New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"In this new war-time hurly-burly, when the world outside is remaking itself in turmoil, it is refreshing indeed to turn into the backwash of the Law Courts to listen to the imperturbable flow of the law which is ever unmindful of the world."

—R. D. BLUMENFELD, Editor of the *Daily Express*.

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COURTS-MARTIAL.

II.

MILITARY law, before 1689, existed only in time of actual war when articles of war were framed and announced under the prerogatives of the Crown. Military law, in the true sense of that word, and applicable alike in peace as in war, was first created by the Mutiny Act of 1689, which created a statutory Military Code. It was passed at a time when the rights of personal freedom had been successfully reasserted, since no more cogent weapons for enforcing those rights then existed or can now exist, than the writ of *habeas corpus* and the action for false imprisonment.

These are remedies to be obtained in the civil Courts, but we must next consider what provision is made in military law for the safeguarding of the rights of accused persons before Courts-martial,* which, as we know, do not consist of Judges or competent trained lawyers.

Security against amateurism in the conduct of trials by court-martial, or abuse of powers, which are often those of life and death on the part of the officers who preside over them, is, in a general way, given by the appointment of the Judge-Advocate-General, who is an officer of the permanent forces attached to General Headquarters. He is responsible to the Minister of Defence, and he checks the administration of military law. In the modern view he should not officiate at courts-martial, one of his duties being to secure the due administration of military justice.

A far more direct and intimate internal legal control is exercised by the Judge-Advocate. The officer convening a court-martial must, if it be a General court-martial, and may, if it be a District court-martial, appoint as Judge-Advocate a person possessing some acquaintance with military law and the rules of evidence. He has the custody of the proceedings, and must, after the finding, transmit them as directed by the order convening the Court.

There can be no office for which a lawyer with average training is better fitted than that of Judge-Advocate. The absolute impartiality which he has learned to expect from a Judge or Magistrate, is applicable to the absolute impartiality with which his duties must be discharged. His functions are of extreme importance. From the beginning of the trial to its close he not only may, but must, pilot it clear of irregularities. Space is not here available to detail his powers and duties, which are set out in the *Manual of Military Law*. It is enough to say that he must inform the Court of any irregularity or informality in its proceedings; and the Court should be guided by his opinion, and not overrule it except for very weighty reasons; that he may sum up the evidence and give his opinion upon the legal bearing of the case; and that he must take care that the accused suffers no disadvantage through his own ignorance or incapacity. The keynote of the unique powers vested in the Judge-Advocate is impartiality.

Other checks on Courts-martial and their decisions are external in character, in contrast with the internal check exercised by the Judge-Advocate or inherent in the military education of the officers who sit as members. By virtue of s. 27 of the Defence Amendment Act, 1912, no proceedings of any Court-martial may be set aside or deemed void for want of form, or be removed by certiorari or otherwise into any civil Court. But if a Court-martial exceeds its jurisdiction, or an officer whether acting as a member of a Court-martial or not, does any act not authorized by law, the action of the Court or of the officer is subject to the supervision of the civil Courts. As is stated in general terms, in the *Manual of Military Law*, 7th Ed., Ch. viii, s. 2:

> The proceedings by which the Courts of law supervise the acts of Courts-martial and of officers may be criminal or civil. Criminal proceedings take the form of an indictment for assault, false imprisonment, manslaughter, or even murder. Civil proceedings may either be preventive—*i.e.*, to restrain the commission or continuance of an injury; or remedial—*i.e.*, to afford a remedy for injury actually suffered.

* Naval and Air Force Courts-martial are not considered in this article, publication of which has been authorized.

> Broadly speaking, the civil jurisdiction of the Courts of law is exercised as against the tribunal of a Court-martial by writs of prohibition or certiorari; and as against individual officers by actions for damages. A writ of *habeas corpus* also may be directed to any officer, governor of a prison, or other who has in his custody any person alleged to be improperly detained under colour of military law.

The civil Courts will not, in general at any rate, deal with rights dependent upon military status and military regulations: they have no power to interfere by one of the prerogative writs, with matters of military conduct and purely military law affecting military rules for the guidance of officers or discipline generally, with the proceedings of a Court-martial or with any action that may thereupon be taken: *R.* v. *Army Council, Ex parte Ravenscroft*, [1917] 2 K.B. 504.

In *Dawkins* v. *Lord Rokeby*, (1873) L.R. 8 Q.B. 255, 271, Kelly, C.B., delivering the views of ten Judges said:

> With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other Judges in *Sutton* v. *Johnstone*, (1786) 1 Term. Rep. 493, and the cases of *In re Mansergh*, (1861) 1 B. & S. 400; *Grant* v. *Gould*, (1792) 2 H. Bl. 69; *Barwis* v. *Keppel*, (1766) 2 Wils. 314; *Keighly* v. *Bell*, (1866) 4 F. & F. 763; *Dawkins* v. *Lord Rokeby*, (1866) 4 F. & F. 806; and *Dawkins v. Lord Frederick Paulet*, (1869) L.R. 5 Q.B. 94; are all authorities to show that a case involving questions of military discipline and duty alone are cognizable only by a military tribunal and not by a Court of law. . . . We think, with the majority of the Judges in *Dawkins* v. *Lord Frederick Paulet* (*supra*), that the motives, as well as the duty, of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a Court of law to determine.

This dictum was criticized by McCardie, J., in *Heddon* v. *Evans*, (1919) 35 T.L.R. 642, 643. The plaintiff had contended that if a Court-martial of an officer acted without jurisdiction as to trial or inflicted a sentence on a soldier which it or he possessed no power to impose, whereby the soldier suffered in his person or his liberty, an action for false imprisonment or assault would lie on proof of the appropriate facts, although the acts complained of arose in the course of military discipline. His Lordship observed:

> It is a settled principle of English law that a man who without lawful authority causes another to be arrested, imprisoned or otherwise injured in his person or property is liable to an action for damages. Does that apply to the acts of military tribunals? On principle, I can see no good reason for exempting military officials from the operation of that law. (See *Dicey's Law of the Constitution*, 8th Ed., 304). If the acts of military tribunals or officers with respect to military discipline were insusceptible of supervision by the civil Courts, then the gravest consequences might ensue. It could scarcely be that military men were alone the interpreters of military law. If so, they became above the civil law; and so to hold would be to exclude the Courts from one of their most important and beneficent functions. The military law is a part of the law of the realm. It rests on a statutory basis. A soldier is a person subject to two sets of laws—the military law and the civil law. The liberty of a soldier should not be infringed save in so far as that infringement is justified either by the law military or the law civil. The question of justification should ultimately be determined by the ordinary Courts of law. It is for those Courts to determine the extent of the military jurisdiction given to military tribunals and officers by the Acts of Parliament.

His Lordship added that the burden of a man who enters the Army, whether voluntarily or not, is that he will submit to military law, not that he will submit to military illegality. He must accept the Army Act† and Rules and Regulations and Orders and all that they involve. These express his obligations; they annouce his military rights. To the extent permitted by them his person and liberty may be affected and his property touched. But save to that extent, neither his liberty, his person, or his property may be lawfully infringed. Where, indeed, the actual rights he seeks to assert have been given not by the common law, but only by military law, then it might well be that in military law alone could he seek his remedy. If, however, the rights which he seeks to assert are fundamental common law rights, such as immunity of person or liberty, save in so far as taken away by military law, then the common law rights may be asserted in the ordinary course. Strange results might follow if it were otherwise. A man, it has rightly been pointed out, who becomes a soldier does not cease to be a citizen: *Burdett* v. *Abbot*, (1812) 4 Taunt. 401, 449.

The first decision cited by Kelly, C.B., *Sutton* v. *Johnston* (*supra*), led McCardie, J., to point out again the vast distinction between an act done in excess of jurisdiction, where illegality might give rise to an action for false imprisonment, and an act done within jurisdiction, where action could be brought (if at all) upon the allegation that there had been a malicious abuse of authority causing injury.

After a review of the authorities, McCardie, J., concluded that (*a*) Members of Courts-martial will be liable to an action for damages, if, when acting in excess of or without jurisdiction, they do or direct to be done to a military man, whether officer or private, an act which amounts to assault, false imprisonment, or other common-law wrong, even though the injury purports to be done in the course of actual military discipline; and (*b*) if the act complained of is done within the limits of military authority or jurisdiction and in the course of military discipline, no action will lie upon the ground only that it is done maliciously and without reasonable and probable cause.

Although, on the second point, he doubted the views expressed in the dictum of Kelly, C.B., in *Dawkins* v. *Lord Rokeby* (*cit. sup.*), McCardie, J., said the question was not open to him as a Judge of first instance; nor was it open to the Court of Appeal. One tribunal only—the House of Lords—is free to hold that an action will lie for the malicious abuse or military authority without reasonable and probable cause. His Lordship referred to the speech of Lord Finlay, L.C., in *Hamilton* v. *Balfour*, (1918) 87 L.J. K.B. 1116, 1118, in giving the opinion of the House of Lords (Lord Finlay, Viscount Haldane, Lord Atkinson, Lord Sumner, and Lord Parmoor), where it was said that *Dawkins* v. *Lord Rokeby* (*supra*) only affirmed the decision of the Exchequer Chamber on the ground of privilege of witnesses, and did not affirm the other and wider proposition that questions involving questions of military duty and military discipline alone are not cognizable in a Court of law. That question, said Lord Finlay, was still open, at all events in that House. It involved constitutional questions of the utmost gravity.

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† The "Army Act" means the Imperial Act called the Army Act, which was passed as the Army Act, 1881 (*17 Halsbury's Complete Statutes of England*, 131), and is kept in force or continued by the Army and Air Force (Annual) Act of the Imperial Parliament. In the Defence Act, 1909, and its amendments, the term "Army Act" includes any Act continuing or amending the Imperial statute of 1881, and the Rules of Procedure for the time being in force made under the authority thereof respectively: Defence Act, 1909, s. 2, whereby the Army Act, 1881 (Imp.), so far as it is in force in New Zealand, is automatically renewed in each year by virtue of the passing of the Annual Act of the Imperial Parliament.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Wanganui.
1940.
Nov. 12–14.
1941.
Jan. 15.
Smith, J.

JACK ET UX v. PETERS.

Vendor and Purchaser—Hotel Lease and Goodwill—Fraudulent Misrepresentation—"Beer consumption five hogsheads per week guaranteed"—After-hours Trading—Contract—Illegality—Whether Purpose lawful—Damages—After-hours Trading by Vendor and Purchaser—Whether Receipts from After-hour Trading calculable in enhancing value of Goodwill and reducing Damages respectively.

In an action for damages for fraudulent misrepresentation inducing plaintiffs to purchase from defendant the lease and goodwill of an hotel and the furniture and stock therein, one of the representations of which the plaintiffs complained was that the beer consumption in the hotel was "five hogsheads per week guaranteed."

The learned Judge found that the plaintiffs were induced to enter into and complete the contract for the sale and purchase of the hotel by reason of three false and fraudulent misrepresentations, one of which was that the hotel did not carry on an after-hours trade and that they were entitled to damages.

B. C. Haggitt, for the plaintiffs; *Brodie*, for the defendant.

Held, 1. That the words "beer consumption five hogsheads per week guaranteed" referred to the purchase of draught beer taken by the purchaser direct from the pumps or taps of the hogshead, and did not include either beer bottled by the licensee from hogsheads or beer purchased by him in bottles.

2. That, although the plaintiffs engaged subsequently in extensive after-hours trading, they did not buy the hotel for the purpose of carrying on an illegal trade, and the purpose of the contract was lawful.

Neal v. *Ayers*, (1940) 63 C.L.R. 524, applied.

3. That, the illegitimate trade done by the defendant could not be regarded by the Court as enhancing the value of defendant's goodwill, and the Court must endeavour to ascertain the real value of the asset to a person carrying on only a legitimate trade.

4. That the money made by plaintiffs by after-hours trade could not be taken into account in favour of the defendant as, apart from other considerations specified, the Court could not undertake an inquiry into such illegal trading for the purpose of awarding the defendant the benefit of the proceeds.

Easterbrook v. *Hopkins*, [1918] N.Z.L.R. 428, G.L.R. 379, referred to.

Solicitors: *Treadwell, Gordon, Treadwell, and Haggitt*, Wanganui, for the plaintiffs; *T. W. Blennerhassett*, Wanganui, for the defendant.

FULL COURT.
Dunedin.
1940.
December 18, 20.
Myers, C.J.
Kennedy, J.
Northcroft, J.

CROMBIE
v.
ROSS AND GLENDINING, LIMITED.

War Emergency Legislation—Woollen-mills Labour Legislation Suspension Order, 1940—Interpretation—"Employment on shift-work"—"Shift"—Woollen-mills Labour Legislation Suspension Order, 1940 (Serial No. 1940/132), cl. 5.

The Woollen-mills Labour Legislation Suspension Order, 1940, by cl. 5, provided that

"Each male adult worker employed on shift-work shall receive in addition to his ordinary wages the sum of 3s. per shift."

The words "employed on shift-work" mean work that is done by shifts; so that, where one group of workers work during the day hours, and, on their leaving off, another group of workers take up the work of the mill, doing the same work as their predecessors in the same way, the first group of workers constitute a day shift and the second group a night shift. The word "shift" not being limited to a group of workers who work during a period outside what may be called the ordinary working-hours of the day, and rotation is not necessary to constitute as "shifts" the two groups of workers so working.

Consequently, so long as a mill-owner works his mill by two shifts, he must pay the additional amount prescribed by the order to the workers employed as members of each shift.

Counsel: *Mowat*, for the plaintiff; *Paterson*, for the defendant.

Solicitors: *Gallaway and Mowat*, Dunedin, for the plaintiff; *Lang and Paterson*, Dunedin, for the defendant.

FULL COURT.
Dunedin.
1940.
Dec. 18, 19.
Myers, C.J.
Kennedy, J.
Northcroft, J.

BOOTH, MACDONALD, AND COMPANY, LIMITED v. McGREGOR.

Factories—Wages—Holidays—Night-shift Workers—Entitled to Extra Wages for Night Shift—Whether entitled to same for Award Holidays—"Same rate as for ordinary working-days"—Factories Act, 1921–22, s. 35—Factories Amendment Act, 1936, ss. 13, 14.

Section 14 (1) of the Factories Amendment Act, 1936, enacts that wages for each whole holiday allowed to any person as provided by s. 35 of the Factories Act, 1921–22, as amended, shall be at the same rate as for ordinary working-days. This contemplates the case of the individual worker affected, and must accordingly be applied to the circumstances of the particular individual.

Thus, where a man working on a night shift was entitled to an extra 3s. a day while so working, that extra payment became part of his wages, and the amount so received was his rate of wages "as for ordinary working-days" during the period when he was working on the night shift; and he was therefore entitled in payment for Christmas Day and Boxing Day, to the extra 3s. for each of those days.

Counsel: *Hensley*, for the appellant; *F. B. Adams*, for the respondent.

Solicitors: *Livingstone and Hensley*, Christchurch, for the appellant; *Raymond, Stringer, Hamilton, and Donnelly*, Christchurch, for the respondent.

SUPREME COURT.
Napier.
1940.
December 17.
Ostler, J.

In re **A MORTGAGE, C. TO PUBLIC TRUSTEE (No. 2).**

War Emergency Legislation—Mortgages—Stock Mortgage—First Mortgagee of Land—Mortgage of Stock—Power to join Stock Mortgagee—Pooling Arrangement—Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), Regs. 2 (1), 6 (2) (a), 12.

The Court has power, even against the will of a stock mortgagee, to exercise its powers under Reg. 12 of the Mortgages Extension Emergency Regulations, 1940, if necessary, to join the stock mortgagee as a party to the application of the land mortgagee, and to make such order as it thinks proper.

In re a Mortgage, F. to the State Advances Corporation, [1941] N.Z.L.R. 5, dissented from.

Counsel: *Evans*, for the stock mortgagee; *Wacher*, for the Public Trustee.

Solicitors: *Bell, Gully, Mackenzie, and Evans*, Wellington, for the stock mortgagee; *C. V. Chamberlain*, Wairoa, for C.; *Public Trust Office Solicitor*, Napier, for the Public Trustee.

SUPREME COURT. Palmerston North. 1940. October 30, 31; December 4. *Myers*, C.J.

SMITH v. YOUNG.

Sale of Land—Specific Performance—Deficiency in Area—Specific Performance with Abatement—Purchaser paying part Cash, raising part on First Mortgage, giving Second Mortgage for Balance—Whether Proportionate Reduction on each Item—Purchaser taking with Abatement—Whether also entitled to Damages.

Where there was a substantial and material deficiency in the area of high-priced land agreed to be sold and the purchaser was entitled to specific performance with a proportionate abatement of the purchase-money, and the arrangement was that the purchaser was to pay part of the price in cash and to raise part on first mortgage, and the balance of the purchase-money was to be secured by a second mortgage to the vendor, each of these three items should be proportionately reduced.

Rutherford v. *Acton-Adams*, [1915] A.C. 866, N.Z.P.C.C. 688, applied.

Semble, A purchaser, who elects to take what the vendor can convey with an abatement of the purchase-money for a deficiency in title, quantity, or quality of the estate, is not entitled to damages as well.

Ontario Asphalt Block Co. v. *Montreuil*, (1913) 29 O.L.R. 534, 12 D.L.R. 223, applied.

Case Annotation: Rutherford v. *Acton-Adams*, E. and E. Digest, Vol. 42, p. 572, para. 1366; *Ontario Asphalt Block Co.* v. *Montreuil*, *ibid.*, p. 578, note b.

Counsel: *H. R. Cooper*, for the plaintiff; *Opie*, for the defendant.

Solicitors: *Cooper, Rapley and Rutherfurd*, Palmerston North, for the plaintiff; *F. G. Opie*, Palmerston North, for the defendant.

SUPREME COURT. Christchurch. 1941. February 3. *Northcroft*, J.

RICHARDS v. OFFICIAL ASSIGNEE.

Practice—Costs—Action—Official Assignee Defendant—Adverse Claims Against Fund held by Official Assignee in Fiduciary Capacity—Unsuccessful Plaintiff's Costs.

In an action brought against the Official Assignee by an unsuccessful plaintiff to determine the rights of a class of claimants against the assets in a bankrupt estate (and who in the case of an originating summons must have been before the Court and would have been allowed costs), the plaintiff was awarded costs as the defendant held the disputed property in a fiduciary capacity.

Love v. *Ihaka Te Rou*, (1890) 8 N.Z.L.R. 610, applied.
Kempton v. *Public Trustee*, [1932] N.Z.L.R. 1380, G.L.R. 647, referred to.

Counsel: *T. P. Hill*, for the plaintiff; *A. W. Brown*, for the defendant.

Solicitors: *A. S. Nicholls*, Christchurch, for the plaintiff; *Raymond, Stringer, Hamilton and Donnelly*, Christchurch, for the defendant.

"ACTION"

"Halsbury" Aids the Defence.

In the course of recent air-raids in the Temple, No. 4 Elm Court was twice bombed. On the first occasion the bomb entered the chambers of Mr. Elliot Gorst, and apparently struck a mahogany bookcase in which there was a thin set of *Halsbury's Laws of England*. This proved so effective that it knocked off the nose-cap of the bomb, which continued on its course to the bottom of the building, was picked up by an A.R.P. representative, carried out to Temple Gardens, and deposited there. He was not aware, of course, that the nose-cap was off. The engineers who immediately inspected the place found that the *Laws of England*, thin paper edition, had destroyed the nose-cap, and in doing so had suffered somewhat. The accompanying

photograph shows exactly what happened. It is interesting to note that the bookcase in which the set of the *Laws of England* was contained completely disappeared, being blown to smithereens by the impact.

And so, as the *Law Journal* (London) comments, "Lord Chancellor Halsbury's eponymous work, of which the first title is "Action" has proved itself, as in so many other actions, a very present help in time of trouble. At first glance the episode is a *lusus martis*, a mere freak of war. But those who are curious to find analogies and portents may see in it a deeper meaning—the law's successful resistance to violence. And though the law, whether of individuals, of nations, or of God, has been by Hitler consistently flouted and denied, yet it is that same law which will ultimately outlast him and prevail."

LAW IN NAZI GERMANY.

The Practising Lawyer and the New Theory.

By R. G. Palmer, LL.M.

Dr. Goebbels stated on May 20, 1936: "At the beginning of every revolution stands the deed, and when the new situation has been created, it is the task of the lawgivers to provide it with a substructure of law." The deeds of the Nazis since they came into power in 1933 are well known, but the efforts of the lawyers to evolve a legal theory explaining and justifying such deeds are worth inquiry if they will help us to know our enemies' mind. To know in advance an adversary's reaction to events, to know how he will explain them to himself or how the official propaganda machine will interpret them for him must be useful at this time; and as the Nazis claim their law to be nothing separate, but an integral part of their new way of life, it should illustrate their typical point of view. What has happened then to their law and lawyers since 1933?

Every practising lawyer, first of all, must now belong to the Bund or Union of German National-Socialist Jurists, and all other professional societies have been suppressed. The teaching and application of the law is controlled by the Academy of German Law incorporated in July, 1934, and as can be imagined anyone who is racially unacceptable or politically unreliable is not a member of this body. It is recorded that 132 teachers of law were dismissed from various University posts as soon as the Nazis had time to give their attention to the law schools.

Lawyers who comply with the requirements of the ruling party have plenty of work; although legal theory has been given a new foundation the greater part of the detailed body of law is not affected, and the Courts function more busily because totalitarianism is opposed to the settling of disputes by arbitration. It is not thought to be in accord with Party spirit to compromise claims either between citizens or States, and also the State prefers all such business made public so that the Judges may keep a watchful eye open for any anti-State activities that may be involved.

The Leadership Principle.

The key words of the new regime in Germany are "unity" and "integration." The State must be strong and so the executive power must be absolute; no legislative checks are allowable, and the collective force of the individuals in the State can only be applied through a Leader who commands the unquestioning faith of each one. To achieve this unanimity all Jews and everyone else holding conflicting views have been expelled or otherwise removed, and any subordinate body possessing independent authority has been abolished—*i.e.*, all must be answerable to the Leader alone.

And thus the Nazis achieve what curiously enough they still insist on calling a democracy—an authoritarian democracy. The Leader, or Fuhrer, has the supreme authority and represents the people as a whole; the unity of the State and the integration of the people are complete. Blind faith in the Leader looks very like the worship of a god whose commands are eternal truths, and who, by some mystical means, is regarded not as a fanatic with too much power, but as the incarnation of the State, as the Voice and Mouthpiece as well as the Clenched Fist of a unified nation.

Consistently with this principle, trade unions must be and have been abolished and each factory is now regarded as a band of followers under a Leader of their own to promote the best interests of their effort for the State. "Social honour courts" presided over by a Party official with two assessors from the factory impose a strict discipline over the social life of the members.

Effects of the New Theory.

Because the will of the Fuhrer is supreme, statutes as the embodiment of law are not at all respected; they are looked upon as being a dangerous cementing of out-worn notions. "Every age has the law which corresponds to its spirit, culture and fundamental ideas," they say, and again: "Law is for us a special form of politics, that is, its ordering." And "The jurist must be politician, philosopher, soldier and leader in one person, a true artist and a connoisseur." These colourful notions would seem to be designed to distract attention from the fact that there is now little law left for the lawyer to practise.

If statutes are only valid when the Leader does not contradict, then it follows logically that the Judiciary becomes a mere branch of the executive Government. The Judge must decide in accordance with Party doctrine rather than with a conflicting statute; but, if in doubt, then he must leave the question for decision by the political authorities. Under the Weimar Constitution of 1919, German Judges were appointed for life and could only be removed upon certain grounds and by procedure fixed by law. These provisions are now forgotten.

"Private ownership" is abhorrent to the Nazis. No member of the community can claim any right or privilege that may conflict with the rights of the whole. Hence they have restricted the free disposition of farms, provided punishments for bad farming, and relieved good farmers of debts incurred through no fault of their own. Copyright and patent rights are the property of the State, and there is no certainty that the individual holder will derive any benefit at all.

Contracts in any stable society are normally binding on the parties, but in the Nazi theory private as well as international contracts may be set aside on a specious argument of frustration or impossibility of performance. The marriage contract is the best example of this, existing marriages being declared void if they do not satisfy the requirements of the national creed.

The New Criminal Law.

It is affirmed in a learned and official publication on the German penal code that "penal law may be called a mirror of the mental attitude of the people" and that "there is need of a National Socialist Penal Code." Another high authority says: "In the will of the Fuhrer, Party and State meet. Let the new penal code be a witness of unified effort." A new criminal code had long been in preparation when the Nazis came into power in 1933; they immediately set to work on the drafts, radically altering them to conform

to the National Socialist conception of people, popular life, popular leadership and state.

The work of protecting the State is highly dramatized; exaggerated danger is seen or assumed in apparently insignificant acts or expressions of opinion and this must be stamped out as ruthlessly as war must be waged. Fear must be ever present to compel the complete obedience of the citizen and if he does offend then the State must exact an instant and frightening retribution.

As in English law the previous German law said, "An act can be legally punished only when this punishment was legally established before the act was committed." The National-Socialist amendment is worth quoting in contrast: "Whoever commits an act which the law declares punishable, or which deserves punishment according to the basic thought of a criminal law and in accordance with a healthy folk feeling, is to be punished. If no criminal law exists which can be directly applied to the deed, then the deed is to be punished according to the law which in fundamental thought best applies."

In effect, the Judge becomes a Party official with unlimited discretionary powers. If he chanced to treat an offender too lightly, however, the Party is still in control of the situation because the Gestapo can take him away in "protective custody," ostensibly to guard him against violence at the hands of the loyal members of the community. There is no crime without a punishment, the arrested man is deemed guilty until he proves his innocence, and if he succeeds in doing this then he is still likely to be taken off to a concentration camp.

There are no nice rules regulating the powers of the police, but simply: "The police have the task of putting into force the Will of the Fuhrer and can take all steps necessary for that." Any word or deed that might be remotely harmful to the State may be classed as treason with a penalty of death. A minor offence can be punished by a "loss of honour" sentence which reduces the offender to the status of a serf who is not allowed even to retain his children. There is no right of appeal.

The sentence of Dr. Goebbels quoted at the beginning of this article sums up the Nazi law. At first is the deed which all can judge. Then comes the attempt to justify, explain away, or make plausible such deed. It is no surprise therefore that the Nazi theory should sound so peculiar and unacceptable to us.

LEGAL LITERATURE.

Industrial Laws of New Zealand. By A. J. MAZENGARB. With a foreword by Mr. Justice Tyndall, Judge of the Arbitration Court. Pp. xvi+490. Wellington: Butterworth and Co. (Aus.), Ltd.

A REVIEW BY MR. JUSTICE O'REGAN.

The Industrial Conciliation and Arbitration Act was passed into law during the session of 1894, after having passed the representative chamber in 1892 and 1893. The statute contained an express provision that it should come into operation on January 1, 1895, but necessarily it remained a dead letter for a period more or less indefinite, but covering several years. The title of the Act was: "An Act to encourage the formation of Industrial Unions and Associations, and to facilitate the Settlement of Industrial Disputes by Conciliation and Arbitration." The statute ordained the division of New Zealand into industrial districts, in each of which there was to be a Board of Conciliation comprising not more than six nor less than four members, not including the chairman, who was elected by the Board. The Boards of Conciliation were to be elected by industrial unions of workers and of employers in each industrial district, but, inasmuch as an industrial union could exist only in virtue of the Act itself, some considerable time necessarily elapsed before the machinery of the statute became, as it were, in working order. The Legislature had all this in contemplation, and hence it was provided by s. 41 that special Boards of Conciliation might be appointed should occasion call, and in fact it was such a special Board that dealt with the first considerable industrial dispute.

In 1896, Consolidated Goldfields of New Zealand Ltd., announced a reduction in the wages of quartz-miners in the Inangahua district. The men refused to acquiesce and were called strikers, when, in fact, they were locked out. At the time they had no union, and they were induced to resume work, pending the formation of an industrial union, after which the dispute would be dealt with by a special Board of Conciliation. The Board was duly appointed, and in 1897 sat at Reefton, heard the dispute, and made their recommendations. These being unacceptable to the miners, the case was taken to the Court of Arbitration of which Mr. Justice Williams was President. Prior to that case the application of the Act was very limited. The case gave an impetus to the formation of industrial unions, and the application of the Act has now widened to an extent undreamed of in those far-off days.

All this is historical fact, though still unwritten, indeed, although the Act has been in operation nearly half a century, Mr. Mazengarb's book contains the first historical epitome of the measure and its workings. The book, however, is not, nor does it purport to be, a history of the Industrial Conciliation and Arbitration Act. It is an orderly exposition of the labour laws of New Zealand. Pride of place, of course, is given to the Industrial Conciliation and Arbitration Act, but the work includes all the labour statutes, as well as relevant excerpts from other Acts, such as the Statutes Amendment Acts and the Finance Acts. No fewer than four parts of the work are clarified by preliminary notes in which all that follows is epitomized. In the result the book is eminently readable.

Necessarily every statute, covering fields so wide as does the Industrial Conciliation and Arbitration Act, the Shops and Offices Act, or the Factories Act, comprises many machinery provisions; and it is a laborious task, merely by perusing a statute, to separate these from what may be called the substantive provisions. The book before us, however, comprizes a compilation of all the reported decisions of the Courts

on the provisions of the several statutes, and it is this, readily distinguishable by different type, that makes the work so useful, indeed indispensable, to the legal practitioner.

Further, the cases are well tabulated, there is a detailed index, and reference is facilitated by the division of the book into sections. Thus, supposing counsel wanted to refer the Court to s. 39 of the Factories Act, relating to accidents, he would cite para. 577, p. 327, of the work. Counsel need no longer appear in Court, therefore, with a pretentious pile of statutes in front of him. He may hold in one hand a volume which will include everything.

Heretofore our labour statutes have been, as it were, a confused and tangled mass, reference to which was once tedious and slow. Mr. Mazengarb has brought order out of chaos, and has made a practical acquaintance with what has long become a special branch of the law readily possible, not only to the practising lawyer, but to the Departmental officials who are charged in large measure with the task of administration, as well as to the union officials whose work is mainly connected with the practical application of the legislation. The author has been not less attentive to the Regulations and Forms, necessarily a part of the legislation, and so he has supplied a long-standing requirement.

It remains only to add that the book affords a good illustration of the printer's art. The only criticism I have to offer is that the first preliminary note could well have been made somewhat more extensive. The curtailment of the initial history of the Industrial Conciliation and Arbitration Act, however, in no respect impairs the practical utility of the volume, and professional opinion will doubtless agree that Mr. Mazengarb has made a very useful contribution to our legal literature.

PRACTICE NOTES.

Deaths by Accidents Compensation Act, 1908: Apportionment of Damages.

By W. J. Sim, K.C.

The recent judgment of Mr. Justice Johnston in *Holloway et Ux.* v. *Goldingham*, [1941] N.Z.L.R. 128, reviewing to an extent the duties and powers of juries in the apportionment of damages under the Deaths by Accidents Compensation Act, 1908, is interesting in view of the amendments to the Act made by the Statutes Amendment Act, 1939. A review of various recent amendments in this connection may be of some practical use at the moment.

The main point in *Holloway's* case was whether in a case where the jury had not apportioned, justified as His Honour held by the conduct of the trial by counsel, such failure to apportion could not be a ground for a new trial. Section 6 of the Act provides that the amount so recovered, after deducting the costs not recovered from the defendant, *shall be divided* amongst the successful claimants in such shares as the jury by their verdict find and direct.

The wording suggests that the apportionment by the jury is mandatory, but the section applies, it was held, only when the jury have actually apportioned. The action in question was a parents' action based upon prospective benefits from a deceased son.

This right of the Court not to insist upon the making of an apportionment by the jury, is in line with the recent amendment in 1939, which entitles the Court upon occasion to disregard an apportionment when actually made, even in the case of an adult plaintiff, not under any disability. For convenience, it is proposed to summarize the various statutory amendments in this branch of law made in recent years. They affect principally, (*a*) the basis of damage itself, (*b*) the treatment of the damages in the award, and subsequently by the Court.

The basis of damage is defined in the first instance by s. 5 of the Deaths by Accidents Compensation Act, 1908, the jury being empowered to give to the parties respectively for whom and whose benefit the act is brought such damages as they think proportioned to the injury resulting from the death. Under this action the right was conditioned by *proof of pecuniary loss actual or expected*, a matter reviewed in a number of cases, *Selbie* v. *Shaw*, (1909) 28 N.Z.L.R. 971, and *Berry* v. *Humm and Co.*, [1915] 1 K.B. 627, being among the more recent. A defendant could set off against the damages any pecuniary benefit accruing to the plaintiff as a result of the death: *Grand Trunk Railway Co. of Canada* v. *Jennings*, (1888) 13 App. Cas. 800; and the value of the benefit had to be estimated according to the facts existing at the date of the death: *Greymouth-Point Elizabeth Railway and Coal Co.* v. *McIvor*, (1897) 16 N.Z.L.R. 258. For many years in England payments by insurance have been excluded in the assessment of damages, see Fatal Accidents Act, 1908, s. 1, but it was not until 1936 that statutory provision was made on this subject in New Zealand. Section 7 of the Statutes Amendment Act, 1936, now provides:

> In assessing damages in any action under the principal Act there shall not be taken into account any gain, whether to the estate of the deceased person or to any person for whose benefit the action is brought, that is consequent on the death of the deceased person.

It is noticeable also that by s. 6 of the Statutes Amendment Act, 1936 (as amended by the above s. 7) provision is made for the award of damages in respect of the medical and funeral expenses of the deceased, if such expenses have been incurred by any of the persons for whose benefit the action is brought.

The most important amendment affecting the substance of the damages is s. 7 (1) of the Statutes Amendment Act, 1937, which provides that damages may be awarded in respect of the "*actual pecuniary benefit* which the person or persons for whose benefit the action is brought might reasonably have expected to enjoy . . . notwithstanding that any such

person or persons may not have been either wholly or partially dependent upon the deceased person prior to his death." Just exactly what difference this provision will make may require consideration. In *Holloway's* case (*supra*), a parents' action, the learned Judge summarized its effect as follows:

> I think this can only mean the pecuniary loss need not be shown. If this is so, expectation must come near to that speculative possibility of benefit which is not assessable: *Barnett* v. *Cohen*, [1921] 2 K.B. 461. It can, however, I think, be removed from that sphere if, to give the words of the section any meaning at all, one is entitled to assume that from conduct and relationships it is reasonable to suppose help would have been forthcoming. The effect of the amendment makes the necessary foundation, upon which a jury must work, not necessarily the proof of actual loss, *but evidence of help*, not necessarily pecuniary, rendered as opportunity arose, sufficient ([1941] N.Z.L.R. 128, 133).

Further on, the learned Judge observes:

> Slender as the grounds of the inferences may be, I think the nature of such claims must rest on a general survey by the jury as to what, considering the likely circumstances of son and parents in the future, they consider the normal course would have been (*ibid.*).

The matter, therefore, becomes very much at large in the hands of the jury, but the conclusion appears more reasonable to permit an award upon the basis of a promising and helpful child, than to make it dependent upon the fact that any such child may have made some contribution of pecuniary value up to the date of his death. The law in New Zealand appears to be that a healthy child can be *per se* a parental asset; and that no doubt reflects the true position in fact. Which parent he was likely to benefit, or whether both severally, or whether a joint claim lies, must depend upon the circumstances of each case.

With regard to apportionment, although the words of s. 6 appear to be mandatory "shall be divided . . . as the jury by their verdict find and direct," the Court has nevertheless an inherent jurisdiction to apportion the amount: *Wilson* v. *Gear Meat Preserving and Freezing Co. of New Zealand, Ltd.*, (1909) 29 N.Z.L.R. 48, and other cases down to *Caldwell* v. *Union Steam Ship Co., Ltd.*, (1915) 17 G.L.R. 702. When the occasion arises, one third is usually paid to the widow for her own use, and the remaining two-thirds for the benefit of the children. The childrens' interests are, however, considered paramount, and the Court may follow or disregard the analogy of the Statutes of Distribution: *Public Trustee* v. *Brewer*, (1912) 32 N.Z.L.R. 239; *Kiernan* v. *Donovan*, [1930] N.Z.L.R. 145.

The interests of infants or persons of unsound mind are protected by s. 13 of the Public Trust Office Amendment Act, 1913, which provides that damages received or awarded to any such person, whether by compromise, payment into Court or otherwise (including damages under the Deaths by Accidents Compensation Act, 1908), shall be paid to the Public Trustee, unless the appropriate Court otherwise orders, and such moneys are to be held and applied for the benefit of the persons entitled thereto. This section has now been extended (giving the Court a discretion) to the cases of persons other than infants or of unsound mind, by s. 14 of the Statutes Amendment Act, 1939. The main purpose of this section stated in simple terms is to permit the Court to deal with the damages as if defining an ordinary family settlement with trustees. Wide powers are given. Where an order is made under the section, no apportionment under s. 6 of the main Act is necessary, and in making a settlement the Court may disregard an apportionment already made. The settlement may provide for successive interests of two or more parties, and for payments partly out of income and partly out of capital, of periodic payments or a lump sum. Power is reserved to vary or revoke any order made under the section at any time. This section, which was shaped by the Law Revision Committee, removes, it is submitted, defects hitherto existing whereby the Court was able to protect only infants or persons of unsound mind and could not create successive interests in the fund. The improvident adult can now be protected against himself or the importunity of others. While the section represents an interference with rights of personal property, it is thought that it places in the hands of the Court a wise power for the benefit of successful claimants. It moreover removes from the hurried consideration of the jury, on inadequate information (the main considerations at the moment being liability and/or amount), questions which are essentially matters for consideration on a more appropriate occasion.

Mr. Justice Johnston's affirmation of principle in *Holloway's* case (*supra*) that a jury's apportionment is not a *sine qua non* to a successful claim even when the case is tried by a jury, is, therefore, in harmony with the development of practice on this subject.

PRACTICE PRECEDENTS.

Compromises with Creditors under s. 159 of the Companies Act, 1933.

By H. E. Anderson.

Under s. 259 (3) of the Companies Act, 1933, it is provided that any conveyance or assignment by a company of all of its property to trustees for the benefit of all its creditors shall be void to all intents and it has been held that a debenture given to a trustee for the benefit of creditors charging the undertaking and all the property is within this jurisdiction: *London Joint &c., Bank, Ltd.* v. *Herbert Dickinson, Ltd.*, [1922] W.R. 13. Such a conveyance involves the payment to the creditors of dividends over possibly a long period. Section 159 however, provides for arrangements or compromises between a company and its creditors and any class of them which may involve the transfer of the whole of the assets of the company but it has been held that where a sale was in consideration of a transferee company agreeing to

pay the creditors of the transferor company by instalments that the arrangement could not be allowed: *Re General Exchange Bank*, (1867) 15 W.R. 477. That case is very old, and it may be that it would be reconsidered now in the light of the wide provisions contained in the present Act.

Acting under s. 159 is another way really of liquidating a company and it can later be dissolved under s. 160 (1) (*d*) with the consent of the Court without winding up; this has distinct advantages as will be seen from the facts of the case which is to be set out. One difficulty in acting under this section is that the Court has no power if the company is not in liquidation to grant a stay of execution on a judgment obtained by a creditor, pending the holding of meetings convened for considering the arrangement under the section: *Booth* v. *Walkden Spinning Co.*, [1902] 2 K.B. 368; and as a general rule the Court should not sanction an arrangement if it would prejudice a creditor whose rights would have been preferential if a winding up took place: *Re Richards and Co.*, (1879) 11 Ch.D. 676, 679.

Arrangements placed before the Court should not involve the doing of an act which is *ultra vires* of the company, and the memorandum of association must be perused to see that the company has the necessary power to carry out the suggested arrangement: *Re Oceanic Steam Navigation Co., Ltd.*, [1939] Ch. 41. It was in the same case pointed out that the jurisdiction under the section had consistently been exercised without regard to the wishes of shareholders or a class of creditors who have no real interest in the assets of the company.

The practice precedents following were used in a scheme of arrangement made between a company, its creditors and landlord whereby the whole of the assets and undertaking of the company were transferred to a new company formed by the landlord. The landlord let certain premises to one C. to carry on the business of a restaurant. C. with another man formed a company to carry on a restaurant, subscribed £1,000 capital and they expended another £2,000 one way and another in fitting the place out, of which sums some £800 was represented by furniture. The company, A. Ltd., entered into about £4,000 of hire-purchase contracts for plant, and from various reasons, after working for about six months, became financially embarrassed to the extent of £3,500. The lessee of the premises, C., had let the company into occupation of the premises without the consent of the landlord and without any contract in writing between himself and the company, and, in terms of the lease, he owed the landlord £800 for rent and £200 for alterations to the premises; and C., by virtue of the possession of the company under the lease, was entitled to be indemnified from the payment of the same sums. The landlord had no right to prove in a liquidation against the company, as the person liable to him was the lessee, C., who had let the company into occupation of the premises; and, therefore he was entitled under the rule that enables a landlord in such circumstances, with the consent of the Court, to distrain against the chattels of the company: *Anderson and Dalgleish's Company Law*, 236. After meetings of the creditors (unsecured and hire-purchase creditors), a scheme of arrangement was put before the creditors whereby the landlord undertook to pay or to form a new company to pay to A. Ltd., £1,000 and to take over the whole of the assets and the business as a going concern upon certain conditions, one of which was that he should be entitled to prove as an ordinary creditor for the rent owing to him and a petition was presented to the Court to sanction the arrangement.

The following are the precedents used:

SUMMONS UNDER SECTION 159 OF THE COMPANIES ACT, 1933, FOR LEAVE TO HOLD MEETINGS.

IN THE SUPREME COURT OF NEW ZEALAND.

..... District.

..... Registry.

IN THE MATTER of the Companies Act 1933 (s. 159)

AND

IN THE MATTER of A. Ltd. of .

LET all parties concerned their solicitors or agents appear before the Right Honourable Sir Michael Myers G.C.M.G. Chief Justice of New Zealand at his Chambers Supreme Court House on day the day of one thousand nine hundred and forty (1940) at 10 o'clock in the forenoon or so soon thereafter as counsel may be heard UPON THE HEARING of an application by A. Ltd. for an order pursuant to s. 159 of the Companies Act 1933 that the company A. Ltd., be at liberty to convene separate meetings to be held at of the—

1. Unsecured creditors.
2. Creditors holding hire purchase contracts

for the purpose of considering and if thought fit approving with or without modification a scheme of arrangement proposed to be made between such unsecured creditors and creditors holding hire-purchase contracts and the company.

And that directions may be given as to the method of convening the said meetings.

And that of or failing him of may be appointed chairman of the said meetings and to report the result thereof to the Judge UPON THE GROUNDS appearing in the affidavit of of in support of this summons.

Dated at Wellington this day of one thousand nine hundred and forty (1940).

Registrar.

To Mr. Solicitor for the Creditors.

This summons is issued by of solicitor for the above-named company whose address for service is at the office of .

N.B.—At a special meeting of the creditors held prior to the issue of the summons the suggested scheme of arrangement was placed before the creditors. This was done because previous meetings had been very acrimonious but it is not essential to place the scheme before any meeting other than the one called by the Court. At the meeting mentioned the creditors present appointed a solicitor to act and appear for them and the summons was consequently addressed to him.

AFFIDAVIT AND EXHIBITS IN SUPPORT OF SUMMONS.

(*Same heading.*)

I, of the City of make oath and say as follows:—

1. That I am &c.
2. That I was appointed by a Committee of the creditors of A. Ltd., on the day of 1940 to look after the accounts and supervise the running of the business of a restaurant carried on by A. Ltd. at and have acted in the capacity since the said day of 1940.
3. That A. Ltd. was duly incorporated on the day of 19 and that attached hereto is a true copy of the Certificate of Incorporation of the said company marked "A" and a true copy of the Memorandum and Articles of Association thereof marked "B" and "C" respectively.
4. That the registered office of the company is at in the city of .
5. That the nominal and issued capital of the said company is one thousand pounds (£1,000).
6. That the company has not issued any debentures or given any security over its assets and undertaking.
7. That there are unsecured creditors to the amount of £ and hire-purchase creditors to the amount of £ .
8. A combined meeting of creditors was held at in the city of at 11 a.m. on Tuesday the day of 1940 and in view of the financial position of the company as set out the unsecured creditors to the value of £ and hire-purchase creditors to the value of £

passed resolutions agreeing to the scheme of arrangement and to an application being made to the Court by the company for an order that the company be at liberty to convene separate meetings of the creditors for the purpose of considering and if thought fit of approving the said scheme. There were no dissenting creditors at the above meeting. True copies of the said financial position, scheme of arrangement and of the resolution that application be made to the Court as aforesaid and other resolutions passed at the meeting are attached hereto, marked "D." and "E." and "F."

9. That the business of the company is carried on at in the city of and that most of the creditors reside in the city of and most of the hire-purchase owners also reside in the city of .

10. I am of opinion that the names of all creditors are known to me and that a circular letter should be posted to each creditor notifying him of the place and the time and date upon which such meeting shall be held.

11. It is suggested that Mr. of solicitor and failing him Mr. of contractor be the chairman of the meetings and that the meetings should be held at .

N.B.—The Court will direct how the meetings shall be summoned. Advertisement is usual, in such case the affidavit should state the appropriate papers for advertising in; see *Palmer*, 15th Ed. Vol. I, 1252, *Annual Practice, 1940*, 2651, 2652.

Exhibits are attached, but formal exhibits are not contained in precedents.

EXHIBIT "D."

FINANCIAL POSITION OF A. LTD., LEADING UP TO THE SCHEME OF ARRANGEMENT SET OUT HEREUNDER.

1. Capital of company is one thousand pounds (£1,000) divided into one thousand (1,000) fully paid up one pound (£1) shares. The only members of the company are holding five hundred and one (501) shares and holding four hundred and ninety nine (499) shares in the capital of the company.

2. Unsecured creditors amount to approximately £ exclusive of the claims of the two shareholders. Such amount of £ was owing at the day of 1939. All amounts for current supplies have been paid weekly out of takings.

3. Creditors as at the day of 1940 holding hire purchase contracts amount to approximately £ .

4. The said C. as immediate lessee of the landlord of the premises upon which the business of A. Ltd. is carried on owes under the lease of the premises bearing date the day of 1940 £800 for rent and two hundred pounds (£200) in respect of alterations to premises and A. Ltd. by virtue of its occupancy of the premises leased to C. by the landlord owes similar sums to C. the lessee.

5. The landlord by virtue of his position as landlord is entitled to levy distress against the occupant of the premises leased A. Ltd. for the rent due to him subject to the Courts Emergency Powers Act, 1939, which would not operate in favour of other creditors and in the event of liquidation of A. Ltd. the said landlord would be granted leave by the Court to distrain upon the goods and chattels of A. Ltd.

6. The furniture and effects of the company not included in the hire-purchase contracts have been valued at approximately £ .

7. Cash at the bank as at the day of was approximately £ after making provision for the weekly payments due on that date.

8. Stock of restaurant supplies as at the day of were of a value approximately £ .

EXHIBIT "E."

SCHEME OF ARRANGEMENT

BETWEEN A. Ltd. its creditors and of Wellington, solicitor as trustee for a company in course of formation.

1. That A. Ltd. hereinafter referred to as "the present company" agrees to a new company being formed with the name of A. Co. Ltd. hereinafter referred to as "the new Company." The new company shall be formed under the Companies Act, 1933, as a company limited by shares with the name of A. Co. Ltd. or with such other name as may be found to be available and allowable.

NOTE.—As it was important that the business of A. Ltd. should continue without interruption and be taken over by the new company under a similar name application was made to the Registrar of Companies to use the name of A. Co. Ltd. This was granted upon A. Ltd. undertaking if the scheme was sanctioned to apply under s. 160 of the Companies Act, 1933, for the dissolution without winding up of A. Ltd.

2. The capital of the new company shall be one thousand five hundred pounds (£1,500) divided into one thousand five hundred (1,500) shares of one pound (£1) each. The objects of the new company shall include the acquisition of the business of the present company as a going concern.

3. The present company shall by its directors enter into an agreement with the new company for the adoption of this scheme by the new company and for the transfer to the new company on the terms and subject to the provisions of this scheme of the business and all the assets (except as hereinafter mentioned) of the present company as existing on the date on which such transfer of the business is effected.

4. The present company to sell to the new company to be formed; (*a*) Its undertaking and its furniture and effects as scheduled and as now used by it as a going concern; (*b*) Current stores of restaurant supplies at a value of approximately £100; (*c*) Lease by occupation; and (*d*) Goodwill of business as a going concern. All the cash to the credit of the present company in the bank and all cash shall remain the property of the present company.

5. Electric light water gas and all wages and current weekly accounts to be paid in full by the present company up to date of completion of sale out of cash in hand and upon settlement the present company shall hand over to the new company receipts and clearances for such electric light water gas and wages.

6. The new company by its trustee or otherwise the landlord shall pay the present company the sum of one thousand pounds (£1,000) cash for the assets above mentioned on the agreed date of settlement which shall for the purposes of stamp duty be assessed upon the valuations made on the date of settlement.

7. If the value of current stores exceed one hundred pounds (£100) then the present company shall be paid in addition to the sum of one thousand pounds (£1,000) the amount of the excess but should the stores be of less value than one hundred pounds (£100) such difference shall be deducted from the amount of one thousand pounds (£1,000) to be paid to the present company.

8. The new company will take over the liability of the present company in respect to the hire-purchase contracts.

9. The said landlord shall relinquish his right to distrain against the present company as occupier of the premises leased by the said landlord to C. the lessee but shall be entitled by virtue of his right to distrain to rank as an unsecured creditor of the present company for the sum of £800 rent due to him. The said landlord shall release the said C. the lessee from the payment of the sum of £800 for rent and £200 for alterations and from all covenants and conditions in and under the said lease.

10. The present company shall be released from its liability to C. the lessee for arrears of rent £800 and cost of alterations £200 due to C. the lessee and C. the lessee shall release the present company from any liability to pay to him the said rent and the value of alterations as aforesaid and from all the covenants and conditions in and under the said lease.

11. The shareholders abandon all their and each of their claims as creditors for loans and other advances being not less than £ and all other claims if any.

12. That all unsecured creditors and the landlord to the extent of £800 due for rent be paid by the present company such dividend as may be available estimated approximately at five shillings (5s.) in £ out of the moneys to be paid by the new company or alternatively by the landlord for the purchase of the business.

13. The unsecured creditors shall accept the provisions for the payment of such dividend in full satisfaction and discharge of all their claims against the present company and the assets thereof and the landlord shall accept from the present company the payment of such dividend on the £800 owing to him for rent in full satisfaction of that sum and of all legal rights to which he may be entitled and shall relinquish any claim to the sum of £200 incurred for alterations.

14. The unsecured creditors or hire purchase contractors shall within four weeks from the date of settlement be entitled to apply for and to be allotted shares in the new company upon payment therefor in cash.

15. The new company shall take over all and continue to employ all employees in their employment. The shareholders and managers of the present company herein agree to resign from their respective positions in the present company without notice or compensation for the loss of the position.

16. The assets of the present company as represented by the cash to be paid for the business being wholly insufficient to pay more than a small dividend in the £ to the creditors of the present company the ordinary shareholders of the present

company have no interest in the assets of the present company or in the scheme.

17. As soon as conveniently may be after this scheme becomes operative the present company and all other necessary parties shall do and execute all such deeds and things as may be necessary for the conveyance and transfer to the new company of the business and assets except as hereinbefore mentioned of the present company in the terms of this scheme and for otherwise carrying the scheme into effect. Until the transfer the present company shall by its directors or committee of creditors carry on the said business in the same manner as heretofore so as to maintain the same as a going concern and shall maintain the restaurant stocks as heretofore.

18. That until the Court sanctions the agreement then all creditors and members of the present company the landlord and C. the lessee shall retain their legal and equitable rights against the present company and against one another unimpaired and unaffected in any way whatsoever by their having assented hereto and unless within the period of one month from the date of this scheme being sanctioned by the Court or such longer period (if any) as the Court may allow, the conditions hereof have been complied with, the scheme shall never come into operation or be of any force or effect in any way whatsoever.

19. The directors of the present company and the landlord may assent to any modification of this scheme or to any condition which the Court may think fit to approve or impose.

20. That the costs of and incidental to and leading up to the application to the Court for and the summoning and holding of the meetings of creditors ordered by the Court and the petition for obtaining the sanction of the Court to the scheme and of all parties properly appearing thereon and the costs of the receiver for the creditors and the dissolution of the company after completion of the transfer of the business of the present company as aforesaid shall be paid in cash by the present company.

SIGNED &c.

(To be concluded).

RECENT ENGLISH CASES.

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

BANKRUPTCY.

Proof of Debts—Postponement of Debts—Interest—Moneylender's Debt—Interest at Higher Rate than 5 Per Cent. Already Received on debt—Bankruptcy Act, 1914 (*c.* 59), s. 66—Money-lenders Act, 1927 (*c.* 21), s. 9 (1).

If a moneylender has received 5 per cent. interest on his loan, he can claim no further sum in respect of interest as a dividend in his debtor's bankruptcy until the other creditors have been paid.

Re LASCELLES; TRUSTEE *v.* BLACK BROS. (FINANCIERS), LTD., **[1940] 4 All E.R. 272. Ch.D.**

As to proof for interest: see HALSBURY, Hailsham edn. vol. 2, pp. 309, 310, par. 412; and for cases: see DIGEST, vol 4, pp. 305–307, Nos. 2852–2875.

CONTRACT.

Excuses for Non-Performance—Impossibility of Performance—Restrictions on Dealing with Goods except under License.

Emergency Legislation—Control of Cereals—Contract made before Imposition of Restrictions to be Performed after Imposition—Whether Restrictions Excuse Performance of Contract.

Where an agreement is made to sell goods, dealings in which are subsequently prohibited except under license, it is the duty of the sellers to apply for a licence, and they are not excused from the performance of their contract unless such an application has been made and refused.

J. W. TAYLOR AND CO. *v.* LANDAUER AND CO., **[1940] 4 All E.R. 335. K.B.D.**

As to excuses for non-performance: see HALSBURY, Hailsham edn., vol. 7, pp. 218, 219, par. 297; and for cases: see DIGEST, vol. 12, pp. 373, 374, Nos. 3099–3102.

DIVORCE.

Desertion—Deed of Separation entered into subsequently—Deed Reciting Respondent's Desertion, but including an Agreement to Live Separate and Apart—Deed Executed by Petitioner under Misapprehension—Deed Bar to Dissolution.

A deed of separation which is acted upon prevents a plea of desertion, even though one party believed when executing the deed that cohabitation was not thereby ended, and that he could afterwards sue for a dissolution of marriage on the ground of desertion.

LONG OF WROXALL (LORD) *v.* LONG OF WROXALL (LADY), **[1940] 4 All E.R. 230. C.A.**

As to desertion: see HALSBURY, Hailsham edn., vol. 10, pp. 654–659, pars. 963–969; and for cases: see DIGEST, vol. 27, pp. 306–319, Nos. 2837–2977.

Intervention after Decree *Nisi*—Decree Granted on Ground of Presumption of Respondent's Death—Respondent Still Alive—Whether a Material Fact—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), s. 183 (2)—Matrimonial Causes Act, 1937 (*c.* 57), s. 8.

The fact that a respondent is found to be alive after a decree nisi has been granted on the ground of his presumed death is a material fact within s. 183 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, and is a sufficient reason for rescinding the decree.

MANSER *v.* MANSER (KING'S PROCTOR SHOWING CAUSE), **[1940] 4 All E.R. 238. P.D.A.**

As to showing cause against a decree: see HALSBURY, Hailsham edn., vol. 10, pp. 770, 771, par. 1216; and for cases: see DIGEST, vol. 27, pp. 479–483, Nos. 5067–5134.

EMERGENCY LEGISLATION.

Company—Debenture—Appointment of Receiver with Leave of Court—Subsequent Application by Receiver for Leave to Sell—Whether Second Application Necessary—Courts (Emergency Powers) Act, 1939 (*c.* 67), s. 1 (2).

Where a debenture holder has appointed a receiver with leave of the court under the Courts (Emergency Powers) Act, 1939, s. 1 (2) (ii), and the receiver is, by the debenture, stated to be deemed to be the agent of the company issuing the debenture, no further leave of the court is required before the receiver can sell the property subject to the charge created by the debenture.

Re WOOD, **[1940] 4 All E.R. 306. Ch.D.**

As to position of receiver of company: see HALSBURY, Hailsham edn., vol. 5, pp. 515, 516, par. 835; and for cases: see DIGEST, vol. 10, pp. 792, 793, Nos. 4974–4980.

Mortgage—Notice Requiring Payment of Mortgage Moneys—Application by Mortgagees to Exercise Power of Sale—Application Made Before Expiration of Three Months from Service of Notice—Law of Property Act, 1925 (c. 20), s. 103—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1.

Application under the emergency legislation for leave to enforce a remedy cannot be made until the time when the remedy becomes enforceable.

Re ROYAL BANK OF SCOTLAND, **[1940] 3 All E.R. 476. Ch.D.**

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

ESTATE AND OTHER DUTIES.

Incidence of Duty—Legacy Payable Out of Residue being the Proceeds of Conversion of Realty and Personalty—Liability of Legacy to Bear Proportion of Estate Duty Attributable to Real Estate—Testamentary Expenses to be Paid out of Residue—"Testamentary Expenses"—Law of Property Act, 1925 (c. 20), s. 16 (1), (5)—Administration of Estates Act, 1925 (*c.* 23), ss. 2 (1), 53 (3).

The expression "testamentary expenses" does not include estate duty on real estate.

Re OWERS; PUBLIC TRUSTEE *v.* DEATH, **[1940] 4 All E.R. 225. C.A.**

As to estate duty as a testamentary expense: see HALSBURY, Hailsham edn., vol. 13, pp. 287–290, pars. 302, 303; and for cases: see DIGEST, vol. 21, pp. 6, 7, Nos. 11–20.

EXECUTORS.

Legacies—Annuities to Several Persons Free of Tax—Rights of Survivorship on Death of any Person—Death of One Annuitant—Date at Which Valuation of Annuities Should be Made—Rate of Income Tax and Allowances.

Where annuities are given free of income tax, and on the death of one annuitant a summons is taken out to determine the value of the annuities, they must be valued as at the date of the order, and the income tax to be considered is the standard rate payable at the date of the order.

Re BALL; LUCAS *v.* BALL AND OTHERS, **[1940] 4 All E.R 245. Ch.D.**

As to valuation of annuities: see HALSBURY, Hailsham edn., vol. 14, pp. 358, 359, par. 669; and for cases: see DIGEST, vol. 23, pp. 420, 421, Nos. 4913–4926.

FAMILY PROTECTION.

Additional Provision for Husband — Husband Having Relinquished Employment to Attend to Home—Husband of Advanced Years and Unlikely to Obtain Employment — Inheritance (Family Provision) Act, 1938 (*c.* 45), s. 1.

Although as a general rule an application by a husband under the Inheritance (Family Provision) Act, 1938, will not succeed, there may be exceptional circumstances justifying such an application.

Re SILVESTER; SILVESTER *v.* PUBLIC TRUSTEE AND OTHERS, **[1940] 4 All E.R. 269. Ch.D.**

As to the Inheritance (Family Provision) Act, 1938; see HALSBURY, Hailsham edn., vol. 34, pp. 439–445, pars. 486–505.

Family Provision—Estate of Small Capital Value—Application of Act—Intention of Testator—Admissibility of Evidence —Inheritance (Family Provision) Act, 1938 (c. 45), s. 1.

In s. 1 (7) of the Inheritance (Family Provision) Act, 1938, "evidence" is not confined to legal evidence. A claim will not lie within the Act if the estate is so small that maintenance cannot be granted out of it.

Re VRINT; VRINT *v.* SWAIN, **[1940] 3 All E.R. 470. Ch.D.**

As to the Inheritance (Family Provision) Act, 1938, see HALSBURY, Hailsham edn., Supp., Wills, par. 1029. For the Inheritance (Family Provision) Act, 1938: see HALSBURY'S COMPLETE STATUTES OF ENGLAND, vol. 31, p. 149 *et seq.*

MASTER AND SERVANT.

Duty of Master—Provision of Safe System of Working—Unloading Ship—Crate of Cheese Rolling Over Side of Ship Through Insufficient Barrier—Delegation of Duty—Common Employment.

An employer who has not provided a safe method of working cannot be heard to say that his employees might have improvised one.

GRANTHAM *v.* NEW ZEALAND SHIPPING CO., LTD., **[1940] 4 All E.R. 258. K.B.D.**

As to liability of master in case of accident: see HALSBURY, Hailsham edn., vol. 22, pp. 187–190, pars. 313–317; and for cases: see DIGEST, vol. 34, p. 199, Nos. 1624–1626.

PRACTICE.

Payment Into Court With Admission of Liability—Defence Subsequently Amended by Leave and Admission of Liability Withdrawn—Money Taken Out by Plaintiff—Defendant's Right to Withdraw Notice Admitting Liability and to Recover Money Paid In.

Where money is paid into Court with an admission of liability, and the defendant subsequently obtains leave to amend his defence, the notice admitting liability may be withdrawn, and, if the plaintiff does not continue the action, the money may be recovered by the defendant, even though the plaintiff may have taken it out. R.S.C., Ord. 22, r. 6, does not preclude a Judge from being informed, on an interlocutory proceeding, that money has been paid into Court.

WILLIAMS *v.* BOAG, **[1940] 4 All E.R. 246. C.A.**

As to non-disclosure of payment into Court: see HALSBURY, Hailsham edn., vol. 26, p. 64, par. 105; and for cases: see DIGEST, Practice, pp. 498, 499, Nos. 1730–1735.

REVENUE.

Stamp Duty—Voluntary Disposition *Inter Vivos*—Transfer of Shares—Transfer in Pursuance of Resolution Declaring Capital Bonus Partly in Specie and Partly in Cash—Whether Transfer Itself Passes any Beneficial Interest—Finance (1909–10) Act, 1910 (*c.* 8), s. 74 (6).

If a company passes a resolution declaring a capital bonus and in pursuance of that resolution executes transfers to the shareholders, those transfers are liable to ad valorem *duty as voluntary dispositions* inter vivos *under s. 74 of the Finance (1909–1910) Act, 1910.*

ASSOCIATED BRITISH ENGINEERING, LTD. *v.* INLAND REVENUE COMMISSIONERS, **[1940] 4 All E.R. 278. K.B.D.**

As to voluntary disposition duty: see HALSBURY, Hailsham edn., vol. 28, pp. 475–477, pars. 1004–1007; and for cases: see DIGEST, vol. 39, pp. 284, 285, Nos. 667–671.

WATERS AND WATERCOURSES.

Escape and Overflow—Wall erected by Riparian Owner and Local Authority to Protect Land of Riparian Owner and Highway—No Right in Adjoining Owners to Protection—Removal of Wall and Re-erection Leaving Gaps—Damage by Flooding.

A riparian owner who has er ected works to protect his land from flooding is under no liabil ity to maintain them, unless others have acquired by prescription a right to protection by those works.

THOMAS AND EVANS, LTD. *v.* MID-RHONDDA CO-OPERATIVE SOCIETY, LTD., **[1940] 4 All E.R. 357. C.A.**

For the law on the point: see HALSBURY, Hailsham edn., vol. 33, p. 634, pars. 1124, 1125; and for cases: see DIGEST, vol. 44, pp. 58–65, Nos. 422–453.

WORKMEN'S COMPENSATION.

Declaration of Liability—No Present Incapacity—Incapacity Due to Disfigurement—No Physical Inability to Do the Work.

Incapacity due to physical disfigurement, which does not in fact prevent a man from performing his actual work, is of precisely the same character and weight in deciding whether a declaration of liability should be granted as is a physical disablement which impedes a man in the actual physical execution of his work.

COLE *v.* UNITED DAIRIES, LTD., **[1940] 4 All E.R. 310. C.A.**

As to declaration of liability: see HALSBURY, Hailsham edn., vol. 34, pp. 930–932, pars. 1274–1276; and for cases: see DIGEST, vol. 34, pp. 433–437, Nos. 3532–3564. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd end., pp. 328–333.

RULES AND REGULATIONS.

Control of Prices Emergency Regulations, 1939. Price Order No. 19. January 30, 1941. No. 1941/6.

Industrial Efficiency Act, 1936. Industry Licensing (Salt Manufacture) Notice, 1941. January 30, 1941. No. 1941/7.

Emergency Regulations Act, 1939. Passport Emergency Regulations, 1939. Amendment No. 1. January 30, 1941. No. 1941/8.

Emergency Regulations Act, 1939. Expeditionary Force Emergency Regulations, 1940. Amendment No. 1. January 30, 1941. No. 1941/9.

Emergency Regulations Act, 1939. Commissions of Inquiry Emergency Regulations, 1941. January 31, 1941. No. 1941/10.

Emergency Regulations Act, 1939. Naval Appointments Emergency Regulations, 1941. February 6, 1941. No. 1941/11.

Emergency Regulations Act, 1939. Stamp Duties Emergency Regulations, 1939. Amendment No. 1. No. 1941/12.

Agriculture (Emergency Powers) Act, 1934. Export Butter-box Pool Regulations, 1938. Amendment No. 2. No. 1941/13.

Fisheries Act, 1908. Sea-fisheries Regulations, 1939. Amendment No. 9. No. 1941/14.

Termites Act, 1940. Termites Act (Application) Order, 1941 (Mount Eden Borough). No. 1941/15.