New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"We have for ourselves the great duty of self-preservation to perform, but the duty of the people of England now is of a nobler and higher order. We are in the first place to provide for our safety against a foe whose malignity to this country knows no bounds, but this is not to close our views or our efforts in so sacred a cause. Amid the wreck and misery of nations it is our just boast that we have continued superior to all that ambition or despotism could effect, and our still higher boast ought to be that we provide not only for our own safety, but hold out a prospect to nations who are bending under the iron yoke of tyranny, of what the exertions of a free people can effect, and that at least in this corner of the world the name of liberty is still cherished and sanctified."

—WILLIAM PITT, April 25, 1804 (when Napoleon was expected to invade England).

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"WAR" AS A LEGAL CONCEPT.

THE recent closing of the Burma Road brings into a strong light the question whether a declaration of war is necessary before it can be said, in law, that a state of war exists between two contestants in the field of military, naval, or aerial hostilities. The question is not of mere academic interest. It is a very practical one, by reason of the presence, in charterparties and other contracts, of conditions for cancellation, &c., if war breaks out or if a state of war exists in relation to one or more named countries.

In so far as Great Britain, the British Commonwealth of Nations, and the British Empire are concerned, a state of war can only exist when His Majesty the King so declares; and since the Statute of Westminster, 1931, such a declaration binds any one of the nations of the British Commonwealth only when His Majesty in his capacity as King of each such Dominion so declares: see the Declaration of a State of War, September 3, 1939 (as against the German Reich), *1939 New Zealand Gazette*, 2321, *Handbook of Emergency Legislation*, 215, and June 11, 1940 (as to the Kingdom of Italy), *1940 New Zealand Gazette*, 1389. Consequently, it is only when other countries are conducting hostilities with one another that difficulty arises, under modern conditions, in determining whether those countries are at war in the legal sense, especially since some countries in recent times have declared such hostilities to be a war in fact, and not to be a war in law.

According to the former practice, a condition of war could arise either through a declaration of a state of war, a manifesto by a State that it considered itself at war with another State, or through one State committing hostile acts of force against another State. History presents many instances of wars commenced in these ways. In international law, "war" has for centuries been defined as a struggle between States, involving the application of force. Grotius laid down the rule that a public declaration of war is necessary for its commencement: *De Jure Belli et Pacis*, iii, c. 3, § 5; but in his own time, and right down to modern times, the rule laid down by him was not observed by belligerents, and the policy adopted depended on the particular circumstances of each case. Apart from the conclusions of fact to be drawn from actual practice, there has by no means been unanimity of opinion on the point among jurists and publicists. On the whole, continental writers urged the necessity of a previous declaration, *pour légitimer l'état de guerre*, as Calvo puts it in *Le Droit International*, 5th Ed., iii, 40. The British view was contrary to this. Thus, Lord Stowell held that a war might properly exist without a prior notification, which constituted merely the formal evidence of a fact. Thus in *The Eliza Ann*, (1813) 1 Dods. 244, 247, 165 E.R. 1298, 1299, 1300, he said:

> A declaration of war was issued by the Government of Sweden, but it is said that the two countries were not, in reality, in a state of war, because the declaration was *unilateral* only. I am, however, perfectly clear that it was not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge, to be accepted or refused at pleasure, by the other. It proves the existence of actual hostilities on the one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only.

The rule adopted by the First Hague Convention, 1899, left everything to the discretion of the State bent on making war, as it declared that, as far as circumstances will allow, before an appeal to arms, recourse must be had to the mediation of friendly States. It is clear, therefore, that the practice remained uncertain, and a declaration of war is, according to international law, a matter of courtesy or discretion rather than of legal obligation.

The Hague Conference of 1907, laid down definite rules which are now binding on belligerents. Article 1

of the Convention provides that the contracting powers recognized that hostilities between them must not commence without a previous and explicit warning, in the form of a declaration of war giving reasons, or an ultimatium with a conditional declaration of war; and Article 2 proclaimed that the existence of a state of war must be notified to the neutral Powers without delay, and should not be held to affect them until after the receipt of a notification.

Writing in 1929, Professor Berriedale Keith, in the Sixth English Edition of *Wheaton's International Law*, p. 638, says:

> The rule must be interpreted as condemning sudden surprise and treachery, and still more, of course, mere attack not preceded by such a condition of negotiations as to render such action natural. War is still possible without declaration, and in such cases the convention requires that neutrals shall be duly notified; but, if they know the facts, they must perform neutral duties.

It is clear, therefore, in the opinion of international jurists, that, so far as the public law of nations is concerned, no declaration or other notice to the enemy, of the existence of war, is necessary in order to legalize hostilities, though the commencement of hostilities without a declaration or an ultimatum would amount to a breach of the law of nations.

So far we have been discussing the position in international law. The construction of contracts and the like come for decision before municipal Courts, and it is in this restricted sphere that, in relation to commercial transactions in particular, it is necessary to have a clear idea of the legal concept of "war," apart altogether from the complexities and obscure technicalities of international law and custom. Because, so far as the construction of a commercial document is concerned, the word "war" is not to be given a technical meaning based on principles of international law, but that word must be construed, having regard to the general tenor and purpose of the document, in what may be called a common sense way.

Fortunately, we have high authority as to the view taken by British Courts on the question whether China and Japan are "at war."

In the case of the present hostilities between China and Japan there has been no declaration of war; and other Governments have not permitted themselves to any decision whether or not the hostilities amount to war. In *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steamship Co., Ltd.*, [1939] 2 K.B. 544, [1939] 1 All E.R. 819, the Court of Appeal (Sir Wilfred Greene, M.R., MacKinnon, and Finlay, L.JJ.) had to decide, on appeal from a decision of Goddard, J., whether the interpretation of a commercial document is to be governed by the niceties of governments or diplomats or by the definitions of writers on international law, as to when it can be said that war had broken out between China and Japan.

By a charterparty, dated June 2, 1936, the owners of the *Nailsea Meadow* chartered their ship to the appellants on a time charter. The contract contained a clause in the following words:

> Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan.

In reliance on this provision, on September 18, 1937, the owners withdrew the ship from service and cancelled the contract, on the ground that war had broken out involving Japan. The charterers contended that the owners were not entitled to do so. They denied that the strained relations between China and Japan amounted to "war" within the meaning of the above clause of the charterparty, and claimed damages for breach of the contract. The position at the date of the cancellation was that very serious fighting was in progress between the regular armed forces of China and Japan, and had been for some time before September 18, involving heavy casualties and very extensive movements of troops. On the other hand, there had been no formal declaration of war; and diplomatic relations between the two countries had not been formally broken off, in the sense that the ambassadors of either country were present at the capitals of the other. An inquiry addressed to the British Foreign Office elicited the reply that the position was anomalous and indeterminate, and that the Government were not prepared to say that a state of war existed. The Foreign Office replied on September 11, 1937, in these words:

> With reference to your communication of September 8, inquiring whether His Majesty's Government recognize that there was an outbreak of war in which Japan is involved either on or before August 25 or at the date of this reply, I am directed by Mr. Neville Chamberlain to inform you that the current situation in China is indeterminate and anomalous and His Majesty's Government are not at present prepared to say that in their view a state of war exists.
>
> At the same time I am to suggest that the question of the meaning to be attached to the term war as used in a charterparty may simply be one of interpreting the relevant clause, and that the attitude of His Majesty's Government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term "war" as used in particular documents or statutes.

In a letter of January 24, 1938, the Foreign Office merely stated that the views of His Majesty's Government regarding the legal status of the conflict in the Far East had not altered, and "that on September 18 His Majesty's Government were still not prepared to say that in their view a state of war existed."

The dispute was referred under a clause in the charterparty to the arbitrators and, on their inability to agree, reference was made to the umpire whose interim award was stated in the form of a special case. The award contained the following material clauses:—

> Clause 3. At the hearing of the arbitration the charterers conceded that extensive fighting had taken place between the armies of Japan and China, and that if the scale of such hostilities constituted the sole test of the existence of war, the two states were at war on September 18, 1937. The charterers contended, however, that those States were not at war for the following reasons:—
>
> (*a*) No declaration of war had been made by China or Japan.
>
> (*b*) Diplomatic relations had not been severed between China and Japan.
>
> (*c*) The British Government had not recognized a state of war between the two countries.
>
> (*d*) The Government of the United States of America had not brought into force the Neutrality Act.
>
> (*e*) Neither of the contending States had an *animus belligerendi*.

As to (*a*) the umpire found that no such declaration of war had been made; (*b*) and (*d*) were admitted by the owners. As to (*c*), the letters from the British Foreign Office dated September 11, 1937, and January

24, 1938, were put in. The charterers contended that the statements in the letters were conclusive.

On the evidence adduced in the arbitration, the umpire found a sequence of facts as to what happened in China as between China and Japan, commencing from July 8, 1937, and, after carrying the matter down to the middle of August, continued:

> In a statement of policy issued on August 15, the Japanese Government charged China with adopting an increasingly arrogant and insulting attitude towards Japan and alleged that she had presumed to complete warlike preparations against Japan. The statement alleged that Japanese patience and restraint had become finally exhausted; and concluded that it had become imperative to take drastic measures in order to chastise the Chinese troops and to impress on the Nanking Government the necessity for a reconsideration. The statement indicated that Japan had no territorial designs.

A summary of the umpire's findings as to the position in the Shanghai area was that 50,000 men supported by the guns of the Japanese fleet and a strong air arm were engaged in battle with Chinese forces of over 1,500,000 on a thirty-mile front. Fighting had lasted over three weeks, and casualties had been heavy and many thousands of Japanese and Chinese were killed or wounded. The position in North China was that three Japanese armies numbering over 100,000 men, fully equipped with aeroplanes, tanks, and heavy artillery, were advancing in the teeth of the opposition of Chinese armies numbering 300,000. Over fifty battles were fought between August 20 and September 16. Since August 25, the Japanese had maintained a naval blockade over a 1,000 miles stretch of the coastline of China and had occupied certain islands.

After a further long detailed account of the position in China, the umpire continued:

> On the evidence submitted to me I also find the following facts:—
>
> (*a*) On August 23 the Secretary of State of the United States of America appealed to both parties to refrain from resort to war . . .
>
> (*c*) On August 29 the Prime Minister of Japan stated that the existing situation rendered overtures for diplomatic relations with Nanking virtually impossible, and that Japan's best course was to beat China to her knees . . .
>
> (*f*) On September 2 the Japanese Foreign Minister stated that Japan's objective was to obtain from China a drastic improvement of her attitude towards Japan; that they were fighting the anti-Japanese movement in China which existed largely in the army; that Japan's idea was that Chinese should govern China . . . He added that it was not a state of war which prevailed in China, but a major conflict . . .

Subsequently the owners' contentions were set out in the award, which then proceeded:

> 14. If and so far as it is a question of fact, I find that the military operations in September up to and including the 18th, were undertaken by both Japan and China *animo belligerendi*.
>
> 15. If and so far as it is a question of fact, I find that by September 18, 1937, war had broken out involving Japan.
>
> 16. On the evidence placed before me by the parties, I further find that the military operations above mentioned were on and for some time before September 18, ordinarily referred to in the daily press of this country and in the *Bulletin of International News*, published by the Royal Institute of International Affairs, as a "war between Japan and China." I was also asked by the owners to find, and I do find, that the said military operations constituted a war in the ordinary and popular meaning of that word between Japan and China.

The umpire therefore made his award in favour of the owners, subject to the opinion of the Court on the question whether on the true construction of the charterparty and on the facts found by him he was entitled to award that on September 18, 1937, war had broken out involving Japan.

In his judgment in the Court of first instance, Goddard, J., (as he then was) said that on the facts as found by the umpire, one was not surprised that he found that war in which Japan was engaged had broken out. His Lordship went on to say:

> There seem to be present all those factors which were dealt with in the one case in which, so far as I know, any definition in English law has been given to the word "war," if one needs to give a definition of that. That case is *Driefontein Consolidated Gold Mines, Ltd.* v. *Janson*, [1900] 2 Q.B. 339 (affirmed on appeal, [1902] A.C. 484). Mathew: J., quoting with approval from *Hall on International Law*, said, at p. 343:
>
> "What is a state of war is well described in *Hall on International Law*, 4th Edn., p. 63: 'When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant'."
>
> As I understand the argument for the charterers here, it is said that, in spite of the acts of force and the acts of violence which Japan has offered towards China, China had not chosen to look upon it as a breach of the peace, but, as the umpire finds that the Japanese had killed many thousands of Chinese, and that Chinese troops were operating not in hundreds or thousands, but in hundreds of thousands, it would seem perfectly clear that China at this time was looking upon it as a breach of the peace. It is difficult indeed to understand how any ordinary person could regard this state of affairs as other than involving war.

The main points which Sir Stafford Cripps argued on behalf of the plaintiff in the Divisional Court, and for the appellant in the Court of Appeal, were these: (*a*) that it was the Court's duty to exercise judicial cognizance on the question whether or not the two foreign countries were at war, and that, if the learned Judge's own knowledge did not enable him to answer that question, he must apply to the Crown, through the appropriate Minister, and obtain information from him; and that was what was done in this case in that one of the parties applied to the Foreign Office and asked whether on September 18, war was in progress; and (*b*) that it would be inconvenient if the Courts took one view and the Executive took another on the subject. The learned Judge, in reference to these submissions, said:

> It seems to me that what I have to determine is what the parties meant by this clause. I think that they were using the word "war" in this clause, and must be taken as intending it to be construed as war in the sense in which an ordinary commercial man would use it, or, if one may so put it, as the captain of a tramp steamer would interpret it. I have not a doubt that a captain of a tramp steamer, arriving at Shanghai, and finding the state of things described by the umpire, would have had no difficulty in recognizing that a state of war existed. I do not think that the parties in a case of this sort are going into the niceties of international law. There is always a temptation in these cases to turn to the words of great international jurists, such as Grotius and Hall and others, who wrote some time ago, when modern conditions did not prevail, though the question whether the state of civilization which then prevailed was the same as the state of civilization which prevails now with regard to the methods of warfare is not for me to enter into. At any rate, in those times things were done more formally. In those days, there were declarations which one now knows, from recent examples in this century, are often omitted.

In my opinion, the parties meant in this charterparty that, if there were a state of conflict going on—not a revolution or a civil conflict, but if there broke out a state of affairs in which there was armed conflict between competing nations, of which Japan was one—that would justify the breaking off of the contract. It is not to be expected that business men can concern themselves with the extraordinarily nice distinctions which are drawn by great international lawyers between reprisals, armed intervention, peaceful penetration and war, definitions which have probably far less importance nowadays than they may have had years ago. No such things as armed intervention not producing a state of war, or a pacific blockade, both of which we know have been much discussed by the text-writers, can ever take place except between two States one of which is far too inferior and weak to resist.

I desire to say that I decide this case exactly on the same grounds, and applying the same rules of construction, as Pickford, J., did in the Court of Appeal in *Bolivia Republic* v. *Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K.B. 785. In that case, the Court had to construe what the word "pirates" meant. The Court said that one is not to go into niceties or refinements of writers on International law, but that one is to look at it in the broad sense, or in the coarser sense, which is one expression used, and find whether commercial men, using that expression in a commercial document, would mean, or would visualize, a state of affairs which was there found to exist. I apply, if I may so put it, the coarser meaning to the word "war." If I had to give a complete definition of the word "war," I do not think that it would be necessary to go further than Professor Hall did in the passage which I read at the beginning of my judgment.

His Lordship found that, on the facts, the umpire was well justified in coming to the conclusion that for the purposes of construing the document between the parties, a war had broken out in which Japan was involved. The plaintiffs appealed.

The judgment of the Court of Appeal found that the learned Judge was manifestly right. In his judgment, Sir Wilfred Greene, M.R., with which the other members of the Court of Appeal agreed, said :

We are not concerned here with the question whether or not His Majesty's Government recognizes a state of war as existing between China and Japan. If that were the question which had to be decided, the Courts would be bound to take judicial notice of the fact of such recognition, and, if the Courts were unable to answer that question, they would ascertain from the appropriate government department whether or not His Majesty's Government had recognized the existence of that state of war. That is not the question with which we are concerned. We are concerned, and concerned only, with the question whether or not, upon the true construction of a particular private document, the owners were entitled to cancel the charterparty, which they are only entitled to do if war breaks out involving Japan.

In my judgment, it is impossible to assert that, within the meaning of that clause, the words, "if war breaks out," mean, "if war is recognized to have broken out by His Majesty's Government." War may break out without His Majesty's Government recognizing it. If His Majesty's Government had recognized that war had broken out, it may be—and I say no more—that a statement to that effect by His Majesty's Government would be a matter which, even when dealing with a document of this kind, the Court would be bound to accept. It is not necessary to decide that question, one way or the other, because that is not the question with which we have to deal.

With regard to the phrase, "if war breaks out involving Japan," Sir Stafford Cripps had contended that the word "war" had not a loose or popular meaning, but a technical meaning ; and that technical meaning, he said, was to be found in the principles of international law. The learned Master of the Rolls answered this submission by saying :

Where those principles of international law, for this purpose, are to be found I must confess that I remain in complete doubt, since the only source of those principles suggested to us was the writings of various writers on international law. It is to be observed, as indeed it was to be expected, that those writers do not speak with one voice, and it is possible to extract from their pages, definitions of "war" which not only differ from one another, but which are also inconsistent with one another in important respects. I asked for any authority in which, for the purpose of the municipal law of this country, "war" is in any way defined. No such authority could be suggested. The nearest authority for that purpose which has been furnished is the observation of Mathew, J., in the *Driefontein* case (*supra*), where he cites, with approval, the passage from *Hall on International Law*, 4th Edn., p. 63, referred to in the judgment of Goddard, J. (*cit. sup.*). However, to say that English law recognizes some technical and ascertainable description of what is meant by "war" appears to me to be a quite impossible proposition.

His Lordship went on to say that, if the English Courts had endeavoured in ancient days to lay down such a definition, no doubt one of the things which in those days they would have regarded as essential to "war" was a declaration of war. Nobody would have the temerity to suggest in these days that war could not exist without a declaration of war. Similarly, recent events in the world had introduced new methods and a new technique, with regard to which the learned Master of the Rolls conceived that writers on international law would dispute for many years to come. He did not propose to be the first to lay down a definition of "war" in a so-called technical sense.

Sir Stafford Cripps had said that, whatever else "war" may mean, an essential element in it is *animus belligerendi* on the part of both, or at least on the part of one, of the combatants. To this, Sir Wilfred Greene replied :

What precisely *animus belligerendi* means is, again, a matter of great obscurity. In fact, to define "war" as a thing for which it is requisite to have *animus belligerendi* is coming very near defining the thing by itself. I must confess that, at the end of the argument, and with the very skilful assistance that we have had, I am still as doubtful as to the meaning of *animus belligerendi* as I was before the argument began.

There is one matter upon which Sir Stafford Cripps was quite precise, and that was that there cannot be an *animus belligerendi* where diplomatic relations between two countries are still preserved, and he pointed out that in the present case the diplomatic relations between China and Japan had not at the relevant date been severed, and he said that it is impossible, as a matter of English municipal law, for war to exist between two countries which have not severed diplomatic relations with one another. Therefore, he said, the finding of the arbitrator could not stand, because, having found that diplomatic relations had not been severed, he was bound, as a matter of law, as a result of that finding, to find that war had not broken out. There, again, I can find no justification for so extreme a view. There may be very good reasons, and no doubt there are very good reasons, why the parties engaged in these present operations have not recalled their respective ambassadors. That circumstance, however, appears to me to amount to nothing more than one element to be taken into consideration in answering the question. I cannot find that it is a conclusive element at all. It is one element, and no doubt an important element—in some cases, even a decisive element—but, in the present case, it appears to me that it is an element of no particular importance. If my view is right—namely, that the fact that diplomatic relations had not been severed did not compel the arbitrator to find that no war had broken out—then the matter becomes a question of fact, and the arbitrator has found as a fact, in so far as it is a matter of fact, that the *animus belligerendi* existed.

Their Lordships' attention had been called to various statements, various findings, in the very clear statement made by the arbitrator, which he suggested showed that, viewing this question as a matter of fact, there was really no evidence upon which the arbitrator could find that an *animus belligerendi* existed. The

matters upon which particular reliance was placed were statements, in some cases by the Japanese, and in some cases by the Chinese commanders in the field in various places in China, and in some cases by members of the executive government of one country or of the other. While their Lordships had no doubt that the authoritative statements of a government concerned in such a matter were matters of importance to which attention must be paid, the Master of the Rolls said that acts very often speak more truly than words and it was perfectly open to the arbitrator, on the facts as found by him as to the state of affairs which preceded the relevant date and was then in existence, to find that war had broken out, notwithstanding that on certain occasions certain individuals had apparently repudiated the idea that there was a war. His Lordship added :

> Speaking for myself, I find myself happy to be able to avoid coming to a conclusion on this matter which would violate all one's feelings of common sense. To say that the finding of fact of the arbitrator is one upon which there was no evidence seems to me to fly in the face of the manifest realities of the position.

Further, the Court was unable to accept the suggestion that there is any technical meaning of the word "war," for the purpose of the construction of this clause ; the Master of the Rolls observed :

> I repeat that, if there is such a technical meaning, I do not know where it is to be found, and, as I have said, I do not propose to attempt to define it. However, even if there be some such technical meaning, it seems to me that, for the reasons which I have given, the finding of fact of the arbitrator is unassailable, and I can find no trace on the face of his award that he has misdirected himself in law.

That, His Lordship thought, really concluded the matter. However, he must not be taken as in any sense disagreeing with the further view expressed by the Judge—namely, that, in the particular context in which the word "war" was found in this charterparty, that word must be construed, having regard to the general tenor and purpose of the document, in what may be called a commonsense way.

He continued :

> If one had asked the owners of this vessel on the relevant date if this charterparty had never existed, or if one had asked any shipowner what he thought about the then-existing position between China and Japan—as to whether or not a war existed—I cannot imagine any commercial person with any common sense answering that question in any way other than that in which the arbitrator has answered it. MacKinnon, L.J., suggests that even the most revered names in international law, such as Bynkershoek or Grotius, would have answered that question in one way, and in one way only. Certainly one modern authority, Professor Westlake, answered it, because he defines "war" as "the state or condition of governments contending by force," a definition which accords with common sense as far as it goes.

It seemed to His Lordship that to suggest that, within the meaning of this charterparty, war had not broken out involving Japan on the relevant date was to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law, rather than the common sense of business men. Agreeing with the reasoning, and with the conclusion, of Goddard, J., (as he then was), the appeal must be dismissed ; and leave to appeal to the House of Lords was refused.

One final observation : If the Foreign Office say that a *de facto* Government is, in their view in existence, that observation—as we known from the Spanish cases—is binding on the Courts. If they say they have not formed an official view whether or not a state of war exists between foreign Governments, then the word "war" in a commercial contract must be given its coarser meaning by the Courts.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Wellington.
1940.
June 17, 18, 19 ;
July 1, 2, 3, 8.
Ostler, J.

EATON v. DALGLEISH.

Waters and Watercourses—Surface Water—Injunction—Obligation of lower Land to take Surface Water from contiguous higher Land, whether collected by Drainage or not—Drainage of Swamp Lands for Farming Purposes—Whether a Natural use thereof—Whether Mandatory Injunction should be granted for Removal of Bank damming up Water on Higher Land.

Where there are two contiguous pieces of land, one higher than the other, the lower land is bound by a servitude imposed by nature to take the surface water flowing on it from the adjoining higher land, whether collected by drainage in the natural use of the latter or not.

This rule applies where the proprietors of the adjoining lands occupy the two halves of a basin-shaped area of land, in which case each tenement has a servitude impressed upon it by nature to receive the water flowing from the other.

The drainage of swamp lands for farming purposes is a natural use of such lands.

Gibbons v. *Lenfestey*, (1915) 84 L.J.P.C. 158, and *Bailey* v. *Vile*, [1930] N.Z.L.R. 829, G.L.R. 311, applied.

Solicitor-General v. *Smith*, (1896) 14 N.Z.L.R. 681 ; *Crisp* v. *Snowsill* [1917] N.Z.L.R. 252, G.L.R. 96 ; *Black and White Cabs, Ltd.* v. *Tonks*, [1928] N.Z.L.R. 590, G.L.R. 311, held to have been impliedly overruled by the two foregoing applied cases, so far as the former express an opinion contrary to the latter.

Wilson v. *Grant*, [1931] G.L.R. 430, doubted.

Plaintiff and defendant owned his adjoining pieces of peat swamp land in a basin-shaped area in a valley running north (defendant) and south (plaintiff). The lowest part of the swamp was along or inside of defendant's southern boundary. Originally the swamp had a slight ridge running across and about the middle of plaintiff's land from east to west and the natural fall of the land was north and south from that ridge. The predecessor in title of the plaintiff and the lessee of the predecessor in title of defendant by arrangement constructed drains by means of which the whole of the water which ran off the surrounding country north of the ridge found its way through defendant's land to the M. Stream. Plaintiff's main drain was continued south from that ridge through the land of his southern neighbour into the M. stream. Owing to the drainage the ridge disappeared and the level of the swamp sank and altered, so that, from plaintiff's southern boundary all the way to his northern boundary and for a chain or two beyond that into defendant's land, the natural fall became from south to north. From that point there was again a rise to a point near defendant's northern boundary when the level fell sharply to the north again. The northern and southern lips of this basin were approximately of the same level. No water from other watersheds was allowed by plaintiff to flow over defendant's land. Defendant, in order to protect his property from the spread of surface water from plaintiff's land, constructed an earthen bank, (twenty-four chains long and over three feet high at the drain) right across the swamp just inside his southern boundary, thus blocking the main drain from plaintiff's land and damming back the natural flow of water over the whole surface of the swamp.

In an action for a mandatory injunction and damages for the wrongful erection of the bank,

Willis, and *Gooding*, for the plaintiff; *Biss*, for the defendant.

Held, 1. That the defendant had no right to bank out the water of the plaintiff.

2. That the facts did not establish an equitable right by the plaintiff against the defendant to continue the drainage of his land by means of the drain through that of the defendant.

3. That, in addition to damages, the plaintiff was, in the circumstances, entitled to a mandatory injunction ordering the defendant to remove the bank.

Storey v. *Casey*, (1885) N.Z.L.R. 3 S.C. 283, distinguished.

Ryder v. *Hall*, (1905) 27 N.Z.L.R. 385, 8 G.L.R. 521; and *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, referred to.

Solicitors: *McKenzie and Marsack*, Masterton, for the plaintiff; *Gawith, Biss, Griffiths, and Wilson*, Masterton, for the defendant.

Case Annotation: *Gibbons* v. *Lenfestey*, E. and E. Digest, Vol. 19, p. 147, para. 1003iii; *Shelfer* v. *City of London Electric Lighting Co.*, *ibid.*, p. 185, para. 1356.

SUPREME COURT. Wellington. 1940. July 11. *Blair*, J.

HOLE v. HOLE.

War Emergency Legislation—Courts Emergency Powers—Proceeding "to the enforcement of any judgment"—Whether applicable to attachment Proceedings—Courts Emergency Powers Regulations, 1939, s. 4 (a).

Regulation 4 (*a*) of the Courts Emergency Powers Regulations, 1939, which forbids anyone without the leave of the appropriate Court,

"To proceed to execution in or otherwise to the enforcement of any judgment,"

does not apply to attachment proceedings, which are punitive in character and are grounded on contempt of the Court's order.

Counsel: *Leicester*, for the petitioner; *Pope*, for the respondent.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the petitioner; *Perry, Perry, and Pope*, Wellington, for the respondent.

SUPREME COURT. Wellington. 1940. July 2, 12. *Myers*, C.J.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED v. DOWMAN AND OTHERS.

Insurance—Motor-vehicles (Third-party Risks)—Comprehensive Motor-car Policy—"Passenger Indemnity" in respect of "personal injuries sustained by a passenger"—Whether includes a Claim under the Deaths by Accidents Compensation Act, 1908, for damages resulting from Passenger's Death.

A comprehensive motor-car policy had annexed to it a typewritten clause headed "Passenger Indemnity" extending the indemnity granted under the policy to cover the legal liability of the insured for claims for compensation in respect of *personal injuries . . . sustained by any passenger*, (subject to certain exceptions which were held not to apply) as the direct result of an accident caused or contributed to by the management or driving of the vehicle by or on behalf of the insured whilst the passenger was being conveyed by the vehicle.

In the printed form of proposal signed by the insured, appeared the words "liability to passengers (see section 12 overleaf)" where, under "Liability to passengers" occurred the words "Policies may be extended to cover the insured's legal liability for *personal injury to passengers . . .* as a direct result of an accident caused by the management or driving of the car."

On originating summons asking whether the plaintiff corporation was liable under the said policy to indemnify the driver of a motor-car in respect of his liability under a judgment recovered against him under the Deaths by Accidents Compensation Act, 1908, by the widow of a passenger who had died from injuries occasioned by the driver's negligence,

Powles, for the plaintiff; *O. C. Mazengarb*, for the second defendant; *Leicester*, for J. F. Dowman.

Held, That the liability indemnified against was liability for the consequences of personal injury to a passenger; and included a claim under the Deaths by Accidents Compensation Act, 1908, for damages resulting to the widow and child upon the death of a passenger caused by an accident.

English v. *Western*, (1940) 56 T.L.R. 680; *Linekar* v. *Hartford Fire Insurance Co., Ltd.*, [1936] N.Z.L.R. 776, G.L.R. 568; *Rose* v. *Ford*, [1937] A.C. 826; and *Digby* v. *General Accident Fire and Life Assurance Corporation*, [1940] 162 L.T. 299, [1940] 1 All E.R. 514, referred to.

Solicitors: *Brandon, Hislop, Ward, and Powles*, Wellington, for the plaintiff; *Mazengarb, Hay, and Macalister*, Wellington, for the second defendant; *Leicester, Rainey, and McCarthy*, Wellington, for J. F. Dowman.

COMPENSATION COURT. Dunedin and Greymouth. 1940. June 5, 12; July 11. *O'Regan*, J.

COUTTS v. GREY VALLEY COLLIERIES, LIMITED.

Workers' Compensation—Accident Arising out of and in the Course of the Employment—Seminoma—Whether Producible by Single Injury—Essential Criteria—Necessity for Critical Examination of Trauma as Causative Factor—Onus of Proof—Workers' Compensation Act, 1922, s. 3.

Seminoma, or testicular cancer, may in occasional cases be produced by a single severe injury where the following essential conditions are satisfied: (i) The adequacy and authenticity of the injury must be established; (ii) The part must have been normal before the injury; (iii) The tumour should arise at the exact point of injury; (iv) There must be a reasonable interval between the date of the injury and the appearance of the tumour; (v) There should be continuity of symptoms from the time of injury to the diagnosis of the tumour.

Every claim, therefore, based on trauma as a causative factor should be critically examined.

The plaintiff, a coal miner, on March 26, shortening a mine prop with an axe, struck a blow so heavy that in releasing it he straddled it and took a short hold. The axe came away easier than anticipated, and the handle struck him in the scrotum causing pain, as he fell in a crouching position. While resting, he looked at the part and saw a reddish mark on the right testicle. Tenderness and swelling followed. The swelling subsided, but the testicle became hard. He continued work, however, to just before the middle of July when he took medical advice. On August 24, the testicle, having swollen to nearly twice its normal size and become hard, was enucleated. An examination of it disclosed that plaintiff had suffered from seminoma or testicular cancer.

The evidence of the professional witness (taken before the actual hearing at which the plaintiff and his work-mate gave their version of what occurred in the mine) as to whether the growth had been induced by the injury, was conflicting.

W. D. Taylor, for the plaintiff; *J. F. B. Stevenson*, for the defendant.

Held, 1. That the plaintiff had not discharged the onus of proving that he was injured by accident arising out of and in the course of his employment.

Lewis v. *Port of London Authority*, (1914) 111 L.T. 776; 7 B.W.C.C. 577; and *Haward* v. *Rowsell and Matthews*, (1914) 111 L.T. 771; 7 B.W.C.C. 552, considered, (they being applied on the question as to whether cancer could be the *sequela* of an accidental injury, but distinguished on the question of the severity of the injury).

Blackwell v. *Ashbee and Sons, Ltd.*, (1936) 29 B.W.C.C. 153, mentioned.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Izard, Weston, Stevenson, and Castle*, Wellington, for the defendant.

Case Annotation: *Lewis* v. *Port of London Authority*, E. and E. Digest, Vol. 34, p. 390, para. 3161; *Haward* v. *Rowsell and Matthews*, *ibid.*, p. 332, para. 2694; *Blackwell* v. *Ashbee and Sons, Ltd.*, *ibid.*, Supp. Vol. 34, No. 2876a.

SUPREME COURT. Dunedin. 1940. June 14, 26. *Kennedy*, J.

COWIE v. CARRUTH.

Transport Licensing—"Goods-service" in controlled Area—Carriage of Goods "for hire or reward"—Owner's Goods carried by Motor-vehicle for hire or Reward payable by another Service—Whether License required—Effect of Minister's Gazetted Notice—Transport Licensing Act, 1931, ss. 47, 55 (a), (b)—Transport Licensing Amendment Act, 1936, ss. 16, 20—Transport Goods Order, 1936 (1936 New Zealand Gazette, *252*) *Part II, Cls. 1 (1), 21 (1), (2).*

Although the applied provisions of the Transport (Goods) Order, 1936 (made pursuant to s. 47 of the Transport Licensing Act, 1931), make it an offence to carry on a goods-service by motor-vehicle except pursuant to a license issued by the licensing authority, they do not apply to the carriage of goods which a man is carrying for himself, not for hire or reward; but they do apply to the carriage for hire or reward of one's own goods payable by another service; and, unless the service comes within certain defined exceptions, a license is required.

Wurzal v. *Houghton's Main Home Coal Delivery Service Ltd.*, [1937] 1 K.B. 380; [1936] 1 All E.R. 311, followed.

Spittle v. *Thames Grit and Aggregates Ltd.*, [1937] 4 All E.R. 101; and *Gill* v. *Laird*, [1940] N.Z.L.R. 540, applied.

The Hon. the Minister of Transport had, pursuant to cl. 21 of Part II of the applied provisions of the Transport (Goods) Order, 1936, by notice in the *New Zealand Gazette*, declared that any service carried on by means of a motor-vehicle owned by or hired from or to, or operated by or for C., and carried on for the carriage of goods (whether for hire or reward or not) should be deemed to be a goods-service within the meaning of the Transport Licensing Act, 1931, and the applied provisions of the Transport (Goods) Order, 1936.

F. B. Adams, for the appellant; *J. S. Sinclair*, for the respondent.

Held, That if there were a dispute whether the carriage by C. was a service for the purpose of cl. 21 (1), then that question was, by virtue of para. 2 of that clause, for the Minister's determination upon the matter which fell to the Minister to be accepted by a Stipendiary Magistrate hearing an information charging C. with carrying on a goods-service in a controlled area otherwise than pursuant to the authority of a goods-service license, when the Minister had by such notice as aforesaid declared such service to be a goods-service.

Solicitors: *Crown Solicitor*, Dunedin, for the appellant; *Sinclair and Stevenson*, Dunedin, for the respondent.

COMPENSATION COURT. Palmerston North. 1940. June 28; July 8. *O'Regan*, J.

SUTTON v. SINGH.

Workers' Compensation—Delay in Commencing Action—Mistake—Father of injured Worker, a Minor, mistakenly signing Petition for Appointment as Guardian ad litem *before a Justice of the Peace—Whether delay occasioned by "Mistake" or "other reasonable cause"—Assessment of Compensation—Worker under twenty-one—Post-accident Increase of Wages—Effect—Workers' Compensation Act, 1922, ss. 9, 27 (4)—Workers' Compensation Rules, 1939 (Serial No. 1939/8), Reg. 5 (8).*

A worker, aged sixteen, was injured by an accident arising out of an in the course of his employment. Part of the compensation was paid and liability for compensation for the loss of a finger was admitted, but the extent of the liability therefor could not be agreed upon. After some negotiations with a view to settlement, the issue of a writ was determined upon. This, however, was not issued until six months after the date of the accident, mainly owing to the fact that the worker's father by mistake signed a petition to be appointed his guardian *ad litem* before a justice of the Peace, and that, owing to the father's movements, a re-engrossed petition did not reach him and was returned through the Dead Letter Office. Further delay was caused by a misunderstanding as to the necessity for application by way of motion for leave to issue the writ.

At the time of the accident, the minimum adult wages prescribed by the award under which defendant was a party was £4 3s. a week, and, after the date of the accident, that minimum was increased to £4 10s.

A. M. Ongley, for the plaintiff; *Opie*, for the defendant.

Held, 1. That the claim was *bona fide* and that the failure to commence the action within the time limited by the statute was occasioned by mistake or by other reasonable cause.

Kitchen v. *C. Koch and Co., Ltd.*, [1931] A.C. 753, 24 B.W.C.C. 294, and *Corrie* v. *Pithie and Ritchie*, [1920] G.L.R. 252, applied.

McHugh v. *Hellaby Ltd.*, [1917] G.L.R. 107, distinguished.

Murton v. *Auckland Harbour Board*, (1913) 12 N.Z.W.C.C. 23, and *Eaton* v. *Evans*, (1911) 5 B.W.C.C. 82, referred to.

Quaere, Whether the period of limitation would not run against an injured minor until he had attained the age of eighteen, when, in virtue of Reg. 5 (8), he would be entitled to sue.

2. That a post-accident increase of wages cannot be taken into account in ascertaining the prospective weekly earnings for the purposes of s. 9 of the Workers' Compensation Act, 1922.

Solicitors: *Gifford Moore, Ongley, and Tremaine*, Palmerston North, for the plaintiff; *F. G. Opie*, Palmerston North, for the defendant.

Case Annotation: Eaton v. *Evans*, E. and E. Digest, Vol. 34, p. 356, para. 2879; *Kitchen* v. *C. Koch and Co., Ltd., ibid.*, Supp. Vol. 34, No. 3038a.

COMPENSATION COURT. Wellington. 1940. July 10, 16. *O'Regan*, J.

ORR v. MAINLAND.

Workers' Compensation—Liability for Compensation—Assessment—Unscheduled injury—Worker an "odd lot"—Onus on Employer of proving that Worker can obtain Work—Onus not Discharged—Incapacity regarded as Total and Permanent—Workers' Compensation Act, 1922, ss. 3 (1), (5), Second Schedule.

Where an accident arising out of and in the course of his employment has left a worker so injured that he is incapable of becoming an ordinary workman of average capacity in a well-known branch of the labour market, he is an "odd lot." If his case is not covered by the provisions of the Second Schedule to the Workers' Compensation Act, 1922, and if his employer should not discharge the onus upon him of proving that the worker could obtain work, the award must be on the basis of total and permanent incapacity.

Cardiff Corporation v. *Hall*, [1911] 1 K.B. 1009, 4 B.W.C.C. 159; *Ball* v. *Coulthard and Co., Ltd.*, (1919) 122 L.T. 164; 12 B.W.C.C. 312; *Yates and Thom, Ltd.* v. *Duxbury*, (1921) 14 B.W.C.C. 80; *Evans* v. *Thomas W. Ward, Ltd.*, (1930) 23 B.W.C.C. 364; and *Harris* v. *Bellamy's Wharf and Dock Ltd.*, (1924) 17 B.W.C.C. 93, applied.

Hales v. *Seager Bros.*, (1913) 16 G.L.R. 111; and *Barry* v. *Napier Gas Co., Ltd.*, [1938] G.L.R. 103, distinguished.

The plaintiff, fifty-two years old, who was minus the left forearm from birth, employed as a carpenter and earning the prescribed maximum wage, by an accident sustained an ununited fracture of the neck of the left femur as a result of which the leg was shortened by an inch and a half, obliging him to wear a specially made boot and he could only walk with a stick. Unchallenged medical evidence estimated the leg injury at sixty per cent. prescribed by the Second Schedule for the loss of the leg, and admitted that the leg had a limited use.

W. P. Shorland, for the plaintiff; *E. S. Parry*, for the defendant.

Held, That on the evidence, the plaintiff was an "odd lot"; that his case was not covered by the provisions of the Second Schedule, and, the employer not having discharged the onus of proving that he could actually obtain work, that the award must be on the basis of total and permanent incapacity.

Solicitors: *Chapman, Tripp, Watson, James and Co.*, Wellington, for the plaintiff; *Buddle, Anderson, Kirkcaldie and Parry*, Wellington, for the defendant.

FIFTY YEARS AT THE BAR.

Mr. H. B. Lusk.

On July 15, fifty years of practice were completed by Mr. H. B. Lusk, the President of the Hawke's Bay District Law Society, and this occasion for felicitation was not forgotten. Into these years this well-known and highly-respected member of the profession has crowded a remarkable amount of valued service to his fellow-practitioners as well as to the nation at large; and this service is appreciated at its true worth by all who know him.

Mr. Lusk was admitted as barrister and solicitor by the late Mr. Justice Conolly at Auckland, on July 15, 1890. He had commenced his career in the profession as articled clerk to the late Mr. J. B. Russell, of the firm of Messrs. Russell and Campbell, with whom he remained five years.

In 1892, Mr. Lusk went to Napier, where he commenced practice in partnership with Mr. W. L. Rees. After two years the firm of Messrs. Rees and Lusk was dissolved, and Mr. Lusk joined Mr. C. D. Kennedy in partnership, an association that continued until Mr. Kennedy's retirement twenty-five years later.

On the death of Mr. H. A. Cornford, Mr. Lusk received the appointment of Crown Solicitor for Hawke's Bay; and since 1923 his conduct of the Crown work in the Courts has shown him to be a model of fairness and efficiency.

For a great many years, the Hawke's Bay District Law Society has had Mr. Lusk as its President, and the respect and confidence of his professional brethren in his immediate vicinity is shown in his invariable re-election to that office. As Hawke's Bay delegate to the Council of the New Zealand Law Society since 1923, Mr. Lusk has rendered very valuable service to the whole of the profession in the Dominion. On the setting-up of the Disciplinary Committee of the New Zealand Law Society in 1935, Mr. Lusk was appointed a member, and he retains this office with the assiduous interest and attendance to its duties that characterizes him in all his activities in the profession's behalf.

It can be said with confidence that there is no member of the profession so highly esteemed as Mr. H. B. Lusk. His kindliness, and devotion to the cause of justice, his capability and his unselfishness cannot be obscured even by that unostentatious and gentle manner of his; and all his professional brethren in the Dominion, knowing the esteem with which he is regarded by the public and the affection in which he is held by all who have the privilege of his friendship, join in wishing him many more years, many happy years, of active life in the councils of his profession and in the service of his country.

FINANCE EMERGENCY REGULATIONS, 1940 (No. 2).

"Security": The Question of the Inclusion of Mortgages.

The following correspondence between Mr. H. F. O'Leary, K.C., as President of the New Zealand Law Society, and the Hon. W. Nash, Minister of Finance, is published for general information.

LETTER FROM THE PRESIDENT OF THE NEW ZEALAND LAW SOCIETY TO THE MINISTER OF FINANCE.

Some doubt and confusion exists in the minds of many members of the legal profession with regard to the effect of Reg. 12 of the above-mentioned Regulations on the giving of mortgages by individuals.

It would appear that you have knowledge of these misgivings, as you were good enough to issue a statement intending to dispose of any doubts, but, notwithstanding this, practitioners are still apprehensive for the reason that your statement does not bind the Courts and it is considered that on a reasonable interpretation of the Regulations they can be held to apply to mortgages by an individual.

The basis for the contention that the Regulations includes every mortgage transaction whether entered into by individuals or corporations is as follows:

Paragraph (1) of Reg. 12 provides, *inter alia*, that

> Except with the consent of the Minister it shall not be lawful for any person . . . to make an issue of capital in New Zealand . . .

Paragraph (3) of the said Regulation provides that

> For the purposes of this Regulation a person shall be deemed to make an issue of capital who
>
> (*a*) Issues any securities (whether for cash or otherwise).

The first point in doubt is the definition of the word "person." Under Reg. 2 (1) this word

> *includes* a corporation sole and also a body of persons, whether corporate or unincorporate.

An individual person is not expressly *excluded* from this definition; and, having regard to the usual meaning of the word "person," there is much doubt

as to whether the individual is excluded by implication, as not having been mentioned in the definition.

The second doubt is as to meaning of the word "security." Under Reg. 2 (1) this word

> *includes* shares, stock, bonds, debentures, debenture stock, and Treasury Bills; but does not include bills of exchange or promissory notes.

It seems clear that this definition is not exhaustive; and, although mortgages are not expressly mentioned, they are securities in the sense that they are instruments which secure the payment of a debt by way of a charge on property.

Thirdly, by Reg. 12 (5)

> References to securities and to the issue of securities respectively *include* reference to any mortgage or charge, whether legal or equitable, created by a company or other corporation or by an unincorporated body (other than a partnership).

The express reference to mortgages contained in this paragraph of the Regulation would appear to strengthen the contention contained in the previous paragraph of this letter.

Moreover, the same para. (5), read in conjunction with the preceding paragraphs of Reg. 12, does not seem to limit the application of the Regulation as a whole to, *inter alia*, mortgages given only by corporate or unincorporated bodies, to the exclusion of mortgages given by individuals.

In view of the foregoing, and notwithstanding your statement, various of the District Law Societies and also individual practitioners have requested the New Zealand Law Society to make representations to have the position put beyond any legal doubt as soon as possible; and, as President of the New Zealand Society, I therefore make the request on their behalf.

It does seem to me personally that the question is open to doubt, and, as it can be readily clarified by the issue of supplementary or amending Regulations, I respectfully ask that consideration be given to the matter and the necessary steps be taken to clear up a position which, if left as it is, may not unlikely lead to the hindering of, or at least uncertainty in, many legitimate business transactions.

REPLY OF THE MINISTER OF FINANCE.

I wish to acknowledge receipt of your letter of July 11, and I note that the profession has doubts as to the application of Reg. 12 to individuals and presumably also partnerships.

The prohibition is against the issue of securities. The definition of "securities" in the Regulations "includes" only the type of securities that can be given by companies and similar institutions. While the use of the word "includes" does not necessary exclude everything else the indication is that securities covered by the Regulation are of this type. Furthermore, by cl. 5 of Reg. 12, mortgages and charges by companies and other corporations are specifically included in the meaning of "securities."

With deference to the opinion of lawyers in their own sphere, it seems to me that the Regulations as drafted express the intention, which is that mortgages and charges given by private individuals and partnerships are not affected by the Regulations and I have already publicly stated that this is the case.

In view, however, of your representations, I will be glad to have the matter looked into again and, if any amendment of the Regulations is contemplated, I will have the point made clear beyond any doubt. If, however, your Council considers that the matter is of such urgency that business is being held up, the Government will be glad to consider a special amendment to meet this point.

DEBTORS EMERGENCY REGULATIONS, 1940.

Courts Emergency Powers Regulations Revoked.

The Courts Emergency Powers Regulations, 1939 (Serial No. 1939/176) and the Courts Emergency Powers Regulations, 1939 (No. 2) (Serial No. 1939/236) have been revoked as from August 2, 1940; but all applications, orders, notices, and generally all acts of authority which originated under those regulations and subsisting and in force on August 2, 1940, enure for the purpose of the substituted regulations, the Debtors Emergency Regulations (Serial No. 1940/162), as if they had originated thereunder, and, where necessary, are deemed to have so originated.

The new Regulations reach the JOURNAL just as it is going to press, and nothing more than a mere summary can now be given; but an endeavour will be made to answer in these pages any inquiries received from subscribers regarding the Regulations.

WHO IS A "DEBTOR"?

A debtor is a person who for the time being is rendering continuous service as a member of any of His Majesty's Naval, Military, or Air Forces, or who has rendered such service outside New Zealand at any time after September 1, 1939, whether before or after August 2, 1940; *or* a person who is a dependant of a member of the Forces (that is, a person who is wholly or partly dependent upon the pay of a member of the Forces or upon a pension payable in respect of the death or disablement of a member of the Forces); *or* a debtor, not coming within the foregoing categories, who files in the office of the Court a notice in the prescribed form or to the effect thereof.

LIMITATION OF CREDITORS' RIGHTS.

Except with the leave of the appropriate Court, it is not lawful for any person to do any of the acts referred to hereunder, in respect of any debtor as above defined. These acts, and the appropriate Court in respect of each of them, are as follows:

(*a*) To issue or proceed with any writ or warrant for the possession, seizure, or sale of any property, or any writ of attachment, in pursuance of any judgment or order obtained against the debtor

(whether before or after the commencement of these regulations) in any Court in its civil jurisdiction, other than a judgment or order for possession of any tenement obtained against any person on the ground that he is a trespasser or that his tenancy has expired, or an order made under the Destitute Persons Act, 1910.

The appropriate Court is the Court in which the judgment or order was obtained or into which it has been removed.

(*b*) To issue or proceed with a judgment summons under s. 5 of the Imprisonment for Debt Limitation Act, 1908, except in cases in which fraud is alleged against the judgment debtor.

The appropriate Court is the Court in which the judgment or order was obtained or into which it has been removed.

(*c*) To obtain an order in favour of a judgment creditor under s. 147 of the Magistrates' Courts Act, 1928, or under s. 56 (5) or (6) of the Statutes Amendment Act, 1936.

The appropriate Court is the Court in which the judgment or order was obtained or into which it has been removed.

Every application for an order is deemed to include an application for the leave of the Court under these regulations.

(*d*) To have a charging order *nisi* made absolute under Rule 326 of the Code of Civil Procedure in the Second Schedule to the Judicature Act, 1908.

The appropriate Court is the Supreme Court.

Every application to have a charging order *nisi* made absolute is deemed to include an application for the leave of the Court under these regulations.

(*e*) To commence, continue, or complete the exercise of any power of sale or leasing conferred by the Rating Act, 1925.

The appropriate Court is the Supreme Court.

(*f*) To file or proceed with a bankruptcy petition or a winding-up petition.

The appropriate Court is the Supreme Court.

(*g*) To commence or continue proceedings in any Court for the appointment of a receiver of any property.

The appropriate Court is the Court in which the proceedings are commenced or to be commenced.

(*h*) To appoint a receiver of any property:

(*i*) To exercise any power of re-entry conferred by any lease or any power of determining any lease, whether granted before or after the commencement of these regulations:

(*j*) To seize or sell any property by way of distress for rent:

(*k*) To commence or continue to exercise any power to take possession of any goods conferred by a hire-purchase agreement within the meaning of the Hire-purchase Agreements Act, 1939.

The appropriate Court, in respect of the acts referred to in paras. (*h*), (*i*), (*j*), and (*k*), is the Supreme Court where the value of the property to which the act relates exceeds £2,000, and in every other case either the Supreme Court or a Magistrate's Court.

Effect of Debtor's Consent: No Contracting Out.

Where any person consents to the doing, in respect of himself or his property, of any of the foregoing acts (being an act which could have been lawfully done at the time of the consent if the leave of the Court in that behalf had then been obtained), and the consent is in writing witnessed by a solicitor of the Supreme Court, who certifies in writing that he is acting for that person, and not for the creditor or any other person affected by the transaction, and has fully explained to him the effect of these regulations and of the consent, and that the consent is given by his advice, the leave of the Court to the doing of that act shall, so far as the consent extends, be unnecessary.

Except as aforesaid, no covenant, condition, agreement, or consent, whether executed, made, or granted before or after August 2, 1940, shall have any force or effect to deprive any debtor of any right, power, privilege, or other benefit provided for by the regulations.

Matters for the Court.

In determining whether leave shall be granted under these regulations to do any act in respect of the debtor or in respect of any property of the debtor, the Court may take into consideration—

(*a*) The effect upon the property of the granting of leave:

(*b*) The desirability of retaining the debtor in possession of the property:

(*c*) The inability of the debtor to perform the obligation in question whether from his own moneys or by borrowing at a reasonable rate of interest or otherwise:

(*d*) The conduct of the debtor in incurring the obligation or in respect of any failure by him to perform the obligation:

(*e*) The extent to which any default of the debtor has been caused by any economic or financial conditions affecting trade or industry in New Zealand, whether or not they are attributable to any war in which His Majesty may be engaged.

If, having regard to the foregoing considerations and to all other relevant considerations, the Court, upon any application for leave as aforesaid, is of opinion that it is equitable so to do, it may in its discretion either refuse the application or grant it wholly or partly or adjourn it for such period as the Court thinks fit. The granting or adjournment of any application may be either unconditional or upon or subject to such conditions as the Court thinks fit, whether as to the payment by the debtor of any moneys which in the opinion of the Court he is able to pay or otherwise.

General Jurisdiction of Court.

In order that full effect may be given to the intent of the regulations, the Court, in every matter coming before it, has full power and jurisdiction to deal with and determine the matter in such manner and to make

such order, not inconsistent with the regulations, as it deems just and equitable in the circumstances of the case, notwithstanding that express provision in respect of that matter is not contained herein.

The Court may at any time, upon or subject to such conditions as it thinks fit, discharge wholly or partly any order made by it under the regulations or vary the order in such manner as it deems just and equitable in the circumstances of the case.

PROCEDURE.

Every application to the Supreme Court under the regulations must be made by motion, and, subject to the regulations, the rules of Court relating to motions apply accordingly.

Every such motion, if it relates to any proceedings or process in any Registry of the Court, is to be filed in that Registry, and in every other case is to be filed in the Registry of the Court in which a statement of defence would be required to be filed if the motion were a writ of summons naming the debtor as defendant.

Every application to a Magistrate's Court under the regulations must be made by originating or interlocutory application, as the case may require and, subject to the regulations, the rules of Court relating to originating and interlocutory applications apply accordingly.

Every application to any other Court under the regulations must be made in accordance with the ordinary practice of the Court in interlocutory proceedings or in such manner as the Court may direct or approve.

Every notice by a debtor (*supra*) in respect of any act or acts may be filed in any office of the Court in which an application for leave to do that act or those acts may be filed. A copy of every such notice, as soon as may be after it is filed, must be served on the creditor or other person who is doing or is entitled or intends to do the act or acts to which the notice relates.

No person is permitted to do in any Court any of the acts referred to above (under the heading "Limitation of Creditors Rights"), unless he produces to the proper officer of that Court an order granting leave to do that act under the regulations or otherwise satisfies the proper officer that such leave has been granted or that the act is one which may be lawfully done without such leave.

No Court fees (except mileage fees for the service of documents) are payable in respect of any proceedings under the regulations or in respect of the filing in any Court of any order made under the regulations or of any other document for the purposes of the regulations.

There is no appeal from any order made under the regulations.

Where any notice, application, or other document is required or authorized to be served on any person for the purposes of the regulations, it may be served in accordance with the rules of the Court or by posting it by registered letter addressed to that person at his last known place of abode or business in New Zealand. A document so posted is deemed to have been served at the time when the registered letter would in the ordinary course of post be delivered.

If the person is absent from New Zealand, the document may be served as aforesaid on his agent in New Zealand. If he is deceased, the document may be served as aforesaid on his personal representatives.

If the person is not known, or is absent from New Zealand and has no known agent in New Zealand, or is deceased and has no personal representatives, the document must be served in such manner as may be directed by an order of the Court.

Notwithstanding anything in the foregoing provisions the Court may in any case make an order directing the manner in which any document is to be served, or dispensing with the service thereof.

FORM OF NOTICE BY DEBTOR.

The following is the prescribed form to be filed by a debtor, and this form, or one to the same effect, must be used :—

*In the Supreme Court of New Zealand, ...

District, ... Registry.

*In the Magistrates' Court, held at .....

In the matter of the Debtors Emergency Regulations 1940, and

*In the matter of an action between ....., plaintiff, and ....., defendant ; *or*

*In the matter of a lease [*or as the case may be*] dated ....., from ..... to ..... affecting [*Particulars of property*].

TAKE NOTICE that I require that the leave of the Court be obtained before you do any of the following acts : [*Specify acts and property (if any) affected thereby*].

Dated at ....., this ..... day of ....., 194..

Signature : .....

Address for service : .....

To the *Registrar, Clerk of the Court, and to [*Name of creditor or other person on whom notice is to be served*].

*Strike out if inapplicable. In any other Court, intitule the notice in accordance with the rules or practice of the Court.

MISCELLANEOUS.

The regulations bind the Crown.

For the purposes of the regulations :

(i) The owner of the equity of redemption in any property that is subject to a mortgage is deemed to be the owner of the property.

(ii) The purchaser within the meaning of the Hire-purchase Agreements Act, 1939, of any goods is deemed to be the owner of the goods, and the exercise of a power to take possession of any goods conferred by a hire-purchase agreement is, unless the purchaser sooner becomes entitled under s. 6 of that Act to redelivery of the goods, deemed to be completed at the expiration of the time within which he can become so entitled.

The exercise of a power of sale or leasing is deemed to be completed when the vendor or lessor becomes bound by an agreement or contract of sale or by a lease, as the case may be.

MORTGAGES EXTENSION EMERGENCY REGULATIONS, 1940.

The Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163) are in addition to and not in derogation of the Debtors Emergency Regulations, 1940, summarized above. Nothing is possible here but the barest outline of the Regulations, which reach the JOURNAL as it is going to press.

Any application, order, notice, or proceeding under the Mortgages Extension Emergency Regulations, 1940, may, so far as practicable and in accordance with the respective regulations, be combined with an application, order, notice, or proceeding under the Debtors Emergency Regulations, 1940.

Any applications, orders, notices, and acts of authority which originated under the Courts Emergency Powers Regulations, 1939, and now revoked, and subsisting or in force on August 2, 1940, enure for the purposes of the Mortgages Extension Emergency Regulations, 1940, and, where necessary are deemed to have so originated.

The Regulations bind the Crown.

DEFINITIONS.

"Guarantor" means a person who has guaranteed the performance by the mortgagor or by any other person of any covenant, condition, or agreement expressed or implied in a mortgage, whether the guarantee is expressed or implied in the mortgage or in any other instrument, and includes any person (not being the mortgagor, as hereinafter defined) who is liable under the provisions of the mortgage, or against whom any person has a legal or equitable right of indemnity in respect of any liabilities under the mortgage; and "guarantee" has a corresponding meaning:

"Lease" means an instrument whereby a leasehold interest in land is created, whether at law or in equity:

"Mortgage" means a deed, memorandum of mortgage, instrument, or agreement whereby security for the payment of any moneys or for the performance of any contract is granted over any property; and includes any statutory or other charge on any property other than a charge for rates under the Rating Act, 1925; and also includes an agreement for the sale and purchase of land:

"Mortgagee" means the person entitled to the benefit of the security of a mortgage:

"Mortgagor" means the owner of the property that is subject to a mortgage; and includes any person claiming to be entitled under an agreement for sale and purchase to any property that is subject to a mortgage:

"Property" includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.

MORTGAGES.

The Regulations apply to all mortgages, whether executed before or after August 2, 1940, and notwithstanding that, whether before or after that date, any power of sale, rescission or entry into possession conferred by the mortgage may have been exercised. They do not apply, at any time after the maturity of any policy for securing a life insurance, endowment, or annuity, to any mortgage of such policy.

An agreement for the sale and purchase of land is deemed to be a mortgage of the land to secure payment of the unpaid purchase money and interest thereon and compliance with the provisions of the agreement.

RIGHTS OF MORTGAGEES LIMITED.

Except with the leave of the Court granted under the regulations, it is not lawful for any mortgagee or any other person to do any of the following acts:—

(*a*) To call up or demand payment from any mortgagor or guarantor of the principal sum or any part of the principal sum secured by any mortgage or guarantee:

(*b*) To commence, continue, or complete the exercise of any power of sale conferred by any mortgage or to exercise any power of rescission or entry into possession conferred by any mortgage, except in respect of property which the mortgagor has abandoned:

(*c*) To commence or continue any action or proceeding in any Court for breach of any covenant, condition, or agreement expressed or implied in any mortgage or guarantee other than a covenant, condition, or agreement for the payment of interest:

(*d*) To commence or continue any action or proceeding in any Court for any interest secured by any mortgage or guarantee in excess of interest at the reduced rate (if any) provided for in the mortgage or guarantee in the case of punctual payment.

Nothing in s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, or in s. 3 of the Property Law Amendment Act, 1939, applies with respect to any mortgage to which the regulations apply.

All moneys paid in respect of any mortgage by the mortgagee or any other person on account of interest due to the person entitled to the benefit of any prior mortgage or encumbrance or on account of insurance premiums, rates, taxes, or other outgoings in respect of any property subject to the mortgage are deemed to be interest due by the mortgagor to the mortgagee or other person paying the moneys.

Where no interest is payable under a mortgage and the principal sum is repayable by instalments at regular intervals throughout the term of the mortgage, each of the instalments for the purposes of these regulations is deemed to consist of interest. Where the principal sum and the interest secured by a mortgage are repayable by instalments at regular intervals throughout

the term of the mortgage, each of the instalments consisting partly of principal and partly of interest, then each of the instalments is for the purposes of these regulations deemed to consist wholly of interest.

For the purposes of the regulations the appropriate Court is, where the principal sum for the time being secured by the mortgage exceeds £2,000, the Supreme Court, and in every other case either the Supreme Court or a Magistrate's Court.

GRANTING OF LEAVE BY COURT.

In determining whether leave shall be granted under these regulations to do any act, the Court may take into consideration—

(*a*) The effect of the continuance of the mortgage upon the security thereby afforded to the mortgagee:

(*b*) The desirability of retaining the mortgagor in possession of the mortgaged property:

(*c*) The inability of the mortgagor or guarantor to redeem the property or to pay the moneys either from his own moneys or by borrowing at a reasonable rate of interest:

(*d*) The conduct of the mortgagor or guarantor in respect of any breaches by him of the covenants of the mortgage or guarantee:

(*e*) The extent to which any default of the mortgagor or guarantor has been caused by any economic or financial conditions affecting trade or industry in New Zealand, whether or not they are attributable to any war in which His Majesty may be engaged.

If, having regard to the foregoing considerations and to all other relevant considerations, the Court, upon any application for leave as aforesaid, is of opinion that it is equitable so to do, it may in its discretion either refuse the application or grant it wholly or partly or adjourn it for such period as the Court thinks fit. The granting or adjournment of any application may be either unconditional or upon or subject to such conditions as the Court thinks fit, whether as to the payment by the mortgagor or guarantor of any moneys which in the opinion of the Court he is able to pay or otherwise.

In every action or proceeding by a mortgagee or other person for the recovery of any sum for interest secured by a mortgage or guarantee the Court hearing the action or proceeding may, if in its discretion and in the circumstances of the case it deems it just and equitable instead of giving judgment for immediate payment, give judgment for payment at a date to be fixed, or by instalments at such times as the Court in its discretion determines, and for this purpose the Court shall have jurisdiction to cause judgment to be entered in such form as it deems best to give full effect to the intent of these regulations.

In order that full effect may be given to the intent of the regulations, the Court shall, in every matter coming before it, have full power and jurisdiction to deal with and determine the matter in such manner and to make such order, not inconsistent with these regulations, as it deems just and equitable in the circumstances of the case, notwithstanding that express provision in respect of that matter is not contained herein.

The Court may at any time, upon or subject to such conditions as it thinks fit, discharge wholly or partly any order made by it under these regulations or vary the order in such manner as it deems just and equitable in the circumstances of the case.

TRUSTEES.

The authority conferred upon trustee mortgagees by s. 4 of the Trustee Amendment Act, 1935, may be exercised in respect of all mortgages to which these regulations apply.

RELIEF OF MORTGAGOR OR GUARANTOR.

No concession, benefit, variation, or discharge from liability granted to any mortgagor or guarantor under these regulations shall operate to relieve any other person from any liability.

CONSENT BY MORTGAGOR OR GUARANTOR TO EXERCISE OF POWERS: CONTRACTING OUT.

Where any mortgagor or guarantor consents to the doing, in respect of himself or his property, of any acts above referred to (being an act which could have been lawfully done at the time of the consent if the leave of the Court in that behalf had then been obtained), and the consent is in writing witnessed by a solicitor of the Supreme Court, who certifies in writing that he is acting for the mortgagor or guarantor and not for the mortgagee or any other person affected by the transaction and has fully explained to him the effect of these regulations and of the consent, and that the consent is given by his advice, the leave of the Court to the doing of that act shall, so far as the consent extends, be unnecessary.

Except as above provided with regard to consents, no covenant, condition, agreement, or consent, whether contained in any mortgage or guarantee or not, and whether executed, made, or granted before or after the commencement of these regulations, shall have any force or effect to deprive any mortgagor or guarantor of any right, power, privilege, or other benefit provided for by these regulations.

HEARD IN COURT.

Counsel (cross-examining petitioner in divorce suit): "Did you not go to the house where your wife was staying, and, while she was talking to some other persons, call out: 'Come out you pack of b——s, or I will smash the window'?"

The Chief Justice: "Surely an error in terminology, Mr. Blank,—swarm, not pack!"

* * * * *

In an action by a widow under the Deaths by Accidents Compensation Act, 1908, for damages for the death of her husband, who, she alleged, was run down owing to negligence on the part of the owner-driver of a motor-car, one Gay, contributory negligence was alleged on the part of the deceased.

Counsel for the defendant: "I suggest that this is a case of jay-walking."

The Chief Justice: "Ah, I see: Jay walking or Gay driving!"

PRACTICE NOTES.

Reciprocal Enforcement of Judgments.

By W. J. Sim, K.C.

The subject of the reciprocal enforcement of judgments has recently been completely overhauled in the Reciprocal Enforcement of Judgments Act, 1934, and the rules passed thereunder, with the result that the law and practice is now clear and straightforward. The Act is substantially founded on the English Act—the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and the rules follow Order XLI B. Prior to the passing of the New Zealand Act, the position was unsatisfactory since certain provision was made on the subject by s. 56 of the Judicature Act, and the subject was further dealt with by the Administration of Justice Act, 1922, and rules thereunder. The latter Act made no express reference to the Judicature Act, and it was held by Stout, C.J., in *Corry and Co.* v. *Kelway and Son*, [1935] N.Z.L.R. 93, that s. 56 was impliedly repealed by the later Act, although the learned Judge expressed the view that the matter was not free from doubt. In *Vacuum Oil Co. Pty., Ltd.* v. *Maxwell*, [1926] N.Z.L.R. 625, a summons under s. 56 had come before Stringer, J. but was dismissed on other grounds.

The Act of 1934 makes the position quite clear that s. 56 is still operative, but only to a limited extent. Section 13 provides as follows :—

> 13. Section 56 of the Judicature Act, 1908, shall hereafter apply only in respect of such judgments, decrees, rules, and orders as, being enforceable under that section, are not enforceable in New Zealand in accordance with the foregoing provisions of this Act.

Section 56 applies in terms to any judgment obtained *in any Court of any of His Majesty's Dominions* whereby any sum of money is made payable, and the procedure is to cause a memorial of the judgment containing the particulars enumerated in the Act and authenticated by the seal of the Court giving the judgment to be filed in the office of the Supreme Court, and such memorial being so filed shall thenceforth be a record of such judgment, and execution may issue thereon as provided in the Act. The application of this section is also subject to a considerable body of case law, the main points of which are, (*a*) That a judgment given without jurisdiction by the foreign Court is unenforceable : *Wallace* v. *Bastings*, (1899) 18 N.Z.L.R. 639, and the proceedings must not offend against English views of substantial justice : *Pemberton* v. *Hughes*, [1899] 1 Ch. 781. The occasions when the Courts of this Country would enforce a foreign judgment in an action *in personam* will be found defined in *Rousillon* v. *Rousillon*, (1880) 14 Ch.D. 351, and *Emanuel* v. *Symon*, [1908] 1 K.B. 302.

The operation of s. 56 is, however, likely to be limited by reason of the wide provisions of the Reciprocal Enforcement of Judgments Act, 1934, and the range of Orders in Council issued thereunder. There is also in the Act satisfactory statutory definition of what judgments are or are not enforceable according to the nature of the judgments and the manner in which they have been obtained, apart altogether from the consideration of where they have been obtained.

The Act completely repeals the Administration of Justice Act, 1922 (s. 12) and is divided into two parts. Part I defines the countries and judgments to which the Act applies, and provides the machinery, as supplemented by the rules, for registration and enforcement. Part II deals with a miscellaneous number of subjects including the question of the estoppel established by a foreign judgment, and the issue of certificates of New Zealand judgments for enforcement abroad under similar reciprocal provisions.

The countries and foreign Courts to which the Act applies are defined by s. 3. Subsection (1) explicitly states that Part I of the Act shall extend to the United Kingdom. Subsection (2) then authorizes the Governor-General to direct by Order in Council that Part I shall apply to *any part of His Majesty's Dominions outside the United Kingdom or to any foreign country*, provided the Governor-General is satisfied that substantial reciprocity is assured in such British Dominion or foreign country for the enforcement of the judgments of superior Courts of New Zealand. The extension, however, is for the enforcement of judgments of superior Courts of such other part of His Majesty's Dominions, or of that foreign country. The Order in Council is to specify which Courts are to be deemed superior Courts. Orders in Council exist with reference to many countries, and the Reciprocal Enforcement of Judgments Order, 1939, made with reference to a number of British countries provided that all Courts in any of such countries shall until further provision is made in the premises, be deemed superior Courts, if they exercise exclusively or in part substantially the like jurisdiction as is exercised by the Supreme Courts of law or equity at Westminster or the High Court of Admiralty in England. It is understood that further definition on this subject is to be expected by Order in Council at any moment. The substantial position is that judgments of superior Courts of the United Kingdom, and of such other places as are dealt with by Order in Council so as to make the Act apply, both as to country and Court, are enforceable under the Act. Section 3 (3) then enumerates further tests of the enforceability of judgments, *viz*—(*a*) Final and conclusive, (*b*) A sum of money payable thereunder, not being for taxes or fines or other penalty and (*c*) It must be given subsequent to the effective Order in Council, with qualifications as to the United Kingdom, or His Majesty's Dominions to which the Administration of Justice Act, 1922, applied immediately before the passing of the Act.

The procedure is to make application for the registration of the judgment and an order is obtained to that effect, but the application must be made within six years after the date of the judgment, or after the last judgment when the matter has been under appeal. The judgment must not have been already wholly satisfied, or be otherwise incapable of enforcement in the original country at the date of application for registration. Thereupon the judgment assumes the qualities of a Supreme Court judgment with regard to execution, the carrying of interest and otherwise (s. 4),

subject to the prescribed rights to have the registration set aside. The New Zealand judgment must be expressed in New Zealand currency and the rate of exchange is that prevailing at the date of the judgment of the original Court. It is possible to register a judgment in respect of a balance remaining due, and if a judgment contains matters not within the ambit of the Act, it may be registered with regard to those which are; and the judgment as entered in New Zealand may make provision for interest up to date according to the law of the original Court, costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original Court.

Section 6 furnishes a code setting out the grounds on which a judgment may be set aside, and indirectly defines relevant tests upon the application to register. These are substantially, in statutory form, the grounds covered by case law when s. 56 of the Judicature Act is under consideration, with the wider provisions that the enforcement of the judgment must not be contrary to public policy in New Zealand, and the Court may examine whether the subject-matter of the judgment sought to be enforced has been the subject of another final and conclusive judgment by "a Court having jurisdiction in the matter." Foreign judgments are classified into judgments, (*a*) In an action *in personam*; (*b*) Actions of which the subject matter is immovable property or actions *in rem* and (c) other actions, and clear definition is given in each case as to when the original Court is deemed to have had jurisdiction.

Section 8 is of some importance, furnishing as it does a bar to an action on the foreign judgment. It prohibits any proceedings for the recovery of the sum payable under the judgment, other than proceedings for the registration of the judgment.

In Part II, s. 9 carries further the principle of *res judicata*. Subject to the provisions of the section, any judgment to which Part I of the Act applies shall be recognized in any Court in New Zealand as conclusive between the parties in all proceedings founded on the same cause of action.

Section 10 gives the Governor-General power to withdraw reciprocity when it appears that the treatment in respect of recognition and enforcement accorded by the Courts of any country to judgments given in any superior Court is substantially less favourable than that accorded by the Courts of New Zealand to judgments of the superior Courts of that country. Section 11 furnishes the procedure for obtaining certificates of New Zealand judgments (other than judgments in respect of taxes, or fines or other penalty) for the purpose of enforcement abroad; and s. 12 carries forward with statutory force all proclamations previously passed under s. 3 of the Administration of Justice Act, 1922.

The rules also furnish a full and satisfactory code of practice for the operation of the Act. The application for registration is to be by motion, and this may be *ex parte* in the first instance, and adequate provision is made as to the contents of supporting affidavits and judicial notice of the authentication of judgment. Rule 16 is a useful rule, providing as it does, that the Court may order the judgment creditor to find security for the costs of the application and of any proceedings which may thereafter be brought to set aside the registration. By R. 23 the application to set aside registration is to be by motion. The issue of execution and form of the writ of execution are dealt with in RR. 24 and 25. It may be noted here that execution has been held in England to include the issue of a bankruptcy notice: *In re a Judgment Debtor*, [1938] 1 Ch. 601.

In view of the satisfactory machinery now furnished by this Act and rules, the hope may be expressed that the work of applying the Act as widely as possible by Order in Council, as contemplated, will be pressed on without delay.

THE NATIONAL SECURITY TAX.

Some Practical Points.

In response to a number of inquiries, the JOURNAL supplies for general information the following summary of the principal features of the Finance Act, 1940, Part II, relating to the National Security Tax.

THE TAX ITSELF.

All persons of the age of sixteen years and upwards, who, for the time being, are ordinarily resident in New Zealand, are liable for the National Security Tax on salaries, wages, and other income.

The National Security Tax is a charge on income at the rate of 1s. in the £ (or 1d. for every 1s. 8d.) received as salary, wages, or other income (Finance Act, 1940, s. 16). It is to be assessed, collected, and recovered in respect of the same persons, companies, and public authorities, and in relation to the same income, and generally with the same mode of payment as under the Social Security Act, 1938, the Social Security Charge is assessed and paid (s. 17).

PERSONS RECEIVING SALARIES AND WAGES.

The National Security Tax is payable on all salaries and wages derived on and after July 22, 1940; and is deductible by the employer or other person by whom the salaries and wages are paid.

The expression "salaries and wages" includes any bonus, gratuity, extra salary, or emolument of any kind in respect of or in relation to employment or service; and it includes special payments such as witnesses' or jurors' fees and other payments or fees of a like nature (s. 18 (1)). It also includes all income liable to deduction of Social Security Charge at the source in terms of the Social Security Act, 1938, s. 118.

No National Security Tax is payable in respect of any salary or wages derived for any period prior to July 22, 1940. On any earned income on and after that date, the combined deduction for National Security Tax and Social Security Charge is double the amount that would have been deductible for the latter charge if the new tax had not become operative (*i.e.*, 1d. in every 10d. of salary or wages received) (s. 17 (1)).

INCOME OTHER THAN SALARY AND WAGES.

The National Security Tax is payable by every person, resident company, or public authority liable for Social Security Charge, and it is calculable in respect of income (other than salary or wages) derived or deemed to have been derived during the year ended March 31, 1940, or deemed to have been derived in that period, *i.e.*, income to other balance dates, which is deemed to be income to the nearest March, on the same basis as for Social Security Charge purposes (s. 18 (2)). For that period only three of the usual four instalments of the National Security Tax will be payable, namely, the one-fourth payable in August, 1940, another one-fourth payable in November, 1940, and the remaining one-fourth payable in February, 1941 (s. 18 3)).

The amount of income (other than salary or wages) on which the National Security Tax will be payable will be the same amount on which this year's Social Security Charge is calculable. Of the four instalments of that charge one was payable in May, 1940; no National Security Tax is payable on the amount representing that instalment. But, in August, 1940 (and again in November, and next February), instead of paying 1s. in the £ (or 1d. in every 1s. 8d.) on a quarter of the income for last

year (the year ended March 31, 1940), 2s. in the £ (or 1d. in every 10d.) will be paid as a combination of the National Security Tax with the Social Security Charge; and similarly in November, 1940, and again in February, 1941.

NON-RESIDENT COMPANIES.

The expression "non-resident company" means a company that is not resident in New Zealand for the purposes of s. 125 of the Social Security Act, 1938, but does not include a company if it is resident in New Zealand for the purposes of Part VI of the Land and Income Tax Act, 1923 (*i.e.*, if it is incorporated in New Zealand, or has its head office—the centre of its administrative management—in New Zealand).

Every non-resident company now becomes liable, in respect of the income derived by it from New Zealand for the year ending March 31, 1941, and for every year thereafter, for the charge on income, the Social Security Charge, imposed by the Social Security Act, 1938 (Social Security Amendment Act, 1940, s. 2 (1) (2)).

Companies excepted from the foregoing liability are companies of a class for the time being exempted by the Governor-General in Council, or companies that for the time being are assessable for income-tax under s. 97 of the Land and Income Tax Amendment Act, 1923 (gold-mining or scheelite-mining companies) or under s. 3 of the Finance Act (No. 2), 1937, (petroleum-mining companies), or under s. 9 of the Land and Income Tax Amendment Act, 1930 (Life Insurance Companies), or under s. 9 of the Land and Income Tax Amendment Act, 1932-33 (Banking Companies), (s. 2 (3)).

Dividends derived from a non-resident company liable to the Social Security Charge on income and declared by the company at any time after March 31, 1941, are exempt from that Charge if and so far as the Commissioner is satisfied that they have been paid out of income derived by the company from New Zealand after March 31, 1940 (s. 2 (5)).

As to National Security Tax: Every non-resident company to which s. 2 of the Social Security Amendment Act, 1940 (*supra*), applies, becomes liable for National Security Tax to the same extent as if the liability for Social Security Charge imposed by that section had extended to income for the year ended March 31, 1940 (Finance Act, 1940, s. 19).

It follows that every non-resident company liable for Social Security Charge on income derived after the year ended March 31, 1940, becomes liable for National Security Tax on three-fourths of its income for the year ended March 31 last in the same manner as persons and resident companies. To these non-resident companies, and to no others, assessments of National Security Tax are being issued.

Resident companies liable for Social Security Charge will, in order to pay their National Security Tax, merely double their next three instalments of Social Security Charge, in August and November, 1940, and February, 1941, respectively, without awaiting any notice or assessment.

TRUSTEES: BENEFICIARIES.

All the provisions relating to trustees in the Social Security Act, 1938 (see the special provisions in s. 124 of that statute) are applicable to payment of the National Security Tax; and those trustees who are liable to pay the Social Security Charge on income will, in the instalments due in August and November, 1940, and February, 1941, pay double the amount which otherwise would have been payable for the Social Security Charge.

Where a trustee has paid National Security Tax and deducted it from income payable by him as such trustee to a beneficiary, the beneficiary will not be liable for that tax on the income so received by him (*cf.* Social Security Act, 1938, s. 124 (2), and Finance Act, 1940, s. 17 (1)).

ACTS PASSED AND IN OPERATION, 1940.

No. 1. Emergency Regulations Amendment Act, 1940. May 31.
No. 2. Imprest Supply Act, 1940. June 21.
No. 3. Land and Income Tax Amendment Act, 1940. July 19.
No. 4. Land and Income Tax (Annual) Act, 1940. July 19.
No. 5. Social Security Amendment Act, 1940. July 19.
No. 6. Finance Act, 1940. July 19.
No. 7. National Savings Act, 1940. July 19.
No. 8. War Pensions Amendment Act, 1940. August 1.
No. 9. War Pensions Extension Act, 1940. August 1.
No. 10. Rural Housing Amendment Act, 1940. August 1.
No. 11. Appropriation Act, 1940. August 1.

MAGISTRATES' COURT DECISIONS.

Recent Cases.

DESTITUTE PERSONS.

Separation, Maintenance, and Guardianship—Divorce Proceedings pending—Jurisdiction—Determination of Complaint—Whether Magistrates' Court may make Interim Maintenance Order—Domestic Proceedings Act, 1939, s. 6.—HARRIS *v.* HARRIS, **M.C.D. 441** (Reid, S.M.).

IMPRISONMENT FOR DEBT LIMITATION.

Judgment Summons—Judgment Debtor not appearing—Excuse by Letter for Non-attendance—Whether Proof required—"Sufficient cause"—Jurisdiction—Change of Venue or Adjournment to another Court—Powers of Magistrates' Court—Imprisonment for Debt Limitation Act, 1908, ss. 7, 8—Magistrates' Courts Act, 1908, s. 150.—JENNESS *v.* FORBES, **M.C.D. 454** (Luxford, S.M.).

MAGISTRATES' COURT.

Judgment—Fencing—Claim for Half-cost of Fence—Technical Defence—Jurisdiction—Equity and Good Conscience—Magistrates' Courts Act, 1928, s. 100 (2)—Fencing Act, 1908, s. 16.—WHITTAKER *v.* POWELL, **M.C.D. 443** (Goulding, S.M.).

MEDICAL PRACTITIONER.

"Doctor of Metaphysics"—"Practises medicine or surgery"—Holding out as being qualified to Practise Medicine—No evidence of Practising Medicine or Surgery—Whether an Offence—Medical Practitioners Act, 1914, s. 23.—POLICE *v.* CLAYTON, **M.C.D. 451** (Paterson, S.M.).

RENT RESTRICTION.

Flats in Picture-theatre Building which included Ground-floor Shops—Common use of Stairway—"Part of the building" let "for residential purposes"—"Dwellinghouse"—Fair Rents Amendment Act, 1939, ss. 3, 4, 5.—LOWER HUTT AMUSEMENTS, LIMITED *v.* TREANOR: LOWER HUTT AMUSEMENTS, LIMITED *v.* BROWN, **M.C.D. 445** (Goulding, S.M.).

Subleases of whole Tenement—Effect as between Landlord and Tenant—Fair Rent as between Lessee and Subtenant—Method of Ascertainment—Fair Rents Act, 1936, ss. 2 (*b*), 6.—BERRY *v.* COAD: BLIGH *v.* BERRY, **M.C.D.** (Lufxord, S.M.).

RULES AND REGULATIONS.

Orchard and Garden Diseases Act, 1928. Fireblight Control (Revocation) Regulations, 1940. July 10, 1940. No. 1940/152.

Emergency Regulations Act, 1939. Farmers' Loans Emergency Regulations, 1940. July 17, 1940. No. 1940/153.

Emergency Regulations Act, 1939. Hospital Accommodation Emergency Regulations, 1940. July 17, 1940. No. 1940/154.

Judicature Amendment Act, 1930. Supreme Court Emergency Rules, 1940. July 24, 1940. No. 1940/155.

Motor-vehicles Act, 1924. Traffic Regulations, 1936. Amendment No. 2. July 24, 1940. No. 1940/156.

Cook Islands Act, 1915. Cook Island Patriotic Purposes Regulations, 1940. July 24, 1940. No. 1940/157.

Labour Legislation Emergency Regulations, 1940. Shearing Industry Labour Legislation Suspension Order, 1940. July 29, 1940. No. 1940/158.

Post and Telegraph Act, 1928. Postal Note Regulations, 1940. July 31, 1940. No. 1940/159.

Labour Legislation Emergency Regulations, 1940. Northern Tinsmithing, Coppersmithing, and Sheet-metal Working (Dairying Industry) Labour Legislation Suspension Order, 1940. July 31, 1940. No. 1940/160.

Sale of Food and Drugs Act, 1908. Sale of Food and Drugs Amending Regulations, 1940, No. 2. July 31, 1940. No. 1940/161.

Emergency Regulations Act, 1939. Debtors Emergency Regulations, 1940. July 31, 1940. No. 1940/162.

Emergency Regulations Act, 1939. Mortgages Extension Emergency Regulations, 1940. July 31, 1940. No. 1940/163.