, [1939] N.Z.L.R. 345, leave to appeal *in forma pauperis* has already been granted by that tribunal. In this case, the jury found both parties guilty of negligence ; but, to the third issue, they answered that the defendant, notwithstanding the plaintiff's negligence, could by the exercise of reasonable care have avoided the accident. The plaintiff was a pedestrian who walked on to the roadway in front of a parked car and who proceeded to cross the road at a slight angle, for a matter of some 10 ft. to 15 ft. The motorist, who was clearly visible, was proceeding at a speed of twenty-five to thirty miles per hour, and within a distance of 25 yards when the plaintiff emerged into his vision. The majority in the Court of Appeal (Myers, C.J., Ostler, and Fair, JJ.), decided that judgment should be entered for the defendant. Smith, J., dissented. In the opinion of the Chief Justice, *ibid.*, 356, the plaintiff was not on the evidence in a state of complete helplessness until he actually got in front of the car ; and then it was clearly too late, and there was no reasonable opportunity for the defendant to do anything to avoid the impact :

> Up to that point it appears plain that the plaintiff had at least as much opportunity of avoiding the accident as the defendant ; and, assuming that the jury were to find each party guilty of the material negligence relied on by the respective parties according to their respective cases as shaped at the trial, there was, in my opinion, no evidence of separation in time and circumstance between the acts of negligence of the parties fit and proper to go to the jury on an issue of last opportunity on the part of the defendant.

Ostler, J., recalls that in 1904, before the age of motors, Williams, J., in *Shearer* v. *Mayor, &c., of Dunedin*, (1904) 24 N.Z.L.R. 192, had observed that if a man chose to walk in front of a tram-car and got knocked down when he must have seen the tram-car coming if he had used his senses, then he must take the consequences ; and whether his absent-mindedness was caused by drink or philosophical meditation was immaterial. His reference to *McLean* v. *Bell*, (1932) 147 L.T. 262, is of especial interest :

> Ever since the decision . . . which has created much difficulty and embarrassment to the Courts of this country in the application of the law of contributory negligence to running-down cases, there seems to have been an assumption that in the case of a pedestrian run down by a motor on the roads the law as to contributory negligence of the pedestrian being a defence to his action has been modified or altered, and is different from the law on this point when a pedestrian was run down by a horse-drawn vehicle or by a tram in the pre-motor period.

In his view, there is no novel principle emerging from the recent authorities ; but notwithstanding that a motorist and a pedestrian, by both failing to keep a proper look out down to the moment of impact, come into collision, the contemporaneous negligence of the pedestrian is no defence to his action in any case where the motorist, had he kept a proper look out, could have avoided the accident in spite of the negligence of the pedestrian :

> The critical moment comes only when the negligence of the pedestrian is spent—*i.e.*, when it has brought him into a position from which no subsequent care for his safety could extricate him even if he ceased to be negligent.

It seems to me that this judgment will be salutary, because of recent years there has been a distinct tendency to whittle away the *Volute* principle and impose by means of a supposed separation of time, place, or circumstance, an extraordinary standard of care on the part of the insured motorist in favour of the negligently luckless, but uninsured victim.

In *Suridge* v. *Hercock*, [1939] G.L.R. 521, we have what Freudians of our legal future may describe as the "motor-pedestrian complex"—once again the old story of the pedestrian who walks out a short distance from the kerb to be struck by the motorist exercising a belated effort to avoid him. The jury here found that both were negligent, but, in answer to the issue as to whose negligence was the real cause of the accident, placed the blame upon the motorist. The issue around which discussion centred in the Court of Appeal was the extent to which there must be evidence of last opportunity before the jury could find upon such an issue. Unfortunately, the case does not provide any practical elucidation of the real problem involved : to my mind, what is really meant, where both parties are negligent, by the issue as to whose negligence was the real cause of the accident. The Court (Myers, C.J., Blair, Johnston, and Northcroft, JJ.), was equally divided, and the judgments covered a wide range of differing opinions. A particularly exhaustive review of the refinement of the doctrine of contributory negligence was given by counsel for the appellant ; but Myers, C.J., considered that the fallacy of the argument lay in the assumption that the jury must be deemed to have found the respondent pedestrian negligent in the precise respects of material negligence alleged against him in the state-

ment of defence—namely, that he failed to keep a proper or any look out when crossing the roadway, and that he stepped in front of the motor-vehicle driven by the appellant. The Chief Justice considered that such an assumption could not be made, for the jury were not asked, nor in their answers to the issues did they say, in what respects the parties were respectively negligent. Johnston, J., reached a similar conclusion, considering that, in view of the difference of the effect of negligence on the part of parties so differently situated as the driver of a fast-moving vehicle and a pedestrian, the Court should be loth to allow the speed with which one party acts, or ought to act, to engulf the acts of the slower party, so that essentially different acts should, by apparent simultaneity, be regarded as a composite act for which both are equally liable. On the other hand, Blair, J., who prepared a diagram showing the relative positions of the pedestrian and the beam of the car's lights at different stages of the journey, thought that it was for the injured pedestrian to establish that there was negligence justifying the jury in holding that the driver had a better opportunity of avoiding the accident than he had; and the diagram, to his mind, made it fairly plain that when it came to a question of comparative opportunity of avoiding the accident the weight of evidence was all against the pedestrian. The finding on the part of the jury that the pedestrian was negligent, according to Northcroft, J., must amount to a finding that he attained his position of danger because he did not pay proper regard for his own safety by looking to the right for approaching traffic; and, in his view, there was no evidence upon which the jury could separate the contributing negligence of each of the parties and the third issue should not have been put. In the result, the Court were equally divided, the judgment of Smith, J., upholding the verdict of the jury as affirmed.

In the third case, *Strawbridge* v. *Mason*, [1939] N.Z.L.R. 877, the motion for judgment for the defendant was by consent removed into the Court of Appeal for argument and determination. This was a claim by a widow arising out of the death of her husband, as the driver of a motor-cycle ridden along a country road, when he was temporarily sun-blinded and occupied a position not "as close as was practicable" to his left of the roadway. The Court of Appeal (Myers, C.J., Johnston, and Northcroft, JJ., Blair, J. dissenting) considered that, as there was evidence from which negligence on the defendant's part was reasonably inferable, the withdrawal of the case would have involved the usurpation of the jury's proper function as the words of the relative regulation raised a question of fact. The appeal is reported solely on the question of the construction of Reg. 14 (1) of the Traffic Regulations, 1936. The accident happened in broad daylight when the deceased, who was a surfaceman employed by the local County Council, was riding a motor-cycle on his way home from work. It occurred on a part of the length of road which was under his care and was at a spot where it was undisputed that two vehicles approaching each other would be plainly visible to each other when 150 ft. apart. Except for the question of the sun being in the cyclist's eyes, it seemed common ground that each vehicle was visible to the other in ample time to allow each driver by the exercise of normal care to avoid any collision. The jury found that the motorist was guilty of negligence materially contributing to the accident, but that the deceased cyclist was not.

The attempt to obtain judgment for the defendant failed. It relied for the most part on certain of the trial Judge's directions upon the issue of last opportunity, but although these, in the opinion of the Chief Justice, might have been more happily expressed, he said that that might happen in almost any summing-up, and that it was neither fair nor proper to take a sentence here and there from a summing-up and, reading it irrespective of its context, maintain that it amounted to a misdirection. "The summing-up must be read as a whole, and I think that taken as a whole there is very little ground for complaint." Also, on this point, Northcroft, J., observed that some passages in the direction were singled out for criticism, and that, taken out of their context, objection might be offered to many statements made on such occasions. He agreed that the direction must be taken as a whole. Well worthy of study are the remarks of Blair, J., at p. 897, upon the necessity of extreme caution both as to place and position on the road when the motorist is affected in his driving by fog or sun or other natural phenomena.

The fourth case is *Tauranga Electric-power Board* v. *Karora Kohu*, [1939] N.Z.L.R. 1040. Here, the summing-up included a statement that the jury might think that "a boy between the ages of sixteen and seventeen, as this boy was, is not in the same position to know the motor regulations and the necessity for observing them as a man of experience nor should he be expected to do so with the same degree of care." This was held to amount to a misdirection justifying the defendant in obtaining a new trial. It was held that Reg. 22 of the Traffic Regulations, 1936, created penal offences, and that under our law every person of or over the age of fourteen years is in substantially the same position so far as responsibility to the criminal law is concerned. The learned Chief Justice, at p. 1045, observes:

> Now, seeing that Reg. 22 applies to "every rider" of a bicycle and that bicycles are used and ridden by thousands of young persons, I can see no reason in principle why any lower standard of care should be permitted in the case of a normal person of sixteen or seventeen years old than in the case of a person of or over the age of twenty-one years, or why the age of the younger person should be a factor in deciding whether or not he has committed a breach of the regulations and has thereby been guilty of negligence.

At p. 1048, Smith, J., says:

> In a criminal case, then, a normal youth of seventeen would not have been entitled to the direction which was given in his favour in the present civil action on the ground of his age. I am therefore of opinion that it is an error in law to say that the same care in the conduct of a bicycle under the Traffic Regulations as would be required of the ordinary reasonable man might not, by reason of his age, be required of a normal boy over the age of fourteen.

The "emergency doctrine," which occasionally assumes the shape of a red herring in accident litigation, fell to be considered by Blair, J., in *Donald* v. *Marshall*, [1939] G.L.R. 643, in which he decided that the *Bywell Castle* rule has no application in the case of a person who has himself created a state of jeopardy on which that rule is founded. It applies only to excuse a blameless person who, in a state of emergency created by reason of another, does the wrong thing by reason of having to make up his mind in a hurry;

and it does not justify the creator of a crisis relying upon the existence of that crisis to excuse himself for doing something which was negligent.

The vagrant defence of "inevitable accident" which, for the most part, has no visible means of support, justified its existence in *Rudman* v. *Auckland City Corporation*, [1939] G.L.R. 326, involving the misdemeanours of a motor road-roller that got out of control in descending a steep hill through a bump causing the gears to slip out of mesh. This had happened before on two or three occasions, but without any ill result because the foot-brake was always strong enough to pull the roller up even on a hill. However, in this instance, the steel brake-band of the foot-brake fractured, rendering the brake useless; and, when the driver applied the hand-brake, the roller had gathered such speed that the hand-brake was not sufficiently powerful to pull it up. The Magistrate found that the liability of the brake-band to fracture was a latent defect which could not with reasonable care have been discovered beforehand, and gave judgment for the Corporation upon the ground of inevitable accident. An appeal against this decision was dismissed by Ostler, J., who considered that the fracture of the brake-band was an inevitable accident, and that, even if the hand-brake did not fully comply with the by-law of the Auckland City Council that a vehicle had to have "two brakes each capable of stopping the vehicle," the real cause of the accident was not such minor non-compliance.

(To be concluded).

EXERCISE OF MORTGAGEES' POWERS.

Preliminary Steps under Existing Restrictions.

By C. E. H. Ball.

(Concluded from p. 54.)

When a mortgagee proposes to exercise his powers, he must carefully consider how the powers he intends to exercise are affected by the legislation and regulations already mentioned.

Perhaps the best method of approach is to decide, first, which provisions are applicable to the mortgage, and secondly, how they affect the powers he desires to exercise. The powers most generally exercised are (i) the enforcing of payment from the mortgagor, (ii) entry into possession, and (iii) selling in exercise of power of sale, and it is perhaps most convenient to consider how each of these powers are affected.

Enforcing Payment from the Mortgagor.

Soldiers' Protection Regulations, 1919.—Where the Soldiers' Protection Regulations apply, the mortgagee is not prohibited from proceeding to judgment, the prohibition being against the issue of process of execution or the filing of a bankruptcy petition without the required consent.

Mortgagors and Lessees Rehabilitation Amendment Act, 1927, s. 7.—This legislation does not specify any special steps to be taken where a payment is due in terms of the mortgage—that is, in respect of interest falling due from time to time, or in respect of the principal sum where it comes due without default, and in accordance with the terms of the contract for payment. But it does apply where, by reason of default, the mortgagee proposes to call up the principal before the expiry of the term or currency of the mortgage. In such a case, the service of a notice and non-compliance therewith is a pre-requisite to enforcing payment.

Property Law Amendment Act, 1939, s. 3.—The same position obtains in cases to which this Act applies as is set out in the preceding paragraph, except that the mortgagee is in addition required by subs. (3) where the land is also subject to a subsequent mortgage, and the mortgagee proposing to exercise his powers has actual notice of the name and address of the subsequent mortgagee, forthwith after serving notice on the owner, to serve a copy of the notice on the subsequent mortgagee.

Courts Emergency Powers Regulations, 1939.—The regulations prohibit, without leave, the calling-up or demanding payment of the principal sum or any part of the principal sum. Unlike the Rehabilitation Amendment Act and Property Law Amendment Act provisions, they are applicable whether the calling-up or demanding of payment is by reason of default, or in accordance with the terms of the contract providing for payment of the principal sum by instalments during the term, or in one amount at its expiry.

In addition, leave is required to proceed for breach of any other covenants than a covenant to pay interest, so that the mortgagee could not—for example, without prior leave—sue for breach of a mortgagor's covenant to repair. He is not prohibited, however, from proceeding to judgment for payment of interest due.

When he has obtained judgment, whether for principal, interest, or other breach of covenant, the mortgagee may not, without leave, proceed to execution on or otherwise enforce the judgment, or issue a bankruptcy notice or petition on it.

Entry into Possession.

Soldiers' Protection Regulations.—These regulations in nowise affect an entry into possession by a mortgagee.

Rehabilitation Amendment Act, and Property Law Amendment Act.—Under both these Acts, the same notices on and defaults by a mortgagor are a pre-requisite to the exercise of any power of entry into possession by the mortgagee. The Court may, however, on the application of the mortgagee, grant leave for him to enter into possession before the date specified in the notice. One aspect requires notice: although moneys which become due in terms of the contract may be recovered without the service of notice, a subsequent entry into possession is by reason of default in payment, and must be preceded by notice and

default by the mortgagor. This also applies to an exercise of power of sale.

Courts Emergency Powers Regulations.—The taking of possession or the appointment of a receiver of any property is prohibited without the leave of the appropriate Court, but proceedings for the appointment by the Court of a receiver or for the recovery of possession otherwise than in default of payment of rent are not affected.

Exercise of Power of Sale.

Soldiers' Protection Regulations.—These regulations prohibit without the necessary consent the exercise of any power of sale conferred by any mortgage, bill of sale, or other security.

Rehabilitation Amendment Act and Property Law Amendment Act.—The comments under the previous main head—"Entry into Possession"—are applicable here, with this additional restriction contained in s. 3 (5) of the Property Law Amendment Act, 1939, and applicable to mortgages of land, that if on a sale after January 1, 1940, the amount realized is less than the amount owing under the mortgage, no action to recover the deficiency may be commenced by the mortgagee against any person other than the owner of the land at the time of the exercise of the power of sale unless the mortgagee at least one month before the exercise of the power of sale serves on that person notice of his intention to exercise the power of sale and to commence action against that person to recover the amount of the deficiency in the event of the amount realized being less than the amount owing under the covenant to repay.

Courts Emergency Powers Regulations.—The regulations prohibit the realization of any security or the exercise of any power of sale conferred by any mortgage (with the exceptions mentioned at the commencement of this article) without the leave of the appropriate Court.

Steps in Procedure.

Undoubtedly one of the greatest difficulties for the profession has been to know in what order the various steps required should be taken, and in the course of endeavouring to clarify this matter, the following judgments have been collected:—

A.M.P. Society v. *Cliff* (Wellington, December 8, 1939—unreported). This was an application for leave in respect of a mortgage under which principal instalments and interest were in default. No notice under s. 3 of the Property Law Amendment Act, 1939, had been given. Sir Michael Myers, C.J., granted leave "subject to compliance with the provisions of the Property Law Amendment Act, 1939."

In re Hicks (deceased) (Wanganui, February 19, 1940). In this case there were two applications, one in respect of an instalment mortgage, under which there was default in payment of principal and interest, and of a bank mortgage. Johnston, J., decided that the Court could not hear an application until notice under s. 3 of the Property Law Amendment Act had been served, and the terms of the notice had not been complied with. The *A.M.P.* case was not cited.

H. and Another v. *I.* (p. 61, *ante*). In this case application for leave was made in respect of an "adjustable mortgage" within the meaning of s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937. A notice purporting to be under the Property Law Amendment Act, 1939, had been served, but the notice did not purport to be also under s. 7. Ostler, J., stated in part: "In my opinion the fact that this notice (under s. 7) has not been given is not fatal to the mortgagees' motion under the Courts Emergency Powers Regulations. The purpose of these regulations was merely to give the Court power to protect mortgagors (and other classes of debtors) whose inability to perform their obligations could be shown to be due to the war. The only defence which can be raised to a motion under the regulations is to prove that the default has been caused directly or indirectly through the war. It would, of course, be wiser for a mortgagee not to move for leave to exercise his powers under the regulations until he had given the proper notices and the period had expired without the default being remedied; otherwise the default might subsequently be made good and the motion would then have been in vain. But, in my opinion, he is not obliged to do so. I can find nothing in the regulations which makes that a condition precedent to his right to apply for leave. All that is necessary for him to prove is that he is a mortgagee under a mortgage in existence and that the mortgagor has made default under the mortgage. He is then entitled to his leave unless the mortgagor can prove that the default was occasioned directly or indirectly through the war: of course, if the leave is given, the mortgagee will still have to comply with s. 7 of the Act of 1937, and s. 3 of the Act of 1939, before he can exercise the powers leave to exercise which have been granted him."

This much more can be pointed out. In case of current account mortgages (unless there has been some default other than in payment) there can be no default until a demand for payment has been made and not complied with. This demand requires the prior leave of the Court. It is only when this leave has been given, a demand made and not complied with, that a notice under s. 3 or s. 7, or both if necessary, would be appropriate. Thus, if *Hicks's* case is correctly decided and applicable to a current account mortgage, then the position is reached that it is impossible to obtain any payment whatever in respect of such a mortgage unless there is some default other than in payment where a notice under s. 7 or s. 3 is required.

Combined Notice.

One document can be drafted which will operate as a notice under both s. 7 of the 1937 Act and s. 3 of the 1939 Act. In *H. and Another* v. *I.* (*supra*), Ostler, J., referring to the notices required under both sections said:

> I can see no reason, however, why the two notices cannot be combined in one document. If the double notice is intituled under the two Acts, and it gives the mortgagor notice "pursuant to s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, and s. 3 of the Property Law Amendment Act, 1939," then it seems to me that it would be a notice under the earlier Act and also under the later Act. Moreover, the later Act does not have the effect of giving the mortgagor the right to a further month's notice in addition to the month's notice he is entitled to under the earlier Act. I see no reason why the month's notice referred to in both sections should not run concurrently.

Notices.

In view of the similarity in the Rehabilitation Amendment Act and Property Law Amendment Act provisions, it seems that, where both apply, as in practice they frequently do, one form of notice can be drafted which will be applicable under both Acts. Where the mortgage is of land, the notice should also be served on subsequent mortgagees, if known, and, in

case of a proposed sale, the notice required by s. 3 (5) should be served on other persons liable, from whom it is intended to recover the deficiency. This notice need not, however, be served at the same time, provided it is served at least one month before the exercise of the power of sale.

The form of the notice may raise a matter of some considerable difficulty—*e.g.*, if the default consists in the payment of principal, and the mortgagee, to comply with the Acts, specifies the breach complained of and requires the owner to remedy the default, does this not amount to a calling-up or demanding payment of the principal secured by the mortgage and constitute a breach of the Courts Emergency Powers Regulations, 1939? Apparently under the decision in *Hicks's* case this does not necessarily follow.

SERVICE.

A notice under s. 3 of the Property Law Amendment Act, 1939, must be served in manner prescribed in s. 8 of that Act, and a notice under s. 7 of the Mortgagors and Lessees Rehabititation Amendment Act, 1937, should be served as provided in s. 61 of the Mortgagors and Lessees Rehabilitation Act, 1936. There is considerable similarity in the two sets of provisions, and in most cases where a notice is so drafted as to be applicable under both Acts, service can be effected so as to comply with both provisions.

LONDON LETTER.

BY AIR MAIL. Somewhere in England,
February 22, 1940.

My dear EnZ-ers,—

Whatever anyone may now consider the issue of the war may be—whether it is brought to an end by an agreement which shall secure the objects for which it is being waged or shall be continued with increasing intensity and the dragons' teeth sown for future wars—it is evident that a restatement will be required of the rules by which maritime warfare is to be regulated. At present this warfare is on the German side pursuing the same policy of ignoring International Law as characterized her in the last war. It is seen in the prevalent—but not universal—practice of sinking enemy ships without providing for the safety of passengers and crew. In the House of Commons on Wednesday, February 14, Mr. Churchill, with general approval, declined to admit a policy of retaliation. And the Germans claim to apply to neutral shipping the rules of blockade where no blockade has been established.

John Buchan.—The news of the death of Lord Tweedsmuir, Governor-General of Canada, has been received with great regret. The Bar is often the stepping-stone to high office, but, in general, fame has already been made in forensic work, and office is the crown of a successful career in the law. So Lord Reading passed from the Bar through judicial office to be Viceroy of India. John Buchan's career in the law, if it can be called a career at all, was much shorter. Literature attracted him, as it has attracted other lawyers, but he did not, like Sir Walter Scott, in whose footsteps he followed, remain in his profession. After a successful career at Oxford he was called to the Bar at the Middle Temple in 1901, but almost immediately he went out to South Africa to assist Lord Milner in the work preparatory to the present successful administration there. On his return in 1903 he devoted himself to the output of romantic stories, which put him in the forefront of the novelists of his day. Not the least interesting was *The Blanket of the Dark*, with its pictures of the Evenlode stream and the Oxfordshire country which he loved. In the last war he was Director of Information, a position in which he avoided the criticism which beats fiercely on the like office in the present war; but he did not embark on politics till he entered Parliament in 1927 as member for the Scottish Universities. His distinction then brought him to the high position which might have been taken from one of his own romances.

Alternative Remedies.—The vexed question of an injured workman's right to elect his common law remedy after receiving compensation has received new light from *Unsworth* v. *Elder Dempster Lines, Ltd.* It had been decided in *Perkins* v. *Hugh Stevenson and Sons, Ltd.* and also in *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.*, that, where a workman has either claimed compensation from his employers under the Workmen's Compensation Act and been paid compensation or accepted payments sent to him by his employers as compensation without making any claim, in such cases the employer cannot be held liable to any damages in proceedings taken by the workman at common law. It was the basis of both these decisions that the workmen, without any qualification, either claimed and received payment of workmen's compensation or received it from the employers knowing it to be compensation, without making a claim. On the other hand, it has been held in *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639, that, in cases where a workman receives from his employer after injury weekly payments which are not to be taken as payments made by the employer under the Workmen's Compensation Act or received by the workman as payments of compensation under the Workmen's Compensation Act, then s. 29 (1) of the Act does not operate at all. In the present case the workman, as soon as he was aware that he had any common law rights, accepted payments of compensation "without prejudice," and it was held that that was enough to preserve his right of election. In *Perkins's* case it was suggested *obiter* that it was difficult to see how, if a workman who had received compensation subsequently recovered at common law, the employers could set off payments already made; but it appears that his damages for loss of wages could be *pro tanto* reduced.

Camels.—One by one animals of doubtful reputation go through the Courts and come out classified for ever as *domitae* or *ferae naturae*. The camel is the latest to kneel at the feet of justice (*Mc Quaker* v. *Goddard*, *Times*, February 9), and it has risen branded with a large D. It is well to remember that the classification of animals is made in law for at least three purposes. Upon one division depend rights of property; upon a second, liability for cattle trespass; and upon a third the applicability of the doctrine of *scienter* in an action

for damage done by that animal. It may easily happen that an animal may find itself in a different category according to the action in which it is concerned. For example, a rabbit may be wild so far as rights of property are concerned, and harmless as regards liability for negligence. The doctrine of *scienter* applies only to tame animals; and, shortly put, exempts their careful owners from liability for vicious or mischievous acts of a kind which it is not that sort of animal's nature usually to commit, unless it can be shown that the owner had knowledge (*scienter*) that that particular animal had that particular tendency. What the camel thinks of his decided status we do not know. Anyone who has been put out of countenance by one glance from a camel may, if they wish, call it a look of conscious superiority, based on its unique knowledge of the hundredth attribute of Allah. If the animal's expression changes after this case, it will probably show even more clearly what Chesterton called God's scorn for all men governing.

Interference With Rights.—"You are not to interfere with rights unless you find express words," said Chitty, J., in *Allhusen* v. *Booking*, (1884) 26 Ch. D. 559, 564, when he was considering the effect of the Ground Game Act, 1880, "that being the general rule of construction of Acts of Parliament." This rule of construction is not restricted to statutes, but is of general application, and the Court of Appeal had no difficulty in applying it in *Re T. H. Downing and Co., Ltd.*, [1940] 1 All E.R. 333. In a reconstruction, preference shares, which had had preferential rights in a winding up, after passing through various operations involving sub-division and consolidation, emerged as preference shares expressed to be entitled to a fixed preference dividend and to a right in a winding up to repayment of the capital credited as paid up on them and to any arrears of dividend, "but such shares shall not carry the right to any further participation in profits or assets." It was argued that these words took away the right to priority in a winding up, and Bennett, J., came to the conclusion that the right had been taken away. The Court of Appeal refused to accept this view, however, for "if an express alteration is not made, then it ought not to be implied unless, taking as a whole the language of all the relevant provisions in the scheme and the articles, the Court is obliged to come to the conclusion that that is clearly intended."

The "General Armstrong."—The case of the *General Armstrong*, affords in its circumstances an interesting comparison with the case of the *Altmark*, and it suggests the appropriate means for settling the controversy which that case has raised. During the war over a hundred years ago between Great Britain and the United States—a war happily "to end war"—the American privateer *General Armstrong* was attacked by a British squadron in the harbour of Fayal, an island belonging to the Portuguese Azores. She defended herself but was captured. The United States claimed damages from Portugal for the failure to prevent this infringement of her neutrality, and after many years of negotiation the dispute was referred in 1851 to Louis Napoleon, the President of the French Republic. In the following year he gave his award in favour of Portugal on the ground that the privateer had chosen to defend herself instead of demanding protection from the Portuguese authorities. It is not clear whether there was any substantial defence of the *Altmark*, and perhaps the case of the *General Armstrong* would not be followed. It is stated in 2 *Oppenheim on International Law*, 5th edn., 615. But there now exists in the Hague Court a more satisfactory way of settling the question than by arbitration.

The Solicitors Bill.—The text of the Solicitors (Emergency Provisions) Bill is now available, and though I must defer a full account of it until it has taken final shape I may give a brief summary of its provisions. During the present emergency the Council are to have discretion to exempt articled clerks from the intermediate examination and to permit them to sit for the final earlier than at present allowed under s. 31 of the Solicitors Act, 1932. Both national service and attendance at a course of legal instruction may be counted as service under articles. These powers are in the discretion of the Council, and, while we have no doubt that they will be wisely exercised, it must be borne in mind that too liberal a use of the discretion is to be deplored. If the convenience of the individual student is too generously met, it may result in a lowering of the standard of knowledge of those admitted to the profession in the next few years. That will be unfortunate for the public, and therefore in the long run to the detriment of the profession as a whole. The Council are to have power to vary or suspend prizes and scholarships during the present emergency and to accumulate income; they may also vary the number of examinations to be held yearly. The Society also seek greater freedom in the application of the fees payable for practising certificates. Two clauses refer to the powers exercised by the Master of the Rolls. In the case of emergency he may by clause 6 vest these in any Judge of the High Court. The Master of the Rolls has, of course, control over the profession as a whole, and many matters connected with articled clerks come before him by way of application, and appeal from the Registrar. In such cases the Society have always been consulted, and by clause 9 such jurisdiction is to be vested in them. So long as the Master of the Rolls continues to exercise his jurisdiction over solicitors generally this will save much time.

The Law Society.—At a special general meeting of the Law Society to be held to-morrow, February 23, Major J. Milner, M.P., will move that the Solicitors (Emergency Provisions) Bill should provide that all solicitors should become members of the Law Society. In 1931 such a proposal was incorporated in a Bill, which was, however, talked out. There is no evidence for asserting that membership of the Law Society will prevent defalcations—the main subject for discussion at the meeting. But compulsory membership of the Society has much to be said for it. It would give greater disciplinary control over conduct which, if not dishonest, is at least unprofessional when judged, as it should be, by a high standard. The Law Society comes in for a good deal of criticism: it would be surprising and most undesirable if it did not. But in spite of a certain inelasticity of outlook and imperviousness to outside ideas, it does a great deal for the benefit of the profession as a whole, and it is inequitable that those who are not members should sit back and take the benefit. The proposals to be put before the Society to deal with the defalcation problem are two. The main proposal is the formation of an indemnity fund (with a reduction in the annual certificate duty) to be raised by contributions from

practising solicitors. Whatever objections there were to this proposal have, in the general opinion, been overborne by events, and it seems essential that some such scheme, which has worked successfully in the Dominions, should be introduced. The other proposal—designed not to palliate but to prevent—is an annual examination of accounts. As to this there seems some difference of opinion on the merits of "examination" and audit. No doubt the meeting will clear the air.

Leave to Proceed.—A creditor who obtains judgment in the High Court for the recovery of money and then duly secures leave from the Master to proceed to enforce the judgment under the Courts (Emergency Powers) Act, is entitled to present a bankruptcy petition in the County Court without obtaining further leave from the County Court. So held Morton and Farwell, JJ., in *Re A Debtor* (1939) 56 T.L.R. 85. Once leave has been given, the judgment creditor may take "all proper steps to enforce the judgment in any Court which he may select and he is in the same position as he would have been before the Act had been passed." The present case comes within Rule 2 of the Courts (Emergency Powers) Rules, 1939, and the "appropriate Court" (s. 1, subs. (1)) is the Court which gave the judgment. Rule 4—which provides an application for leave to be made in the County Court—deals only with the levy of distress and the other remedies specified in subs. (2) (*a*), not with the recovery of money in accordance with subs. (1). The petition in bankruptcy should accordingly be filed. Yet it still remains open to the respondent to prove, if he can, that his inability to pay his debts is "due to circumstances directly or indirectly attributable" to the war: See *A.* v. *B.* [1939] 4 All E.R. 167, 171, *per* Sir Wilfrid Greene, M.R. In that event the Court may—at any time—stay the proceedings under the petition either for a definite or an indefinite period and with a wide discretion to impose conditions (subs. (5)).

Yours as ever,

APTERYX.

PRACTICE NOTES.

The Court of Appeal.

By C. MASON.

(*Concluded from p. 56.*)

When an *ex parte* application is refused by the Supreme Court, an application for a similar purpose may be made under R. 10 to the Court of Appeal *ex parte* at its next sitting. It is obvious that in many cases it would be impossible to name an appellant and a respondent for the purposes of an appeal and R. 10 proves a very convenient procedure in such a case, although I have seen it used only twice in all the time I was at Wellington. Once it was used where an application for probate was refused and the other time when an application under the Companies Act was refused. It is convenient also in that no security for appeal is required. The documents in the application filed and dismissed in the Supreme Court are not used in the Court of Appeal. Fresh documents are drawn and executed and affidavits may be filed in support containing evidence not put before the Supreme Court. You will notice that there is no time fixed within which the application must be made after the dismissal order, than that it must be made at the next sittings of the Court of Appeal. The application to the Court of Appeal being *ex parte* it is wise to file a full memorandum by counsel setting out the authorities and argument.

Rule 21 provides that every application to the Court of Appeal must be made by notice of motion. This means every application similar to an interlocutory application in the Supreme Court. A summons is a document not issued or used by the Court of Appeal.

The Court of Appeal has a criminal jurisdiction. Section 69 of the Judicature Act provides for a trial at Bar. If, after a bill of indictment has been found, it appears to the Supreme Court by affidavit, that a case is one of extraordinary importance or difficulty and that it is desirable that it should be tried before the Judges at Bar, the Supreme Court may grant a rule *nisi*, and if no sufficient cause is shown, may make it absolute for the removal of such indictment and the proceedings thereon, into the Court of Appeal. The Supreme Court may also direct that a special or common jury, as it thinks fit, be summoned from the judicial district in which the alleged offence was committed, or the accused was apprehended, or from the judicial district in which the sitting of the Court of Appeal takes place. The proceedings then follow, as nearly as may be, a trial at Bar in England and the Court of Appeal has the same jurisdiction, authority, and power in respect thereof, as the Kings Bench Division of the High Court of Justice has in England, in respect of a trial at Bar. In England trial at Bar takes place before a Divisional Court of the King's Bench Division, which Court may consist of two or more Judges. The jury is almost *invariably* a special jury. The only criminal trials at Bar in recent years have been *R.* v. *Jameson*, [1896] 2 Q.B. 425, for being unlawfully engaged in a military expedition against a friendly state; *R.* v. *Lynch*, [1903] 1 K.B. 444, for treason committed abroad; and *R.* v. *Casement*, [1917] 1 K.B. 98, for treason.

Trial at Bar is a most unusual procedure in New Zealand, but other criminal matters are commonly argued in the Court of Appeal. Under s. 442 of the Crimes Act, the Supreme Court may reserve any question of law arising on the trial of any person or of any of the proceedings preliminary, subsequent, or incidental thereto for the opinion of the Court of Appeal. If a question is reserved a case is stated for the opinion of the Court of Appeal. The case is sometimes drawn by counsel and sometimes by the Judge, but in any event it is approved and signed by the Judge who presided at the trial. The case stated is printed by the Government Printer and the expense is borne by the Justice Department. No setting down is necessary —simply the filing of the signed original and with

printed copies and their argument by counsel in Court. The powers of the Court of Appeal in connection with any appeal under the Crimes Act, 1908, are contained in s. 445, which is as follows :—

1. Upon the hearing of any appeal under this Act the Court of Appeal may—

(*a*) Confirm the ruling appealed from ; or

(*b*) If of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new trial ; or

(*c*) If it considers the sentence erroneous or the arrest of judgment erroneous, pass such a sentence as ought to have been passed, or set aside any sentence passed by the Court below, and remit the case to the Court below with a direction to pass the proper sentence ; or

(*d*) If of opinion, where the accused has been convicted, that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused be discharged, which order shall have all the effects of an acquittal ; or

(*e*) In any case whether the appeal is on behalf of the prosecutor or of the accused, direct a new trial ; or

(*f*) Make such other order as justice requires :

Provided that no conviction or acquittal shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial :

Provided also that, if the Court of Appeal is of opinion that any challenge was improperly disallowed, a new trial shall be granted.

2. If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment the Court may give separate directions as to each count, and may pass sentence on any count that stands good and unaffected by such wrong or miscarriage, or remit the case to the Court below with a direction to pass such sentence as justice requires.

Under s. 446 any person convicted of any crime may apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. The application is made by notice of motion supported by affidavit exhibiting the indictment notes of evidence and copy exhibits. No printing is necessary—the documents being typed and sufficient copies supplied for the Judges' use.

Under the Crimes Amendment Act, 1920, any person convicted of a crime may apply to the Court of Appeal for leave to appeal against the sentence. The rules under this amendment provide a simple form of application which can be filled up by the prisoner himself ; but if counsel draws the form it is better if supported by affidavits. It is not usual to hear counsel on the application for leave, but the Court will always hear counsel if requested so to do, and it is better to appear in support of the application for leave, because, if a case for variation of the sentence is made out, leave to appeal is granted and the sentence varied without a further appearance. The order or direction of the Court of Appeal in criminal matters is not embodied in a formal judgment but is drawn pursuant to s. 445 (3) in the form of a certificate signed by the presiding Judge and forwarded by the Registrar to the Court where the case was tried. The certificate is drawn in the Court office. Incidentally no Court fees are payable to the Court of Appeal in criminal matters.

The Judge of the Court of Arbitration may state a case for the opinion of the Court of Appeal. The case stated is signed by the Judge and printed by the Government Printer at the expense of the Labour Department. No setting down is required and the case is argued by counsel in Court.

Appeals may be brought before the Court of Appeal from the decision of the Magistrates' Court either directly or after appeal to the Supreme Court. Section 67 of the Judicature Act says that the determination of the Supreme Court on appeals from inferior Courts shall be final unless leave to appeal from the same to the Court of Appeal is given. The application for leave to appeal must be applied for promptly and if leave is refused, such refusal cannot be reviewed either in the Supreme Court or Court of Appeal. If leave to appeal is granted, the case is printed by the appellant and set down for hearing in the ordinary way. An appeal may be had from the Magistrates' Court direct to the Court of Appeal, if either party is dissatisfied with the determination of the Magistrates' Court either in point of law or upon the admission or rejection of any evidence. He must intimate his intention of so appealing and state the grounds of his dissatisfaction to the Magistrate, either at the hearing or within six days after judgment, and the Magistrate must certify the grounds of dissatisfaction and that they seem in his opinion to involve some question of law of considerable difficulty or great importance. A case is stated, signed by the Magistrate, printed by the appellant and set down in the ordinary way.

During the sitting of the Court of Appeal it is usual to hear cases that have been referred to the Full Court. This is not a hearing before the Court of Appeal but before the Supreme Court. A sitting of any two or more Judges of the Supreme Court is referred to as a Full Court and because the Judges assemble for the Court of Appeal it is convenient to have Full Court sittings then. Sittings of the Full Court have in recent years been curtailed considerably. An application for such a hearing is granted only when the decision of the Supreme Court is final and it is desirable to have the judgment of more than one Judge. Instances of this often arise in appeals from Samoa and in appeals under the Justices of the Peace Act, other than rehearings. The application to obtain such a hearing is informal—no documents are required—simply an appearance before the Judge in Chambers. If an order is made referring the matter to the Full Court the order is not even sealed. Sufficient copies for the Judges, of all necessary documents, are lodged in Wellington, and the case is not even set down for hearing. A fixture is obtained and the case argued.

MR. JUSTICE KENNEDY'S RETURN.

Southland Bar Dinner of Welcome.

A very successful dinner was held by members of the Southland Bar, on Friday, March 1, to welcome the Honourable Mr. Justice Kennedy on his return from abroad.

The toast of the evening was in the hands of the President, Mr. T. R. Pryde, who asked His Honour, in replying, to tell something of his experiences.

Members of the Bar listened with interest to a very informative account of extensive travel, interspersed with sidelights on the administration of justice in other parts of the Empire.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

The annual meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, at 11 a.m., on Tuesday, February 27, 1940.

The President, Mr. H. F. O'Leary, K.C., occupied the chair, and welcomed those delegates who were attending for the first time.

The following Societies were represented: Canterbury, Messrs. J. D. Godfrey and A. R. Jacobson; Gisborne, Mr. J. V. W. Blathwayt; Hamilton, Mr. H. J. McMullin; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. W. T. Churchward; Nelson, Mr. C. R. Fell; Otago, Messrs. R. G. Sinclair (proxy) and J. B. Thomson; Southland, Mr. T. R. Pryde; Taranaki, Mr. C. E. Monaghan; Wanganui, Mr. A. A. Barton; and Wellington, Messrs. H. F. O'Leary, K.C., G. G. G. Watson, and S. J. Castle.

Apologies were received from the Auckland delegates, who were prevented from attending owing to the interruption of the train services by floods, and from Mr. H. W. Kitchingham, of Westland.

Minutes.—The minutes of the Council Meeting of December 8, 1939, as printed and circulated, were confirmed.

Annual Report and Balance-sheet.—On the motion of the President, seconded by Mr. Lusk, the annual report and balance-sheet was adopted.

Mr. Monaghan asked what should be done with the Legal Conference fees held by the District Law Societies, and was informed that these should be forwarded to the New Zealand Law Society, which had a special Bank Account for them.

Election of Officers.—The following officers, the only nominees for the positions mentioned, were elected:—

(*a*) *President*: Mr. H. F. O'Leary, K.C.

(*b*) *Vice-President*: Mr. A. H. Johnstone, K.C.

(*c*) *Treasurer*: Mr. P. Levi.

(*d*) *Management Committee of Solicitors' Fidelity Guarantee Fund*: Messrs. P. Levi, E. P. Hay, A. H. Johnstone, K.C., and D. Perry.

(*e*) *Joint Audit Committee*: Messrs. H. E. Anderson and P. B. Cooke, K.C.

(*f*) *Library Committee, Judges' Library*: Messrs. S. J. Castle and G. G. G. Watson.

Disciplinary Committee.—Mr. W. T. Churchward stated that he did not intend to seek re-election, as he thought that it was only fair to the Otago Society that it should have a representative on the Committee.

The following were then declared duly elected: Messrs. H. F. O'Leary, K.C. (Chairman), A. N. Haggitt, J. D. Hutchison, A. H. Johnstone, K.C., J. B. Johnston, H. B. Lusk, C. H. Weston, K.C., and G. G. G. Watson.

On the motion of the President, it was decided to place on record the appreciation of the Council for Mr. Churchward's services on the Committee, and for his self-effacement in the matter.

History of Legal Profession.—Mr. Good wrote, stating that he had received and had discussed with the New Zealand Director of Messrs. Butterworth and Co. (Aus.) Ltd., a draft contract covering the publication of the proposed "History of the Legal Profession."

He was of opinion that it would not now be possible to complete the volume by the end of 1940, and mentioned that there were several matters in the contract he would like to discuss when next in Wellington.

The report was received.

Appointment of Auditors.—The President reported that a circular had been issued by the New Zealand Society of Accountants to its members, drawing attention to the carelessness which had been displayed by some auditors of Solicitors' Trust Accounts, and urging that an immediate report of any irregularity noted should be sent to the local District Law Society.

Various points in connection with the appointment of auditors were then discussed, and it was decided to hold the matter over until the next meeting to enable the District Societies to consider it fully and present their views.

Receipts for Amounts paid to Stamp Duties Department.—The Secretary reported that the Joint Audit Committee had interviewed the Commissioner of Stamp Duties, and had explained to him that the receipts issued by his Department in connection with death and gift duties contained no reference to the estate or person on whose behalf they were paid.

Mr. Pearce had been very sympathetic, and had arranged to notify his officers that the name of the relative estate or person should be noted on the receipt, and that, if a triplicate copy of the requisition were presented, this would be stamped with the office number of the original requisition, thus enabling an auditor to check the triplicate and original if desired.

It was decided to thank the Commissioner for his action in the matter.

Solicitor with Power of Attorney.—The Secretary reported that the Joint Audit Committee had considered the letter from Taranaki, but had come to the conclusion that no general ruling could be given on the question owing to its very wide range and to the obvious difficulties involved. It was clear that powers of attorney could be given to cover collections of interest or commission only, or to conduct a business, or to act as New Zealand attorney for overseas corporations, and that some of these cases might be within the regulations and others not.

The Audit Committee had therefore decided to ask Taranaki to submit fuller details of the case mentioned by them, and to give a decision on that individual case alone.

Solicitor Trustee: Receipt of Trust Moneys.—The following letter had also been considered by the Audit Committee:—

> The Council of the Auckland District Law Society would be grateful if you would refer to the Audit Committee of the New Zealand Law Society for their opinion upon certain questions which have been raised concerning the duties of a solicitor trustee in regard to the receipt of trust moneys.
>
> The matter was raised in this way: A solicitor, "A.," and two lay persons are trustees in the estate of a deceased

person. The trustees keep a separate set of books of account and a separate bank account. Another solicitor, "B.," made a payment to "A." of interest due on the estate and was tendered an ordinary form of receipt for money received. Solicitor "B." contends that he is entitled to a receipt in the form specified by Reg. 7 (1) of the Solicitors' Audit Regulations, 1938.

Solicitor "A." relies upon Reg. 8 (3). My Council is not informed as to whether solicitor "A." has authority by himself to operate upon the trust banking account, but it is clear that he did himself receive the interest, and my Council is therefore of opinion that the case was not within the provisions of Reg. 8 (3).

The Council thought that the case came within Reg. 8 (4), and that the giving of a special form of receipt was contemplated. They were, however, not clear on the matter, and decided to seek the opinion of the Audit Committee.

I am directed to add that my Council is not informed of what became of the money after it was received by the solicitor trustee, and to ask the opinion of the Committee as to whether moneys paid to a solicitor trustee under the circumstances narrated above should not be dealt with in accordance with the provisions of s. 46 of the Law Practitioners Act, 1931.

Will you kindly refer this letter to the Audit Committee and let me know their views on the matters submitted as early as possible.

The Joint Committee were of opinion that where the money was actually received by the solicitor in the course of his practice, it was his duty to pay it into his trust account and give a trust account receipt for it.

The Courts Emergency Powers Regulations, 1939.—The Wellington Society reported that a Sub-committee consisting of Messrs. Young, Buxton, and the Secretary, had waited on the Under-Secretary of Justice, and had handed him a memorandum pointing out anomalies and difficulties in the draft of the new regulations, the advance copy of which had been given to Mr. Young for the Society's perusal. A very friendly conversation had taken place with Mr. Dallard, in which he thanked the Society for its comments, and promised to use his best endeavours to have the difficulties overcome when the final form of regulations was decided upon.

So far as was known, no further draft of the regulations had appeared.

The report was received and the Committee thanked for their services.

Scale of Fees: Stock and Implements: Sale of Farms as Going Concerns.—The following letter was received from Hamilton:—

The question of the fee to be charged on the value of stock and implements when the sale of these is included in the sale of a farm has been considered by my Council, who decided that the following suggested scale of fees should be charged on the value of the stock and chattels included in the transaction:—

	£	s.	d.
Not exceeding £200	1	1	0
Not exceeding £500	2	2	0
Not exceeding £1,000	3	3	0
Not exceeding £2,000	4	4	0
Exceeding £2,000	5	5	0

These fees will, of course, be exclusive of all necessary disbursements. This suggested scale is referred to you for consideration, and, if the New Zealand Law Society approves, for adoption throughout New Zealand.

After Mr. McMullin had pointed out that the suggested scale was in addition to the ordinary conveyancing charges, it was decided to refer this matter also to the Conveyancing Committee.

(To be continued.)

RECENT ENGLISH CASES.

Noter-up Service
FOR
Halsbury's "Laws of England"
AND
The English and Empire Digest.

BANKRUPTCY.

Deed of Arrangement—Trustee—Liability—Order Given as Trustee.

A trustee of a deed of arrangement does not escape personal liability merely by describing himself as a trustee.

HUNT BROS. *v.* COLWELL, **[1939] 4 All E.R. 406. C.A.**

As to liability of trustee of deed of arrangement: see HALSBURY, Hailsham edn., vol. 2, pp. 427–440, pars. 597–599; and for cases: see DIGEST, vol. 5, pp. 1104–1108, Nos. 9010–9030.

EASEMENTS.

Support—Natural Right of Support—Neighbouring Owners—Escape of Water—Natural Use of Land—Escape by Operation of Natural Causes—Water Blown on to Adjoining Land by Wind.

If as a result of natural user of land water accumulates, and, as a result of the operation of natural causes on that water, the right of support of neighbouring land is taken away, no action will lie.

ROUSE *v.* GRAVELWORKS, LTD., **[1940] 1 All E.R. 26. C.A.**

As to natural right of support: see HALSBURY, Hailsham edn., vol. 11, pp. 362–365, pars. 636–641; and for cases: see DIGEST, vol. 19, pp. 163–168, Nos. 1139–1167.

EMERGENCY LEGISLATION.

Leave to Commence—Parties to Application—Inability to Pay Due to War—Onus of Proof—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (*b*) (4).

The onus of proving that the debtor would have been able to pay the debt but for the outbreak of war is upon the debtor, and he does not discharge that onus where it is a mere matter of speculation whether he would have been able to discharge the debt.

TOMLEY AND OTHERS *v.* GOWER AND MCADAM, **[1939] 4 All E.R. 460. Ch.D.**

As to emergency powers: see HALSBURY, Hailsham edn., vol. 23, pp. 464, 465, par. 683; and for cases: see DIGEST, vol. 21, pp. 428, 429, Nos. 92–103.

LANDLORD AND TENANT.

Lease—Covenant to Pay all Assessments, Impositions and Outgoings Whatsoever—Road Charges—Charges not Paid by Landlord at Date of Issue of Writ—Right of Landlord to Recover Charges.

When a tenant is under covenant to pay charges on property, the landlord, if he is liable for those charges, can recover them even if he has not then paid them.

FRANCIS *v.* SQUIRE, **[1940] 1 All E.R. 45. K.B.D.**

As to incidence of outgoings: see HALSBURY, Hailsham edn., vol. 20, pp. 187–195, pars. 205–212; and for cases: see DIGEST, vol. 31, pp. 294–300, Nos. 4396–4455.

NEGLIGENCE.

Producer of Variety Programme—Heel of Dancer's Shoe Becoming Detached and Hitting Member of Audience—Whether Dancer Servant or Independent Contractor—Standard of Care Required.

If the proprietors of a theatrical entertainment employ a firm to present an entertainment, the relationship between the firm and the spectators is that of invitor and invitee.

FRASER-WALLAS AND ANOTHER *v.* E. & D. WATERS (A FIRM), **[1939] 4 All E.R. 609. K.B.D.**

As to risks incident to entertainments: see HALSBURY, Hailsham edn., vol. 23, pp. 718, 719, par. 1009; and for cases: see DIGEST, vol. 36, pp. 40, 41, Nos. 242–246.

SALE OF GOODS.

Transfer of Property—Ascertained Goods—Purchase Price Provided by Auctioneers—Bankruptcy of Purchaser—Whether Property in Goods in Purchaser or Auctioneers—Sale of Goods Act, 1893 (c. 71), s. 17 (1).

At an auction, unless it can be shown that the buyer was an agent for the auctioneer, the property in the goods never passes to the auctioneer.

Re CAPON; TRUSTEE IN BANKRUPTCY *v.* KNIGHT AND SONS; SAME *v.* WOODWARD AND WOODWARD, **[1939] 4 All E.R. 554. C.D.**

As to transfer of property in specific goods: see HALSBURY, Hailsham edn., vol. 29, pp. 83, 84, pars. 97–99; and for cases: see DIGEST, vol. 39, pp. 501, 502, Nos. 1187–1205.

SOLICITORS.

Alleged Unprofessional Conduct—Conduct of Case Left to Managing Clerk—Inadequate Affidavits of Documents—False to Knowledge of Clerk—Whether Solicitor can be Made personally Responsible for Costs.

Misconduct by a solicitor's clerk may render his principal liable to pay the costs of an action, although the principal himself has not been guilty of misconduct.

MYERS *v.* ELMAN, **[1939] 4 All E.R. 484. H.L.**

As to liability of solicitor to pay costs: see HALSBURY, Hailsham edn., vol. 31, pp. 269–272, pars. 290, 291; and for cases: see DIGEST, vol. 42, pp. 337–353, Nos. 3810–4022.

SPECIFIC PERFORMANCE.

Building Contract—Contract to Make Sewers and Roads—Whether Defendant Must by the Contract Obtain Possession of Land—Defendant in Fact in Possession of Land on Which Work to be Done.

Where specific performance of a building contract is sought, it is not necessary that the defendant should be in possession of the land by the contract, if he is in fact in possession of the land.

CARPENTERS ESTATES, LTD. *v.* DAVIES, **[1940] 1 All E.R. 13. Ch.D.**

As to specific performance of building contracts: see HALSBURY, Hailsham edn., vol. 31, pp. 333, 334, par. 365; and for cases: see DIGEST, vol. 7, pp. 400, 401, Nos. 265–273.

STREET AND AERIAL TRAFFIC.

Pedestrian Crossing—Light-controlled Crossing—Crossing With Refuge—Whether Refuge Part of Crossing—Pedestrian Stepping from Refuge—Contributory Negligence—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 2, 3, 4, 5.

A refuge in the middle of a light-controlled crossing is not part of that crossing, and a person stepping off the refuge may be guilty of contributory negligence.

WILKINSON *v.* CHETHAM-STRODE, **[1940] 1 All E.R. 67. K.B.D.**

As to pedestrian crossings: see HALSBURY, Hailsham edn., vol. 16, p. 492, par. 724; and for cases: see DIGEST, Supp., Street and Aerial Traffic, Nos. 31*a*, 31*b*.

WORKMEN'S COMPENSATION.

Sailor—Ship Sent to Mosquito-infested Area—Death From Yellow Fever and/or Malaria—Dangerous Locality—Whether Death Due to Injury Arising Out of His Employment—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

The death of a sailor who in the course of his employment is sent to a mosquito-infested area, and dies from yellow fever contracted there, is due to injury arising out of his employment.

DOVER NAVIGATION CO., LTD. *v.* CRAIG, **[1939] 4 All E.R. 558. H.L.**

As to risks incidental to employment: see HALSBURY, 1st edn., vol. 20, Master and Servant, pp. 168, 169, par. 358; and for cases: see DIGEST, vol. 34, pp. 318–323, Nos. 2604–2641. See also WILLIS'S WORKMEN'S COMPENSATION, 31st edn., pp. 85–94.

Course of Employment—No Evidence of Cause of Accident—Compensation Paid after Notice of Accident—Whether Payments Evidence that Accident Happened in Course of Employment.

Unqualified payment of compensation by employers is some evidence of an admission of liability.

WAY *v.* PENRIKYBER NAVIGATION COLLIERY CO., LTD., **[1940] 1 All E.R. 164. C.A.**

As to admissions of liability: see DIGEST, vol. 34, p. 387, Nos. 3135–3140. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd edn., pp. 653, 654.

MAGISTRATES' COURT DECISIONS.

Recent Cases.

INDUSTRIAL CONCILIATION AND ARBITRATION ACTS.

Union—Amalgamation of Unions—Consequential Cancellation of Registration of Union, a Party to such Amalgamation—Dispute pending at Time of Cancellation—Effect of Amalgamation thereon—Duty of Registrar of Industrial Unions—Industrial Conciliation and Arbitration Act, 1925, ss. 21, 22 (*a*)—*In re* HAWKE'S BAY BUILDERS' AND GENERAL LABOURERS' INDUSTRIAL UNION OF WORKERS, **M.C.D. 372** (Gilmour, S.M.).

POLICE OFFENCES.

Wilful Obstruction of Police Constable in Execution of his Duty—Constable taking Names and Addresses of Persons drinking in Hotel Lounge after Hours—Police Inquiries interrupted and hindered—"Inspector"—"Wilfully obstruct"—Police Offences Act, 1927, s. 77—Licensing Act, 1908, ss. 188, 226.—POLICE *v.* MADDICK, **M.C.D. 359** (Goulding, S.M.).

PRACTICE.

Statement of Claim—Amended Statement of Claim filed and served—New Causes of Action included—No Appearance of Defendant—Jurisdiction—Judgment on Original Cause of Action—Magistrates' Courts Act, 1928, s. 79 (1).—REEVES *v.* COLE, **M.C.D. 364** (Luxford, S.M.).

PRINCIPAL AND AGENT.

Land Agent—Contract for Sale—Purchaser unable to Complete—Contract induced by Negligent Misrepresentation of Agent—Principal entitled to Deposit paid—Liability of Agent in Damages—Agent disentitled to Commission.—VANCE *v.* W. BUTLER AND COMPANY, **M.C.D. 377** (Lawry, S.M.,

RENT RESTRICTION.

Part of House—Use in Common with Landlord of Other Parts of House—"Separate dwelling"—"Relevant matter"—Method of fixing Fair Rent—Fair Rents Act, 1936, ss. 2, 7—Fair Rents Amendment Act, 1939, ss. 4, 5.—BOAS *v.* HOGAN, **M.C.D. 362** (Goulding, S.M.).

Purchaser seeking Possession—*Bona fide* Agreement for Purchase Subject to Condition—Effect of Condition—Fair Rents Act, 1936, s. 13 (1) (*f*)—Fair Rents Amendment Act, 1939, s. 7 (1). JENSEN *v.* MULHOLLAND, **M.C.D. 375** (Goulding, S.M.).

VENDOR AND PURCHASER.

Principal and Agent—Land Agents—Mortgagors and Tenants Relief—Contract for Sale—Land Subject to Adjustment Order—Sale to Purchaser ready to Complete—Leave of Court of Review not applied for—Rescission of Contract by Consent—Claim for Land Agents' Commission on *quantum meruit*—Liability of Vendor to Agents—Mortgagors and Lessees Rehabilitation Act, 1936, s. 82.—WILSON AND ANOTHER *v.* SNELL, **M.C.D. 365** (Lawry, S.M.).

RULES AND REGULATIONS.

Fisheries Act, 1908. Trout-fishing (Hawke's Bay) Regulations 1940. February 7, 1940. No. 1940/31.

Board of Trade Act, 1919. Board of Trade (Woolpacks) Revocation Regulations, 1940. February 21, 1940. No. 1940/32.

Control of Prices Emergency Regulations, 1939. Price Order No. 1. February 22, 1940. No. 1940/33.

Emergency Regulations Act, 1939. Oil Fuel Emergency Regulations, 1939, Amendment No. 3. February 28, 1940. No. 1940/34.

Dogs Registration Amendment Act, 1937. Dogs Registration (Prevention of Hydatid Disease) Regulations 1938, Amendment No. 4. February 28, 1940. No. 1940/35.

Transport Licensing Act, 1931. Transport Licensing (Goods-service) Regulations 1936, Amendment No. 3. February 28, 1940. No. 1940/36.

Transport Licensing Act, 1931. Transport (Goods) Order 1936, Amendment No. 4. February 28, 1940. No. 1940/37.

Statutes Amendment Act, 1939. Compensation Court Regulations, 1940. February 29, 1940. No. 1940/38.