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PRACTICE: APPLICATION FOR TRIAL BY SPECIAL JURY.

SECTION 37 of the Statutes Amendment Act, 1939, provides as follows :—

> Except with the consent of all the parties, no action, issue, or criminal case shall be tried before a Judge with a special jury unless in the opinion of the Supreme Court or a Judge thereof difficult questions in relation to scientific, technical, business, or professional matters are likely to arise.

The section came under judicial notice in *Duthie* v. *Union Airways of New Zealand, Ltd.*, [1939] N.Z.L.R. 1050, and in *Shiska* v. *National Trading Co., Ltd.*, [1941] N.Z.L.R. 20. More recently, in *Auckland Hospital Board* v. *Marelich*, [1944] N.Z.L.R. 596, it was interpreted by the Court of Appeal, with the result that *Shiska's* case was overruled as having gone too far.

In *Duthie's* case, His Honour Mr. Justice Blair, in a short judgment, dealt with the requirement of the statute as to "difficult questions in relation to . . . technical . . . matters," and held that the matter must not only be of a technical character, but that it must be a difficult one as well before an order could be made for a special jury.

In *Shiska's* case, Mr. Justice Fair, at p. 24, held as follows :—

> The Court does not, of course, pronounce upon the facts, but it should have material before it to enable it to say with confidence that there is evidence upon which issues will be raised in such a form as to require the jury's serious consideration of the questions relied on as justifying the application ; that such evidence will be led ; and that such questions are likely to be difficult to determine. . . . The plaintiff is entitled to information as to such questions, and the Court to be satisfied that there is evidence worthy of serious consideration in support of them. The applicant cannot be prejudiced by this information being supplied, and, indeed, it should facilitate the preparation for trial by both parties, and the clear presentation of the evidence at the hearing. It is necessary that the Court also should have put before it in as clear a form as is reasonably possible the grounds upon which it is claimed that it should make the order.

In *Marelich* v. *Auckland Hospital Board*, [1944] N.Z.L.R. 357, the Supreme Court (Fair and Callan, JJ.), reversed an order made by Callan, J., granting a special jury on the ground that difficult questions in relation to scientific, technical, and professional matters were likely to arise, and that the action was a proper one to be tried by a Judge and special jury. In the course of their judgment, the learned Judges thought that the decision in *Shiska's* case laid down principles upon which an application for a special jury should be considered. They said, at p. 362 :

> In the first place, allegations in the pleadings are not in themselves sufficient to warrant such an order. The facts relied on as justifying the Court in forming an opinion in the terms of s. 37 of the Statutes Amendment Act, 1939, should be proved by affidavit. The Court must form its own opinion. It does not do that by merely adopting an opinion expressed by other persons. It must have before it evidence of facts as to which it is proved that the defendant intends to tender evidence and which satisfy it that difficult questions relating to scientific technical or professional matters are likely to arise.

Their Honours adopted the passage in *Shiska's* case, *cit. supra*, which, modified to apply to the circumstances of the application then before them, would read :

> The questions of a technical or professional nature which the defendant alleges are likely to arise in the action should have been definitely stated, the facts upon which it is alleged these questions will arise should have been specifically set out, and the nature of the difficulty should appear clearly. The person making the affidavit should be able to swear as to the facts and definitely indicate the difficulties. The Court does not, of course, pronounce upon the facts, but it should have material before it to enable it to say with confidence that there is evidence upon which issues will be raised in such a form as to require the jury's serious consideration of questions relied on as justifying the application ; that such evidence will be led, and that such questions are likely to be difficult to determine.

From their Honours' judgment and order refusing a special jury the defendant Board appealed, and the Court of Appeal (Sir Michael Myers, C.J., and Smith, Johnston, and Northcroft, JJ.) unanimously reversed the order of the Supreme Court, and restored the order of Callan, J., granting a trial before a Judge and a special jury. In doing so, they overruled *Shiska* v. *National Trading Co., Ltd.*, as we have already indicated. The question is an important one as a matter of practice. We accordingly proceed to a consideration of the principles now enunciated by the Court of Appeal with relation to s. 37 of the Statutes Amendment Act, 1939, and the granting or refusal of a special jury in terms of that section.

First, as to the facts, which we summarize from the judgment of the learned Chief Justice : The respondent

had suffered an injury by accident, as the result of which he twisted his right knee and sustained a torn semilunar cartilage. His statement of claim alleged that he entered the Auckland Public Hospital on medical advice to the effect that surgical treatment by way of excision of the torn semilunar cartilage was appropriate and would result in complete restoration of the use of his knee. The knee was operated on by Dr. Guthrie, a surgeon employed by the Hospital Board, for the removal of the cartilage. The statement of claim then proceeded to make various allegations as to the post-operational treatment by the nurses and Dr. Guthrie, and averred that degenerative changes took place in the foot and leg, in consequence whereof the leg had to be amputated above the knee. The statement of claim then alleged that the necessity for the amputation originated in negligence on the part of Dr. Guthrie in various ways in treating the respondent; and, by reason of this alleged negligence the respondent claimed as special damages the sum of £480 and as general damages the sum of £4,000.

The appellant Board made an application for trial before a special jury. The application came before Callan, J., at Chambers, and, after hearing counsel for the appellant and the respondent and without calling upon counsel for the appellant in reply, he made an order that the case should be tried before a special jury. The respondent moved for a review of that order, and the motion came before Fair and Callan, JJ., sitting together, when, after hearing counsel and taking time to consider the matter, judgment was delivered by Fair, J., setting aside the original order, ([1944] N.Z.L.R. 357). From the last-mentioned judgment, or the formal order rescinding Callan, J.'s order, the appeal was brought.

In support of the application before Callan, J., two short affidavits were filed, one by the appellant's solicitor, the other by an independent medical practitioner in Auckland, Dr. Johnson, who deposed that at the request of the Hospital Board he had perused the statement of claim and had considered the allegations of negligence made by the plaintiff against the defendant, and that "for the purpose of deciding the allegations of negligence made by the plaintiff against the defendant specialist medical evidence will be necessary, directed to difficult scientific, technical, and professional matters and to medical practice and hospital routine." By its statement of defence the Board denied all the allegations of negligence; and no affidavits were filed by or on behalf of the respondent in answer to Dr. Johnson's statement, which the learned Chief Justice noted, was stated as a fact and not merely as an expression of opinion. His Honour then proceeded:

> With Dr. Johnson's affidavit before me and the pleadings, which the Judge must necessarily look at and consider, if the application for a special jury had come before me I should without the least doubt or hesitation have made the order that Callan, J., made. It is quite possible that some of the allegations of negligence may not require for their determination the evidence of experts, but, whatever may be said about any of the other allegations, it is plain from para. (*d*) of the particulars of negligence that that allegation does. It is alleged in that paragraph that, after Dr. Guthrie became aware of degenerative changes in the respondent's right foot, he failed to use due care by earlier resort to surgery whereby the effects of such degenerative changes might have been minimized. Consequently the doctor's skill as a surgeon, the standard of care required in the treatment of the respondent's case, the question whether the doctor exercised that care, and the propriety of his surgical technique in connection with the case are in issue, and I should have thought that in such a case difficult questions in relation to professional and technical, and possibly scientific, matters must necessarily, or at least probably, arise. Section 37 of the Statutes Amendment Act, 1939, does not require the certainty of such questions arising. It is sufficient if they are "likely to arise." I should have thought, reading the pleadings alone, that such questions are at least likely, if not of a certainty, to arise, but in addition to the pleadings there was Dr. Johnson's affidavit that for the purpose of deciding the allegations of negligence specialist medical evidence *will be necessary*, directed to difficult scientific, technical, and professional matters and to medical practice and hospital routine.

The learned Chief Justice then quoted the passage from the judgment in *Shiska's* case, relied upon by their Honours in the Court below. He said that, in his opinion, the effect of this is to lay down an arbitrary rule which would compel on the part of the applicant for an order for a special jury a disclosure practically of his counsel's brief. Even if that expression of opinion goes too far, at least the effect would be to lay down an arbitrary rule which is not required or justified by the statute or by any reasonable requirements necessary for the consideration of an application of the kind. He did not consider it necessary to rely in any way whatever upon the further affidavits of the solicitor and Dr. Johnson, though he would have thought himself that Dr. Johnson's did satisfy even the requirements laid down in *Shiska's* case. He did not, however, consider it necessary even to consider whether they were admissible or not, because, as he had already said, the original affidavit of Dr. Johnson, taken with the pleadings, was amply sufficient, in his opinion, to justify, if not indeed to compel, the making of an order for trial before a special jury. He continued:

> After all, it must be remembered that s. 37 of the Statutes Amendment Act, 1939, is very similar to the law as it stood from 1898 to 1936. The provision in the Juries Act, 1898 (which was also copied into the Code of Civil Procedure), was contained in s. 3, which read: "From and after the coming into operation of this Act no case or inquiry shall be tried or heard by a special jury unless all parties consent thereto, or unless in the opinion of the Court or Judge expert knowledge is required." It was held in applications that came before the Court soon after the Act of 1898 was passed that the expert knowledge referred to meant expert knowledge on the part of the jury which might exist already in the minds of the jurors, or might have to be acquired from the evidence to be given by witnesses. If expert evidence was necessary, then expert knowledge was required on the part of the jurors, and the expert witnesses had to place the jury in possession of the requisite expert knowledge. All this is well known to the profession, and is stated succinctly in *Stout and Sim's Supreme Court Practice*, 8th Ed. 527. I think that very much the same principles as were applied in applications under the 1898 provision should be applied in applications under the provision of 1937. There are many cases in which those principles are stated. I am content to cite but very few of them. In one of the very earliest of them—*Carmichael* v. *Johnston (No. 2)*, (1899) 17 N.Z.L.R. 673, 675, Sir James Prendergast, C.J., said that it seemed to him that where there were difficult questions such as arise under almost all building contracts as to the meaning of specifications and the doing of work, and possibly also questions of account—in such cases as these special juries might be summoned. He added: "*The mere statement by a party that there are such questions, and that he intends to call expert evidence, is, of course, not enough; but in this case it sufficiently appears that there are such questions*, and that expert evidence will have to be called to deal with the points in dispute. I therefore think that an order for a special jury should be made."
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> In *Bradshaw* v. *Mason, Struthers, and Co., Ltd.*, [1907] 26 N.Z.L.R. 1265, 1267, Chapman, J., said: "The pleadings and affidavits appear to me *to make it probable that there will be an important issue in the case, which will turn mainly on the effect of expert medical evidence.* The question of probable permanence or duration of the effects of the injury is almost certain to involve this. This is generally so in cases

of injury to the spine. . . . I do not think that such an application should be granted merely because it is probable that expert witnesses will be called, but I grant this because *I feel certain that both parties will treat the issue as if expert knowledge were essential and expert evidence actually required—that is to say, that it would be dangerous to omit to call it.* The mere fact that a party thinks that his case will be the better for expert evidence, and even considers it necessary, is not enough; *the Court must itself see* that *in all probability* it will be required to impart the necessary knowledge, and that, I think, must be the case here." It may be said that in *Bradshaw's* case, as appears from the report, the application was supported by the affidavit of a doctor on very much the same lines as Dr. Johnson's first affidavit in this case. Then there is *Lean* v. *McKibbin*, (1909) 28 N.Z.L.R. 764, the headnote in which—and it correctly states the effect of Chapman, J.'s judgment—is as follows: "Special jury granted "in an action against a medical practitioner for causing "death of plaintiff's wife *by alleged negligent and unskilful treatment after confinement.*" The learned Judge said that *it was* quite clear to him that expert evidence was essential and would be answered by expert evidence. In *Hill* v. *Gough*, [1925] G.L.R. 266, Adams, J., in granting an order for a special jury, said: "The *principle* upon which I propose to act has been recognized and followed for many years": the learned Judge was referring to cases such as *Bradshaw* v. *Mason, Struthers, and Co.*

The learned Chief Justice then said that in the only reported case other than *Shiska's* since s. 37 of the 1939 statute was passed is *Duthie's* case, in which in a short judgment, Blair, J., though he did not refer to the authorities under the 1898 statute, adopted the principle that they laid down. Unfortunately, when dealing with the *Shiska* case and the present case, the attention of the learned Judges was not drawn to the authorities to which reference was made in the passage last cited from the Chief Justice's judgment. Had it been, he could not help thinking that Fair, J., would not have laid down the principles stated in *Shiska's* case, and that Callan, J.'s order at Chambers in this case would not have been rescinded. In concluding his judgment, His Honour said:

Shiska's case goes too far and cannot be supported. The Court or Judge is of course not bound merely to adopt an opinion expressed by other persons, but when an opinion is expressed on affidavit by a qualified professional man (in this case, as I have said previously, there is more than a mere opinion), and there are no answering affidavits filed, and that opinion seems reasonable when read with the pleadings (and that is the case here, at least so far as para. (*d*) of the particulars of negligence is concerned), in my opinion a case for a special jury has been made out. The *Court or Judge* has to be satisfied merely that difficult questions in relation to scientific, technical, business, or professional matters are *likely to arise.* To require "evidence of facts as to which it is proved that the applicant for a special jury intends to tender evidence" is, in my opinion, unwarranted by the statute. If there are conflicting affidavits, the Judge may possibly require more specific information than when the affidavits filed in support of the application are unanswered, but the presence of conflicting affidavits created no difficulty in practice under the enactment of 1898 and should present none now.

His Honour Mr. Justice Smith said that he thought that s. 37 of the Statutes Amendment Act, 1939, was intended to limit the grounds upon which a special jury could be obtained. For the future, it was not sufficient that expert knowledge was required. It must appear that difficult questions in relation to matters of the kind in which special juries had been granted under the previous law were likely to arise. He went on to say that the judgment under appeal was based on the interpretation of s. 37 by Fair, J., in the case of *Shiska* v. *National Trading Co., Ltd.* The views which that learned Judge there expressed had been approved by Callan, J., in the present case. In His Honour's opinion, the judgment in *Shiska's* case laid down these propositions:

(i) That trial by special jury is an exception to the general rule and that the onus of showing that a special jury should be ordered is upon the person applying for it;

(ii) that the Court should order a special jury only where there is satisfactory material upon which it can form an opinion that such an exceptional trial is necessary;

(iii) that the allegations in the pleadings are not in themselves sufficient to warrant an order because they do not bind the parties and because allegations made in the pleadings may be abandoned at the trial;

(iv) that the applicant for a special jury must support his application by affidavit proving the facts which the defendant intends to establish so that the Court may form its own opinion as to whether difficult questions of the kind specified in s. 37 are likely to arise;

(v) that the standard of proof and evidence required for this purpose may be gauged by reference to the exceptional procedure, authorized by R. 50 of the Code, for the service of a writ of summons out of the jurisdiction—and, applying that standard, that the affidavit must be made by a person who can swear to the facts and that it must specifically set out those facts upon which it is alleged the difficult questions will arise so that the nature of those questions may clearly appear; and

(vi) that before making an order, the Court should be able to say with confidence upon the material before it that evidence raising difficult questions relating to scientific, technical, business, or professional matters will be led at the trial and will require the jury's serious consideration.

His Honour agreed with the first of these propositions subject to the reservation that the decision rests "in the opinion" of the Court or Judge. In the second proposition, the word "necessary" may appear to be too stringent, but he did not assume that the word meant more than that an applicant will not obtain a special jury unless the conditions for obtaining a special jury are satisfied. With all respect, he thought that the other propositions went too far. The statute of 1898 and the former R. 259 were in the form of a prohibition with an exception, and he thought that s. 37 of the Act of 1939 was not intended to change the nature of the material or the standard of the proof required for viewing an application. Usually the application is made by summons in Chambers. In some cases, the pleadings provide sufficient material to enable the Court to form its view, as they apparently did in *Australian Fine Arts Studio Co.* v. *Victoria Insurance Co.*, (1905) 25 N.Z.L.R. 56, though it is the proper practice to file an affidavit in support of the application. The learned Judge continued:

The material required to enable the Court to reach its opinion is likely to vary with the circumstances of each case. Under s. 37, that opinion is concerned with two matters—namely, whether difficult questions of the kind specified are involved in the case; and, secondly, whether they are likely to arise. The Court has to form its opinion upon these matters before the trial of the action, and I am unable to think that s. 37 necessarily requires that the facts upon which the difficult questions are alleged to arise must be specifically set out, if that phrase means that one party must disclose the details of his evidence in advance to the other before the hearing of the case. The Court may be able to form its opinion without that disclosure. In some cases, the applicant, in order to succeed, may have to condescend to the disclosure of detailed facts. In many applications, he may not. I think also that the last proposition deduced from *Shiska's* case should be qualified by the comment that the Court is required to reach its opinion before the hearing of the action and that this opinion is concerned with difficult questions that are "likely to arise." With all respect to the learned Judges in the Court below, I do not think it is desirable to say more for the assistance of litigants than this—that a special jury will not be ordered unless the material which is before the Court is sufficient to lead the Court to the opinion that

difficult questions of the kind specified are involved in the action and that they are likely to arise at the trial. This statement does but slightly expand the wording of the rule.

Mr. Justice Johnston, in the course of his judgment, said that in his view of s. 37, a Judge can of his own motion direct a trial to be before a special jury if he thinks difficult questions of a scientific or a professional nature are likely to arise, although it must be in rare cases that a Judge would so order without either the consent of both parties or the application of one. In most cases, questions likely to arise are disclosed in the pleadings, and if, in *Marelich's* case, the statement of claim alleged negligence in a surgeon in that he failed in determining the time for the surgical operation having regard to the degenerative changes in a limb, it would, he thought, be a bold man who would say conflicting testimony of professional men and difficult questions would not be a feature of the case. He added :

> In this case defendant moved for a special jury, and supported his motion with two affidavits, one by a member of the firm of solicitors acting for defendant, in which deponent said that he believed the allegations of negligence and the evidence given would raise difficult questions relating to scientific, technical, and professional matters and that special medical evidence would be called. The other by a medical practitioner who said that he had considered the allegations of negligence made by the plaintiff, and that for the purpose of deciding those allegations special medical evidence would be necessary, directed to difficult scientific, technical, and professional matters, and medical practice and hospital routine.
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> Those affidavits with the pleadings are more than sufficient, in my opinion, to entitle a Judge to determine whether difficult questions are likely to arise. I think it a mistake, where a Judge's order depends entirely on his opinion of questions he thinks likely to arise in the course of a trial, to assume the pleadings do not themselves provide the answer and insist on affidavits from people not so well qualified to express an opinion as those conducting the litigation on topics largely a matter of opinion.

In His Honour's view, the principles laid down in *Shiska* v. *National Trading Co. of New Zealand, Ltd.*, should not be approved as being of general application.

In his judgment, Mr. Justice Northcroft considered the passage from *Shiska's* case, *cit. supra*, overstated the requirements of s. 37 of the Statutes Amendment Act, 1939, and seemed to associate an application for further particulars with an application for a special jury. It was always open to a party to apply under the rules for a more explicit statement of claim or of defence, but that was a separate and different thing from an application for a special jury. He concluded :

> Under s. 37 of the Statutes Amendment Act the Court, or a Judge, must be of opinion that difficult questions, as specified are likely to arise. In some cases he may be able to form that opinion from the pleadings alone. I think this present case is such a one. If the pleadings do not justify that opinion, then affidavits must be filed by the party seeking the special jury, but those affidavits do not, in my opinion, require to go the length required by the judgment now appealed from and by the judgment in *Shiska's* case.

In allowing the appeal, their Honours came to the conclusion that the construction placed upon s. 37 of the Statutes Amendment Act, 1939, by the Court below was incorrect in the requirement of new material and a higher standard of proof than the section upon its true construction required. All that is necessary to place before the Court or a Judge upon which to base the exercise of discretion in favour of the grant of a trial by a Judge and special jury, is sufficient material (affidavits or pleadings, or both) to satisfy such Court or Judge that difficult questions in relation to scientific, technical, business, or professional matters are " likely to arise."

SUMMARY OF RECENT JUDGMENTS.

ANGLAND v. PAYNE.

SUPREME COURT. Auckland. 1943. November 22 ; December 13. 1944. March 4, 23. FAIR, J., CALLAN, J.

COURT OF APPEAL. Wellington. 1944. June 28 ; July 18. MYERS, C.J. ; SMITH, J. ; JOHNSTON, J. ; NORTHCROFT, J.

Mental Defectives—Reception-order—Protection of Persons seeking Order—Leave sought to bring Action against Person applying for Order—Whether " Substantial ground " for Contention that proposed Defendant acted in " Bad faith or without reasonable care "—Principle on which Grant of Leave should be based—" Satisfied "—" Substantial ground "—Mental Defectives Act, 1911, ss. 2, 3, 4, 5, 16, 17—Mental Defectives Amendment Act, 1935, s. 6.

The appellant, a Police sergeant, acting under instructions from his superior officer, an inspector, after an interview with the respondent, made an application for a reception order under the Mental Defectives Act, 1911, against the respondent, obtained a warrant to apprehend him, arrested him, and brought him before the Magistrates' Court, where he was examined by two medical practitioners. They did not certify him as a mental defective, and no reception order was made under s. 5 of the Act. As the result of such examination, the respondent was released. The circumstances connected with the application for a reception order and arrest and the inspector's instructions are fully set out in the judgment of the Court of Appeal.

The respondent applied under s. 6 of the Mental Defectives Amendment Act, 1935, for leave to proceed in an action for damages against the appellant on the ground of wrongful imprisonment on the grounds that the appellant had been guilty of malice and want of care. *Callan*, J., refused such leave, but on the review of his decision by a Court consisting of *Fair* and *Callan*, JJ., that decision was reversed and leave to proceed with the proposed action was granted, the Court holding that no higher standard was required under s. 6 (2) than applications from convicted persons for leave to apply for a new trial upon the ground that the verdict was against the weight of evidence, in which latter case to obtain such leave it is sufficient if there is a reasonably arguable ground for contending, not necessarily successfully, that the verdict was against the weight of evidence.

Held, by the Court of Appeal (*Myers*, C.J., *Smith* and *Johnston*, JJ., *Northcroft*, J., dissenting), That, on the evidence, there was no substantial ground for the contention that the person against whom it was sought to bring the action had acted in bad faith or without reasonable care.

Per *Myers*, C.J., 1. That, on an application under s. 6 of the Mental Defectives Amendment Act, 1935, the onus of proof of substantial ground for the contention that the proposed defendant had acted in bad faith or without reasonable care is upon the applicant. Substantial ground cannot be said to be shown unless it appears that the material relied on is such as to afford a reasonable prospect of success.

2. That, where bad faith is relied upon by the applicant, he must show that there is substantial ground for the contention that the proposed defendant has acted either dishonestly or with some improper motive.

3. That a person who applies under s. 4 of the Mental Defectives Act, 1911, for a reception order in respect of a person whom he believes to be mentally defective cannot be held to have acted in bad faith or without reasonable care, simply because when the person for whose reception the application is made is said, when he comes before the medical men appointed to examine him, not to be certifiable as a mentally defective person.

Per *Smith*, J., 1. That the use of the words " satisfied that there is substantial ground " in s. 6 (2) of the Amendment Act, 1935, necessitates that the Judge hearing the application should weigh the opposing contentions of the applicant and the proposed defendant, and reach a clear conclusion that a substantial ground

exists for the applicant's contention with reasonable prospect of success.

2. That the wording of s. 6 establishes a principle for the decision of the learned Judge different from that applied upon the hearing of an application under the Crimes Act, 1908, for leave to a convicted person to apply for a new trial upon the ground that the verdict was against the weight of evidence, in which all the Court is required to decide is that there must be a reasonable arguable ground for contending, not necessarily successfully, that the verdict was against the weight of evidence. Such latter ground may well be something less than a ground which a Judge is satisfied is substantial. Therefore, the learned Judges of the Court below had based the exercise of their discretion in respect both of bad faith and of negligence upon a wrong principle.

Per *Myers*, C.J., and *Johnston*, J. That, under s. 6 of the Amendment Act, 1935, the learned Judge is to exercise such a discretion as will give to the officers and others who are acting under the Mental Defectives Act, 1911, and its amendments, the protection the statute intended they should have.

Shackleton v. *Swift*, [1913] 2 K.B. 304, applied.

Counsel: *Solicitor-General* (*Cornish*, K.C.) and *Rogers*, for the appellant; *Field*, for the respondent.

Solicitors: *V. R. S. Meredith*, Crown Solicitor, Auckland, for the appellant; *E. Thurlow Field*, Auckland, for the respondent.

AUCKLAND HOSPITAL BOARD v MARELICH

Court of Appeal. Wellington. 1944. June 22; July 18. Myers, C.J.; Smith, J.; Johnston, J.; Northcroft, J.

Practice—Trial—Special Jury—Application for Trial by Special Jury—" Difficult question in relation to scientific, technical, business, and professional matters "—Evidence necessary to satisfy Court such Questions " likely to arise "—Statutes Amendment Act, 1939, s. 37.

Practice—Appeal—Interference by Appellate Court with Exercise of Discretion by Lower Tribunal—Principles regulating such Interference.

The respondent had suffered an injury by accident as a result of which he twisted his right knee and sustained a torn semilunar cartilage. He sued the appellant for damages for negligence. His statement of claim alleged that the knee was operated on by Dr. G., a surgeon employed by the appellant Board, for the removal of the cartilage, made various allegations as to the post-operational treatment of the nurses and G., and averred that degenerative changes took place in the foot and leg, in consequence whereof the leg had to be amputated above the knee. The respondent further alleged that the necessity for the amputation originated in various negligent acts and omissions of G. and the nurses and attendants, specified in detail, including adjustment, bandaging, and failure to resort earlier to surgery.

The appellant Board applied for trial before a special jury and filed two short affidavits, one by its solicitor, and the other by an independent medical practitioner, Dr. J., who deposed that he had perused the statement of claim and considered the allegations of negligence made therein, and that for the purpose of deciding such allegations medical evidence would be necessary, directed to difficult scientific, technical, and professional matters and to medical practice and hospital routine. No affidavits in reply were pleaded by the respondent. *Callan*, J., who heard the application made an order for trial by a special jury, but on the hearing by *Callan* and *Fair*, JJ., for a motion for a review of that order, the learned Judges set aside the original order: reported [1944] N.Z.L.R. 357.

On an appeal to the Court of Appeal,

Held, by the Court of Appeal (*Myers*, C.J., and *Smith, Johnston*, and *Northcroft*, JJ.), 1. That the affidavits filed, together with the pleadings, were sufficient to satisfy the Court that difficult questions in relation to scientific, technical, and professional matters were " likely to arise."

Shiska v. *National Trading Co., Ltd.*, [1941] N.Z.L.R. 20, [1940] G.L.R. 593, overruled.

Per *Myers*, C.J., and *Smith*, J., 1. That, in reference to the interference of an appellate tribunal with the exercise of a judicial discretion, the general rule (that an appellate Court will not disturb an order made by the primary tribunal in the exercise of a discretion unless it is shown that the discretion was exercised upon a wrong principle) must now be taken as subject to the views expressed in *Evans* v. *Bartlam*, [1937] A.C. 473, [1937] 2 All E.R. 646, and *Charles Osenton and Co.* v. *Johnston*, [1942] A.C. 130, [1941] 2 All E.R. 245, which establish the rule that an appellate tribunal will interfere with the exercise of a judicial discretion, whether or not it relates to a mode of trial, if the tribunal reaches the clear conclusion that no weight or no sufficient weight has been given to relevant considerations which are important to the just determination of matters in issue, and that injustice may be done if it does not interfere.

Evans v. *Bartlam* and *Charles Osenton and Co.* v. *Johnston* applied.

2. That the learned Judges below exercised their discretion upon a wrong principle in their erroneous construction of s. 37 of the Statutes Amendment Act, 1939, on requiring new material and a higher standard of proof than the section upon its true construction required.

Per *Smith*, J. That the principle of *Charles Osenton and Co.* v. *Johnston* also applied, and authorized the granting of a special jury.

Duthie v. *Union Airways of New Zealand, Ltd.*, [1939] N.Z.L.R. 1050, G.L.R. 659; *Australian Fine Arts Studio Co.* v. *Victoria Insurance Co.*, (1905) 25 N.Z.L.R. 56, 7 G.L.R. 635; and *Hope* v. *Great Western Railway Co.*, [1937] 2 K.B. 130, [1937] 1 All E.R. 625, referred to.

Appeal from the judgment of *Fair* and *Callan*, JJ., [1944] N.Z.L.R. 357, allowed.

Counsel: *Goldstine*, for the appellant; *O'Regan* and *Haigh*, for the respondent.

Solicitors: *Goldstine, O'Donnell, and Wood*, Auckland, for the appellant; *F. H. Haigh*, Auckland, for the respondent.

THE KING v TAILOU.

Court of Appeal. Wellington. 1944. June 12; July 18. Myers, C.J.; Smith, J.; Johnston, J.; Fair, J.; Northcroft, J.

Criminal Law—Practice—Trial—Possession of Spirits whereon Duty not paid—Whether Accused entitled to elect to be tried by Jury—" Customs Acts "—Onus of Proof—Justices of the Peace Act, 1927, ss. 3, 124—Distillation Act, 1908, s. 116—Customs Act, 1913, ss. 3 (1) (h), 276.

The Distillation Act, 1908, is a " Customs Act " within the meaning of that term as used in s. 3 of the Justices of the Peace Act, 1927.

A person charged with an offence under s. 116 of the Distillation Act, 1908, has the right, under s. 124 of the Justices of the Peace Act, 1927, to elect to be tried by a jury.

Section 276 of the Customs Act, 1913, relating to the burden of proof, does not apply to such a trial.

So held, by the Court of Appeal (*Myers*, C.J., and *Smith, Fair*, and *Northcroft*, JJ., *Johnston*, J., dissenting), on a case stated by *Fair*, J., for determination by the Court.

Counsel: *Solicitor-General* (*Cornish*, K.C.) for the Crown; *Skelton*, for the accused.

Solicitors: *V. R. S. Meredith*, Crown Solicitor, Auckland, for the Crown; *Skelton and Skelton*, Auckland, for the accused.

RAMSAY v. RAMSAY.

Supreme Court. Christchurch. 1944. July 21. Northcroft, J.

Divorce and Matrimonial Causes—Intervention—Petition alleging Adultery with " Person unknown "—Woman believing herself to be such Person—Leave to be made a Party—Divorce and Matrimonial Causes Act, 1928—Matrimonial Causes Rules, 1943, RR. 53, 54.

Where a petition alleges the respondent's adultery with a " person unknown," and a person believes herself from the facts alleged in the petition to be identified as the person with whom the respondent is alleged to have committed adultery, and asks for leave to intervene, the Court may, under s. 42 of the Divorce and Matrimonial Causes Act, 1928, make her a party to the suit.

Counsel: *A. W. Brown*, in support of the motion for leave to intervene; *Twyneham*, for the petitioner; *Thomas*, for the respondent.

Solicitors: *Raymond, Stringer, Hamilton, and Donnelly*, Christchurch, for the applicant; *Twyneham*, Christchurch, for the petitioner; *C. S. Thomas*, Christchurch, for the respondent.

INTERNATIONAL SECURITY THROUGH THE EVOLUTION OF LAW.

By SIR CECIL HURST, Chairman of the United Nations War Crimes Committee. *

No one can read Air Vice-Marshal Bennett's article in the LAW JOURNAL of May 23 on "International Security Through the Evolution of Law" without feeling moved to help in the campaign which the author urges upon us to undertake for the purpose of securing sure and lasting peace. As he says, the legal profession can, if they will, take a leading part in this vital extension of law and order. Clearly, the task of finding a satisfactory post-war machinery which will secure permanent peace to the world is one of great difficulty. Probably the greatest service which the lawyers can render to the cause is to examine the subject critically and to endeavour to arrive at a correct understanding of the difficulties that stand in the way, not with a view to allowing those difficulties to block the path and thereby destroy the hope of ensuring lasting peace when the present struggle is over, but with a view to seeing how best those difficulties can be overcome; to find out, in fact, the best method of convincing the public at large that their true interests will be served by creating an international machinery which shall be capable of achieving the high purpose of ensuring peace.

If when this war is over the democracies of the world are to play a predominant role, it is a delusion to think that the creation of machinery by itself will be enough to save us from another Armageddon. However perfect the machinery may be, it will be useless unless behind it there is the will to make the machinery work. There will not be that will to make the machinery work unless behind the governments whose delegates will meet in council as the executive branch of whatever international organisation is set up there is an understanding public aware of what war means and willing to shoulder the burdens that machinery for ensuring peace is bound to entail.

The legal world will probably be willing to accept in broad outline the idea set forth in Air Vice-Marshal Bennett's article that the line along which the world will move forward towards peace enforced by authority will be analogous to that which culminated in this country in the King's Peace being imposed on all the turbulent elements which disturbed our tranquillity in the earlier days of the feudal régime. How far that simile can be pressed is a subject which requires careful investigation. It is to be hoped that attention will be given to it by writers of any subsequent articles.

The logical conclusion of any such line of development in the international sphere would seem to be the emerging of something in the nature of a super State. The King's Peace was only made to prevail in England in early times through there coming into being one central authority strong enough to reduce all others to its will.

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The future international authority which the world must aim at establishing after this war can scarcely be of the nature of a super State. There is no evidence so far that public opinion would be ready to accept anything so far-reaching. The maintenance of peace in future would, in that case, be a simpler and less complex problem. A political organisation on the lines of a super State would involve attributes which would immensely simplify the problems connected with the future coercion of aggressors, such as the power to tax and with the proceeds thereof pay the cost of the upkeep of any international force with which the organisation was equipped, and the power to take decisions by a majority and therefore to secure rapid and effective machinery both for legislation and for executive action.

There is little evidence, however, at present that world opinion is ready for any development so far-reaching. Nor has there been any indication in the pronouncements of responsible statesmen that they were prepared to advocate such measures.

Unless the world is to run the risk of encountering another set-back due to the failure of an international organisation, from the institution of which much was hoped, it will be wiser to envisage a central authority endowed only with such powers as the States of the world, while preserving their own sovereign independence, are content to delegate to it.

This seems to be the implication of the Four-Power Declaration of Moscow, which spoke of a general international organisation based on the principle of the sovereign equality of all peace-loving States.

A limitation of the powers of the post-war international organisation, however, to those which the States of the world may be willing to delegate to it for the common good is no bar to the adoption of the central idea of the Air Vice-Marshal's article that the organisation which is to be responsible for maintaining peace must be entrusted with sufficient powers to enable it to achieve the results which the King achieved when he imposed peace upon the feudal barons.

The minimum which is necessary for the purpose is that the organisation should be able to bring into immediate action force adequate to impose the common will upon the nation that is bent upon disturbing the peace of the world.

More than that may be necessary to satisfy the dreams of those who yearn after the immediate introduction of Utopia; if more can be obtained, it would simplify the task of achieving world government; but without that minimum there can be no hope of ensuring a secure and lasting peace.

A secure and lasting peace implies that this war is to be the last war, or at any rate the last great world war. It definitely excludes the idea that the democracies of the world are to wake up one day, as they did on the eve of the present struggle, to the realisation of the fact that the enemy was upon them in all his might.

To achieve that minimum will be difficult enough. For the democracies of the world it means that public opinion in each country must support its Government in endowing the new political organisation with a force sufficient to enable it to suppress an aggressor, and with the power to set that force in motion in case of need.

To induce countries to delegate such far-reaching powers to an international organisation will need great political understanding on the part of the peoples and more courageous leadership than was shown in the past.

The measures which the establishment of an efficient central international organisation would entail may be both expensive and unpopular. They would almost certainly involve the expenditure of money on the maintenance of forces at a time when the financiers may be telling us that there is urgent need of economy. They will probably mean the insistence on the acceptance by the heads of our own defence forces of a general international supervision of armaments.

It is idle to suppose that even this minimum of providing the international political organisation of the future with the power to bring into immediate action force sufficient to impose the common will for peace upon the would-be aggressors can be achieved without difficulty.

The hope lies in the fact that the " world is with the young." So high a proportion of the young men and women of the country will have been brought into personal touch with the horrors of modern warfare that it is not unreasonable to hope that they will insist—as Air Vice-Marshal Bennett has done in his article—that the means of achieving the minimum described above shall be found. At any rate their insistence should be sufficient to set the forward-moving minds in the legal profession to work on the problem of how best to attain the desired goal.

The details of any plan for the purpose must be thought out. No one man is likely to achieve the desired result single-handed. It is to be hoped that some legal committee working under the auspices of a body like the Royal Institute of International Affairs, and composed of men whose positions will ensure that their recommendations carry weight, may undertake the task.

Apart from the difficulty of thinking out the details of a workable plan, there is a deadweight of scepticism to be overcome as to whether it is possible to get rid of war between nations. This feeling is widespread among people of the older generation. It is in part due to the innate conservatism of the English people. We do not change our ideas very readily. It may also be due in part to the fact that international law is not at present founded upon the view maintained in Air Vice-Marshal Bennett's article that war is a process of multiple crime.

The time has come when the professors of international law must consider whether their teachings on the subject of war still hold good.

The rules of international law gradually crystallised during a long period when wars were frequent. War no doubt was regarded as an evil, but it was an inevitable evil. Grotius drew a distinction between wars which were just and wars which were unjust, but the consequences of the distinction were not pushed far, either by him or by those who followed him. Whether just or unjust in their origin, wars were regarded as struggles which primarily affected only the States which were engaged in them, and from which other States not only might, but ought to, hold aloof. Hence arose the rules of neutrality, prescribing the rights and duties of States not participating in the conflict.

The reason for formulating clear rules as to the rights and duties of neutral States was obvious, but the purpose was to localise the conflict, not to suppress it. Belligerent interference with neutral States, and with the trade and commerce of their nationals, was almost certain to occur. If a neutral State wanted to keep out of the conflict it was well that there should be as clear an understanding as possible as to the extent to which it was bound to put up with belligerent interference, and as to the extent to which its citizens were entitled to engage in the exciting but very profitable commercial intercourse with a belligerent whose need of particular commodities might be almost desperate. Otherwise the neutral State might be drawn into the conflict. The area of the struggle might spread.

That is the framework within which the rules of international law took shape ; so much so that, as a rule, half the pages of any standard text-book on international law are devoted to war and neutrality. The reason is not far to seek. The writers have to deal with a condition of things in which war is regarded as legitimate.

Is that the position to-day ? If it is the position to-day, need it continue to be so ?

It is becoming an axiom nowadays among all who think or write about international affairs—as apart from international law—that war is not a matter which affects only the States which participate in the struggle. The Covenant of the League of Nations proclaimed that any war or threat of war, whether immediately affecting any of the members of the League or not, was a matter of concern to the whole League, and the League was to take any action that might be deemed wise and effectual to safeguard the peace of the world.

Could anything be clearer ? We are engaged in the present titanic struggle because, after the first World War was over, the democracies were not prepared to implement the declaration which the statesmen of 1919 proclaimed in Art. 11 of the Covenant. That is the stark, naked truth : and the Governments followed where the people led.

Suppose the professors of international law re-write their treatises, and, instead of the pages devoted to the rules of war and neutrality, endeavour to give practical shape to the consequences of the Paris Pact, which pledged every important State in the world not to resort to war as an instrument of national policy! Would their teaching reflect the line of conduct which the mass of the people in this and in other democratic countries are prepared to uphold ?

Any system which may be worked out for some new political organisation for the good ordering of the world in the future—whether on the lines indicated in Air Vice-Marshal Bennett's article or not—must, if it is to ensure the maintenance of peace, provide for the coercion of would-be aggressors—that is to say, it must provide, if need be, for the use of armed force : that means willingness on the part of peace-loving States to go to war in the last resort at the request, or under the instructions, of the new organisation.

Some 30 years ago Mr. Taft, sometime President of the United States, speaking at a Conference at Lake Mohonk during the first World War, when men's minds were much occupied with this question of how war could be prevented for the future, laid it down that a democracy cannot be counted on to go to war unless it is deeply moved, *i.e.*, that the circumstances of any conflict likely to lead to the initiation of war by one State must be such as to touch the vital interests of another democratic State, if the latter is going itself to plunge into belligerency.

No plan for the purpose of securing a lasting peace when the present struggle is over by coercing and, if need be, by crushing an aggressor, will succeed unless it is accepted by the mass of the people in the democratic countries as one which is worth while; they must be willing to face up to the realisation of what an obligation to use force to crush a would-be aggressor means, and with full knowledge to accept the burden.

The help which the legal profession can give if it responds to Air Vice-Marshal Bennett's appeal is to help in framing some plan which the proverbial man in the street will accept as worth while.

In our daily life we accept the recurrent burden of an insurance policy. In the international sphere the burden of an insurance against a third World War would proportionately be no greater.

JUDGMENT SUMMONS.

Does a Successive Order Lie ?

By BRUCE SINCLAIR-LOCKHART, LL.M.

Does a successive order lie upon a second judgment summons ? The answer seems to rest upon whether the law has been vindicated by punishment suffered or payment made in virtue of the Imprisonment for Debt Limitation Act, 1908, hereinafter referred to as "the Act." There is, as well, the cumulative condition to be met that any prior order of committal has been extinguished on the expiry of its currency of one year.

The legal position would appear upon investigation to be clear-cut and well-defined by authority: but a doubt has been raised and settled upon certain facts, an outline of which is as follows :—

A judgment summons was determined in Auckland on January 26, 1943, and an order, *inter alia*, for payment forthwith in default imprisonment was made. Such order was not served owing to the fact that the debtor left the district before service of the order could be effected. He had, therefore, never been imprisoned upon the first order, nor had he subsequently made any payment. On April 18, 1944, after the expiry of the original order, a second judgment summons came on for hearing at New Plymouth, where the debtor had been traced to and served with the fresh proceedings in respect of the same debt. There was no appearance of the defendant. The presiding Magistrate adjourned the summons to enable further facts to be adduced and to permit counsel to make submissions upon the law.

In the circumstances which prevailed, the Court considered it was empowered under the Act to make a second order of committal, which His Worship made accordingly.

Reference may first be had to the passage in *Wily and Cruickshank's Magistrates' Courts Practice*, 2nd Ed. 433, under the caption "Extinguishment of Remedy," where the learned authors forsee difficulty in the way of a second order of committal being made and give citations to substantiate their view.

As to the necessity of interpreting strictly a penal statute such as the Act, see *Scott* v. *Morley*, (1887) 20 Q.B.D. 120, 126, 129, 131.

Section 4 of the Act provides the Court may commit to prison "any person who makes default in payment of any debt . . . due from him in pursuance of *any* order or judgment of that or any other Court of competent jurisdiction."

Section 5 provides: "(1) *Whenever and as often as* any sum of money due under any judgment or order in any Court remains unsatisfied," it shall be lawful for the person entitled to obtain a summons.

Neither section restricts the ambit of the statute to a single application for, nor a single order upon, a judgment summons. There may, it is submitted, be more than one judgment summons issued for the same debt and a fresh order may be made upon each summons, if the circumstances justify successive orders. There is, as well, express provision in s. 7 that "*the costs of any fruitless writs or warrants of execution and of levies*" may be ordered by the Court to be paid by the party so summonsed. Surely the clear implication arises, that the costs of a previous judgment summons must be borne by the debtor ? Indeed, Debt Form No. 15 being the form of judgment summons given at p. 443 of *Wily and Cruickshank* contains the item "Costs of previous judgment summons" nearly at the foot of the form, which it would appear goes to prove that the issue of more than one judgment summons for the same debt is visualized, if need be, against the defaulting debtor.

It is contended that, *provided a debtor has had sufficient* funds to meet his obligations, *the Court must make successive orders of committal* on the expiry of a current order at the end of a year unless the debtor goes to gaol, in which case the remedy of committal is extinguished, or unless the debtor pays his creditor. If this were not so, the debtor would flout the order of the Court with impunity. Such other remedies as may be available to the creditor, for example, distress or attachment, may not be adequate to ensure payment.

The Legislature never intended that a mere order of committal under the Act which has been held in abeyance unexecuted—*e.g.*, through the temporary disappearance of the debtor should obviate payment of a debt. Such an order is designed to punish dishonesty and facilitate payment, where the debtor has made wilful default, as appears to be the case in this instance.

The strongest citation in favour of a successive order of committal, which I am able to find, is *Reg.* v. *Stonor*

(*Brompton County Court Judge*), (1888) 57 L.J.Q.B. 510, where it was held by two Judges of the Queen's Bench that as *no arrest nor imprisonment* had ever taken place upon an order committing the defendant to prison, such order having expired through lapse of time, and *as the defendant was still in default*, the County Court Judge had power to make a second order of commitment. The procedure under the English Debtors Act, 1869, and the County Court Rules is very much the same as that obtaining under the Act and the rules made thereunder.

In *Stonor's* case, as in the present application, the first order of commitment expired in one year and after its expiry a fresh order was made: at p. 511, Field, J., in the course of counsel's argument interpolated these comments :—

> These cases (*Horsnail* v. *Bruce*, (1873) L.R. 8 C.P. 378, and *Evans* v. *Wills*, (1876) 1 C.P.D. 229) do not apply, for in each of them an absolute committal of the debtor to prison had taken place, which is not the case here. *A mere order to commit and a committal to prison are two different things.*

In his judgment, at p. 511, Field, J., says :

> I am clearly of opinion that after the expiration of one year the original order has gone altogether. [After referring to the order of commitment]. It is true that no application for its extension was made before its expiration, *but being as it was dead and gone, and no arrest or imprisonment having ever taken place under it*—which distinguishes the present case from those of *Horsnail* v. *Bruce* and *Evans* v. *Wills*—I am clearly of opinion that the learned County Court Judge had jurisdiction to adopt the course he did. [That is, to make a second order of commitment.]

Wills, J., at p. 512, says :

> I am of the same opinion, no arrest or imprisonment having taken place under the order of the 4th March, 1886 " (the first order of commitment)," and that order having expired, the course taken by the learned County Court Judge is in no way inconsistent with the provisions of the 5th section of the Debtors Act, 1869. [This section corresponds with s. 4 of the statute.]

In *Horsnail* v. *Bruce* there is the further distinction additional to those enumerated by Field, J., from the present facts that the second order of commitment was made before the expiration of the first order, which was still valid.

In *Evans* v. *Wills* the defendant was imprisoned under the first order of commitment and the second order of commitment was made within five months of the making of the first order. It was held that a second warrant of commitment could not issue against the debtor in respect of the same debt. In New Zealand the order, in virtue of R. 28 of the Imprisonment for Debt Limitation Rules, shall continue in force for one year only and, on its expiry, my submission is that the *ratio decidendi* in *Reg.* v. *Stonor* applies.

The case of *R.* v. *Birmingham County Court Judge*, [1902] 2 K.B. 283, cited in *Wily and Cruickshank* at p. 433, does not appear to have any direct bearing upon the present facts. With reference to *Church's Trustee* v. *Hibbard*, [1902] 2 Ch. 784 (*ibid.*, 433), the Judges deal with s. 4 of the Debtors Act, 1869, which concerns default by a trustee or person acting in a fiduciary capacity and the basis of the decision is the release by mistake from imprisonment of the debtor and whether a second order of attachment could be issued for his rearrest. Again, the Court held that such second order could not issue. The first order was still in force when the second order was made.

I come now to review such cases in New Zealand as my researches have revealed.

In *Jones* v. *King*, (1911) 6 M.C.R. 60, Kettle, S.M., held that, despite the debtor having suffered imprisonment through an order of committal on a judgment summons, a Magistrate has power to make another order. The intervention of an *amicus curiae* to the effect that a second order had, he thought, been made by another Magistrate no doubt assisted the plaintiff in obtaining a second order.

His Worship stressed the prefatory words of s. 5 (1) of the Act : " *Whenever and as often as* " as a distinguishing feature from the English statute.

I submit, in the light of decisions made already and referred to by His Worship—*e.g.*, *Evans* v. *Wills* and *Horsnail* v. *Bruce*—and of judgments given subsequently (see *infra*), Kettle, S.M., went too far, but only in this respect that *a second term of imprisonment should not have been inflicted when the debtor had already been in gaol for the same debt.* But for the fact that the defendant had been punished by imprisonment and had actually served his sentence, the decision of the learned Magistrate could, no doubt, be supported.

The case of *Jacobus* v. *McLean*, (1927) 22 M.C.R. 130, was decided by Page, S.M., and the learned Magistrate there held that where a defendant has been committed to prison, the Court has no power to impose a second term of imprisonment. It seems that *Jones* v. *King* was not cited. It is to be noted that the defendant there served a term of imprisonment upon the first order. At p. 130, His Worship says: " Once the defendant has been committed to prison the Court is *functus officio*, and cannot impose a second term."

The issues involved did not call for consideration by the learned Magistrate of *Reg.* v. *Stonor*. His Worship does not deal with facts similar to those now the subject of consideration where a warrant of committal has not been executed.

My remaining citation is *Shaw* v. *Brew*, (1928) 24 M.C.R. 21. It is, I think, important at the outset to counter the unfavourable *prima facie* impression one gains from the headnote, which seems to indicate that once an order for imprisonment has been obtained any future order for imprisonment cannot issue. It is pertinent to this inquiry to stress the opening words of the judgment in which the learned Magistrate says : " *The judgment debtor has already served* a sentence of imprisonment." In this respect, the facts in *Shaw* v. *Brew* differ radically from those of another application, the cardinal feature of which is that the defendant although ordered on the first judgment summons to pay the amount of the summons forthwith and in default nineteen days imprisonment is imposed, *has never made any payment nor apparently has he been sent to gaol.*

It is as well a matter for comment that Barton, S.M., in *Shaw* v. *Brew* did not apparently consider the express findings in and the implications of *Reg.* v. *Stonor* by way of analogy. No doubt, as in *Jacobus* v. *McLean*, that decision was not of direct value in reaching a conclusion, but *Reg.* v. *Stonor* might, in all probability, have been usefully referred to in assisting the Court to determine the question at stake.

A further point for consideration is the proposed addendum to s. 7 of the Act which His Worship thinks would clarify the statutory intention, if it had been so

intended, to permit successive orders for imprisonment. His Worship states at p. 22 of the report of *Shaw* v. *Brew* (*supra*): "The argument put to me would be stronger if s. 7 in stating the issues before the Court when a debtor appears on judgment summonses directed attention to his means and ability to pay 'since the time of obtaining such order or judgment *or since he was last imprisoned*, as the case may be,' but it does not do so."

The vital words, I think, which express the mind of the Court in giving judgment are "*or since he was last imprisoned*." My contention, is that a second order may be made only where there has been in fact no imprisonment under the first order. I am bound to admit on the decided cases I have already mentioned that imprisonment once suffered is final and no second order inflicting such a penalty can be made. Once a debtor has served a sentence he cannot be punished twice for the same default, even on the expiry of a current order one year after it was made. But where the debtor has never been to gaol, although he has been ordered to be imprisoned, it is submitted that a successive judgment summons will undoubtedly lie and unless the debtor proves inability to pay a second order may be made, provided of course no other order still remains in force. Barton, S.M., in *Shaw* v. *Brew* (*supra*) makes reference to "the strong authority of the judgment in *Evans* v. *Wills*." However, it is to be noted that the case was decided in 1876 in the Common Pleas Division by two Judges; that *Reg*. v. *Stonor* was determined twelve years later in 1888 in the Queen's Bench Division, when the power of the County Court Judge to make a second order of commitment was confirmed also by two Judges of the High Court; and that *Evans* v. *Wills* was cited in *Reg*. v. *Stonor* and referred to in one of the judgments.

It may be concluded with safety that an affirmative answer must be given to the question raised at the outset of this article, provided always that the special facts, as described above, justify it.

ROAD TRAFFIC AND THE WAR EMERGENCY REGULATIONS.

XIII.—Recent Regulations.

By R. T. Dixon.

During the present year, the Emergency Regulations issued within scope of this series have been few, but they, and the related Court decisions, are likely to have considerable interest for practitioners.

Oil Fuel (Horse Transport) Control Notice, 1944 (No. 2) (Serial No. 1944/41).—This repealed the previous order of similar effect (Serial No. 1944/38), and the present general result is to prohibit the use of oil fuel for the purpose of transport of any race-horse over a distance exceeding thirty miles, whether by means of one or more motor-vehicles. Thus in a total journey of, say, one hundred miles, the race-horse may be carried only thirty miles in all by any motor-vehicle or motor-vehicles, if the vehicles are propelled by oil fuel or by a gas-producer unit. Although race-horses are not specifically mentioned, the transportation of a horse for "farming purposes only" is excluded from the restrictions imposed by the order.

The validity of the order was recently upheld by Mr. H. P. Lawry, S.M., in *Robertson* v. *Jeffard* (to be reported), a lengthy judgment which has many points of interest in its examination of the principles involved.

Oil Fuel Emergency Regulations, 1939, Amendment No. 7 (Serial No. 1944/63).—This follows on and reverses the effect of the decisions, *Taylor* v. *Shortland*, [1944] N.Z.L.R. 345, and *Lindsay* v. *Heads*, [1944] N.Z.L.R. 349. The regulations now specifically authorize the Oil Fuel Controller, or a person acting under his delegation, to require information from any person relating to the "acquisition, possession, use, and disposal" of petrol coupons, as well as to the oil fuel obtainable under them.

Motor-vehicles Registration Emergency Regulations, 1942, Amendment No. 2 (Serial No. 1944/80).—The simple effect of this amendment is to provide that "business" cars—*i.e.*, cars which are Class 5 for third-party insurance purposes—are now to be issued with distinctive licenses ("stickers") lettered "B–C." Presumably, no relation is to be assumed between the letters used on the "sticker" and the vintage of any car to which it is attached.

Notice under the Oil Fuel Emergency Regulations, 1939, relating to the Sale of Motor-spirit (1944 New Zealand Gazette, 863).—The Government announced that this notice was issued on account of the discovery of large quantities of forged petrol coupons prepared for the July allocation. It is, therefore, made necessary by the notice that coupon motor-spirit be issued only to the tank of a motor-vehicle and that the purchaser must endorse on the back of the coupon his signature and the registration-plate number of the respective vehicle.

Transport (Goods) Applied Provisions Order, 1942 (Serial No. 1942/21).—In *Fippard* v. *Goodwin*, (1944) 3 M.C.D. 426, Mr. Coleman, S.M., at Feilding, held that a "goods-service" as defined by s. 2 of the Transport Licensing Act, 1931, as amended, may consist of a single trip; and, in view of that definition and from the provisions of cl. 11 (3) of Part III of the Schedule to the Transport (Goods) Applied Provisions Order, 1942, the words "carry on" must be construed in the light of that fact. In a prosecution for carrying on a goods-service for hire or reward without a license, the onus of proof that no offence was committed is thrown on the defendant by s. 55 of the Transport Licensing Act, 1931.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 14.—W. to B.

Rural Property—Productive Value—Assessment—Disposal of Firewood—Excess Value of Residence—Absence of Necessity for Telephone—Increased Butterfat Returns.

As was proving not uncommon on appeals, the appellant in this case came before the Land Sales Court with a great deal more evidence than was adduced before the Committee. In addition, the evidence was more specifically directed to material issues and was of higher probative value in that it was given, for the most part, by practical men speaking from their own experience.

The contest centred around three major and a number of minor issues. The first major feature was the question of the amount of butterfat per cow that might reasonably be expected to be recovered from an average herd grazed upon the property. The second material feature had relation to the value of an area of ti-tree which is immediately available for disposition as firewood without prejudicing the farm or the farming operations. The third major issue concerned the claim by the appellant that credit should be given for the amount by which the dwelling upon the property exceeds in value the value of what would, in other circumstances, be a sufficient and adequate residence.

Outside of these three phases, the appellant was concerned, for the most part, to get not the elimination, but modifications only of a few items of expenditure charged in the budget of the principal Crown witness. For instance, exception was taken to travelling-expenses being charged at the sum of £20 per annum. Then it was claimed that a telephone was not a necessary or proper expense, having regard to the proximity of the property to the town, and that the charge for book-keeping was too high. Some claim was also made that the Crown witness had charged an excessive sum for the maintenance of fencing, but on this latter topic no definitive evidence was led.

The Court said: "It is pertinent to comment that, as the property was agreed to be sold at £3,775 and the Committee consented to the sale at £3,350, a sum of £425 only was in difference. Such being the case quite minor increases in income or decreases in expenditure would easily tend, in whole or part, to eliminate this difference. It is not surprising, in consequence, that the case was presented with meticulous care.

"A number of the minor issues call for but little comment. In the first place, it is common ground that the ti-tree can be disposed of for firewood without prejudicing the necessary shelter on the land. It is also common ground that this ti-tree is worth at least £200 to the landowner. This sum of £200 represents a very real capital asset immediately available to the landowner, and the value of the property should clearly be increased by that amount. On this point there is no contest.

"There was some dispute concerning the travelling-expenses which were charged in the budget at £20 per annum. The justification for the inclusion of the item, or the major part of it, was the cost involved in inspecting and supervising the stock when the latter is put out for two months for winter grazing. As the property is within one mile of the post-office at Dargaville, any travelling necessitated by the farming operations other than that due to the winter grazing must be of very limited extent. However, in view of the conclusion the Court has reached on another phase of the case, it is not necessary to determine this minor question.

"The Crown budget allows £6 for the rent of a telephone, but a telephone has never been used on the property during all the years it has been occupied, and there is none there now. It would seem, therefore, that experience has shown that a telephone is not necessary. This is in accordance with what might be expected where the property is within walking distance of a compactly settled borough. It is thought, therefore, that this item of £6 per annum might well be eliminated. This will add approximately £133 to the aggregate productive value of the prope ty.

"The question of what might be called the excess value of the house provoked but little dispute. It is a particularly good house and, by common agreement, is in particularly good condition. It is not an excessively valuable residence, having regard to the situation and character of the property, and there seems no reason why credit should not be given for the value it represents above normal requirements.

"It is first, however, necessary to ascertain the value of the house. The only feature in dispute in that regard related to the price to be allowed for the veranda space. This space is not abnormal, but quite usual, as was admitted by the Crown. The appellant's witness assessed a value of £1 a foot for the whole 1,798 square feet contained in the house, whilst the Crown witness allowed £1 a foot for 1,564 square feet, but 10s. a foot only for the 234 square feet comprised in the veranda.

"This topic was the subject of a judgment of the Court recently at Auckland (*No. 11—H. to S.*) in a case where an architect of the highest standing demonstrated that, where a veranda space is normal, and not excessive, in relation to the size of the house, it is not just that the veranda space should be assessed at a lower rate than the rest of the house. As he pointed out, the kitchen and bathroom would cost very much more than the sum allowed per square foot over all, and this under assessment of value in respect of these particular parts of the house are compensated for by allowing the same average rate in respect of the veranda. This view of the position would show that a sum of £117 should be added to Mr. O.'s assessment of the value of the house, and it would not be unjust if this sum were treated as fairly representing the sum by which the value of the house exceeds the value of the residence normally required.

"It will be seen that at this point the productive value in the opinion of the Court should be increased as follows: £200 in respect of the ti-tree firewood presently available for disposition; £117, being the additional value of the house above normal; £133 in respect of additional productive value due to the absence of necessity for a telephone.

"Against the aggregate of these items must be allowed the sum of £400 necessary to be spent to establish a cow-shed and piggeries. This item was not deducted in the budget submitted to the Committee.

"In the result, at this point the productive value has to be increased by a sum of £50 on account of the items heretofore mentioned, leaving a sum of £375 difference between the sale price and the productive value after taking into account those features to which reference has been made. This difference in price could only be allowed to the appellant if the productive capacity of the herd has to be treated as exceeding the 240-lb.-per-cow-per-annum basis to which the Crown witness testifies. As it is, without manure and with a herd consisting of an undue proportion of heifers owing to the bad condition in which the herd was handed over by a share-milker in 1942, the appellant got 10,598 lb. of butterfat from a herd of forty-five cows in the 1943–44 season. This shows an average production of 235½ lb. per cow per annum, and represents a marked increase from the previous season when, from the same herd of which she had just resumed possession, she recovered 8,989 lb.

"This recovery in output is indicative of an ability to secure an increased production per cow, and conforms in this respect to the average production of 252 lb. per cow secured by all the reasonably competent farmers in this very limited district whose returns were made available to the Court.

"The evidence in its totality suggests that an average herd on the appellant's land, under the management of an average efficient farmer, would produce 250 lb. of butterfat per cow per annum, and might well produce more. If the productive capacity is treated at 250 lb. per cow, this will increase the capacity of the property by more than enough, after allowing all proper deductions to cover the deficiency above mentioned.

"For the reasons given, the Court is satisfied that the basic value of the property is not less than the £3,775 at which the appellant gave an option to purchase, and the basic value is therefore declared to be that sum accordingly."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Goulding, S.M.'s, Petition.—The profession will welcome the recommendation of the Public Petitions (A to L) Committee of the House of Representatives on the petition of A. M. Goulding, S.M. Government after Government has appointed Magistrates as chairmen of special Boards and Commissions of Inquiry, usually paying them a fee or remuneration for the special work, while at the same time allowing them to continue to receive their usual salaries as Magistrates. To such a course there are at least two objections. First, it throws extra work on the other Magistrates. Secondly, and more important, it means that there are plums for some Magistrates but not for others—a matter that necessarily imperils the independence of the Magistracy. It is extraordinary that the practice has been allowed to continue for so many years without protest, and it is to be hoped that the recommendation of the Committee will be given effect to by the Government.

Opening the Defence in Criminal Cases.—Recently, in Wellington, Blair, J., trying a criminal case, interrupted the opening address of counsel for the accused, saying, according to *The Dominion* (Wellington):

> You have been addressing the jury for half an hour. Would you mind telling me what your case is? You have made some points destructive of the truth of the Crown case. There is a time provided for that. . . . If you propose to open the case to the jury, why not open it? The jury want to know what your case is. A certain amount of comment is incidental to the opening, but when it is a question of collating it, the time to do so is in your final address.

Scriblex would think that the learned Judge's observations must be regarded as being directed simply to the circumstances of the particular case which was before him and cannot properly be taken as laying down a general rule that counsel opening for an accused in criminal proceedings must confine himself to outlining and explaining the effect of the evidence which he proposes to call. In criminal proceedings, it has never been the practice, either in England or New Zealand, to place strict limits on the ambit of the opening address of counsel for the accused. Primarily, no doubt, the purpose of such an address is to outline and explain the evidence proposed to be called, but it cannot be said that there is any hard-and-fast rule that the opening must be so limited. The general practice has always been to allow counsel a considerable degree of latitude in the matter of including in his opening address comments critical of the Crown case and Crown witnesses. Such comments, for instance, formed the main part of the opening speech of the present Lord Chancellor when, as J. A. Simon, K.C., he was leading counsel for Lord Kylsant in the *Royal Mail Case.* Those who care to take the trouble to peruse the cases in the *Notable British Trials* series where evidence was called for the defence will probably find other instances of defence openings by no means confined to outlining the evidence to be called.

Humour Misunderstood.—Frank Lockwood, Q.C. (1846-97), was one of the ablest and most popular counsel of his day. He had a keen sense of humour. On one occasion the American Bar Association invited Lockwood, together with the then Lord Chief Justice, Lord Alverstone, to go to the United States for one of the Conferences of the Association. At functions associated with the Conference Lockwood made several lighthearted speeches which were greatly enjoyed by the members of the American Bar. Augustine Birrell in his biographical sketch *Sir Frank Lockwood* tells how Lockwood entertained one audience with the following entirely apocryphal story :—

> I remember on one occasion defending an innocent man—it has not often fallen to my lot to defend so innocent a man. When I asked the solicitor who instructed me about the case to tell me what the defence was, he said: "It is an alibi." Said I: "No better defence can be proffered to any Judge; tell it to me." He said: "It was on the 15th March, as you are aware, that this innocent man is charged with this offence at York." York is my own constituency, and I defend my constituents on reasonable terms. He said: "On the 15th March, our client, so far from being in York, was in Manchester attending a race-meeting." I said: "I don't like it. It may offend the Nonconformist conscience." "Well," says he, "let that pass. He was at Blackpool." "Where?" I said. "Drinking at the bar of a public house and I have got the barmaid to prove it." This I rejected on the ground that the public house might be a stumbling-block to some. "Well, what do you think of this?" says he. "Wolverhampton, in a second-hand furniture dealers' shop buying a coffin for his mother-in-law, and I have got the book to prove it." I said: "That is the alibi for our innocent man." Well, we tried that man and he was convicted, and at the conclusion of the trial I had an opportunity of conversing with the learned Judge who tried the case. Said he: "That was a goodish alibi." Said I: "It ought to be, my Lord, it was the best of three."

Some of the hearers of the story took it seriously and were outraged at its ethics. Lockwood found himself involved in a considerable correspondence answering criticisms of his conduct.

The Censorship Case.—Many of the public seem to imagine that the judgments of the majority of the Full Court in *Billens* v. *Police* have placed substantial fetters on the censorship. This impression is erroneous, but it is not difficult to see how it has been created. During the argument all three members of the Court made a number of comments—some of them strongly critical—about the censor and his powers. These observations were given considerable prominence in the newspapers, and the result was that many of the public came to believe that the appeal raised wider issues than was in fact the case; and then, when the majority judgments came to be delivered in favour of the appellant, the inference was erroneously drawn by many people that the Court had clipped the censor's wings. Judges are not to be blamed if the public wrongly imagines that the Court has decided more than is in fact the case, but, nevertheless, one may perhaps be forgiven for wondering whether it might not have been better had stricter limits been placed upon the observations during the argument. Lawyers understand that comments made by Judges during an argument are made simply in an exploratory way for the purposes of testing the submissions of counsel and are not to be taken as indicating any predilection of view on the part of the Court. The public, however, is inclined to take the observations at their face value and when, as in *Billens* v. *Police,* the comments appear to be critical of matters which may be said to be part of the policy of the Government of the day, there is a danger that unthinking members of the public may misconstrue the purpose of the comments.

LAND AND INCOME TAX PRACTICE.

Assessment of Visitors to New Zealand and Australia.

Persons who are not normally resident in New Zealand become liable for New Zealand taxation if they derive income from New Zealand during the course of their visit. The law in this connection is contained in the following provisions of the Land and Income Tax Act, 1923 :—

Section 84. Income derived from New Zealand or abroad : how far assessable.

(2) Subject to the provisions of this Act all income derived from New Zealand shall be assessable for income-tax, whether the person deriving that income is resident in New Zealand or elsewhere.

Section 87. Classes of income deemed to be derived from New Zealand.

The following classes of income shall be deemed to be derived from New Zealand :—

(*b*) All salaries, wages, allowances, and emoluments of any kind earned in New Zealand in the service of any employer or principal, whether resident in New Zealand or elsewhere.

The foregoing provisions bring the income to assessment. The fact that income earned in New Zealand may be subject to assessment in another country is not sufficient to confer exemption in New Zealand. The section providing relief from double taxation does not apply to exempt income not derived by a resident—Section 89 reads :

Exemption of income chargeable with tax in other British dominion.

(1) Income derived by a person resident in New Zealand but *not* derived from New Zealand shall be exempt from income-tax if and so far as the Commissioner is satisfied that it is derived from some other country within the British dominions and that it is chargeable with income-tax in that country.

The amount of special exemption allowable as a deduction from the assessable income of visitors is determined by reference to s. 7 (3) of the Land and Income Tax Amendment Act, 19:9, which provides that from the yearly assessable income of every person whose home is not in New Zealand during any part of the income year, and who is personally present in New Zealand during any part of the income year for the purpose of deriving income from New Zealand, there shall be deducted a proportionate part of the personal exemption (now £200) based on the number of days present in New Zealand for the purpose of deriving income. No other special e emptions are allowable.

It does not necessarily follow, however, that the whole of a visitor's remuneration earned in New Zealand or elsewhere during his period of stay in New Zealand must be included in his assessment for New Zealand income-tax.

For example, a company executive who is paid a fixed salary may be sent from his normal location in Australia to New Zealand for the purpose of performing additional special work for the New Zealand branch. While in New Zealand he is expected to continue certain administrative duties in connection with the Australian firm. For the additional work in New Zealand he is paid a fee definitely and specifically attributable to the services performed in New Zealand, such fee being charged against the New Zealand branch. In such circumstances, an assessment would be made upon the stated fee paid from the New Zealand branch only, and not upon the total remuneration from Australia and New Zealand.

In view of the frequency of visits made by New Zealand residents to Australia to perform special duties over a short period in that country, it is of interest to note the Australian practice, which was recently stated in *The Taxpayers Bulletin* (April, 1944), as follows :—

Temporary Visitors to Australia.—Section 23 (*c*) (vi) of the Income Tax Assessment Act, 1936/1943, provides for the exemption of income derived "by a person visiting Australia, from an occupation carried on by him while in Australia, if, in the opinion of the Treasurer, that visit and occupation are primarily and principally directed to assisting the Commonwealth Government or a State Government in the settlement or development of Australia."

To determine the eligibility of an applicant for exemption under this section, the Commissioner of Taxation is requiring the following information :—

1. What are the terms of applicant's contract of service in Australia ?

(*a*) Period of service ;

(*b*) Rate of remuneration ;

(*c*) Does contract provide for payment of fares to Australia and also payment of fares for return journey ;

(*d*) Any other relevant particulars.

2. Does the contract contain any terms relating to applicant's return after period of service in Australia is completed ?

3. How was applicant employed immediately prior to date of Australian engagement ?

4. Has that engagement been terminated absolutely ?

5. If reply to (4) is in negative, what are the contractual relations extant with previous employer ?

6. If there is no contractual relationship, is there any understanding between applicant and previous employer ? If so, what is the nature of the understanding and how is it evidenced ?

7. What is the conjugal condition of the applicant ?

8. Are there any dependent children ?

9. Has taxpayer brought his wife and/or dependent children to Australia with him.

10. Is claimant maintaining a home in the country from which he left to come to Australia ?

11. Will claimant's engagement in Australia result in loss of residential qualification in the country which he left ?

12. Will claimant be subject to income tax in his home country in respect of the personal exertion income earned in Australia ?

13. In the negotiations for engagement was any stipulation made or understanding arrived at with regard to Australian income-tax ?

14. Does claimant intend to return to his home country when present engagement is terminated ? If so, is there any material evidence of such intention ?

It is noteworthy that the Australian law also contains the following special provision to exempt from Australian tax income derived by commercial executives who are visitors to Australia.

Section 23 (*c*) exempts income derived "as director's fees or salary by a non-resident during a visit to Australia during which he acts as a director, manager, or other administrative officer of a manufacturing, mercantile, or mining business or of a business of primary production, if the visit of the non-resident to Australia does not exceed six months."

In reverse circumstances—*i.e.*, where Australian residents earn income in New Zealand and are made liable for New Zealand income-tax thereon, it should be noted that s. 23 of the Commonwealth Income Tax Assessment Act contains the following relevant provisions to exempt the income from Australian income-tax—

23 (*q*) Income derived by a resident from sources out of Australia where that income is *not exempt* from income-tax in the country where it is derived : . . .

Provided that this paragraph shall not apply to exempt any income unless, where there is a liability for payment of income-tax in the country where that income is derived the Commissioner is satisfied that the tax has been or will be paid . . .

For social security charge and national security purposes a person is not liable for the combined charge unless he is "ordinarily resident in New Zealand for the time being." There is no special meaning attached to the phrase "ordinarily resident," and each case is dealt with on its merits.

In practice, the Commissioner regards persons who arrive in New Zealand and derive income therefrom, and whose definite intention, at the date of arrival, is to remain for less than twelve months, as not "ordinarily resident" for social security charge and national security tax purposes. For income-tax purposes such persons are "absentees" personally present in New Zealand for the purpose of deriving income.

(*a*) **Social Security Contribution.**—Provided the person's original intention as to length of stay for less than twelve months is adhered to, there is not any liability for social security charge and national security tax in respect of earnings in New Zealand. It is not necessary to obtain a registration fee coupon book, or to register under the Social Security Act. If application is made to the Commissioner of Taxes before salary or wages are received, the Commissioner will, on being satisfied as to the facts, furnish a certificate authorizing the employer to pay salary or wages free of deduction of social security charge and national security tax. Any charge which has been deducted

at the source of salary and wages will be refunded on production of a certificate from the employer, when application is being made for a clearance certificate at the conclusion of the visit. The employer's certificate must include :—

(i) Taxpayer's full name.
(ii) Period of employment.
(iii) Amount of salary or wages earned.
(iv) Amount of social security charge and national security tax deducted.

The employee must also state the amount or value of any social security benefits received.

(*b*) **Income-tax.**—From the total assessable income, a proportionate part of the annual special *personal* exemption only is deductible, based on the number of days spent in New Zealand.

PRACTICAL POINTS.

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1. Mortgage.—*Land without Direct Road Frontage.*

QUESTION : A. is the registered proprietor of a fully-guaranteed Land Transfer title issued in 1889 ; the land included therein has no road frontage, access being obtained to the nearest street by means of a right-of-way. The right-of-way does not purport to be appurtenant to A.'s title, and there is no certificate of title issued for the fee-simple of the right-of-way. My client, B., proposes to take a mortgage from A. Could the District Land Registrar refuse to register the mortgage from A. to B., and a transfer in exercise of power of sale should default be made later under the mortgage, on the ground that the land has no road frontage ?

ANSWER : The District Land Registrar could not decline to register the mortgage because s. 125 of the Public Works Act, 1928, does not apply to a mortgage. Section 125 only applies where the owner sells *part* of his land, and "owner" includes mortgagee exercising power of sale. Therefore the only ground for declining to register a transfer in pursuance of power of sale would be that at that time the mortgagee also owned adjoining land : *Peers* v. *McMenamin*, (1908) 27 N.Z.L.R. 833.

The reason why the land has no legal road frontage is that in 1889, there was no provision corresponding to s. 125 of the Public Works Act, 1928 ; at that date, the common law as to subdivisions of land prevailed.

2. Probate and Administration.—*Sale by Administrator—Land Transfer Title in his Name—Proposed Sale without consent of all Beneficiaries—All Debts paid.*

QUESTION : A. is on the Land Transfer Register, as administrator of D., by virtue of a transmission. D. died intestate, and those entitled beneficially are A., B., C., E., and F., his children. B., C., and E. have consented to a proposed sale from A. to P. ; the sale is considered by them very advantageous, inasmuch as the property has been very difficult to sell. Unfortunately F. is in a prisoner of war camp abroad and his consent cannot be obtained. A., however, is quite certain that F. would consent to the sale and is willing to take the slight risk of an action by him for damages. Can A. confer a good title on P. ? Can the District Land Registrar refuse to register the transfer ? A search of the title discloses no caveats. All debts in D.'s estate have long since been paid. What recitals should there be in the transfer ? Should B., C., and E. execute the transfer ?

ANSWER : A. can confer a good title on P. : s. 124 (2) of the Land Transfer Act, 1915. The District Land Registrar cannot decline to register the transfer, if there is no recital as to the beneficial ownership. There should be no recitals in the transfer and in the circumstances the beneficiaries should not execute it : *In re Transfer, Fairbrother to Allan*, (1896) 15 N.Z.L.R. 196, in which case it will be observed there were no recitals. Unless the District Land Registrar is put on inquiry by notice of some irregularity he must act on the maxim, *Omnia praesumuntur rite esse acta. Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, and *B.* v. *M.*, [1934] N.Z.L.R. s. 105, show that the purchaser would get an indefeasible title.

For his protection, it would be advisable for A. to get an indemnity from B., C., and E.

3. Magistrates' Court.—*Execution—Application for Leave—How obtained.*

QUESTION : How should leave be obtained to issue execution under s. 119 of the Magistrates' Courts Act, 1928 ?

ANSWER : On *ex parte* application supported by affidavit. In *Taylor* v. *Taylor*, (1941) 2 M.C.D. 274, 275, it is stated that there is no necessity to explain or account for the delay ; but in the form given in *Chitty's King's Bench Forms*, 15th Ed. 572, 573, one of the clauses reads : "3. Here state the facts showing why execution has not been issued sooner, and why it should be issued now." The other clauses are to the following effect : (1) relates to recovery of the judgment ; (2) no sum (or what sum) has been paid ; (3) that the judgment remains in full force ; (4) no change has taken place in the parties ; (5) amount for which execution should issue : see also 1941 *Annual Practice*, 779, para. "Practice," &c. ; and *Stephens's Supreme Court Forms*, 270 (No. 245) ; and cl. 6 in the form of affidavit (state reason for any apparently undue delay).

RULES AND REGULATIONS.

Invercargill Licensing Trust (Travelling-allowances) Regulations, 1944. (Invercargill Licensing Trust Act, 1944.) No. 1944/116.
Stone-quarries Amending Regulations, 1944. (Stone-quarries Act, 1910.) No. 1944/117.
Local Authorities (Primary Production) Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/118.
Rationing Emergency Regulations, 1942, Amendment No. 3. (Emergency Regulations Act, 1939.) No. 1944/119.
Prisoners of War (Discipline) Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/120.
Trout-fishing (Grey) Regulations, 1943, Amendment No. 1. (Fisheries Act, 1908.) No. 1944/121.
Noxious Weeds Act Extension Order, 1944. (Noxious Weeds Act, 1928.) No. 1944/122.

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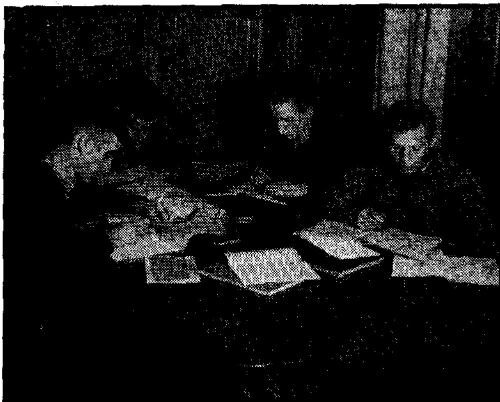

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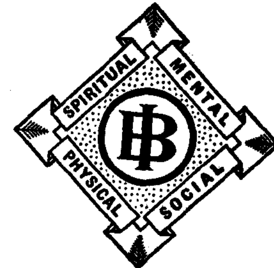

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