New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."
VOL. XXVII. TUESDAY, JULY 3, 1951. No. 12.

INVITEE AND INVITOR: THE RULE IN INDERMAUR v. DAMES.

THE duty of occupiers of land and houses to persons going there by invitation is generally known as the rule in *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274, where the principle of the invitor's liability in tort was expressed at p. 288 by Willes, J.:

> [the invitee], using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and . . . where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

Ever since Willes, J., formulated this proposition of law, it has been applied in hundreds of cases, but its precise meaning and the true legal consequence of the words used have long been in dispute; and explanations by the text-book writers of the rule led to differing interpretations. Recently, in *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1, the House of Lords set out to explain this rule.

The rule is thus stated in *Underhill on Torts*, 16th Ed. 171, 172, almost *ipsissima verba* from Willes, J.'s, judgment:

> An occupier of land, buildings, or structures owes to persons resorting thereto in the course of business upon his invitation, express or implied, a duty to use reasonable care to prevent damage from unusual danger of which he knows or ought to know.

Lord Porter, in his speech in the House of Lords in *Horton's* case, stated, at p. 6, that the difference between *sciens* and *volens* has by now been firmly established; but where the exact line is to be drawn is a matter of some difficulty. It seems to us, however, that one of the troubles of text-book writers may have been that they have stated the rule in terms of *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274; aff. on app., (1867) L.R. 2 C.P. 311, but have explained it in the light of some of the glosses which have been put upon it from time to time by the Court of Appeal, often in *obiter dicta*. Thus, in *23 Halsbury's Laws of England*, 2nd Ed. 604, 605, para. 853, the rule is stated as follows:

> The duty of the occupier of premises on which the invitee comes, is to take reasonable care that the premises are safe (*Robert Addie and Sons (Collieries), Ltd.* v. *Dumbreck*, [1929] A.C. 358, 365), and to prevent injury to the invitee from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware (*Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274; aff. on app., (1867) L.R. 2 C.P. 311, and the many other cases cited in support), or in other words, to have his premises reasonably safe for the use that is to be made of them (*Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 840).

A large number of cases, all of them short of the authority of the House of Lords, are cited for the last-mentioned part of the proposition, and, as we shall see, Lord Porter did not think very highly of them as authorities, as none seemed conclusive of the true meaning of the rule in *Indermaur* v. *Dames*. Consequently, the authoritative decision of the House of Lords explaining and applying the words of Willes, J., in *Indermaur* v. *Dames* (though it is a majority decision, three to two) is of more than passing interest.

I.

London Graving Dock Co., Ltd. v. *Horton* was an appeal from an order of the Court of Appeal ([1950] 1 All E.R. 180), who awarded damages to Horton, the respondent, and set aside a judgment of Lynskey, J., in favour of the appellants. The material facts were not in dispute.

The respondent was employed as a boilermaker and electric welder by Thames Welding Co., Ltd. By December 16, 1946, he had been employed for at least a month in the fish hold of a trawler, known as the *Valmont*, of which the appellants were at all material times the occupiers. The respondent's employers had contracted with the appellants to weld strips into position on the sides of the hold; and it was the appellants' duty to provide—and they did in fact provide—the necessary staging for the respondent and other workmen to work on. The staging provided consisted of four boards, about 20 ft. long, 11 in. wide, and 3 in. thick, laid fore and aft in the hold and resting on two thwartship angle-irons 5 ft. 5 in. from the bottom of the hold and about 3½ in. by 3 in. in dimension. The boards were placed about 5 ft. apart, and each outside board was about 18 in. from the side of the ship. The respondent, or any other welder who wanted to cross from one board to another, could do so only by stepping on to one of the angle-irons. The respondent and some of his fellow-welders had made half-hearted complaints to the appellants' charge-hand shipwright about the insufficiency of the staging before December 16, 1946, but, though some promises were made that he would see what could be done, no steps were taken to effect a change. On that date, the respondent in the course of his duty was standing on the starboard centre deal, and was engaged in handing a tool-box to another man on the starboard deal. For this purpose, he placed one foot on to the angle-iron and transmitted the tool-box safely, but, as he was trying to get back, his foot slipped, with the result that he fell astride the angle-iron and sustained injury.

In these circumstances the respondent maintained that the Court of Appeal were right in holding the appellants to be in fault, and that he was entitled to recover the damages, which, if recoverable, had been agreed at £275. The claim was put in two ways. First, it was said that he was an invitee and that the appellants had not exercised the degree of care required in such a case. Secondly, it was said that, on the principle laid down in *Donoghue* v. *Stevenson*, [1932] A.C. 562, the appellants owed a duty to the respondent to take reasonable care to avoid acts or omissions likely to injure him. Under the first heading, the duty towards an invitee was said to be to take reasonable care that the premises were safe, or, alternatively, if the duty was not so high, at any rate to establish that the danger was appreciated by the invitee and was freely undertaken by him with full knowledge of the risk which he was running, and unconstrained by any feeling which would interfere with the freedom of his will. In other words, it must be shown that he was *volens*, within the meaning applied to that word in the phrase *volenti non fit injuria*, as interpreted by Scott, L.J., in *Bowater* v. *Rowley Regis Corporation*, [1944] 1 All E.R. 465.

The appellants, on their part, contended that the duty of an invitor was of a lower order than either of the duties claimed by the respondent. In their submission, they had fulfilled their duty either if they took reasonable care to make the premises safe or if the invitee had knowledge or notice of the danger.

The contentions on either side have been put in a broad way, because it was apparent to their Lordships that, in one aspect, the case demanded a solution of the much-discussed problem of the distance to which the burden imposed by the decision in *Indermaur* v. *Dames* is to be carried and in what manner the *dictum* of Willes, J. (L.R. 1 C.P. 274, 288), set out above, is to be interpreted.

Lord Porter said that, if the respondent was right in saying that notice or knowledge is immaterial, that the invitor is under an obligation to use reasonable care to make the premises safe however manifest the risk may be, then, unless the appellants can show that the respondent was *volens*, they cannot escape liability. To this distance, at least, His Lordship understood Singleton, L.J., to have carried the doctrine in the Court of Appeal in the case before their Lordships' House. Lord Porter went on to say ([1951] 2 All E.R. 1, 4):

> The dispute has raged now for many years round the language of *Willes*, J. ((1866) L.R. 1 C.P. 274, 288): "that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, *which he knows or ought to know*." As was pointed out in argument and with truth, the words of *Willes*, J., are not embedded in a statute, but they have been carefully chosen and often acted on, and they form the basis on which the duty of an invitor is established. I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is, not to prevent unusual danger, but to prevent damage from unusual danger. It is in this consideration, as I think, that notice or knowledge becomes important. Either may prevent damage, though the unusual danger admittedly exists. As I take this view, I find the question what is unusual danger of less importance than it might otherwise be considered. To my mind, danger may be unusual though fully recognized, and I am not prepared to accept the view that the word "unusual" is to be construed subjectively as meaning "unexpected" by the particular invitee concerned. Moreover, I get little assistance from the alternative word "unexpected," suggested by *Phillimore*, L.J., in *Norman* v. *Great Western Railway Co.* ([1915] 1 K.B. 584, 596). I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises. Indeed, I do not think that *Phillimore*, L.J., in *Norman* v. *Great Western Railway Co.* ([1915] 1 K.B. 584) is speaking of individuals as individuals, but of individuals as members of a type—*e.g.*, that class of persons such as stevedores or seamen who are accustomed to negotiate the difficulties which their occupation presents. A tall chimney is not an unusual difficulty for a steeplejack, though it would be for a motor mechanic, but I do not think that a lofty chimney presents a danger less unusual for the last-named because he is particularly active or untroubled by dizziness.
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> In the present case, undoubtedly, there was a danger of slipping owing to the wide spacing of the planks, and that danger is, in my opinion, accurately described as unusual. The existence of that factor, however, is not in itself enough to ensure the success of the respondent. Indeed, his advisers do not so contend. Contributory negligence on his part would destroy his claim and so, as I understand their concession, would a free and willing and unconstrained acceptance of the risk with full knowledge of its danger. It is in a consideration of this last concession, as I think, that the real contest lies. Contributory negligence may be disregarded. No act of the respondent could be so described.

Lord Porter then said that the plea *volenti non fit injuria* did not appear in the defence; and, as he explained later, it, in his opinion, was unnecessary for the appellants to prove such facts as would warrant a finding to that effect; but, in any case, even if it was incumbent on the appellants to establish that the respondent undertook the risk willingly and without constraint, he did not think that a formal pleading to that effect was necessary. His Lordship explained that as follows (p. 5):

> The protagonists are invitor and invitee and the former is entitled to set up by way of defence any circumstance which would enable him to escape liability at the suit of the latter. If notice or knowledge of the danger on the part of the invitee is enough, then the invitor can prove and rely on the existence of either or both. If, in order to succeed in that defence, the appellants must prove such facts as would establish a plea of *volenti non fit injuria*, then the appellants can cross-examine or call evidence to that effect, and, if this testimony is accepted, will escape liability, not because they have pleaded that the respondent was *volens*, but because they have established the fact that they have performed the obligations incumbent on invitors. *Singleton*, L.J., as I think, recognizes this contention to be accurate, but holds that the respondent has not been shown to be *volens*, and *Tucker*, L.J., finds that the evidence proves the respondent to have been *sciens*, but not *volens*. *Jenkins*, L.J., if I understand him rightly, goes further and takes the view that the appellants were under a duty to provide safe staging, and, if they did not do so, were liable in negligence.

Lord Porter found it difficult to take any of those views. He accepted the contention that an invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved. If the parties had been master and servant, he said, it might well be that one should go further and say that a full appreciation of the risk is not enough, the servant must not be put in a position in which he is obliged either to obey orders or to run the risk of dismissal. To his mind, however, the position is different where the injured person is not a servant but an invitee. Admittedly, the duty of a master to his servant is higher than that of an invitor to his invitee. The invitor, as Lord Porter saw it, is not concerned with the position of the invitee *vis-a-vis* his own ultroneous master. So far as he is concerned, the invitee is an invitee and nothing more. He proceeded, at p. 5:

> I am content to accept the statement of *Singleton*, L.J., that the rule of law, as stated by *Willes*, J., in *Indermaur* v. *Dames* ((1866) L.R. 1 C.P. 274, 288), ends with the words "damage from unusual danger, which he knows or ought to know." The duty, however, is not "to prevent damage,"

but to "use reasonable care" to prevent it, and it has to be determined what is reasonable care. This problem is dealt with in the latter part of the statement of *Willes*, J., by which I understand him to mean: Even if there is unusual danger, the duty to use reasonable care to prevent damage may be performed by notice, lighting, or guarding, and the recognition that the invitor may fulfil the obligations imposed on him by notice or lighting indicates that adequate warning to the invitee may be a compliance with the duty which is owed by the invitor. It is not, to my mind, an answer to say that the risk was there and the invitee returned to his work daily as the invitor knew. He did come back and continue his work, but, as the learned Judge has found, he did so with full knowledge of the risk he ran. The real question is whether that fact is enough to exonerate the appellants or whether in the case of an invitee, as in that of an employee, it is incumbent to show, not only that the invitee knew and appreciated the danger, but also willingly undertook it. If so, the position of an invitee is on exactly the same footing as that of an employee, except for such special rights to compensation as are given to a workman under Acts dealing with the relation of master and servant. In my opinion, however, it is not the same, but is to be judged by a less exacting standard.

On the principle so enunciated, the question, therefore, was: Did the invitee undertake the risk of performing his task with full appreciation of the danger? This, as has been said more than once, is a question of fact for a jury to decide, if there be a jury. If not, it must be decided, like all other questions of fact, by the tribunal which tries the case—in the present instance, by Lynskey, J. At the end of his judgment ([1949] 2 All E.R. 169, 171), that learned Judge said:

If it were necessary to decide it I should have held on the facts of this case that [the respondent] did freely and voluntarily impliedly agree to accept the risk of working on the staging with full knowledge of the nature and the extent of the risk he ran.

He had, in Lord Porter's opinion, evidence on which he could reach the conclusion that the respondent had at least full knowledge of the nature and extent of the risk which he ran, and Lord Porter did not feel justified in reversing this decision. Such a finding was, Lord Porter thought, a sufficient answer to a contention by an invitee that the invitor fell short of the standard of care which the law imposes on him. It is true that the staging was, and remained, unsafe, notwithstanding that complaints were made, and it is true also that the appellants did nothing to improve it, but the invitee had been held to have had full knowledge of his risk, and such notice or knowledge is sufficient to exculpate the invitor, provided the full significance of the risk is recognized by the invitee. Then, Lord Porter said, at p. 6:

I cannot myself find much assistance in the decided cases. The exact meaning of the words of *Willes*, J., in *Indermaur* v. *Dames* ((1866) L.R. 1 C.P. 274, 288) and their true legal consequences have long been in dispute and for many years formed a basis of discussion by the text-book writers. The difference between *sciens* and *volens* has by now been firmly established, but where the exact line is to be drawn is a matter of more difficulty. The accurate demarcation, however, in my opinion, need not be laid down in the present case, since it is enough to protect the invitor from liability if he proves that the invitee knew and fully appreciated the risk. The further step that he must be shown not to have been under a feeling of constraint or, to put it otherwise, must have been *volens* is not an essential to the defence. Whether the learned Judge meant to find that the respondent was *volens* I am not sure, nor am I sure that, if he had meant to do so, he had evidence which entitled him to reach that conclusion. As I have said, however, my view is that that question does not arise.

Before considering the cases in which *Indermaur* v. *Dames* was followed or discussed, Lord Porter observed, at pp. 6, 7, that it may be well to bear in mind that not every passing expression of a Judge, however eminent, can be treated as an *ex cathedra* statement. It must be read in its context, and the most that can be expected is that it should be accurate enough for the matter in hand. In this connection, he thought it sufficient to use two illustrations and contrast two expressions:

In *Robert Addie and Sons (Collieries), Ltd.* v. *Dumbreck*, [1929] A.C. 358, Lord Hailsham, L.C., at p. 365, said:

Towards such persons [invitees] the occupier has the duty of taking reasonable care that the premises are safe.

Lord Atkinson expressed the dictum in *Cavalier* v. *Pope*, [1906] A.C. 428, 432:

one of the essential facts necessary to bring a case within that principle [the principle of *Indermaur* v. *Dames*] is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered.

Lord Porter pointed out that the first was the case of a trespasser, and Lord Hailsham, L.C., was doing no more than setting out a rough differentiation between the duties owed to an invitee, a licensee, and a trespasser, respectively. No accuracy or exactness of expression was required. In the latter, the duty of a landlord who had let a dilapidated house was under discussion. Except to point out that no question of invitor or invitee came in question, that relationship was immaterial to the point at issue. Lord Porter added that even cases such as *Brackley* v. *Midland Railway Co.*, (1916) 85 L.J.K.B. 1596, where the statement of principle was *obiter*, since the danger was on a highway and not on private property, *Griffiths* v. *Smith*, [1941] 1 All E.R. 66, where, again, the view expressed was *obiter*, and *Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E.R. 628, which raised a question as to a safe system of working, must be regarded with caution. So, also, must cases dependent on contract, such as *Osborne* v. *London and North Western Railway Co.*, (1888) 21 Q.B.D. 220, or those dealing with the relationship of master and servant, such as *Bowater* v. *Rowley Regis Corporation*, [1944] 1 All E.R. 465. His Lordship concluded his examination of the principle of *Indermaur* v. *Dames* by saying, at p. 7:

None seems to me conclusive of the matter under discussion, and, though natural sympathy must make the inclination lean towards a desire to compensate the respondent for his injury, *the true principle is, in my opinion, that a full appreciation of the danger on the part of the invitee and a continuance of his work with that knowledge are sufficient to free the invitor from liability for damage occasioned by the i[n]security of the premises to which resort is made.*

The italics are ours.

Lord Porter quickly disposes of the argument based on *Donoghue* v. *Stevenson*, [1932] A.C. 562, in which the defence did not have to show that the pursuer drank the contents of the ginger-beer bottle with a full knowledge of the risk. It would have been enough if examination and consequent knowledge were to be expected. To that extent, he said, an argument based on *Donoghue* v. *Stevenson* seems less forcible than the more obvious contention founded on the relationship of invitor and invitee. Neither ground, in His Lordship's opinion, supported the conclusion that the appellants were in breach of their duty of care.

With Lord Porter's conclusions, both Lord Normand and Lord Oaksey agreed; but Lord MacDermott and Lord Reid dissented, and were of the opinion that the appeal should be dismissed.

In our next issue, we propose to give our readers some further consideration of the rule in *Indermaur* v. *Dames*.

SUMMARY OF RECENT LAW.

BIRTHDAY HONOURS.

The King, on the occasion of the celebration of His Majesty's Birthday, conferred the following honours on the Acting Chief Justice and members of the profession:

Knight Bachelor: The Hon. Arthur Fair, M.C., senior puisne Judge of the Supreme Court.

Commander of the Order of the British Empire: Mr. L. O. H. Tripp, O.B.E., Wellington.

Officer of the Order of the British Empire: Mr. T. W. M. Ashby, Auckland.

Member of the Order of the British Empire: Mr. J. W. Cerd, Featherston.

COMPANY LAW.

Points in Practice. *101 Law Journal*, 312.

CONTRACT.

The Plea of Tender. *211 Law Times*, 192.

CONVEYANCING.

"Bi-monthly." *211 Law Times*, 194.

Determinable Interests and the Power of Advancement. *95 Solicitors Journal*, 247.

Gifts Over. *101 Law Journal*, 325.

Trusts for Sale. *211 Law Times*, 194.

COSTS.

Appeals. *95 Solicitors Journal*, 217.

CRIMINAL LAW.

Assault—Action for Damages—Defendant's Plea of Justification—Allegation, in Plaintiff's Reply, of Use of Excessive Force—Onus and Standard of Proof. Per *Sholl*, J., Where, in a civil trial, a serious assault amounting to a crime is alleged, the onus is on the plaintiff to prove the defendant's actions according to the civil standard. Such an assault must be proved to the reasonable satisfaction of the Court, having due regard to the magnitude of the matter that is in issue. A similar standard applies in respect of a defendant's plea of justification. In neither case is it necessary to prove intent. Where M. alleged that S. seriously assaulted him, S. pleaded self-defence, and M. replied that S. had used excessive force. *Held*, per *Sholl*, J., That the onus on the pleadings was on M. to prove the excess of which he complained in his reply. The standard of proof applicable was the same as that cast upon M. in proving the original assault and that on S. in proving justification. (*Helton* v. *Allen*, (1940) 63 C.L.R. 691, applied.) On appeal to the Full Court, the decision of *Sholl*, J., was upheld on the facts. *McClelland* v. *Symons*, [1951] V.L.R. 157.

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty—Natural Consequence of Respondent's Acts—Rebuttable Presumption—No Act of Violence—Callous Indifference—Reasonable Apprehension of Danger to Health. The husband appealed from the finding of Justices that he had been guilty of persistent cruelty to his wife, in whose favour the Justices had made a maintenance order. The wife alleged that her husband kept her short of money, bought food for himself which he did not share with her, refused to take her for a holiday, stayed out of the house until late at night, was taciturn and unfriendly while at home, ignored her, showed her no affection, and on several occasions told her to leave the house. It was admitted that there had been no violence, but the wife contended that the husband's conduct had affected her health and amounted to persistent cruelty. On behalf of the husband, it was contended that his conduct amounted to no more than "the development and manifestation of his own character," and that it was no more "aimed at" his wife than her corresponding attitude was "aimed at" him. *Held*, That the maxim that a man must be taken to intend the natural consequences of his acts was applicable in determining charges of cruelty in matrimonial cases, but it must be remembered that it did not express an irrebuttable presumption of law, and was to be applied only in connection with conduct which could fairly be described as ill treatment; in the present case, the Justices had found that the husband's conduct was of sufficient gravity; and, even though it might be said on one aspect to be "a manifestation of his own character," it could be held that his conduct was wilful and was "aimed at" his wife and that he intended injury to her health. (Observations of *Denning*, L.J., in *Hosegood* v. *Hosegood*, (1950) 66 T.L.R. 738, 739, 740, criticized.) (*Boyd* v. *Boyd*, [1938] 4 All E.R. 181, disapproved.) (*Edwards* v. *Edwards*, [1948] 1 All E.R. 157, approved.) (*Buchler* v. *Buchler*, [1947] 1 All E.R. 319, applied.) *Simpson* v. *Simpson*, [1951] 1 All E.R. 955 (P.D. & A.).

Notice to Produce in Undefended Divorce Cases. *95 Solicitors Journal*, 229.

Points in Practice. *101 Law Journal*, 327.

EXECUTORS AND ADMINISTRATORS.

Barring Claims after Notice to enforce Claim against Estate—General Nature of Claims—Ante-mortem and Post-mortem Claims included—"Claim against the estate"—"Administrator"—Administration Amendment Act, 1911, s. 3. The word "administrator" as used in s. 3 of the Administration Amendment Act, 1911, is used in its primary meaning (*i.e.*, an administrator properly so called); and, consequently, it does not apply to an administrator who has become a trustee. (*In re Anderson*, [1921] N.Z.L.R. 770, applied.) (*Quill* v. *Hall*, (1908) 27 N.Z.L.R. 545, and *In re Clover*, [1919] N.Z.L.R. 103, referred to.) A person who claims to be entitled to a portion of the assets of the estate of a deceased person, whether in money or property, is making a "claim against the estate," within the meaning of those words in s. 3, irrespective of whether the basis of the claim is a legacy under the will, a claim as next-of-kin, or some other basis. Consequently, post-mortem claims (*i.e.*, those arising from contracts made by the administrator in the course of administration) are within the section. Section 3, therefore, applies in every case where there is a claim of any sort against the administrator as such, requiring to be met by him in the due course of his administration, whether it affects the assets of the estate directly or affects them indirectly through the administrator. In either case, the administrator cannot safely distribute without the protection of the Court. When s. 3 is applicable, and is applied, to a claim in respect of which the administrator is personally liable, the effect will necessarily be to bar the personal liability as well as to exonerate the assets from the claim for indemnity. The section avails for the protection of the administrator throughout the whole course of the performance of his duties as administrator. *Semble*, There may be cases in which the administrator has not got, or has lost, or may lose, the right to an indemnity out of the estate; but those may be regarded as exceptional cases not affecting the general rule. (*In re Griffin*, [1940] N.Z.L.R. 174, overruled.) (*Newton* v. *Sherry*, (1876) 1 C.P.D. 246 (cited with approval in *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Public Trustee*, [1942] N.Z.L.R. 294), *In re Timm*, [1912] V.L.R. 460, and *In re Barber*, [1924] V.L.R. 123, referred to.) (*In the Will of Walker*, (1943) 43 N.S.W.S.R. 305, mentioned.) *In re Long (deceased)*. (C.A. Wellington. June 11, 1951. Stanton, Hay, F. B. Adams, JJ.)

INFANTS AND CHILDREN.

Custody—Previous Order of Foreign Court—Variation of Order—Welfare of Infant Paramount Consideration. The parties, who were American citizens, were married in Vermont in 1933, and lived in the United States of America until December, 1946. They separated in December, 1940. On September 4, 1941, the parties executed an agreement which provided, *inter alia*, that, without the written permission of the other party, neither of them would remove their infant son from or out of the United States of America. On December 17, 1942, a decree of divorce was granted to the father by the Superior Court of the State of California, and he was awarded custody of the child. Subsequently, the order as to custody was varied by the same Court, and it was ordered that custody of the infant should be given to the mother. The father, who then resided with the child at Port Austin, Michigan, thereupon took him into Ontario, Canada. In February, 1947, *habeas corpus* proceedings were instituted by the mother in Canada, and a Judge gave the sole custody of the infant son to the father. This order was confirmed by the Court of Appeal for Ontario, but, on a further appeal by the mother, the Supreme Court of Canada reversed the order and decided that the mother should have the custody of the child. In making this order, the Supreme Court of Canada was of opinion that the father, in taking the infant with him from the United States of America into Ontario to avoid obedience to the order of the Californian Court, whose jurisdiction he himself had invoked, had no right to have the whole question of custody retried by the Canadian Courts.

Held, That in proceedings relating to custody the welfare and happiness of the infant was the paramount consideration; the order of a foreign Court as to his custody must be given the weight which was due to it in the circumstances of the case, but such an order was only one of the facts which must be taken into consideration; and, therefore, it was the duty of the Canadian Court to form an independent judgment on the merits of the matter. (Observations of *Morton*, J., in *Re B.'s Settlement*, [1940] Ch. 63, applied.) *McKee* v. *McKee*, [1951] 1 All E.R. 942 (P.C.).

As to Guardianship and Custody of Infants, see *17 Halsbury's Laws of England*, 658-669, paras. 1377-1386; and for Cases, see *28 E. and E. Digest*, 288, Nos. *1403-1411*.

LANDLORD AND TENANT.

Encroachment by Tenants. *101 Law Journal*, 271.

Illegal Premiums Paid to Agents. *95 Solicitors Journal*, 232.

"Obligation of the Tenancy." *95 Solicitors Journal*, 220.

Recovery of Possession of Premises—Premises not a Dwelling-house—Notice to Quit on ground Premises reasonably required for Occupation by Lessor—Whether Particulars required—Landlord and Tenant Act, 1948 (No. 5264), ss. 37 (5) (g), 41. A lessor of business premises gave notice to quit to the tenant on the ground contained in the Landlord and Tenant Act, 1948, s. 37 (5) (*g*) (ii), that the premises, not being a dwelling-house, were reasonably required for occupation by the lessor. The notice set out particulars of the ground as follows—*viz.*, that the premises, being shop premises, were required by the lessor to carry on business therein. A complaint based on the notice to quit was dismissed, it being held that insufficient particulars had been given. *Held*, on order to review, That a mere statement, in the notice to quit, of the ground in the words of the section was sufficient by way of particulars, and that the complaint had been wrongly dismissed. (*Frier and Sons* v. *O'Rourke*, [1945] V.L.R. 107, applied.) *Peppas* v. *Union Trustee Company of Australia, Ltd.*, [1951] V.L.R. 133.

LAW PRACTITIONERS.

A Mechanized Accounting System for Firms of Solicitors. *95 Solicitors Journal*, 245.

"Without Prejudice." *95 Solicitors Journal*, 215.

LEGAL EDUCATION.

The Teaching of Equity. *95 Solicitors Journal*, 231.

MINES, MINERALS, AND QUARRIES.

Special Amalgamated Dredging-claim Licence—Application for Surrender of Part of Licence—Payments relative to Licence not made—Surrender granted—Licensee not released from Such Payments—Mining Act, 1926, s. 155—Mining Amendment Act, 1937, s. 13—Mining Amendment Act, 1941, s. 16—Mining Amendment Act, 1947, s. 2. Where an application is made for surrender of part of a special amalgamated dredging-claim licence, but not for the purpose of including it in a new licence, neither s. 16 of the Mining Amendment Act, 1941, nor s. 13 of the Mining Amendment Act, 1937, applies to it, and the application (which is governed by s. 155 of the Mining Act, 1926) may be granted notwithstanding that the licence fees owing to the Crown are not fully paid up to the date of surrender. The granting of the application does not release the licensee of the mining dredge from liability for all such sums owing. In the present case, the learned Warden said that the applicant might have a surrender of part of the claim, as applied for, or an adjournment to enable it to make an application to the Minister of Mines, under s. 16 (5) of the Mining Amendment Act, 1941, for exemption of the land from the provisions of that section. *In re An Application by Austral New Zealand Mining, Ltd.* (Cromwell. December 5, 1950. Dobbie, S.M., as Warden.)

MUNICIPAL CORPORATIONS.

Nuisance—Escape of Water from City Main—Damage caused to Bus through Subsidence in Street—Liability of Corporation for Nuisance without Proof of Negligence—Such Liability not Strict or Absolute—Nature of Proof required to fix Liability for Nuisance on Corporation. The plaintiff's bus, while proceeding along a street under the control of the defendant Corporation, encountered a defect in the roadway, in consequence of which the steering-wheel was wrenched from the driver's hands and the bus swerved to the left, mounted the pavement, and ran into a shop. The bus was extensively damaged. Immediate inspection of the road by the driver showed that there was a large hole in the roadway filled with water at the point where the bus had swerved. It was later found by the defendant Corporation's employees that the water was escaping from the water-main under the roadway, such escape of water being unknown to the defendant Corporation or its servants, or to the plaintiff, or to anyone else until after the accident. The plaintiff sued the defendant Corporation for damages amounting to £296 11s. 1d., based on nuisance, or, alternatively, on negligence. Counsel concurred in asking the Court to hear preliminary argument on the question whether, on the admitted facts, the escape of water from the main and the effects of such escape upon the soil of the road constituted a public nuisance for which the defendant Corporation was liable without proof of negligence. *Held*, 1. That the only conclusions which could be drawn from the admissions and the pleadings were that the main was duly laid under statutory authority; the escape of water therefrom was not due to negligence, but was due to some unknown cause, and the defendant Corporation was in ignorance of such escape; and it was conceded that the rule in *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330, did not apply. (*Irvine and Co., Ltd.* v. *Dunedin City Corporation*, [1939] N.Z.L.R. 741, distinguished.) 2. That, in the circumstances, the defendant Corporation would be liable at common law without proof of negligence if it could be established by proved or admitted facts that the condition of things amounted to a nuisance; and, if so, by virtue of s. 173 of the Municipal Corporations Act, 1933, it would be under no statutory immunity or protection in respect thereof. (*Jacobs* v. *London County Council*, [1950] 1 All E.R. 737, and *Wringe* v. *Cohen*, [1939] 4 All E.R. 241, referred to.) (*Lambert* v. *Lowestoft Corporation*, [1901] 1 K.B. 590, *mentioned*.) 3. That all that could be taken as proved was that water had escaped from the main under the road, causing an undoubted defect or hazard on the road, but there was nothing to show what caused such escape; and it could not be inferred from those proved facts that there had been a neglect of duty or failure to repair on the part of the defendant Corporation. 4. That, as the liability for nuisance is not a strict or absolute liability, the whole case should be adjourned *sine die* to enable plaintiff's counsel to consider what course he should adopt, because, if the defendant Corporation were not liable in nuisance, the plaintiff would be at liberty to proceed upon the alternative cause of action based on negligence, in which case evidence in the ordinary way would require to be heard. (*Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349, followed.) *Peninsula Motor Service, Ltd.* v. *Dunedin City Corporation*. (Dunedin. March 13, 1951. Willis, S.M.)

NEGLIGENCE.

Bailee—Clause in Document excepting Liability "for any damage howsoever arising" to Bailed Article—Innocent Misrepresentation as to Extent of Exception Clause—Exclusion of Exception—Cleaner and Dyer—Damage to Garment. The plaintiff took to the defendants, a firm of dyers and cleaners, a white satin wedding dress for cleaning. She was asked to sign a document which contained a clause that the dress "is accepted on condition that the company is not liable for any damage howsoever arising." Before signing the document, the plaintiff asked why she had to sign it, and she was told by one of the defendants' servants that the defendants would not accept any liability for damage done to beads or sequins on the dress. The plaintiff then signed the document without having read all of it. When the dress was returned, there was a stain on it. The County Court Judge found that there was no stain on the dress when the plaintiff left it with the defendants for cleaning, that the burden of proof was on the defendants to show that the stain had not been caused by their negligence, and that the defendants had failed to discharge that burden. The defendants did not challenge that finding, but sought to rely on the exception clause in the document which the plaintiff had signed. *Held*, That, since the plaintiff had been induced to sign the document by an innocent misrepresentation as to the extent of the exception clause, the exception never became part of the contract between the parties, and, therefore, the defendants were liable to the plaintiff.

Per *Denning*, L.J., That any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption. A representation might be literally true but practically false, not because of what it says, but because of what it leaves unsaid—in short, because of what it implies. When one party puts forward a printed form for signature, failure by him to draw attention to the

existence or extent of the exemption clause may, in some circumstances, convey the impression that there is no exemption at all, or, at any rate, not so wide an exemption as that which is in fact contained in the document. *Curtis* v. *Chemical Cleaning and Dyeing Co., Ltd.*, [1951] 1 All E.R. 631 (C.A.).

As to Conditions Limiting Liability, see *23 Halsbury's Laws of England*, 2nd Ed. 670, para. 952; and for Cases, see *3 E. and E. Digest*, 73-75, Nos. *134-144*.

NUISANCE.

Fire—Fire spreading to Neighbour's Land—Occupier's Failure to take Reasonable, Prompt, and Efficient Means for Abatement—Liability for Damages for Negligence—Measure of Damages—Diminished Value of Land due to Spread of Fire. The occupier of land is liable in damages if, with knowledge, or means of knowledge, of the existence of a fire on his land, he suffers it to continue without taking reasonable, prompt, and efficient means for its abatement; and, if the possibility of damage emerging is apparent, then to take no precaution to prevent it is negligence. (*Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349, and *Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391, followed.) In the present case, the plaintiff's land was damaged by a fire which existed on the defendant's land and spread therefrom to the plaintiff's land. The defendant knew of the existence of such fire and the likelihood of its spreading and doing damage, and took no precautions, either by way of abatement or otherwise, to control such fire and to prevent its spread. *Held*, That the defendant was negligent, and the measure of damages payable by him was the diminished value of the plaintiff's property or of his interest in it. *Rutherford* v. *Landon*. (Huntly. February 16, 1951. Paterson, S.M.)

PRISONS.

Escape from Lawful Custody—Prisoner transferred from Prison to Hospital for Treatment—Order transferring Him to Hospital by One Visiting Justice (instead of "by . . . a Magistrate or the Visiting Justices")—Prisoner escaping from Such Hospital—Prisoner not to benefit by Technical Error or Irregularity in Order of Transfer—Prisoner "in lawful custody" at Time of Escape—Prisons Act, 1908, s. 46—Crimes Act, 1908, ss. 143, 147 (2). Section 46 (1) of the Prisons Act, 1908, provides, in case of the illness of any prisoner, that he may, "by order of a Magistrate or the Visiting Justices of a prison," be removed by the Gaoler from any prison to any hospital named in such order. Under s. 46 (2), in any such case, the prisoner "shall be deemed to remain in the lawful custody of the Gaoler who removed him." A prisoner, Otto, was transferred from prison to a hospital for treatment, the order for his transfer to hospital being signed by one Visiting Justice. The prisoner escaped; and he was afterwards convicted, on indictment, of having escaped from lawful custody. Gibbs and Harvey were each convicted on indictments charging them with conspiring to assist Otto to escape from lawful custody and with assisting him to escape. Gibbs was also convicted of being an accessory after the fact to the crime of Otto's escape from lawful custody. On appeals from those convictions, upon the grounds of misdirection by the learned trial Judge as to what constituted lawful custody and as to the moment when an escape is completed, *Held*, by the Court of Appeal, 1. That, considering the order for the prisoner's transfer to the hospital in the light of all the circumstances, it could, notwithstanding its having been signed by only one Visiting Justice, be regarded as such an irregularity as s. 147 (2) of the Crimes Act, 1908, was intended to provide for. 2. That, accordingly, the custody of the prisoner while at the hospital was to be regarded as lawful in terms of s. 46 of the Prisons Act, 1908. (*Smythe* v. *Wiles*, [1921] 2 K.B. 66, and *Fry* v. *Moore*, (1889) 23 Q.B.D. 395, applied.) (*Craig* v. *Kanseen*, [1943] 1 K.B. 256; [1943] 1 All E.R. 108, distinguished.) 3. That the appellants Gibbs and Harvey were active participants in the preparations for the prisoner's escape; and that the plan was carefully arranged, so as to correlate the movements of all the parties involved, and was indispensable to the escape itself. (*R.* v. *Keane*, [1921] N.Z.L.R. 581, distinguished.) 4. That, accordingly, Gibbs and Harvey were conspirators with Otto in the preparations for escaping from the hospital, and that consideration formed the substance of the direction to the jury, and was not affected by the subsequent reference to the time when the escape might be deemed to be completed. All the appeals were dismissed. *The King* v. *Otto*: *The King* v. *Gibbs and Harvey*. (C.A. Wellington. May 3, 1951. Gresson, Stanton, Hay, JJ.)

PROBATE AND ADMINISTRATION.

Minors' Grants of Administration. *211 Law Times*, 204.

Offensive Statement in Will: Omission. *24 Australian Law Journal*, 454.

Points in Practice. *101 Law Journal*, 214.

SHARE-MILKING AGREEMENT.

Share-milker "to receive 4d. per gallon on all milk produced by the herd"—Not Agreement to pay "a share of the returns or profits derived from the dairy-farming operations"—"Share-milker"—Share-milking Agreements Act, 1937, s. 2. A remuneration which is merely measured by returns or profits, and which is in no way connected contractually with them, is not sufficient to bring the person who receives it within the definition of "share-milker" in s. 2 of the Share-milking Agreements Act, 1937. The words in the definition "entitled under a share-milking agreement to receive" show that not only must there be a share of the returns or profits, but the agreement itself must also confer a right to such a share. In an action by a share-milker, the statement of claim alleged a verbal contract whereby the plaintiff agreed to milk, care for, and feed defendant's herd and to perform maintenance work during the 1948-49 dairying season. It was alleged that: "The plaintiff was to receive 4d. per gallon on all milk produced by the herd." The statement of defence admitted that the plaintiff was to be paid a fixed remuneration calculated at the rate of 4d. per gallon on all milk produced by the herd. The following question of law was argued before trial: "Does the agreement to pay 4d. per gallon on all milk produced by the herd as alleged in the statement of claim herein constitute in law an agreement to pay 'a share of the returns or profits derived from the dairy-farming operations' within the meaning of s. 2 of the Share-milking Agreements Act, 1937?" *Held*, That the simple promise to pay 4d. per gallon on all milk produced by the owner's herd was a simple promise, which did not constitute an agreement to pay "a share of the returns or profits derived from the dairy-farming operations" within the meaning of those words as used in the definitions of "employer" and "share-milker" in s. 2 of the Share-milking Agreements Act, 1937; because the contract gave the plaintiff a mere monetary claim measured by "returns" in the form of milk produced, as distinguished from a right "to receive a share of the returns or profits." (*Handley* v. *Wishnowsky*, [1941] N.Z.L.R. 390, distinguished.) (*Newstead* v. *Labrador (Owners)*, [1916] 1 K.B. 166, and *Meader* v. *Danum Steam Trawler Co.*, (1921) 14 B.W.C.C. 236, referred to.) *Semble*, Payments at so much per gallon and other forms of payment may be "shares of the returns or profits," if the contract makes them such; but the ground of this judgment is not that the payment was at so much per gallon. (*Costello* v. *Pigeon (Owners)*, [1913] A.C. 407, *Burman* v. *Zodiac Steam Fishing Co.*, [1914] 3 K.B. 1039, and *Stephenson* v. *Rossall Steam Fishing Co.*, (1915) 8 B.W.C.C. 209, applied.) *Keighley* v. *Peacocke*. (S.C. Hamilton. April 2, 1951. F. B. Adams, J.)

SHOPS AND OFFICES.

Wages—Exemption by Magistrate from Application of Opening-hours and Closing-hours Provisions in Award—Nature and Extent of Magistrate's Powers—Effect of Exemption—Assistants Employable on Saturdays at Ordinary Rates of Pay—"Open for business"—Shops and Offices Amendment Act, 1927, s. 19—Statutes Amendment Act, 1949, s. 54 (1). The effect of the amendment to s. 19 of the Shops and Offices Amendment Act, 1927 (as effected by s. 54 (1) of the Statutes Amendment Act, 1949), is to give a Magistrate power to grant exemptions to occupiers from the application or the effect of the closing-hour provisions of an award, which, in this case, prohibited normal trading operations, including attendance on customers by shop-assistants, on Saturdays; and it was from the restrictive application of those provisions that the defendant company sought for and obtained relief under s. 3 (3) of the Shops and Offices Amendment Act, 1945. Consequently, the effect of such total exemption from the application to the defendant company of a clause in the award specifying the opening-hours and closing-hours was to permit it to remain open for business and employ its assistants on Saturdays at ordinary rates of pay. (*Weir (Inspector of Awards)* v. *Paraparaumu Co-operative Dairy Co., Ltd.*, [1948] N.Z.L.R. 1057, explained.) *Mealings (Inspector of Awards)* v. *Laings Grocery, Ltd.* (Ct. of Arb. Christchurch. April 9, 1951. Gilmour, S.M.)

SOCIAL SECURITY.

Destitute Persons—Maintenance Moneys due at Date of Termination of Deserted Wife's Benefit—Principles on which Moneys paid into Court in pursuance of Maintenance Order should be allocated—Social Security Amendment Act, 1943, s. 13—Social Security Amendment Act, 1950, s. 21 (2)—Practice—Social

Security—Destitute Persons—Variation of Registrar's Apportionment of Maintenance Moneys—Proceedings by way of Originating Application—Social Security Amendment Act, 1950, s. 21 (2)—Magistrates' Courts Rules, 1948, r. 75. Proceedings under s. 21 (2) of the Social Security Amendment Act, 1950, should be by way of originating application under the Magistrates' Courts Rules, 1948, and the Registrar, the Social Security Commission, and the wife should all be made parties to the proceedings and served accordingly. The principle to be observed by the Registrar in the apportionment of moneys in Court should, as and when paid, be as follows: 1. Any maintenance ordered for children to be a first charge on moneys paid up to the payment in full of maintenance falling due, back to the termination of the mother's benefit. 2. Where the wife is, in the opinion of the Registrar, a destitute person, or not able to support herself fully, even though not drawing a benefit from the Commission, then the balance of any moneys in hand after the above payment to be paid to her on the same basis, provided, however, that, where the wife is partially supporting herself and the moneys paid would be more than sufficient, in addition to her earnings, to maintain her properly, then the Registrar should apportion the payments between the wife and the Commission. 3. Where the wife is fully supporting herself, then any such balance should be paid to the Commission in reduction of the amount due to it. *Poulson* v. *Poulson*. (Auckland. March 16, 1951. H. Jenner Wily, S.M.)

TRANSPORT.

Removal of Motor-driver's Disqualification—Jurisdiction—Considerations leading to Removal—Power to impose Conditions—Transport Act, 1949, s. 31 (7)—Transport Amendment Act, 1950, s. 14. Section 31 (7) of the Transport Act, 1949 (as inserted by s. 14 of the Transport Amendment Act, 1950), empowers the Court, after the expiration of six months from the date of an order disqualifying a person from obtaining a motor-driver's licence, to remove the disqualification if it thinks fit. In considering the removal of the disqualification, the Court must have regard to (*a*) the character of the applicant and his conduct subsequent to the making of the order; (*b*) the nature of the offence; and (*c*) any other circumstances of the case.

The Court may, in effect, reduce the term by removing the disqualification at a future date (being earlier than the date of the expiration of the original term); and, if it removes the disqualification, it may impose conditions—*e.g.*, by requiring the applicant to take out a prohibition order and to renew it during the term of the original disqualification. There is no power for the Court under s. 31 of the Transport Act, 1949, to grant, even with consent, a "probationary" licence. Section 31 is to be acted on, not as giving a right of appeal, but as being *in pari materia*, so far as it goes, with s. 12 of the Crimes Amendment Act, 1910, so that, in effect, the Court should exercise the like functions as the Prisons Board does under that section. *In re Gray.* (S.C. New Plymouth. June 13, 1951. Fell, J.)

VENDOR AND PURCHASER.

Specific Performance—Contract for Sale of Land—Condition inserted in Contract solely for Benefit of One Party—Right of That Party to waive Performance of, or Compliance with, Such Condition—Right to seek Specific Performance without Such Compliance—Evidence—Contract—Admissibility of Evidence of Surrounding Circumstances to ascertain for whose Benefit Condition included in Contract. On July 28, 1950, a contract was entered into between the two defendants as vendors and the plaintiffs as purchasers for the sale and purchase of the premises of the Taita Hotel and the goodwill of the publican's licence in respect of the hotel, and of the hotel business, for £65,000, the furniture, chattels, and stock-in-trade to be purchased at a valuation. It was known when the contract was made that the Licensing Control Commission would shortly be sitting in the Hutt Valley, in which district the Taita Hotel is situated, and would then be examining the adequacy of the buildings and appointments of the licensed premises there, and considering whether there was a need of further licences in that district. Paragraphs 5 and 6 of the offer made by the plaintiffs were as follows: "5. Any contract arising out of the acceptance of this offer is conditional upon (*a*) the Licensing Commission (1) approving of the said hotel and its appointments in their present state and (2) not recommending any hotel being erected or any hotel business being carried on within a radius of two miles from the said Taita Hotel and (*b*) a certificate of fitness to hold a publican's licence in respect of the said premises being obtained by either of us or our nominee. 6. Subject to cl. 5 hereof settlement shall be effected and vacant possession given and taken within thirty days after the report of the Licensing Commission is known and on settlement date all usual adjustments shall be made." The plaintiff's offer was accepted by the defendants "subject to mortgage being reduced by at least £1,000 per annum," and the plaintiffs endorsed an acceptance of that added term. The Licensing Commission, which sat in August, 1950, and issued its decision dated February 15, 1951, said, *inter alia*: "5. The remaining hotel, the 'Taita,' situated near the northern boundary of the City appears to be of good standard, providing modern amenities for bar patrons and good comfortable accommodation for the travelling public. This hotel (in which major alterations and improvements have recently been effected) is an example of how an old building can be improved to provide desirable amenities . . . 23. . . . The Commission has come to the conclusion that it should authorize three further publican's licences as follows . . . (*b*) One publican's licence to be located in the Nae Nae–Epuni area within the boundaries described in the Fifth Schedule attached hereto and to provide accommodation for not less than ten guests and to comply with the standards laid down in the said Fifth Schedule." The greater part of the "Nae Nae–Epuni area" lies within a radius of two miles from the Taita Hotel. It was common ground that, having regard to cl. 23 of the Commission's decision, para. 5 (*a*) (2) of the contract had not been complied with. The defendants wholly renounced the contract as being no longer binding. In an action by the purchasers for specific performance of the contract for sale and purchase, *Held*, 1. That, where a condition or stipulation is inserted in a contract of sale and purchase entirely for the benefit of one party, it is competent for that party to waive performance of, or compliance with, that condition or stipulation and seek specific performance of the contract without such compliance; and, where there is a failure of a condition, it does not make any difference whether the failure is due to the action of a party or to the action of an outsider as far as regards the right of either party to waive the condition if it is solely for his benefit. (*Hawksley* v. *Outram*, [1892] 3 Ch. 359, *Morrell* v. *Studd and Millington*, [1913] 2 Ch. 648, and *Marten* v. *Whale*, [1917] 1 K.B. 544, followed.) (*Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284, and *Chillingworth* v. *Esche*, [1924] 1 Ch. 97, distinguished.) 2. That the contract between the parties was, subject to the conditions contained in it, a complete one, with nothing more formal contemplated or required; and, as the conditions contained in para. 5 (*a*) (1) and (2) were inserted in the contract solely for the benefit of the purchasers, they could, accordingly, waive a non-compliance of the condition relating to the erection of another hotel within a radius of two miles. 3. That, where, as here, the Court is concerned with the question of for whose benefit a certain condition was included in the contract, evidence of surrounding circumstances is properly admissible. *Donaldson* v. *Tracy.* (S.C. Wellington. May 29, 1951. Hutchison, J.)

WILL.

Class Gift—Closing of Class—Gift to Children on attaining Specified Age—Gift in futuro *subject to Life Interest—No Member of Class existing at Cesser of Life Interest—Closing of Class on Attainment of Specified Age by One Member of Class.* By a codicil to his will, a testator, who died on February 20, 1925, gave £10,000 to his executors on trust to invest and pay the income thereof to his daughter-in-law, then the wife of his son H., "during so much of her life as she shall remain [the wife or widow of [H.] . . . [and] subject to the interest of my daughter in-law therein my executors shall hold the said sum of £10,000 . . . upon trust for all or any the children or child of [H.] who shall attain the age of twenty-one years if more than one in equal shares." In 1927, H.'s marriage, of which there was no issue, was dissolved. In the same year, H. remarried, and in March, 1929, a daughter was born. In 1950, the daughter, having attained the age of twenty-one years, and there being then in existence no other child of H., claimed the whole fund. H. was still living. *Held*, That the rule in *Andrews* v. *Partington*, (1791) 3 Bro. C.C. 401, being a rule of construction, might be excluded if the language of the will were sufficiently clear; the fact that the daughter was not born until after the cesser of the life interest subject to which H.'s children took was not sufficient to exclude the rule; and, applying the rule, the class of remaindermen closed on the attainment of the age of twenty-one by the daughter, who was, therefore, entitled to the whole fund. Decision of *Harman*, J., [1951] 1 All E.R. 628, reversed. *Re Bleckly (deceased), Bleckly and Others* v. *Bleckly*, [1951] 1 All E.R. 1064 (C.A.).

As to the Rule in *Andrews* v. *Partington*, see *34 Halsbury's Laws of England*, 2nd Ed. 271-276, paras. 322-325; and for Cases, see *44 E. and E. Digest*, 768-781, Nos. *6266-6379*.

GIFTS BY WILL FREE OF DUTY.

A Comparison with the English Practice.

By J. GLASGOW.

In the second supplement to his invaluable work, *The Law of Death and Gift Duties in New Zealand*, Mr. E. C. Adams refers to the fact that the English and New Zealand revenue authorities treat gifts left free of duty each in a different manner. In England, the practice is to treat a direction altering the statutory incidence as a legacy to the person to whom the gift free of duty is made. At first glance, it may seem immaterial which way the matter is treated, because, in any case, the payment of the duty on the main gift will reduce the amount of the residue; but in fact the difference in result may be very great, both to the beneficiaries and to the revenue, and the New Zealand method may cause hardship in some cases to the residuary legatee.

If there are sufficient funds to pay all gifts and duties, and if it so happens that the rate of succession duty is uniform throughout, owing to all the beneficiaries being equally nearly related to the testator and to the gifts being nearly equal in amount, it will make no difference which way the direction to pay legacies free of duty is treated; but, if, for example, the residuary legatee is a stranger in blood and the other beneficiaries are close relations of the testator, a very great difference in favour of the Crown and against the residuary legatee may result. Of course, a contrary result will occur if the residuary legatee is a close relation and the other beneficiaries strangers in blood. Again, where there is a deficiency of assets, enormous differences may result, according to whether the English method or the New Zealand method is adopted.

Take, for example, a comparatively small estate of £6,000. Then, worked to the nearest £1, we get the following results: £1,500 is left to A, a child of the testator, free of duties; £1,500 is left to B, a child of the testator, free of duties; the residue is left to C, a stranger in blood.

In New Zealand, this would be treated by the Stamp Office thus:

A:	£1,500.	Estate duty on this at 11 per cent., £165; succession duty, 2 per cent., £30	£195
B:	£1,500.	Estate duty on this at 11 per cent., £165; succession duty, 2 per cent., £30	£195
C:	£3,000.	Estate duty on this at 11 per cent., £330; succession duty at 18⅓ per cent., £550	£880
	£6,000		£1,270

C actually gets £1,730, and the Crown collects 18⅓ per cent. on the difference between that and £3,000—*i.e.*, £1,270—which the residuary legatee never receives.

Worked out according to the English method, we get the following result:

A gets £1,724 less duty 13 per cent.,	£224;	net legacy, £1,500
B gets £1,724 less duty 13 per cent.,	£224;	net legacy, £1,500
C gets £2,552 less 11 per cent., plus 18⅓ per cent.	£748	
£6,000		£1,196

£2,552 less £748 = £1,804.

Thus, C gets £74 more, and the Crown £74 less, under the English method.

In a large estate, where the total duties approach 50 per cent., the difference between the two methods is very great, and, where the duties in fact absorb the whole residue, the injustice to C is very marked. The writer has seen an assessment in which duty was assessed on a residue of over £5,000, and in fact the residuary legatee received nothing.

Of course, were A and B strangers in blood and C a child, working out the matter under the English method would benefit the Crown.

It may be noted in passing that in England legacy duty is apparently charged only on the amount the legatee gets after payment of other duties; but this does not affect the matter under discussion.

Let us turn now to the question of whether or not a gift free of all duties, or (what amounts to the same thing) a direction that the duty on some particular gifts are to be paid from a particular fund, is (as is held in England) a legacy to the person who, but for such direction, would have had to bear the duty. There appears to be no decision to this effect in New Zealand. If there were, of course, the Stamp Office would have to follow it. There is, however, a dictum by Sir Michael Myers, C.J., in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639, 648, referring to a direction to pay the duties on property notionally included in the estate by virtue of s. 5 of the Death Duties Act, 1921. Sir Michael said, at p. 648:

> After all, such a disposition is in substance a legacy, an additional gift, to the persons benefited by the previous gift or settlement.

There seems to be little difference in principle between a direction to pay duties on property notionally included and a direction to pay duties on property passing under the will.

In England and Scotland, however, there is plenty of authority on the subject.

In *Noel* v. *Lord Henley*, (1819) 7 Price 241; 146 E.R. 960; varied *sub nom. Noel* v. *Noel*, (1823) 12 Price 213; 147 E.R. 702, there was a direction to sell realty and out of the proceeds to pay certain legacies free of duty. It was held that, where a legacy is given free of duty, this is an increase of the legacy itself, and, consequently, ought to be paid out of the same fund—that is to say, out of the proceeds of the sale of the realty, and not out of the personalty.

In *Wilkinson* v. *Barber*, (1872) L.R. 14 Eq. 96, there was a legacy given to a charity free of duty. Lord Romilly, M.R., said that a direction that a charitable legacy should be paid free of duty was a disposition for the benefit of the charity, and fell within the Mortmain Act, and, consequently, the legacy duty could not be paid out of impure personalty.

In *Farrer* v. *St. Catharine's College, Cambridge*, (1873) L.R. 16 Eq. 19, Lord Selborne, L.C., said that the gift of legacy duty on a legacy was a common pecuniary legacy, and, in the event of the general estate's being insufficient, the gift of legacy duty must abate along with other pecuniary legacies.

It will be convenient in this connection to refer to the decision of Sir Michael Myers, C.J., in *In re Berti*,

Pointon v. *Westrupp*, [1936] G.L.R. 182. There, there was a devise of realty free of duties and several pecuniary legacies free of duties, and a direction to pay all duties from residue. There was in fact no residue, and it was held that, where there is a direction to pay duties otherwise than in accordance with s. 31 of the Death Duties Act, 1921, and the fund indicated for payment of duties is non-existent, then, the direction having failed, s. 31 again comes into effect, with the result that the devisee is not entitled to claim payment of duties on the devise in priority to those payable in respect of the legacies. Presumably a similar principle would apply where the indicated fund is insufficient and not non-existent.

In *In re Wilkins*, *Wilkins* v. *Rotheram*, (1884) 27 Ch.D. 703, there were two annuities. One was to the widow, and attracted no legacy duty. On the other, duty was directed to be paid from residue. There was a deficiency. Pearson, J., appears to have laid down the principle correctly but to have applied it wrongly. He said, at p. 706 :

> I think the intention of the testator was that each should receive that exact proportion of his estate which she would have received if the estate had been sufficient to pay both the annuities in full.

The widow's annuity was £150 and the other £100, and he ordered the duty on the £100 annuity to be paid first, and the balance to be applied in conformity with the rule in *Heath* v. *Nugent*, (1860) 29 Beav. 226 ; 54 E.R. 613—*i.e.*, in the proportions that the two annuities bore to each other. It would appear that he should have added the duty on the £100 annuity to the capital value of that annuity, and then applied the proceeds in the proportion that that total bore to the capital value of the £150 annuity.

In *In re Turnbull*, *Skipper* v. *Wade*, [1905] 1 Ch. 726, Farwell, J., refers to the last-mentioned case. He says, at p. 730 :

> Unfortunately, *Farrer* v. *St. Catharine's College*, *Cambridge* (L.R. 16 Eq. 19) was not cited to *Pearson*, J., in *In re Wilkins* (27 Ch.D. 703, 706) ; but, if I understand his judgment aright, I agree with his statement of the principle to be applied, although I venture to differ from the arithmetic which he deduces from that principle.

He then goes on to point out that the duty was an additional legacy, and should have been added to the value of the annuity before working out the proportions. Earlier in the judgment, Farwell, J., quotes with approval, at p. 729, the judgment of the Lord Ordinary in *Lord Advocate* v. *Miller's Trustees*, (1884) 21 Sc. L.R. 709. Referring to a deficiency of assets, the Lord Ordinary (Fraser) said, at p. 711 :

> Thus, suppose the legacy is one of £100, upon which 10 per cent. is payable, and declared to be duty free. This is in reality a legacy of £110. But if the estate can only pay one-half of the legacies, the amount to this legatee would only be £55—10 per cent. on which must go to the Crown, or £5 10s.—thus reducing the sum actually receivable by the legatee to £49 10s.

Farwell, J., concludes his judgment thus ([1905] 1 Ch. 726, 730) :

> It follows that the legacy duty must be treated as an addition to each legacy, and then all the legacies will abate rateably and each of the abated legacies will bear its own duty.

With respect, it is submitted that the method of working out the amount of duty adopted by the Lord Ordinary is not strictly correct. Suppose there had been no deficiency ; then the legacy of £100 with 10 per cent. duty comes to £110, and, according to the Lord Ordinary, the legatee pays £11 duty and gets £99. That is not £100 free of duty, which the testator directed the beneficiary should get. It is strange that a Scots Judge, of all people, should think a shortage of £1 (which would then have bought four bottles of whisky) immaterial. It may be said that the additional £10 was also free of duty. But, then, so would be the £1 required to pay the duty on the £10, and so would the 2s. on the £1. This way, we get the problem of Achilles and the tortoise over again. The correct way is, it is submitted, to treat the legacy of £100 free of legacy duty as a gift of such a sum as will, after payment of the duty thereon, produce a net sum of £100. Where the duty is 10 per cent., this will work out at £111 2s. 2⅔d., 10 per cent. on this being £11 2s. 2⅔d. The net legacy is, therefore, £100 0s. 0d.

The Stamp Office appears to consider that s. 11 of the Death Duties Act, 1921, compels it to adopt the attitude it does. Mr. Adams points out that s. 11 does not mean that, in arriving at the *relative* value of each succession, the Crown cannot take into consideration an indirect gift to successors by a testator exercising his rights under s. 31. In support of this, he quotes the South Australian case of *In re Staker*, *Staker* v. *Commissioner of Succession Duties*, [1941] S.A.S.R. 146, and the remarks of Sir Michael Myers, C.J., in *Houghton's* case, [1945] N.Z.L.R. 639, 648, quoted above.

If, on the true interpretation of a will, a gift of £100 free of duty is a legacy of such a sum as will produce £100 after payment of duty, then (where the duty is, say, 10 per cent.), under s. 11, not only is there nothing to stop the Crown from treating this as a legacy of £111 2s. 2⅔d., but also it is its duty to do so, just as if the testator had bequeathed a direct legacy of that amount.

It may be taken for granted that the Stamp Office will not alter its practice unless so directed by a Supreme Court judgment, or unless some new legislation is passed. This matter may perhaps be worth the consideration of the Law Revision Committee.

The Presumption of Innocence

" Looking his hostile jury squarely in the eyes, Erskine delivered an apostrophe to his profession : 'I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the Judge ; nay, he assumes it before the hour of judgment ; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very Judge to be his counsel' " : Lloyd Paul Stryker, *For the Defence*.

COMPENSATION FOR CANCELLED PUBLICANS' LICENSES.

Principles to be Applied.

In a judgment, *In re Claims for Compensation, Hauraki Licensing District*, the Licensing Control Commission dealt exhaustively with the relevant provisions of the Licensing Amendment Act, 1948, relating to compensation in respect of cancelled publicans' licences, and enunciated the principles applicable to an award of compensation to the various parties affected by the cancellation.

The Commission began by saying that, as the definition of "owner" in s. 4 of the Licensing Act, 1908, includes the owner of the fee simple and those tracing title through him, it covers (*a*) an owner of the fee who is not the licensee, (*b*) an owner who is also the licensee, (*c*) a lessee who is not the licensee, and (*d*) a sub-lessee who is not the licensee. The term "licensee" covers (i) a lessee licensee, (ii) a sub-lessee licensee, and (iii) a tenant licensee.

In arriving at the amount of compensation to be awarded on claims under the Licensing Amendment Act, 1948, the Commission has to try to assess reasonably but fairly, and on an equitable basis (but always within the meaning of the provisions in the Act), the loss suffered by the owner and the licensee, or by the licensee, of the licensed premises in question.

The amount of the compensation to be ascertained is the diminution in value to the owner of the property in its actual condition at the relevant time, with all its existing advantages and all its possibilities. That is to say, the owner is entitled to that which a prudent man, in the position of a purchaser, would have been willing to give for the property sooner than fail to obtain it.

Licensees upon weekly or other undefined tenancies, even where they have been licensees for many years, cannot sustain claims for loss of three years' profits. The claimant is entitled, in respect of each year or part of a year, to a sum equal to the average annual net profits made by him immediately preceding the date of determination to cancel. The basis of calculation of annual net profits is that laid down under the alternate provisions of s. 40 (1) (*a*) or (*b*) or (*c*), and this does not amount to less than the one year's annual profits.

In respect of claims of licensees under weekly tenancies, a variety of circumstances may arise which will justify either an increase or a reduction of compensation actually arrived at on the calculations which the Licensing Control Commission is directed to employ under the statute (and these calculations must be the primary basis on which to work), but it is not possible to lay down any hard-and-fast rules as to the application of the discretionary power given by s. 40 (1). In assessing compensation, each case must be looked at upon its own particular facts.

Where, due to lack of maintenance of buildings and furniture, expenses shown are less than what should be proper operating costs, and there is a danger that owners will receive excessive goodwill based on false profits, and such profits, when capitalized, could easily reward the owner for failing to do the thing he ought to have done, the fact that the Licensing Amendment Act, 1948, includes the powers given to the Commission to cancel licences and to lay down standards, &c., and the increased powers given to the Licensing Committees are all matters which would be taken into consideration by prudent purchasers of licensed premises, and, accordingly, they do affect the value of licensed premises. The "fair and equitable" provision under s. 39 (2) can be applied to meet any such cases.

The phrase "and, if the owner of the licensed premises is not the licensee" in s. 38 (1) (*a*) (i) shows the intention to prevent payment of compensation twice in respect of the same element of loss. In the case of the owner licensee, the value of the premises as licensed premises will necessarily include the value of the licence and the goodwill of the business carried on therein, as both the licence and the goodwill are forms of property which enhance the value of the land, buildings, plant, and property upon which the licence is operated. In this matter, the Commission followed *In re Oriental Hotel, Muir to Niall*, [1944] N.Z.L.R. 512.

Over-all or total value of licensed premises is made up of the following components—namely, (*a*) the realty and all that goes with the realty (*e.g.*, buildings and fixtures), (*b*) the furniture, fittings, plant, and stock, and (*c*) the licence and goodwill attached to the premises.

Methods of ascertaining the value of licensed premises include the following:

(*a*) Evidence of actual sales of hotel premises (whether of the particular one in respect of which it is sought to fix the value or of neighbouring licensed premises).

(*b*) Capitalization of the true rack-rentals to be obtained from the licensed premises (the capitalization of rental paid by either lessee or tenant licensee may be a useful check upon value based upon capitalization of returns from the business). In cases where, over a substantial period of years, owners experienced in the hotel industry have received particular rents and on occasions accepted increased rents, the Commission takes the view that, *prima facie*, such rents are the best which the licensed premises will command.

(*c*) Capitalization of the net returns from the business carried on in the licensed premises (which would provide the soundest method for the purpose of assessing compensation, and the Licensing Control Commission proposes to follow it).

The Commission, however, considered that, having regard to the particular method of valuation adopted in *In re A Proposed Sale, Mountney to Young*, [1947] N.Z.L.R. 436, deduction of an amount representing the estimated value of the furniture and stock should not be made. The reasoning of the Land Sales Court in that case was only partly followed.

Under the scheme for compensation gathered from the provisions of ss. 39 and 40, a claim for compensation on behalf of a tenant or lessee licensee cannot be a claim in addition to the value of the licensed premises, as the value of the premises as licensed premises, by whatever method that value be arrived at, less the value of those premises without the licence, will comprise the compensation fund, and that value includes

the value of the licence and goodwill of the business carried on on the premises.

Where there is an owner of licensed premises and a "licensee . . . being a lessee, sublessee, or tenant" (within the meaning of those words appearing in s. 38 (1) (*a*) (ii)), the value of the licensee's interest in the premises would be a component part of the value of the licensed premises as such; and, where the licence is compulsorily taken away, there is an injury or loss sustained by the licensee. In such a case, the amount of difference arrived at by valuing the premises, both licensed and unlicensed, in terms of s. 39 (1) is the basic compensation fund from which claims by both the owner and a licensee who is a lessee, sublessee, or tenant must be met.

Where an owner has parted with a portion of his interest in the form of a lease or tenancy, it is "fair and equitable" to reduce, in accordance with s. 39 (2), the "basic compensation" payable to the owner in terms of that section by a sum equal to the basic compensation payable to the licensee, being a lessee, sublessee, or tenant, calculated in accordance with the provisions of s. 40 (1) (*a*) or (*b*) or (*c*), since any injuries sustained by the licensee as calculated in s. 40 (1) must be reflected in the diminution of the value of the premises. However, this method of reduction of "basic compensation" payable to the owner in cases where there is a "lessee, sublessee, or tenant" licensee is not exhaustive of the discretionary powers of the Commission under the provisos to ss. 39 and 40.

Notwithstanding that there may be no diminution in value, owing to the cancellation of the licence, and that there may be no basic compensation payable to the owner, the licensee may nevertheless be entitled to his basic compensation calculated in accordance with s. 40 (1) (*a*) or (*b*) or (*c*).

The words "net profits" as used in s. 40 (1) are primarily to be construed in their popular sense, and mean the excess of receipts over expenditure (which includes expenditure in labour as well as in cash); but, in respect of the licensee, such amount should be only a sum that would reasonably represent wages and subsistence of the person whose services were being performed by the licensee or his relations.

The words "income earned by the licensee" in s. 42 (1) are not synonymous with the words "net profits" as used in s. 40.

Where premises are brewery-owned but let to a tenant who occupies them as a "tied" house, in arriving at the value of the premises, the amount of profit made by the brewery in supplying liquor to the house must be ascertained.

Furniture, when the value of licensed premises is being arrived at, is an integral part of the assets, and is essential to the conduct of the business.

Independent claims for loss of wholesale trade, by reason of the cancellation of a licence, are not competent within ss. 38 and 39.

Once the maintainable net profits have been determined, the value of the premises is arrived at by a dual capitalization—namely, by adopting a rate per centum for investment and realty, and by adopting a higher rate for any surplus profits. This method of valuation, when made, is subject to the optimum methods of financing as set out in the judgment.

INTOXICATED DRIVERS.

Is Partial Disqualification Possible?

By R. T. Dixon.

It has been held in a recent case, *Police* v. *Macassey*, (1950) 6 M.C.D. 330, that s. 41 of the Transport Act, 1949, permits the Court to limit the compulsory disqualification of drivers (in penalty for intoxicated driving) to particular classes of vehicle. Thus, the learned Magistrate disqualified the defendant from driving any motor-vehicle other than a road machine—*e.g.*, a grader—for a period of one year.

If this decision is correct—and the writer respectfully has doubts whether it is—the discretion provided is very wide indeed. For example, it would be possible under this section to disqualify a taxi driver from driving a private car and to permit him to continue driving his taxi.

The reasons given by the Magistrate for his decision rest on the use in subs. 1 of s. 41 of the words "any motor-driver's licence." It was considered by the Magistrate that the word "any" justifies "a construction investing the Court with discretion to limit the scope of the disqualification to one or more particular class or classes of licence" (*ibid.*, 332).

The Magistrate then goes on to cite *Burrows* v. *Hall*, [1950] 2 All E.R. 156, in support of his views. This is a case based on the corresponding provisions of the Road Traffic Act, 1930 (Eng.).

First, let us consider the use of the word "any" in this context. In the result, it appears that it is immaterial whether this word has its primary meaning of one from among a number or whether it has the alternative meaning of the whole of a genus: *cf. F. E. Jackson and Co., Ltd.* v. *Collector of Customs*, [1939] N.Z.L.R. 682, 707. The clue to the effect of the section appears rather to lie in the words "the Court shall make an order . . . disqualifying him from obtaining." The effect of these words appears to the writer to be that the Court is directed to disqualify the defendant from obtaining any motor-driver's licence whatsoever. If the word "any" in s. 41 (1) means a licence for any particular class of vehicle, then the Court must disqualify the defendant from obtaining a licence for any of such classes. If, on the other hand, the word "any" means all drivers' licences as a genus, then the disqualification applies accordingly, and clearly no provision is made in the section for exceptions. To put it briefly and simply, the natural effect of prohibition from doing any thing of a genus is prohibition from doing all things of that genus.

The learned Magistrate's interpretation is that "any motor-driver's licence" in s. 41 (1) means "a "motor-driver's licence or any specified class of motor-"driver's licence" ((1950) 6 M.C.D. 330, 332). If the word "specified" were left out of this assigned meaning, it is respectfully submitted that there would be closer accord to the result following the use of the word "any" in this context, and, as above explained, it is submitted that the effect of the wording thus altered *is to require disqualification of the offender from* obtaining any driver's licence or any class of driver's licence.

The bearing of the above-cited English case on the interpretation is valid only to the extent that the provisions of the English law, as considered and interpreted in the case, correspond to those of the New Zealand law.

While there is a superficial resemblance between s. 15 (2) of the Road Traffic Act, 1930 (Eng.), and s. 41 (1) of the Transport Act, 1949 (N.Z.), nevertheless, when *Burrows's* case is analysed, it does not appear to be very relevant. The words used in s. 15 (2) are "shall . . . be disqualified . . . for holding or obtaining a licence." The sole point at issue and decided affirmatively in that case was whether, in *applying the provisions of s. 15 (2), the Court does so* in terms of the preceding s. 6, which deals with disqualification from driving in a more general way, and particularly authorizes the Court to limit the disqualification to the "same class or description of vehicle as the whole in relation to which the offence was committed."

In the New Zealand Transport Act, 1949, the point so decided in *Burrows's* case is not permitted to be in dispute, because s. 41 (1) states that "the Court shall make an order under s. 31 of this Act," and s. 31 corresponds generally to s. 6 of the English Act.

The important difference between the English and the New Zealand legislation is that, in both of the English sections above referred to, the words "a licence" are used where relevant. On the other hand, in the New Zealand legislation, s. 41 (1) uses the words "any motor-driver's licence," and s. 31, in referring twice to powers of disqualification, both times uses the words "a motor-driver's licence," and also specifically gives power to apply the disqualification provisions to "any specified class of motor-driver's licence."

Here lies a further argument against the interpretation adopted by the Magistrate, as it is a well-known rule of construction that, when wording is used in one part of an Act which differs from wording in another part of that Act, the Courts are to endeavour to find a reason for the difference and apply that reason in the interpretation. *If the Legislature had intended* to supply the discriminatory power in disqualification under s. 41, why was it not supplied by wording corresponding to that used in two places in s. 31 ?

The point raised by the learned Magistrate is a most interesting one, and no doubt in the particular circumstances of this case, as in many others, it would have fallen hard on the defendant if he had suffered the full rigour of complete disqualification from driving. Nevertheless, there appears to be some room for doubt as to the correctness of the decision, and this article is written with a view to further thought's being given to the matter by any Court faced with argument based on the findings in this case.

VIA LATINA—VIA DOLOROSA.

By Advocatus Ruralis.

Some years ago, when we had time to stand and stare, a number of older rural practitioners were warming their toes before the fire (when we had fires), waiting their turn to appear or reappear in Court. Advocatus was giving his opinion of an illiterate and uneducated generation of practitioners who had failed to grasp one of his happiest classical illusions. He had referred to the waste of effort when Pelion was unsuccessfully piled on Ossa. The Judge—an educated man—said 'Quite," but his youthful opponent and the more youthful listeners had later expressed the opinion that a reference to one of the less well known works of a little-known author in an unknown language added nothing to the lucidity of the argument, and was merely a form of intellectual snobbery.

The oldest member filled his pipe and then ventured the opinion that there was probably a lot to be said for the youthful point of view. He himself, in his younger days, had made a specialty of Biblical illustrations, on the ground that not even the youngest Magistrate would dare plead ignorance of his illusions, and, as a result of his experience, he felt that possibly a year's study of the Bible was quite as valuable as a year on farming in Italy two thousand years ago.

Warming to his subject, he said: "After the Boer War, I was for a considerable time tied to my bed with a damaged leg. I was a voracious reader, but, after a while, all reading became stale and unprofitable. A Scottish student friend suggested that I read the Bible right through, and he suggested that I should start with the book Esther, which he thought was a darned good yarn. I spent the next two or three months reading this book, and, from a purely legal point of view, it was time well spent. I studied the story of Susannah and the Elders, where the elders gave their evidence like the plaintiff's witnesses in a motor collision—and the cross-examination by the Judge which broke down the story.

"I noted with interest the economy of words and the vividness of description in the story of the man who went down from Jerusalem and fell among thieves. *Not even a senior sergeant on a Monday morning* could have been more succinct.[1]

"I learned how, by the painting of an early youthful background to an irascible old man like Samuel (who was somewhat heavy-handed with Agag), he would be remembered by a jury of readers as a mass of gentleness.[2]

1. Luke x, 30.

2. I Samuel iii, 9. I Samuel xv, 33.

"I learned from Jonah that the most improbable alibi would sometimes pass.[3]

"On one occasion, the local Dean lit a rubbish fire which spread to his neighbours.[4] On another occasion, a man sent his horse to be broken in, and it died of tetanus.[5] On both occasions, I was able to quote the appropriate verse in Exodus, which was good law to-day.

3. Jonah, *passim*. 4. Exodus xxii, 6.
5. Exodus xxii, 10; but see xxii. 14.

"In my youth, we were taught a lot of Roman Law, but a close study of Exodus, Leviticus, and the Code of Hammurabi might have been just as valuable as a ground work for modern law. You know," he added with a twinkle, "I have not yet found a lawyer who went to one extra lecture in Latin after he had passed for his degree."

"And I," said Advocatus, "am not sure whether I could translate the first verse of *Gaudeamus*."

JOINT FAMILY HOMES.

The Position when Husband predeceases Wife.

In advising three different clients as to the usefulness of the Joint Family Homes Act, 1950, I did some figuring which, if my mathematics are correct, may be useful to the rest of the profession.

The only case considered is where the house is now in the husband's name and he dies first. If the wife dies first, the Joint Family Homes Act simply puts things back as they were. All that has happened is that some costs and fees have been wasted.

If the house is now in the wife's name and she dies first, the following calculations need adjustment, because the husband's succession is not within s. 21 of the Finance Act, 1947, and because husbands pay more succession duty than wives do.

CASE I.

(*a*) House worth £3,000, other assets £5,000. Everything left to wife.
On husband's death, duty would be on £6,000 at £8,000 rate—*i.e.*, estate 12½ per cent., succession 2⅔ per cent. (on £3,000) = £830.
On wife's death, if she left £8,000 to two children, the duty would be 12½ per cent + 3 per cent. = £1,240. Total, £2,070.

(*b*) Bring property under Act; then, on husband's death, there would be no duty; on wife's death, the same duty. Total, £1,240.

(*c*) If husband leaves wife life interest, remainder to two children, then, on husband's death, duty would depend on value of wife's life interest. If her age at the date of his death does not exceed seventy-eight years, that would reach £2,000, the maximum exemption.
Assuming it does, on the husband's death, duty would be £900 (succession 2½ per cent. on £6,000); on the wife's death, nil. Total, £900.

CASE II.

(*a*) House, £3,000. Other assets, £8,000. Everything left to wife.
On husband's death, duty on £11,000 (estate 14 per cent., succession 3⅔ per cent. on £6,000) = £1,760.
On wife's death, leaving £9,000 to one child, duty would be estate 13 per cent., succession 5⅗ per cent. = £1,674. Total, £3,434.

(*b*) Bringing property under Act on husband's death, duty on £6,000 at £8,000 rate = £820. On wife's death, leaving £10,000 to one child, estate 13½ per cent., succession 5⅘ per cent. = £1,930. Total, £2,750.

(*c*) Husband leaves life interest to wife, remainder to one child, and assume wife's expectation of life makes her succession and the child's the same: estate 14 per cent., succession 3½ per cent. = £1,820.
On her death, there is none. Total, £1,820.

CASE III.

(*a*) House worth £4,000 mortgaged to wife for £1,500, her money used in acquiring it. Other assets, £6,000. Everything left to wife.
On husband's death, she pays duty on £7,000 at rate for £8,500 (estate 13 per cent., succession 3 per cent. on £2,000) = £1,015.
On wife's death leaving £8,500 to two children, she pays estate 13 per cent., succession 4 per cent. = £1,445. Total, £2,460.

(*b*) Make it a family home; on husband's death, duty is presumably on £6,000, which means £2,000 at rate for £6,000—*viz.*, estate 11 per cent., succession 2 per cent. on £1,000 = £240, on wife's death £10,000, £1,750. Total, £1,990.

(*c*) Husband leaves wife a life interest, remainder to two children.
On husband's death, wife's succession being worth at least £1,500, duty is as above, £1,015.
On wife's death, there is duty on £1,500 (estate 3 per cent., succession 1 per cent.) = £60. Total, £1,075.

It will be seen that in all cases it is better to leave the wife only a life interest, and the same applies in Case III, and not in Case I or Case II, if she has a life interest in the home only and an absolute interest in the other property.

Whether or not that is the best course to adopt depends, of course, on other factors—*e.g.*, how much she needs to live on, her age, and her other assets. A worrying factor is that, although by this method the family will undoubtedly benefit in the long run, more duty is payable on the death of the husband. The view can be taken that, to save the wife this extra payment, the children will simply have to pay more.

It is no doubt too much to expect an avaricious Government to exempt all gifts by will between husband and wife and collect its duty when the survivor dies. Certainly the Department in my experience spends a great deal of its time examining transactions between husband and wife and trying to give to them legal effects which were never intended.

It would, however, be a benefit, when one leaves a life interest to the other in real or personal property, to collect the duty, not on the death of the first to die, but on the death of the survivor. The assets would still be there, and the survivor's means when living on the income would not be retrenched to the great extent that they now are.

W.

POWERS OF ATTORNEY.

Grant to A whom failing B.

By E. C. ADAMS, LL.M.

In (1950) 26 NEW ZEALAND LAW JOURNAL, 60, I dealt with the topic of an attorney under a power of attorney acting by means of a substitute. There is, however, one very common mode of substitution often employed in New Zealand which I did not discuss in that article, and that is a power of attorney granted in favour of A *whom failing* B.

For example, a very common form of appointment *reads like this:*

I DO HEREBY NOMINATE AND APPOINT A or should the said A die or at any time become incapacitated or incapable of acting or unwilling to act then B to be my true and lawful attorney &c.

But many conveyancers in New Zealand who adopt this method of delegation in drafting their powers of attorney omit to include a clause relieving third parties who are asked to accept B as the attorney from making inquiries as to whether or not there have arisen the circumstances as set out in the grant which enable B to act as the agent of the principal. In the absence of any such clause, it may be difficult to persuade, for example, a bank manager, or a District Land Registrar, to accept B's signature on behalf of the principal.

In the following precedent, this difficulty is surmounted. A declaration by B that he is for the time being acting as the principal's attorney shall be conclusive, and no person so dealing with B shall be required to make any further or other inquiry. In practice, B would add a clause to this effect in the customary declaration as to non-revocation, which he has to make for the purposes of s. 100 of the Property Law Act, 1908.

Sometimes even more latitude is given by the principal, and it is expressly stated in the power of attorney that the fact that B purports to act under the power of attorney shall be conclusive evidence that B is authorized to act as A's substitute and that no person so dealing with B shall be required to make any inquiry as to B's authority to act.

PRECEDENT.

POWER OF ATTORNEY TO A WHOM FAILING B.

AND for the further better and more effectually doing effecting and executing and performing of the several matters and things aforesaid I HEREBY GIVE AND GRANT unto the attorney full power and authority from time to time to appoint one or more substitute or substitutes to do and perform any or all such matters and things as aforesaid and the same substitute or substitutes at pleasure to remove and to appoint another or others in his her or their place or places AND all and whatsoever the attorney or his substitute or substitutes shall do or cause to be done in or about the premises I hereby covenant with the said A to allow ratify and confirm.

IN the event of the indisposition or death of the said A or his absence from New Zealand or inability unwillingness failure or neglect for any reason to act in the premises I HEREBY NOMINATE CONSTITUTE AND APPOINT in his place and stead permanently or temporarily as may be necessary B of Wellington Solicitor to act as my attorney and agent with all and singular the powers authorities and discretions by this power of attorney conferred upon the said A including the power of delegation conferred by the immediately preceding clause.

I DECLARE for the satisfaction of persons dealing with the said B as my substitute attorney that a declaration by him that he is for the time being acting as my attorney in consequence of the death absence inability failure or neglect for any reason to act of the said A shall be conclusive and no person so dealing with the said B shall be required to make any further or other inquiry.

I HEREBY DECLARE that this power of attorney shall be deemed to be in full force and effect until expressly revoked by me notwithstanding that I also may be in a position myself to do any act which the attorney may be performing hereunder.

COUNTY JUSTICES IN ENGLAND.

Their Jurisdiction.

By N. F. LITTLE, B.A., LL.M.

During a long visit to Great Britain, I attended sittings of the English Courts of summary jurisdiction and of Quarter Sessions, and heard much of the work of the Magistrates who conduct them. I found the study of the English system of the administration of justice to be exceedingly interesting. One may read of "Justices" and of "Petty Sessions" and "Quarter Sessions" in *Halsbury* or *Stone*, but only personal contact gives a true impression of a system which, though it suggested the form of our own a hundred years ago, has continued to develop on traditional lines, and now seems very different from ours. Though its traditions still mould it, it has kept abreast of the needs of the community by constant change. Indeed, the conditions of the appointment of Magistrates were revised again thoroughly last year; and it is on the standing and efficiency of the Magistrates that the system turns.

In England, the chief Magistrates are the Justices of the Peace. They form the Courts of Petty Sessions and Quarter Sessions. Where (in the cities, chiefly) it has become impracticable or inconvenient to secure the services of panels of Justices, Recorders or Police Magistrates or Stipendiary Magistrates, on a permanent salaried basis, have been appointed; but their Courts are only Courts of summary jurisdiction (in Petty Sessions), doing in certain cases the work that Justices in Petty Sessions normally do.

Justices are appointed (and removed) by the Lord Chancellor for each County or Borough, usually on the recommendation of local advisory committees, from persons of standing considered suitable for active judicial work. The County Justices take precedence over the Justices of Boroughs within their County; indeed, it is on the County Justices that the system

(Concluded on p. 196.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Problems of Escape.—In *Police* v. *Hallmond, Police* v. *Rakena*, [1951] N.Z.L.R. 432, two prisoners serving unexpired terms of reformative detention escaped from prison, and, after less than a day's freedom, were recaptured and charged under s. 55 (1) of the Police Offences Act, 1927, which declares such miscreants to be incorrigible rogues liable to imprisonment with hard labour for two years. In an exhaustive judgment in which he deals with the difficult problems of punishment in such cases, F. B. Adams, J., says, at p. 437, *that it has come to his notice*:

> that certain unfortunate country Justices sitting at Te Awamutu in 1942 were called upon to grapple with a similar case, and did so with disastrous consequences to themselves.

It seems that, in the case they dealt with, the escapee was at liberty for a few days, no violence was involved, and no offence was committed while he was at liberty, but the Justices sentenced him to two years' hard labour cumulative upon the sentence he was then serving. In 1946, when he came before the Court upon another charge, Sir Michael Myers, C.J. ("in a newspaper which penetrates to every part of New Zealand") is quoted as having said that the sentence was a savage and sadistic one, likely not to reform the man, but to make him worse than he was before. F. B. Adams, J., comments, at p. 438:

> If this be a correct report, it may not be out of place to say, first, that the Justices who were so roundly condemned were not before the Court to be heard in their own defence; and, secondly, that the propriety of the sentence they imposed was not a matter on which the Court was called upon to express any opinion. They imposed a sentence of two years in exchange for a few days of liberty. I have imposed sentences of one year where liberty was achieved for only twenty-four hours or thereabouts. Their action was stigmatized throughout New Zealand as "savage" and "sadistic," and this was done by judicial utterance against which they could have no legal remedy. I should like to think that those Justices, no doubt capable and worthy men, serving their country without reward, may come to know that they have at least my sympathy. As to the propriety of the sentence they imposed, I need say nothing. But the facts that liberty is short, that no violence is involved, and that no other crimes are committed, do not, in my opinion, render it proper to treat such escapes as calling for merely nominal punishment. One has to consider, *inter alia*, the effect on other prisoners, the way in which such escapes strike at the whole system of reformatory and humanitarian treatment in such institutions as Waikeria, the disturbance of the community in surrounding districts, and the fact that escapees are almost inevitably driven to other crimes.

Now, with great respect to F. B. Adams, J., and making due allowance for the fact that Sir Michael Myers, C.J., would occasionally reel a trifle during a bout of righteous indignation, Scriblex cannot see why Justices of the Peace, if they elect to grapple with difficult problems of punishment and hand out heavy sentences, should be immune from strong criticism by members of the judiciary, nor why the propriety of the sentences they impose should demand silence on the part of higher authorities. The real trouble *is* that they are permitted to deal with the more important types of criminal work at all. Their ignorance and capriciousness are often to be deplored, even if their honesty and earnestness are to be admired. This fact is recognized by the restrictions placed on their judicial activities by the proposed Criminal Justice Bill. In the cases before him, in which the prisoners had to be fired at before they stopped, F. B. Adams, J., regarded one year's further imprisonment with hard labour as appropriate; in the case to which Sir Michael Myers, C.J., referred, the additional term was two years' hard labour. The use of the adjective "sadistic" is perhaps ill-advised, but as "savage" the sentence might well have been regarded by many freedom-lovers other than the prisoner.

Common Informers—Speaking to a private Bill introduced into the English House of Commons with the purpose of abolishing that legal anachronism the common informer, the then Attorney-General (Sir Hartley Shawcross) described this gentleman as a parasite, and maintained that the necessity for him had ceased to exist nearly one hundred years ago. In moving the second reading of this proposed legislation (the Common Informers Bill), Mr. Lionel Heald, K.C., quoted the description "viperous vermin" which Sir Edward Coke (Inst. 111) gave to him, and Mr. Heald was himself congratulated by Sir Hartley on introducing a measure that "would remove from the legal arena an animal who at one time sometimes served a useful purpose but who is now universally disliked." In New Zealand, we see little of the common informer, but the informer of any crime is still entitled to a wide measure of protection. By Letters Patent under the Great Seal dated May 11, 1917, there is delegated to the Governor-General the prerogative of granting pardon to any accomplice in a crime committed within the Dominion if he gives information leading to the conviction of the principal offender, or of any of such offenders if more than one, or of remitting his sentence or fines imposed upon him if he happens to have been convicted and punished. The inadmissibility, in a public prosecution, of evidence as to the source of Police information extends to the names of informers and the source of their information: in fact, a witness cannot even be asked if he himself was an informer: *Attorney-General* v. *Briant*, (1846) 15 M. & W. 169; 153 E.R. 808.

Mistaken Identity.—Mention of the Australian Jubilee Convention brings to mind the name of its popular and enthusiastic President, Harry Alderman, K.C., of Adelaide, at whom A. W. Rogers recently had an amusing thrust when welcoming Bench and Bar to the 1951 Annual Dinner of the Victorian Law Institute. Here is the old story in a new dress. "They tell me," he said, "that on an occasion when he was in England he was honoured by being permitted to ride in a procession through the streets of London in the same carriage as the King. The procession passed through the cheering London streets, with the King and the visitor sitting side by side in the leading carriage. As it drew near the steps of the House of Parliament, Churchill, who was standing there beside Attlee, turned to Attlee, and, pointing to the leading carriage, asked: 'I say, Attlee, who *is that sitting in that carriage* beside Harry Alderman?'"

COUNTY JUSTICES IN ENGLAND.

(*Concluded from p. 194.*)

is traditionally founded. It is interesting that solicitors may be, and often are, appointed as County Justices, including solicitors who have held appointments in the legal Departments or in the High Court (such as Masters), but no solicitor who is a County Justice, or his partner, may practise before any Justices of that County. The Justices of a County or Borough elect their own chairman and deputy-chairman.

The Court of Petty Sessions is the Court of summary jurisdiction, consisting of two or more Justices. The County or Borough Council provides the Court-houses and pays the expenses of clerks and staff appointed by the Justices. Usually, a County is divided into Petty Sessional Districts or Divisions, the Justices in each Division constituting the Court for that Division. The jurisdiction is mainly in criminal matters, but extends to a fairly wide range of civil and administrative matters.

The Court of Quarter Sessions of a County is constituted by the Justices of the County assembled at regular quarterly sessions, duly proclaimed, to which jurors, gaolers, and constables are summoned. All the Justices of the County may attend. A chairman or deputy-chairman, elected by the Justices, presides. In most Boroughs, the Court is held by a Recorder, sitting alone. The Clerk of the Peace, as the principal officer of the Court of Quarter Sessions is called, is usually, in the Counties, the Clerk of the County Council; and all costs of the administration of the Court are paid by the County. An interesting point is that the County Police are controlled by a standing joint committee of the County Council and Quarter Sessions, and are subject to the orders of the Justices.

A Court of Quarter Sessions has original criminal jurisdiction, the trial of prisoners being always by indictment, and being conducted in the same way as by a Court of Assize; and it has extensive civil and administrative jurisdiction—*e.g.*, in licensing and lunacy matters. Another principal function is as a court of appeal from Petty Sessions, this function being exercised usually by an "appeal committee" appointed by the Justices in Quarter Sessions themselves. In most cases, only barristers practise before Courts of Quarter Sessions. There is provision for special cases to be stated to the High Court.

Juvenile Courts are petty sessional Courts composed of Justices, often with a woman Justice as chairman.

It was very interesting to see a divisional Court of Petty Sessions sitting. The Court consisted of six or seven Justices, including several women. A number of offenders were dealt with summarily, and one or two were remitted to Quarter Sessions; some separation and maintenance cases were disposed of, and some licensing matters.

At a sitting of the Court of Quarter Sessions for Oxfordshire which I attended, a large number of County Justices (fifteen or sixteen) constituted the Court, which was presided over by a County Court Judge, but in his capacity as a County Justice elected as chairman of Quarter Sessions. The general conduct and atmosphere of the Court were very like those of our Supreme Court, except that the panel of Justices replaced our Judge and the jury remained sitting in Court ready to deal with each jury case in turn (there not being a different jury for each case). Audience was given to barristers only. At that sitting, several prisoners were dealt with, some originally and one or two on remand from Petty Sessions, and a list of administrative business was disposed of expeditiously. I did not see a jury trial, as those offenders who had intended to plead not guilty altered their pleas to guilty when it came to the point.

In England, there seem still, even under present-day conditions, suitable men and women in the Counties who will come forward and discharge, from a sense of public duty, the functions of Magistrates—functions which involve much time and responsibility. It is part of the English tradition that County people of standing should do that. One result is that appointment as a Justice is an honour and dignity in England—a state of affairs which holds an obvious lesson for us in New Zealand. I understand that the Lord Chancellor, with the help of his advisory committees, is very careful in his appointments, and does not hesitate to remove Justices from the active list if they fail to take their part in magisterial duties or prove unsuitable; the new statute governing appointments defines the conditions and the Lord Chancellor's powers very precisely.

No doubt there are arguments for and against the applicability of the present-day English system to conditions in New Zealand; but, if we had Justices of suitable standing, Courts composed of panels of Justices under experienced chairmen could relieve our Magistrates' Courts (which have in their civil jurisdiction *grown now* more like the County Courts in England) of much of their heavy burden of criminal and administrative work.

OBITUARY.

Mr. J. H. Upham (Christchurch).

Mr. John Hazlitt Upham, for many years a member of the legal profession in Christchurch, died at his home, after a short illness. He was aged eighty-three.

Mr. Upham was born in London and was educated in England and France. Before coming to New Zealand, he spent some time on a sugar plantation in Queensland. Mr. Upham came to New Zealand in 1899 to visit his brother, the late Dr. C. H. Upham, of Lyttelton. He decided to remain in New Zealand and study law.

Mr. Upham began his studies at the age of thirty-six. He qualified in 1902 and entered the office of Mr. J. J. Dougall, who shortly afterwards took him into partnership. This partnership lasted until 1923, when he joined the firm which became Harper, Pascoe, Buchanan, and Upham. He remained with this firm until December, 1949, when he retired.

He was a profound lawyer, especially on local body, equity, and commercial work; and his opinion was widely sought on knotty legal problems. He was a tenacious opponent in Court, and in his day engaged in heavy litigation, appearing before the Court of Appeal quite frequently. Over the last few years of practice, deafness hampered him, and he gave up Court work. He was well read on many topics apart from law.

Mr. Upham had few interests outside his profession. His main entertainment he derived from walking, and he was frequently seen walking across the hills to Lyttelton. He was a staunch member of the Church of England, and served for many years as churchwarden at St. Michael's Church.

Mr. Upham is survived by his widow, one son, Mr. C. H. Upham, V.C. and Bar, and three daughters.