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" Do everything at your best. I can assure you I have taken as great pains with the smallest thing I ever did, as with the biggest."

—CHARLES DICKENS to his son, the late Sir Henry Dickens, K.C., in the latter's *Recollections*. (Wm. Heinemann, Ltd.).

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Solicitor-Trustee Partner and Profit Costs.

A SOLICITOR who is also a trustee cannot charge profit costs for work done in relation to his trust unless the testator or creator of the trust has expressly authorized him so to charge. This general and well-known principle was expressed by Lord Cranworth in *Broughton v. Broughton*, (1855) 5 DeG. M. & G. 160, 164, 43 E.R. 831, 832, when, after saying that it was not stated so widely as it ought to be stated by saying that a trustee shall not be able to make a profit out of his trust, he continued :

> " The rule really is that no one who has a duty to perform shall place himself in a situation to have interests conflicting with that duty ; and a case for the application of the rule is that of a trustee doing acts which he might employ others to perform, and taking payment in some way for doing them. The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust—namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee."

From another viewpoint, Lord Langdale, M.R., in *Todd v. Wilson*, (1846) 9 Beav. 486, 488, 50 E.R. 431, 432, summed up the position of a solicitor-trustee acting as solicitor when legal work was done in the execution of the trust as follows :

> " He was both solicitor and client : he was acting as solicitor for himself, in his character of trustee."

The foregoing is clear and well-settled law ; but difficulty arises in applying it to circumstances wherein a solicitor-trustee is a member of a partnership firm. The question arises as to whether his firm or his partners may receive profit costs for work done for his trust. In *Bainbrigge v. Blair*, (1845) 8 Beav. 588, 50 E.R. 231, it was held that, though a trustee acting as solicitor is entitled only to out-of-pocket payments, compensation may be made to him, in special cases, by order of the Court authorizing him to retain a fixed allowance but not allowing him usual professional charges. This applies also to a solicitor-trustee who is a member of a partnership firm, as appears from *In the Will of Edward Costley*, (1884) N.Z.L.R. 3 S.C. 155, where Gillies, J., said :

> " The accounts charged by the legal firm, of which one of the executors is a member, cannot either on principle or authority be allowed, except so far as outlay is concerned."

This was an application by executors for commission which was allowed, His Honour concluding his judgment as follows :

> " The accounts of the legal firm referred to, which are by no means excessive in their charges, I have gone over, and thereby obtained a pretty good idea of the trouble the executors have been put to, and I think the percentages I have indicated above will amply remunerate the executors over and above the amount of these legal charges, which must be disallowed."

In general, the problem arises differently : the solicitor-trustee naturally refers legal work in connection with his trust to his own office ; can his partners separately, or can his firm, take what he individually may not take if he were practising on his own account ?

In *Christophers v. White*, (1847) 10 Beav. 523, 50 E.R. 683, it appeared that one of the trustees, White, was a solicitor practising in partnership, but, he being incapable from ill-health, the whole of the legal work relative to the trust was done by his partner. Lord Langdale, M.R., in allowing only out-of-pocket payments to the firm, said the work was done for the trustee's profit as a partner,

> " and is the same as if two partners divide their business, one attending to the law department, and the other to the equity, in which case each acts for the profit of the other. Would this Court allow a trustee to say to his partner, ' you shall act as solicitor, and earn all the profit you can for the concern,' I think that could not be maintained."

In *In re Doody, Fisher v. Doody*, [1893] 1 Ch. 129, Stirling, J., after referring to the above quotation, from Lord Cranworth's judgment in *Broughton v. Broughton*, said :

> " As a general rule, neither a solicitor-trustee nor a firm of which the trust is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust."

That there were exceptions to the rule, Stirling, J., admitted. He referred to *Clack v. Carlon*, (1861) 30 L.J. Ch. 639, where Wood, V.-C., as he then was, held that a solicitor-trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to affairs of the trust and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself should not derive any benefit from the charges. " Nothing short of this will be sufficient." In the course of his judgment, Wood, V.-C., had said :

> " I apprehend that the true ground of the rule is simply that a trustee ought not to make any profit out of his trust ; and it is distinctly sworn in this case that no such profit is received or receivable by Mr. Carlon. No doubt there is force in the argument that such an arrangement affords a means of collusion and duplicity. But the same remark applies with no less force to the case of a solicitor-trustee who employs another solicitor. It was said that partners might make an arrangement that each should take the other's trustee business, and thus a door for fraud be opened. I confess I see no reason why such an arrangement should not be made, or why a trustee should not be able to say to his partner ' *Quoad* this transaction, we are not in partnership.' He may then employ his partner in the same way as he might employ his town agent, and the parties will stand in the same position as anybody else."

In *Cradock v. Piper*, (1850) 1 Mac. & G. 664, 41 E.R. 1422, it was held by Lord Cottenham, L.C., that where a solicitor (or his firm) appears in a suit or action on behalf of himself and a co-trustee, and the expense has not thereby been increased, then the solicitor, or his firm, as the case may be, is entitled to the usual costs. Though this rule has been followed ever since, it has been adversely criticized—*e.g.*, by Lord Cranworth, M.R., in *Broughton v. Broughton* (*supra*) ; by Lindley and Lopes, L.JJ., in *In re Corsellis, Lawton v. Elwes*, (1887) 34 Ch. D. 675 ; and in *In re Doody, Fisher*

v. Doody (*supra*) and by Lindley, Bowen, and A. L. Smith, L.JJ., each of whom considered it ought not to be extended, the first-named saying:

> "If we thought it sound in principle we ought to extend it to cases which, although different, fall within its principle; but the better opinion being that the decision is unsound it ought not to be extended to any case not coming clearly within it."

Last year, in *In re Gates, Arnold v. Gates*, [1933] Ch. 913, the facts were that a firm of which a solicitor, who was co-trustee with a layman, was employed in administration proceedings, and in due course a bill of costs for work done by the firm was laid before the Taxing Master. It was shown that there was a custom in the firm that where one of the partners was a trustee, and the firm did any work in connection with the trust, the profit costs of the firm would be credited only to the remaining partners, and it had been suggested that an agreement to that effect should be entered into. The Master allowed out-of-pocket expenses, but decided that profit costs of the firm should not be allowed, owing to the fact that no such power had been given in the will, and also owing to the fact that there was no such agreement in writing, and it would be impossible then to make an agreement which would have a retrospective effect.

On appeal, Clauson, J., held that the firm was not entitled to charge its profit costs, even though there was an agreement between the partners that only the partners who were not trustees of the particular trust funds would be entitled to have the profit costs shared between them. His Lordship said, at p. 918:

> "It is true there is authority for saying that if a litigant, being a solicitor-trustee, is in partnership with other solicitors he may employ those partners to act for him as his solicitors provided that none of the profit costs which those partners make find their way into his own pocket. . . . Accordingly if the plaintiff had employed other members of the firm to act as his solicitors, I should have felt justified for the reasons expressed by Stirling, J. [in *In re Doody, Fisher v. Doody, cit. supra*], in allowing his partners to take the profit costs. . . ."

> "There appears to be no authority for saying that a solicitor-trustee who has two partners and whose firm acts as solicitors for him, is in any better position than a solicitor-trustee who, carrying on business alone and not in partnership, acts as his own solicitor in the matter of his trust. In such a case it appears to me plain that he could not be allowed to charge profit costs, and I do not see how, in the circumstances of the case with which I have to deal, profit costs can be allowed."

His Lordship, after dealing with and overruling the Master in his objection on the ground that there was no express agreement in writing to exclude the solicitor-trustee partner from sharing the profit costs, said the real difficulty would not be dissipated even if there were such an express agreement between the three partners. But, he added,

> "It would be dissipated if I were satisfied that, instead of the firm having been employed as solicitors, the solicitor-trustee's partners had been so employed and acted in that capacity, with, of course, proper safeguards against any portion of the profit costs coming into the hands of the solicitor-trustee; but I am told that it cannot be said with truth that that was the case."

More recently, the question again came up in *In re Hill, Claremont v. Hill*, [1934] W.N. 134, C.A. The plaintiff was a solicitor, a member of a firm in which there were two other partners, and he was one of the trustees under a trust deed. In August, 1929, he came to an agreement with his partners that owing to his advancing years and indifferent health he should cease to be an ordinary working partner and should only attend at the office at such times as he might find convenient to himself, and that for consultative purposes; and that he should receive a fixed sum of £600 per annum payable out of the firm's profits. He employed his firm throughout in connection with the affairs of the trust which had for a long time been attended to by one of the other partners; and the latter, with the exception of two or three letters written by the solicitor-trustee himself, had done the whole of the business which was the subject of the bill of costs before the Court. The solicitor-trustee in his affidavit said that the sum of £600 per annum which he received was a small fraction of the firm's profits, in which otherwise he had no interest; he was not entitled to any part of the costs in question, as the firm's profits earned earlier in the financial year in which the work was done greatly exceeded the £600 received by him.

The Taxing Master disallowed the profit costs on the ground that the plaintiff, a trustee without power to charge profit costs, employed his firm to do the work, and he considered the case concluded by *In re Gates, Arnold v. Gates* (*supra*). On appeal, Eve, J., upheld the Taxing Master and dismissed the summons. The plaintiff appealed, and the Court of Appeal (Greer and Maugham, L.JJ.) dismissed the appeal. Greer, L.J., after referring to *Christophers v. White* (*supra*) where there was no limitation of the share of the solicitor-trustee's share of profits, said that the fact that the present trustee's share of the profits was limited to £600 made no difference:

> "Theoretically, the business of the firm might not be so profitable as to make his share of the profit as much as £600 per annum. But in fact at the time the work was done the profits of the firm exceeded very considerably the plaintiff's share of £600. But His Lordship did not think that made any difference. It was sufficient if the plaintiff's conduct of the case might have been influenced by the fact that his firm were entitled to profit costs."

Maugham, L.J., referred to the exception to the general rule as the result of the decision in *Clack v. Carlon* (*supra*), and pointed out the two material things in that case as being (*a*) that one partner should act as the solicitor-trustee's solicitor in connection with the trust; and (*b*) that the partner so acting should receive for his own benefit the whole of the costs and charges for so doing. "That common sense decision has been followed ever since, but it has never been extended," His Lordship said; and he added that he thought it impossible to extend the rule in *Clack v. Carlon* to the case before him:

> "What has been done in the present case was not what Wood, V.-C., said should be done. The trustee did not say to his partner, '*Quoad* this transaction we are not in partnership.'"

His Lordship said he agreed with what Stirling, J., had said in *In re Doody, Fisher v. Doody* (*supra*).

Both Lords Justices considered it unnecessary to refer to last year's decision of Clauson, J., *In re Gates, Arnold v. Gates* (*supra*), which was not precisely in point, but in Their Lordships' present view it had been correctly decided.

It, therefore, appears both on principle and present authority that, in the absence of an express power in the instrument authorizing a solicitor-trustee to charge usual professional costs in relation to the trust business, in order that his partners shall not be penalized by reason of his being a trustee, the partnership must be suspended *ad hoc* by written agreement to effect the exclusion of the solicitor-trustee from participation in the profit costs of work done by his partners as solicitors for his trust.

Summary of Recent Judgments.

SUPREME COURT
Palmerston North.
1934.
August 1, 2.
Ostler, J.

IN RE BASSETT (DECEASED), BASSETT AND OTHERS v. BASSETT AND OTHERS.

Trusts and Trustees—Will—Annuitant and Remaindermen—Farming Business carried on by Trustees pursuant to Will—System of Accounting—Standard Value of Stock.

The proper method of keeping the trust accounts of a farming business, where there are life tenants or annuitants and remaindermen, is by taking a standard value at the commencement of that period and maintaining that standard value throughout, the duty of the trustees being to see that so far as number and quality are concerned the stock is kept up to the standard value.

It is not proper, therefore, for trustees in the trust of any such farming business to value the live stock at the end of each year for the purpose of their accounts.

In re Angas, [1906] S.A.L.R. 140, and **In re Macpherson,** [1913] S.A.L.R. 209, applied.

In re Thornley, Boyd v. Thornley, [1925] V.L.R. 569, **Littlejohn v. Davies,** (1916) 16 N.S.W.L.R. 183, and **In re Brunette, Public Trustee v. Brunette,** [1922] N.S.L.R. 490, referred to.

Anson v. Commissioner of Taxes, [1922] N.Z.L.R. 330, and **Macfarlane v. Commissioner of Taxes,** [1923] N.Z.L.R. 801, distinguished.

Counsel: Dorrington, for the plaintiffs; **A. M. Ongley,** for the defendant trustees Thompson and Bassett; **Lloyd,** for the defendant trustee Stewart; **H. R. Cooper,** for Mrs. Just, Mrs. Bell, and their children.

Solicitors: P. W. Dorrington, Dannevirke, for the plaintiffs; **Gifford Moore, Ongley, and Tremaine,** Palmerston North, for the defendants; **Lloyd,** Dannevirke, for the defendant Stewart; **Cooper, Rapley, and Rutherfurd,** Palmerston North, for Mrs. Just, Mrs. Bell, and their children.

SUPREME COURT
Nelson.
1934.
July 26; Aug. 3.
Reed, J.

CHAMBERS AND OTHERS v. NELSON CITY CORPORATION.

Landlord and Tenant—Lease—Construction—Provision avoiding the lease and "every clause and thing therein contained" if lessee in arrear with rent or going into liquidation—Proviso allowing lessee to remove buildings "on the termination of the term hereby granted"—Lessee Company in liquidation and lessor re-entering during term—Right to remove buildings lost.

Originating summons for the interpretation of a lease executed by a company on December 19, 1932, for a term of twenty-one years, with permanent right of renewal at valuation subject to due compliance with all covenants and conditions. The lessee covenanted, *inter alia*, to expend not less than £2,000 in the erection and completion of a building suitable for the business of curing, treating, packing, and/or manufacturing of tobacco products, and further covenanted to use the building for such purposes, only. The building was duly constructed, but, before occupying it, the company went into liquidation, and the lessor gave notice of intention to re-enter and determine the lease. The liquidators of the company claimed the right to remove the buildings.

The lease contained the following provisions:—

"Provided that . . . . if the lessee shall become bankrupt or shall go into liquidation . . . . it shall be lawful for the lessor or any person duly authorized by it in its behalf into and upon the said demised premises or any part thereof in the name of the whole to re-enter and thereupon this present lease and every clause and thing herein contained shall absolutely cease determine and become void . .

"Provided always that on the termination of the term hereby granted the lessee upon payment of all rent and other moneys due up to the date of such determination shall be at liberty for the space of one calendar month thereafter by its agents and workmen to enter upon the said lands for the purpose of removing all buildings erected thereon, the property of the lessee . . . ."

A later clause was as follows:—

"If the lease hereby granted is not renewed in accordance with the foregoing provisions or if it is determined by forfeiture re-entry or otherwise all buildings and improvements on the land demised shall absolutely revert to the lessor free from any payment or compensation whatsoever."

On originating summons to determine whether or not, under the terms of the lease, the liquidators were entitled to remove the buildings,

R. H. Mackay, for the plaintiffs; **Glasgow,** for the defendants,

Held, That the clauses were consistent and the later one emphasized the position that unless the terms of the lease were complied with for the full term of twenty-one years there was no right to remove the buildings, the right to remove the buildings being "upon the termination of the term granted," not, as in the usual form, "at the end or sooner determination of the term granted."

Solicitors: J. Stanton, Auckland, for the plaintiffs; **Pitt and Moore,** Nelson, for the defendants.

SUPREME COURT
Wellington.
1934.
July 17;
August 6.
Myers, C.J.

NEWMAN BROS., LIMITED v. ALLUM, S.O.S. MOTORS, LIMITED (in Liquidation), AND OTHERS.
JENKINS' MOTOR SERVICES, LIMITED v. ALLUM, S.O.S. MOTORS, LIMITED (in Liquidation), AND OTHERS.

Transport Licensing—Procedure where Three Applicants for License for Passenger Service and Room for One Service only—Applicant a Company in Liquidation—Application for License by Receiver for Debenture-holders—Validity thereof—"Financial ability" of Applicant to carry on proposed Service—Right of Licensing Authority where Company insolvent to take into Consideration ability of Debenture-holders to finance Operations pending Transfer to Government Railways Board—Preference to Board over other Applicants as Application for Extension of existing Transport Service—Transport Licensing Act, 1931, ss. 15, 20, 24, 25, 26, 27, 33, 35, 36, 43—Transport Law Amendment Act, 1933, s. 18.

Two actions, heard together, primarily concerning the renewal of two passenger-service licenses.

S.O.S. Motors, Ltd., held two passenger-service licenses under the Transport Licensing Act, 1931, authorizing it to conduct a passenger service between Wellington and Wanganui. In November, 1933, a receiver was appointed for the debenture-holders of that company. On February 12, 1934, he made in the name and on behalf of the company an application for renewal of the licenses, which expired on February 28, 1934, but by reason of the proviso to s. 33 of the said Act continued in force until the disposal of the application unless the Licensing Authority otherwise directed. No such direction was given. On May 19, 1934, an order was made for the winding-up of the company.

Two other companies, Newman Bros., Ltd., and Jenkins' Motor Services, Ltd., made application for new licenses. Admittedly there was room for only one service. The Licensing Authority considered the applications on May 23 and June 6,7, and 8, hearing each application and reserving his decision until he had heard all. The official liquidator of the S.O.S. Motors, Ltd., attended the first public sitting on May 23 and asked for an adjournment. At the subsequent sitting he did not attend; but the receiver or his counsel attended, purporting to act for the company. On June 8, licenses were issued and delivered to the S.O.S. Motors, Ltd., (*nunc pro tunc*) for a service to commence on March 1, 1934.

The two other companies, which had arranged to work for their common benefit the license that either might obtain, brought actions claiming, *inter alia* a writ of certiorari and a writ of

mandamus on the grounds, *inter alia*: (*a*) That the Licensing Authority should have dismissed the application made on behalf of the S.O.S. Motors, Ltd., for want of prosecution. (*b*) That he acted on extraneous considerations and on evidence that he was not entitled to take into account. An application was also made for an interim injunction, which was granted restraining the Licensing Authority from hearing or adjudicating upon the application for the transfer of the S.O.S. Motors, Ltd.'s, licenses to the Government Railways Board.

Harding, for the plaintiff, Newman Bros., Ltd.; **Marsack,** for the plaintiff, Jenkins' Motor Services, Ltd.; **P. B. Cooke,** for the defendant, J. C. Allum; **Baldwin** and **Abraham,** for the other defendants.

Held, 1. That the Licensing Authority's procedure in dealing with the applications was proper.

Rex v. Shann, [1910] 2 K.B., 418, 432, referred to.

2. That, although the right of a receiver to bind the company by contract terminates on the commencement of the liquidation, the receiver in making the application to the Licensing Authority was not binding the company by any contract or obligation, but seeking to obtain for it a valuable license.

3. That there was, therefore, a valid application made before the expiration of the license, the Licensing Authority had jurisdiction to grant a renewal and it was for him to decide on matters of both law and fact, and in such circumstances certiorari would not lie even though the decision, whether in law or in fact, might appear to be wrong.

Whitfield's Motor Service, Ltd. v. Matthews, [1932] N.Z.L.R. 1414, 1420, and **Rex v. London City Income Tax Commissioners, Ex parte Inland Revenue Commissioners,** (1904) 91 L.T. 94, applied.

4. That it could not be said that the Licensing Authority was wrong.

Gough's Garages, Ltd. v. Pugsley, [1930] 1 K.B. 615, applied.

5. That the Licensing Authority was not bound to refuse to renew the licenses or to refuse to take into consideration the ability of the debenture-holders to finance the company's operations pending the disposal of the license or the fact that there was an arrangement whereby almost immediately the license would be transferred to the Government Railways Board. Section 26 (2) (*a*) of the Act that the Licensing Authority shall take into account, *inter alia*, the financial ability of the applicant to carry on the proposed service and the likelihood of his carrying it on satisfactorily does not mean that the applicant must necessarily be in a position to carry on the proposed service with his own moneys.

Semble, Even if certiorari went, the plaintiff would not be entitled to a writ of mandamus, as (*a*) the provision for appeal contained in s. 43 of the Act as amended by the Act of 1933 provides a specific remedy which is not less convenient, beneficial and effective, than a mandamus would be;

Stepney Borough Council v. John Walker and Sons, (1934) 50 T.L.R. 287.

and, (*b*) if certiorari had gone and the plaintiffs could not have a writ of mandamus, the license would have lapsed and it would be competent for any person to apply under s. 24 of the Act for a new license. In that case an application by the Government Railways Board would be entitled to preference under s. 27 as being for a service which would be an extension of a transport service carried on by the applicant—*i.e.*, the Railway Service.

Shanghai Corporation v. McMurray, (1900) 69 L.J.P.C. 19, referred to.

Solicitors: Meek, Kirk, Harding, Phillips, and Free, Wellington, for the plaintiffs; **McKenzie and Marsack,** Masterton, for the plaintiff, Jenkins' Motor Services, Ltd.; **Hankins, Fitzherbert, and Abraham,** Palmerston North, for the defendants, S.O.S. Motors, Ltd., Barrand and Abraham, Ltd., H. S. Harman, Ltd., H. W. Paul, and F. Treloar.

Case Annotation: *R. v. Shann*, E. & E. Digest, Vol. 30, p. 51, para. 394; *Gough's Garages, Ltd. v. Pugsley, ibid.* Supplement No. 9 to Vol. 10, title *Companies*, p. 51, para. 5184 *b*.

NOTE:—For the Transport Licensing Act, 1931, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Transport*, p. 832.

Roads Trespassers and Children.

A Recent Decision Considered.

By S. A. WIREN, B.A., LL.M.

Can one suggest in a reputable journal that learned Lords Justices have been quibbling? I refer to the judgments in *Liddle v. North Riding of Yorkshire County Council*, (1934) 50 T.L.R. 377, but I do not wish to be understood as questioning the result of the decision. I comment merely on some of the dicta.

The defendant Council was improving an awkward corner on a main road. This was being done by widening the road on the inside of the turn and filling up the new part of the road to the level of the old part. They made a concrete foundation for the new part, and after providing for a grass verge beyond the metalled part of the road they erected a stone wall with a castellated top and made a retaining wall under the new part of the road. The wall was 4 ft. 6 in. high and from the top of the wall there was a drop of about 18 ft. into the field below.

On the Saturday afternoon when the accident occurred the defendants had finished putting in the foundations, the metalling of the road, and the building of the wall, but there was still a month's work to be done. Three or four days previously a mound of earth had been placed on the grass verge against the stone wall. It was removed on the following Monday. That morning they removed notices "Repair work in progress" and red flags which had been placed at some distances from the approaches to the work.

The boys of the neighbourhood had been warned by the defendants' workmen not to go on the pile of earth or climb on the wall, but, notwithstanding the warning, they did so, apparently to a considerable extent, though when seen they were chased away. The inevitable workman remembered warning the infant plaintiff off the work.

On the afternoon in question the infant plaintiff, aged six, was going on a message with some milk-cans from his home a quarter of a mile away to a house which was a short distance further on. Seated on the wall were two friends a little older than himself. They had climbed there by means of the soil. One of them said that the wall was too high for them to get on to if it had not been for the heap of soil. The plaintiff climbed up the same way and sat between them on the wall. He appears to have been saying something about how bees fly, and stretching out his arms overbalanced himself and fell into the field, receiving injuries in respect of which the jury awarded £1,500.

Mr. Justice Swift seems to have thought that the place was what the authorities call an "allurement" to children. Anyone who has walked with boys of this age would call it a direct challenge. The only Judge of the Court of Appeal who mentioned this aspect was Scrutton, L.J., whose opinion apparently was that the facts could not possibly justify referring to the wall and the mound as "an attractive and dangerous combination." The learned Judge, who some years ago was the hero of an article in the *Law Quarterly Review* intituled "The Judge as a Man of the World," does not give reasons for his opinion, but fortifies himself with citations that one must be Draconian and not humanitarian.

What the Court did decide was that the plaintiff was a trespasser, and therefore had to show that the defendants injured him intentionally or put dangerous traps for him intending to injure him, and as he could not do this he failed. The nebulous parts of the judgment are incidental.

Lord Justice Scrutton considered that no part of the new road construction had been dedicated to the public; Lord Justice Greer, that the newly constructed highway was dedicated but not the grass verge or the wall; Lord Justice Slesser, that probably the grass verge was but not the wall.

There was some discussion as to what actions on a highway amount to trespassing. Greer, L.J., said that leaning against a boundary fence adjoining a highway may well be doing something incidental to the right of passage in *Harrold v. Watney*, [1898] 2 Q.B. 320, per A. L. Smith, L.J., but not sitting on a wall adjoining a highway. Slesser, L.J., said that if the plaintiff could have shown that he sat upon the wall for the purpose of resting himself as a passenger it would have been difficult to say that he was a trespasser; but on the facts the plaintiff went there to play which is I suppose synonymous with talking to his friends. He says that the question of intent is material, but does not deal with the case of a dual intent such as resting and also talking to friends, a very probable condition of mind for a child of six. Moreover, while he was willing enough to try to deduce the intent of this small boy (who did not give evidence and was of course incapable of a criminal intent), there might be obvious difficulties in the case of children still smaller or maybe less mentally alert.

He then notes that in *Hickman v. Maisey*, [1900] 1 Q.B. 313, A. L. Smith, L.J., seems to think that, if a man took a sketch from a highway, no reasonable person would treat the act as a trespass, whereas in *Harrison v. Duke of Rutland*, [1893] 1 Q.B. 142, Kay, L.J., suggests that if by the side of a highway an artist set up his easel and made a sketch he might be a trespasser.

The Court were unanimous in holding (1) that there was here no nuisance on a highway; (2) that the case of *Cooke v. Midland Great Western Railway Co. of Ireland*, [1909] A.C. 229, must now be taken as a case where the child was not a trespasser but a licensee for whom a trap had been set; and (3) that infants on the property of others are invitees, licensees, or trespassers, and are not in a special category of their own.

But the dicta as they stand seem to leave great and doubtless gratifying scope for legal argument and confusion.

Using a Niblick.—As an example of how to get over a judicial stymie, Lord Esher, M.R., in *Turton v. Turton*, (1889) 42 Ch.D. 128, supplies the following: "As to *Hendriks v. Montagu* (17 Ch. D. 638), which has been cited against myself and my brother Cotton in order to frighten us by something which we had said in a former case: if I have said something in that case not necessary to the decision of the case, and I have found now that what I then said was wrong, I should nevertheless go home with a quiet mind, believing that when the point came to be material I decided it rightly, although when it was immaterial I had said something wrong about it."

Torture of Witnesses.

Some Old "Saws" and Modern Instances.

By Wilfred Blacket, K.C.

The Common Law of England has never tolerated the torture of witnesses. True it is that in the fourteenth century King Henry II allowed some witnesses to endure some mild tortures which did not include "any mutilation or serious injury, or effusion of blood," but these were inflicted under orders received from Pope Clement V, who seems on this occasion to have forgotten his own name, and after his death no further torturing was permitted. At the Tower of London the Wilfred Shadbolts were always busy in the Middle Ages, but the Common Law never was admitted there; and so it was that torture was reserved for politicians and persons of high degree, who thus in a manner of speaking obtained it by influence.

Peine forte et dure was inflicted in the Law Courts but this was not to extort confessions but simply to induce a prisoner to plead "not guilty." If he pleaded and thereafter was convicted his estates were forfeited to the King, and therefore many wealthy persons accused of felony preferred to die under torture so that their children would have and enjoy the family estates. Of course these men showed splendid bravery, but it must always be remembered that men in those days did not mind being tortured to death nearly as much as they would now.

In Scotland the torture of witnesses seems, anciently, to have been regarded as one of the national sports. The practice and policy favoured the torture of some persons who might be induced to confess some other person's iniquities. Then as soon as the confession was obtained the man who had confessed was murdered for fear that he should change his memory. Scottish caution is proverbial, but where could one find a nobler instance of it than in these facts.

Upon the trial of the rebel Pate Stewart some exception was, as it might seem, quite properly taken to evidence of a confession given shortly before her death by Mrs. Alason Balfour, because it was said that she "wes be vehement tortour of the caschielawis, quhairin (wherein) sche wes kepit be the space of fourtie-aucht houris, compellit to mak the said pretendit Confessioune." The "caschielawis" was the "witches' bridle," a sort of cage to be worn on the head. It was studded with spikes which could be screwed up so as to make it a better fit. The members of Mrs. Balfour's family "wer all kepit at anis (once) and at the same instant in waird (custody) besyde hir, and put to tortouris att the same instant tyme; to this effect that hir said husband and bairnis beand swa tormentit besyde hir, mycht move hir to mak ony Confessioune for thair relief," and from this it is clear that Scottish law in those days was based upon very cogent reasoning and sound knowledge of the frailities of human nature.

The responsibilities of her husband as head of the family included the "long irons" which weighed seven hundred pounds. He was ninety-five, so the handicapper in usual course gave him weight for age.

"The sone callit in the buitis (boots) with fiftie sewin straik is the daughter aged seven"—her father, be it

remembered, was ninety-five—" was treated to a light task " as the racing men say, for she was only put in the " pinny-winkis," (thumbscrews) and this may have been appropriate for " pinnies " of any kind are very becoming to a child of that age.

This statement is ghastly enough without any more translations. If you understand half of the tale you will shudder sufficiently to lose most of the benefit of your spring weather. But all the time you have to remember that these things were not done under the Common Law of England, but under the Scottish law of the age, which may have been suitable to them but was, like the bag-pipes, of no earthly use to anyone else. And it is necessary to mention in justice to an admirable race, that they have discarded the " caschielawis," although they still hug the haggis.

In medieval Scotland it seems to have been but a short leap from arrest to conviction, so it seems a very slight digression to mention that in those days convicts served their sentences in the " jougges " which consisted of a short iron chain and a ring of iron which was padlocked round the prisoner for the term of his awarded imprisonment. It was an exceedingly economical method of providing gaol accommodation, but in spite of this merit it has been superseded by a more humane alternative. Generally the chain was fastened to the wall of a church, and hence the origin of the proverb "the nearer to the church the farther from the Almighty" for a man held by the " jugs," as the name was sometimes spelled, would necessarily be a base 'un. Our slang word " jug," meaning thereby a prison, was derived from the name of this great Scottish institution, but it is to our credit that our prison system was moulded upon other precedents.

We now return to the studio.

Modern instances of torture in daily thousands may be obtained from Russia, but as the Soviet is not a government but merely a tyranny sustained by Terror, and as its tribunals are admittedly not Courts of Justice but Courts of conviction following rules of procedure akin to those used by a jury of dingoes upon the trial of a fat lamb, or a jury of graziers upon the trial of a dingo, it is useless to go to Russia for illustrations, especially as no sane person now wants to go to Russia for anything. Nor to Hades.

But it really is the extraordinary fact that torture of witnesses ranging from the third to the *n*th degree still prevails in the U.S.A. In one recent instance an arrested person in Pekin, Ill., named Martin Virant, had " the hard word" put to him to induce him to confess that he had participated in a murder, and after the conclusion of his interview with several officers of the law he was found hanging in his cell. He had sustained a fatal concussion of the brain, had a broken rib, and other serious injuries and was covered with bruises. The coroner found that the hanging had nothing to do with the death, it apparently was merely the addition of insult to injury. Another prisoner named Mallefert was put in a " sweat box " with a chain round his neck, his feet in stock, and his body encased in a barrel with armholes. He was dead when inspected after a night of his torture. It was thought that he had collapsed from weakness and been strangled by the chain, and some support for this theory was found in the fact that he had been kept without food for twenty-four hours before he entered upon this non-stop long-distance endurance test.

It should be stated, however, that these and other instances of official harshness are not sanctioned by the code of criminal procedure in the States, as is proved by the fact that certain officials have been indicted for the murder of these two persons, and will doubtless be tried for these crimes unless the interrogatories administered to them do not prove fatal, as in Virant's case.

One other recently recorded case of torture of witnesses in the course of alleged legal proceedings at Seattle, U.S.A., may be mentioned. An unfortunate person named Mayer was charged with the murder of a man whose body could not be found. The District Attorney then applied the " truth machine "—an apparatus said to be capable of extracting the truth from Americans—and injected the " truth serum " for six whole days. His enthusiasm in the work is seen in the fact that he did not take the usual Saturday half-holiday. Then at the end of the time Mayer moved for an injunction, and the extraordinary thing is that the Court granted it. It was vainly urged by the District Attorney that if he could keep on with the hypodermic injections for another three hours he would be able to get Mayer to tell the truth. Even this alluring prospect did not induce the Court to let the good work go on. It almost looks as if the Court didn't want the truth. Clearly, if truth can be dug out of an American witness with hypodermic needles the proper course would have been to allow further time and plenty more needles.

Although this District Attorney obtained no benefit from the "truth serum" it is to be hoped that the inventor will make the profits his discovery deserves. One may look forward with hopefulness to the time when a certificate of inoculation by injection of some quarts of the serum will be a more reliable guarantee of integrity than a ten-year-old testimonial signed by a Sunday School Superintendent.

Cases of the Moment.—A case of some interest came before the Court of Appeal recently in which Messrs. Hawkes and Sons (London), Ltd., music publishers, had sued the Paramount Film Service, Limited, for an injunction to restrain the publication of a talking newsreel which included a reproduction of a ceremony at which there was a band playing the well-known march " Colonel Bogey," the copyright in which belonged to the plaintiffs. The defendants pleaded that the playing of the march was merely incidental to the ceremony which was photographed, and that the reproduction of a part of the tune which the band happened to be playing at the time could not be a breach of copyright. Mr. Justice Eve, before whom this case was heard in the first instance, took the same view as the defendants and dismissed the action, but the Court of Appeal took the opposite view and allowed the appeal.

A recent decision of the House of Lords on Workers' Compensation may be of interest to you. In this case a miner who had been awarded compensation for incapacity caused by miners' nystagmus had so far recovered as to be certified fit for work, but owing to the fact that the employers refused to employ underground any man who had at any time suffered from that disease he was unable to get employment at his old work, and claimed that this was a continuing effect of his injury which entitled him to compensation under s. 9 (4) of our Act. The House of Lords held that this was not so. There is, however, I believe, no counterpart to that subsection in your Workers' Compensation Act.–H.A.P.

New Zealand Law Society.

Council Meeting.

(*Concluded from page 198.*)

Guarantee Fund—Liability for Fee where son apparently held out as a Partner.—The following letter was received from the Secretary of a District Law Society :—

"My Council would be glad if you could give an opinion on the following question :

"There is a firm here called Blank and Blank, father and son, the son being a qualified solicitor who works in his father's office, but the father each year gives me a certificate to the effect that the son is a clerk and not a partner.

"The heading of the notepaper is 'Blank and Blank,' and underneath the words 'A.X. Blank' only, and the father, A.X. Blank, states that he is not holding out his son as a partner and therefore he is not liable for the guarantee fee and he offers to show his books to prove his case.

"The son appears in Court and takes a prominent part in the office, and to all the world it must appear as if the son is a partner."

It was decided that, in the opinion of the Council, the fee was payable, and the matter was therefore referred back to the District Law Society to consider taking action to enforce payment of the fee for the period during which the son has practised in the way stated.

Solicitor qualifying as Barrister under s. 4 (e)—*Whether present rights are reserved even if this sub-section rescinded* —A letter was received from a practitioner, pointing out that he understood s. 4 (*e*) of the Law Practitioners Act, 1931, was being rescinded, and enquiring if solicitors who had already practised for part of the period required by that sub-section could claim to be admitted as Barristers on completion of the necessary five years.

The Council resolved that a clause should be inserted in the new Act saving all rights of present solicitors, the draftsman to be instructed accordingly.

War Regulations Continuance Act, 1920 (Assisted Discharged Soldiers).—The Southland District Law Society wrote, urging the repeal of the Soldiers' Protection Regulations referred to in the 2nd Schedule to the War Regulations Continuance Act, 1920.

The Secretary pointed out that in 1932 the Southland District Law Society had urged that these regulations should be amended by placing the onus of proof on the debtor, and that the Attorney-General had then been asked to consider the matter.

It was resolved to approach the Attorney-General again with a view to having the Regulations repealed, and, if this were refused, to ask that the onus of proof of being an assisted discharged soldier should be placed on the debtor.

Membership of Rules Committee.—The Solicitor-General, Mr. H. H. Cornish, wrote, pointing out that, as he was now Solicitor-General, the Council might desire to substitute someone for him on the Rules Committee.

On the motion of Mr. Wiren, it was resolved to accept Mr. Cornish's resignation on the understanding that he still remains a member of the Rules Committee as Solicitor-General, the Council to appoint another member, if necessary, at the next meeting.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Covenants Implied in Instruments by Statute.

The New Zealand legislation, particularly under the Property Law Act, 1908, caters fairly well for the draftsman who desires to attain brevity by reliance upon implied covenants in certain instruments; but the system is materially defective. In a conveyance by way of sale, mortgage, lease, or otherwise for valuable consideration, there are implied covenants for right to convey, quiet enjoyment, further assurance, production of title deeds, and so on under ss. 56 *et seq.* of the Property Law Act, 1908. In the corresponding instrument of transfer under the Land Transfer Act, 1915, there is implied a covenant for further assurance under s. 164 (2) and it is declared that the Property Law Act shall, as regards land under the Land Transfer Act, be read and construed so as not to conflict with the provisions of the latter statute (the Land Transfer Act, 1915, s. 1 (2)).

Certain rules of substantive law established by the Property Law Act have been held to apply to the parallel cases under the other statute; in *Daveney v. Carey*, (1913) 33 N.Z.L.R. 598, the mortgagor's equity of redemption created by s. 70 (2) of the Property Law Act has been held to apply to a memorandum of mortgage under the other Act. Again in *Smith v. Tiller*, [1930] N.Z.L.R. 272, the covenants implied on the part of the conveying party in a conveyance of a term of years (under s. 58 of the Property Law Act, 1908) have been held to be implied in a transfer of lease under the Land Transfer system.

On the other hand, whether there is an implied covenant for quiet enjoyment in a memorandum of lease is still judicially an open question, *Cooper v. Bertelsen*, (1910) 30 N.Z.L.R. 1057, as is also the question whether a mortgagee accepting interest under an overdue memorandum of mortgage is entitled to call up without notice, *Turner v. Barton*, [1918] N.Z.L.R. 107; and certainly the covenant for production of title deeds in s. 56 (*d*) of the Property Law Act is inapplicable to a memorandum of transfer; the covenant for further assurance in the preceding para. (*c*) is duplicated in the Land Transfer Act, as has already been noted, and presumably does not extend to the latter system; and the covenants defined in the two preceding paragraphs for quiet enjoyment and right to convey are commonly thought by reason of their nature to be inapplicable to the Land Transfer system. In New South Wales it has been held, *West v. Read*, (1913) 13 S.R. (N.S.W.) 475, there is no warranty of title implied in an unregistered transfer or other instrument under a statutory provision corresponding to s. 164 of the Land Transfer Act, 1915, and the covenants implied by virtue of that provision are implied in a registered instrument only. This seems to be the position in New Zealand also.

To sum up, then, certain implied covenants under the Property Law Act are from their nature inapplicable to the Land Transfer system. Conceivably the sub-

stituted covenant for title on the part of a trustee, mortgagee, executor, or administrator under s. 61 (1) does not so apply. Secondly, certain others are reproduced with or without variation in the Land Transfer Act itself, and the prototype is thereby excluded—*e.g.*, (1) the covenant for further assurance abovementioned, and (2) the qualified covenant for repair implied in a (deed of) lease under s. 84 (*b*) of the *Property Law Act*, 1908, with which is to be compared the *absolute* covenant for repair implied in a memorandum of lease under s. 97 (*b*) of the *Land Transfer Act*, 1915. Thirdly, certain others have been judicially engrafted from the Property Law system on to the Land Transfer system: see *Smith v. Tiller*, *supra*. Fourthly, in one instance the Land Transfer Act (s. 91) by implying in a transfer of lease a covenant on the part of the transferee for payment of rent, performance of covenants, and indemnity has appropriately remedied an omission from the Property Law Act. Fifthly, whether or not certain provisions are implied in an instrument under the Land Transfer Act may turn merely on the fact of registration or non-registration, and the instrument may or may not be capable of registration in its given form, whereas under the Deeds system no such line of distinction can be drawn. But sixthly, whether or not other covenants and powers implied under the Property Law system extend to the Land Transfer system can only be satisfactorily answered in many instances by the Court itself. For example, it is submitted, after a comparison of the rubrics of mortgages in and the Fourth Schedules to the two Acts, that the covenant by a mortgagor of a term of years for payment of rent, performance of covenants, and indemnity under s. 65 of the Property Law Act ought to be implied in a memorandum of mortgage of leasehold under the Land Transfer Act, but that the language of the statutes does not in its ordinary meaning admit of that interpretation.

Adverting to the covenants statutorily implied in deeds, and memoranda of lease respectively, one observes that, as long ago as 1901, Mr. Martin pointed out (*Conveyancing in New Zealand*, Preface, p. v) the oft disastrous effect of the silent implication in these instruments of covenants on the part of the lessee to pay rates and to repair. *Vox clamans in deserto* is still unheard, or at least unheeded. Moreover, the corresponding provisions of the present Acts in question are not co-extensive. In addition to the variance between the implied covenants for repair, one notes the omission from s. 98 of the Land Transfer Act, 1915, of a lessor's power to distrain, although doubtless the common-law power incident to the relationship of landlord and tenant is available: *Cf. Lyons v. Guy*, (1899) 18 N.Z.L.R. 124.

Moreover, the requirement of a period of six months' default in payment of rent or breach of covenant precedent to the exercise of a lessor's implied power of re-entry under s. 98 (*b*) of the Land Transfer Act, 1915, is an astonishing piece of work on the part of the Legislature. An implied power of distress in a lease—"lease" here means "lease by deed," and not agreement for tenancy; *Lyons v. Guy* (*supra*)—under the other system is provided by s. 85 (*b*) of the Property Law Act, 1908, and a more reasonable corresponding period of one month's default before re-entry by a lessor is prescribed by para. (*c*) next following.

There is surely need for an ordered revision of all covenants and powers implied in instruments under each Act.

London Letter.

Temple, London,
June 28, 1934.

My dear N.Z.,

The principal item of news this month, although not strictly legal news, is, I feel, that England, the country of green fields and wet summers, is still suffering from a drought. I think it was in February last that I wrote of our troubles in this respect, and although the position was temporarily relieved in March and April, May and June have been almost rainless until a few days ago. Heavy falls of rain, however, have occurred almost all over the country during the past week and, although the authorities tell us that they have done little to alleviate the situation, at least the fields and gardens have had a good soaking. The Bill which was promoted in order to assist local authorities and water companies to conserve water supplies received the Royal Assent last month and appropriate measures are now no doubt being taken under it.

New Statutes.—Various other Bills, one or two of which may be of interest to you, have also recently become Acts of Parliament. These include the Arbitration Act, the object of which is to speed up arbitration proceedings and generally to amend the law relating thereto; the Marriage (Extension of Hours) Act, which allows marriages in this country to take place up to 6 p.m. instead of 3 p.m. as formerly (a reform long overdue); the Firearms Act (1920) Amendment Act, which restricts the rights of young persons to purchase and keep firearms or ammunition; and the Protection of Animals Act, which is aimed largely at the prevention of cruelty at rodeos.

Law Reforms (continued).—There is before the House of Lords an Appeals Bill designed to give effect to some of the recommendations in the Second Interim Report of the Hanworth Committee with respect to appeals. This Bill provides, first, that appeals from County Courts should lie direct to the Court of Appeal (thus cutting out the Divisional Court), and, secondly, that appeals to the House of Lords should be only by leave either of the Court of Appeal or of the House of Lords. The suggestion to abolish Lords Justices of Appeal has, it seems, been abandoned. In fact the Bar Council has recently passed a resolution expressing their opinion that, in view of the extra work likely to be thrown on the Court of Appeal if the Appeals Bill becomes law, there should be appointed three more Lords Justices of Appeal. There are at present five Lords Justices of Appeal who, with the Master of the Rolls, are able to form two Courts.

Obituary.—The legal profession has suffered the loss of three well-known members during the past month: Sir Maurice Hill, Sir Henry Theobald, and Professor Murison. Sir Maurice Hill, who died early in the month at the age of seventy-two, was, as of course you know, a famous Judge in Admiralty. He was a great nephew of the famous Rowland Hill who introduced the penny post in this country (would that we had another Rowland Hill to reintroduce it to-day). Sir Maurice was called to the Bar in 1888 and took silk in 1910, at which time he had a large commercial practice and was considered an expert in marine insurance. On the outbreak of

War he gave up a great deal of his time to assist the shipping industry. He was appointed a Judge of the Probate, Divorce, and Admiralty Division in 1917, a post which he held until his retirement in 1930. Although he had perforce to undertake a good deal of divorce work, his real interest lay in the Admiralty Court, where he gave many now famous judgments, and his opinion of the work he had to do in the two Courts was summed up in his well-known saying that "he had one foot in the sea and the other in a sewer."

Sir Henry Theobald, K.C., who died two days after Sir Maurice Hill, must be known almost the world over for his work on "Wills." He had been a Master in the Lunacy; but, owing largely to the affliction of blindness from which he suffered, he retired from that post in 1923. Besides his book on Wills he was the author of a treatise on the law of Lunacy and a book on the Law of Land. He had attained the age of eighty-seven when he died.

Professor Murison, K.C., LL.D., who has died at the age of eighty-eight, will be remembered chiefly as a writer and a teacher of law. He specialised in Roman Law and was Professor of that subject at University College, London, from 1883 until his retirement in 1925. He was also Professor of Jurisprudence and Deputy Professor of Roman-Dutch Law in the University of London, and an examiner for Oxford, London, and New Zealand Universities and the Council of Legal Education. He was called to the Bar in 1881 and took silk in 1924. He practised little, however, but devoted himself almost entirely to his work of teaching law and to writing. As a writer he produced a mass of works, mostly translations of the Greek and Latin poets. He leaves two sons, the younger of whom, Sir William Murison, K.C., was Chief Justice of the Straits Settlements until his retirement a year ago.

The Parliamentary Bar (Unlicensed).—An unusual application was made to the Chief Metropolitan Magistrate at Bow Street Police Court last week by Mr. A. P. Herbert, the novelist, for summonses against fifteen members of the Kitchen Committee of the House of Commons and the manager of the Kitchen department for the alleged illegal sale of alcoholic liquor in the refreshment-rooms of the House of Commons. Mr. Herbert, whose writings are no doubt well known to you, complains (for some reason not known to me) that alcoholic liquor is sold in the House of Commons without a license, and asserts that an offence has therefore been committed in respect of which Members of Parliament have no immunity. What difference it makes to Mr. Herbert, who is not a Member of Parliament, whether liquor is sold in the House with or without a license, it is difficult to see. Nevertheless, it raises an interesting legal point on the question of the privileges of Parliament on which there seems to be little or no authority, although I do not think the same point could arise with you in view of the provisions of your Licensing Act, 1908, and Legislature Act, 1908, with regard to Bellamy's. The Chief Magistrate refused the application, but pointed out that there was a remedy open to the applicant by way of mandamus, which, rumour says, has been applied for and may come before the High Court this week. So there will probably be a sequel to this paragraph in my next letter.

Yours ever,

H. A. P.

Practice Precedents.

In Divorce—Leave to verify Case in Part by Affidavit.

The witnesses in all proceedings before the Court, where their attendance can be had, shall be sworn and examined orally in open Court, and such attendance and the production of documents by them shall be compellable in the same manner as in an action at law; *but the parties, with the leave of the Court, may verify* their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit, on the application of the opposite party or by the direction of the Court, shall be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit is filed:—

Section 48 of the Divorce and Matrimonial Causes Act, 1928.

See *Sim on Divorce*, 4th Ed., p. 49 (and the notes thereto).

See also *Rayden and Mortimer on Divorce*, 3rd Ed. p. 288; *Brown and Latey on Divorce*, 7th Ed., 299, 301, 554.

The affidavit aforesaid should not be made *before* the time for filing an answer has expired. If no answer is filed the motion is *ex parte*, but if an answer is filed a notice of motion is required; but in view of the fact that the opposing party has the right to cross-examine the deponent, applications for leave to verify by affidavit are not made in defended cases.

As to the course to be adopted with regard to witnesses, the provisions of RR. 173 to 178 inclusive of the Code of Civil Procedure in the Supreme Court apply, *mutatis mutandis*, to proceedings under the Divorce Act (R. 106 of the rules under the Divorce and Matrimonial Causes Act, 1928): see *Sim on Divorce*, 4th Ed., p. 82.

When a witness resides more than two hundred miles from the Supreme Court Registry instead of verifying a case by affidavit, in whole or in part, by affidavit, in a *defended suit* the better course is to apply for an order to examine the witnesses (if resident within New Zealand) or for a writ of commission (if the witness is resident without New Zealand).

It is here proposed to set out forms applicable to an undefended suit, the ground of divorce being adultery. Attention is directed to the case of *Gayer v. Gayer*, [1917] P. 64. In undefended cases leave to prove adultery by affidavit should only be given in special circumstances.

In connection with the affidavit of search to be filed it is here desirable to point out that the form of affidavit of search set out in *Sim on Divorce*, 4th Ed. 109, should bear an additional clause:

"That the time for filing an answer expired on the day of 19 ."

It is to be noted that *an appearance may be entered at any time, &c.*: see R. 25, *Sim on Divorce*, 4th Ed., 62: see also R. 22.

In practice the affidavit by which it is desired to adduce evidence is filed before the application is dis-

posed of, so that the Court is in a better position to see what the nature of the evidence is. If the affidavit is not so filed, it must be produced at the time the application is heard.

MOTION FOR LEAVE TO ADDUCE EVIDENCE BY AFFIDAVIT.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

BETWEEN A.B. of married woman, petitioner, and C.D. of farmer, respondent.

Mr. of counsel for the above-mentioned petitioner TO MOVE in Chambers before the Right Honourable Sir Chief Justice of New Zealand, at the Supreme Courthouse at on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER giving the petitioner leave to prove part of her case by affidavit of of licensee UPON THE GROUNDS that it will entail considerable hardship and expense to the petitioner to produce the said as he is resident at to give evidence *viva voce* in this suit AND UPON THE FURTHER GROUNDS set out in the affidavits of and of filed herein.

Dated at this day of 19 .

Solicitor for petitioner.

Certified correct pursuant to rules of Court.

Counsel moving.

Reference: His Honour is respectfully referred to s. 48 of the rules under the Divorce and Matrimonial Causes Act, 1928: (*Sim on Divorce*, 4th Ed., p. 49).

AFFIDAVIT IN SUPPORT.

(*Same heading.*)

I of solicitor make oath and say as follows:—

1. That I am a solicitor in the employ of solicitor for the above-named petitioner.

2. That the petitioner has alleged in her petition for divorce that adultery occurred between the respondent and one X. at on or about the day of 19 .

3. That the petitioner desires to adduce evidence that the said respondent and X. stayed at and occupied a double bedroom at the Hotel at the City of between the day of 19 and the day of 19 .

4. That the petitioner further desires to adduce evidence of identity which can be given by the licensee of the said hotel.

5. That it will entail hardship and expense to the petitioner if the said [*licensee*] is required to attend in person at the hearing of the petition filed herein.

6. That the time for filing an answer to the said petition expired on the day of 19 .

7. That no answer to the said petition has been filed.

Sworn etc.

AFFIDAVIT OF [*Licensee*].

(*Same heading.*)

I of licensee of the Hotel at make oath and say as follows:—

1. That I am the licensee of the Hotel situate at aforesaid.

2. That on the day of 19 one [*respondent*] and a woman booked in together at my hotel as Mr. and Mrs. and remained at the said hotel until the day of 19 .

3. That the said [*respondent*] and [*woman*] occupied during the whole of their stay at my hotel room No. which contained one bed only being a double bed.

4. That hereunto annexed and marked "A" is a page from the visitors' book at the said hotel containing the record of the arrival of the said guests.

5. That the writing in the said book was made by [*respondent*] in my presence on the arrival of the said guests at my hotel aforesaid.

6. That hereunto annexed and marked "B" is a snapshot of the said [*respondent*] and [*woman*] aforesaid.

7. That the said snapshot was handed to me by one of the members of my hotel staff after the said [*respondent*] and [*woman*] had departed.

8. That I saw the said [*respondent*] and [*woman*] daily in each others company and going into and out of room No. during their stay at my hotel.

Sworn etc.

ORDER FOR LEAVE TO ADDUCE EVIDENCE IN PART BY AFFIDAVIT.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the petition for divorce filed herein and the motion and affidavits filed in support thereof for leave to adduce evidence in part by affidavit AND UPON HEARING Mr. of counsel for the above-named petitioner IT IS ORDERED that leave be and the same is hereby granted to the petitioner to prove part of her case by the affidavit of licensee of the Hotel at .

By the Court.

Registrar.

Correspondence.

N.Z. League for the Hard of Hearing.

Sir,

We have been directed by the Board of Governors of the New Zealand League for the Hard of Hearing to bring to your notice its aims and objects with a view to asking you to be good enough to place them before your readers for their information, and in case any clients of theirs may desire to make a charitable bequest for the League's purposes.

The Patron of the League is His Excellency the Governor-General of New Zealand, Lord Bledisloe. Among the officers are: The Mayor and Mayoress of Auckland, Mr. and Mrs. G. W. Hutchison; Hon. J. A. Young, Minister of Health; Archbishop Averill; Right Rev. Bishop Liston; Rabbi Goldstein; the President of the Council of Christian Congregations, Dr. North; the Moderator of the Auckland Presbytery; Hon. Sir Walter Stringer; Hon. Sir George Fowlds, C.B.E.; Mr. C. J. Tunks, M.B.E.; Mr. W. Wallace, J.P.; Dr. Buckley Turkington, Ch.M.; Mrs. A. D. Campbell, J.P.; Mr. E. C. Cutten; Hon. J. Alexander, C.M.G., M.L.C.; Mr. G. Fenwick, F.R.C.S.; Mr. A. E. Ford, A.M.I.E.E.; Miss A. Basten, J.P.; Miss Carnachan, J.P.; Mrs. Kenneth Gordon; Mrs. Prendergast; Mr. G. C. Gorrie, F.P.A. (N.Z.); Mr. E. J. Prendergast; Mr. Stanley Chambers, F.P.A. (N.Z.).

Our Aims and Objects are:—

1. To improve the outlook for totally or partially deafened adults.

2. To reduce the ill effects of deafness to a minimum.

3. To encourage deafened and hard of hearing people to realize and face their disability which, after all, is a very definite step in overcoming any difficulty.

4. To assist deafened and hard of hearing people to pursue their accustomed means of livelihood with a minimum of inconvenience to their employers, the public, and themselves.

5. To eliminate quackery (so far as it concerns deafness).

6. To co-operate with the New Zealand Government in dealing with the prevention of deafness in children.

The means to be employed are :—

1. Teaching of lip-reading, which is the main structure of our work.
2. Demonstration of mechanical and electrical hearing aids.
3. Re-education of ears.
4. Providing recreation and fostering a spirit of sociability.
5. Assisting in finding employment for the deafened and hard of hearing.
6. Providing books and pamphlets which are published by organisations for the hard of hearing.

It is estimated that there are at least 10,000 people in the Dominion who are afflicted with disabling hardness of hearing, this being in many cases of an hereditary type. Unfortunately, in the present state of medical knowledge, the condition cannot be remedied, yet with proficiency in lip-reading they can be helped to enjoy fuller lives, and remain active members of society.

The League has retained a permanent and competent teacher, who has recently arrived from England. At present the activities of the League are confined to Auckland, but as soon as means become available, it is proposed to extend them to other centres in New Zealand. The classes meet in the Foresters' Hall in Albert Street. There is a pressing need for the establishment of a permanent institution for class work, and a fund for engaging a sufficient staff of competent teachers.

The League would be grateful if you would see your way clear to bring its aims and objects before your readers. Its solicitors suggest the form of bequest printed hereunder.

Yours, etc.,
JAS. HARDIE NEIL,
President.
(MRS. G. A.) K. HURD-WOOD,
Hon. Organising Secretary.

FORM OF BEQUEST.

I GIVE AND BEQUEATH to the New Zealand League for the Hard of Hearing the sum of £ (or) my stock of in (or) of my shares in the Company Limited (or) my freehold/leasehold property in Street in City (describing the property so as to be identifiable) free of all duties and to be used and disposed of for any of the purposes of the said League as the controlling body thereof may decide.

64 Brooklyn,
Emily Place, Auckland C.1.

The Wellington Law Students' Society.

First Moot, 1934: Arbuckle v. Smith.

A Question of "Bare Licensee."

The first moot of the present session was argued before Mr. J. B. Callan, K.C., in the small Court Room, Supreme Court House, Wellington, recently.

The facts, as agreed upon, were as follows:

Smith owned a large drapery store which had glass panes set in a grating in the floor of the vestibule, for the purpose of lighting the basement. Mrs. Webster, who was shopping in the store, arranged for her friend, Mrs. Arbuckle, to wait for her in the vestibule. Mrs. Arbuckle who was a woman of average weight stepped on the grating, which breaks, causing her serious injury. On the underside of the pane on which Mrs. Arbuckle stepped, there was a substantial chip which the shopwalker, whose duties included an inspection of the premises, should have discovered. Mrs. Arbuckle sued Smith for damages.

M. R. Jackson and R. C. Connell, **for the Plaintiff.** (*a*) The plaintiff was a licensee with an interest. There is no need for pecuniary interest; it is sufficient if it is to ultimate advantage of both licensee and licensor. *Hayward v. Drury Lane Theatres, Ltd., and Moss Empires, Ltd.*, [1917] 2 K.B. 899; *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74. See also railway cases where friends seeing passengers off were held entitled to the same rights as passengers: *Watkins v. Great Western Railway Co.* (1877) 46 L.J.Q.B. 817; *Thatcher v. Great Western Ry. Co.* (1893) 10 T.L.R. 13; *Sweeny v. Board of Land and Works* (1878) 4 V.L.R. (L.) 440, and see analogous cases with reference to bailment: *Ultzen v. Nicols* [1894] 1 Q.B. 92.

[*Callan, K.C.* The railway cases are all distinguishable. In the course of business and long continued usage of coming to and going from trains, there is a standing invitation to come and see people off or arrive; and it is in the general interests of the Railway Company that they should. The friends there accept the invitation, and are in a different position from Mrs. Arbuckle in the present case.]

Counsel, continues: The shopkeeper invited people to take advantage of amenities available, such as lounges, telephones, etc. Plaintiff's contiguity to the shop made her a prospective customer. Mrs. Webster might not have shopped there, if Mrs. Arbuckle had not been allowed to wait for her. A licensee with an interest has the same rights as an invitee: *Sutcliffe v. Client Investment Co.* [1924] 2 K.B. 746.

(*b*) The shopkeeper ought to have known of the trap, and, was therefore in the same position as if he had actual knowledge of it. The *dicta* of Lords *Atkinson* and *Wrenbury* in *Fairman's* case *supra*, and of Lord *Hailsham* in *Robert Addie and Sons (Collieries) v. Dumbreck* [1929] A.C. 358 did not alter existing law but filled in a gap in the law. There is no case where occupier ought to have known of a danger and was held blameless because he did not in fact know. Even if Lords *Atkinson* and *Wrenbury* were not directing their minds to the issue Lord *Hailsham* was. See parenthesis. In *Sutcliffe's* case (*supra*), *Bankes*, L.J., criticises Lords *Atkinson* and *Wrenbury*, but his remarks are *obiter*. See *Salmond on Torts*, 6th Ed. 441 where this statement of the law is accepted.

J. H. B. Scholefield for the defendant. (*a*) The plaintiff at most was a bare licensee; (*b*) As such, she was entitled only to be warned of dangers actually known to the occupier.

There is no evidence that plaintiff was on the premises on the business of defendant; therefore, she must be either bare licensee or a trespasser. Assuming that she was a bare licensee: An invitee in a colloquial sense is not necessarily an "invitee" in the legal sense; *Pollock on Torts*, 13th Edn., 547. For a definition of "bare licensee," see *Salmond on Torts*, 7th Edn. p. 452 (2). Plaintiff is within this definition; *Clerk and Lindsell on Torts*, 8th Ed. p. 444; 21 *Halsbury's Laws of England*, 386-7-8, 391. The onus of proof that plaintiff is more than a bare licensee lies on the plaintiff; it has not been discharged.

The grant of a license to bare licensee is analogous to the case of a gift; 21 *Halsbury's Laws of England*, 392; *Hounsell v. Smyth* (1860) 7 C.B. (N.S.) 731, 743.

As to the duty of an occupier towards a bare licensee; *Ivay v. Hedges* (1882) 9 Q.B.D. 80. This is probably too wide, see *Salmond on Torts*, 7th Ed. p. 454 (4), for the correct rule, which is that there is a duty to warn only of dangers actually known; *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74, Lord *Wrenbury* at p. 95; *Gautret v. Egerton* (1867) L.R. 2 C.P. 371, 375; *Clerk and Lindsell on Torts*, 8th Ed., pp. 445-46 Up to the decision in *Fairman's* case, there was only a duty to warn of dangers actually known to occupier.

A. R. Perry, in support. The law of licensees is not changed by the *dicta* in *Fairman v. Perpetual Investment Building Society* (*supra*) for the following reasons: (*a*) The *dicta* would alter the law: see *Sutcliffe v. Clients Investment Co.* [1924] 2 K.B. 746, 754; (*b*) Their Lordships did not say they were doing otherwise than stating previous law, as would have been expected; all five Lords agreed in overruling *Miller v. Hancock* [1893] 2 Q.B. 177; *Sutcliffe's* case (*supra*) 754; (*c*) The *dicta* would place a bare licensee in same position as an invitee according to the latter's rights as set out by Lord *Atkinson* himself in

Cavalier v. Pope [1906] A.C. 428, 432. For a previous statement of Lord *Atkinson's* views of rights of bare licensee, see *Cooke v. Midland Great Western Railway of Ireland* [1909] A.C. 229, 238. It is very unlikely that Lord *Atkinson's* view-point would change. (*d*) The statements were unnecessary and merely *obiter dicta*: *Sutcliffe's* case [1924] 2 K.B. 746, 754. (*e*) The *dicta* were made *per incuriam*: *Salmond on Torts*, 7th Edn. 457; and (*f*) they were not accepted by later authorities as altering the law: see *Addie and Sons v. Dumbreck* [1929] A.C. 358 deals with a trespasser and not licensee, the statement of Lord *Hailsham* is *obiter dicta*. *Public Trustee v. Waihi Gold-mining Co., Ltd.*, [1926] N.Z.L.R. 449, *Stringer*, J., p. 454. *Sutcliffe's case* [1924] 2 K.B. 746, *Bankes*, L.J., at 754 and *Scrutton*, L.J., at 756. *Coleshill v. Manchester Corporation* [1928] 1 K.B. 776, *Eve*, J., at 796. *Salmond on Torts*, 7th Edn. 454, 456. *Clerk and Lindsell on Torts*, 8th Edn., 445, 448. *Underhill on Torts*, 12th Edn. 184, 186.

Mr. J. B. Callan, K.C., (orally) delivered judgment as follows: This case has been thoroughly argued, and counsel have got to the heart of the matter.

There are only two ways in which the plaintiff can succeed, and her counsel have put their fingers upon them: in the first place, to persuade me to find that what Lords *Atkinson* and *Wrenbury* said in *Fairman's* case is the law; that the occupier owes to a bare licensee not only the duty of warning, but also the duty of taking some kind of care to discover damages. No sufficient care was taken in this shop, and there is no question but that the carelessness of the shopwalker is attributable to the proprietor himself; but if it be the law that there is no duty to go looking about for dangers for the purpose of warning mere licensees, then if this lady is a bare licensee she cannot get damages. She may recover damages if she is more than a bare licensee or if what Lords *Atkinson* and *Wrenbury* said is good law—*i.e.*, if even to bare licensees the occupier has the duty to go looking for trouble.

I say at once that I am not prepared to accept the view that Lords *Atkinson* and *Wrenbury* were right. What they said in *Fairman's* case was *obiter*. The weight of subsequent opinion shows that they were expressing their views on this question with a little carelessness. Lord Justice *Bankes* in *Sutcliffe's* case takes up the criticism. Sir John Salmond was startled by *Fairman's* case as he showed in his last (6th) edition, which was published almost immediately after the decision; but he is a little careful. It is wrong to say that Dr. Stallybrass in his edition (7th) says one thing, and Sir John Salmond another. My conception is that Sir John Salmond showed grave distrust of this part of *Fairman's* case, and that Dr. Stallybrass had the courage to let himself go. The general weight of subsequent opinion is that these *obiter* remarks of Lords *Atkinson* and *Wrenbury* are wrong, and that the remarks of Lord *Hailsham* in *Addie's* case are *obiter* and wrong also. I cannot accept that way of giving damages to the plaintiff. To a bare licensee there is no higher duty than to give warning of known dangers. That may be a disastrous state of the law. I cannot help that. It is not for me in the face of the weight of authority which seems to exist to follow the *dicta* of the learned Law Lords in *Fairman's* case. A rule of law, when clear, is to be followed; and it is only in a case of doubtful construction that we are entitled to resort to the argument of convenience or justice at all.

The second point is whether this lady is anything more than a bare licensee. The statement of facts is scanty. It shows that she would not come into the main shop with Mrs. Webster, which in my experience is quite unprecedented. I can only conclude that Mrs. Arbuckle was a strong-minded woman who was determined not to be interested in Smith's wares; had a dislike of going in, and, therefore, waited outside. There is nothing to suggest that she did anything else but wait. The accident happened quickly. If she was moving to look into the window, or if she was looking at a hat at the moment she fell, that might turn the scale. The recess is an invitation to people to look at the wares for sale. It is not more, not an invitation to step in from the weather, or for any other similar purpose. There is some distinction between this and the lounge in the building.

No doubt the present position of the law may raise a multitude of difficult cases, for the status of a person will depend on the state of mind of the person. It may change as the purpose of stopping changes. If a person who merely stops outside has the character of an invitee, where are you going to draw the line? Take for example the case of a person who just steps back into the recess to look up at a window on the other side of the street.

I do not think Mrs. Arbuckle had the character of an invitee; she was only a bare licensee. I, therefore, give judgment for the defendant.

Recent English Cases.

Noter-up Service.

PAWNS AND PLEDGES.

Sale of Goods—Pledge—Goods on Approval—Goods Pledged—LONDON JEWELLERS, LTD. *v.* ATTENBOROUGH; SAME *v.* ROBERTSONS (LONDON), LTD. (C.A.).

Where a person who has obtained goods on approval by false pretences pledges them, the property in the goods passes to him and the pawnbroker obtains a good title.

As to the title to pawned property: see HALSBURY, 22, para. 517 *et seq.*; DIGEST 37, p. 18 *et seq.*

SHIPPING AND NAVIGATION.

Shipping—Contribution in General Average—Deviation—TATE & LYLE, LTD. *v.* HAIN STEAMSHIP CO. (C.A.).

A cargo owner is not liable for a general average contribution after an unjustifiable deviation.

As to general average contribution: see HALSBURY, 26, para. 438 *et seq.*; DIGEST 41, p. 133 *et seq.*

WILLS.

Will—Power of Appointment—Lapse—*Re* BAKER; STEADMAN *v.* DICKSEE (C.A.).

A testator can only by his will execute such powers as are in existence when the will takes effect.

As to the execution by will of powers of appointment: see HALSBURY 28, para. 1191; DIGEST 37, p. 435 *et seq.*

Rules and Regulations.

Motor-spirits Taxation Act, 1927. The Motor-spirits Regulations Amendment No. 2.—*Gazette* No. 52, August 9, 1934.

Sale of Food and Drugs Act, 1908. Amended Regulations.—*Gazette* No. 52, August 9, 1934.

New Books and Publications.

Workmen's Compensation, 29th Edition. By W. Addington Willis, C.B.E., LL.B. (Butterworth & Co. (Pub.) Ltd.). Price 23/6d.

Recollections of Sir Henry Dickens, K.C. (Heinemann.) Price 25/-.

Civil Procedure in a Nutshell. By Marston Garsia, B.A. (Sweet & Maxwell, Ltd.) Price 5/6d.

Law of Trusts, 1934. By G. W. Keeton, M.A., LL.D. (Pitman & Sons.) Price 34/-.

History, Law, and Practice Relating to Mayors, Aldermen, and Councillors. By R. Tweedy-Smith. (Jordan & Sons.) Price 8/6d.

Butterworth's Workmen's Compensation Cases. 26th Edition, 1934. Edited by His Hon. Judge Ruegg, K.C., etc. (Butterworth & Co. (Pub.) Ltd.). Price 42/-.

Butterworth's Twentieth Century Statutes, 1933. Vol. 30. (Butterworth & Co. (Pub.) Ltd.). Price 44/-.

Questions and Answers on Jurisprudence, 1934. By L. Bartlett. (Sweet & Maxwell, Ltd.). Price 5/6d.

Conveyancing Lexicon. By Samuel Freeman. 1st Edition, 1934. (Butterworth & Co. (Pub.) Ltd.). Price 79/-.