New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."
VOL. XXVI. TUESDAY, AUGUST 22, 1950. No. 15.

DAMAGES FOR LOSS OF EARNINGS: SOCIAL SECURITY CHARGE.

IT will be remembered that, at p. 43, *ante*, we discussed the decision of the learned Chief Justice in *Ramstad* v. *Union Steam Ship Co., Ltd.*, [1950] N.Z.L.R. 389, in which His Honour held that the Social Security charge should not be deducted by the employer from special damages for loss of earnings where the amount of earnings is agreed upon, and that it must not be deducted by any tribunal assessing the amount of such damages.

The question arose in an action for damages for negligence, in which liability was admitted. The amount recoverable as special damages for hospital and medical expenses was agreed upon. With regard to the amount claimed as special damages for loss of earnings, the parties, although they were agreed as to the amount of wages that had been lost, were in conflict on the question whether, in assessing the amount recoverable as special damages, there should be deducted from that amount Social Security tax for the current year. That question was agreed to be left for decision by the Court, and the jury proceeded to assess the general damages.

His Honour's judgment was appealed against, and the Court of Appeal (Callan, Stanton, Hay, and Cooke, JJ.), in *Union Steam Ship Co., Ltd.* v. *Ramstad* (to be reported), in affirming that judgment, has given reasons which are substantially the same as those upon which the learned Chief Justice based his conclusions.

In the Court of Appeal, however, their Honours in their judgment (delivered by Cooke, J.) went further when they said:

> We think that the charge is *res inter alios acta*, and that what is generally called Social Security tax should be left out of account in the assessment of special and general damages for loss of earnings.

After stating that the conclusion at which their Honours had arrived was but an application of the general principle that collateral matter cannot be used in mitigation of damages (*Mayne on Damages*, 11th Ed. 151, and *Shearman* v. *Folland*, [1950] 1 All E.R. 976, 978), they also said in the context in which the passage appears later in this article:

> It is, we think, clear that, although the question that falls for determination on this appeal arises in an action between servant and master, the same question constantly arises in actions brought by servants against other persons. In our view, the conclusion at which we have arrived is also applicable to the assessment of damages in those last-mentioned actions.

The case before their Honours dealt with special damages, and, though the foregoing dicta are general statements of principle, we do not propose to enter into a discussion concerning whether or not they are *obiter*. As the learned Master of the Rolls, Sir Raymond Evershed, said in an address given this year to the University of London:

> It is an easy matter to say wise things about judicial dicta—that they are entitled to great or at least to proper respect, but that they have no binding force. But in practice it may be far less easy to distinguish with certainty between dictum on the one hand and decision or *ratio decidendi* on the other—especially when a Judge may support his conclusion on more than one ground. Those of you who make it a practice to read that exhilarating periodical *The Law Quarterly Review* may recall almost animated discussion in its pages not long ago on the question whether all or any part of a well-known judgment relating to the effect of the statutory fusion of law and equity was decision as distinct from dictum.

At the beginning of their judgment, their Honours said that the question before them—whether the Social Security charge should be deducted when assessing the amount of special damages for loss of earnings—was one that was of general and practical importance; and it is not, therefore, surprising that the decisions that were cited to them show that similar questions have been judicially considered, not only in England and in Scotland, but also in Canada and in Australia. The judgment continued:

> Speaking generally, there are at least two ways in which income-tax and other similar taxes such as Social Security tax on wages and salaries are normally imposed. In some cases, personal liability for the payment of the tax is thrown solely on the recipient of the income. In other cases, personal liability for deduction and payment of the tax is thrown, at least in the first instance, on the employer, but there are usually provisions under which the recipient of the income is also made personally liable for the tax to the extent that the employer fails to perform the duty of deduction. We think it is desirable to consider the position in each of those two classes of cases separately.

I.

Their Honours first considered the cases in which personal liability for payment of the tax is thrown solely on the recipient of the income. They began with the English decisions. In *Fairholme* v. *Firth and John Brown, Ltd.*, (1933) 49 T.L.R. 470, in which only general damages were involved, and which was decided before the introduction of the P.A.Y.E. system providing for deduction at source, du Parcq, J. (as he then was), held that the liability for tax should not be taken into account. The learned Judge said in effect that he would be reluctant to alter the inveterate English practice of disregarding the liability

for tax in such cases unless he was convinced that the practice was inconsistent with principle and unjust; but he went on to hold that the practice was right, on the principle that such liability was *res inter alios acta*. In *Jordan* v. *Limmer and Trinidad Lake Asphalt Co., Ltd.*, [1946] K.B. 356; [1946] 1 All E.R. 527, in which only special damages were involved, and which was a case in which tax was deductible at the source under the P.A.Y.E. system, Atkinson, J., held that the true way of looking at the matter was to ascertain the plaintiff's contractual rights against his employer, apart from any deduction of what was due to the Crown. In their Honours' view, that learned Judge, in effect, adopted the principle adopted by du Parcq, J., that any liability for tax is *res inter alios*. At the conclusion of his judgment, he said that the practice of ignoring the tax was too well-established for a Judge of first instance to interfere with it. Their Honours in their judgment in *Ramstad's* case did not think that observation in any way indicated that Atkinson, J., did not also decide the matter on principle.

In *Billingham* v. *Hughes*, [1949] 1 All E.R. 684, which, like *Fairholme's* case, was not a case in which tax was deductible at the source, it was in connection with general damages only that the dispute as to tax arose, and the Court of Appeal held in considered judgments that the tax liability should be disregarded. Tucker, L.J., based his judgment on the principle that the damages recoverable were the amount required to effect *restitutio in integrum*, and were, accordingly, the full amount of the wages. He appeared, therefore, to have treated the matter very much in the same way as did Atkinson, J., and, indeed, his observation that questions of the plaintiff's ultimate liability to the Revenue authorities were matters which did not concern the defendants shows that for all practical purposes his views were substantially identical with those of du Parcq, J., and Atkinson, J. The view of Singleton, L.J., turned largely, if not wholly, on his disinclination to disturb the existing practice; but the view of Birkett, J., was based on the principle of *res inter alios*. After so analysing these judgments, our Court of Appeal said:

> We think that the decision of the Court of Appeal is a clear decision that, in cases in which personal liability for tax is thrown solely on the recipient of the income, all questions of income-tax should be disregarded. We think, moreover, as we have indicated, that the judgments of *Tucker*, L.J., and *Birkett*, J., each proceeded on the basis that matters of taxation were *res inter alios*. It is to be observed, too, that in the very recent case of *Shearman* v. *Folland* ([1950] 1 All E.R. 976), the Court of Appeal, in a judgment delivered by *Asquith*, L.J., on behalf of a Court of which *Tucker*, L.J., was a member, expressed in the clearest language its view as to the effect of the decision in *Billingham* v. *Hughes* ([1949] 1 All E.R. 684). In our view, the decision of the Court of Appeal in *Billingham* v. *Hughes* ([1949] 1 All E.R. 684) was right, and was right for the reasons given by *Tucker*, L.J., and *Birkett*, J., and should be followed by this Court.

Their Honours proceeded to consider if those judgments should be followed in New Zealand. They said:

> It was laid down many years ago by the Privy Council that, in the construction of a section of a statute in force both in England and in the Colonies, the Court in the Colony should follow the decision of the Court of Appeal in England: *Trimble* v. *Hill* ((1879) 5 App. Cas. 342) and *R.* v. *Carswell* ([1926] N.Z.L.R. 321, 329; and in the case of conveyancing decisions of long standing a similar principle exists: *Staples and Co., Ltd.* v. *Corby* ((1899) 17 N.Z.L.R. 734). The New Zealand revenue legislation differs in many respects from that in force in England, and it cannot be suggested that the principle laid down in *Trimble* v. *Hill* ((1879) 5 App. Cas. 342) applies in terms to the present case; but we think that, even in cases that fall outside the above principles, this Court should, and always will, hesitate long before differing from a decision of the English Court of Appeal, and particularly so where such a decision relates to a matter that arises in the day-to-day practice of the common law. Even, therefore, if we were doubtful as to whether the decision in *Billingham* v. *Hughes* ([1949] 1 All E.R. 684) were right, we would take the view that this Court should follow it: *cf. Thos. Borthwick and Sons (Australasia), Ltd.* v. *Ryan* ([1932] N.Z.L.R. 225, 278).

After noting the fact that in Scotland the decisions in *M'Daid* v. *Clyde Navigation Trustees*, [1946] S.C. (Ct. of Sess.) 462, and *Blackwood* v. *Andre*, [1947] S.C. (Ct. of Sess.) 333, disclose a conflict of opinion between Lord Sorn and Lord Keith, the Court of Appeal said that in *Billingham* v. *Hughes*, [1949] 1 All E.R. 684, the question in dispute related only to the general damages. In their own view, however, the decision of the Court of Appeal in that case, and the ground upon which that decision is based, apply as much to the assessment of special damages as to the assessment of general damages. They concluded this part of their judgment by saying:

> For the foregoing reasons, we think that, in cases in which personal liability for payment of the tax is thrown solely on the recipient of the income, the liability for tax should not be taken into account in assessing either general damages or special damages.

II.

Their Honours next considered the position that arises when personal liability for deduction and payment of the tax is thrown, at least in the first instance, on the employer. They pointed out that, in *Billingham* v. *Hughes*, [1949] 1 All E.R. 684, Tucker, L.J., expressed the view that *Jordan* v. *Limmer and Trinidad Lake Asphalt Co., Ltd.*, [1946] K.B. 356; [1946] 1 All E.R. 527, was rightly decided. While it is true that, at an earlier stage of his judgment, he observed that it was possible that considerations might arise in cases under the P.A.Y.E. Regulations different from those that arise in other cases, he at once added that he was not to be taken as casting any doubt on the correctness of the decision of the learned Judge in *Jordan's* case (*supra*). On this matter, their Honours observed:

> We think that the observation of *Tucker*, L.J., that possibly different considerations might arise in cases under the P.A.Y.E. Regulations was not intended to be an indication that in such cases the amount of the tax was to be taken into account, but was intended to be an indication merely that in such cases all the reasons that exist for the disregard of the tax in other cases might not be available. We think that what the learned Lord Justice had in mind was that, in cases under the P.A.Y.E. Regulations, it might be impossible to give the plaintiff *restitutio in integrum*, but that, nevertheless, the result in such cases should still be that the question of tax should be ignored. *Singleton*, L.J., referred without disapproval to the decision in *Jordan* v. *Limmer and Trinidad Lake Asphalt Co., Ltd.* ([1946] K.B. 356; [1946] 1 All E.R. 527), and towards the end of his judgment said: "No question arises in this case under the Regulations made under the P.A.Y.E. system [under the Finance (No. 2) Act, 1940, s. 11], and their effect was not fully argued, but I think it is right to say that I do not see that they have changed the basic position. Income-tax remains a charge on the person, and not on his profits or gains from his employment or on his property" ([1949] 1 All E.R. 684, 689). The judgment of *Birkett*, J., contains no express reference to cases in which tax is deductible at the source, but his reference to *Jordan's* case (*supra*), and his adoption of the wide and general words of *Lord Keith*, that the Court has no concern with the incidence of taxation in assessing the damages of an injured taxpayer, leave little doubt, we think, that he would have subscribed to the view that, in that respect, the position in cases in which tax is deductible at the source is, for present purposes, substantially the same as it is in cases in which liability for the tax falls only on the recipient of the income.

If some uncertainty existed in Scotland with regard to both classes of cases, no such uncertainty appeared to exist in the Province of Ontario. There was first the decision of Barlow, J., in the High Court of that Province in *Fine* v. *Toronto Transportation Commission*, [1946] 1 D.L.R. 221, in which that learned Judge showed clearly that the amount of the tax would have been deducted by the employer; and showed equally clearly that it was because he, following *Fairholme's* case (*supra*), regarded the question of taxation as *res inter alios* that he held that it should be ignored in the assessment of a sum for damages that included both special and general damages for loss of earnings. Similarly in the decision of Urquhart, J., in the same Court in *Bowers* v. *Hollenger*, [1946] 4 D.L.R. 186, though it was not clear from the report whether the damages in question in that case were special or general; but the taxation that was there in question was both income-tax and unemployment tax. The income-tax was no doubt the same income-tax as was in question in *Fine's* case, and was, therefore, deductible at the source; Urquhart, J., following *Fine's* csae, *Fairholme's* case, and *Jordan's* case, which by then had also been decided, held that questions of tax were in effect *res inter alios*, and that the gross amount of wages was the proper basis of calculation.

Their Honours then considered the Australian cases. In the Supreme Court of South Australia, in *Davies* v. *Adelaide Chemical and Fertilizer Co., Ltd.* (*No. 2*), [1947] S.A.S.R. 67, apparently both special and general damages were involved, and Mayo, J., held, following *Fairholme's* case and *Jordan's* case, that income-tax, deductible by the employer, should be left out of account in the assessment of the damages; and his judgment proceeds on the ground that, in assessing the damages, the liability to tax is *res inter alios acta*.

In view of the meagreness of the newspaper report of the judgment of Owen, J., in the Supreme Court of New South Wales in *Atkinson* v. *Port Line, Ltd.* ((1946) *Sydney Morning Herald*, June 20), their Honours of the Court of Appeal felt that they would not be justified in attaching to that judgment the weight that should clearly be attached to the other authorities to which they had referred. The judgment then proceeds:

> Although we have thought it desirable to deal separately with cases in which the liability for the tax is thrown in the first instance on the employer, we think that the state of the authorities is such that it is beyond any real doubt that the true view of the matter in those cases is that the question of liability for tax is *res inter alios acta*. We therefore hold that in that class of case, as in the class of case in which liability for tax is thrown solely on the recipient of the income, such liability should be left out of account in assessing both general and special damages.
>
> In truth, it seems to us that in each of the two classes of cases the fundamental basis for the view that questions of tax should be ignored is the fact that it is only when the gross earnings have either actually or notionally become the income of the employee that they attract the tax. In the first class of cases, they have actually become his, and he alone becomes liable for payment of the tax. In the second class of cases, they have become notionally his, and it is out of them that the tax is payable by the employer: see, for instance, the English Finance (No. 2) Act, 1940, s. 11, the English Income Tax (Employments) Act, 1943, s. 1, the Canadian Unemployment Insurance Act, 1940, s. 19, and the Australian Income Tax Assessment Act, 1940. Whether, as in the first class of case, the gross earnings have actually become the income of the employee, or, as in the second class of case, they have notionally become his income, the liability that descends on them for tax is a matter that is foreign to the assessment of damages for the past or future loss of those earnings.

Their Honours' view as to the second class of case appeared to them to be strongly supported by what was said by the Privy Council in *Forbes* v. *Attorney-General for Manitoba*, [1937] A.C. 260; [1937] 1 All E.R. 249, with reference to similar statutory provisions that were contained in the Special Income Tax Act, 1933, of the Province of Manitoba. In that case, Lord Macmillan, in delivering the opinion of the Board, said:

> To all this the appellant answers that while the statute may profess to charge the tax on the wage-earner in respect of his wages, it enacts that it is to "be levied and collected . . . in the manner prescribed by this Part," and the manner prescribed is that the employer is to deduct the amount of the tax from the wages which he pays to his employees and account for it to the Crown. The tax, he says, is thus really imposed on the employer; it is not a tax on any income which the employee receives, but a tax on the wage fund in the hands of the employer, and the tax is thus only indirectly imposed on the employee. Their Lordships cannot accept this argument. In their view s. 3 is what it professes to be, a section charging the tax on the employee. The following sections which provide for the deduction of the amount of the tax by the employer before he pays over his employee's wages are mere machinery, and machinery of a very familiar type in income-tax legislation. The expedient of requiring deduction of tax at the source, as it is called, is one which has long been in effective use in the United Kingdom. A taxpayer is said either to pay or to bear income-tax according as he pays it himself or suffers deduction of it from moneys due to him, but in either case he is the taxpayer and on him the burden of the tax is imposed. In their Lordships' opinion the present tax is a direct tax on employees in respect of that portion of their income which consists of wages.

III.

The main burden of the argument for the appellant company was that the effect of the provisions of the Social Security Act, 1938, is to impose a charge on the wages and salary themselves; that such charge is a statutory charge on the wages and salary themselves, and not on the person; that such charge, being statutory, is, as was said by Chapman, J., in *Godber* v. *Manning and Chapman*, (1913) 33 N.Z.L.R. 603, 605, "held by the highest title known to the law"; that the existence of such charge makes the matter one of direct account between the employer and the revenue authorities, and leaves the employee a stranger to the transaction; and that, for all those reasons, the charge must be taken into account in the assessment of the special damages for loss of earnings that are claimed in this action. Counsel for the appellant examined the provisions of the Act of 1938 in some detail for the purpose of establishing that view of the matter.

Their Honours thus commented on this argument:

> It is implicit in his [the appellant's counsel's] argument that the charge to which he refers is a charge in the sense that it binds property. It appears to us, however, that, even if his submissions as to the nature of that charge are wholly right, there is nothing to which the charge can attach until the point of time is reached when payment is made to the employee . . . In our view, the conjoint effect of ss. 108 and 118 is that there is nothing to which the charge can attach until the time is reached when there is a payment or a crediting or an application of salary or wages of the employee from which the charge can be deducted. We think, therefore, that the charge cannot attach until the gross amount of the salary or wages has, as between the employee and his employer, notionally become the income of the employee.

As, therefore, the liability for deduction and payment of the tax under the Social Security Act, 1938, does not arise until the gross earnings have notionally become the income of the employee, the Court's view was that the position under the Social Security Act, 1938,

is no different for present purposes from the position existing under the English, Canadian, and Australian legislation to which they had referred. Even, therefore, if the argument for the appellant as to the nature of the charge were wholly right, their Honours thought that the charge was *res inter alios acta*, and that what is generally called Social Security tax should be left out of account in the assessment of special and general damages for loss of earnings.

So far in their Honours' judgment, they had assumed that the charge under the Social Security Act, 1938, is, as had been in effect submitted by counsel for the appellant, a charge in the sense that it binds property. They said that it is desirable to say, however, that the word "charge" was used in Part IV of that statute to describe the tax itself rather than the method of its enforcement, and that, although it might be that the charge there referred to momentarily binds the salary or wages at the time of payment or crediting or application of them, the position appeared to their Honours to be that, if the employer failed to deduct the amount of the charge, the income was itself no longer bound by the charge, and that the charge is not, therefore, a charge that binds property in the same way as does, for instance, the charge on real and personal property referred to in s. 119 (5). That view of the matter is in harmony with the provisions of s. 110 of the Act, which impose personal liability on the earner of the salary or wages. Indeed, for present purposes, there is, their Honours thought, no essential difference between the so-called charge under the Social Security Act, 1938, and the enforcement provisions that are contained in the English legislation to which they had referred.

There were three matters to which the Court of Appeal said it was desirable to refer in conclusion:

In the first place, we think that the conclusion at which we have arrived is but an application of the general principle that collateral matter cannot be used in mitigation of damages: *Mayne on Damages*, 11th Ed. 151, and *Shearman* v. *Folland* ([1950] 1 All E.R. 976, 978).

In the second place, it is to be remembered that the question of the deduction of Social Security tax did not, of course, arise in New Zealand until after the Social Security Act, 1938. Even if there had ever since then been a universal practice to make the deduction, we should, in view of the conclusion at which we have arrived on the authorities, be slow to hold that such practice should be disturbed. We do not think, however, that it has been shown that any such universal practice at present exists. It is true that in *Sarcich* v. *Wellington Harbour Board* ([1945] G.L.R. 68) *Sir Michael Myers*, C.J., accepted apparently without question a computation of special damages based on the deduction of tax; but it does not appear that the question of the propriety of the deduction was raised or argued in that case. Even, however, if the incidental references that were made to the matter in the judgment in that case are sufficient to establish that at that time there existed a universal practice to make the deduction, it does not necessarily follow that such a universal practice exists to-day . . . Having regard to the fact that, as the Chief Justice was informed at the Bar, there has not for some time been universal acceptance of the right to deduct, we have no hesitation in holding that the practice, in the state in which it exists to-day, affords no reason for not giving effect to the conclusion at which we have arrived on the principle we have indicated.

In the third place, it is, we think, clear that, although the question that falls for determination on this appeal arises in an action between servant and master, the same question constantly arises in actions brought by servants against other persons. In our view, the conclusion at which we have arrived is also applicable to the assessment of damages in those last-mentioned actions.

Their Honours concluded by saying that, for the reasons they had given—substantially the same reasons upon which the learned Chief Justice had based his conclusion (for which see *Ante*, pp. 43 *et seq.*)—his judgment was right, and the appeal should be dismissed.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Safeguards in the Exercise of Functions by Administrative Bodies. (Richard C. FitzGerald.) *28 Canadian Bar Review*, 538.

BY-LAWS.

Fastening of Load on Vehicle—By-law requiring Load on Any Vehicle to be safely and securely fastened—By-law not repugnant to or inconsistent with General Law—"Fastening"—By-laws Act, 1910, s. 14—Municipal Corporations Act, 1933, s. 364 (19). On a prosecution, charging the defendant that he drove a vehicle in the city of Dunedin "while the load carried thereon was not safely and securely fastened," in breach of a Dunedin City by-law, it was contended that the by-law under which he was charged was invalid, in that it was repugnant to, and inconsistent with, the general law. *Held*, 1. That the by-law in question was made with full authority under s. 364 (19) of the Municipal Corporations Act, 1933, which was not repealed by the Transport Act, 1949. 2. That the by-law was not repugnant to, or inconsistent with, statute law, or Regulations thereunder, merely by reason of the requirement of "fastening" in all cases, which may well be necessitated by local conditions. *Semble*, The word "fasten" means "to fix or hold securely in position," and does not necessarily involve a tying or lashing of some sort; but the placing in position of a tailboard or the method of stacking would hold the load securely in place, and, therefore, comply with the by-law; and every case must stand on its own merits in this regard, and the inadequacy of the "fastening" must be proved. *Dunedin City Council* v. *Cahill.* (Dunedin. June 6, 1950. Warrington, S.M.)

CHARITY.

Charitable Purpose—Gift to Royal College of Surgeons—Subsidiary or Incidental Object of College not Charitable—Will—Gift to Medical School of Hospital—Gift over if Hospital nationalized or passes into Public Ownership—Whether Gift over takes effect consequent on National Health Service Legislation. By her will, dated January 13, 1943, a testatrix, who died on February 10, 1943, gave her residuary real and personal estate on the usual trusts for conversion, and directed that the resulting "endowment fund" should be held on "the following charitable trusts," which were, *inter alia*, "to pay the residue of the income of the endowment fund in each year to the treasurer . . . of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said Hospital . . . Provided always that should the . . . Middlesex Hospital become nationalized or by any means pass into public ownership or should the [trustees] at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund . . . to the Royal College of Surgeons." The Bland-Sutton Institute was a department of the Medical School of Middlesex Hospital, and until 1948 the School was a department of the Hospital. On July 5, 1948, under the National Health Service Act, 1946, the Hospital was designated a teaching hospital, but the School became a separate legal entity, with a governing body constituted under s. 15 (1) of the Act. The Royal College of Surgeons claimed that, by reason of the changes brought about by the Act, the gift over took effect. *Held*, That the effect of s. 8 (1) of the Act of 1946 was to take the property held for the purposes of the Medical School out of the provisions of ss. 6 and 7 (by which land and other property of hospitals were vested in the Minister of Health, and endowments of teaching hospitals were vested in boards of governors appointed by the Minister), and the property of the School was now vested in an incorporated governing body set up pursuant to a scheme prepared by the former council of the Medical School under s. 15 (1) of the Act; that corporate body was not nationalized and the

property of the school had not passed into public ownership; and, therefore, for the purposes of the defeasance clause, the Middlesex Hospital had not "become nationalized" or passed into "public ownership," and the trustee was able lawfully to apply the income for the purposes mentioned in the will. *Per curiam*, On the facts, the real object of the Royal College of Surgeons was the promotion and encouragement of the study and practice of surgery, and not of the interests of surgical practitioners, and, therefore, the College was a charity. (Dictum of *Romer*, L.J., in *Institution of Civil Engineers* v. *Inland Revenue Commissioners*, [1932] 1 K.B. 172, applied.) (*Re Royal College of Surgeons of England*, [1899] 1 Q.B. 871, distinguished.) *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd.* v. *Council of the Middlesex Hospital Medical School and Others*, [1950] 2 All E.R. 466 (Ch.D.).

As to Gifts for Educational Purposes, see *4 Halsbury's Laws of England*, 2nd Ed. 116-118, paras. 153, 154; and for Cases, see *8 E. and E. Digest*, 245-248, Nos. *51-73*.

COMMERCIAL LAW.

Points in Practice. *100 Law Journal*, 410.

COMPANY LAW.

Points in Practice. *100 Law Journal*, 355.

CONSTITUTIONAL LAW.

Parliamentary Sovereignty and the Limits of Legal Change. (Prof. W. Friedmann.) *24 Australian Law Journal*, 103.

CONVEYANCING.

Accumulations during Excessive Period: Allocation to Statutory Period. *24 Australian Law Journal*, 116.

Charitable Purposes. *100 Law Journal*, 409.

Charity: Employees of Company. *24 Australian Law Journal*, 116.

Exercise by Will of Special Powers of Appointment. *100 Law Journal*, 354.

Furnished Lettings and Sharing Agreements. *100 Law Journal*, 425.

Gifts to Hospitals. *209 Law Times*, 342.

Landlord and Tenant: Order on Tenant's Admission of Landlord's Right to Possession. *24 Australian Law Journal*, 113.

COSTS.

Taxation—Review by Court—Objection as to Quantum—No Error by Master in Principle. On an inquiry as to damages, an Official Referee awarded the plaintiff a sum of £10,541, together with costs which he directed should be taxed. A bill of costs brought in by the plaintiff was reduced by the taxing Master in respect of sums included in the bill in respect of the items "instructions for brief," fees and refreshers to leading and junior counsel, and fees of accountants whose services the plaintiff had used at the inquiry. The plaintiff objected to the reductions, on the ground that the fees allowed were inadequate, and asked for the decision of the taxing Master to be reviewed. *Held*, That the complaint went to *quantum* only; it had not been shown that the taxing Master had erred on a question of principle; and, therefore, the Court had no jurisdiction to interfere with his decision. (*Re Ogilvie*, [1910] P. 243, and *White* v. *Altrincham Urban District Council*, [1936] 1 All E.R. 923, followed.) (*Re Lindsay's Estate*, [1915] W.N. 246, explained.) *Coon* v. *Diamond Tread Co. (1938), Ltd.*, [1950] 2 All E.R. 385 (Ch.D.).

As to Review of Taxation, see *31 Halsbury's Laws of England*, 2nd Ed. 227-230, paras. 251-254; and for Cases, see *42 E. and E. Digest*, 210-217, Nos. *2346-2439*.

CRIMINAL LAW.

Appeal against Conviction—Change of Venue refused—Refusal resulting in Miscarriage of Justice—Jurisdiction of Court to entertain Appeal—"Any other ground"—Criminal Appeal Act, 1945, ss. 3 (b), *4* (*1*). It is within the jurisdiction of the Court of Appeal, under the Criminal Appeal Act, 1945, to entertain and allow an appeal against conviction, on the ground of the refusal of an order to change the venue of the trial, if the Court is satisfied that there was a miscarriage of justice in refusing the order. (*R.* v. *Gibbins and Proctor*, (1918) 13 Cr. App. R. 134, and *R.* v. *Grondkowski and Malinowski*, [1946] 1 All E.R. 559, applied. At the Supreme Court sittings in Gisborne in November, 1949, F. and O'C. were jointly tried on an indictment comprising a large number of counts of false pretences and two counts of theft, and they were convicted, F. of fourteen charges of false pretences and two of theft and O'C. of eight charges of false pretences and one of theft. The evidence showed that they had been associated in business with the appellant, who was frequently mentioned during their trial. The jury, in giving its verdict, added a rider recommending mercy on all charges "on account of the fact that the two accused were led into crime by persons not before the Court." On December 15, 1949, the appellant was arrested on a charge of obtaining, by false pretences, money from the same company in respect of which F. and O'C. were charged. On January 24, 1950, a further forty-one informations were sworn in similar terms, and many of the charges related to the same motor-vehicles and purchasers as were mentioned in the charges against F. and O'C. The preliminary hearing at Gisborne occupied several days, and evidence against the appellant was given by F. and O'C. and others. He was committed for trial at the Supreme Court sittings beginning at Gisborne on February 20, 1950. Before those sittings began, the appellant applied, under s. 370 of the Crimes Act, 1908, for a change of venue from Gisborne. The application was heard at Napier by the Judge who was later to preside at the Gisborne sessions. The application was supported by the affidavits of fifteen residents of Gisborne, who included a retired City Councillor, three company managers, a retired bank manager, a land and estate agent, an electrical engineer, the manager of a taxi company, the proprietor of a delivery service, a taxi-driver, a motor-garage proprietor, a fish-hawker, a motor-dealer, and a hairdresser. These deposed to the amount of Press publicity that the trial of F. and O'C. had had and the publication of the jury's rider, which was accepted as indicating the appellant's association with the two earlier accused, whose trial was a subject of widespread discussion and rumour. It was also said that there was a prejudice against the appellant, and that a fair and impartial trial in Gisborne could not be expected. The learned Judge refused the application. The appellant was tried at Gisborne and convicted on forty-one counts and acquitted on one, and he was sentenced to an aggregate term of three years' hard labour. On appeal from the convictions, on the ground, *inter alia*, that a change of venue should have been granted, *Held*, That the appellant was prejudiced by the trial's taking place in Gisborne, and a miscarriage of justice resulted from the refusal of an order to change the venue, and the conviction should be quashed. *R.* v. *Beecher*. (C.A. Wellington. July 14, 1950. O'Leary, C.J., Callan and Stanton, JJ.)

Evidence — Direction to Jury — Evidence of Accomplices — Onus of Proof—Proper Direction to be given. When evidence of accomplices is relied on, the right to accept that evidence without corroboration should be stated by the trial Judge in his summing-up; but the jury should be warned of the danger of accepting it without corroboration; and what amounts to corroboration should be explained. A direction that the evidence of accomplices should be treated with reserve is not adequate or complete. A direction on the onus of proof is so qualified as to be inadequate if the trial Judge, while early in his summing-up stating what would have been an ample direction, later so states the position, as between the evidence of accomplices, on the one hand, and the evidence of the accused, on the other, as to indicate that the question of onus did not enter into the weighing of the rival stories one against the other. *The King* v. *Beecher*. (C.A. Wellington. July 14, 1950. O'Leary, C.J., Callan and Stanton, JJ.)

CROWN PROCEEDINGS.

The Meaning of "Government Department." *100 Law Journal*, 297.

DAMAGES.

Social Security—Damages for Loss of Earnings—Social Security Tax on Wages—No Deduction in Assessment of Special or General Damages—Res inter alios acta—*Tax to be left out of account in Action by Servant against Master or by Servants against Other Persons—Social Security Act, 1938, ss. 108, 110, 118, 119.* The Social Security tax on wages should be left out of account in the assessment of special and general damages for loss of earnings, both in an action brought by a servant against his master and in actions brought by servants against other persons. Judgment of *Sir Humphrey O'Leary*, C.J., [1950] N.Z.L.R. 389, affirmed. (*Billingham* v. *Hughes*, [1949] 1 All E.R. 684, followed.) (*Forbes* v. *Attorney-General for Manitoba*, [1937] A.C. 260; [1937] 1 All E.R. 249, *Fairholme* v. *Firth and John*

Brown, Ltd., (1933) 49 T.L.R. 470, and *Jordan* v. *Limmer and Trinidad Lake Asphalt Co., Ltd.*, [1946] K.B. 356; [1946] 1 All E.R. 527, applied.) (*Fine* v. *Toronto Transportation Commission*, [1946] 1 D.L.R. 221, *Davies* v. *Adelaide Chemical and Fertilizer Co., Ltd.* (*No. 2*), [1947] S.A.S.R. 67, and *Shearman* v. *Folland*, [1950] 1 All E.R. 976, referred to.) *Sarcich* v. *Wellington Harbour Board*, [1945] G.L.R. 68, explained.) *Union Steam Ship Co. of New Zealand, Ltd.* v. *Ramstad*. (C.A. Wellington. July 14, 1950. Callan, Stanton, Hay, Cooke, JJ.)

DEATH DUTIES.

Points in Practice. *100 Law Journal*, 424.

INFANTS AND CHILDREN.

Guardianship of Infants. *209 Law Times*, 343.

INSURANCE.

An Evolutionary Pattern in Insurance Legislation. (V. Evan Gray.) *28 Canadian Bar Review*, 493.

INTERNATIONAL LAW.

The United Nations and Korea. *100 Law Journal*, 423.

JURISPRUDENCE.

The Greek Conception of Law. (Carleton Stanley.) *28 Canadian Bar Review*, 367.

LAND AGENTS.

Commission. *100 Law Journal*, 396.

LAW PRACTITIONERS.

Public Relations of the Legal Profession. (Glenn R. Winters.) *28 Canadian Bar Review*, 524.

MAORI LAND.

Maori Trustee Regulations, 1922, Amendment No. 5 (Serial No. 1950/130).

MUNICIPAL CORPORATIONS.

Offences—Entertainment on Sunday without Permit—Dance at Cabaret open to Public commenced on Saturday Night and continued until 12.30 a.m. on Sunday—Doors closed at Midnight—Entertainment not "held or given on any Sunday"—Municipal Corporations Act, 1933, s. 313. An entertainment which substantially takes place on Saturday, and which is only in a minor degree held or given on Sunday, does not fall within s. 313 of the Municipal Corporations Act, 1933. (*Dyke* v. *Elliott, The Gauntlet*, (1872) L.R. 4 P.C. 184, and *Dickenson* v. *Fletcher*, (1873) L.R. 9 C.P. 1, followed.) (*Scott* v. *Cawsey*, (1907) 5 C.L.R. 132, applied.) Thus, an appeal from the conviction of the proprietor of the entertainment under s. 313 of the Municipal Corporations Act, 1933, was allowed where, after all requests for a permit from the local authority had been refused, a dance open to the public was commenced about 8.40 p.m. on Saturday and was carried on until about 12.30 a.m. or 12.45 a.m., the doors were closed at midnight, and it was not obvious from the street after that hour that the cabaret was still open or being used for dancing. *Quaere*, Whether the Sunday Observance Act, 1780, applies to the continuance of such an entertainment into the early hours of Sunday. *Carr* v. *Wilson*. (S.C. Wellington. August 8, 1950. Fair, J.)

NEGLIGENCE.

Nuisance—Tree—Elm-tree adjoining Road—Fall on Passing Car—Fall due to Disease—Liability of Occupier of Land. The respondents were lessees of a block of flats which they occupied by their tenants. In the forecourt of the flats was a row of elm-trees. On April 7, 1947, the appellants were driving past the flats when one of the trees fell on their car, wrecking it and injuring the appellants. The fall was proved to have been due to a disease of the roots, which was of long standing, but the disease had not taken a normal course, and there was no indication from the condition of the tree above ground that it was affected by the disease. The tree, which was about one hundred and thirty years old, carried a considerable crown, although not abnormal for a tree of that age, and had never been lopped, topped, or pollarded. Evidence was given that elm-trees should be inspected every five or seven years, and, if this tree had been topped, it was unlikely that it would have fallen when it did, but it had not appeared to be dangerous to any of the witnesses who were called. On March 1, 1947, the respondents had engaged a timber-haulage contractor to advise what should be done with the elm-tree in question, as well as with the other elm-trees on their property, not because they had any suspicion of the soundness or safety of the tree, but because they wished to put their gardens into good order. It appeared that the contractor did not think that the tree was likely to be a source of danger, and he proceeded to pollard the other trees first, leaving the tree in question untouched, with the result that some of the protection from the wind which the tree had formerly enjoyed was withdrawn. In an action by the appellants against the respondents for damages for negligence, and, alternatively, nuisance, *Held*, That, in the absence of any evidence that the respondents had failed in their duty to take reasonable care in the management of their premises, they were not liable. Decision of the Court of Appeal, [1949] 1 All E.R. 874, affirmed. Per *Lord Radcliffe*, "I hope that I do not misinterpret the significance of this decision if I say that I do not think that it can be the last word on the position or liability of the tree-owner . . . The accepted test that liability only begins when there is apparent in the tree a sign of danger has the advantage that it seems to ignore, or to a large extent to ignore, the distinction between the spot that is much, and the spot that is little, frequented, but, on the other hand, I think that it does end by making the standard of the expert the test of liability." *Caminer and Another* v. *Northern and London Investment Trust, Ltd.*, [1950] 2 All E.R. 486 (H.L.).

As to Occupier's Duty towards the Public in Respect of the State of Premises Adjoining a Public Place, see *23 Halsbury's Laws of England*, 2nd Ed. 619-621, para. 870; and for Cases, see *E. and E. Digest*, Supplement.

NORFOLK ISLAND.

Sources of the Law of Norfolk Island. (F. C. Hutley.) *24 Australian Law Journal*, 108.

OPTICIANS.

Offences—Advertising—Optician's Name in Booklet in List of Persons prepared to allow Discounts to Members of Cash Purchase Society—Optician "purporting to give discounts"—Mens rea not a Constituent of Offence of "Advertising"—Practising Opticians Regulations, 1942 (Serial No. 1942/343), Reg. 3. The financial members of the Dunedin Returned Services Association may, on payment of an annual fee of 1s., become members of the Dunedin Returned Services Cash Purchase Society, the object of which is "to enable members to purchase goods on the most reasonable terms," this being effected by arranging with firms to allow members discounts at varying rates on cash purchases and in respect of certain work performed. In a booklet, which contained a list of firms and persons who were stated to be willing to allow discounts to members, the defendant, an optician, was listed, with no condition attached, under the appropriate trade or business heading. On an information against the defendant under Reg. 3 of the Practising Opticians Regulations, 1942, alleging that, being an optician, he advertised that he purported to give discounts by causing his name and business address to be inserted in the booklet, *Held*, 1. That, in the circumstances outlined, the defendant had "advertised," as it was not essential to the offence that there should be a communication addressed in some form or other to the public at large, and it was sufficient if it were brought to the notice of a section of the public in some book, circular, or other writing. 2. That the defendant, by permitting his name to be listed in the booklet (wherein it was stated that discounts were payable at time of purchase on production of the booklet), did "purport to give discounts" at a rate to be arranged from time to time with each customer. 3. That Reg. 3 of the Practising Opticians Regulations, 1942, contained an absolute prohibition against advertising by opticians, and, consequently, *mens rea* was not a constituent of the offence created by that Regulation. (*Harding* v. *Price*, [1948] 1 All E.R. 283, followed.) *Pearson* v. *Booch*. (Dunedin. August 7, 1950. Willis, S.M.)

POLICE OFFENCES.

Aiding and Abetting in Summary Cases. *94 Justices of the Peace Journal*, 345.

POST AND TELEGRAPH.

Postal Amending Regulations, 1950 (Serial No. 1950/132), fixing the rentals for private letter-boxes and private mail-bags, and fixing postal charges.

PRACTICE.

Execution while Appeal Pending. *24 Australian Law Journal*, 119.

Joinder of Defendants. *24 Australian Law Journal*, 119.

Legal Periodicals and the Supreme Court. (G. V. V. Nicholls.) *28 Canadian Bar Review*, 422.

PUBLIC SERVICE.

Public Service Commission—Powers—Officer of Public Service refusing to answer Question whether he was a Communist—Whether Commission's transferring him from Department of Scientific and Industrial Research to Social Security Department ultra vires*—Powers of Commission considered—Public Service Act, 1912, ss. 12, 12 (1A), 50, 60—Public Service Amendment Act, 1927, ss. 11, 12.* The plaintiff was an officer in the Public Service of New Zealand, and was originally a probationer occupying the position of technical trainee in the Department of Scientific and Industrial Research, his appointment to that position being confirmed on April 19, 1947, whereupon he became an officer of the Public Service in that Department with the status of assistant technician. On September 29, 1948, the plaintiff was interviewed by Mr. G. T. Bolt, one of the members of the Public Service Commission. At that interview, he was asked whether he was a Communist. He declined to answer, giving as his reason that, in his view, public servants were entitled to maintain their own counsel on their private political views, and that, in his view, Mr. Bolt was not entitled to ask that question. Mr. Bolt said that, in the absence of an assurance that the plaintiff was not a Communist, the Commission did not regard him as a good security risk, and it could not allow him to remain in his position with the Department of Scientific and Industrial Research. On November 1, 1948, the plaintiff was transferred by the Public Service Commission to the Social Security Department. In an action against the members of the Public Service Commission claiming writs of prohibition and certiorari; and, alternatively, a declaratory order under the Declaratory Judgments Act, 1908, that the defendants had acted *ultra vires* in transferring the plaintiff from the Department of Scientific and Industrial Research to the Social Security Department, alternatively, an injunction, *Held*, by *Northcroft*, J., 1. That the scheme and purpose of the Public Service Act, 1912, and its Amendments is to place the management of the Public Service in the hands of a non-political body, the Public Service Commission, and to make that body responsible for its efficient and economical working. (*Barnes* v. *The King*, [1933] N.Z.L.R. s. 117, referred to.) 2. That a public servant has no absolute right to a continuance of employment in the Public Service, which is established and maintained in the public interest; and, if his presence in it is thought by the Public Service Commission to be prejudicial to the public interest, it is the Commission's duty to remove the prejudice by dismissal or by transfer to an innocuous position. 3. That, in addition to the occasions calling for disciplinary action, for which s. 11 of the Public Service Amendment Act, 1927, provides, if the Commission, *inter alia*, considers that the continuance in a particular office or Department of a certain person is a danger to the efficiency of that office or Department, and takes action in the interests of efficiency or of economy, then that action is authorized by the Public Service Act, 1912, and, in particular, by s. 12 (1A) thereof (inserted by s. 25 of the Public Service Amendment Act, 1946). 4. That the plaintiff's case did not come within the provisions of s. 11 of the Public Service Amendment Act, 1927 (which provides for disciplinary action in respect of certain specified matters upon which complaints or charges may be made). 5. That the action taken by the Commission in respect of the plaintiff was concerned, not with the punishment of the plaintiff, but with the efficiency of the Public Service, and was proper; and it was within its statutory authority. On appeal from that judgment, *Held*, by *O'Leary*, C.J., and *Finlay*, J., That, as the Public Service Commission had acted within its authority, the appeal should be dismissed. *Held*, by *Gresson* and *Hutchison*, JJ., *per contra*, That, as the appellant was entitled to the injunction sought, the appeal should be allowed. Judgment of *Northcroft*, J., affirmed. *Deynzer* v. *Campbell and Others*. (S.C. Wellington. July 28, 1949. Northcroft, J. C.A. July 27, 1950. O'Leary, C.J., Finlay, Gresson, and Hutchison, JJ.)

PUBLIC WORKS.

Total Expropriation of Commercial Premises. (R. W. Macaulay.) *28 Canadian Bar Review*, 390.

RAILWAYS.

Appeal Board—Jurisdiction—Right of Member of Railways Service to appeal against Appointment of Another Member to Position for which Both applied—Appointment of That Other Member not involving Promotion for Him, but involving Promotion for Appellant if successful in Appeal—Jurisdiction of Railways Appeal Board to hear Such Appeal—Determination of Board as to Appellant's Qualifications for Position—Board's Decision thereon not examinable by Supreme Court—Government Railways Amendment Act, 1927, ss. 5, 6, 7, 11. Sections 5 (7) and 11 (1) (*b*) of the Government Railways Amendment Act, 1927, give to a member of the Railways Service, who is unsuccessful in his application for a position which would involve promotion for him, the right to appeal against the appointment under s. 5 of that statute of another member for whom the appointment did not involve promotion; and the Railways Appeal Board has jurisdiction to hear and determine his appeal. (*Cooke* v. *Charles A. Vogeler Co.*, [1901] A.C. 102, followed.) (*Rockland* v. *Auckland Electric Tramway Co., Ltd.*, [1918] N.Z.L.R. 824, referred to.) It was within the jurisdiction of the Railways Appeal Board to determine whether the appellant, in the present case, was qualified under Reg. 58 of the Government Railways Regulations, 1922, for the position to which he sought appointment; and, consequently, the Board's finding as to his qualifications for the position is not examinable in the Supreme Court. (*Van de Water* v. *Bailey and Russell*, [1921] N.Z.L.R. 122, applied.) *So held* by the Court of Appeal, allowing an appeal from the judgment of *Hay*, J., [1950] N.Z.L.R. 192. Per *O'Leary*, C.J., That with the implied right of the Crown to dismiss a public servant at any time, subject to any limitation that may be imposed by statute, there is a corresponding right to transfer within a Department, or from Department to Department, or from one position to the other, subject to any limitation imposed by a clear and express statutory provision to that effect which may affect the servant transferred or may give rights to any other servant affected by the transfer. (*Barnes* v. *The King*, [1933] N.Z.L.R. s. 117, referred to.) Appeal from the judgment of *Hay*, J., [1950] N.Z.L.R. 192, allowed. *Harris* v. *General Manager of Railways and Another*. (C.A. Wellington. July 14, 1950. O'Leary, C.J., Callan and Stanton, JJ.)

SETTLEMENT.

Trust for Daughter and Her Children or Remote Issue: Rule against Perpetuities. *24 Australian Law Journal*, 114.

STATUTE LAW.

Transitional and Post-war Powers in Australia. (R. Else-Mitchell.) *28 Canadian Bar Review*, 407.

TRANSPORT.

Lights on Vehicles. *94 Justices of the Peace Journal*, 293.

TRUSTS AND TRUSTEES.

Appointment of Separate Sets of Trustees. *207 Law Times*, 140.

VENDOR AND PURCHASER.

Land Sales—Farm Land—Property within City Limits used for Poultry-farming—Land used for "agricultural purposes"—Property within Classification of "Farm land"—Servicemen's Settlement and Land Sales Act, 1943, s. 2—Servicemen's Settlement and Land Sales Regulations, 1949 (Serial Nos. 1949/81, 1950/15), Reg. 3 (d). A property, which was urban in character, being situated in the City of Dunedin and rated as an urban property, consisted of an acre and a half of land with a modern residence and the poultry-houses and equipment requisite for the carrying on of an efficient poultry farm. The property had been used for the keeping of poultry on a commercial basis for some years, and it supported the owner and his family and kept the owner fully occupied. It was sold as a going concern. The purchaser intended to carry on the poultry business. On the question whether the property was "farm land" or not "farm land" for the purposes of Reg. 3 (*d*) of the Servicemen's Settlement and Land Sales Regulations, 1949 (as inserted by Amendment No. 1 (Serial No. 1950/15)), *Held*, 1. That, notwithstanding its situation and characteristics, the property was "farm land," and that it "should be used, principally, if not exclusively," for the keeping of poultry, which is an "agricultural purpose" within the definition of those words in s. 2 of the Servicemen's Settlement and Land Sales Act, 1943, in the sense that, for the time being, its continued use for poultry-farming appeared to be the most appropriate and profitable use to which the land could be put. (*No. 114.—J. to J.*, (1947) 23 N.Z.L.J. 279, referred to.) 2. That the Court had no discretionary power to classify the land as not "farm land," and so to exempt it from the continued operation of the Servicemen's Settlement and Land Sales Act, 1943. *In re A Proposed Sale, Smith to McPheat.* (L.V.Ct. Dunedin. July 26, 1950. Archer, J.)

WILL.

Attestation Clause. *24 Australian Law Journal*, 115.

RETIREMENT OF MR. JUSTICE KENNEDY.

Farewell Function in Supreme Court.

The full strength of the profession in Dunedin was present on the occasion of the Bar's farewell on Monday, July 17, to the Hon. Sir Robert Kennedy who had been resident Judge at Dunedin during most of his twenty-one years' service on the Supreme Court Bench. In addition, there were present the President of the New Zealand Law Society, Mr. W. H. Cunningham, the delegate of the Southland District Law Society, Mr. I. A. Arthur, and the President of the Canterbury District Law Society, Mr. A. C. Perry. There was also a representative gathering of the public, including the Mayor of Dunedin, Sir Donald Cameron. Among those present were Mr. J. D. Willis, S.M., Mr. J. G. Warrington, S.M., Mr. J. R. Bartholomew, who for many years was the senior Magistrate at Dunedin, and the Superintendent of Police, Mr. J. McIntyre.

The New Zealand Law Society.

The first to address Mr. Justice Kennedy was the President of the New Zealand Law Society, Mr. W. H. Cunningham, who said it was his great privilege on behalf of the members of the profession throughout New Zealand to express to His Honour their respectful admiration and thanks for his outstanding judicial service, and their regret at his decision to retire. The President continued :

" After a brilliant career at Victoria University College, which my predecessor recently somewhat disrespectfully referred to as ' the old clay patch at Kelburn,' in which in five years your Honour graduated simultaneously Master of Arts and Master of Laws, with first class Honours in each, you were admitted to the Bar in Wellington in February, 1911, and subsequently entered into partnership with Mr. Arthur Luke, a partnership which lasted until your Honour was appointed a Justice of the Supreme Court and took the judicial oaths on February 11, 1929."

Mr. Cunningham recalled that during His Honour's eighteen years at the Bar in Wellington, he built up a busy practice and a high reputation, particularly in Company and Commercial Law, and he appeared as counsel in many important cases, both in the Supreme Court and in the Court of Appeal. As legal adviser to the National Dairy Association of New Zealand, Ltd., he rendered outstanding service to one of the country's great primary industries, the co-operative dairy industry, at a critical period in its development. The set of articles that His Honour prepared in the 'twenties at the request of the National Dairy Association for the use and guidance of co-operative dairy company members if they cared to adopt them were now embalmed in the Co-operative Dairy Companies Act, 1949, and the Legislature had decreed that the most important of them must be adopted by any dairy company which desired to retain its status as a co-operative dairy company. Mr. Cunningham continued :

" When, after admission, you became a member of the Wellington District Law Society, you very soon interested yourself in the work of that Society and matters generally pertaining to the welfare of the profession. You became a member of the Council of that Society in 1922, and you were elected President in 1925. Your colleagues on the Council at that time, Sir Michael Myers, Sir Archibald Blair, Sir David Smith, Sir Harold Johnston, and the Honourable H. H. Cornish, were to be your brethren on the Bench.

" You served also for several years on the Council of the New Zealand Law Society as the representative of Auckland, Gisborne, and Hawke's Bay District Law Societies. During that period, important matters such as legal education and the formation of the Solicitors' Guarantee Fund were under consideration, and you actively assisted with the work entailed in these matters.

" On your appointment to the Judiciary, you became the Supreme Court Judge resident in Dunedin, and this gathering here to-day testifies to the esteem in which your Honour is held in the district where you have presided in the Supreme Court during the greater part of your judicial life, and it is fitting and proper that your official farewell should be said in this very Court in which you have presided for over twenty-one years.

" We in Wellington have been privileged to appear before you when you sat at regular periods in the Court of Appeal, and in difficult cases your Honour's presence there inspired counsel with confidence. Throughout your lengthy period on the Bench, there have been remarkably few appeals from your Honour's judgments, and, of those, very few were successful."

Mr. Cunningham went on to say that His Honour that day stepped down from the Bench, having left behind a remarkable record of judicial achievement. He had given to the profession an outstanding example of what could be achieved by hard work, unflagging industry and devotion to duty, and meticulous and scrupulous care in the performance of his judicial duties. Elevated to the Bench at an unusually early age, His Honour had, throughout his twenty-one years of service to the community, pursued with unswerving zeal the high standard that he had set for himself when he first took his seat on the Bench. Counsel, litigants, and others who came before him as the dispenser of justice were always assured of a patient hearing, the most careful consideration of their case, and a judgment which demonstrated that every point had been weighed in arriving at a decision. His Honour would go down in the legal history of the Dominion as one of our great Judges.

" The members of the profession throughout New Zealand sincerely regret that your Honour's decision to retire is to deprive the Supreme Court Bench of one of its soundest Judges in his very prime as a Judge," said Mr. Cunningham, " but we rejoice with your Honour, now that that decision has been made, that your Honour has been able to achieve at so youthful an age such judicial distinction and the completion of such lengthy service on the Bench. We rejoice with you that you are now able to enter upon your retirement comparatively young and in good health, and on behalf of the members of the profession throughout New Zealand I wish your Honour and Lady Kennedy many years of the greatest happiness in your well-earned retirement."

THE OTAGO DISTRICT LAW SOCIETY.

The President of the Otago District Law Society, Mr. G. M. Lloyd, said that it afforded him much pleasure to follow Mr. Cunningham, the President of the New Zealand Law Society, and to endorse all the sentiments so ably expressed by him. Busy as they knew him to be, they did appreciate his presence with them that day, more particularly so since Mr. Cunningham joined His Honour's old firm of Messrs. Luke and Kennedy on His Honour's elevation to the Bench. He said :

" I would also like your Honour to know that Mr. A. C. Perry, President of the Canterbury District Law Society, was to be here with us to-day to represent his Society at this farewell to you, but his aircraft has been delayed owing to weather conditions. A number of members of the Southland District Law Society are present here to-day also. It is most unfortunate that the President of the Southland Society is ill and unable to join us, but Mr. Ian Arthur is acting in his stead, and we welcome him too. I have received a number of apologies from persons unable, for various reasons, to be present, including apologies from the Hon. the Attorney-General, Mr. T. Clifton Webb, the Right Hon. Sir Humphrey O'Leary, Chief Justice, the Hon. Mr. Justice Northcroft, Mr. F. C. Spratt, President of the Wellington District Law Society, and the members of the Oamaru Law Society. We regret the inability of these gentlemen to be present at this farewell, but their kindly sentiments towards you have been well expressed in their own words.

" It is indeed a pleasure and a privilege on behalf of each and every member of the Otago Bar to-day to wish you well on your retirement.

" It is quite unnecessary for me to dwell at length on your early career at the Bar, but I would like to refer briefly to some matters of interest to us all. After a very successful academic career at Victoria University College, where you graduated as Master of Laws and Master of Arts with first class Honours in each instance, you were admitted as a barrister and solicitor of the Supreme Court of New Zealand on February 3, 1911, at Dunedin, and not at Wellington, as has been said on a number of occasions. You acquired your early training with the late Mr. E. R. Bowler at Gore, for a short time with the late Mr. John Wilkinson of Dunedin, and then with the well-known Wellington firm of Messrs. Bell, Gully, and Co. You then entered into partnership with Mr. Luke, and founded the successful commercial practice of Messrs. Luke and Kennedy. For fifteen years or more you practised in the capital city with credit to yourself and to your profession. During that time, you were an examiner in law to the University of New Zealand, President of the Wellington District Law Society, and a member of the Council of the New Zealand Law Society."

It was on February 11, 1929, Mr. Lloyd continued, that His Honour was appointed a Judge of the Supreme Court of New Zealand, and from that date down to the present time they had learned to appreciate and to respect his many good qualities, his strict impartiality on all occasions and at all times, his sound knowledge of the law and the wisdom of his judgments, his independence of mind, his deep learning, and his outstanding ability as a Judge. Indeed, he had upheld the best traditions of the Bench. The highest traditions of British justice had been observed in his Courts at all times. His influence upon the present generation of lawyers practising in Otago and Southland in maintaining and elevating the finest traditions of justice had been profound. It was now their task as members of his Bar to maintain those standards which His Honour had had so large a part in establishing. They would endeavour to uphold those standards as a respectful tribute to his memory and to the pleasant years that he had spent with them.

" We do appreciate all that you have done for the profession as a whole," Mr. Lloyd said, " and, I may add, for the community in general. I would like to place on record the fact that during the past fortnight I have been stopped in the street on a number of occasions by well-known and highly respected citizens of this city, who have expressed to me their sincere regret at your Honour's retirement. Their words to me were always of deep appreciation, respect, and pride in the recognized standing of ' their ' Judge. No greater tribute could be paid to your Honour than to say that the citizens of Dunedin and the members of your own Bar respect you, they always speak kindly of you, and they now regret your decision to retire. It must be a matter of great pleasure to you to know how well-disposed towards you are the good citizens of this city.

" Present in this Court to-day are his Worship the Mayor, Sir Donald Cameron, Lady Sidey, Mr. J. R. Bartholomew, the learned Magistrates of this city, Mr. T. L. Gillions and Mr. George Stratton, the President and the Registrar of the Justices of the Peace Association, the Superintendent of Police and members of the Police Force, and no doubt others who have escaped my notice. All are here to pay respect to their own Judge. It is not possible for all of us to express in words and to show our own feelings and sentiments on an occasion such as this, but the very presence of these gentlemen is eloquent tribute to your integrity and standing in this community. There will no doubt be opportunity afforded these good citizens to extend to you their good wishes in their own way. I do so to-day on behalf of each and every member of this honourable profession to which we belong.

" It is with pleasure and with pride I recall that His Majesty the King included your Honour's name in the New Year Honours last year—a fitting tribute to a long and distinguished record on the Bench. Otago and Southland have been well served by three distinguished Judges of the highest calibre—Sir Joshua Williams for some thirty-eight years, Sir William Sim for fifteen years, and your Honour for the past twenty-one years. It would be a joy to us all if portraits of our three distinguished Judges could be hung in this Honourable Court. We trust that this may be possible.

" Each and every member of the legal profession in Otago joins with me to-day," Mr. Lloyd concluded, " in wishing Lady Kennedy and yourself the best of health and much happiness in the years to come. You richly deserve all the good things in life in the years of your retirement. We most sincerely wish you well."

THE SOUTHLAND DISTRICT LAW SOCIETY.

Representing the Southland District Law Society, Mr. I. A. Arthur said it gave him great pleasure to be present on behalf of the members of the Southland District Law Society, to extend their best wishes to

His Honour on the eve of his retirement, and to pay their tribute to the great ability with which he had discharged the duties of his office during his twenty-one years on the Bench. Mr. Arthur proceeded :

" It is much regretted by Mr. Broughton, the President of my Society, that he is prevented by illness from attending this ceremony, and he has asked me to express his apologies for his absence.

" I would like to associate myself with everything that has been said by the President of the New Zealand Law Society and by the President of the Otago District Law Society, and to adopt as my own the sentiments they have expressed. They appear to me to have said nothing that transcends your undoubted merits.

" A circumstance which has made the details of your career a matter of especial interest and pride to the people of Southland, and particularly to the members of my Society, is the fact that Southland is the Province of your birth, in Southland you spent your earliest formative years, and at the Southland Boys' High School, of which you were Dux, you early manifested and cultivated those natural talents which in later years so well equipped you for the high office to which you were to attain. Your brilliant scholastic achievements, your distinguished career at the Bar, your elevation to the Bench, your profound understanding of legal principles, and the consummate skill with which you applied those principles to the complicated sets of facts which from time to time came before you for elucidation—these have all been the subject of appropriate and adequate reference by previous speakers.

" You renewed your close association with the Southland District on August 20, 1929, when you presided for the first time over the sittings of the Supreme Court in Invercargill. That association was to continue for upwards of twenty years, during which period you presided regularly over the quarterly sittings of the Supreme Court in that city."

In His Honour's Court, Mr. Arthur continued, justice was administered as they would all wish that it should be administered, with dignity, decorum, and the utmost impartiality. In his day, His Honour presided over many notable criminal trials. It had been remarked that, to the reflective mind, there was no more striking scene than that presented on the trial of a grave criminal case—a Judge who tried with certain hands fairly to hold the scales of justice, and a jury, calm, honest, dispassionate, with no desire but to do justice in the case according to their conscientious belief. No one who visited His Honour's Court during the progress of such a case could fail to be impressed by the truth of that observation. But in all cases, civil or criminal, the litigant or the accused person, whether assisted by counsel or not, was assured that there he would get justice, justice as happily it was understood in this country, in the highest meaning of the term.

Through His Honour's long association with Invercargill and with Southland, he had become identified with the life of the city and of the Province. When last year the honour of knighthood was conferred on him by His Majesty the King, the people of Southland as a whole took a personal and particular pride in this well-merited recognition of His Honour's worth. And now, as His Honour was about to lay aside the cares of office, he carried with him the kindliest feelings of goodwill on the part of those people.

" On behalf of the members of the Southland District Law Society," Mr. Arthur concluded, " I publicly acknowledge the great debt which we owe to your influence and example. On their behalf, I have much pleasure in conveying to Lady Kennedy and yourself our very best wishes for your future. May you both enjoy good health and content in the years that are to come, and may you long be spared to enjoy the leisure which is your due by reason of the great service you have rendered to your country."

Mr. Justice Kennedy's Reply.

Mr. Justice Kennedy, who was obviously very deeply moved, then addressed the members of the Bar as follows :

" It is very hard to say good-bye to you all, and I shrink from doing it. Now that the time has come, it is not made easy by the generous things you have said. I should be made of sterner stuff than I am if I were not moved by your kindness. I have not sat for over twenty-one years without finding it difficult to part from you all as Judge. I am not going because I have reached the age limit, and I might have continued for another nine years, but I wished to retire when I still, so I thought, had my powers to the full, and when it might still be possible for me to be useful, although no longer on the Supreme Court Bench. This results from the fact that, with my recent colleague, Sir David Smith, I was appointed at an unusually early age to the Bench. You would have to go back for many years to find equally early appointments. After more than twenty-one years with only one period of leave, I feel that a short rest is desirable, and that I hope to have. It has given me very great pleasure to receive your kind assurances that I retire with your good wishes and with your respect and esteem, and to listen to such a generous demonstration of your good will. I shall not forget all that you, out of your generosity, have said, and all that you have done for me, and all your kindness through the years.

" I have often thought, as I administered the high office of Judge, of my immediate predecessors in this Province, Sir Joshua Williams and Sir William Sim. As you know, there have been but three resident Judges in Otago and Southland during the last seventy-five years. There, apparently serenely watching in this Court, is Sir Joshua, and Sir William is not forgotten, although it is one of my disappointments that I did not arrange for his portrait or photograph to be here too. I often had it in mind, but never accomplished it. It was no easy task for anyone to follow two such great Judges. I was always proud to be their successor. I came here as a junior Judge, when no one else wanted to come to Dunedin. I had many opportunities later of leaving and going elsewhere, but I wished to stay."

During the period that he had been in Dunedin, His Honour said, there had been many changes. He missed that day some of their leaders who had unhappily been overtaken by the noiseless foot of time, but, in compensation, he saw before him many whom he had had the pleasure of admitting in the very room where he was himself admitted by Sir Joshua Williams, and he had watched their development and their performance in the Courts. He had no doubt they would be worthy of those they followed. He also saw many of his old friends there, whose presence he regarded as a tribute of friendship. He took pleasure in the thought that they had all been able to discharge their high

duties with mutual esteem, and he recalled nothing that had marred the relationship between him and the members of the profession during the years. That, of course, was due as much to their qualities as to his, but it was what the public expected. He thought it was as it should be. The friendliness of the Bar to him during the whole of his long term of office would be one of his cherished recollections.

His service as a Judge, His Honour continued, covered a depression, a war, and its aftermath, and the Courts had had for solution problems which followed social upsets. He did not refer to the nature of the judicial process. The great Judge Cardozo had discussed it in one of his books, and anyone who reads the life of Mr. Justice Denniston would see a picture of a Judge in action. All he said was that anyone who thought that justice was achieved without effort and without sweat and tears deceived himself. A Judge could not do his work unless he was sustained and supported and helped by the Bar. No Judge himself could surmount all the infinite complexities of law and fact without great aid, and, if he personally had appeared to have achieved anything, then he would record his indebtedness to them all. He had, in the most ample measure, had the benefit of their research and help all those years. Few of the public could ever know what that meant, but he knew. Then His Honour said:

"Then I should not go without expressing appreciation of the work of the officers of the Court, particularly the Registrars, who have been helpful in all matters, and especially in their own province of probate, administration, and practice. From the officers of the Court everywhere I have always had the greatest assistance on the numerous occasions that I have required it.

"I have likewise had no opportunity since I was a Judge of referring to the service of the Police in the Courts. It has not appeared to me convenient to refer to it in the Court when cases were disposed of, but it does leave me with something I wish to say. I have seen the Police in my Courts as officers and witnesses and so on. I have observed the part they play in the protection of people and in the maintenance of security. I have seen the way in which they have brought criminal persons to justice, and I have always thought that the whole community was under a great obligation to them for the faithful discharge of their duties. There have been many occasions in my Court on which I thought they deserved thanks for their services to justice.

"I have felt, too, that it was very necessary that the work of the Court should be adequately reported to the public, so that they might understand what was being done and might follow the justice of decisions, and might feel especially that criminal justice was their justice. When I first came to the city, the reporting was, by common consent, the fullest, the most accurate, and the best in the country; but, of course, times have changed, the exigencies of space and labour have brought many difficulties, and we could not expect it to continue at such a high level. Still, I have found that the doings and happenings of the Court have been adequately and properly reported. The Press in this city has been vigilant, fair, and accurate, and, so far as I have seen, in reporting the doings of the Court it has followed and maintained a high standard. I acknowledge that in my office I have always had unfailing consideration and courtesy from the Press.

"And now," His Honour concluded, "I must as a Judge of the Supreme Court bid farewell to you, and to all who have sent messages to me on this occasion. I wish to thank you all from the bottom of my heart for being here to say goodbye to me, and for the generosity with which you have appreciated anything I may have tried to do and for the overwhelming kindness I have always had from you."

His Honour then stepped down from the Bench and aid goodbye personally to all the practitioners present.

Farewell Bar Dinner.

In the evening, there was a large attendance to farewell His Honour Mr. Justice Kennedy at a dinner held under the auspices of the Otago District Law Society. This was the profession's own farewell.

The opportunity was also taken of congratulating Mr. F. B. Adams, formerly Dunedin's Crown Prosecutor, on his elevation to the Bench.

Among those present were Mr. W. H. Cunningham, President of the New Zealand Law Society, Mr. A. C. Perry, President of the Canterbury District Law Society, and Mr. I. A. Arthur, acting for the President of the Southland District Law Society, Mr. G. M. Broughton, and Dunedin's former senior Magistrate, Mr. J. R. Bartholomew. The President of the Otago District Law Society, Mr. G. M. Lloyd, presided.

"Our Judge."

Mr. Lloyd asked Mr. A. G. Neill, K.C., who was making his first appearance after taking silk, to propose the toast of "Our Judge."

Nearly half the twentieth century had gone, said Mr. Neill, and during those fifty years Otago had been favoured indeed, as it had known three great Judges, Sir Joshua Williams, Sir William Sim, and Sir Robert Kennedy.

"These men," he said, "have been outstanding in their probity, wisdom, and knowledge of the law, and we can take the opportunity now of telling our Judge that he is joining the ranks of his illustrious predecessors, those two other great Judges.

"I began studying law when Sir Joshua Williams was the Judge, I began to practise under Sir William Sim, and I began to gain some knowledge of the law under Sir Robert Kennedy."

The best Judges came either from the ranks of the advocates or from the lawyers. From the former class came men like the present Chief Justice and his predecessors, Sir Michael Myers and Sir Charles Skerrett, and from the lawyers came Sir Robert Kennedy, he said, and he could think of another great Judge who was a lawyer—Lord Greene. He found many marks of similarity between these two men. They were in the same age group, they started their scholastic training at the same time, and both were brilliant students. They were called to the Bar within a year or two of each other. They had been elevated to the Bench at much the same time, Sir Robert first and Lord Greene

a little later. Both had showed remarkable qualities. They were similar in their judgments, their conciseness, and their impartiality. They had also, added Mr. Neill, served at a time of depression and war, with that unfortunate plethora of regulations which follows a war. They had stood at a time when the drift of law was away from the law, and had managed to hold the reins and keep us to fundamentals.

And there was one last similarity, said Mr. Neill, in that both had retired at the same time. He hoped that, if Sir Robert were ever able to meet Lord Greene, he would be able to discuss these similarities with him.

" His Honour is proud of his Bar," said Mr. Neill, " and he has provided a great training-ground in knowledge of the law and in decorum. Critics say our Bar here to-day is not what it used to be, that the men of the good old days do not exist, and that the Bar has fallen. This sort of criticism comes from men who do not practice at the Bar, or who did not know the giants of old, or who have forgotten them. Judges to-day have greater powers of amendment than they formerly had, and can now obviate the nonsuit.

" There is a better spirit now than there was years ago, and there are better methods of getting together. There is no attempt nowadays to keep knowledge to one's self; the aim is to spread it and share it. There is a wonderful system of reporting the law to-day, and this has improved it to a degree where one man cannot take the same advantage over the other fellow."

Mr. Neill illustrated his argument by stories of the Courts in earlier times, when law reports had to come out from England, and one man was able to take advantage of his fellows by obtaining reports more quickly than they could.

There had been a great improvement, he said, and the Judge was in the best position to know whether the Bar was as good as it used to be. The Bar to-day, he said, did not go in for the same class of oratory as it did in former days. It put up arguments of clarity, and enabled the Judge to give his judgment in the best interests of justice.

All those who were present, said Mr. Neill, had had experience of His Honour's kindness, and no one could have helped him personally more than the Judge had done. Sir Robert had always been prepared to help those who wished to be helped, but not those who did not seek assistance. It was no good hinting, said Mr. Neill. One had to go and ask. He had upheld the dignity of the Bar and the dignity of the Court.

" We appreciate the dignity His Honour has exacted from us as a Bar," Mr. Neill proceeded. " There is a lot to be said for the ceremonial of the Court. In England, when the Assizes start, there is a procession through the town, with the Judge in full regalia and scarlet robes. We do not have this here, but I feel it would not be out of place if, in jury cases, the Judges wore red and ermine. If we can impress on the people that the Court means something, it will affect their general outlook."

Sir Robert, said Mr. Neill, had never used an unnecessary word. His rulings were always concise and firm, and no one left the Court-room without a due appreciation of the process and dignity of the law.

" How fortunate it is for our country," said Mr. Neill, " that we have men such as our Judge. He loved the law, he gave of his best to the law, and now he can look back and say it has been worth while. As he goes into retirement, there will be no withdrawal from, or lessening of interest in, the Otago Bar. May we learn his lessons of tolerance and impartiality. We thank you," he said, " for your assistance, your tolerance, and your knowledge, and hope you will enjoy the years that are before you."

Mr. W. R. Brugh, who followed Mr. Neill, said it was unnecessary to call on him to add hues to the rainbow depicted by Mr. Neill. He himself had had the privilege of being present at the farewells to each of the three great Judges of Otago, he said. Sir Joshua Williams had been followed by one of the few men who could have followed in his footsteps, Sir William Sim, and it had been his sad duty when he was President of the Otago District Law Society to pay a tribute to Sir William.

" But now," said Mr. Brugh, " we come to another farewell, tinged with rosier hues. The Judge is not retiring because of age, as he has merely reached full adult manhood.

" I can't go on with farewells," added Mr. Brugh. " In the natural course of events, it has to stop some time.

" Any corners Sir William Sim left on us this man quickly knocked off, and we must surely now be model practitioners. We farewell, not only a learned Judge of consummate ability, and one on whom the King has been delighted to bestow honour, but also one of God's greatest gifts—a perfect gentleman."

The next speaker was Mr. E. J. Anderson, who said he was anxious to express on behalf of the middle age-group of practitioners how much they felt it when the Judge under whom they had grown up laid down the reins.

" It has been a privilege for men of my generation," said Mr. Anderson, " to have known Sir Joshua, and to have practised before Sir William and Sir Robert Kennedy. Sir Robert has for two decades presided over our Bar in Dunedin, and, if the Otago Bar is good, we owe it entirely to three very great New Zealand jurists. Now we modern folk have to shake the hand of farewell, and I know of no better farewell in this Scottish community than ' Lang may your lum reek,' and implicit in this is the wish for a long and happy retirement for Sir Robert and Lady Kennedy.

" In this room to-night," added Mr. Anderson, who is a member of the City Council, " are thirty-three and one-third per cent. of the Dunedin City Council. Sir Robert and Lady Kennedy have been worthy citizens of no mean city. For their citizenship of this city over twenty-one years we thank them both."

Mr. J. S. D. More said he was happy to associate the members of the junior Bar with the tributes paid by their senior colleagues. Sir Robert's learning, he said, had been not only an example but also a protection, as practitioners always had the knowledge that his learning would give to their clients the justice they deserved in spite of their counsel. Sir Robert, he added, had taken a great interest in other activities, such as the Repertory Society and the Shakespeare Club, and he thanked him for that interest.

" We feel grateful," said Mr. More, " that we were called to the Bar during the years you occupied the Bench."

Mr. Lloyd, in asking Sir Robert to speak, said that twenty-seven years ago he had applied for a job in the office of Messrs. Luke and Kennedy, Sir Robert's old firm. It was with some regret that he had to report that at that time there was no vacancy on the staff.

His Honour's Reply.

On rising to reply to the toast, Mr. Justice Kennedy was greeted with prolonged applause. He said:

"This is no doubt the last time that I shall have the pleasure of replying to this toast. In a very short time, I shall step down from the Bench and become, if you will accept me, one of yourselves, and I say that, not only to you my friends in Otago, but also to you my friends in Southland. I have noticed how many of you have come from Invercargill. I could not go to Invercargill to say goodbye, and I am so glad that you have come to see me. And then there are my friends from Canterbury, and, of course, my old friend Mr. Cunningham, who comes on this occasion amply filling the highest office in your gift.

"I feel on this occasion, even as I did when I was first asked to become a Judge, a sadness at the termination of old associations which have been so satisfying, but to-day I have had such a display of your goodwill and kindness, and Mr. Neill, Mr. Brugh, Mr. Anderson, and Mr. More have spoken for you in such terms, that I have, for the moment, felt that, if this was to be the end and conclusion of the whole matter, it was worth while. I have now for two-thirds of my life dedicated myself to the law and for one-third done so as a Judge, and I am a little bewildered to have no cares but my own upon my shoulders. The terms of your toast—'Our Judge'—have subtly complimented me, although it is a fact that we are closer to each other in this city and Invercargill than could possibly be the case in other centres where there are many Judges, and of course I have always thought of it that way myself, for I detect that it is not of '*the* Bar' that I speak, but always of '*my* Bar,' meaning thereby all who have come into my Courts anywhere I may have been.

"To-day I have tried to express my sense of all that you have given me as a Judge in this District and to tell you how I value all the kindness, all the help, all the support, and all the friendship that you have given me over these years. I feel shy in saying these things, but I do wish to say them, because they are so true.

"I may count myself fortunate that I have lived and done my work chiefly with a Bar undoubtedly strong and able, but not so numerous that we could not get to know each other and to respect each other and to become friends, and that has, of course, been easier because I soon discovered that we had all fundamentally the same aims, and you have always honoured me by giving me your confidence.

"If there is a centre without a Judge, of course the question is: Who shall go there? I found myself in this city, but, as I told you to-day, here I remained because I wished to. Here we began, as it were, a fresh life, and, if anyone should, in the spirit of inquiry, now say, 'Have you lived all your life in Dunedin?' we should answer: 'Not yet.'

"There does, of course, come a time when a Judge should retire. There are good reasons why any Judge should retire, and you know them all. The removal of a Judge has apparently no immediate effect, and yet it has indirect effects of the highest importance. People who know more about these things than I do tell me that in a stream or in a pool the trout range themselves in size and power, and, if you catch the biggest, all the others leave their stations in strict order and move up one, so that each gets more of the good things that are borne upon the stream. I know that my going will bring benefit to the Bar somewhere. You will all each move up one, and there will remain for all more of those considerable trifles than the wind and the current normally bring your way.

"At Limerick, it is recorded, an old man once asked Mr. Justice Boyd to be excused from jury service, and the following conversation took place:

> Mr. Justice Boyd: You look very well. Why should I excuse you?
>
> Old Man: I am sixty-nine years, my Lord.
>
> Boyd: I am seventy-nine.
>
> Old Man: I am deaf, my Lord.
>
> Boyd: So am I.
>
> Old Man: I am very stupid, my Lord.
>
> Boyd: You are not half as stupid as I am, and the Government pay me £4,000 a year. Get into the box, my friend. Between us, we will make a fine job of this case.

I do think myself that Mr. Justice Boyd left it rather late.

"I have seen already so many of you develop your powers; I have seen some go away and some happily remain with us. In my time, I have seen three K.C.'s emerge from the Bar, and I have seen two Judges appointed from this city. I speak of that as accomplished which, to our pleasure, we know is soon to be. I include, of course, Mr. Justice Callan, whom I know you always claim as one of yourselves. I have not time to refer to every distinguished person, but I would like to mention two, and the first is that incomparable and delightful person Mr. Hanlon, K.C., whose like I fear we will not see again. I can remember the days when counsel's speeches were reported to the extent of two or three columns, and I feel sure that, when I myself was a young man, the reading of those speeches, if anything, confirmed me in a course which, without really knowing much of the law, I had decided to follow. It is a great achievement when the advocate pleases a Judge as he delights the jury, and Mr. Hanlon always showed how that could be done. Then there was Mr. Stephens, with gifts which we see continued, who produced a book almost too good for ordinary practitioners, but a delight to the connoisseur of practice.

"Westbury said once: 'Do not mis-state the law to me. The facts are always at your disposal.' But, in the good old days, that, of course, was not enough. I understand one counsel was wont to say: 'Facts! You don't want facts. What you want is language.' And of course I have always had a great respect for language. However, I read the other day that talking to the jury is the lowest form of speech. As I have myself in my day so often spoken to juries, I have, of course, nothing but scorn for that suggestion.

"Our cases seem to us to have a complexity never achieved by cases before other tribunals, and I do not except the Privy Council. I suppose each one of you will agree with that opinion as applied to your cases.

For example, this case is frequently mentioned as showing the perspicacity of the Privy Council. It is said that an Indian peasant sued another Indian peasant for trespass by a cow upon his field. They say that, when the case opened before the Privy Council, the Council then discovered that the peasant had no cow and that the other peasant had no field. Issues like that, of course, in New Zealand, and in this centre, would never had escaped Mr. Willis, even if I might have missed them. Indeed, this type of case is never seen. The Bar always settle them. In all seriousness, the Privy Council is a great tribunal, and, in my view, with the House of Lords, is the greatest Court in which the common law may be developed and applied. I hope this connection will be maintained.

" It has been said that a perfect Judge never sits upon a human Bench, and, if the truth were told, the Bench upon which I have sat for many years is a rather imperfect Bench. I imagine the Woolsack, whether of wool or of Victorian horsehair, is equally as uncomfortable as is my own Bench, and my brother in Christchurch, who was recently in this centre, said he had discovered why I was retiring. He said : ' The reason is that you have the most uncomfortable seat in New Zealand.' But all this, of course, is nothing to what Coroners have to do, or did do. I am disposed to ask Mr. Warrington this time whether it is true that Coroners, in a manner of speaking, sit upon the body ? Even to this day I suppose they must see the body. But I come at once to the point of all this—which is not taken from the statute but from miscellaneous sources, say, generally, the English reports—by saying that I imagine it was only in very early times, and never in New Zealand, that the Bench ever sat upon the Bar. Now, the Bar sits upon the Bench, because I suppose we always remain of the Bar, although upon the Bench we are really in some state of suspense.

" At Invercargill, as our friends there know, we work under conditions attractive enough to call a Judge there and to induce him to linger. I fear it has been otherwise in this city. But, with all its faults, I have enjoyed being here in that old and uncomfortable building. The satisfaction has been in the work and the associations which it has brought me, and for all that, and for so much else, I am now, and always will be, indebted to you.

" I come now to my final words. We live in an age when the rule is that ' They should take who have the power and they should keep who can.' I commend to you, my brethren in the law, as I go, Pascal's words : ' We must therefore put together justice and force, and so dispose things that whatsoever is just is mighty and whatsoever is mighty is just.' "

The New Judge Honoured.

Mr. A. N. Haggitt said that the gathering of the profession served a dual purpose, the second of which was not known at the time when the arrangements were made, and therefore did not appear on the agenda. He referred to the appointment to the Supreme Court Bench of their Dunedin colleague, Mr. F. B. Adams, announced that day, and expressed their congratulations to him on attaining judicial office.

The speeches in this connection will appear in the next issue of the JOURNAL.

The Guests.

Mr. J. P. Cook, who proposed the toast of " Our Guests," said there were present a number of very interesting guests. In addition to those named in the toast list, there was a selection of Magistrates, ancient and modern, and a Registrar of the Supreme Court. Mr. Cunningham was present from Wellington, and he was happy to see Mr. I. A. Arthur, from Invercargill, and Mr. A. C. Perry, President of the Canterbury Law Society. He, too, was pleased to see Mr. Bartholomew, as well as Mr. J. D. Willis, S.M., and Mr. J. G. Warrington, S.M.

Mr. Cunningham said he was pleased he had been able to be present. He recalled that, when he joined the Volunteers, he was in a Highland company which had a liaison with a Dunedin Highland company, and he had heard so much about " a wee Scots nicht " that he thought he had better not miss it. He had known the principal guest for a very long time, said Mr. Cunningham, and the profession had a great respect for him in Wellington, especially when he sat on the Court of Appeal.

Mr. I. A. Arthur said the warmth of the welcome to the guests lost nothing by comparison with the weather. It had been said, he recalled, that the Southland climate was selective in its effects, and that weaklings were driven to the north. That was palpably absurd. The chief guest, Sir Robert, had once been ordered off the football field, and that sort of thing could not happen to weaklings.

Mr. A. C. Perry said he felt in the position of third junior counsel to the one brief. All he could add was that he concurred in everything that had been said. Perhaps he could, however, be a chorus, as in *Trial by Jury*, and say : " And a good Judge, too." Christchurch, he said, had had twenty Judges, but only two of them had stayed for a long time, and these were Otago men. Judges, he added, conferred an honour on a city by staying a long time in it. In 1933, he said, he had been to a farewell in Christchurch to Mr. Justice Adams, and, if for no other reason, he would have come to Dunedin to pay Canterbury's tribute to his son. Canterbury, added Mr. Perry, felt that Sir Robert was one of them. He was held in the highest esteem.

Mr. J. B. Thomson said the occasion was a sad one, as Dunedin was farewelling both its Judge and the ewe lamb of its flock, of whom the latter would be seen in the future only from afar, dressed in judicial ermine. Most of the junior members of the Bar in Dunedin, said Mr. Thomson, began to practise before Sir Robert, and most of them were, in some measure, what he had made them. He hoped that those who came after them might look on them with reverence as those who appeared before Sir Robert, just as they now looked on the older men who had practised before them.

Mr. C. L. Calvert said he had once been numbered among famous men, as one of his associates in the office of Mr. John Wilkinson had been Robert Kennedy. " Alas," he added, " though we were in the same boat, we had not the same sculls, and he outdistanced me."

Items were given during the evening by a trio consisting of Messrs. A. J. H. Jeavons, K. W. Stewart, and P. S. Anderson, and by Mr. R. Don.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Rundown Millionaire.—In *Shearman* v. *Folland*, [1950] 1 All E.R. 976, it was contended for the defendant in a running-down accident that the amount awarded the plaintiff as special damages should be diminished by the hotel expenses she would have incurred during the time she spent in a nursing-home as the result of the accident. These expenses were said to be seven guineas a week. In the judgment of the Court of Appeal, delivered by Asquith, L.J., it was pointed out that on this argument a millionaire, accustomed to live at a palatial hotel, where his weekly expenses far exceeded the charges of the nursing-home, would recover nothing. (The fact that, if he were a millionaire, he wouldn't need any more is a socialistic, and not a legal, rejoinder.) Could it really be in the mouth of a wrongdoer, he asked, in such a case to say: "I am entitled to go scot free; I have, by my negligent act, not merely inflicted no loss, but conferred a financial benefit, on the plaintiff, by saving him from the consequences of his habitual extravagance." In the result, the Court negatived the argument, but held that the defendant was entitled to deduct the sum of £1 a week in respect of the provision of food.

Contempt of Court.—Proceedings for contempt of Court brought against Robert Brett, proprietor, printer, and publisher of the *Melbourne Guardian*, raise interesting questions. On January 27, 1950, this newspaper contained an article criticizing adversely the appointment of Mr. R. R. Sholl to the Supreme Court Bench of Victoria. Headed in bold black type, "Mr. Justice Sholl: Die-hard Tory," it says (*inter alia*):

> His legal practice was confined to litigation over huge estates, disputes between great commercial concerns, and the like. His whole life has been a sheltered one: his main mission has been defending the positions of power and privilege of the wealthy—he himself was chairman of directors of a wealthy company. His daily associates have been men of the same kind—one of his chief backers in securing promotion to the Bench was Chief Justice Sir E. Herring, whose reactionary utterances are well-known. Mr. Sholl's knowledge of real life is nil—he knows nothing of the lives of the people. He will be called upon to adjudicate in the Criminal Court (the only Court where even a semblance of the problems of the lives of the people arise). Yet Mr. Sholl, like all except one of his new colleagues, has very rarely been in the Criminal Court—not only is it beyond his capacity, but it is beneath his dignity. What can such a man know of the real problems that arise there? Such an appointment throws a clear light upon the nature of the judiciary—namely, an institution forming an integral part of the repressive machinery of the State.

The respondent, who did not write the article, gave evidence to the effect that he did not intend to publish anything in contempt of Court, and that he regarded the intention of the article as being to criticize the methods by which the Victorian Government makes appointments and to draw attention to the danger to the proper administration of justice inherent in such methods of appointment. Reaching the conclusion that the respondent did not intend to suggest that the Judges of the Court would not be impartial in the exercise of their office, and that he did not intend to lower the authority of the Court as a whole or that of its Judges, O'Bryan, J., nevertheless found the article offensive, although not punishable summarily as contempt. Had it been, the punishment would have been severe, and a fine would have been inappropriate. The action of the Crown in bringing the matter forward was found to be justified. Costs were refused. "It is to be hoped," O'Bryan, J., added, "that the respondent will appreciate that, though fair criticism of those who hold public office is not to be discouraged, malicious and improper comment is not to be tolerated, and that this article is one which is close to the border-line of cases which merit summary punishment."

Conveyancing as An Art.—"In conveyancing the ultimately potent thing is not the deed but the invisible intention and desire of the parties to the deed; the written document itself is only evidence of this intention and desire. So it is with music, the written notes are not the main thing, nor is even the heard performance; these are only evidences of an internal invisible emotion that can be felt but never fully expressed. And so it is with the words of literature and with the forms and colours of painting": Samuel Butler's *Note-books*.

Nonconformity. At one of the hearings of the Licensing Control Commission, the local town-planner gave evidence that certain hotels, which did not fit in with the town-planning scheme proposed by his Council, were known as nonconformists, although, if approached with good and sufficient reasons, the Council was disposed to grant what it called "dispensation from nonconformity." Does this amount to a recognition of the fact that an hotel, overcrowded at times by people of flesh, blood, and thirst, has a soul after all? It is comforting to think that some of our hotels, shabby in appearance though they be, follow the great tradition of such nonconformists as William Fox, David Livingstone, William Blake, Robert Owen, and Keir Hardie.

The Irish Way.—From Ireland comes a story that may be of use to some of the many counsel appearing before the Licensing Control Commission on its review of Wellington's forty-seven hotels. It illustrates how difficult it is to break down the spirit of a determined hotel proprietor. It seems that on March 13, 1939, one James Downey, the owner of a tavern at Laoghaire, dismissed all his Union employees, because the Dublin Bartenders' Union sought to tell him how to run his business. In pursuance of a resolution to ruin him, the leaders have since spent £20,000 of the Union funds keeping pickets in front of the public-house. This has had the effect of drawing attention to the bar and making it one of the most famous in all Ireland. Sales have increased; and, it is said, if the pickets have not arrived by ten o'clock in the morning, Downey telephones the head office of the Union and complains bitterly.

Musings on Costs.—Obtain some security from the client who instructs you to proceed "regardless of expense."

Even a grateful client often regards the amount of a detailed bill as grossly exceeding the same sum in a composite form.

The well-known principle of rendering the bill "while the tears are in their eyes" overlooks the power of an appeal as a lachrymal absorbent.

1. Subdivision of Land.—*Mutual Common Easements—Personal Covenants—Limitation of Personal Covenants.*

QUESTION: A client of mine is subdividing his land. Easements common to each lot must be created. There will be personal covenants in each instrument creating the easements, but it is desired that each owner's liability thereunder should cease on his disposing of his lot. Can you suggest a suitable clause?

ANSWER: The following clause has been used in practice and may be suitable for your case: "That the easements hereby created being intended to run with each of the several subdivisional sections hereinbefore referred to it is hereby declared that none of the respective owners (both legal and equitable) from time to time of any piece of land affected by this transfer shall be liable in respect of any breach of any covenant herein expressed or implied committed after he she or it shall have ceased to be the owner thereof."

X.1.

LEGAL LITERATURE.

Garrow's Criminal Law in New Zealand.*

Attractively clad in red and gold, a book masquerading as the third edition of *Garrow's Criminal Law in New Zealand* has recently been noticed in circulation. The late Professor at no time produced a book of that name, but there was a publication issued many years ago, entitled *Garrow's Crimes Act, 1908 (Annotated)*, which could be described as *in pari materia* with the present work. But there the resemblance almost ends, for this newcomer is, in truth and substance, "Evans-Scott on Criminal Law in New Zealand." It is a most significant addition to our legal literature, on which the author will receive well-merited congratulations from all parts of the country.

The first conspicuous change made by the author has been to incorporate in the Introduction and throughout the work extracts from the Report of the Criminal Code Commission, upon whose labours so much of the Crimes Act depends. All readers will find this an excellent innovation. Next, the author has contributed short essays on a number of topics on criminal law and evidence. The more extended notes appear as appendices to the work, and deal, for example, with the admissibility of evidence of similar acts, identification of the accused, statements obtained by the Police, summary trial of indictable offences, extradition, and jurisdiction. Where the subject was one similarly dealt with in the previous edition, the material has been completely revised and rewritten. New summaries of the law on many other subjects are to be found in the appropriate part of the text, dealing with matters such as corroboration, severance of trials, evidence of previous convictions, marital coercion, provocation, and insanity. There are extremely valuable notes on search warrants, bail, restitution of property, and similar matters, which make the book an indispensable work of reference for senior Police officers as well as for lawyers. In addition, there is a full and detailed explanation of the scope and operation of the Criminal Appeal Act, 1945, in the light of decisions on this Act and on the corresponding English legislation.

With this new work, especially the many notes on evidence and procedure and on the Criminal Appeal Act, the author has placed the profession deeply in his debt. His writing has exceptional clarity, and the criticisms which he makes of a number of decisions are invariably forceful and substantial. He may, perhaps, rely rather too heavily on the gospel according to *Archbold*, but practitioners will certainly find the many references to standard English works extremely helpful. The notes on culpable homicide, and on the complex questions relating to theft, false pretences, and fraud, are models of succinct and lucid exposition.

Original and suggestive comment is offered on many aspects of our criminal law and procedure. On the subject of the criminal liability of corporate bodies, though the text is strangely silent on the question of *ultra vires*, there is an excellent criticism of the supposed test of corporate liability based on the "physical nature" of the criminal act. There is a good note on aiding and abetting suicide, in the course of which *R.* v. *Hinchcliffe* is disposed of. Dealing with proof of theft where only a general deficiency is shown, the writer draws attention to a group of cases, not previously considered in this connection, to support the view that such theft over a period constitutes but one continuous offence. There is an interesting submission that the common-law procedure of trial by jury still applies to special pleas in New Zealand. There are well-reasoned suggestions regarding the proper order of addresses in joint trials or where the accused makes an unsworn statement from the dock. Extra-territorial jurisdiction, and the effect of the adoption of the Statute of Westminster, are most ably handled.

Although the book does not purport to be a general critique of the criminal law or a study in criminology, it contains one or two suggestions for amendment of the law. The scope of these suggestions is limited, but they are all worthy of consideration. They include suggestions regarding the term of imprisonment of prisoners who escape (p. 25), perjury by children (p. 87), infanticide (p. 109), Police powers of search and seizure (p. 251), and evidence of confessions (p. 423).

The author has cited New Zealand, Australian, English, Irish, and Canadian cases. The coverage of the English and New Zealand decisions has been extremely thorough, and no decision of first importance in either country appears to have been overlooked.

All who have been concerned in the publication are to be congratulated on the excellence and accuracy of the printing. As the author points out, there are inaccuracies even in the Reprint of Statutes in 1931, and it is a superhuman task to eliminate errors entirely in a work of this nature. On a first reading of the book, it appears to be remarkably free from these defects. Attention may perhaps be called to one or two slips or printer's errors which might lead to confusion:

P. 27: For "Governor-General," read "Attorney-General."

P. 70: For the reference to *R.* v. *Joyce* (which is to the proceedings in the Court of Criminal Appeal), substitute references to the decision of the House of Lords: [1946] A.C. 347; [1946] 1 All E.R. 186.

P. 120: The reference to *R.* v. *Gauthier* (spelt "*Ganthier*" on this page and on p. 118) should be 29 Cr. App. R.

P. 141: For "s. 404," read "s. 407."

P. 163: For "*R.* v. *Simmonds*," read "*Lake* v. *Simmons*."

P. 369, l. 29: For "s. 3," read "s. 4."

The work is admirably set out, and well indexed. One regrets, however, to notice two changes that have been made since the previous edition. There is now no index to the statutes cited; and, where the year of a decision is not part of the reference to the case in the reports, it is not now given.

The chief criticism to which the work is open, in the opinion of this reviewer, is the excessive reliance that is placed on decisions at common law. The recurring citations from the Report of the Criminal Code Commission serve to remind the reader of many changes deliberately introduced into the law when the Code was enacted, but the changes may well be greater than the Commission itself realized. A statute is a verbally authoritative form of law-making; and its construction, where the language has a natural meaning which involves no ambiguity or uncertainty, is not governed by the previous state of the law, even though no change was premeditated. It is consequently necessary to examine the statutory provisions closely before prior or subsequent English decisions can be confidently cited in illustration of the meaning and operation of the Act. The author, however, frequently cites these decisions when it is clearly questionable whether the common-law rule has not been modified, abrogated, or superseded by the statute. This, and other points on which the author's exposition seems open to doubt, and may well be considered in an article in these pages.

The book is almost wholly confined to indictable offences, but, in conjunction with other available works dealing fully with summary jurisdiction, it provides a complete coverage of the main principles of the criminal law of New Zealand. *Garrow's Criminal Law in New Zealand* is an essential requirement for all who are concerned with practice in our criminal Courts, teaching criminal law, or administering our system of justice.

I. D. C.

* *Garrow's Criminal Law in New Zealand*, 3rd Ed. (rewritten), by Charles Evans-Scott. lxxvii + 549 pp. Wellington. Butterworth and Co. (Aus.), Ltd. 85s. post free.