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WILL: TESTAMENTARY CAPACITY: DELUSIONS.

II.

IN our last issue, we showed, from the judgments of the members of the Court of Appeal in *In re White, Brown* v. *Free*, the first rule of law as to the effect of delusions on testamentary capacity. That is, while the mere existence of a delusion does not, in itself, deprive a testator of capacity, the issue is always the testator's capacity to make a will, so that, in a case into which delusion enters, the question for the tribunal of fact is whether the delusion has affected the general faculties of the testator's mind so as to have an effect upon the resulting will. If it is established that the testator suffered from partial unsoundness but that it did not affect his general faculties and did not operate on his mind, that is not sufficient in itself to render him incapable of disposing his property by will.

The second rule of law, as enunciated in *Banks* v. *Goodfellow*, (1870) L.R. 5 Q.B. 549, relates to the onus of proof that the testator was of sound and disposing mind when he made his will. This includes proof that any partial unsoundness of his, such as a delusion or delusions not affecting his general faculties and not operating on his mind in regard to his testamentary dispositions, was not sufficient to render him incapable of disposing of his property by will.

The learned Chief Justice said that the onus of satisfying the Court that, upon the whole of the evidence, the deceased had testamentary capacity when he executed the will before the Court for which the applicant claims probate rests on such applicant. His Honour, on that point, referred to *Mortimer on Probate*, 2nd Ed. 54, where it is said that the burden of proof often shifts about in the process of the cause:

> It is to be observed that though, as a general rule, the burden of proving insanity rests upon those who seek to defeat the will upon that ground, yet if circumstances of grave suspicion arise at the outset of a case, the burden of proving, and very satisfactorily proving, the testator's sanity rests upon the propounding party.

Authority for that proposition is the judgment of the Privy Council delivered by Lord Brougham in *Waring* v. *Waring*, (1848) 6 Moo. P.C.C. 341, 355, 356; 13 E.R. 715, 720, 721, and also *Tyrrell* v. *Painton*, [1894] P. 151, which was said by Sir Charles Skerrett, C.J., in *Howie* v. *Chatterton*, [1926] N.Z.L.R. 595, 605, to apply wherever any circumstances of whatever nature existed which were calculated to excite the suspicion of the Court.

His Honour went on to say that, notwithstanding some remarks of Viscount Haldane in *Sivewright* v. *Sivewright's Trustees*, [1920] S.C. (H.L.) 63, which suggest that the onus of proving that a will is the product of an insane delusion is on the opponent, it is now generally accepted that, where there is evidence of a delusion, the onus is on the party propounding the will to establish that it did not affect the disposition: see the judgments of Sir Charles Hall, V.-C., and Baggallay, L.J., in *Jenkins* v. *Morris*, (1880) 14 Ch.D. 674, 677, 685, and also *Waring* v. *Waring*, (1848) 6 Moo. P.C.C. 341, 355; 13 E.R. 715, 720. The learned Chief Justice added that Williams, J., after discussing this question in *Bull* v. *Fulton*, (1942) 66 C.L.R. 295, concluded by saying, at p. 343:

> Usually the evidence is such that the question upon whom the onus of proof lies is immaterial, but it is clear to my mind that, although proof that the will was properly executed is *prima facie* evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, then the Court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it.

The learned Chief Justice, in applying the law to the facts and circumstances of the case on appeal, said that the will was shown to be properly executed and attested, but there were circumstances which must excite the suspicion of the Court, and those suspicions had to be removed before it could be said to be affirmatively established that the testatrix was of sound mind when she executed the will.

As to the second rule of law relating to the burden of proof, Mr. Justice Finlay said that no question as to the onus of proof was raised in the Court below, it being conceded for the respondent executors and trustees, there and upon the hearing of the appel, that the burden of proof rested upon them. That was, in His Honour's opinion, a proper concession; for, despite what might possibly (but should not), he thought, be inferred to the contrary from what was said by Lord Haldane in *Sivewright* v. *Sivewright's Trustees*, [1920] S.C. (H.L.) 63, the incidence of the burden of proof has the weight of too much and too weighty authority to be open to question.

His Honour referred to the statement of Lindley, L.J., in *Tyrrell* v. *Painton*, [1894] P. 151, 157, that "the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator," and to *Waring* v. *Waring*, (1848) 6 Moo. P.C.C. 341; 13 E.R. 715. The statements in *Mortimer on Probate*, 2nd Ed. 53, that, when all the evidence is before the Court, the decision of the Court "must be against the validity of the will, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of

sound mind when he executed it," and that on p. 54, " if circumstances of grave suspicion arise at the outset of a case, the burden of proving, and very satisfactorily proving, the testator's sanity rests upon the propounding party," must be accepted as accurate.

Mr. Justice Gresson, turning to the question of onus, said there were two aspects of this question—first, the onus upon respondent in the Court below, and, secondly, the onus on appellant in the Court of Appeal. In regard to the first, or original, onus, His Honour said :

> From the earliest times, it was held that a party propounding a will was bound to show due execution by a person possessing a sound and disposing mind. A will rational on the face of it and properly attested is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. But that is no more than a *prima facie* proof, and, if the validity of the will is impeached, the onus lying, as in every case it must, upon the party propounding the will becomes very much heavier. It has been so held in many cases, and, therefore, where delusions have been shown to exist, as was said in *Boughton and Marston* v. *Knight* ((1873) L.R. 3 P. & D. 64): " it becomes the duty of the plaintiffs to satisfy you that at the time the testator made the will he was free from those delusions, or free from their influence. The burthen of proof, as it is called, is upon those who assert that the testator was of a sound and disposing mind " (*ibid.*, 76).
>
> So, too, in *Smee* v. *Smee* ((1879) 5 P.D. 84) it was said by *Sir James Hannen*, P., in his summing-up to the jury: " The burden of proof rests upon those who set up the will, and, *a fortiori*, when it has already appeared that there was in some particular undoubtedly unsoundness of mind, that burden is considerably increased. You have, therefore, to be satisfied from the evidence . . . that the delusions under which the deceased laboured were of such a character that they could not reasonably be supposed to affect the disposition of his property " (*ibid.*, 91).

The foregoing proposition (His Honour added) was recognized in New Zealand by Denniston, J., in *Marshall* v. *Public Trustee*, [1916] N.Z.L.R. 969, 979, when he said :

> I am forced to conclude that, while, if the burden were on the plaintiff to show that the delusions to which I feel bound to hold the testator was subject had or were calculated to have influenced him in making it, I should have found against her; yet, as the authorities so plainly cast on those supporting the will the burden of showing that the delusions could not have so influenced it, I must find in favour of the plaintiff and pronounce against the document [instructions for a will executed as a will] of February 24, 1910.

It was also recognized in *Jones* v. *Jones*, [1930] G.L.R. 662, 666.

His Honour then referred to a dictum of Lord Haldane in *Sivewright* v. *Sivewright's Trustees*, [1920] S.C. (H.L.) 63, which seemed to sound a contrary note. Lord Haldane said, at p. 64 :

> the law requires that the temporary delusion should be shown to have brought about the disposition impeached.

Mr. Justice Gresson said that, on a reading of the whole of that judgment, he did not understand Lord Haldane to be referring to the onus of proof, but rather to the necessity of showing that the delusion operated in the production of the particular will—that the dispositions of the will were linked to, and resulted from, the delusion. His Honour was confirmed in this view by the fact that the only case cited by the learned Law Lord was *Jenkins* v. *Morris*, (1880) 14 Ch.D. 674, the importance of which, he says ([1920] S.C. (H.L.) 63, 65) :

> lies in the way in which it lays down the general principle that the delusion need not be held fatal, even if not wholly unconnected with the subject-matter.

It was held as a matter of fact by Lord Atkinson, at p. 66, that, even if Sir James Sivewright had been suffering under a delusion of a character calculated to affect his testamentary disposition :

> there is not only an entire absence of evidence to show that it in fact did so act, but . . . the reasonable inference to be drawn from all the facts proved is that it did not do so.

It appears to Mr. Justice Gresson, therefore, and, too, it was the view of the learned author of *Mortimer on Probate*, 2nd Ed. 55 (*y*), that these dicta of Lord Haldane's were not intended as an expression of opinion that, where insane delusions are proved to have existed, the burden of proving that they affected the dispositions of property is on those who attack the will. Williams, J., in the High Court of Australia, in *Bull* v. *Fulton*, (1942) 66 C.L.R. 295, 341, makes the suggestion that, as Lord Watson, in *Hope* v. *Campbell*, [1899] A.C. 1, appeared to have been of the same opinion as Lord Haldane, it may be that, in the case of a trust disposition which is made by deed, the law of Scotland is different from the law of England on this point.

His Honour concluded by saying that he was of the opinion that refinements in regard to the onus of proof are neither helpful nor necessary :

> The burden of proof is, at the outset, on those who propound the will. Though it may shift from time to time to and fro, as evidence tendered leads to inferences which in time are rebutted by other evidence, there is ever present the governing or master principle that the Court has to be satisfied it is the will of a testator who had testamentary capacity to make, not a will in general, or any kind of will, but the particular will in dispute, *a fortiori* when it is shown that he was subject to delusions which may not be wholly unconnected with the dispositions he has made. Whether or not this *onus probandi* has been discharged can be finally determined only when all the evidence has been heard and the last word said.

As their Honours did not agree with the conclusions on the evidence reached by the learned trial Judge, they finally considered the principles which apply when an appellate tribunal is reviewing the decision of a Judge sitting without a jury to decide a question of fact.

Applying the principles enunciated by Lord Thankerton in *Thomas* v. *Thomas*, [1947] A.C. 484; [1947] 1 All E.R. 582, their Honours held that, as they, as an appellate tribunal, were satisfied that the judgment appealed from was wrong, they should reverse it. In the case before them—for the detailed reasons given in their several judgments—they were satisfied that neither the Court below nor the Court of Appeal, on a review of the whole of the evidence, could affirmatively declare itself satisfied of the testator's competency at the time of the execution of the will.

In fine, as Mr. Justice Gresson put it, those attacking the will had established that the finding of testamentary capacity was wrong in law, inasmuch as insufficient weight was given by the learned trial Judge to a considerable body of evidence, lay and medical, negativing any such capacity.

III.

From the several judgments of the learned members of the Court of Appeal in *In re White (deceased)*, *Brown* v. *Free*, there emerges a restatement of certain principles relating to testamentary capacity, and, particularly, those having relation to delusions on a testator's part. These may now be summarized briefly.

The issue of testamentary capacity is one of fact, to be examined in the light of established legal principles; and the question for the Court, where the presence of such capacity is attacked, is whether the person making

the will was of sound and disposing mind and understanding at the time when he made it. Unless the Court, on a review of the whole of the evidence, is able affirmatively to declare itself satisfied of the testator's competence when he executed the will, it must declare against its validity.

The mere existence at the date of the will of a delusion or partial unsoundness of mind not affecting the general faculties and not operating on the mind of the testator in regard to his testamentary dispositions does not render him incapable of disposing his property by will. Thus, if the particular delusion under which the testator laboured could not reasonably be supposed to have affected his disposing power, its presence would not incapacitate him from making a valid will.

Where there is evidence of a delusion affecting the mind of the deceased at the time of his making his will, the onus is on the party propounding the will to show due execution by a testator possessing a sound and disposing mind; and, thus, to establish affirmatively that, at the time when he made the instrument so propounded, he was free from the delusion or its influence, or that it was of such a character that it could not reasonably be supposed to affect the disposition of his property.

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Bankruptcy Law and Practice. *94 Solicitors Journal*, 791.

CHARITIES.

General Charitable Intention. *94 Solicitors Journal*, 789.

CHATTELS TRANSFER.

Chattels Transfer Fees Order, 1951 (Serial No. 1951/17), with effect from January 1, 1951, specifying the fees to be taken under the Chattels Transfer Act, 1924, as follows: Registration of any instrument, 5s.; Renewal of registration of any instrument, 5s.; Registration of transfer of instrument, in respect of each instrument transferred, 5s.; Filing memorandum of satisfaction or of partial satisfaction and entry thereof, in respect of each instrument satisfied or partly satisfied, 5s.; Searching register books, indices, and instruments: For every search against any one person, 1s.; Office copy of or extract from any instrument or affidavit: For every folio of seventy-two words, 4d.; Certifying copy of or extract from any instrument or affidavit not exceeding ten folios of seventy-two words, 2s.; For every folio of seventy-two words after the first ten folios, 1d.

CONVEYANCING.

Degrees of Charitability. *94 Solicitors Journal*, 795.

Testamentary Options. *94 Solicitors Journal*, 833.

COSTS.

Admiralty. *94 Solicitors Journal*, 792.

COUNTIES.

Ridings Representation—Readiustment of Representation in General Election Year—Urban and Farming Portions of County—"As far as possible"—Counties Act, 1920, s. 60. Section 60 of the Counties Act, 1920, calls for an adjustment, as far as possible, of representation triennially when any substantial disproportion manifests itself in the representation of the several ridings, having regard to the rateable value and number of electors in each riding. The words "as far as possible," used in the section, recognize that there will be cases where it is not possible to make any reasonably precise adjustment: this may arise from the difficulty of reconciling the two factors to which the representation is to be proportioned. *Attorney-General, Ex rel. Bradshaw and Another* v. *Peninsula County.* (S.C. Dunedin. January 29, 1951. Hutchison, J.)

CRIMINAL LAW.

Criminology. (Hon. Mr. Justice Barry.) *25 Law Institute Journal*, 22.

CROWN PROCEEDINGS.

Ultra vires, Estoppel, and The Crown. *210 Law Times*, 337.

DAMAGES.

Jury—Breach of Promise of Marriage—Damages awarded by Jury—Misconduct of Jury—Disobeying Trial Judge's Direction not to take into account Question of Costs—Power of Appellate Court to enter Judgment for Reduced Amount—Limits thereof—New Trial—Whether generally or limited to Assessment of Damages. In an action for damages for breach of promise of marriage, the jury, in awarding damages to the plaintiff, said they assessed them at "£1,500 clear of all costs." The trial Judge thereupon having told them that costs were not a matter for the jury, the jury reassessed damages at £1,750. Judgment was entered for £1,750. Upon motion for a new trial, *Held*, 1. That, as the jury had, contrary to the trial Judge's direction, taken into account the question of costs, the verdict could not stand. 2. That, despite the consent of the plaintiff, there was no power in the Full Court to reduce the amount of damages and enter judgment for £1,500. (Principle in *Watt* v. *Watt*, [1905] A.C. 115, applied.) 3. That, as there was ample evidence on which the jury could find for the plaintiff, no question of misdirection, and no reason for supposing that the jury's misconduct in relation to the assessment of damages affected their verdict on the issue of liability, the new trial should be limited to the assessment of damages. *James* v. *Colahan*, [1951] V.L.R. 37 (F.C.).

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Return of Deserting Party to Matrimonial Home—Spouses sharing Same Household—Relationship of Guest and Host—Whether Period of Desertion interrupted. A wife deserted her husband in September, 1946. In 1947, without the intention of re-establishing the matrimonial relationship, she returned to her husband's home and remained there two years. Although, during that time, she and her husband shared the same household, the relationship between them was merely that of guest and host. *Held*, That there had been no interruption of the period of desertion. (Principle in *Hillary* v. *Hillary*, [1941] V.L.R. 298, and *Singleton* v. *Singleton*, [1946] V.L.R. 31, applied.) Consideration of the law applicable with respect to the act of desertion and the termination of the state of desertion. *Jackson* v. *Jackson*, [1951] V.L.R. 24.

Points in Practice. *101 Law Journal*, 88.

EXECUTORS AND ADMINISTRATORS.

Commission—Claim by Executors and Administrators—Quantum—Registrar's Adherence to Scale of Charges prescribed for Public Trustee—Too Narrow View taken—Weight to be given to Realities of Administration of Each Estate—Administration Act, 1908, s. 20. On a petition by executors and trustees of an estate for commission out of the estate, referred to the Registrar for inquiry and report, too narrow a view of the rights of the petitioners is taken if the Registrar rigidly adheres to the scale of charges prescribed for the Public Trustee, without giving full weight to the realities of the petition, such as factors calling for sound judgment and a large sense of responsibility on the part of the trustees exercised to the advantage of the beneficiaries, and actual savings they made to the estate. These entitle them to some consideration in determining the amount of their remuneration. (*In re McLean*, (1911) 31 N.Z.L.R. 139, applied.) *In re Brown (deceased).* (S.C. Wellington. January 26, 1951. Hay, J.)

FAMILY PROTECTION.

Application by Widow—Value of Testator's Estate—Estate including Immoveable Assets outside Jurisdiction—Determination of Such Assets—Evidence taken of Testator's Reasons for excluding Applicant—Onus on Opponent to negative Moral Claim—Matters taken into Consideration for reducing Provision—Administration and Probate (Testator's Family Maintenance) Act, 1937 (No. 4483), ss. 3, 4, 5, 6 (Family Protection Act, 1908, s. 33). A gift of property made by a testator before his death, which would afterwards constitute a notional part of his estate for the purposes of duty, while not part of his "estate" within the meaning of Part V of the Administration and Probate Act, 1928, may, on an application for an order under Part V, nevertheless be taken into account when considering the means possessed by the donees and in apportioning the burden amongst the beneficiaries in accordance with any provision ordered by the Court

under s. 145 (3) of the Act. Although an order under Part V of the Act does not affect immoveables outside the territory of the testator's domicil, the existence of those immoveables as assets may influence the *quantum* of any provision ordered by the Court under Part V. Once an applicant's *prima facie* claim to testator's family maintenance has been established, the onus shifts to the opponent to negative the claim. For the purpose of negation, evidence of the testator's reasons for excluding the applicant is admissible, not to prove the truth of the facts the testator alleges, but as showing the circumstances calling for explanation. If the applicant's moral claim is not fully rebutted, the Court may still be satisfied of enough matters to lead it to reduce the provision it would otherwise have ordered. (*In re Duncan*, [1939] V.L.R. 355, and *Re Ruxton*, [1946] V.L.R. 334, considered.) *In re Paulin*, [1950] V.L.R. 462.

INCOME-TAX.

Points in Practice. *101 Law Journal*, 74.

INDUSTRIAL UNION.

Industrial Association—Affiliation of Industrial Association to Trade Union Congress—Objects of Congress embracing All Workers in All Industries and covering purely Political Aims—Affiliation ultra vires*—Industrial Conciliation and Arbitration Act, 1925, ss. 5, 6, 26 (1).* The functions and powers of an industrial union or of an industrial association created under the Industrial Conciliation and Arbitration Act, 1925, are limited to the industry with which the union or association is concerned. (*Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87, applied.) The plaintiff union sought an injunction against the defendant industrial association to restrain it from continuing its affiliation with the New Zealand Trade Union Congress. Both the plaintiff and the defendant were registered under the Industrial Conciliation and Arbitration Act, 1925. The plaintiff was an industrial union of workers with a membership of over 4,000, and with a number of branches at different freezing-works and abattoirs in the Auckland district. The defendant was an industrial association the members of which were industrial unions of workers in the freezing and related trades in various parts of New Zealand, having a total membership of about 12,000. The defendant association had been a member of the Federation of Labour, but, in October, 1950, it decided to transfer its adherence to the Trade Union Congress, which was an unincorporated society not registered under any statute or rule of law under which unincorporated societies may be registered in New Zealand; and, in particular, it had not been registered under the Industrial Conciliation and Arbitration Act, 1925. The objectives and some of the rules of the Congress are set out in the judgment. *Held*, granting the injunction applied for, 1. That, the purposes of the Trade Union Congress in their scope and range were not only beyond the industry in which both parties were concerned, but were also beyond any of the purposes for which the Industrial Conciliation and Arbitration Act, 1925, authorized the creation of unions and associations of workers; and, consequently, the affiliation of the defendant with the Trade Union Congress was *ultra vires*. 2. That, as the Industrial Conciliation and Arbitration Act, 1925, limits the functions of unions and associations of workers to industrial matters in their own particular industries, the defendant's affiliation to the Trade Union Congress could not be validated by reasonable implication as an extension to other industries such as was involved in the defendant association's affiliation to the Trade Union Congress, and still less could there be an implied extension to political matters which might have no relation whatever to any industry. *Auckland Freezing Works and Abattoir Employees' Industrial Union of Workers* v. *New Zealand Freezing Works and Related Trades Industrial Association of Workers.* (S.C. Christchurch. February 7, 1951. Northcroft, J.)

INFANTS AND CHILDREN.

Access—Mother Patient in Mental Hospital—Application on Her Behalf, with Consent of Public Trustee, for Access to Her Three Children—Application opposed by Her Husband—Jurisdiction of Court to grant Access—Order made subject to Conditions—Infants Act, 1908, s. 6—Guardianship of Infants Act, 1926, ss. 3, 6. A Magistrate has power to make an order to regulate a mother's right of access to her children, notwithstanding that she is a patient in a mental hospital. On an application made in that behalf, the only question for discussion is whether it is in the interests of the children that they should visit their mother. In the present case, an order was made on an application, with the consent of the Public Trustee, made on behalf of a mother who was a patient in a mental hospital, giving her the right of access to her children subject to the conditions set out in that order. *B.* v. *B.* (Auckland. November 20, 1950. Luxford, S.M.)

INSURANCE.

Fire—Assignment—Covenant to insure in Mortgagee's Name—Fire destroying Subject-matter of Mortgage before Policy assigned to Mortgagee—Subsequent Letter by Insured to Insurer assigning Fire Policy to Mortgagee—Letter constituting Valid Legal Assignment of Rights then Possessed by Insured—Assignment also Good in Equity—Proceeds of Policy passing to Mortgagee—Property Law Act, 1908, s. 46. In July, 1947, one P. bought a grocery business for £1,900, the purchase being financed by a loan of £500 from a company and a loan of £1,400 from the plaintiff. By deed dated July 21, 1947, executed by P. by way of security for the plaintiff's loan, it was recited that P. was the owner of the grocery business, and of the stock-in-trade, plant, and some specifically described chattels, and that certain of the plant and chattels were subject to an instrument by way of security in favour of the company securing its loan. The business, the goodwill, the stock-in-trade, and all the plant and chattels were assigned to the plaintiff by way of mortgage, and P. covenanted, *inter alia*, as follows: "To insure in the name of the mortgagee (subject to the rights of Levin and Company Limited under its aforesaid security) and keep insured to the full insurable value thereof all the stock-in-trade and the aforesaid plant and chattels." P. insured the stock-in-trade in his own name under a separate policy. On March 6, 1949, the premises, plant, and stock-in-trade were destroyed by fire. The amount ultimately paid in respect of the loss was £638 7s. 1d. When the fire occurred, the plaintiff was absent from New Zealand, but P. notified him by cable of the fire and of the fact that the insurance policy was not in the plaintiff's name. On April 19, 1949, the following letter to the insurance company was signed by P. and despatched to and received by the company on or about its date: "Dear Sir, With reference to the fire policy. I wish to inform you that under the agreement made between myself and Mr. Philip Schneideman on July 21, 1947, a clause therein contained that I am obliged to assign the insurance cover in the name of Philip Schneideman as mortgagee. Owing to an oversight of mine in respect of same I desire to rectify the matter. I hereby assign the fire insurance policy to the said Philip Schneideman as per the agreement. The clause referred to in the agreement reads as follows: 'To insure in the name of the mortgagee (subject to the rights of Levin and Company Limited under its aforesaid security) and keep insured to the full insurable value thereof all the stock-in-trade and the aforesaid plant and chattels.' I would be glad if you would kindly arrange this matter accordingly, and make the insurance payable to Philip Schneideman. I am, Yours faithfully, Jack Phillips." About this time, there were two meetings of P.'s creditors. At the first one, on May 6, 1949, a resolution was passed approving the assignment of P.'s estate to the defendant as trustee for the benefit of the creditors. At the second meeting of the creditors, on June 13, 1949, P. agreed to assign his assets to the defendant as trustee for his creditors, and the following resolution was passed: "Resolved that by agreement the insurance monies be paid to Mr. Barnett and that as soon as practicable and by consent of all parties, the monies be paid into the Magistrates' Court and interpleader proceedings be instituted by Mr. Barnett to ascertain their ownership." Later, P. and the defendant executed a deed of assignment dated July 4, 1949, and the plaintiff and other creditors subscribed their names in the schedule; but the deed contained no reference to the insurance moneys or to the plaintiff's claim thereto, but preserved the rights of creditors to any securities held by them and their right to sue any person other than the debtor who might be liable for all or any part of their respective claims. The claim in respect of the fire under the policy was not adjusted until August 23, 1949, and the amount was paid by the insurance company to the defendant. On originating summons to determine who was entitled to the proceeds of the fire insurance policy over the stock-in-trade, *Held*, 1. That, though the letter, by its terms, was an assignment of the policy of insurance, it operated as a valid legal assignment of such rights as the insured still possessed, including the right to receive the proceeds; and that right passed to the plaintiff by virtue of the assignment. *William Brandt's Sons and Co.* v. *Dunlop Rubber Co., Ltd.*, [1905] A.C. 454, followed.) 2. That it was immaterial whether the assignment was one to which s. 46 of the Property Law Act, 1908, applied or whether it was an equitable assignment, as it was a legal assignment operating under that section and it was good in equity. (*William Brandt's Sons and Co.* v. *Dunlop Rubber Co., Ltd.*, [1905] A.C. 454, followed.) (*In re Connolly*, [1931] G.L.R. 551, and *G. and T. Earle, Ltd.* v. *Hemsworth Rural District Council*, (1928) 44 T.L.R. 758, applied.) (*Williams* v. *Atlantic*

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LEGAL ANNOUNCEMENTS.

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Assurance Co., Ltd., [1933] 1 K.B. 81, and *Clegg* v. *Bromley*, [1912] 3 K.B. 474, distinguished.) 3. That, in the absence of any evidence of provision in the policy making consent necessary to such an assignment (a provision which would be unusual and improper), consent to an assignment of the proceeds was not necessary. (*Bank of Toronto* v. *St. Lawrence Fire Insurance Co.*, [1903] A.C. 59, applied.) 4. That, accordingly, the plaintiff was entitled to the proceeds of the insurance policy held by the defendant, such proceeds being applicable in or towards the satisfaction of the assignor's liabilities to the plaintiff under the deed of July 21, 1947. *Schneideman* v. *Barnett.* (S.C. Wellington. November 30, 1950. F. B. Adams, J.)

JUDICIAL CHANGES.

Mr. Charles Richmond Fell, of Nelson, has been appointed a Temporary Justice of the Supreme Court until November 30, 1951. On February 23, he took the prescribed oaths of office, and entered upon his duties accordingly.

LANDLORD AND TENANT.

Option to Determine if required for Purpose. *94 Solicitors Journal*, 796.

Quiet Enjoyment and Eviction. *94 Solicitors Journal*, 834.

PUBLIC SAFETY CONSERVATION.

Proclamation of Emergency, declaring that a state of emergency exists throughout New Zealand (*1951 New Zealand Gazette*, 251).

Waterfront Industry Emergency Regulations, 1946, Amendment No. 9 (Serial No. 1951/20), empowering the Minister to suspend in whole or in part all or any of the provisions of the principal Regulations or of any order, direction, or decision made thereunder.

Suspension Order, 1951 (Serial No. 1951/21). Suspends Regs. 10, 10A, 10B, 10C, 10D, 13, and 21 of the Waterfront Industry Emergency Regulations, 1946, except that part of Reg. 10 (2) set out in the First Schedule to the Order.

Waterfront Strike Emergency Regulations, 1951 (Serial No. 1951/24), made pursuant to the Public Safety Conservation Act, 1932, provide for declaration by the Minister of strikes to which the Regulations apply by specifying offences under these Regulations, and by the appointment of a receiver, suspension of orders and awards, the temporary employment of members of the Armed Forces, prohibiting counselling of a strike, &c., threats, picketing, the unlawful display of posters, &c., processions and meetings, and giving extended power of entry to the Police Force.

Waterfront Strike Notice, 1951 (Serial No. 1951/25), declaring as a strike the strike existing in the waterfront industry by the act of members of the Union in discontinuing their employment by refusing or failing to work normal hours, including overtime, as required in accordance with the conditions of their employment, and requiring the Union to end the strike not later than 8 a.m. on Monday, February 26, 1951.

TRANSPORT.

Offences—Failure to report Accident—Duty to report arising on Happening of Condition that Person has been injured—Mens rea *—Knowledge of Accident Essential Ingredient of Offence—Onus of Proof of Such Knowledge on Prosecution—"Accident"—Transport Act, 1949, s. 47* (2). The meaning of the word "injury" as used in s. 47 (2) of the Transport Act, 1949, is analogous to the meaning of "bodily harm"—namely, "any hurt or injury which interferes with the health or comfort of any person and which is not transient or trifling." (*R.* v. *Donovan*, [1934] 2 K.B. 498, applied.) Section 47 (2), which is made applicable to those accidents which are the subject of subs. 1, imposes further duties upon the driver of the motor-vehicle involved. One of these duties is to report the accident in person if the accident involved injury to any person. If the driver ascertains that he has not injured any person (and the ascertainment is his own judgment, even if it be erroneous), then the duty to report the accident does not arise. This duty arises on the happening of the condition that a person has been injured, and it is a positive duty—namely, a duty to do something on the happening of that condition. Therefore, knowledge of such injury is an essential ingredient of the offence under subs. 2; and the burden of proof rests upon the prosectuion. Consequently, under s. 47 (2) of the Transport Act, 1947, the failure of the driver of a motor-car to report an accident which in fact involves personal injury *prima facie* imports an offence; but the offender can absolve himself by proving honest ignorance: this brings the offence within the third class specified in *R.* v. *Ewart*, (1905) 25 N.Z.L.R. 709. (*Harding* v. *Price*, [1948] 1 All E.R. 283, followed.) *Police* v. *North.* (Otorohanga. December 20, 1950. Paterson, S.M.)

Removal of Motor-driver's Disqualification—Exercise of Jurisdiction—Considerations leading to Removal or Conditional Removal —Transport Act, 1949, s. 31 (7)*—Transport Amendment Act, 1950, s. 14.* The purpose of s. 31 (7) of the Transport Act, 1949, is to enable a person under disqualification by an order of the Court from procuring a motor-driver's licence, to apply, at any time after the expiration of six months from the date of the order of disqualification, to a Magistrate exercising jurisdiction in the Court in which the conviction was recorded, to obtain an order removing the disqualification as from a specified date. The most important consideration specified by the subsection is that relating to "the nature of the offence," which means the degree of intoxication, and the manner in which the applicant was driving or behaving at the time when the offence was committed. If the nature of the offence is such that it *per se* justifies (apart from the statutory requirement) a disqualification for a period of a year or upwards, a Magistrate would not be justified in removing the disqualification. Where a continuance of the disqualification is causing serious and undue hardship, a conditional removal that would enable the applicant to drive a motor-vehicle for the necessary limited purposes may be justified provided that the applicant is of good character and that his conduct subsequent to the order has been good. Where the nature of the offence does not *per se* justify a disqualification for a period of twelve months, then the applicant is entitled to a removal of the disqualification provided that he is of good character and that his conduct subsequent to the order has been good. *In re K.* (Auckland. December 15, 1950. Luxford, S.M.)

Right-hand Rule—Mens rea *Ingredient of Offence in Breach of Rule—Traffic Regulations, 1936 (Serial Nos. 1936/86, 1943/199), Reg. 14 (6)* (a). The offence created by Reg. 14 (6) (*a*) of the Traffic Regulations, 1936, consists in failing to perform a duty which arises only when the particular circumstances as provided in the Regulation are present at the material time. There is no absolute prohibition of the act of driving across the intersection, but there is a duty not to do so in certain circumstances: as such, *mens rea* is a constituent of the offence. (*Harding* v. *Price*, [1948] 1 All E.R. 283, and *R.* v. *Ewart*, (1905) 25 N.Z.L.R. 709, followed.) (*Ashton* v. *Whittaker*, [1938] N.Z.L.R. 508, *Cunningham* v. *Reilly*, (1947) 5 M.C.D. 141, and *Frost* v. *Harper*, (1950) 6 M.C.D. 356, applied.) *Police* v. *Shannon.* (Auckland. October 19, 1950. H. Jenner Wily, S.M.)

TRUSTS.

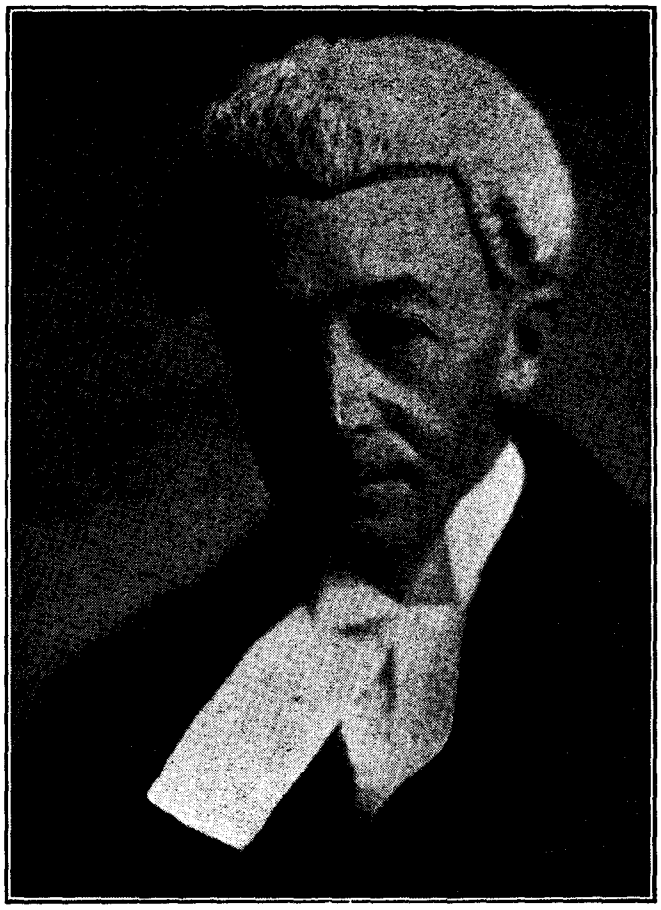
Trustee—Will—Trusts in Will of Shares in Capital of Company —Trustee of Will also Director of Company—Sale of Company's Main Asset by Trustee for Commission—Trustee commissioned to sell Asset before Testator's Death—Sale completed subsequent to Testator's Death—Whether Trustee liable to account for Commission. A trustee holding (as such) shares in a company is not *ipso facto* accountable for remuneration received by him from the company, independently of any use by him of the trust holding, whether by voting or by refraining from voting. H. was one of the executors and trustees of T.'s estate. T. was director of the S. Co., and held slightly less than one twenty-first of the shares in the S. Co. T. was also a member of a partnership which held approximately two-sevenths of the shares in the S. Co., and T. was entitled to a one-third interest in these shares. During T.'s lifetime, he contracted with H., for and on behalf of the S. Co., to pay H. a fee, the amount of which was not fixed, in the event of the completion of a sale of the company's main asset to a purchaser introduced by H. The K. Co. was introduced by H. during T.'s lifetime, but no sale had resulted at the time of T.'s death. Upon T.'s death, H. was appointed a director of the S. Co. Negotiations thereafter resulted in a sale of the S. Co.'s assets to the K. Co., and at an extraordinary general meeting it was resolved to pay H. a fee of £3,465 for his special services in connection with the sale. *Held*, 1. That, as the contract in respect of which H. received his commission was entered into before the testator's death, at a time when no fiduciary relationship on the part of H. existed, H. was not accountable for the fee to T.'s estate. 2. That H. was not liable to account on the principle expressed in *In re Gee*, [1948] Ch. 284, as the fee was not received by him for his services as a director of the company. (*In re Sharp*, [1945] V.L.R. 31, explained.) *In re Taylor, Howitt* v. *Union Trustee Co. of Australia, Ltd.*, [1950] V.L.R. 476.

THE LATE MR. JUSTICE CALLAN.

The Bench and Bar's Great Loss.

Practitioners throughout New Zealand heard of the death of Mr. Justice Callan, on February 12, with a sense of personal loss. His Honour, who was sixty-nine years of age, had been a Judge of the Supreme Court since 1935. During the whole of his judicial life, he had been a resident Judge at Auckland. As the various tributes to his worth and work which are reproduced here show, all admired him for his many qualities of mind and heart, and felt that his loss was not merely the profession's, but also that of the people of the Dominion generally.

When His Honour died, the Criminal Sessions in Auckland, Hamilton, Napier, Palmerston North, Wanganui, Wellington, and Christchurch were in progress. On the next morning, a tribute to the memory of His Honour was paid by each presiding Judge, and the sorrow and sympathy of the Bar were feelingly expressed on each occasion. Space, however, does not permit any detailed account of these gatherings. In each case, the Court adjourned for only a short period, because, as Mr. Justice Finaly said on the morning after His Honour's death, though the Court was meeting under the shadow of a great loss, the demand of public business and the interests of accused persons "should not be sacrificed to our grief."



S. P. Andew, Ltd., photo.

The Late Mr. Justice Callan.

The Funeral.

The funeral of the late Mr. Justice Callan took place on February 14. Requiem Mass was celebrated at St. Patrick's Cathedral by the Catholic Bishop of Auckland, the Most Rev. Dr. Liston, who was a pupil with the late Judge at the Christian Brothers' School in Dunedin. Present in the Cathedral were the Rt. Hon. the Chief Justice (Sir Humphrey O'Leary), Mr. Justice Fair, Mr. Justice Finlay, and Mr. Justice Stanton; the Mayor of Auckland (Sir John Allum), and the Town Clerk (Mr. T. W. M. Ashby); the Vice-President of the New Zealand Law Society (Sir Alexander Johnstone, K.C.), the President of the Auckland District Law Society (Mr. H. R. A. Vialoux) and the members of its Council; the Registrar of the Supreme Court (Mr. C. O. Pratt) and the Superintendent of Police at Auckland (Mr. J. Walsh). There was also a very large attendance of members of the profession.

The principal mourners were Mrs. Callan, Mr. and Mrs. J. B. Callan, jun., Mr. A. N. Mowat (brother-in-law), of Roxburgh, Mr. G. McG. Mowat (nephew), of Wairoa, Mr. R. McG. Mowat (nephew), of Auckland, and Mr. R. A. Cornish (cousin), of Auckland. Mrs. E. R. Goulter, of Blenheim, His Honour's sister, was unable to be present.

At the end of Mass, Bishop Liston addressed the congregation. He said:

"Some words should be spoken for this day of sadness, but they must be simple, as becomes the high simplicity in belief and life of him who loved God with the child's sincerity and trust that win entrance into the Kingdom.

"Let me be spokesman, brethren, for you, in offering to those dearest to him our sympathy in their grief and our prayer for God's comforting of their hearts. How tender the ties between them! With them, he knew happiness that soaks the heart as hills are soaked by slow in-soaking snow. The presence of the Mayor tells us that men of our city—as, indeed, of all the land—are united with you, members of the Judiciary and the legal profession, in your sense of loss and in your affectionate admiration for the man who walked in honour amongst you.

"Esteem for true men is part of our love of life, which in turn is a longing for the perfect life. They show us how fine a thing it is to be sincere and loyal, and make us sure that, in a world where evil makes much noise, there is goodness and justice and hope. They confirm our faith in the sacredness and worth of our years on earth, and help us to understand that within and beneath and beyond all we see is God, Creator and Father, who knows and loves us, His children. Thanks to God, who makes us, such men are found. Their power comes from within, where great thoughts, high aims, serious purposes, and love are born and nourished. They are true to God and themselves, pure in mind and heart, modest in bearing, ready for the command of duty, deeply conscientious, happy in the good they do, glad of leisure to be with friends and the dearly loved of home.

"Thoughts of this kind come quickly to us as we look at the life of the Honourable Mr. Justice Callan. He was more than the learning and skill and wisdom that set him on an eminence in his profession and office: he was a true man, loyal to God, ready to accept God's ordering for him, be it for further years of life, or much

suffering, or death ; lowly in his ways, kindly, urbane, just ; the service of his fellow-men in his high office being a thing of conscience. Such were his ideals, and, in the light of them, Mr. Justice Callan believed, hoped, loved, worked, suffered, and died, and for all that we hold his name and memory in reverence and benediction. To some of us—to myself, for one, in our friendship from boyhood to death—was given the privilege of looking within the soul and seeing there prayer, serious, strong, joyous, reverent worship of God, deep study of the truths revealed by Our Lord Jesus Christ for our salvation, the privilege of hearing the heart speak with full sincerity during these last weeks. ' Whatever God wills for me, I accept as best, for He is infinitely wise and infinitely tender.'

" The last books this man of God read were his New Testament and a recent edition of some writings of St. Thomas More, one time Chancellor of England, the noblest, surely, of men. The Saint in his sense of duty, his loyalties to God, his prudence, his courage, his love of wife and children and friends and country, his ' the King's good servant but God's servant first '—the Saint was his favourite study and pattern for life, and to many of us it seemed that his, too, was the saintly way.

" Brethren, we have a duty to the dead of prayer to aid his soul at the Throne of the Most High Judge. We have a duty to say to ourselves : ' The time is short, year follows year, this world is passing away, eternity is long. Here is our scene of probation, no more than that, but no less ; the sould of each one of us is a candidate for a life without end. Let us, in the grace of God, turn this world to good account and make it the path of peace and of life everlasting.' "

After Mass, a Union Jack was draped over the casket. The pall-bearers at the church and at the cemetery were Mr. J. S. Luxford, S.M. ; the President of the Auckland Law Society (Mr. H. R. A. Vialoux) ; the Vice President (Mr. C. J. Garland) ; the Registrar of the Supreme Court at Auckland (Mr. C. O. Pratt) ; Mr. R. A. Cornish ; and Mr. R. P. Towle.

The funeral procession moved off through a guard of honour formed by the boys from St. Peter's Christian Brothers' School at Auckland, as His Honour's pre-University education had been received from the Christian Brothers in Dunedin. His Honour was interred at the Waikaraka Cemetery, at Onehunga, beside the waters of the Manukau Harbour. Bishop Liston officiated at the last rites at the graveside.

Tributes from Bench and Bar.

On the following morning, February 15, the Supreme Court at Auckland was the scene of a gathering of the members of the profession practising in Auckland and its vicinity. It was one of the largest gatherings of practitioners ever seen in Auckland. There was also a large attendance of the public.

The Chief Justice presided, and with him on the Bench were Mr. Justice Finlay and Mr. Justice Stanton.

Among those present were Mr. J. B. Callan, a son of the late Judge, the President of the New Zealand Law Society (Mr. W. H. Cunningham), the Solicitor-General, (Mr. H. E. Evans, K.C.), Sir Alexander Johnstone, K.C., and Mr. A. K. North, K.C.

There were present the Auckland Magistrates, Messrs. J. H. Luxford, H. Jenner Wily, F. McCarthy, M. C. Astley, W. S. Spence, and J. W. Kealy. They also attended at the Cathedral on the previous day.

The Chief Justice.

Addressing the President of the New Zealand Law Society, His Honour the Chief Justice said :

" This is a solemn and sad occasion on which we are gathered to express our grief at the death, and to pay a tribute to the memory, of Mr. Justice Callan, a Judge singularly beloved by Bench and Bar, and, indeed, by all people generally.

" Already tributes to him have been paid in the public Press and by representative public men, who have voiced the feelings of all in their admiration for the Judge, but it is particularly fitting that we of the Bench and you, the Bar, should pay a public and united tribute to him in the Court where he presided so happily and efficiently during the greater part of his judicial term ; that we should here mourn our common loss ; and that in this Court we should remember, too, those who have been bereaved by his death, and speak words of comfort to them.

" We of the Bench have to deplore the loss of a very dear comrade, a very generous, helpful, co-operative colleague ; as such, he will ever be remembered by us, and in this I speak for retired Judges, all of whom desire to be associated with us to-day.

" You of the Bar and we who, when we were at the Bar, contended with him, found him an honourable and capable opponent, and at the same time a great and true friend.

" And you who at the Bar practised before him found him a Judge who was kind and considerate, who gave to the advocate, however young he might be, patient attention and kind consideration, with the result that he was not only admired and respected, but was beloved, by you all.

" When he was elevated to the Bench in 1935, there were some who thought that it was a tardy, perhaps too tardy, recognition of his fitness and qualification for judicial work. How quickly he justified his appointment, and how well he has functioned after the best Dunedin traditions—Dunedin, the training-ground and source of so many of our Judges.

" His masterly presiding over and control of Supreme Court proceedings, his judgments in apt and lucid language, many of them the leading judgments in the Court of Appeal, his care in dealing with, and directing the course of, what is thought to be the lesser work of a Judge—namely, his Chamber work—work which the general public know little of, all these attributes and work made him what he was, a great Judge.

" The words sometimes inaptly used apply to him aptly and with truth : ' We shall not look upon his like again.' He possessed every quality and accomplishment that a Judge needed. He had a splendid intellect, keen and profound. He was a good lawyer. I think the word consummate might not inaptly be used, and he was thoroughly imbued with legal principles. He was a man of wide experience, not merely in the law, but also in those things which make a man of the world fitted to deal with the affairs of the world.

" He had but one desire when he took his seat on the Bench, that justice be done according to right, and he carried out this desire in administering justice firmly

and impartially. And, with all this, he was a modest man, a charming man, and a humane man; he looked on life courageously and cheerfully, with kindness and deep human sympathy for all.

"His passing has been a great loss, not only to you and to us, but also to the public, who have sustained an irreparable loss in his death. We had all hoped that after his operation, grave as it was, he would rally and remain with us; but this was not to be.

"Amongst one of my very cherished memories in years to come will be the recollection that I was able to visit him last weekend. He was obviously very ill and with little strength, to speak was an effort, to move was heavy labour; nevertheless, he was as courageous, as charming, and as humorous as ever.

"I mention with pride and affection these memories I will have of my last visits to him. He may have felt that his end was approaching, but, whether he did or not, there was a serenity, a tranquillity, a spiritualness about him, due, no doubt, to his strong religious fervour, which would call forth the admiration of any Christian, and which, in me, created the hope that I may approach death with the same calm confident disposition as my beloved Brother did. It was an inspiration.

"I will not recount in detail his public services, as a soldier, a Senator of the University, lecturer in the Otago Law School, member of his own District Society and of the New Zealand Law Society. The statutory tribunals which he presided over showed that he was ever ready to undertake and discharge any task of public service.

"You in Auckland will miss him. You will long mourn his loss, for you have lost a genial and happy Judge; you have all lost a friend. We outside Auckland will miss his visits to us and his lightening of our task with his generous help, his sound advice, his unerring wisdom, and his fund of humour and anecdote. But is our loss anything compared with the loss to Mrs. Callan, to his son Jock and his wife, and to his grandchildren, of whom the Judge was so fond and so proud? His home life, his domestic life, was admirable, and we must not forget in this tragic hour those to whom that home life, that domestic circle, will never be the same. Our heartfelt sympathy goes out to them. We trust that the knowledge that we feel the loss second only to them will in a measure, though an inadequate one, assuage their grief and be a helpful consolation to them.

"And so with sorrow and affection we pay a tribute to John Bartholomew Callan's memory, and lament his loss."

Mr. Justice Finlay.

Mr. Justice Finlay, who became the senior Judge at Auckland on the death of Mr. Justice Callan, then spoke. He said:

"The Chief Justice has spoken for the Bench generally in a sense and in a way that commands the concurrence of us all; and my confrère and I would have been glad to have our concurrence conveyed by silence.

"But our late Brother was so close to us for so long, and our association with him was so intimate, that we feel a particular obligation to express in words our affection and respect. To that end, we crave your sympathetic indulgence.

"In an association as intimate as ours, three aspects of our Brother presented themselves predominantly to us—the natural man, the close companion, and the Judge.

"Of the natural man, no words of ours are necessary. The qualities that were his are widely known. He was gentle, kindly, and considerate; and, in his associations, those qualities were irradiated by a humour that was sometimes whinsical, but a humour that was always sparkling, and sometimes flashing, a humour that cut through the superficial and the false and made the truth apparent. He was courageous and of independent thought.

"Now that he has fallen, as upon some plain of Philippi, we may say with truth of him:

> 'His life was gentle; and the elements
> So mix'd in him that Nature might stand up
> And say to all the world, "This was a man."'

"Such a man could not but be a good companion.

"In the intensity of the stress and strain of judicial work, he could not take our burdens, but, so far as opportunity was afforded him, he, as our senior, constantly endeavoured to see that the overburdened were not further burdened, and what relief was possible was afforded, even at the highest cost to himself. No Judge could wish a better companion.

"But it was as an exemplar of what a Judge should be that his light shone brightest. Great is the strength of the soul true to its highest self. And our Brother was true to the highest that was in him, and the highest in him was high indeed. He was a faithful son of an ancient Faith, and the high moral principles it inculcated conditioned his thinking and governed his every action. It was as though, in respect of every act of his, he asked himself: 'Will what I am about to do be acceptable to the God I worship, and to Whom I must render an account?' Could any poor human but God-made, God-inspired, man aim higher?

"Such being, in general, the spirit which inspired his life, he brought to his judicial work a knowledge of legal principle which was founded upon a profound understanding of the spirit of the Law. He was no docile follower of the opinions of other men, however highly placed. And to that knowledge there was allied in him a knowledge of men and affairs and of the springs of human action. They are the essential qualities of a great Judge, and, when joined, as they were in him, to a power of expression that was at once forceful and clear, serving a mind inspired by a passion for justice, the elements of a great Judge are complete. He was a great Judge. If the Tree of Knowledge were but the Tree of Life, he would be with us yet.

"If, perchance, I overlook qualities which should be set to his detriment, and I know of none, then I plead in mitigation, in the poet's words: 'Grief remembers me of all his gracious parts.'

"The hand we knew can be clasped no more, the voice we knew has gone down into the tongueless silence of the dust; but my confrère and I rejoice that

> 'We have a voice with which to pay the debt
> Of boundless love and reverence and regret.'

Words can avail no more."

The Solicitor-General.

The Solicitor-General, Mr. H. E. Evans, K.C., addressed their Honours as follows:

"I have been asked by the Attorney-General, who regrets that he is prevented by indispositions from

travelling to Auckland, to say a few words by way of tribute to the life, the work, and the character of the great and beloved Judge whose passing we mourn to-day. The feeling with which I approach the task is that words of mine must be inadequate to express our admiration of his gifts, the inspiration of his example, and the affection which his human qualities attracted from all who knew him.

" His Honour's service to his country and his fellow-men was unsparingly given in many and varied ways. It began in Otago University, where he took an active and prominent part in the student activities, and later became Dean of the Faculty of Law. He was a member of the Council of Legal Education, and a Fellow of the University of New Zealand. Forty-four years ago, he commenced the practice of the law. He was prominent in the Territorial Forces, served with distinction in the New Zealand Rifle Brigade in the war of 1914-1918, and thereafter gave of his energies to the cause of the returned soldier. In 1934, the distinction which he had achieved in the legal profession was recognized by his appointment as one of His Majesty's Counsel, and he came to Wellington to practise. It was only a year afterward that he was chosen to fill the high office in which, for nearly sixteen years past, he has added honour and distinction to it and to himself.

" Of his great learning in the law, of his industry, of his command of the resources of language, of his lucidity of expression, and of his sound and balanced judgment, the volumes of the Law Reports afford abiding proof. But there is one group of qualities of his which, in the nature of things, they cannot express, which to us who knew him will ever be an endearing memory, and of which the record of the words spoken here to-day cannot, for those who follow us, be more than a dim reflection. His kindness, his friendliness, and his delightful sense of humour were the supreme human qualities which mingled attractiveness with every other gift, and made him beloved of all.

" There is yet one other quality—one for the exercise of which the occasion does not so frequently arise, and the existence of which may often pass unknown : it is that which is displayed on the field of battle or in the advocacy of an unpopular cause. That His Honour possessed that quality in full measure had its latest proof when the Chief Justice told us at Wellington on Tuesday last of the courage and cheerfulness with which he bore the sufferings of his last illness and, fortified by a strong religious faith, faced the prospect of death.

" His widow and son and grandchildren can be assured of our respectful sympathy, because, in the full sense of that word, we share their sorrow. But we also share with them the inspiration of a life which has done honour to the name they bear, honour to his profession and his high office, honour to his country, and honour to himself."

The New Zealand Law Society.

Next came the address of the President of the New Zealand Law Society, Mr. W. H. Cunningham, who said :

" I am privileged as President of the New Zealand Law Society to be afforded this opportunity of joining in the tribute being paid this morning to the memory of a loved and respected Judge who has so suddenly and unexpectedly been taken from us. His early life and education, and his career both at the Bar and on the Bench, have already been mentioned in some detail, and I shall not attempt to repeat what has already been so ably stated.

" First, I would like to refer briefly to the short period in which the late Mr. Justice Callan practised as a King's Counsel in Wellington. During that period, short as it was, the members of the profession in Wellington got to know him and to value his friendship, and he and his wife made many friends. He came to Wellington when he took silk, and the Dominion-wide reputation at the Bar he had built for himself whilst practising in Dunedin preceded him. During the short time he practised in Wellington, he was a busy man. Then, in 1935, he was elevated to the Bench, and went to live in Auckland as one of the Judges resident there ; and, while we rejoiced at his elevation, we regretted his unavoidable departure.

" When he took his seat on the Bench, it was expected that, with his learning, his knowledge of the law, and his sound judgment, which had made him so eminent at the Bar, he would achieve greatness as a Judge. That expectation was amply fulfilled. He died one of the greatest Judges of our time.

" As a Judge, he was kindly and courteous to every counsel who appeared before him. He tactfully assisted any young counsel suffering from nervousness or inexperience to produce whatever merit might be in his case.

" While the members of the profession throughout New Zealand respected and admired Mr. Justice Callan, off the Bench we loved sincerely J. B. Callan the man, for his great human qualities. He had a thorough knowledge and understanding of human nature, which not only assisted him to preside so efficiently in a Criminal Court but also enabled him to enjoy mixing with his fellow-men, and particularly with members of the profession. At Law Society social functions at which he happened to be present, he soon had a gathering about him.

" He possessed an irrepressible sense of humour, which did much to lighten the dull atmosphere of Court, and, outside the Court, to entertain and amuse his friends. In the Court of Appeal, this sense of humour was particularly dangerous to the unwary advocate, whom, metaphorically speaking, he would coax higher and higher up the tree of an unsound argument, and then, with a twinkle in his eye and with a single deft blow, he would fell it. I do feel that he whom we mourn on this solemn occasion to-day would like us even now to remember his abiding sense of humour. It was so essentially a part of him.

" Before his elevation to the Bench, Mr. Justice Callan served his profession well, as a member of the Council of the Law Society for the District of Otago, of which he was at one time President, for many years as a member of the Council of the New Zealand Law Society, and also as a member of the Council of Legal Education. The profession is grateful for this valuable service so freely rendered.

" His Honour went to the first World War as an officer in the New Zealand Rifle Brigade, and served with it for two years with distinction, reaching the rank of Captain. In the proceedings of courts martial, he found ample outlet for his legal qualifications, both as prisoner's friend and as a member of the Court. There was nothing that he enjoyed better after his return than chatting over happenings in France while serving with

his unit, and invariably he delighted to scoff gently at J. B. Callan in the role of a soldier.

" He took a keen interest in ex-servicemen after the war, and gave freely of his time to assist the Returned Servicemen's Association in Dunedin, in which he held office for a time as Vice-President.

" In conclusion may I say how difficult it is on an occasion such as this to express either adequately or satisfactorily the love that all of us had for the late Mr. Justice Callan. We can only say to his widow and his son how great is our sympathy for them, both in the loss of a loving and devoted husband and in the loss of a father, and how deep is our own sense of grief at the passing of a beloved Judge."

THE AUCKLAND LAW SOCIETY.

The President of the Auckland District Law Society (Mr. H. R. A. Vialoux) was the last speaker. He said that the members of the profession in the Auckland District, and with them the members of the Taranaki and Hamilton District Law Societies, who asked to be included, were grateful to the Court for affording them the opportunity of respectfully associating themselves with the Bench on this sorrowful occasion to venerate the name of John Bartholomew Callan, Judge of the Supreme Court at Auckland, whose untimely death they now deplored, and to offer to his memory the last sad tribute of their deep respect and whole-hearted affection.

Mr. Vialoux continued :

" We assemble with heavy hearts, having scarcely recovered from the suddenness of the shock of His Honour's death. We speak labouring under great strain and with intense emotion, for we had grown to love him to the same extent as we respected his many admirable qualities, not the least of which were the profundity of his wisdom, the soundness of his judgment, and the impartial administration of justice in his Court.

" The late Judge was a benign and gracious man, as was exemplified by the courteous and tactful manner in which he set at ease the young practitioners who appeared before him from time to time. They and we, the older brethren, have lost a dear friend, beloved by all.

" Deeply religious, and actuated always by the highest motives, this devout Christian gentleman strove consistently to live the Faith that he professed.

" At a comparatively early age he proved himself a clear and concise thinker and a keen debater by winning, with Mr. L. T. Burnard, the Joynt Scroll for inter-University debate. From that time on, he displayed such ability in the practice of his profession as to arrest the attention of the Judges, of the profession, and of the public alike.

" To his work, whether as counsel or as Judge, he brought, not only those qualities with which nature had so richly endowed him, but also a wealth of knowledge of human relationships resulting from his wide experience of men and their affairs.

" In addition to his many and varied philanthropic activities, he was for some time lecturer on the Law of Torts, and Dean of the Faculty of Law at Otago University, member, and subsequently President, of the Law Society for the District of Otago, for many years member of the Council of the New Zealand Law Society, and a foundation member of the Council of Legal Education. For all these his services, we, in company with the profession throughout the Dominion, will be eternally grateful.

" Now he is gone, and the recollection of those shrewd, keen, twinkling eyes, which were wont to give expression to the analytical mind which lay behind them, may fade with this generation, but not so the records of his ability and attributes, for they are set forth in the law reports, models both of advocacy and judgment for those who would seek to follow in his footsteps.

" We join in extending our sincere and heartfelt sympathy to Mrs. Callan and her son, and express the hope that, despite the shadow that darkens their path, they may find some consolation in the assurance that their many friends are with them in spirit at this time, and in the certain knowledge that His Honour, having spent a very full and useful life, has now been called to the final Bar, there to receive that reward we believe his life of service so richly merits."

The Court then adjourned.

NEWSPAPER TRIBUTES.

The following is the text of leading articles in the Auckland daily Press on the day following His Honour's death.

THE NEW ZEALAND HERALD.

It is not only the Supreme Court Bench and his profession but the whole country which are the poorer for the passing of Mr. Justice Callan. He was a great Judge. This is no mean praise as one surveys the long line of distinguished men, from the days of giants like Arney, Richmond, Chapman, Williams, and Salmond, who have made our judiciary notable in the Empire. John Bartholomew Callan had many of the qualities of genius. He joined to an incisive and commanding intellect a verbal felicity and a wit which entitled him to distinction in any company. He belonged to that rare band capable of delivering oral judgments in perfect English. He was a patient Judge and a kindly one. No young counsel who was conscientious and painstaking had any apprehension in appearing before His Honour. Nor was there senior counsel, or, for that matter, brother Judge, who was not advantaged by the profound knowledge of the law, the acquaintance with men and affairs, and the flashing humour of one of the most brilliant of men. Even of greater importance, Mr. Justice Callan inspired the most complete confidence and respect in all the multifarious people who passed before him in his Court. Behind all his wit and humour was a personality devoted to rectitude and profoundly religious. The Judge was indefatigable. He never spared himself in his judicial labours, and may be truly said to have died in harness, devoted to the never-ceasing work of his high office. Though he belonged to the whole Dominion, yet Mr. Justice Callan, who was nurtured in Dunedin, had become, through his lengthy judicial service in Auckland, peculiarly a citizen of this city. So his death is widely mourned as his memory will long be cherished.

THE AUCKLAND STAR.

In the death of Mr. Justice Callan the Supreme Court Bench of New Zealand has lost one of its glories. His name and his work will endure, by reason of the immense contribution which he made to the legal tradition of this country. Although regarded by the profession as one of the best Judges in the Court of Appeal, it was as a trial Judge that he was chiefly esteemed. In that sphere, all his qualities were luminously apparent. Not least of them was his understanding of men, of human nature, and of life as it is lived by the generality. Like Lucretius of old, he had a ready appreciation of the truth

that what is food to one man may be fierce poison to others. Always it was apparent, when he was presiding at a trial, that the finest nuances, the most subtle undertones, evasive and elusive as they might be, and perhaps but dimly comprehended—if comprehended at all—by any save the most experienced of counsel, were fully apprehended by the Judge. Indeed, more than any other Judge in recent times, Mr. Justice Callan revelled in subtleties. His anticipation of events and of questions, in the quick and at times heated interplay and drama of query and reply, gave counsel confidence and assurance.

His complete integrity, his impartiality, whatever the nature of the case, were widely recognized not only by the profession, but by litigants and witnesses. On the Bench, the demeanour of Mr. Justice Callan was quiet and unassuming. He had no mannerisms. Yet there was always instant recognition of the power of his personality, a personality compounded of many notable qualities. Chief of them was a deep rightness of judgment, the more noteworthy because expressed in language remarkable not only for its lucidity, but perhaps more for the fact that there was in all that he said an almost instinctive use of words and phrases which fitted the argument or subject with the precision of inevitability.

Only one deeply steeped in the humanities could have given full play to these qualities of mind and experience. But Mr. Justice Callan had more than the humanities, more than a long experience of Bar and Bench, more than a thorough grasp of the law on which to draw. He was, in the finest and truest sense, a Christian gentleman. To ignore the Catholic idealism which motivated his mind and heart would, in relation to such a man, be positively grotesque. When members of the Law Society gather in their fullest numbers to do his memory reverence, it is certain that of this so highly esteemed son of Dunedin, whom Auckland was privileged and proud to claim as her own in recent years, little will be left unsaid as of one accounted great. But perhaps there could be no finer tribute than that paid spontaneously and naturally, in private conversation this morning, when one of the young barristers of the city said, "I feel that I have lost a father."

NOTES FROM ENGLAND.

By Apteryx.

D.P.P.

The convention, criticized as "a needless complexity," whereby the Director of Public Prosecutions is named as a party in reports of only House of Lords criminal cases in which the prosecution's case is conducted on his instructions may be misleading. The Director is entitled to institute or take over the conduct of virtually any criminal proceedings, and must do so in the case of any capital offence. Thus, in the much-publicized Arundel Park case, he had declined, on the information before him, to institute proceedings, but, when a relative of the dead girl succeeded in an application to Justices for a murder warrant, the Director had no alternative but to take over the prosecution. In the result, the lower Court held that no *prima facie* case was established, and an article by the successful accused, entitled "The Girl I met in Arundel Park," appeared in a Sunday newspaper.

Since 1944, the office of Director has been held by Sir Theobald Mathew, a nephew of the author of *Forensic Fables*, a son of Charles Mathew, K.C., and a grandson of Lord Justice Mathew (perhaps best remembered as the first Judge—and, in a sense, the creator—of the Commercial Court). Sir Theobald is himself a lawyer, having been both at the Bar and at one time a partner in Charles Russell and Co. He is slightly built, dark, strong of feauture, and alert-looking, and conveys an impression of breadth of knowledge, tolerance, and detestation of red tape which is typical, one would imagine, of the finest kind of English civil servant. He is also a consummate public speaker. "I call all my talks 'The King's Peace,'" he will begin. "It doesn't tie me down." He will go on to explain that he directs nobody, and that there are no public prosecutions, but a little later will add with an engaging smile that, having on appointment found no one who could tell him what his duties were, he had, by "a series of pathetic letters to the Home Office," eventually procured the making of some new Regulations, "so that I now have statutory authority to do what I like." The last remark is not wholly truthful, as he is subject to the directions of the Attorney-General. One is glad that the Cominform is (presumably) unrepresented when, in defining "voluntary confessions" to a predominantly Police audience, he expresses the view, with no visible sign of tongue in cheek, that the contemporaneous consumption of fifty cups of tea and two hundred cigarettes by no means removes a statement from the category. It is hardly necessary to add that much of the bitterness in his life derives from the necessity of continually reading reports from policemen; but he acknowledges the sense of elation with which he recently read, not that a Constable had "proceeded" to the end of a street, but that he actually "ran" there. This was short-lived, however, for it was not long before another reported that he had "proceeded to proceed in an easterly direction." Moreover, Sir Theobald must have felt conscious of the futility of all human endeavour when, at the end of the talk which the present writer heard, the presiding Chief Constable heavily informed the audience that they might now proceed to ask questions.

A point upon which Sir Theobald insists, as far as he can, is that statements taken from accused persons or witnesses should be recorded in their own words. Here, at least, he is apparently meeting with success, since it has been reported that a prisoner has corrected such a statement on the ground that "the Judge mightn't like it put that way." On the other hand, Sir Theobald is strongly opposed to the suggestion that prisoners should be asked to write their own statements, a practice which, he says, Lord Goddard, Humphreys, J., and other Judges have shown some inclination to elevate into a rule of law. "What," he asks, "are you to *do* with the sort of statement that begins: 'Sergeant X is telling me to write this. He has just hit me for the first time with his truncheon'?"

A Portent?

The rise of administrative tribunals is, as might be expected, more noticeable in England than in New Zealand, although we have had our experiences. Perhaps the most criticized of these new bodies in England are the Rent Tribunals, which perform rent-fixing functions that have been not unsuccessfully entrusted in New Zealand to the ordinary Courts. They need not include members with legal qualifications. For horrid examples of their methods, see *The King* v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Bell London and Provincial Properties, Ltd.*, [1949] 1 All E.R. 720, and *The King* v. *Brighton and Area Rent Tribunal, Ex parte Marine Parade Estates (1936), Ltd.*, [1950] 1 All E.R. 946. It comes as a slight surprise to a Dominion visitor to be confronted in the streets with posters informing the public of the setting

up of such Tribunlas in named localities, stating their jurisdiction, and advising as to how they may be set in motion. This seems very like extending invitations to tenants to "try their luck at getting the rents reduced," to adopt an expression used by Lord Goddard, L.C.J., in the case last cited. How far should this sort of advertising go? Can it be that a new era is beginning, and that in time our superior Courts will be driven to retaliate by soliciting business with such slogans as "Equitable remedies speedily granted"?

FARMERS MUST NOT DIE.

As Things are To-day.

By ADVOCATUS RURALIS.

This week, I was asked to advise a farmer on the making of his will.

According to custom, I endeavoured to find out what his assets were, apart from his wife and two children. He murmured something (which I hesitate to repeat) about the price of wool and the current taxation. To get on to safe ground, I asked him what his position was in 1948, and the going immediately became easier. At that time, he had a farm worth about £11,000, with 2,500 sheep valued in his books at £1, and cattle and odds and ends showing another £500. He had a mortgage then of approximately £6,500, and his other assets and his bank overdraft see-sawed to an almost perfect balance. His books, therefore, showed him as worth £7,500 at that time.

I explained to him that, had he been so fortunate as to die in, say, October, 1948, the Commissioner of Stamp Duties would have raised the value of this live and dead stock from £3,000 to £4,000 and the Commissioner of Taxes would have charged income-tax on this odd £1,000. The Commissioner of Stamps would have then spent the best part of a year in an endeavour to inflate his other assets to bring his final estate above the £10,000 mark. Should his solicitor be successful in keeping the level at, say, £9,500, then his death duties and income-tax would have been somewhat as follows:

To estate duty on £9,500 at 13½ per cent. (allowing for widow's £5,000 exemption)	£597 10s. 0d.
To succession duty on same, say ..	£90 0s. 0d.
To income-tax on £1,000 rise in book value	£250 0s. 0d.
	£937 10s. 0d.

This would leave his widow and family £8,562 10s.

The farmer somewhat peevishly explained that he had not died in 1949, but, instead, he had been working hard, and, till this year, he had been making about £1,500 a year, and his mortgage was now down to £5,000 and his wool money still had to come in. What would happen if he died next October, and the price of wool came down in January?

This meant quite another sum, for, believe it or not, his wool cheque this year would be £10,000, and his sales of sheep would pay all his outgoings, so that his figures would be quite different. And, at any rate, his car was thirteen years old. I explained as gently as I could that, if he died in October, he would owe income tax on the above £10,000—say, £7,000. The Commissioner of Stamps by that time would raise the value of his stock from the book value of £3,000 to £12,000, and the Commissioner of Taxes would then charge him for income-tax on this extra £9,000.

His executors would then be faced with the following sum:

Assets (actually the same as in 1948):				
Land				£11,000
2,500 sheep with lambs at foot at £4 10s.				£11,250
Cattle				£750
Balance of wool cheque after running farm from now till October and buying that car				£7,500
Liabilities:				
Mortgage ..	£5,000	0s.	0d.	
Income-tax to March 31, 1951	£7,000	0s.	0d.	
Income-tax on increased price of live stock over book values (£9,000) less running-expenses till October, say,	£5,000	0s.	0d.	
Estate duty on £13,500 at 15½ per cent. (there being no widow's exemption) ..	£2,092	10s.	0d.	
Succession duty on same, say	£350	0s.	0d.	
Leaving a balance of ..	£11,057	10s.	0d.	
	£30,500	0s.	0d.	£30,500 0s. 0d.

The farmer gazed at these figures for a while, and then asked what would happen if, in 1952, wool came back to 1948 prices and his live stock reverted to a value of £4,000.

I explained that, in that case, assuming that he had used some of his cash to pay some of the taxes, his estate would probably still be owing the various State Departments about £7,000, and that the net value of his estate would then be approximately £3,000. Should his trustees decide to sell his farm and pay his debts, his widow could buy a comfortable home and have enough left over for the first repaint. His widow would then be qualified to subsist on Social Security.

I explained that a well-known commercial man had died just before the 1930 slump and his assets had depreciated about 60 per cent. after being valued for death duties, but that the then Government saw nothing in this which would induce them to grant relief from payment of duties.

When my client left, I had the feeling that he was dissatisfied about something.

DEATH AND GIFT DUTY LAW.

Recent Statutory Amendments and Decisions.

By E. C. ADAMS, LL.M.

As our Death Duties Act, 1921-22, takes its toll of wealth, the law of death and gift duty increases in volume and in complexity. Whatever his own views as to the effect and purpose of this expropriating legislation, the busy solicitor cannot fully do his duty to his clients unless he keeps abreast of the changes in this branch of taxation law, for all the recent changes in the statutory law, and all the recent decisions of the Courts on the interpretation of the statute, have not been in favour of the Crown: the Legislature has granted relief to the tax-payer in certain respects, and the Crown has lost several important and far-reaching test cases.

First, we have the not inconsiderable concessions in gift and death duty which a married person may obtain by transforming the matrimonial home into a joint family home under the Joint Family Homes Act, 1950. When the necessary Regulations are gazetted under that Act, it is anticipated that many married persons will avail themselves of its benefits and privileges. As to these concessions, see the article in (1950) 22 NEW ZEALAND LAW JOURNAL, 333. Then there is a separate Death Duties Amendment Act, 1950, consisting of four sections. The first section is mere drafting, constituting, as it does, the Short Title. But, when we get to the second section, we come to something really important and beneficial to the tax-payer.

Section 2 alleviates the effect of s. 49 of the Death Duties Act, 1921, which has been a nightmare to many solicitors for many years. It has always been possible by careful drafting to keep a family transaction out of the ambit of this section, for it applies only to gifts in the ordinary sense of the word or to transactions which, by the statute, are constructively made gifts; and even a transaction which is a gift or a constructive gift is not caught by the section unless there is reserved some benefit or advantage which has the element of *futurity*. A cash payment, for example, is not a benefit or advantage for the purposes of s. 49, and, if a sole owner of land transfers one undivided moiety by way of gift, the remaining one undivided moiety is not a benefit or advantage for the purposes of the section: *Commissioner of Stamps* v. *Finch*, (1912) 32 N.Z.L.R. 514. The fact is that the family solicitor has always been able to take advantage of the point that s. 49 itself does not extend the definition of "gift": *Commissioner of Stamp Duties* v. *Card*, [1940] N.Z.L.R. 637, 645. Nevertheless, it has always been necessary for the solicitor to be on the alert and to advise his client as to the effect of this section, for, as Johnston, J., said in *Card's* case, at p. 642:

> the tax-gatherer has cast a wide net and . . . the meshes are closely woven.

(Pausing for a moment, I can never quite understand why the modern salaried tax-gatherer should get the odium. Surely it was the Legislature which cast the wide net.) Once caught within the net, there was no escape for the tax-payer, until the passing of s. 2 of the Death Duties Amendment Act, 1950.

Once a valid trust is created, or once a gift has become complete, the settlor or donor cannot revoke it, unless a power of revocation has been reserved: *Naas* v. *Westminster Bank, Ltd.*, [1940] A.C. 366; [1940] 1 All E.R. 485. And, even if a power of revocation has been reserved, the transaction is caught by s. 49, for a power of revocation is one of the things expressly set out in this section.

Thus, if a settlor settles £25,000, and reserves to himself a life interest in such sum, he must pay gift duty on the full sum of £25,000: he cannot deduct from the value of the gift the actuarial value of his life interest: *Perry* v. *Commissioner of Stamps*, (1913) 32 N.Z.L.R. 1194. That is the effect of s. 49.

In the case of transactions constituting constructive gifts for the purpose of the statute, there is usually the element of valuable consideration, and, if such transactions have not been completed *instanter*, they are enforceable as contracts. Usually such transactions are caught by the gift-duty provisions because the consideration is not fully adequate, but, if the consideration is to be paid in the future, such consideration is, by virtue of s. 49, ignored in computing the value of the gift. Thus, if A transfers or agrees to transfer to B land worth £5,731 in consideration of B's paying to A, some time in the future, the sum of £4,660, gift duty is payable on the full sum of £5,731: *Taylor* v. *Commissioner of Stamp Duties*, [1924] N.Z.L.R. 499. Until the passing of s. 2 of the Death Duties Amendment Act, 1950, the gift duty could not have been avoided by the mutual cancellation of such an agreement or the retransfer of the property from B to A, for that would in effect have constituted a fresh gift from B to A, and would not have altered the fact that an assessable gift had been made in the first instance.

My invariable experience has been that the tax-payer who has been caught by s. 49 regards that section as a monstrous iniquity. Fortunately for the disgruntled tax-payer, subs. 1 of s. 2 of the Death Duties Amendment Act, 1950, now provides that, when an instrument creating or evidencing a gift caught by s. 49 has been presented for stamping, the Commissioner of Stamp Duties may, on application by both parties to the instrument within six months from the date of the instrument, permit the parties to withdraw the instrument for the purpose of cancelling or altering it. On being satisfied that any such cancellation or alteration has been made, the Commissioner is to amend the assessment of gift duty accordingly. It is to be noted that the consent of both parties to the alteration or cancellation is necessary, but, as most of the transactions caught by s. 49 are family ones, it may reasonably be anticipated that in most cases the donee will, "as an act of reverence and good manners," consent to the cancellation or alteration. And so s. 49 will no longer be a nightmare to the practising solicitor.

But s. 49 could also have other unhappy repercussions. It might happen that, after the gift was made or the trust created, the donor or settlor would desire to surrender or release to the beneficiary the benefit or advantage which he had reserved. Such a release or surrender, be it noted, must be effected more than ten years before the donor or settlor dies if the property

comprised in the gift or settlement is not to become subject to death duty on his death : ss. 5 (3) and 16 (3) of the Death Duties Act, 1921 ; and see *In re Bethell, Bethell* v. *Commissioner of Stamp Duties and Church Property Trustees*, [1947] N.Z.L.R. 49, where the gift was made in 1935, the future benefit (an annuity for life of the donor) was released in 1944, and the deceased died in 1945. Such a release or surrender is in itself an independent gift, and liable to gift duty accordingly, although, in the case of the first gift, no allowance has been made in the assessment gift duty for the value of the future benefit. Actually, this did not amount to double taxation, because each gift transaction is separately liable to gift duty, but I have no doubt that the tax-payer who was caught by s. 49 on the first transaction would regard it as double taxation. If authority is required for the proposition that the subsequent surrender or release is, if by way of gift, a separate and independent gift transaction, it will be found in the latter part of the judgment of Johnston, J., in *Commissioner of Stamp Duties* v. *Card*, [1940] N.Z.L.R. 637, 644.

This unjust result has now been removed. Subsection 2 of s. 2 of the Death Duties Amendment Act, 1950, now provides that the gift duty on any further gift of the whole or part of the benefit or advantage reserved is to be reduced by a proportionate part of the gift duty paid on the original gift. The subsection, which is necessarily rather involved in order to be fair both to the Crown and to the tax-payer, reads as follows :

> (2) Where the donor of a gift to which section forty-nine of the principal Act applies (in this subsection referred to as the original gift) makes at any time after the passing of this Act a further gift of the whole or any part of the benefit or advantage created or reserved on the making of the original gift, there shall be deducted from the gift duty which would otherwise be payable in respect of the further gift (so far as that gift duty extends) an amount bearing the same proportion to the gift duty paid on the original gift as the value of the further gift bears to the value of the original gift, and only the residue (if any) of the gift duty on the further gift shall be payable :
>
> Provided that the amount so deducted or, where there are two or more further gifts, the aggregate of the amounts so deducted shall not exceed an amount bearing to the gift duty paid on the original gift the same proportion as the value of the benefit or advantage as originally created or reserved bears to the value of the original gift.

It was held in *Public Trustee* v. *Commissioner of Stamp Duties* [1943] N.Z.L.R. 467, that payments made on the death of a contributor to a superannuation fund were liable to death duty (whether or not deceased had been obliged to contribute to the fund) if the payments were made as of right, and not *ex gratia*. In 1948, pensions payable to the widows of civil servants were exempted from death duty. This was followed by exemption to pensions payable to the widows of Members of Parliament : ss. 39 (3) and 72 (8) (*c*) of the Superannuation Act, 1947, and ss. 10 and 20 of the Superannuation Amendment Act, 1948. Section 75 (3) of the National Provident Fund Act, 1950, makes similar provision in respect of the National Provident Fund. Section 3 of the Death Duties Amendment Act, 1950, extends the exemption to pensions payable to the widow of a deceased contributor to a *private* superannuation fund, as defined by s. 3. The section defines " Superannuation fund " as follows :

> " Superannuation fund " means any superannuation fund established under the Local Authorities Superannuation Act, 1908 ; and includes any superannuation fund established for the benefit of the employees of any employer and approved for the time being by the Commissioner of Stamp Duties for the purposes of this section.

The exemption conferred by s. 3 of the Death Duties Amendment Act, 1950, does not extend to any additional pension that may be payable by reason of an election by the contributor to accept a reduced pension in his lifetime.

With regard, therefore, to exemption from death duty in respect of pensions payable to *widows* of contributors to superannuation funds, the law has been made uniform. If payments to the widow of a civil servant are exempted, it is only fair that payments to the widow of a man who is not a civil servant should also be exempted. It will be borne in mind, however, that payments under superannuation funds to the children or other relatives of a deceased contributor are still liable to death duty : *Public Trustee* v. *Commissioner of Stamp Duties* (*supra*).

The last section of the Death Duties Amendment Act, 1950, is purely administrative, and not of much interest to the legal profession. It transfers from the Minister of Finance to the Commissioner of Stamp Duties the function of approving superannuation funds for the purpose of exemption from gift duty and stamp duty of elections by contributors to accept reduced pensions in consideration of benefits for their dependants. It may be mentioned in passing that the approving authority for superannuation funds for the purposes of the Land and Income Tax Act, 1923, is the Commissioner of Taxes.

Turning now from statutory amendments to death and gift duty law, I shall deal with two topics covered by recent cases.

In ascertaining liability to death or gift duty, the exact date a gift becomes complete is often of vital importance, but not always easy to ascertain. The crucial date is not necessarily the date the donor *intended* a gift to be complete, but the date it became complete in actual fact : *Chambers* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504, an ineffectual attempt to make a gift of interest owing under a Land Transfer mortgage by mere entry in the intended donor's books.

For the purposes of gift duty, the Commissioner can aggregate all gifts made within any one twelve-months period which includes the gift in immediate question. He may aggregate either backwards or forwards for twelve months from the date of the making of the gift in question. He may not aggregate both backwards and forwards, because that would give the Commissioner a range of twenty-four months instead of twelve.

In *McGrath* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 950, the question at issue was what constituted the period of twelve months for the purpose of aggregation of gifts. In this case, it was held that the day of the making of the gift in question is included in the computation of the period of twelve months, and that the day of the date of making of the gift must be excluded in the period of twelve months. Smith, J., said, at pp. 953, 954 :

> Where, therefore, a gift is made on March 31, time begins to run on that day and expires on the following March 30. A gift made on March 31 may not be aggregated with a gift made on the following March 31. A donor may continue to make gifts on March 31 without the risk of having them aggregated with gifts made on the previous March 31.

As a matter of practice, where the donor cuts things so finely, the Stamp Duties Department must be satisfied

(*Concluded on p. 64.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Callan, J.—The recent death of that courageous, human, and lovable Judge, Mr. Justice Callan, calls to mind how few of our Judges during the past fifty years have died, as it were, in harness. Sir John Salmond and Sir William Sim both did so. Sir Charles Skerrett and Mr. Justice Alpers were on leave when the end came, but in both cases the period of waiting was attended with a great deal of suffering, although, in the case of Alpers, J., this did not prevent his completing the finest legal autobiography this country has yet seen. It was characteristic of Callan, J., that all his judgments had been completed and delivered. No Judge excelled him in his whimsical and puckish sense of humour, nor in the order and quiet decorum in which he invariably conducted his Court. That no one ever sought to take advantage of these endearing qualities as a Judge is in itself a tribute to his sterling qualities as a man.

Documentary Meal.—Scriblex sets a problem this issue for conveyancers, who complain, with a degree of justification, of his bias for the more exciting atmosphere of the Courts. The problem is this: Can a memorandum of contract for the sale and purchase of a house property, which memorandum has taken up its abode in the digestive tract of the person signing it (or in that of his lawfully authorized agent), be relied upon in order to render the contract enforceable under the Statute of Frauds? What has given rise to the problem is the unusual procedure adopted recently by a Scottish client in order to repudiate a contract signed by him and binding him to purchase a dwelling for £1,500. According to *The Times* of December 12, 1950, he picked up the document in his solicitor's office and promptly ate a large part of it. Charged before the Sheriff's Court at Edinburgh with malicious damage to the document, he was fined £10. The Sheriff decided that he could not escape the consequences of his unusual meal, but whether he could escape the consequences of his bargain is a matter left to the decision of some higher Court.

Criminal Types.—The monumental work of Leon Radzinowicz (*A History of English Criminal Law and its Administration from 1750*) commences with a study of the attempts made between 1750 and Peel's reforms of 1827 to correct the anomalies of English criminal law and "the utter lack of balance between the gravity of offences and the severity of their corresponding punishments, with the consequent wide scope assigned to the death penalty." Many writers have considered that the real remedy for crime lies in the ascertainment and segregation of criminal types; and in this connection Dr. E. A. Johnson recalls that some years ago Professor Lombroso presided at Oxford over the International Congress of Criminologists. Several authors of crime books were present. Strongly urging the existence of a "criminal type," the learned Professor contended that such individuals could always be recognized by their beetling brows, low foreheads, protruding chins, and habits of gesticulating. In the discussion that followed, an extremely tactless speaker pointed out forcibly that all these *indicia* were observable among the members of the Congress themselves.

Exsibilation.—In reply to one of the most famous of the Holmes letters (in which the Judge had written that people are born fools and damned for not being wiser), Pollock replied:

> Go to! Who told you that I was disposed to think of man as a little god against the universe? That is a damnable heresy of dualism which I do *ex animo* renounce, repudiate, reject, explode, exsibilate, and consign to thirty thousand cartloads of doubting and self-tormenting devils.

There is a neat precision in the use of the word "exsibilate" here, in its rare sense of "hissing off the stage." It is touches of this sort that caused the publication of the Pollock-Holmes letters to become, much to the astonishment of their publishers, one of the best sellers of 1941, and the work, edited by one of Holmes's secretaries (another, Alger Hiss, is at present in jail), has continued, like Mrs. Beeton's cookery book, to do remarkably well since.

Mathematics in Negligence.—*Problem*: Motor-cyclist A, travelling along a straight road in darkness, has his lights fail, and, in order to fix them, parks his machine 2 ft. out from the edge of the road, when there would have been no difficulty in wheeling it on to a grass verge level with the road.

Five minutes pass. Motor-cyclist B (type *rara avis*), driving too fast from the same direction, with headlights unnecessarily dipped and failing to keep a proper look-out, crashes into the stationary vehicle. He receives injuries and sues A. Parker, J., dismisses the action, holding A wholly to blame. Cohen and Denning, L.JJ., uphold the appeal, upon the ground that B did not take reasonable precautions to avoid the accident, and Somervell, L.J., dissents, considering B was entitled to assume that he would have been seen sufficiently far off to have been avoided. Proportion: two-thirds of the negligence to A, one-third to B: *Hill-Venning* v. *Beszant*, [1950] 2 All E.R. 1151.

Here and There.—The attention of those whose work in the main lies on the seamy side of the law is drawn by Scriblex to *The Law of Sewers and Drains*, by J. F. Garner, LL.M. (Shaw and Sons, Ltd., 1950). Advanced or Honours students in this subject will find it treated in even greater detail in the standard text-book of MacMorran and Willis.

"He professes to say that he was actuated in his choice by a liking of the Scottish climate and things Scottish and an admiration for Glasgow as a big industrial centre. Such professions come ill from one who up to that time had never set foot in Scotland, and in my view carry no weight. The evidence leaves no doubt that it was the exigencies of his service with the Admiralty which brought him to Scotland and kept him there": Lord Jamieson, rejecting the contention of a "domicil of choice" in *Cooney* v. *Cooney*, Court of Session, November 3, 1950.

DEATH AND GIFT DUTY LAW.

(*Concluded from p. 62.*)

that the dates set up by the donor are the exact dates the gifts first became complete, and it is in this connection that a knowledge of gift law is essential for the family solicitor.

Again, for the purposes of death duty, s. 5 (1) (*b*) of the *Death Duties Act, 1921*, provides that, in computing, for the purposes of that Act, the final balance of the estate of a deceased person, his estate shall be deemed to include and consist of any property comprised in any gift, within the meaning of Part IV of that Act, made by the deceased within *three years before his death*, and whether before or after the commencement of that Act, if the property was situated in New Zealand at the time of the gift. The recent English case of *Re Owen, Owen* v. *Inland Revenue Commissioners*, [1949] 1 All E.R. 901, is in point as to the interpretation of this subsection.

A testator *rather more than three years* before his death told certain members of his family that he intended to make gifts to them, and instructed stock-brokers to sell securities to the value of £17,000 and pay the proceeds into his bank. He drew four cheques for various sums and sent them to the recipients on the same day, towards the end of May, 1941. One cheque was paid into the recipient's bank and cleared before the end of that month, but the others were not paid in until June 4, 1941, or later. The testator died on June 1, 1944. It was held that, *as a gift made by the donor's cheque is not complete and effective until the cheque is paid in and cleared*, the gifts made by the three cheques not paid in until June 4, 1941, were made within three years of the donor's death, and must be aggregated with his estate for the purposes of estate duty.

The moral of this tale is : Never hang on to a cheque which is handed to you ; pay it in to your bank as soon as possible. In addition to the risk of aggregation for gift or death purposes, as explained in the preceding paragraphs, a cheque is a mere mandate, and is automatically revoked on the death of the drawer, and, if given by way of gift, cannot be honoured by deceased's legal personal representative.

I shall conclude this article by a short discussion of two recent cases dealing with the liability of the interest of a non-contributing joint tenant to death duty on the death of a joint tenant who is not the last surviving joint tenant.

DOMINION LEGAL CONFERENCE, 1951.

PROGRAMME.

TUESDAY, MARCH 27:

5.15 p.m.—Cocktail Party at Dunedin Club, Melville Street, Dunedin.

WEDNESDAY, MARCH 28:

10 a.m.—Opening Ceremony and Welcome to Visitors at Concert Chamber, Town Hall.

Morning Tea for all Visitors at Concert Chamber, Town Hall.

Inaugural Address by the Attorney-General (the Hon. T. Clifton Webb).

2.15 p.m.—Paper: "Some Reflections on the Development of the 'Donoghue principle'"—W. E. Leicester, Wellington.

Remit: "That in the opinion of the members of the legal profession present at this Conference the salaries of the Judges of the Supreme Court should be substantially increased."

General Discussion.

9.15 p.m.—Conference Ball at the Tudor Hall, Princes Street.

THURSDAY, MARCH 29:

10 a.m.— Paper: "A Suitable Second Chamber for New Zealand"—D. J. Riddiford, Wellington.

Paper: "Occupation Courts in Germany"—Major-General L. M. Inglis, C.B., C.B.E., D.S.O., M.C., Dunedin.

2.15 p.m.—Paper: "Suggested Reforms in the Law of Evidence"—Dr. A. L. Haslam, Christchurch.

Closing Address: W. H. Cunningham, C.B.E., D.S.O., President of the New Zealand Law Society.

7.15 p.m.—The Conference Dinner at the Tudor Hall, Princes (for 7.30 p.m.) Street.

Sports Day.

FRIDAY, MARCH 30:

10 a.m.—Golf Tournament at St. Clair Golf Links.

9.45 a.m.—Bowls Tournament at St. Clair Bowling Greens, Ings Avenue, St. Kilda.

9.45 a.m.—Tennis Tournament, Logan Park Courts.

3.45 p.m.—Afternoon Tea at Lady Sidey's home, "Corstorphine," Caversham.

Ladies' Programme.

TUESDAY, MARCH 27:

5.15 p.m.—Cocktail Party, Dunedin Club.

WEDNESDAY, MARCH 28:

10 a.m.—Opening Ceremony and Welcome to Visitors, Concert Chamber, Town Hall.

Morning Tea, Concert Chamber, Town Hall.

9.15 p.m.— Conference Ball at the Tudor Hall, Princes Street.

THURSDAY, MARCH 29:

1.45 p.m.—Scenic Drive. Afternoon Tea at the Brown House.

8 p.m.—Theatre Party.

Supper Party, The Vedic, Princes Street.

FRIDAY, MARCH 30:

Morning—Visit Home Science School, Otago University. Morning Tea at School.

3.15 p.m.—Afternoon Tea and Presentation of Trophies at "Corstorphine."