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THE NEIGHBOUR'S TREES.

FOR some time past, there has been a growing interest in the improvement of the law relating to nuisance—using that word in its most general sense—caused by trees growing in a neighbouring property.

At common law, there is a distinction between two classes of trees for the purposes of determining whether damage done by them to a neighbouring property is actionable. This differentiation depends on whether or not the growing of the trees in question is a natural user of the land.

Where it is proved that damage has been caused to a neighbouring property by a tree which overhangs the boundary-line of that property and the property on which the offending tree is growing, or by the encroachment of the roots of such a tree on the neighbouring property, the person damnified has an action for damages in nuisance; and, if he cannot from his own land cut the offending branches, he may obtain a mandatory injunction compelling the removal of the tree in question. The reason is that such a growing of trees is a non-natural user of the neighbour's land.

Where, however, damage is caused by a tree growing on a neighbour's property or by natural agencies depositing debris from such a tree thereon, but the branches of such a tree or its roots do not extend beyond the common boundary-line, the adjoining occupier has no redress. The reason is that an owner or occupier of land, using or occupying his land for any purpose for which it may be used or occupied in the ordinary or natural course of the enjoyment of his land, is not liable for damage to the property of another through natural agencies operating as a consequence of such ordinary or natural user or occupation. The growing of trees for ornament, or shelter, or for the sake of the timber, is such a natural user of land.

It cannot be maintained that the law relating to damage caused by a neighbour's trees is in a satisfactory state; and it is generally known that the New Zealand Law Revision Committee has been giving serious consideration to recommending some statutory solution. Since the whole matter substantially rests on established common-law principles, only by statute can the position be remedied.

I.

Two recent appeals, heard by the learned Chief Justice at Wanganui, illustrate rather forcibly the law relating to nuisance arising from a non-natural user of land by the planting of a row of pine trees close to the boundary of a neighbour's land: *Mandeno* v. *Brown*: *Mandeno* v. *Wilkie* (to be reported).

In one action, the plaintiff was the owner of land which adjoined the land of the defendant at St. John's Hill, Wanganui. This land was not built upon; but the plaintiff was in occupation, and he had made preparations for building a house, and intended to do so in due course. In substance, the claim alleged that the defendant had a row of pine trees close to the boundary between his land and that of the plaintiff and others; that these trees were not planted in the natural user of the land; that they (or some of them) had reached a considerable height, and the branches of the trees overhung the lands of the plaintiff for various distances; and that, by reason of the encroachment, they deposited pine-needles and rubbish on the land of the plaintiff, and in other ways damaged his property. It was alleged that the soil of the land was corrupted and poisoned; that the use and enjoyment was seriously interfered with; and that, in the case of this particular plaintiff, the value as a building-site was seriously diminished.

A claim by another plaintiff against the same defendant was based on similar facts.

The learned Magistrate delivered a written judgment after he had heard lengthy arguments and submissions from counsel for the respective parties.

The order made in each case was in the form of a mandatory injunction, and its main effect was that the defendant was to remove the offending trees from his property within an ordered time.

The defendant appealed, in pursuance of the Magistrates' Courts Act, 1947, by way of rehearing.

In his judgment on the first appeal, the learned Chief Justice set out the relevant findings of fact by the Magistrate, which were as follows:

> I am compelled to hold on the evidence that the plaintiff has suffered substantial damage, and his right to abate the nuisance by cutting the overhanging branches is neither sufficient nor practical. It is clear that the plaintiff cannot utilize his land as a building-site to the best advantage whilst this nuisance continues, as he cannot site a dwelling to the best advantage on the land, and quite an area of what is a relatively small building-section is rendered unfit for gardening purposes and the general lay-out of the section as a residential property.
>
> Owing to the height and size of the tree, the plaintiff cannot cut the branches overhanging his property without entering on the defendant's land, which he has no right to do. Further, to cut the overhanging branches and encroaching roots would involve considerable work, risk, and expense, and would leave the tree in a dangerous state, as it would be blown over by the first strong wind, and might

result in serious damage to property and injury to persons in the vicinity.

The injury is of so material a nature that the plaintiff cannot be well or fully compensated by the recovery of damages, and is such as, from its continuance and permanent mischief, will occasion a continuous grievance.

The learned Chief Justice, applying the principles of such cases as *Beaumont* v. *Whitcombe and Tombs*, (1897) 16 N.Z.L.R. 133, and *Berg* v. *Semeloff*, (1904) 24 N.Z.L.R. 522, found that there was evidence which, if accepted by the Magistrate, was sufficient on which to hold that the various facts stated by him had been established. Of particular importance was the Magistrate's finding that the plaintiff had suffered substantial damage and that his right to abate the nuisance was not sufficient, or, to use the Magistrate's own word, not "practical." His findings in detail are set out in the above extract from his judgment.

In general, the learned Magistrate summarized the position by saying that the injury from the nuisance is "of so material a nature that the plaintiff cannot be well or fully compensated by the recovery of damages, and is such as, from its continuance and permanent mischief, will occasion a continuous grievance." With this the learned Chief Justice agreed, and accepted the findings as reasonable and justified. Consequently, the appeal could not succeed on the facts.

His Worship disposed of various contentions not uncommon in cases of this kind, such as that the plaintiff, Brown, had only recently purchased and had, therefore, "gone to the nuisance", and that the main offending tree in Brown's case had not been planted by the defendant; but these were all disposed of by the Magistrate in favour of the plaintiff, and, on appeal, the points were not taken.

The defendant also rested his appeal on the following submissions in law: (*a*) that the Magistrate was wrong in awarding damages in this case, as the planting of trees was a natural user of the land; (*b*) that the plaintiff had his remedy for encroachment in cutting back the branches or roots; (*c*) that the damage was not sufficient, actual, or sensible to give rise to a cause of action; and (*d*) that, in any event, the granting of an injunction was wrong; and, added to this, that, even if an injunction should go, damages in addition should not be awarded.

The learned Chief Justice dealt with the legal contentions in the order of their submission: first, as to what constitutes natural user of land, His Honour said:

In the New Zealand cases cited in the Magistrate's judgment, *Matthews* v. *Forgie* ([1917] N.Z.L.R. 921) and *Molloy* v. *Drummond* ([1939] N.Z.L.R. 499), claims by adjoining owners for damage caused by trees, failed, for the reason, it was held, that the damage resulted from a natural user of the land. In *Molloy* v. *Drummond*, in a strong wind, nuts, leaves, and twigs from a tree fell on plaintiff's roof, made a noise, and blocked his drainpipes. In *Matthews* v. *Forgie* ([1917] N.Z.L.R. 921), there were similar happenings, but it was held that the planting of trees for the purpose of shelter is part of the ordinary use to which land is put in New Zealand; and the following from *24 Halsbury's Laws of England*, 2nd Ed. 43, para. 76, applies: "Owners or occupiers of land are legally entitled to use or occupy their land for any purpose for which it may in the ordinary and natural course of the enjoyment of land be used or occupied, and they are not responsible for damage sustained by the property of others through natural agencies operating as a consequence of such ordinary and natural user or occupation."

In *Matthews* v. *Forgie* ([1917] N.Z.L.R. 921), *Sim*, J., after referring to cases concerning overhanging trees, said this, which I think is a correct statement of the law: "To plant trees, whether noxious or not, which overhang a neighbour's property and cause actual damage is actionable . . . for to have a tree . . . permanently projecting over a neighbour's land is of itself a nuisance" (*ibid.*, 924).

The learned Chief Justice added that the foregoing accords with the following from *24 Halsbury's Laws of England*, 2nd Ed. 44, para. 77:

As a general rule, no act can be justified as an ordinary user of premises which in fact results in a state of things amounting to a substantial interference with the ordinary use and enjoyment of property by other persons: and a person who injures the property of another or disturbs him in his legitimate enjoyment of it cannot justify that injury or disturbance as being the natural result of the exercise of his own rights of enjoyment, if he exercises his rights in an excessive and extravagant manner, or, it seems, if the inconvenience or injury resulting from the exercise of rights might easily be avoided, or if the user is extraordinary or dangerous. Moreover, an owner of property who suffers his property to become and remain a place of deposit for refuse and filth, is responsible for any nuisance that arises in consequence.

Therefore, it being proved that the tree or trees in the present case overhung the plaintiff's property and caused damage, there was an actionable nuisance.

The next point dealt with by His Honour related to the plaintiff's having the right of entry to abate the nuisance. He said:

In *Smith* v. *Giddy* ([1904] 2 K.B. 448), which is authority for the proposition that an action lies against an adjoining landowner for allowing his trees to overhang the boundary to the damage of the plaintiff's crops, it was contended that the plaintiff had the remedy of cutting the trees back himself, and that this was all-sufficient. *Wills*, J., said this was no answer to the action; and *Kennedy*, J., in the same case said: "If trees although projecting over the boundary are not in fact doing any damage, it may be that the plaintiff's only right is to cut back the overhanging portions; but where they are actually doing damage, I think there must be a right of action. In such a case I do not think that the owner of the offending trees can compel the plaintiff to seek his remedy in cutting them. He has no right to put the plaintiff to the trouble and expense which that remedy might involve" (*ibid.*, 451).

As to the appellant's third point, His Honour said that in *Fitzgerald* v. *Simpson*, (1900) 2 G.L.R. 369, Sir Robert Stout, C.J., held that an action for damages for nuisance caused by overhanging trees will lie only where actual or sensible damage can be proved. He continued:

I have already quoted what the learned Magistrate said as to damage, and it is plain that he held that actual and sensible damage was caused, and, therefore, the action would lie. This being so, *Fitzgerald* v. *Simpson* applies: there was actionable damage.

There is no question that, to found an action for a private nuisance (and that is what is alleged here), actual damage is necessary: see *Salmond on Torts*, 10th Ed. 219, *Smith* v. *Giddy* ([1904] 2 K.B. 448), and *Butler* v. *Standard Telephones and Cables, Ltd.*, *McCarthy* v. *Standard Telephones and Cables, Ltd.* ([1940] 1 All E.R. 121).

As to the remedies for nuisance: The respondent's counsel contended, on the authority of *Smith* v. *Giddy*, [1904] 2 K.B. 448, and *Butler's* case, [1940] 1 All E.R. 121, that the encroachment by trees, either by the branches or through the roots, is in the "consequential category of legal nuisance," and is actionable on proof of damage, or, as an alternative, that the nuisance of encroachment was actionable *per se*. He quoted *Salmond on Torts*, 10th Ed. 224, as showing that there could be two types of damage, either of which was sufficient in the case of nuisance—(*a*) physical injury, or (*b*) some interference with beneficial use of premises—and contended that in this case interference with the beneficial use of the premises as well as some physical injury was found. His Honour held that any damage of that kind for which a Court would make a pecuniary

award is sufficient damage to found an action for nuisance.

It was contended for respondent that, though the granting of an injunction was a discretionary right, the principles for using it in this case were well established, as the damage was serious and continuous and likely to be repeated, or that, even though damage may be trivial, continuous damage may be found as the suitable basis for an injunction : see *24 Halsbury's Laws of England*, 2nd Ed. 91. Further, it was submitted that injunction was suitable as preventing a multiplicity of actions, and that the jurisdiction to award damages instead of granting an injunction should not be exercised so as to enable a defendant to purchase a right or freedom to commit a wrong : see *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 322.

It was submitted for the appellant that, if granting the injunction was within the authority of the Magistrate, he was wrong in awarding damages in addition to granting an injunction.

The learned Chief Justice said that there is strong authority in New Zealand to the contrary. He added :

> It is true that the right of abatement is alternative to damages : *Salmond on Torts*, 10th Ed. 192 ; but there is full power in our Courts to award damages not only in lieu of, but in addition to, an injunction : *Ryder* v. *Hall* ((1905) 27 N.Z.L.R. 385, 394).

In the result, the appellant's contentions failed. His Honour saw no reason for differing from the judgment appealed from, and he dismissed the appeal.

His Honour held, and for the same reasons, that the appeal in the other case should also be dismissed. In that case, the learned Magistrate in his judgment had stated that the facts and circumstances of the two actions were similar ; and he had held that the injury suffered by the plaintiff from the overhanging branches of trees and the deposit of pine-needles and rubbish from them was of so material a nature that the plaintiff could not be well and fully compensated by the recovery of damages, and it was such as, from its continuance and permanent mischief, would occasion a continuous grievance. The Magistrate, therefore, had awarded the plaintiff damages for what he had suffered to date, and ordered the issue of an injunction to restrain the defendant from continuing the nuisance by removing the offending trees.

In our next issue, we propose to consider the law as it stands where damage is done to a neighbour's property by trees which do not overhang the boundary-line (as in the foregoing appeals). In such circumstances, the presence of such trees is a natural user of the land on which they are growing, and the neighbour—no matter how greatly he is inconvenienced or his property is depreciated—has no remedy at common law.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Winding-up—Contributory—Realization of Assets—Desirability of ascertaining Views of Contributories. The only assets of a public limited company, A., Ltd., were 49 per cent. of the shares of a private limited company, W., Ltd. An order was made for the winding-up of A., Ltd., and the liquidator entered into an agreement (conditional on the approval of the Court) with the holder of the majority of the shares in W., Ltd., for sale to him of the minority holding. Certain contributories of A., Ltd., desired the liquidator to apply to the Court to have W., Ltd., wound up, in order that proceedings might be taken against the directors. The liquidator refused. Per *Sir Raymond Evershed*, M.R., I have not been impressed by the suggestion that the contributories cannot be expected to form an opinion on such a matter themselves. They are the persons solely concerned, and, however well founded may be the liquidator in his opinion, it is wrong to deny the contributories an opportunity, if they wish, even of throwing good money after bad. *Re Agricultural Industries, Ltd.*, [1952] 1 All E.R. 1188 (C.A.)

As to Hearing *in Camera*, see *8 Halsbury's Laws of England*, 2nd Ed. 526, para. 1167 ; and for Cases, see *16 E. and E. Digest*, 128-131, Nos. *259-289*.

Winding-up—Foreign Bank—Bank nationalized by Foreign Decree—Debt situated Abroad—Claim by Customer against English Assets. A bank, which had its head office in Moscow and a branch office in Petrograd, but no branch office in England, was dissolved, according to Russian law, on or about December 14, 1917, by a decree of that date of the Soviet Government by which the bank, in common with other banks, was nationalized, its assets and liabilities being taken over by the State Bank. On May 30, 1932, a winding-up order was made in England in respect of the bank. The R. company sought to prove in the liquidation of the bank in England in respect of the equivalent in sterling (at the rate of exchange current on December 14, 1917) of (*a*) a sum of roubles 1,332,992 which, in December, 1917, stood to the credit of a current account with the bank in the name of the R. company ; (*b*) a sum of roubles 4,500,000 which in December, 1917, stood to the credit of a deposit account in the name of the R. company ; (*c*) a sum in respect of interest on the latter account ; and (*d*) the value of bonds, shares, and other securities deposited with the bank for safe custody by the R. company (as a customer) in Petrograd. The liquidator having rejected the proof of the R. company, *Held*, (i) That the proper law of the contract between the R. company and the bank was Russian law, and so the claims of the R. company, which were against the bank in Russia, were regulated by Russian law ; the effect of the Russian decree of nationalization was to extinguish the rights of the R. company against the bank ; and, therefore, at the date of the winding-up order in England, there was no subsisting debt or liability owed by the bank to the R. company. (Dictum of *Maugham*, J., in *Re Russian Bank for Foreign Trade*, [1933] Ch. 766, applied.) (ii) That, the Soviet State having taken possession of the securities deposited by the company with the bank, with regard to this part of the claim the bank would be entitled to plead that it had been evicted by title paramount, and, therefore, discharged from liability. (*Ross* v. *Edwards and Co.*, (1895) 73 L.T. 100, applied.) *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Royal Exchange Assurance* v. *The Liquidator*, [1952] 1 All E.R. 1269 (Ch.D.).

Winding-up—Services rendered—Claim for Remuneration—Bank dissolved by Russian Decree subsequently ordered to be wound up by English Court—Services rendered in relation to Assets of Bank after Decree of Dissolution but before Winding-up Order. Between March, 1930, and the date of the winding-up order in May, 1932, W., an expert in Russian law, assisted in various legal proceedings relating to the bank, and, largely owing to his advice with regard to a claim made in respect of assets of the bank by the Deutsche Bank, that claim was finally defeated. W. claimed in the winding-up of the bank in respect of his expenses and for a sum by way of remuneration. *Held*, That, although for the purposes of winding up the bank it was necessary notionally to revivify it (notwithstanding its dissolution under Russian law), it could not be regarded as having been in existence at the time of the rendering of, and for the purpose of receiving, W.'s services, and, therefore, W. could not be regarded, whether as an agent of necessity or in any other capacity, as having rendered services to the bank for which he could claim in the winding-up. *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269 (Ch.D.).

As to Debts Provable in a Winding-up, see *5 Halsbury's Laws of England*, 2nd Ed. (1949) 739-747, paras. 1200-1217 ; and for Cases, see *10 E. and E. Digest*, 925-930, 932, 933, Nos. *6343-6370, 6385-6397*.

CONTRACT.

Implied Term—Duty to supply Good Work and Materials—Purpose made known to Contractor—Reliance on Skill and Judgment—Execution by Subcontractor contemplated—Contractor's Advice on Materials and Subcontractor accepted—Contractor's Liability for Unsuitable Materials and Subcontractor's Faulty Work. A motorist with no technical or engineering knowledge, but with a good knowledge of his car, a Bentley speed model with powerful brakes, took it to experienced car repairers to have the brake-drums relined. Knowing this was specialist's work, which they did not undertake, he suggested it should be done by a firm who advertised cast-iron linings, which, he said, would be preferable, because they would consist of an unwelded circle of metal. The price quoted by that firm being considered high, the car repairers, with the plaintiff's consent, obtained a lower quotation from another firm, who advocated fitting alloy steel linings. In recommending the acceptance of this quotation, the repairers omitted to inform the motorist that alloy steel linings involved welding. The second firm did the work as subcontractors of the car repairers, but the alloy steel linings were not suitable for the brake-drums, and the car was damaged in consequence. *Held*, That, the motorist having so made known to the repairers that he required the brake-drum linings for a car designed for speed as to show that he relied on their skill and judgment to ensure that the brakes were repaired in a suitable and efficient manner, notwithstanding that he had approved the employment of specified subcontractors, the repairers were under a duty to provide good workmanship, materials of good quality, and a braking system fit for its purpose, and not merely to employ competent subcontractors. (Dictum of *Lord Wright* in *Cammell Laird and Co., Ltd.* v. *Manganese Bronze and Brass Co., Ltd.*, [1934] A.C. 423, and dictum of *du Parcq*, J., in *G. H. Myers and Co.* v. *Brent Cross Service Co.*, [1934] 1 K.B. 55, applied.) *Stewart* v. *Reavell's Garage*, [1952] 1 All E.R. 1191 (Q.B.D.).

As to Duty of Person employed under Contract of Work and Labour, see *34 Halsbury's Laws of England*, 2nd Ed. 465-467, paras. 529-534; and for Cases, see *44 E. and E. Digest*, 1300, 1301, Nos. *56-62*.

CONVEYANCING.

Appropriation by Trustee to Himself. *96 Solicitors' Journal*, 206.

Sale or Mortgage of a Ship. (F. E. Moss.) *4 Australian Conveyancer and Solicitors Journal*, 45.

CRIMINAL LAW.

Obscene Publication—Cover of Publication obscene—Destruction of Whole Publication—Obscene Publications Act, 1857 (c. 83), s. 1. On a summons to show cause why copies of a publication seized under a warrant issued under the Obscene Publications Act, 1857, s. 1, should not be destroyed, the Magistrate found that illustrations on the insides of the covers of the publication were the only obscene parts of the publication. The publishers submitted that, in those circumstances, there was no power to order the destruction of the whole publication. The Magistrate overruled that submission, and ordered the destruction of the whole publication. *Held*, That a publication was an obscene publication even if only a part of it was obscene, and, therefore, the order to destroy the whole publication was right. *Paget Publications, Ltd.* v. *Watson*, [1952] 1 All E.R. 1256 (Q.B.D.).

As to Indecent Publications, see *9 Halsbury's Laws of England*, 2nd Ed. 395, 396, paras. 667-669; and for Cases, see *15 E. and E. Digest*, 748-751, Nos. *8068-8095*, and Digest Supplements.

DIVORCE AND MATRIMONIAL CAUSES.

Condonation by Intercourse. *213 Law Times*, 193.

FALSE IMPRISONMENT.

False Imprisonment—Arrest without Warrant—Person arrested to be taken before Justice or Police Officer as soon as reasonably possible—Right of Detention for Purpose of Investigation. The respondent and her daughter entered the appellant's shop, where the daughter stole certain articles. They then left the shop, and the daughter placed the stolen articles in a bag carried by the respondent. Two detectives employed by the appellants followed the two women outside the shop and saw them go into another shop, where the daughter again stole an article and placed it in the respondent's bag. As they came out into the street, one of the two detectives accosted them, said they had stolen the articles, and asked them to come with her. It was a regulation of the appellants that only a managing director or a general manager of the appellants was authorized to institute any prosecution. The respondent and her daughter were taken back to the appellants' shop and detained until the chief store detective and the managing director heard the account of the two detectives, after which the Police were sent for and the respondent and her daughter were taken to the Police station, charged, and released on bail. Next morning, the daughter was tried and convicted, but the charge against the respondent was withdrawn by consent of the Court, as the appellants were advised that there was insufficient evidence to justify a prosecution. On a claim by the respondent for damages for false imprisonment, *Held*, That, where a person in exercise of his common-law right arrested a person without warrant, he should take the arrested person before a Justice of the Peace or a Police officer, not necessarily forthwith, but as soon as was reasonably possible; in the circumstances, the taking of the respondent to the appellants' office to obtain authority to prosecute was not an unreasonable delay before handing her over to the Police; and, therefore, the appellants were not liable for false imprisonment. (*Wright* v. *Court*, (1825) 4 B. & C. 596, *Hall* v. *Booth*, (1834) 3 Nev. & M.K.B. 316, and *Morris* v. *Wise*, (1860) 2 F. & F. 51, considered.) Decision of Court of Appeal, [1951] 1 All E.R. 814, reversed. *John Lewis and Co., Ltd.* v. *Tims*, [1952] 1 All E.R. 1203 (H.L.).

LAND TRANSFER.

Foreclosure of Land under Registered Title. (L. A. Harris.) *4 Australian Conveyancer and Solicitors Journal*, 41.

LANDLORD AND TENANT.

Licence—Licence to occupy Premises—Exclusive Occupation—Tenancy—Tenancy at Will—Exclusive Occupation of Premises—Need to consider Intention of Parties. The fact of the exclusive occupation of property for an indefinite period is no longer inconsistent with the occupier being a licensee and not a tenant at will. Whether or not a relationship of landlord and tenant has been created depends on the intention of the parties, and, in ascertaining that intention, the Court must consider the circumstances in which the person claiming to be a tenant at will went into occupation and whether the conduct of the parties shows that the occupier was intended to have an interest in the land or merely a personal privilege without any such interest. (Dictum of *Lord Greene*, M.R., in *Booker* v. *Palmer*, [1942] 2 All E.R. 676, applied.) (*Lynes* v. *Snaith*, [1899] 1 Q.B. 486, no longer good law.) *Cobb and Another* v. *Lane*, [1952] 1 All E.R. 1199 (C.A.).

As to Tenancy at Will, see *20 Halsbury's Laws of England*, 2nd Ed. 117-121, paras. 130-134; and for Cases, see *31 E. and E. Digest* (Replacement Volume), 32-42, Nos. *1890-2003*.

Repairs or Improvements. *96 Solicitors' Journal*, 207.

LEGITIMACY.

Presumption of Legitimacy—Rebutting Evidence—Statements by Mother during Lifetime—Statements by Natural Father—Admissibility—Matrimonial Causes Act, 1950 (c. 25), s. 32 (1) (2). All the children of the intestate, who was married in 1900 and died on November 14, 1949, were born during the lifetime of her husband. The intestate and her husband lived together for some years, but, in view of the intestate's association with one J.R., her husband left her, and she thereafter lived with J.R. (who died in 1930) as his wife. On the question of the legitimacy of a child of the intestate, the Court was asked to receive the evidence of a friend of the intestate (a cousin of J.R.) of statements made to him by the intestate to the effect that the child was not that of the intestate's lawful husband, and to admit birth certificates based on information supplied by the intestate which also indicated the child's illegitimacy. It was also sought to have admitted evidence of statements of J.R. to the effect the he was the father of the child in question. *Held*, (i) That the Matrimonial Causes Act, 1950, s. 32 (1), had the effect, not only of rendering admissible the oral evidence of a spouse tending to bastardize a child born during wedlock, but also of rendering admissible evidence having that effect whatever form it took, and, therefore, the evidence offered ought to be admitted. (ii) That, while the evidence of J.R. would be admissible as part of the *res gestae*, the statements would not be admissible as direct evidence of paternity as declarations against interest, for, in the circumstances that J.R. had assumed responsibility for the maintenance of all the children of the intestate, legitimate and illegitimate, his pecuniary interest was unaffected, nor could his statements satisfy the requirements as to admissibility on the ground that the fact was one of which he had peculiar or direct personal knowledge. Per *Jenkins*, L.J., Now that the direct evidence of a husband or wife as to non-access has been made admissible by s. 7 (1) of the Law Reform (Miscellaneous Provisions) Act,

1949, re-enacted in s. 32 (1) of the Matrimonial Causes Act, 1950, his or her indirect evidence to the like effect, provided it is admissible in other respects, must also be admissible, inasmuch as the reason for its exclusion which formerly obtained has ceased with the abrogation of the rule in *Russell* v. *Russell*, [1924] A.C. 687, in relation to direct evidence. *Re Jenion (deceased), Jenion and Others* v. *Wynne*, [1952] 1 All E.R. 1228 (C.A.)

NEGLIGENCE.

Air Rifle—Liability of Parent. The defendant, who lived in a populous district of Liverpool, allowed his son, aged thirteen years, to have an air rifle on condition that it was never used outside the house. There was a large cellar to the defendant's house, where the son was allowed to use the air rifle. Behind the house, and providing access to it and other houses, was an alleyway where children came to play. Without the defendant's knowledge, the son fired the air rifle in the alleyway and injured the plaintiff, a child aged five, who was standing at the entrance to the alleyway. *Held*, That an air rifle was not a dangerous thing *per se* in the sense that a savage animal or poison or fire was a dangerous thing *per se*, but it was potentially dangerous, in the sense that it might cause injury if negligently used, and a parent was negligent if he allowed a child aged thirteen to have an air rifle and did not take any precautions which were reasonably necessary to preclude the dangerous use of it; but, in the circumstances, the precautions taken by the defendant to restrict the use of the air rifle to a place of safety were suitable, and would have been adequate but for the son's disobedience, which could not reasonably have been foreseen or contemplated by the defendant, and, therefore, the defendant was not guilty of negligence. *Donaldson* v. *McNiven*, [1952] 1 All E.R. 1213.

As to Dangerous Articles, see *23 Halsbury's Laws of England*, 2nd Ed. 629, para. 883; and for Cases, see *36 E. and E. Digest*, 56-58, Nos. *353-364*.

Breach of Statutory Duty—Breach Fault of Deceased jointly with Fellow-workman—Liability of Employers in respect of Death of Deceased. The deceased and a fellow-workman, both employed by the defendants in their mine, were of equal status, neither being in charge of the other, and both were directed by a foreman of the defendants to bring down an unsafe roof under which they were proposing to work. After attempting unsuccessfully to bring down the roof, they jointly agreed to cease their efforts and to carry on with their normal work. As a result of the unsafe condition of the roof, the defendants were in broach of their duty under Regs. 7 (3) and 14 (1) of the Metalliferous Mines General Regulations, 1938, and the deceased and his fellow-workman were in breach of their duty under Reg. 15, the duty in each case being to secure safe conditions in the mine. Shortly after resuming work, the deceased was killed by a fall of roof. In an action by his widow against the defendants under the Fatal Accidents Act, 1846, *Sellers*, J., found in her favour, on the ground that the defendants were liable for the negligence and/or breach of duty on the part of the deceased's fellow-workman, and gave judgment for her for half the amount which he would have awarded if the deceased had not been partly responsible. On appeal, *Held*, That the deceased's own negligence and/or breach of duty, and not that of the defendants, was the substantial cause of the deceased's death; there was no negligence or breach of duty on the part of the deceased's fellow-workman for which the defendants could be made responsible; and, therefore, the widow's claim must be dismissed. *Stapley* v. *Gypsum Mines, Ltd.*, [1952] 1 All E.R. 1092 (C.A.).

As to Effective Cause of Injury, see *23 Halsbury's Laws of England*, 2nd Ed. 590-594, paras. 843-845; and for Cases, see *36 E. and E. Digest*, 24, 25, Nos. *118-124*.

Road Collision—Driver turning to Right into Traffic and signalling Intention to do so—Giving of Signal Immaterial to Question of His Liability for Accident—Fact of giving Signal at Proper Time Relevant only to Question of Other Driver's Negligence—Onus of Proof of giving Proper and Efficient Signal at Proper Time on Driver alleging He had given Such Signal. The mere fact that the driver of a motor-car, subsequently involved in a collision with another motor-car, when driving across the line of oncoming traffic, has signalled his intention to turn to the right is immaterial to the question of his liability for the accident, and is relevant only to the question of negligence on the part of the driver of the other car. (*Kleeman* v. *Walker*, [1934] S.A.S.R. 199, and *Webb* v. *Black*, [1937] S.A.S.R. 360, followed.) Whether or not the driver of the other car, the plaintiff, contributed to the accident by not keeping a proper look-out, or by failing to do what might reasonably have been done to avoid the consequences of the defendant's negligence, depends on whether or not he had sufficient notice of the defendant's intention to turn across his path, in time to alter his course or to stop. Where the defendant at some stage gave a signal of intention to turn to the right, the burden of proof that such a proper and efficient signal was given at such a time as would have enabled the plaintiff to see it and take effective action to avoid the collision is on the defendant. *Gower* v. *Rodhouse*. (Hamilton. May 16, 1952. Paterson, S.M.)

NUISANCE.

Fire Authority engaged in dealing with Peat Fire—Hose with Planks Protection on Each Side laid across Road—Truck-driver braking hard on approaching Hose, and damaging Truck—No Appreciable and Practical Interference with Use of Road—No Negligence or Breach of Duty on Part of Fire Authority's Servants—Forest and Rural Fires Act, 1947, ss. 44, 45. The occupier of a farm situated at T. Road called upon the defendant corporation for assistance in dealing with a peat fire. The corporation was a Fire Authority under the Forest and Rural Fires Act, 1947; and its overseer, who was also the County Fire Officer under the statute, ordered the County foreman to take men and gear to fight the fire. These County employees took to the scene of the fire a trailer pump, a 2 in. hose, and some planks. The only water available in the locality was in a deep drain on the opposite side of the road from the fire. Accordingly the pump was placed at the side of the drain and the hose was taken across the road to the scene of the fire. In order to protect the hose from damage by passing vehicles, some planks were laid on the road surface on each side of the hose. These planks were 9 in. wide, and on one side of the hose they were 1½ in. thick, and on the other 2 in. thick; and, with the 2 in. hose, they made an object 20 in. wide across the road. The plaintiff was the owner of a Ford V 8 truck, which two of her boarders took to get a load of wood for her. One of them, H., who did not have a driver's licence, was driving the truck at about 10.15 a.m. along T. Road in a southerly direction when the truck came upon the hose and planks across the road. H. braked hard, causing the truck to run off the road and overturn, whereby it was damaged. In an action claiming as damages an amount representing the damage done to the truck on the alternative grounds of nuisance and of negligence on the part of the defendant corporation's servants, *Held*, 1. That, in so far as the hose and planks were an obstruction, it was of a temporary nature, and did not amount to a nuisance, as there was nothing unreasonable in the laying of the hose across the roadway or in protecting it from traffic by using the planks, and the hose and planks presented no hazard to a vehicle driven with ordinary care. 2. That there was no negligence or breach of duty on the part of the defendant County's servants, and that the damage to the truck was due to the negligence of the truck-driver in not keeping a proper look-out and in driving at an excessive speed. (*Searle* v. *Metropolitan Water Sewerage and Drainage Board*, (1936) 13 L.G.R. (N.S.W.) 115, followed.) (*Benjamin* v. *Storr*, (1874) L.R. 9 C.P. 400, and *Butterfield* v. *Forrester*, (1809) 11 East 60; 103 E.R. 926, applied.) (*Ware* v. *Garston Haulage Co., Ltd.*, [1943] 2 All E.R. 558, explained.) *Williamson* v. *Waikato County*. (Hamilton. February 11, 1952. Paterson, S.M.)

PRACTICE.

Court of Appeal—Hearing in camera. Per *Sir Raymond Evershed*, M.R., Notwithstanding that a matter was heard at first instance in Chambers, to justify the Court of Appeal in sitting *in camera* it must be shown plainly that otherwise the ends of justice would be liable to be defeated within the principle laid down in *Scott* v. *Scott*, [1913] A.C. 417. The Court of Appeal has no power to sit in Chambers. *Re Agricultural Industries, Ltd.*, [1952] 1 All E.R. 1188 (C.A.).

As to Hearing *in camera*, see *8 Halsbury's Laws of England*, 2nd Ed. 526, para. 1167; and for Cases, see *16 E. and E. Digest*, 128-131, Nos. *259-289*.

PUBLIC REVENUE.

Estate Duty—Gift inter vivos—Date when made—Shares—Transfer before April 10, 1943—Transfer registered after That Date. By a transfer dated March 30, 1943, the deceased, in consideration of his love and affection for his wife, transferred to her 10,000 shares of £1 each in an unlimited company, to hold subject to the several conditions on which he held the same at the time of the execution thereof. By another transfer of the same date, the deceased, in consideration of the payment of 10s., transferred a similar number of the said shares to his wife and R., to hold subject to the same conditions. By

a settlement of the same date, made between the deceased, of the first part, the wife, of the second part, and the wife and R. (as trustees), of the third part, trusts were declared of the second block of shares in favour of the wife and the son of the deceased. Under the articles of association of the company, the directors were empowered, in their absolute and uncontrolled discretion, and without assigning any reason, to decline to register any proposed transfer of shares. The deceased was governing director of the company, and, as such, had full and uncontrolled authority to determine who should be admitted from time to time to be a shareholder of the company. The other direcrors were the deceased's wife and R. The two transfers (which were in the form prescribed by the articles of the company) and the settlement were executed by all parties between March 30, 1943, and April 5, 1943, and the share certificates of both blocks of shares were thereafter held by R. The transfers were not registered until June 30, 1943, and it was agreed that (having regard to the transitional provisions contained in the Finance Act, 1946, Schedule XI, Part II) all the shares would be liable to estate duty under the Finance Act, 1894, s. 2 (1) (*c*), unless before April 10, 1943, there had been *bona fide* dispositions of the shares purporting to operate as immediate gifts *inter vivos*. *Held*, That the deceased had done all in his power to divest himself of the shares and to vest them in the transferees, and the transfers were effective as between the deceased and the transferees to divest the deceased of beneficial ownership and to constitute the transferees the beneficial owners of the shares; the circumstance that the transferees must, to perfect their legal title, apply for and obtain registration did not prevent the transfers from so operating, and, pending registration, the deceased was the trustee for the transferees of the legal estate in the shares which still remained in him; and, therefore, the gift of the beneficial interest in the shares had been made and completed before April 10, 1943, and no estate duty was exigible. (*Milroy* v. *Lord*, (1862) 4 De G.F. & J. 264, distinguished.) (*Re Rose*, [1948] 2 All E.R. 971, approved.) Decision of *Roxburgh*, J., [1951] 2 All E.R. 959, affirmed. *Re Rose (deceased), Rose and Others* v. *Inland Revenue Commissioners*, [1952] 1 All E.R. 1217 (C.A.).

SHARE-MILKING AGREEMENTS.

Person engaged to milk Cows on Dairy-farm—Remuneration to be at Rate of 4d. per gallon on All Milk produced by Herd—Payment out of Proceeds of Milk sold—Such Remuneration not "a share of the returns derived from the dairy-farming operations"—Such Person not a "Share-milker". Share-milking Agreements Act, 1937, s. 2. The plaintiff claimed the sum of £1,535 on the ground (*inter alia*) that he was enaged by the defendant to milk cows and do certain work on the defendant's dairy-farm for which the agreed remuneration was that the plaintiff was to be entitled to receive as his share of the milk returns the sum of 4d. out of the proceeds of every gallon of milk produced by the herd and sold for town supply, and that he was entitled to payment as a "share-milker". The jury found that the plaintiff was employed as an independent contractor, and that it was a term of the contract between the parties that the plaintiff should be paid 4d. per gallon on all milk produced by the herd, and that the sum of 4d. per gallon was to be paid out of the proceeds of milk sold. On motion by the defendant for judgment on the jury's findings, and, alternatively, for a new trial, the defendant contended that, even accepting the jury's findings, the plaintiff was not a "share-milker" within the definition of that term in s. 2 of the Share-milking Agreements Act, 1937. It was contended by the plaintiff that, as the agreed remuneration (4d. per gallon on the milk produced and sold for town supply) was to be paid out of the proceeds of milk sold, the contract between the parties constituted an agreement whereby the plaintiff was to receive "a share of the returns derived from the dairy-farming operations" as those words are used in the definition of "share-milker" in s. 2 of the Share-milking Agreements Act, 1937. *Held*, 1. That, in determining whether a particular remuneration is to be regarded as a share of returns, it is not conclusive to ascertain that the agreed remuneration is determined by the amount of such returns, or that the remuneration will, or is to, come out of such returns. (*In re Young, Ex parte Jones*, [1896] 2 Q.B. 484, distinguished.) 2. That the plaintiff's remuneration was to be measured, not by the amount of the returns, but by the number of gallons in the returns, whatever would be the price per gallon that would be received. (*Costello* v. *Pigeon (Owners)*, [1913] A.C. 407, applied.) (*Newstead* v. *Labrador (Owners)*, [1916] 1 K.B. 166, *Duck* v. *North Sea Steam Trawling Co., Ltd.*, (1915) 9 B.W.C.C. 83, and *Meader* v. *Danum Steam Trawler Co.*, (1921) 14 B.W.C.C. 236, referred to.) The defendant was accordingly entitled to judgment. *Keighley* v. *Peacocke*. (S.C. Hamilton. May 5, 1952. Stanton, J.)

TENANCY.

Jurisdiction—Fixing of Fair Rent by Magistrate's Court not Conclusive as to Character or Status of Premises as "dwelling-house" in Other Proceedings in regard to Such Character or Status—Premises possessing Necessary Status when Fair Rent fixed retaining That Status so long as Same Tenancy continues without Other Alteration in Terms or Change in Nature of Occupancy—Tenancy Act, 1948, ss. 2 (1), 8—Tenancy Amendment Act, 1950, s. 4 (1). Neither the fact that the jurisdiction of the Magistrates' Court in the fixing of fair rents under the Tenancy Act, 1948, is exclusive, nor the absence of a right of appeal from the exercise of that jurisdiction, is a ground for treating such a decision as conclusive in other proceedings in regard to the character or status of the premises, so as to enable an order fixing the fair rent to stamp the premises irrevocably with the character of a "dwellinghouse". A Magistrate's Court, when called upon to fix a fair rent under the Tenancy Act, 1948, whether its decision fixing the fair rent is or is not a judgment *in rem*, or analogous thereto in so far as it fixes a fair rent, has no exclusive jurisdiction conferred on it by the statute to determine the status of the premises. The jurisdiction is a jurisdiction to fix a fair rent in respect of premises which possess the necessary status, and not a jurisdiction to determine conclusively and as against all the world that the premises possess such status. (*Bethune* v. *Bydder*, [1938] N.Z.L.R. 1, followed.) (*Inland Revenue Commissioners* v. *Sneath*, [1932] 2 K.B. 362, and *Inspector of Awards* v. *Peninsula Motor Service, Ltd.*, [1949] G.L.R. 17, applied.) (*Wakefield Corporation* v. *Cooke*, [1904] A.C. 31, distinguished.) If premises possess the necessary status at the time when a fair rent is fixed in pursuance of s. 8 of the Tenancy Act, 1948, they will retain that status so long as the same tenancy continues without other alteration in its terms than necessarily flows from the fixation of the fair rent, or any change in the nature of the occupancy or in any other relevant factor. (*Bethune* v. *Bydder*, [1938] N.Z.L.R. 1, referred to.) *Quaere*, As to the position if the terms of the tenancy are varied by agreement, or if the tenancy comes to an end and a new tenant enters on the same or on different terms, or if there is a relevant change in the nature of the occupancy or in any other respect. *Fleming* v. *Armstrong*. (S.C. Auckland. April 28, 1952. F. B. Adams, J.)

TOWN-PLANNING.

Consent of Local Authority to Proposed Building—Refusal of Consent based on Local Authority's Opinion that Such Building in Contravention of Town-planning Principles—Such Refusal in Council's Discretion although No Town-planning Scheme prepared or approved—Decision Conclusive in absence of Bad Faith—Decision of Town-planning Board, on Appeal from Such Decision, Conclusive to Same Extent—"Town-planning principles"—Town-planning Act, 1926, s. 34. Where, under a statute or a by-law, the consent of a local authority is necessary to any building or work, the local authority may invoke s. 34 of the Town-planning Act, 1926, at any time before it has prepared and had approval of a town-planning scheme. It may base its decision under that section upon any or all of the three grounds mentioned in the section; but it ought at once to make clear to the person or persons affected exactly what its decision is. The decision is conclusive in the absence of bad faith on any question relating to the principles of town-planning; and, in the event of an appeal from it, the decision of the Town-planning Board is conclusive to the same extent. (*Mowbray* v. *Mayor, &c., of Takapuna*, [1929] N.Z.L.R. 99, and *Fenton* v. *Auckland City Corporation*, [1945] N.Z.L.R. 768, applied.) On August 15, 1951, a builder, acting on behalf of plaintiff, lodged with the Northcote Borough Council a written application for a permit, accompanied by plans and specifications. Endorsed on the application form was a statement to the effect that permits were necessary for the erection, &c., of any building whatsoever. Plaintiff's property was a parallelogram measuring 40 ft. on the Queen Street frontage and 100 ft. on the Duke Street frontage, the angle formed by the two frontages being slightly less than a right angle. The proposed buildings comprised a small laundry shop and store fronting Queen Street, integral with a dwelling at the rear fronting Duke Street, and, some distance from this dwelling, a garage and a small laundry. No suggestion was made that the defendant's requirements would prevent plaintiff, by some reasonable modification of his plans, from using the property for his intended purposes, though the vacant spaces available around and between buildings might be reduced. On September 27, 1951, in pursuance of a resolution of the Council passed on September 12, 1951, and in accordance with its terms, it was intimated to plaintiff that the necessary permission would be given provided the buildings were set back 10 ft. from the Queen Street frontage and that buildings or growth were kept clear of a further triangular area

10 ft. by 10 ft. on the Duke Street corner behind the 10 ft. set back. This was treated as an implied refusal of the permit except upon those conditions; and the subsequent conduct of the Council showed that it was so intended. It was not suggested that the setting back of the shop on the Queen Street frontage would adversely affect plaintiff's business; but, while nothing had been particularized, the requirements no doubt involved detriment to plaintiff. The defendant Council sought to justify the refusal of the permit by reference to s. 34 of the Town-planning Act, 1926. It was common ground that no by-law of the Council was infringed by the plans or specifications, and no suggestion was made that they contravened any statutory prohibition or requirement. In an action claiming a writ of mandamus commanding the Council to issue a permit for the buildings, and for an injunction restraining it from imposing certain conditions on the permit, *Held*, 1. That the word "scheme" in the phrase "at any time before the scheme has been approved" in s. 34 (1) of the Town-planning Act, 1926, as amended, is the scheme which the local authority is under obligation to prepare or has resolved to prepare—a concrete scheme if one has been prepared, but, if none has been prepared, it is the scheme which will come into existence when the obligation is performed or the resolution implemented; and the phrase covers the period of time from the date when the obligation is imposed or the resolution is passed down to the final approval of a scheme. (*Wells* v. *Newmarket Borough Council*, [1932] N.Z.L.R. 50, *Mount Eden Borough* v. *N.Z. Wallboards, Ltd.*, [1945] N.Z.L.R. 711, and *Fenton* v. *Auckland City Corporation*, [1945] N.Z.L.R. 768, distinguished.) 2. That, at least to the extent indicated in the judgment, a local authority may rely on s. 34, even though it has not yet prepared, or begun to prepare, a scheme; and its decisions thereunder need not have reference to any particular or ascertainable scheme. (*James* v. *Waimairi County Council*, [1929] N.Z.L.R. 449, and *New Zealand Breweries, Ltd.* v. *Auckland City Corporation*, [1938] N.Z.L.R. 428, referred to.) 3. That the Council, having in fact acted in pursuance, or intended pursuance, of s. 34, was at all times entitled to rely on that section, even though its resolution of September 12, 1951, made no reference to the Town-planning Act, 1926, and that statute was not mentioned in correspondence by it or on its behalf until the statement of defence was filed. (*Jones* v. *Public Trustee*, [1931] G.L.R. 475, referred to.) 4. That it was open to the Council, in the exercise of the discretion conferred on it by s. 34, to say that in this case town-planning principles required that the building should be set back and the triangular area kept clear as provided in the Council's resolution. 5. That, on the facts, the Council had acted in good faith—namely, it had exercised the power conferred on it by s. 34 for its proper purposes, and not on improper or extraneous considerations; and the plaintiff's only remedy, in the circumstances of the case, was by way of appeal to the Town-planning Board. *Wong* v. *Northcote Borough*. (S.C. Auckland. April 30, 1952. F. B. Adams, J.)

TRANSPORT.

Suspension of Driver's Licence—Motor-vehicle driven by Person other than Owner when Accident occurred—Owner convicted of Failing to give Information leading to Such Driver's Identification—Order suspending Owner's Licence and disqualifying Him from obtaining Licence for Twelve Months—Owner's Driving not in Issue—Suspension and Disqualification quashed—Transport Act, 1949, s. 31. The power given by s. 31 of the Transport Act, 1949, was given to deal with a driver who is disclosed to be reckless, a menace, or a driver who is a danger and unfitted to be in charge of a car on the highway. Consequently, the disqualification of a driver or the suspension of his right to obtain a licence should not be applied where the offence has nothing to do with the offender's driving of a motor-vehicle. W. knew that a friend of his was driving W.'s car at the time of a comparatively minor accident, but he refused to disclose to the Police who was the driver of the car at the time. He was charged under s. 49 of the Transport Act, 1949, that being the owner of a motor-vehicle, on being informed of an offence alleged to have been committed by the driver of the motor-vehicle, and on being requested so to do by a Police constable, he did fail to give all information in his possession or obtainable by him which might lead to the identification and apprehension of the driver. He admitted the offence and was fined £50, his motor-driver's licence was suspended, and he was disqualified from obtaining a further licence for a period of twelve months. On appeal against the sentence, *Held*, That, though the monetary penalty was severe, the offence was a deliberate one, and, as the Magistrate had taken the view that the appellant's attitude was contumacious and merited a severe penalty, the monetary penalty would not be altered; but that part of the Magistrate's order suspending the appellant's licence and disqualifying him from obtaining a further licence for twelve months should be quashed. *Quaere*, Whether the Magistrate had power to deal with the appellant's licence, which he purported to do under s. 31 of the Transport Act, 1949. *Willis* v. *MacLennan*. (S.C. Wanganui. May 16, 1952. O'Leary, C.J.)

TRADE UNION.

Disciplinary Action against Member—Review of Decision—Jurisdiction of Court—Domestic Tribunal—Review of Decision—Jurisdiction of Court. In 1949, the plaintiff and one S., both members of the defendant Guild, applied to the local authority for a site on a fair ground. The plaintiff was allotted a position to which S. claimed, in accordance with a previous ruling of the Guild, he was entitled. The plaintiff, nevertheless, occupied the site. By r. 14 (*a*) of the rules of the Guild, the committee of each section of the Guild had power to impose a fine on any of its members who broke the rules, and, if the fine was not paid within one month, the member was deemed to have ceased to be a member of the Guild. Rule 15 (*c*) provided: "No member of the Guild shall indulge in unfair competition with regard to the renting, taking or letting of ground or position." On a complaint by S., a committee of the Guild decided that the plaintiff was guilty of "unfair competition" within r. 15 (*c*), fined him, and, the fine not having been paid, resolved that he ceased to be a member. In an action by the plaintiff for declarations that the decisions of the committee were *ultra vires* and void, *Held*, That the Court had jurisdiction to examine any decision of the committee which involved a question of law, including one of the interpretation of the rules; on the facts, the committee had misconstrued r. 15 (*c*) in finding that the plaintiff had been guilty of "unfair competition" within the meaning of that rule; and, therefore, the committee had acted *ultra vires* and their decision to expel the plaintiff was void. *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.).

WILL.

Seaman at Sea—Deceased in Service of Shipowner—Document made in Contemplation of Voyage—Alteration—Presumption of Alteration while "at sea"—Wills Act, 1837 (c. 26), s. 11. On July 25, 1944, the deceased, an apprentice in the employ of a steamship company, executed a will while on leave ashore in England. Within the next week, he returned to his ship, which sailed on August 1, 1944. At the date of making the will, the deceased was under the age of twenty-one, and, therefore, the will was invalid unless the deceased were a seaman at sea within the meaning of s. 11 of the Wills Act, 1837 (as explained by s. 1 of the Wills (Soldiers and Sailors) Act, 1918). At a date unknown, the will had been altered by the striking out of a bequest. This alteration had been initialled by the deceased, but there was no evidence to show whether it had been done before or after execution of the will. On an application for a grant of probate omitting the bequest, *Held*, (i) That the deceased, being in the employment of the steamship company when he made the will, and being then in contemplation of sailing on a fresh voyage within a very few days, was a seaman at sea within s. 11 at the material time, and the will was valid. (*In the Goods of Hale*, [1915] 2 I.R. 362, applied.) (ii) That there was a presumption that the alteration was made while the deceased was "at sea", and so no formalities were required for its alteration, and the revocation of the bequest was valid. (*In the Goods of Tweedale*, (1874) L.R. 3 P. & D. 204, and *In the Estate of Gossage*, [1921] P. 194, applied.) *In the Estate of Newland*, [1952] 1 All E.R. 841 (P.D. & A.).

As to Privileged and Nuncupative Wills, see *14 Halsbury's Laws of England*, 2nd Ed. 198-201, paras. 325-328; and for Cases, see *39 E. and E. Digest*, 332-339, Nos. *180-252*.

Seaman at Sea—Deceased in Service of Shipowner—Nuncupative Will made in Contemplation of Voyage—Wills Act, 1837 (c. 26), s. 11. The deceased was a chief officer employed in the marine department of a petroleum company. On January 11, 1946, he went on leave in England, and on April 25 he received instructions to join a ship on April 30. On April 27, he made a nuncupative will by saying in the presence of witnesses: "If anything happens to me, I want everything to go to my mother." *Held*, That the deceased made the will in contemplation of the voyage on April 30, and, therefore, he was a "seaman at sea" within the meaning of s. 11 of the Wills Act, 1837, and the will could be admitted to probate. (*In the Goods of Hale*, [1915] 2 I.R. 362, applied.) *In the Estate of Wilson, Wilson* v. *Coleclough*, [1952] 1 All E.R. 852 (P.D. & A.).

As to Privileged and Nuncupative Wills, see *14 Halsbury's Laws of England*, 2nd Ed. 198-201, paras. 325-328; and for Cases, see *39 E. and E. Digest*, 332-339, Nos. *180-252*.

LONG-TERM TABLE MORTGAGE.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

A solicitor has pointed out that in *Goodall's Conveyancing in New Zealand* there is no precedent of a long-term table mortgage. The late Mr. Goodall, of course, intended his book to be something more than just a collection of precedents in common use in New Zealand: it actually is in addition a valuable treatise on the history and theory of conveyancing in New Zealand, and, as such, is of great assistance to the law student as well as to the practising solicitor. Within the compass of such a book, it is quite impossible to include most of the conveyancing precedents in common use in New Zealand. It may be pointed out, however, that many forms not to be found in *Goodall's Conveyancing in New Zealand* were included by Goodall and Wallis in their two-volume New Zealand Supplement to the *Encyclopaedia of Forms and Precedents*. I endeavoured to bring this New Zealand Supplement up to date about two years ago, in another volume, which also contains precedents not found in *Goodall's Conveyancing in New Zealand*.

The precedent which follows is in use in the Wellington district, and appears to fill the bill adequately.

In drawing a mortgage, the conveyancer should avoid anything in the nature of a penalty provision. We all know the general rule as to mortgages—namely, that a proviso for increasing the rate of interest on non-punctual payments is not allowed as being a penalty, but a proviso for reduction from the rate first stipulated on punctual payment, and, in default, at the original rate, is a good agreement. On the other hand, a covenant to pay compound interest is valid, as is also a provision that interest in arrear shall be capitalized and bear interest as a further advance: *Garrow's Real Property in New Zealand*, 3rd Ed. 486. It has also been held that, in a mortgage bond given to secure the due payment by instalments of a sum due, a provision making the total sum due enforceable on any default is not to be considered a penalty. The following cases appear to show that in the precedent which follows there is no objectionable penalty provision: *Wallingford* v. *Mutual Society*, (1880) 5 App. Cas. 685, *General Credit and Discount Co.* v. *Glegg*, (1883) 22 Ch.D. 549, and *McLeod* v. *National Bank of New Zealand*, (1887) 6 N.Z.L.R. 3.

The further eleven covenants in the precedent are the normal covenants in a modern memorandum of mortgage under the Land Transfer Act, 1915, and do not, therefore, require any explanation.

The final charging or operative clause is essential to every mortgage under the Land Transfer Act, 1915, and therefore must never be omitted: *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489, 500.

Mortgage, [1916] N.Z.L.R. 489, 500.

A long-term table mortgage is often taken by a vendor in lieu of relying on a long-term agreement for sale and purchase. In *Goodall's Conveyancing in New Zealand*, 2nd Ed. 71, we find the following note:

> The powers and remedies of a vendor under a "long-term" agreement for sale and purchase seem therefore to compare unfavourably with those which would be conferred upon him if the agreement were carried into effect before possession by his giving a conveyance and taking a mortgage of the land for the balance of purchase-money and interest thereon.

From a purchaser's point of view a conveyance or transfer, followed by a mortgage for the unpaid purchase-money, is also preferable, as, until conveyance or transfer, the purchaser does not get the legal estate, and there is a risk of the purchaser's estate's being postponed in favour of some third person who gets, or procures a mortgage over, the legal estate: *Ryder* v. *Arkle*, [1935] G.L.R. 725, and *Calder* v. *Holdsworth*, [1935] G.L.R. 215, 222.

CONVEYANCING PRECEDENT.

Long-term Table Mortgage.
Principal and Interest payable by Weekly Instalments.
Term: 25 years.

MEMORANDUM OF MORTGAGE.

A.B. of Wellington Town Clerk (hereinafter with his heirs, executors, administrators and assigns, referred to as and included in the term "the Mortgagor") being registered as the proprietor of an estate in fee-simple subject, however, to such encumbrances, liens, and interests as are notified by memoranda underwritten or indorsed hereon, in that piece of land situate in the Provincial District of Wellington containing [*Set out here area*] be the same a little more or less being [*Set out official description of land*] being also all the land comprised and described in Register Book Volume Folio IN CONSIDERATION of the sum of One thousand two hundred pounds (£1,200) (hereinafter called "the said principal sum") this day lent to him the Mortgagor by C.D. of Wellington Land Agent (hereinafter with his heirs, executors, administrators and assigns referred to as and called "the Mortgagee") the receipt of which sum is hereby acknowledged DOTH HEREBY COVENANT with the Mortgagee that he the Mortgagor will repay the said principal sum together with interest thereon computed from the first day of May 1952 at the rate of Five pounds (£5) per centum per annum calculated with annual rests by regular weekly payments each of One pound twelve shillings and ten pence (£1 12s. 10d.) for a period of twenty-five years the said weekly payments to be due and payable to the Mortgagee in the City of Wellington and to payable on the Thursday of each week the first of such payments to be due and payable on the 8th day of May 1952 AND the Mortgagor doth further covenant and agree with the Mortgagee that if the Mortgagor shall at any time make default in payment of any of the said weekly instalments of One pound twelve shillings and ten pence (£1 12s. 10d.) or any part thereof for a period of fourteen (14) days after the date upon which the same should have been paid then and in every such case the Mortgagor will pay to the Mortgagee interest on any and every weekly instalment so unpaid at the rate of Five pounds (£5) per centum per annum as from the due date thereof and for so long as any such instalment shall be unpaid such interest to accrue from day to day AND FURTHER that if any such weekly instalment as aforesaid shall be wholly or partially in arrear and unpaid for the space of fourteen (14) days after the same ought to have been paid or if the mortgagor shall make default in the observance or performance of any covenent condition or agreement on his part herein contained or implied immediately thereupon the whole of the principal moneys remaining payable hereunder shall become a present debt immediately payable by the Mortgagor to the Mortgagee upon demand and until payment thereof shall with interest thereon at the rate of Five pounds (£5) per centum per annum and together also with any such overdue and unpaid instalments and other moneys payable by the Mortgagor to the Mortgagee with interest thereon as aforesaid respectively be secured by way of Mortgage on the said lands above described and shall wholly and for all purposes be within the operation of this present security AND the Mortgagor DOTH HEREBY FURTHER COVENANT with the Mortgagee as follows:—

FIRST, that the Mortgagor will fence the said land within the meaning of any Fencing Act or Ordinance for the time being in force in the district where the said land is situated; and will pay all rates, taxes, charges, assessments and other outgoings charged, assessed or imposed on or payable in respect of the said land or any part thereof.

Continued from cover i.

LEGAL ANNOUNCEMENTS.

FOR SALE.

LUCRATIVE LEGAL PRACTICE, established 20 years in leading SOUTH ISLAND CITY. Five years' lease available.
Replies to:—
"LEGAL PRACTICE,"
C/o C.P.O. Box 472, WELLINGTON.

ANNOUNCEMENT.

MR. THOMAS HENRY ROLAND GIFFORD, who has hitherto been practising as a Barrister and Solicitor at Tennyson Chambers, Tennyson Street, Napier, has pleasure in announcing that he has admitted into partnership MR. THOMAS DENNISON ALTY, LL.B. The practice will be carried on as from the 1st May, 1952, at the same address under the firm name of "GIFFORD & ALTY."

ANNOUNCEMENT.

MR. W. B. L. WILLIAMS OF HAMILTON, SOLICITOR, wishes to announce that on the retirement of his former partner MR. A. H. POWELL he has been joined in partnership by MR. G. R. BOWDEN, B.A., LL.B., and that the practice will continue to be carried on at Union Bank Buildings, Hamilton, under the name of POWELL, WILLIAMS AND BOWDEN.

ANNOUNCEMENT.

MR. C. E. LEES, BARRISTER AND SOLICITOR, who has been carrying on practice under the firm name of CHALMERS AND LEES at 41 Shortland Street, Auckland, wishes to announce that he has been joined in partnership by MR. L. E. MORGAN, BARRISTER AND SOLICITOR, formerly of Reefton and latterly of Auckland. The practice of Barristers and Solicitors will be carried on, as from the 1st April, 1952, under the name of LEES AND MORGAN at the above address.

SECONDLY, that the Mortgagor will repair within the meaning of the Land Transfer Act 1915 or any Act or Acts amending the same, all the buildings and erections, and all fences, hedges, drains and watercourses now erected or being or hereafter to be erected, or to be on the land hereby mortgaged, and also will clear and keep clear the said land from gorse, tauhinu, sweetbriar, Californian thistle, and other noxious weeds and shrubs, and will in all respects comply with the provisions of the Noxious Weeds Act 1950 or any Acts amending or in substitution for that Act and will free and keep free the said land from rabbits and noxious vermin.

THIRDLY, that the Mortgagor will insure and keep insured all buildings and erections for the time being situate on the said lands against loss or damage by fire in the full insurable value thereof in the name of the Mortgagee in some insurance office in New Zealand to be approved by the Mortgagee, and in the event of the said buildings and erections or any of them being destroyed or damaged by fire all moneys received by the Mortgagee under any insurance in respect of such destruction or damage shall be applicable at the sole option of the Mortgagee either in or towards repairing or rebuilding the buildings and erections so destroyed or damaged, or towards repayment of the mortgage debt hereby secured and this condition shall not modify or limit any of the powers conferred on the Mortgagee by the Land Transfer Act 1915 except as herein expressed.

FOURTHLY, that if the Mortgagor shall fail or neglect to insure or keep insured the said buildings or erections as aforesaid then and in any such case it shall be lawful for but not obligatory on the Mortgagee to insure the said buildings and erections or any of them and all moneys expended by the Mortgagee in so doing shall be payable by the Mortgagor to the Mortgagee upon demand and until paid shall be charged on the said lands together with interest at the rate aforesaid computed from the date or dates of such moneys respectively being expended.

FIFTHLY, that the Mortgagor will "cultivate" and "will not carry on offensive trades" according to the meaning given to such phrases by the Sixth Schedule of the Land Transfer Act 1915.

SIXTHLY, that so long as any moneys shall be or remain due on this security, the Mortgagee shall, subject to the rights of any prior mortgagee have, and retain possession of, and be entitled to, the beforementioned Muniments of Title or any other or others to be issued in substitution therefor, whether to a purchaser of the equity of redemption or otherwise.

SEVENTHLY, that for the purpose of receiving any sum of money which may become payable by virtue of any policy of insurance effected against loss or damage of the premises hereby mortgaged by fire in the name of the said Mortgagee or in the name of the Mortgagor alone the Mortgagor doth hereby irrevocably appoint the Mortgagee to be his attorney and agent, with full power from time to time to demand, sue for, and receive from any Insurance Company or Society, or from any person or persons liable to pay the same, all moneys secured or to become payable under any such policy, and to give good and effectual receipts and discharges therefor, which shall exonerate the taker or takers thereof from all responsibility and liability whatsoever, and to settle and compound and compromise any proceedings, claims and demands with such Company, Society, person or persons in respect of such insurance or policy, and to exercise all the powers of an absolute owner, and for all or any of the purposes aforesaid to sign, seal and if necessary as the act and deed of the Mortgagor deliver any instrument, document or deed which may be necessary in the premises, and if necessary to appoint one or more substitute or substitutes for any of the purposes aforesaid, and such substitution at pleasure to revoke.

EIGHTHLY, that if the power of sale herein implied or expressed should at any time be exercised by the Mortgagee it shall be lawful for the Mortgagee to retain out of the proceeds of such sale all such sum or sums as shall be owing on the security of these presents or secured hereby, notwithstanding that the day for payment thereof shall not have arrived.

NINTHLY, that if the Mortgagor shall sell the said lands during the continuance of this security the Mortgagor shall obtain from the purchaser on such sale the execution by such purchaser of a Deed of Covenant by the purchaser, his executors, administrators and assigns with the Mortgagee to observe, perform, fulfil and keep the covenants, conditions and agreements herein contained or implied (but without releasing the Mortgagor from the personal liability of the Mortgagor hereunder) and further covenanting that should such purchaser in turn sell the said lands he will procure from his purchaser the like Deed of Covenant with the Mortgagee in every respect as is provided for by this clause and so *toties quoties* the said Deed of Covenant and every succeeding Deed of Covenant to be prepared by the Solicitors for the Mortgagee at the cost in all respects of the Mortgagor or other persons who shall be primarily liable to procure the Deed of Covenant in question.

[N.B.—*As from January 1, 1953, the date of the coming into operation of the Property Law Amendment Act, 1951, this clause will be unnecessary.*]

TENTHLY, that immediately after default in payment of any of the sums hereby secured or of any interest or in the performance or observance of any of the covenants, conditions or agreements herein expressed or implied by virtue of the Land Transfer Act 1915, or any amendment thereof, it shall be lawful for the Mortgagee either forthwith or at any time after such default or breach as aforesaid without any notice to the Mortgagor or making any demand on the Mortgagor (other than in compliance with s. 3 of the Property Law Amendment Act 1939) to sell the estate and interest of the Mortgagor of and in the said land or any part or parts thereof either together or in lots by public auction or private contract or partly by either of such modes of sale and subject to such conditions as the Mortgagee may think fit and to buy in and resell the same without being liable for any loss occasioned thereby and to make and execute all such instruments as shall be necessary for effecting the sale thereof, all which sales contracts matters and things hereby authorized shall be as valid and effectual as if the Mortgagor had made, done or executed the same and the Mortgagee may also exercise and put in force all such other incidental powers, rights and remedies as are conferred upon Mortgagees by the Land Transfer Act 1915, or any Act amending the same or in substitution for that Act or by-law and in such case it shall be lawful for the said Mortgagee to demise and lease the said premises or any part thereof for any term in possession at such rent and on such conditions as he shall think fit.

ELEVENTHLY, that the covenants, powers and conditions directed to be implied in mortgages by the Fourth Schedule of the Land Transfer Act 1915 shall be implied herein except in so far as the same are hereby expressly modified or negatived.

AND for the better securing to the Mortgagee the repayment in manner aforesaid of the said principal sum interest and other moneys and the observance by the Mortgagor of the covenants on his part herein contained or implied the Mortgagor hereby mortgages to the Mortgagee all the estate and interest of the Mortgagor in the said land above described.

IN WITNESS whereof the Mortgagor has hereto signed his name this day of April one thousand nine hundred and fifty-two.

SIGNED by the said A.B. as Mortgagor in the presence of:—

E.F.,
Solicitor,
Wellington.

THE LATE SIR ARCHIBALD BLAIR.

Tributes by Bench and Bar.

In our report of the Court gathering on April 24 to pay tribute to the life and work of the late Sir Archibald Blair (*Ante*, p. 120), the name of Mr. Justice Finlay was inadvertently omitted from the names of those who were present on the Bench on that occasion.

We regret the omission all the more for the reason that Mr. Justice Finlay was a lifelong friend of the late Judge, and it was particularly appropriate that he should be able to take part in the representative tributes paid to one who had earned the affectionate regard of all who knew him.

WHAT IS A "PROFESSION"?

By Peter Wright.*

"Into the ranks!" exclaimed Willie. "But don't you want to be an officer?"

"No, I do not," said Horry.

"But what else can one be," asked Willie, "except a barrister, or go into the Diplomatic Service? Surely you wouldn't be a doctor or a clergyman?"

"There are more professions in heaven and earth, little Willie," said Horry, looking very profound, "than are dreamt of in your philosophy": Duff Cooper, *Operation Heartbreak* (London, 1950), 18.

What is meant by a "profession"? We are now so accustomed to the debasement of the currency in our pocket that many of us may be unmoved by the comparable change that has taken place in our professional status. Words of merit and significance, for which men died, are every day applied to concepts the very opposite of those which inspired them. Peace means war; democracy, tyranny; freedom, serfdom; dominion implies subjection; and material security is said to be obtained by utter dependence on others. We live in a revolutionary society. The word "profession", and all it stands for, has not withstood the surge of time. There has been a conscious examination in other places of this and like changes, which have been nowhere more marked than in Socialist Britain. Carr-Saunders and Wilson in 1933 studied *The Professions* in a monumental work.[1] In 1939, Professor T. H. Marshall wrote a thoughtful and balanced essay on "The Recent History of Professionalism in Relation to Social Structure and Social Policy."[2] In 1949 Roy Lewis and Angus Maude examined *The English Middle Classes*, the professions among them.[3] Dr. Roscoe Pound has considered "The Professions in the Society of To-day" with apprehension.[4] This year, Professor J. E. Smith of Queen's University has written an impressive article in *The Canadian Chartered Accountant* on "The Criteria for Professional Status."[5] Finally, continual efforts to professionalize many callings and ventures have tendered to the traditional professions the sincerest form of flattery.

"Profession" is a word of decent antiquity. It is derived from the Latin verb *profiteor*, "to declare publicly, to freely own, acknowledge, avow, to openly confess or profess." In classical times, the noun derived from it, *professio*, was used as a public declaration of a business or calling, and was applied then to rhetoric, philology, philosophy, magic, and medicine.

The Greeks too had the concept of a profession. Plato wrote in *The Republic*:[6]

> But when intemperance and diseases multiply in a State, halls of justice and medicine are always being opened; and the arts of the doctor and the lawyer give themselves airs, finding how keen is the interest which not only the slaves but the freemen of a city take about them . . . Is it not disgraceful, and a great sign of the want of good breeding, that a man should have to go abroad for his law and physic because he has none of his own at home, and must therefore surrender himself into the hands of other men whom he makes lords and judges over him?

In the second century, A. D. Lucian wrote in words as fresh to-day as then: "When my childhood was over and I had just left school, my father called a council to decide upon my profession."[7] Later, in *The Parasite: A Demonstration that Sponging is a Profession*, Lucian discussed trades and professions that enable ordinary people "to benefit themselves and others." The professions to him, at that date, were rhetoric, or the calling of an advocate, music, medicine, mathematics, and philosophy. He spoke of abstaining from these professions "because nothing great is easy," and contrasted with them the trades of carpentry and cobbling.

In these civilizations of the Mediterranean, professions were already recognized as necessary elements in the civilized state, and on a level somehow higher than honest trades.

From the collapse of these civilizations a military profession arose. Buckle in the *History of Civilization in England*[8] put it this way:

> In a backward state of society, men of distinguished talents crowd to the army, and are proud to enrol themselves in its ranks. But as society advances, new sources of activity are opened, and new professions arise, which, being essentially mental, offer to genius opportunities for success more rapid than any formerly known. The consequence is that in England, where these opportunities are more numerous than elsewhere, it nearly always happens that if a father has a son whose faculties are remarkable, he brings him up to one of the lay professions, where intellect, when accompanied by industry, is sure to be rewarded. If, however, the inferiority of the boy is obvious, a suitable remedy is at hand: he is either made a soldier or a clergyman; he is sent into the army or hidden in the church. And this, as we shall hereafter see, is one of the reasons why, as society advances, the ecclesiastical spirit and the military spirit never fail to decline. As soon as eminent men grow unwilling to enter any profession, the lustre of that profession will be tarnished: first its reputation will be lessened, and then its power will be abridged.

There followed an era in which the three peaceful professions of law, divinity, and medicine gained an eminence and honour that still attaches to the word. The great writers acknowledge it. That famous scholar and physician Dr. T. Browne wrote in *Religio Medici*[9] in 1635:

> And to speak more generally, those three noble Professions which all civil Commonwealths do honour, are raised upon the fall of Adam, and are not in any way exempt from their infirmities; there are not only diseases incurable in Physick but cases indissolvable in Laws, Vices incorrigible in Divinity.

In No. 21 of *The Spectator*,[10] Joseph Addison, "as a describer of life and manners . . . perhaps the first

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* Of McMillan, Binch, Wilkinson, Stuart, Berry, and Wright, Toronto, Ont. Formerly Provincial Editor for Ontario of the *Canadian Bar Review*. (The article is published by courtesy of the *Canadian Bar Review*, in which it first appeared.)

[1] A. M. Carr-Saunders and P. A. Wilson, *The Professions* (Oxford, 1933).

[2] (1939) *5 Canadian Journal of Economics and Political Science*, reprinted in *Citizenship and Social Class* (Cambridge, 1950).

[3] Phoenix House, London.

[4] (1949) *241 New England Journal of Medicine*, 351. Another rather disconcerting approach is found in *Education for Professional Responsibility: A Report of the Proceedings of the Inter-Professions Conference on Education for Professional Responsibility, held at Buck Hill Falls, Pennsylvania, April 12, 13 and 14, 1948* (Pittsburgh, 1948), which started with the assumption that it was concerned with divinity, medical, business, legal, and engineering education, an assumption which arose no doubt because of the unquestioned position of the Harvard Graduate School of Business Administration and the Carnegie Institute of Technology, who, with the Carnegie Corporation of New York, gave leadership and support to the Conference.

[5] (1951) *58 Canadian Chartered Accountant*, 271.

[6] Jowett's translation, 3rd Ed., Oxford, 1921, pp. 405A-405B.

[7] *The Vision: A Chapter of Autobiography* (Fowler's translation, Oxford, 1905).

[8] Chapter IX (Robertson's Edition, London, 1904), p. 114.

[9] *The Religio Medici and Other Writings of Sir Thomas Browne* (Everyman's Library Edition), 81.

[10] Saturday, March 24, 1710.

of the first rank," observed :

> I am sometimes very much troubled, when I reflect upon the three great professions of divinity, law, and physic ; how they are each of them overburdened with practitioners and filled with multitudes of ingenious gentlemen that starve one another.

In 1742 David Hume, the Scots philosopher, linked law and physic together as " the common professions " in his essay " Of the Middle Station of Life."[11] Samuel Taylor Coleridge had a great respect for the old professions. He set his boy to the law. In his *Table Talk* he included several pertinent passages :

> *January 2nd, 1833.* I should be sorry to see the honorary character of the fees of barristers and physicians done away with. Though it seems a shadowy distinction I believe it to be beneficial in effect. It contributes to preserve the idea of a profession, of a class which belongs to the public,—in the employment and remuneration of which no law interferes but the citizen acts as he likes *in foro conscientiae* . . .
>
> *March 14th, 1833.* Divinity is essentially the first of the professions because it is necessary for all at all times ; law and physic are only necessary for some at some times. I speak of them, of course, not in their abstract existence but in their applicability to man.
>
> Every true science bears necessarily within itself the germ of a cognate profession, and the more you can elevate trades into professions the better.

That should be enough to show that in the development of modern Britain the professions meant pre-eminently the three common, noble, and learned professions. They were a recognized part of the organized life of all European societies, enjoying a respect and privileges that persist to-day. They had a common merit. They were open at both bottom and top. A lad enjoying no special favour could enter and rise with talent and toil to the exalted ranks which otherwise had " no damn pretence of merit." These professions shared too the liabilities of a privileged class. The very tradition that sustained them in public honour subjected them to envy.

There have been many other professions in the books. Shakespeare spoke darkly[12] of " thieves professed " and " boundless theft in limited professions " ; Bacon[13] of " lawyers, seamen, mintmen and the like " as particular professions ; and Milton[14] of " some old *patentees* and *monopolizers* in the trade of bookselling " as men labouring in a profession. In *The Beggar's Opera*,[15] Captain Macheath, the highwayman, looked upon himself " in the military capacity as gentleman by his profession." Charles Dickens in *Nicholas Nickleby*[16] introduced Miss Petowker of The Theatre Royal, Drury Lane, who " disliked doing anything professional in private parties".

There must be numberless other examples to show that " profession " has come to be applied to embalmers, public accountants, auctioneers, architects, patent agents, dentists, pharmacists, beer and insurance salesmen, nurses, midwives, engineers, chiropractors, surveyors, masseurs, business men, actors, veterinaries, teachers, optometrists, secretaries, chiropodists, plumbers, and any calling of men who resent the fancied implication of " tradesmen's entrance". There is also the widespread use of " professional " in sport, implying mercenary in the old military sense. It is these uses that have led to a decay in the value of the word " profession " to convey a precise idea, and that call for a new definition.

[11] *The Essays of David Hume* (World's Classics Edition), 579.
[12] *Timon of Athens*, Act IV, sc. III.
[13] *Bacon's Essay's*, " Of Counsel."
[14] In the last paragraph of *Areopagitica*.
[15] Act I, sc. VIII, l. 24.
[16] Part I, Chap. XIV.

Here, then, is another example of the meaning of a word changed by the life in which we live. It is a change that affects lawyers nearly. We use the word. Our parents considered that we would enjoy a distinction as members of a profession. We are members, but the world has changed around us.

It is not words and history that we ought to be most deeply concerned with. It is the real things of our current life. When we speak of ourselves as professional persons, what is the living character of our lives that we mean ? If we know what we mean, we may the more fraternally welcome new professions and more surely distinguish the unqualified. What then are the elements of a profession ?

The Oxford English Dictionary defines " profession " in part as :

> The occupation which one professes to be skilled in and to follow.
>
> (*a*) A vocation in which a professed knowledge of some department of learning or science is used in its application to the affairs of others or in the practice of an art founded upon it. Applied spec. to the three learned professions of divinity, law and medicine ; also to the military profession . . .
>
> (*b*) *In a wider sense* any calling or occupation by which a person habitually earns a living.
>
> Now usually applied to an occupation considered to be socially superior to a trade or handicraft ; but formerly and still in vulgar (or humorous) use, including these.

What elements must be present in order that a vocation may be called a profession ? On the one hand, the present tendency to apply " profession " to every calling represents decadence in our language. On the other, to restrict " profession " to the three learned professions is to give it nothing but an historical meaning. It is a significant word. It now represents an idea distinct both from vocation and from the recognition given at one stage of society to three privileged callings. That idea is found in Plato and Lucian, as it is found in Coleridge and Sir William Osler. Its significance and distinction are part of Western civilization.

The first element is the holding out to the public, the offer of public service. The best example is the public avowal of the priest and parson. In the legal profession, there is the dedication of the call to the Bar, the admission and enrolment of the solicitor, and the oath of office. There is the brass plate or shingle. There is the moral duty not to refuse the client without cause or explanation.

This avowal and practice of availability to the public is shared with groups that on other grounds are not professions. The innkeeper and the common carrier are by law required to accept and serve the public. Every advertising trader or business man declares his readiness to deal with the public. But there are groups and callings otherwise qualified that are not professions because they do not avow their service to the public. The creative poet, composer, author, or artist who refuses to practise his art to order is not a professional man. Nor are the cloistered religious, the private antiquary or student, the stamp collector, and the curator of a private art gallery.

Within the recognized professions themselves are groups and individuals who are no longer available to the public in any direct way. In the law, there are the solicitors employed by private corporations. They are members of the profession although they serve but one principal. They must be recognized as an exception to

the definition of a profession rather than a cause for extending it. They dilute the professional spirit.

The second element is the special skill a professional man is assumed to have. This assumption is essential. It is not that the members of a profession must be skilful. It is that they should profess to be so.

The third element is training and education. The skill of the huckster is not the skill of a professional man. Nor is a calling properly called a profession if any man may qualify for it at this instant without more. At the very least, there must be training; at the very most, there must be education in its broad sense. It is for this reason that systems of professional admission requiring nothing more than readiness as a qualification are held in scorn. To-day, when the virtues of the past in legal training are being urged on the profession, no one advocates a return to the situation under the Upper Canada Judicature Act, 1794,[17] and the appointment of lieutenants, clerks, registrars, leading citizens, prominent personages, sons of Judges and Inspectors of Forests, without more. What that more should be is now a matter of public debate and private decision. This at least I will venture to say, that a profession requires not only training in technical skill but also a broader education, inspiring the practitioner to relate his daily work to the life of man and the problems of mankind.

If we adopt merely the minimum requirement of training, we may still reject as professions certain stages of auctioneering, newspaper reporting, trading, selling, banking, advertising, most forms of brokerage and agency, and the work of postmen and day labourers. We must reject those aspects of these callings that do not now require training or any special standard of education. We must recognize, however, not only that training in some of these callings is done by the apprenticeship method but also that they are developing special schools and standards. To this extent they are becoming professions.

Lord Macmillan discusses this element, and some others, in his address to Scottish law agents on "Law and History":[18]

> We call ourselves a learned profession. Let me remind you that we are also a liberal profession. The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit, while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest rewards in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare. It is only by the liberality of our learning that we can hope to merit the place in public estimation which we claim and to render to the public the services which they are entitled to expect from us.

A fourth element in the concept of a profession is privilege or State recognition. The social changes of the past one hundred and fifty years have rendered it an unreal and unfair requirement. It is unreal to say on this ground that the barrister is a professional man and the social worker is not. It is true that the barrister is protected and governed by special laws and customs in his calling. But so are the notary, the doctor, the dentist, the pharmacist, the drugless practitioner, the nurse, the surveyor, the architect, the Court reporter, the accountant, the engineer, the veterinary, the saw log culler, the innkeeper, the embalmer, the money lender, the pawnbroker, the detective, the optometrist, the real estate broker, the stock broker, the financial counsellor, the employment and collection agent, and the auctioneer. In Ontario, for example, all these enjoy some special privilege or recognition, and some enjoy wide powers of self-government and legislation. These have arisen from different causes. In some cases, they are simply the recognition of antique precedence and privileges. In other cases, they are the result of vigorous lobbying by the group involved, in order that it might attain recognized status and the power to control its members by lawful means. Others, again, have been placed under public control for the protection of the public or for reasons far removed from dignity and honour. In consequence, the privileges they enjoy and the obligations each are under greatly differ. Thus, although this is a criterion, it is not a proper criterion to-day of professional status.

The point is a positive one, vital to the future of our society. As the State steadily assumes control of an increasing part of the life of its citizens, the existence of self-governing groups not directly dependent on the State becomes the surest guarantee of the liberties of all. The churches, the professions, the unions, and the other societies and brotherhoods of persons with common interests are the bulwarks of our liberties against the totalitarian State on the march in our midst. They must neither control the State nor be controlled by it. If we are wise, we shall guard and preserve the independent position of all of them.

A fifth element is that a profession is a self-disciplined group. "You have all become," said Sir William Osler to students, "brothers in a great society."[19] There must be a community of interest in theory and in fact among the members of the calling. Its solitary pursuit is not the practice of a profession unless in some measure at least there is contact with others of the same calling. The activities of Jack Miner in wild life conservation had most of the essential qualities of a profession, but it could not be said that he was a member of a profession until there had been established some conscious community of interest with others in the same work and some common discipline. This point, and the rise of a new profession, is illustrated by Robert Louis Stevenson, who wrote of the profession of his grandfather and family in the days when John Smeaton, the builder of the Eddystone Light, was the first civil engineer:[20]

> For the profession which is now so thronged, famous, and influential was then a thing of yesterday. My grandfather had an anecdote of Smeaton probably learned from John Clerk of Eldin, their common friend. Smeaton was asked by the Duke of Argyll to visit the West Highland coast for a professional purpose. He refused, appalled, it seems, by the rough travelling. "You can recommend some other fit person?" asked the Duke. "No," said Smeaton, "I am sorry I can't." "What!" cried the Duke, "a profession with only one man in it! Pray, who taught you?" "Why," said Smeaton, "I believe I may say I was self-taught, an't please Your Grace." Smeaton at the date of Thomas Smith's third marriage was yet living and as the one had grown to the new profession from his place at the instrument maker's, the other was beginning to enter it by the way of his trade. The engineer of to-day is confronted with a library of acquired results; tables and formulae to the value of folios full have been calculated and recorded; and the student finds everywhere in front of him the footprints of the pioneers. In the eighteenth century, the field was largely unexplored; the

[17] 34 Geo. III, c. 2.

[18] *Law and Other Things* (Cambridge, 1938), 127.

[19] *The Student Life and Other Essays* (Constable's Miscellany, 1928), 6.

[20] *Records of a Family of Engineers* (Scribners, New York, 1902), 211, 212.

engineer must read with his own eyes the face of nature; he arose a volunteer, from the workshop or the mill, to undertake works which were at once inventions and adventures. It was not a science then—it was a living art; and it visibly grew under the eyes and between the hands of the practitioners.

Finally, there is the touchstone of the true profession and the truly professional life. There must be a measure of unselfishness or freedom from purely personal considerations. For a calling to be a profession, it must have an unselfish aspect of public service. For persons to be professional men or women, they must be governed by moving considerations other than those of personal advantage.

The priest or minister, the doctor, the lawyer, the teacher, the social worker, the soldier, sailor or airman, the policeman, the civil servant, as groups share this quality. The main purpose of their calling is not themselves or their pay. This quality is shared in fact by all men of good will. Unselfish effort in the interests of our fellow-men is found in every corner of life. When it is practised by a group as a feature of their life in common, it is the highest claim to professional status.[21]

Here is the rub in modern professional life. The modern age is a commercial age. Its values are measured in money. (It is only money that can no longer be measured.) The leaders of our thought constantly excite us with the injustices of our fellow-citizens in terms of money. The poor would be happy if wealthy. The front-line soldier's dedication to his country is sought to be measured in an extra dollar a day. The naval officer at sea can be solaced for his service abroad by relief from income-tax. Legislators will contentedly represent their fellow-citizens if their indemnity is raised or their disbursement fund is recognized as tax-exempt. The sage advice of bank and other directors can be assessed in terms of a director's fees. And in the field of labour there is one cry: What do we get in money or money's worth? What is there in it for me? The hire must be worthy of the workman, or effort and interest cease.

The future of a profession depends to-day on how its members face this arid and pervasive assessment of a man's life work. If in the secret hearts of its members they know that they pursue their profession not for what they get out of it but first for the service of others, it can be a true profession. The sincerity of the fellow-workers in a profession is the best security for its status.

In review, then, the factors to be considered in deciding if a calling is a profession are: the holding out to the public; the avowal of special skill; training and education; conscious community of interest as a self-disciplined group; and unselfishness. From these, a modern meaning of a profession may be fashioned. A profession is a self-disciplined group of individuals who hold themselves out to the public as possessing a special skill, derived from training or education, and who are prepared to exercise that skill primarily in the interests of others. A professional person is a member of such a group.

[21] Professor J. E. Smyth in the article in *The Canadian Chartered Accountant, supra,* lists eight criteria for professional standing: sale of intellectual services, training, research, responsibility to the public, responsibility to the client, independence, judgment, and self-governing associations. He says, at p. 280, that independence is "the most important test of professional status." I respectfully suggest that he has been over-influenced by the structure and purpose of his own profession. By his definition he has denied professional status to ministers of religion, teachers, social workers, soldiers, sailors, airmen, and civil servants, some of whom had been practising professions long before the Court of Session first sought the aid of professional accountants in the administration of the estates of "bankrupts, lunatics, infants and other persons not regarded as fit to look after their affairs": see Carr-Saunders and Wilson, *The Professions,* 209. Perhaps Professor Smyth has been strongly influenced by this work, which at p. 3 expressly excludes "the Church and the Army," the first because the authors were "only concerned with the professions in their relation to the ordinary business of life," the second (in 1933) "because the service which soldiers are trained to render is one which it is hoped they will never be called upon to perform." What profession in 1951 do we require in the ordinary business of life more than the Church or the Army?

Professor Marshall in his article, *supra,* considered that the essence of professionalism is "the belief that the individual is the true unit of service because service depends on individual qualities and individual judgment, supported by an individual responsibility which cannot be shifted on to the shoulders of others."

LEGAL LITERATURE.

Clarke Hall and Morrison's Law relating to Children and Young Persons, 4th Edition. By A. C. L. MORRISON, C.B.E., and L. G. BRAMWELL. Pp. 615 + xxxvi and Index. London. Butterworth & Co. (Publishers), Ltd. Price 97s. 6d., post free.

This new edition of a well-proved text-book enlarges the scope of the work following on the making of important changes in the law in Great Britain. In consequence, it has been thoroughly revised and rearranged. It is useful to practitioners in New Zealand whose duties lead them to the Children's Court and to dealing with the law generally relating to children, as it sets out the law in England that is relatively included in New Zealand statute law, while it is of particular interest to students of comparative law.

Justice and Administrative Law: A Study of The British Constitution, 3rd Ed., by W. A. ROBSON. London, 1951. Stevens and Sons, Ltd. Pp. xxxiii + 674. 36s.

Dr. W. A. Robson has prepared a third edition of his *Justice and Administrative Law,* which, though first published in 1928, remains the most authoritative book on English administrative law. The present edition, however, adds little to the earlier editions, apart from necessary references to recent authorities, newly appointed administrative tribunals, and, in particular, the rent tribunals, which have caused a spate of litigation. The learned author has attempted to meet minor criticisms of the second edition. He has included passages dealing with judicial review of administrative determinations and the decline of judicial control over administrative bodies. Although in this respect the book still falls short of providing an adequate treatment of these questions, it is one which lawyers with an administrative-law practice can ill afford to be without.

—J. F. N.

Emden and Watson's Building Contracts, 5th Edition. By W. E. WATSON, F.R.I.B.A., A.R.I.C.S., Barrister at Law. Pp. 387 + xi. London. Butterworth and Co. (Publishers), Ltd. Price, 55s. 6d., post free.

So popular has this text-book been that a reprint of the Fifth Edition became necessary. It is really more than a legal text-book, as it combines the qualities of such a work with those of a practical work of reference for architects, contractors, and builders. Every aspect of the subject is dealt with; and, at the present time, when there is such an extensive building of houses and other structures, the usefulness of this work makes a wide appeal.

"WE REGRET THE DELAY."

By Advocatus Ruralis.

This week the oldest practitioner received a *cri de coeur*, not from a legal firm, but from a firm doing business with the legal profession. It was written in long hand, and read as follows :

> We enclose documents relative to the above discharged mortgage and apologize for the delay in forwarding same. These were handed to our junior typist for dispatch several months ago and it was not until we received your letter of the 19th ultimo that we were aware that the documents had not been forwarded. This lass who is no longer with us had the unhappy habit when in doubt of slipping papers into any file that came to hand and we had a considerable search to locate them.

This brought a host of lost-document stories from all present. The oldest practitioner was of the opinion that boys were better at filing than girls ; that girls looked upon exact filing as undue fussiness on the part of males ; and that in Government Departments, when the search for a file got really hot, the offending junior had probably passed through two other Departments or had married and left the service.

Advocatus expressed the opinion that perhaps juniors were put on to filing too soon, before the importance of the job could be understood. He suggested that it was rather like endeavouring to " do " jurisprudence in the first year at the University.

The oldest practitioner thought that the method of teaching clerks was basically wrong from the day they left primary school. If a girl entered High School at twelve plus, she was instantly headed for the teaching profession, and it required quite a strong-willed parent to have the girl taught commercial subjects. Instead of the schoolmaster's proceeding to give the girl (or the boy) some rudiments of a decent education, commercial students are apparently immediately put on to shorthand and typing. To learn shorthand on a three-year course, starting at, say, thirteen, is a soul-destroying business.

The best typists and shorthand-writers were those who had some educational grounding, followed by a hard six months to a year learning shorthand.

The oldest practitioner expressed the opinion that all the best typists would be found to come into this class. The good typist has certainly better than a Matric. intelligence. The schoolmaster does not realize that the commercial world requires a more alert intelligence than is required for some of the professions.

Once again the talk drifted to lost files. Advocatus was deemed to have handed in the best lost-document story.

During World War One, the clerical staffs in the cities changed as frequently as the gears of a Baby Austin in Wellington. Advocatus sent from the country a complicated group of documents in which joint tenancies and tenancies in common predominated. This required transmissions and notices of death, and each city registration clerk placed the documents in his " pending " box and went off to the war. Advocatus, in desperation, sent his own file down, to see if matters could be straightened out. For a time matters ran smoothly ; then that clerk also went to camp. Advocatus's agents then stated they had no knowledge of the documents and they did not hold them. Meanwhile, Advocatus's client (one of the trust companies) was becoming impatient. Advocatus thought that he would have to advertise for new documents, but, as a last resort, he went to the city and in desperation asked to examine the boxes of the boys who were overseas. This move was successful, and Advocatus asked that the documents be taken immediately to the trust company. The unkindest cut was that the trust company, who had become impatient at the delay, asked the city agents (a most reputable firm) to complete the transaction so that there would be no further delay.

This story set the oldest practitioner on his mettle. " The stories of lost files," he said, " bring back a memory of some twenty-five years ago, when deeds searching was becoming a lost art."

Once, in the dear dead days beyond recall, an early missionary family erected an ornamental dam, complete with walks round it and boathouses on it. An endeavour was made to hand it over to the then Government as a game reserve, but the Government would not accept the gift. In those days, it was necessary to be educated to be a Cabinet Minister, and Ministers were reminded to beware of " Danaos et dona ferentes." The event proved their wisdom.

The missionaries' descendants then proceeded to do a small spot of cutting up round the lake or dam, and cheerfully granted rights-of-way and rights of turbary, piscary, and boatery. For thirty years all was well, and then one night a storm arose ; " the rains descended and the floods came," and the dam, which was not builded on a rock, fell ; and great was the fall thereof (Matt. vii : 25). The householders for a mile below rose in their wrath and their nightshirts. Came the dawn, and the dam was merely a patch of mud covered with incipient litigation.

When the litigation died down, the descendant of another missionary purchased the bed of the dam, but the question remained : What had happened to the rights of turbary, to the rights ambulatory, piscatorial, and natatorial ?

This required a search by an expert, and there was one light of other days who quitted a fairly busy office to return to that love of his youth, deeds searching. It must be remembered that the purchaser had by this time only an academic interest in the various rights. He was the owner of the freehold, but he was prepared to pay to find out all about his title.

After a week's work, the search expert found that his other work was getting behind, and he endeavoured to surrender his brief to anyone in his office, but there were no takers.

Meanwhile, the principals in the country and the purchaser (who had some legal training, and personally knew the city firm) began to press gently for a report. The expert side-stepped, and on the first of each month it became customary to write : " Re Dam : Can you let us have a report ? " One June 1, the country office lapsed into verse, but still without response. The verse was addressed to the legal firm but was posted to the expert personally. The following May, the matter was still unfinished, so on May 31 a letter was written : " Re Dam : We refer you to our letter of June 1 last." The city office was most punctilious in its correspondence, and after a short delay the reply came : " We regret that we appear to have mislaid the letter referred to. Can you let us have a copy ? "

It is very seldom that country members are left with a nice open shot to the green, but this seemed to be the occasion. Back came the answer :

(Concluded on p. 160.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

To Contact.—"Keep that word out of this Court. It is an Americanism, and we don't want it here," Finlay, J., is reported as having announced to a young Auckland barrister who used "contact" as a verb. The Judge is not the first one to take exception to this word, which to-day is an unfashionable reminder of the great era of American efficiency when even sex was sublimated to sales promotion. In 1931, one F. W. Lienau, an official of the Western Union, ordered employees of his company not to use it. "Somewhere," he said, "there cumbers this fair earth with his loathsome presence a man who, for the common good, should have been destroyed in early childhood. He is the originator of the hideous vulgarism of using 'contact' as a verb. So long as we can meet, get in touch with, make the acquaintance of, be introduced to, call on, interview, or talk to people, there can be no apology for 'contact.'" However, it cannot be denied that indulgence in a favourite American habit of turning nouns into verbs has led to enrichment of the English language—harness, bridle, saddle, implement, model, process, and highlight are a mere few of the many nouns that now make effective and striking verbs. Nor is the fault, if such it be, entirely American. In his renowned study of language, H. L. Mencken draws attention to the use of the horrible verb "to obituarize" in *The Times* (London) of June 7, 1934— a use attributed by the *Oxford English Dictionary* to the London *Saturday Review* for October 17, 1891. Mencken says that his seeing a monster so suggestive of American barbarism in *The Times* affected him like "seeing an Archbishop wink at a loose woman."

Desertion and Insanity.—The question whether supervening insanity during the period of three years' desertion prevents the continuance of that desertion was decided by Langton, J., in *Williams* v. *Williams*, [1939] 2 All E.R. 13. He held that desertion, being a question of intention and requiring an exercise of the will, ceases when the deserting person becomes of unsound mind. This decision was affirmed by the Court of Appeal (Sir Wilfrid Greene, M.R., and MacKinnon and Finlay, L.JJ.) ([1939] 3 All E.R. 825). MacKinnon, L.J., however, pointed out that the view may lead to difficulty in the extreme case where, after a long period of desertion, the person at fault becomes insane a short time before the filing of the petition. The case was followed by Finlay, J., in *M.* v. *M.*, [1944] N.Z.L.R. 328, although distinguished by the same Judge in *Johnson* v. *Johnson*, [1944] N.Z.L.R. 330, in a case where he professed himself as satisfied that the respondent, a German national, had never in fact abandoned the *animus deserendi*. The matter was considered again in the House of Lords in *Crowther* v. *Crowther*, [1951] A.C. 723; [1951] 1 All E.R. 1131, which overruled *Williams* v. *Williams* at least to the extent that supervening insanity on the part of a deserting spouse raises an irrebuttable presuption that desertion has come to an end. Circumstances in which the presumption is rebutted are illustrated in *Scherger* v. *Scherger*, [1952] V.L.R. 89. Here, several months after a husband had deserted in 1945, he became insane, and remained in mental institutions until 1949. Some six letters written during lucid intervals of his incarceration clearly showed an intention not to resume marital relations, and he made no attempt to do so after his release.

The Correct Address.—Thomas Lopdell O'Shaughnessy, Recorder of Dublin, had, it is said, a special dislike for the learned Serjeant Sullivan, K.C., with whom he had many a joust, and "only a strongly girded arm could stay his lance". On one occasion, when Sullivan addressed him in the Kilmainham Courthouse as "Your Honour", the Recorder sharply reproved him: "That is not a proper way, Serjeant, to treat this Court. You will kindly address me as Your Lordship." "When Your Honour is sitting in Green Street, Your Honour," was the reply, "as the Recorder for the City of Dublin, Your Honour, then Your Honour is properly entitled to the appellation of Your Lordship, Your Honour, but, when Your Honour is sitting in Kilmainham, Your Honour, as the Judge for the County of Dublin, Your Honour, then Your Honour is properly addressed as Your Honour, Your Honour!"

Banquet Note.—Students of the art of English caricature will be familiar with the many drawings of the late Sir Henry Curtis-Bennett, K.C., a rotund and Dickens-like personality. In *The Life and Times of Mr. Justice Humpreys* (Odhams), a new biography by Stanley Jackson, there is a letter from Curtis-Bennett to the Judge: "I am, as you know, the Master for the present year of that ancient City Guild, the Gold and Silver Wyre Drawers. We should be greatly honoured if you would be our guest at our forthcoming banquet." "My dear Henry," replied Sir Travers, "I thank you very much for your invitation. I accept it with alacrity. The prospect of seeing you with gold and silver wyre drawers makes it irresistible."

The Wily Widow.—Sexual attractiveness, according to James Laver, an acknowledged authority on women's clothes, is the keynote of female dressing. An exception is provided, now and again, by young widows in claims under the Deaths by Accidents Compensation Act, or its local equivalent. Here, the motive is for the most part pecuniary. Faced on one occasion with this situation, and with a young widow heavily veiled and rendered almost inaudible by professed sorrow, the famous Tim Healy remained calm and unmoved. "Madam," he asked, "will you kindly remove your yashmak and discocoon yourself."

Views of Humpreys, J.—"We are all, Judges and juries alike, much too prone to accept without question the evidence of a good-looking well-spoken young woman."

"The assistance offered by Science to Law should be received with gratitude and used with caution. Jurymen are not fools. A jury have a good nose for a real expert as distinct from a mere crank."

"I am not sure that there is not some impression abroad that it does not mattter how often one goes through the ceremony of marriage. There will be a rude awakening for those that hold that impression. If it gets too prevalent Judges will have to harden their hearts and send all persons convicted of bigamy to prison, whatever the circumstances."

—*The Life and Times of Mr. Justice Humpreys*, by Stanley Jackson (Odhams).

THEIR LORDSHIPS CONSIDER.

By COLONUS.

University Lectures.—Lord FitzGerald, in the interesting case of *Caird* v. *Sime*, (1887) 12 App. Cas. 326, said, at p. 359 :

> My opinion is that a public lecture delivered publicly at a University by one of its Professors in the performance of the public duty he has undertaken, becomes by the act of delivery published to the nation, and may be likened to a gift from the University or the Professor to the nation.

He was, however, in a minority of one. What had happened was that an industrious student attending Professor Caird's lectures in moral philosophy in the University of Glasgow took the usual notes and passed them over to a bookseller for publication. No doubt the Professor was relieved when Lord Halsbury, L.C., remarked early in his judgment that in respect of certain particulars it was a blundering and unsuccessful reproduction of the appellant's work, and even more relieved when the House held him entitled to restrain the publication of the lectures without his consent. As Lord Watson pointed out, at p. 344, the test was " whether the oral delivery of the appellant's lectures to the students attending his class is, in law, equivalent to communication to the public," as, if it were, the author would have parted with his rights.

Humidity.—" An inhabitant of the town of Ashburton might say with satisfaction or regret according to his own views, ' Before this I was in a dry district, now I am in a wet one ' " : *Scales* v. *Young*, (1931) N.Z.P.C.C. 313, 320.

Law and Equity.—A useful reflection on the authorities is interjected by Lord Blackburn into the argument in *Smith* v. *Chadwick*, (1884) 9 App. Cas. 187, 189 :

> I have often thought that perhaps the discrepancies between expressions of equity and common law Judges are greatly owing to the fact that at common law questions of fact are for the jury and it is necessary for the Judge to separate them clearly from the questions of law ; whereas in equity the Judges have to determine both law and fact, and it is sometimes impossible to understand whether their decisions were meant to be inferences of fact or of law.

Damages.—In *Banco de Portugal* v. *Waterlow and Sons, Ltd.*, [1932] A.C. 452, a well-known case that created much interest a few years ago, the question arose whether certain measures taken by the Portuguese Government to reduce the embarrassing effects of a flood of forged banknotes were the best that could have been taken in the circumstances. The firm by which the notes had been printed, and which was in danger of having to bear the burden of its delivery thereof to unauthorized persons by paying huge damages, maintained that the onus was on the party injured (the Portuguese Government) to minimize the damages, and that the liability should be limited to what would have been lost if the best measures had been adopted. Lord Macmillan would have none of it. He said, at p. 506 :

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

Shamrock v. *Thistle.*—" The statement of the law [of prescription] made by my noble and learned friends has been so very clear and satisfactory that I shall not attempt to add one word to it. By ' the law ' I mean the law of Scotland as applicable to the particular case now before us. It differs very much from the English law upon the same subject, but still more from the law of Ireland, which is so clear and simple that a question such as is now before your Lordships could not possibly have arisen " : Lord FitzGerald in *Mann* v. *Brodie*, (1885) 10 App. Cas. 378, 401, 402.

Hadley and Baxendale at the Theatre.—In 1927, a firm of theatrical producers agreed to engage an actor " to play one of the three leading Comedy parts in our new musical production at the London Hippodrome." When the casting was disclosed in due course, the actor considered that what he was given to play could not be called a leading part in anything ! The jury, in *Herbert Clayton and Jack Waller, Ltd.* v. *Oliver*, [1930] A.C. 209, agreed with him to the extent of £1,000 damages for loss of advertisement and reputation. After taking time for consideration, their Lordships followed the highest precedent, and were not amused. Said Lord Buckmaster, at p. 219 :

> Making all necessary allowances for the fact that the kind of humour of such a play seems melancholy in print, the part assigned to the plaintiff is so trivial that even in relation to this play the verdict is fully warranted.

As to the allowing of damages at all, a Hippodrome appearance was, in the theatrical profession, a valuable right, and Lord Dunedin referred, accordingly, at p. 221, to the rule in *Hadley* v. *Baxendale*, (1854) 9 Ex. 341 ; 156 E.R. 145. So it seems that these two old friends, in partnership since 1854, have at last established a footing on the boards, and join Banquo among the immortals of the stage.

" WE REGRET THE DELAY."

(*Concluded from p. 158.*)

Re Dam.
One fine day—'twas the first of June—
We sighted a file in the afternoon,
Half covered over in the basket it lay.
It might stay there till Judgment Day.

The expert surrendered. He called in another man learned in the law, and, after nearly a fortnight's searching, the various rights were all tabulated and, after many days, surrendered.