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CRIMINAL LAW: DRUNKENNESS AS AFFECTING THE TEST FOR PROVOCATION.

IN a recent judgment, *R.* v. *McCarthy*, [1954] 2 All E.R. 262, 263, the Court of Criminal Appeal said that the question, which not infrequently arises, as to how far drunkenness may be taken into account in considering whether the offence can be reduced from murder to manslaughter has been treated in some of the text-books as a matter on which the law is not clear.

The question, which sometimes centres on the degree of provocation, is one of mixed law and fact. It is for the Judge to rule as to whether the provocation was sufficient to lead a reasonable man to do what the accused did. If his ruling is in the affirmative, then it is for the jury to say whether it considers that, on the facts as found from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did: *Holmes* v. *Director of Public Prosecutions*, [1946] 2 All E.R. 124, 126, and see, also, *R.* v. *Jackson*, [1918] N.Z.L.R. 363; [1918] G.L.R. 11, to the same effect, in view of s. 184 (3) of the Crimes Act, 1908.

I.

Provocation is dealt with in s. 184 of the Crimes Act, 1908, which has most recently been considered by our Court of Appeal in *R.* v. *Kahu*, [1941] N.Z.L.R. 386. That section is as follows:

> 184 (1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
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> (2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.
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> (3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact.
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> (4) No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

It must always be borne in mind that in New Zealand as in England, the burden is upon the prosecution to prove that the crime is murder and not manslaughter: *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462, and *Mancini* v. *Director of Public Prosecutions*, [1942] A.C. 1, both applied in *R.* v. *Kahu*, [1941] N.Z.L.R. 368. In the last-mentioned case, Callan, J., in delivering the judgment of the Court of Appeal, said:

> To enact, as was done in s. 184, that culpable homicide which would otherwise be murder *may be reduced* to manslaughter if certain factors are present is a matter of definition, but enacts nothing as to whether the burden rests on the accused of proving the existence of those factors, or on the prosecution of proving their absence. The statute being silent on that topic, the common law as enunciated in *Woolmington* and *Mancini* is applicable in New Zealand.

It follows, as the Court pointed out, that s. 184 did not deal with the burden of proof. The judgment proceeded:

> The view that such a section as our s. 184 deals merely with definition, and not with burden of proof, is supported by matter in judgments delivered in the High Court of Australia, in *Packett* v. *King*, (1937) 58 C.L.R. 190, 212, 213, 222.
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> The decision of the Judicial Committee of the Privy Council in *Kwaku Mensah* v. *The King*, [1946] A.C. 83, manifests a strong disinclination by their Lordships to hold that the rule as to the burden of proof as enunciated in *Woolmington* and *Mancini* has been displaced by legislation. The *ipsissima verba* of the relevant code then under consideration are not quoted in the report, but matter which appears in the report of the argument (*Ibid.*, 88), and in the judgment which was delivered by Lord Goddard (*Ibid.*, 93) suggests that this was a case in which a stronger argument could be presented for the view that legislation had altered the burden of proof than it is possible to found on our s. 184. Yet Lord Goddard is reported as using language which appears to imply that in this particular case the onus was not on the accused to prove manslaughter as distinct from murder, but on the prosecution to prove murder as distinct from manslaughter. We refer to the passage where His Lordship speaks of: "an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether . . . the *prosecution had discharged the onus which lay upon them of proving murder as distinct from manslaughter*" (*Ibid.*, 94). In the circumstances of the particular case, this may have been an *obiter dictum*. But the phrasing which we have italicized appears to have significance.

The effect of drunkenness in relation to criminal responsibility must next be considered.

II.

Many years ago our Court of Appeal in *R.* v. *Garr*, [1909] 28 N.Z.L.R. 546, in a judgment delivered by Cooper, J., took a view which closely approximates to recent judgments including one of the House of Lords, followed in *R.* v. *McCarthy*. The evidence was that the prisoner, although under the influence of liquor, was

capable of moving about and entering into altercation with the passengers, and that he was fighting with another man. The captain interfered with and separated him, and the prisoner drew a pistol and fired it at the captain, who was wounded, but he recovered. Garr was then charged upon an indictment containing two counts, one for attempted murder, and the other for doing actual bodily harm to the prosecutor with intent. Edwards, J., directed the jury that before it could find the prisoner guilty on either count it must be satisfied that the intent as charged had been proved, but that if it thought that such intent had not been proved it might still find him guilty of causing actual bodily harm under such circumstances that if death had been caused he would have been guilty of manslaughter. The jury found the prisoner not guilty of the crimes charged in the indictment, upon the ground that he was incapable of forming an intent, but guilty of the crime of causing bodily harm under such circumstances that if death had been caused he would have been guilty of manslaughter.

Cooper, J., in delivering the judgment of the Court of Appeal, at p. 548, said :

> Manslaughter is culpable homicide not amounting to murder. When a man by his own voluntary act gets drunk, and while so drunk kills a person under circumstances which justify a jury in finding that the drunken man was incapable of forming that intention which is necessary to constitute the crime of murder, he is nevertheless guilty of culpable homicide, which, although, by reason of the absence of a malicious intent, it is not murder, is nevertheless manslaughter. Indeed, in the present case it was quite open to the jury to have convicted the prisoner of the full offence stated in the indictment.

The Court of Appeal referred to the judgment of Alderson, B., in *R.* v. *Meakin*, (1836) 7 C. & P. 297; 173 E.R. 131, where he said :

> If a man chooses to get drunk it is his own voluntary act; it is very different from a madness, which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from he must answer for. However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it. But where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.

To which our Court of Appeal added :

> . . . unless the drunkenness is such as to render the man incapable of forming any intent.

(This qualification was also made some years later by the House of Lords in *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479).

In *Garr's* case, the jury had taken a lenient view of the prisoner's conduct, and, having negatived the intent necessary to constitute proof of the full offences laid in the indictment, it was competent to convict the prisoner of the minor offence, and it did so. The second branch of Edwards, J.'s direction to that effect was, therefore, right.

The Court of Appeal pointed out that the precise point that this part of His Honour's direction was right had been decided by the Court of Criminal Appeal in England, only a few months previously, in *R.* v. *Meade*, [1909] 1 K.B. 895. In that case, the prisoner was charged with murder. The Judge, Lord Coleridge, J., thus directed the jury :

> Every one is presumed to know the consequences of his acts. If he be insane that knowledge is not presumed. Insanity is not pleaded here, but, where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this : that if the mind at that time is so obscured by drink, if the reason is dethroned and the man incapable therefore of forming that intent, it justifies the reduction of the charge to manslaughter.

The Court of Criminal Appeal held that this direction was right in law, and did not infringe the rule which has been established by modern authority, and which the Court declared to be as follows :

> A man is taken to intend the natural consequences of his acts. This presumption may be rebutted : (1), in the case of a sober man, in many ways ; (2), it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing what he was doing was dangerous—*i.e.*, likely to inflict serious in ury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted.

In the recent judgment of the Court of Criminal Appeal, *R.* v. *McCarthy*, [1954] 2 All E.R. 262, their Lordships, in considering the earlier cases dealing with the question as to how far drunkenness may be taken into account in considering whether the offence can be reduced from murder to manslaughter, said that it is not necessary to consider many of the older cases bearing on the subject, *e.g.*, *R.* v. *Thomas*, (1837) 7 C. & P. 817 ; 173 E.R. 356, and *R.* v. *Monkhouse*, (1849) 4 Cox C.C. 55). Their inquiry began with *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479, in which the House of Lords considered *R.* v. *Meade*, to which our Court of Appeal referred in *Garr's* case (*supra*).

In *Beard's* case, the House of Lords held that the rule laid down in *R.* v. *Meade*, [1909] 1 K.B. 895, that a person charged with a crime of violence resulting in death or serious injury may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous, could not be supported as a rule of general application, but must be confined to the class of case with which the Court was there dealing.

Their Lordships, while thus limiting the application of the principle of *Meade's* case, held that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration, with the other facts proved, in order to determine whether he had that intent. They considered that the test of criminal responsibility is not the same in the case of drunkenness as in the case of insanity, and, upon a plea of drunkenness where insanity is not pleaded, the jury should not be asked to consider whether, if the accused knew what he was doing, he knew also that he was doing wrong.

The facts in *Beard's* case were that, upon an indictment for murder, it was proved or admitted that the accused ravished a girl of thirteen years of age and in furtherance of the act of rape placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defence was a plea of drunkenness. Bailhache, J., directed the jury that, if it was satisfied by evidence that the accused was so drunk that he did not know what he was doing or did not know that he was doing wrong, the defence of drunkenness succeeded to the extent of reducing the crime to manslaughter. The accused was convicted of murder and sentenced to death. The

Court of Criminal Appeal substituted a verdict of manslaughter upon the ground that the Judge was wrong in applying to a case of drunkenness the test of insanity, and that he ought to have directed the jury in accordance with the rule laid down in *Meade's* case.

It was held, by the House of Lords, that the rule in *R.* v. *Meade* did not apply, and that drunkenness was no defence in the case before their Lordships, unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it (which was not alleged), inasmuch as the death resulted from a succession of acts—the rape and the act of violence causing suffocation—which could not be regarded independently of each other. It was also held that the learned trial Judge was mistaken in applying the test of insanity to a case of drunkenness not amounting to insanity, but that, read as a whole, the summing-up did not amount to a misdirection. It was held, therefore, that the conviction of murder should be restored.

In *Beard's* case, [1920] A.C. 479, the House of Lords considered all the cases on the subject of drunkenness being regarded as an element which would reduce the crime of murder to manslaughter, and stated their conclusions under three heads. The third of these is that evidence falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

In delivering the opinion of the House of Lords in *Beard's* case, Lord Birkenhead, at p. 502, critically examined the judgment of the Court of Criminal Appeal in *R. v. Meade*, applied by our Court of Appeal in *Garr's* case, *supra*. He said that that judgment did not intend to lay down a rule which should be applied to a case such as *Beard's* case. In *Meade's* case—as in *Garr's* case—the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In *Beard's* case, the crime charged was that death arose from violence done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent; in *Beard's* case, it was necessary to prove only that the violent act causing death was done in furtherance of the felony of rape. The learned Lord Chancellor observed, at p. 503, after setting out the direction of Lord Coleridge, J., that the Court of Appeal had expressed the conclusion that, on a true construction, the language used by Lord Coleridge, J., did not differ from the rule stated by the Court of Criminal Appeal itself. Lord Birkenhead continued:

> The language of the Court of Appeal [in *Meade's* case, *cit. supra*] contains a proposition of law which, regarded as a rule of general application, would mean that a person charged with a crime of violence may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing what he was doing was dangerous. . . . the proposition in *Meade's* case, in its wider interpretation, is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect, the so-called rule differs from the direction of Lord Coleridge, J., [*cit. supra*] which is more strictly in accord with the earlier authorities. . . .
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> I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime—*e.g.*, wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the *mens* was *rea*. Drunkenness, rendering a person incapable of the intent would be an answer, as it is, for example, in a charge of attempted suicide. In *R.* v. *Moore*, (1852) 8 C. & K. 319; 175 E.R. 571), drunkenness was held to negative the intent in such a case, and Jervis, C.J., said: "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself.

Turning to the case before their Lordships' House, the learned Lord Chancellor said:

> Drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. For, in the present case, the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is, in other words, to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

Their Lordships concluded that there was no evidence that Beard was too drunk to form the intent of committing rape. In these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing (their Lordships said) is by the law of England murder.

III.

Our next task is to consider the defence of provocation, and how far drunkenness at the time of the commission of the crime may be taken into consideration in relation to reduction of a charge of murder to that of manslaughter.

In *McCarthy's* case, the judgment of the Court of Criminal Appeal, after reference to *Beard's* case, at p. 264, proceeded:

> At the present day we have the assistance, not only of *Beard's* case, [1920] A.C. 479, but of two other decisions of the House of Lords, namely, *Mancini* v. *Director of Public Prosecutions*, [1941] 3 All E.R. 272, and *Holmes* v. *Director of Public Prosecutions*, [1946] 2 All E.R. 124. In *Mancini*, [1941] 3 All E.R. 272, Viscount Simon, L.C., in stating the opinion of the House, said at p. 277,
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> > The test to be applied is that of the effect of the provocation upon a reasonable man, as was laid down by the Court of Criminal Appeal in *R.* v. *Lesbini*, [1941] 3 K.B. 1116, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (i) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (ii) to take into account the instrument with which the homicide was effected, for to retort in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter.

In *Holmes's* case (*Supra*, at p. 124) Lord Simon said further:

> The distinction, therefore, is between asking: "Could the evidence support the view that the provocation was

sufficient to lead a reasonable person to do what the accused did ? " (which is for the Judge to rule), and assuming that the Judge's ruling is in the affirmative, asking the jury : " Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did ? "

We now come to the judgment of the Court of Criminal Appeal in the recent case of *R.* v. *McCarthy*. The appellant was convicted before Havers, J., for the murder of Sidney Rees, and he appealed on the certificate of the learned Judge, given in order that the Court might consider whether the direction he gave to the jury was correct—namely, that it was not entitled to consider the fact that the appellant was the worse for drink (if the jury found that he was), and, consequently, might be more excitable and liable to lose his self-control if provoked, and, whether the accused was the worse for drink or not, the test to be applied was whether a reasonable person, in consequence of the provocation received, could be driven through transport of passion and loss of self-control to the degree and method and continuance of violence which produced the death.

On the night in question the appellant who had, undoubtedly, had a considerable amount of drink, got off a bus in which he had been riding and in which the dead man was also a passenger and went some little way with him. He turned up a side road, the surface of which was rough and stony, and on that road Rees was found by a neighbour lying dead. His skull was fractured in three or four places and his face badly injured, and the case for the prosecution was that the appellant had knocked Rees down and afterwards beaten his face or head on the surface of the road thereby causing shocking injuries. When the appellant was interviewed by the Police as the man who was known to have been last in the company of Rees, he asserted that he had seen a car coming fast down the road, obviously intending to suggest that it was that car which knocked Rees down and killed him. He afterwards altered the story, and in his defence stated that he had gone up the side road to relieve himself, that Rees had there got hold of his penis, and, on being pushed away, invited the appellant to commit sodomy with him. This, he said, so provoked him that he went raging and hit him, after which his memory was vague, but he did admit that he remembered catching hold of the dead man's ears and bumping his head on the ground. It is only fair to the memory of the deceased man to say that there was nothing to support this allegation other than the appellant's own evidence, and the learned trial Judge had informed the Court that, having regard to the respective size and build of the two men, the story was at least improbable. The medical evidence was clear that the injuries from which the deceased man died could not have been caused by a single blow, but must have been caused by repeated acts of violence.

The learned Judge directed the jury that, if it was of opinion that the assault and the invitation referred to were made, those were acts which could in law constitute provocation, and the jury then had to consider whether in all the circumstances of the case they constituted provocation to reduce the crime from murder to manslaughter. He then went on to give the jury the direction already mentioned in respect of which he granted the certificate.

Lord Goddard, L.C.J., in delivering the judgment of the Court, said :

Now, in this case it might be enough to say that, considering the learned Judge clearly left to the jury that, whether the appellant was drunk or sober, the assault and invitation were of a nature which could amount to provocation in law, the only question for the jury was whether the violence used by the appellant as a result of the provocation could possibly be excusable, as it is undoubted law that the violence used must have some reasonable relation to the provocation. While this provocation would, no doubt, have excused (when we say " excused " we mean enough to reduce the killing to manslaughter) a blow, perhaps more than one, it could not have justified the infliction of such injuries as three or four fractures of the skull and the beating of the man's head on a stony road. But as the question of how far drunkenness may be taken into account in considering whether the offence can be reduced from murder to manslaughter not infrequently arises and has been treated in some of the text-books as a matter on which the law is not clear, we propose to consider whether the direction given by the learned Judge accurately stated the law.

And at p. 265, the judgment proceeded.

We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely on his excitable state of mind if the violence used is beyond that which a reasonable, or, as we may perhaps say, an average, person would use to repel an act which can in law be regarded as provocation. No Court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury, and what, no doubt, would govern their opinion would be the nature of the retaliation used by the provoked person. If a man who is provoked retaliates with a blow from his fist on another grown man a jury may well consider—and probably would—that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation might well merit a blow with the fist. It would be quite another thing, however, if the person provoked not only struck the man, but continued to rain blows on him or to beat his head on the ground, as happened in this case and as the accused apparently did in the case of *Thomas*, (1837) 7 C. & P. 817) to which we have referred.

The Court, in dismissing the appeal, said that the direction given by the learned Judge was correct. It stated the following principle :

In view of the three decisions of the House of Lords to which we have referred, it is, in our opinion, now settled that, apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results.

It follows, therefore, that drunkenness may, in proper cases, be taken into account in considering whether the offence can be reduced from murder to manslaughter. Such proper cases are those in which there is evidence of drunkenness which rendered the accused incapable of forming the specific intent essential to constitute the crime ; and that evidence ought to be taken into consideration, with the other facts proved, in order to determine whether he had that intent. Apart from that, drunkenness which may lead a man to attack another, as the result of sudden provocation, in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results, the burden being always on the Crown to prove that the crime is murder and not manslaughter.

LEGAL ANNOUNCEMENTS.

Continued from cover i.

BARRISTER AND SOLICITOR, 26 years of age, 8 years general experience, requires position. Replies to :—
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SUMMARY OF RECENT LAW.

AGENCY.

Mercantile Agent—Motor-car Owner authorizing Person who, in Customary Course of His Business, had Authority to sell His Principals' Cars, to negotiate for Sale of His Car—Car-owner voluntarily handing over Car to Agent, and consenting to His Retaining it in His Possession and giving him Car-registration Certificate—Sale of Car by Agent to Third-party without Owner's Knowledge and Appropriation of Proceeds—Purchaser acting in Good Faith and Purchasing for Good and Full Consideration—Agent a "Mercantile agent"—Sale by Him giving Good Title to Purchaser—Owner's Signature on Change of Ownership Form forged by Agent—Effect of Requirement of Certificate of Registration and Change of Ownership Form considered—Mercantile Law Act, 1908, ss. 2, 3 (1)—Transport Act, 1949, ss. 18, 26.—Practice—Costs—Three Other Parties joined as Defendants—Unsuccessful Plaintiff ordered to pay Defendant's Costs on Basis of Defendant's defending Action alone—Recognition of Factors arising from Course of Defence—Defendant to hold Such Costs Fund on Trust in Proportions payable to Himself and Joined Parties—Plaintiff to pay Defendant's Disbursements exclusive of Disbursements occasioned by Joinder of other Parties—Such Parties to bear their Respective Disbursements—Plaintiff to pay Witnesses' Expenses of Each Party—Form of Order. In November, 1951, the plaintiff, P. purchased from A. Motors, a firm of motor dealers at Palmerston North, a Vauxhall Velox motor-car for the price of £785. He paid a deposit of £250, and the certificate of registration was put into his name and handed over to him with a letter, which showed that there was an unpaid balance of £556 free of interest for three months. The car did not suit P., and in February, 1952, he saw F. with a view to selling it. P. knew that F. sold cars on a commission basis for such people as would entrust them to him. He did not give F. an unconditional authority to sell. He told F. that when F. found a prospective purchaser for the Velox, he was to bring him to P., and then, provided a Morris Minor approved by P. was at the same time available, P. would be willing to sell the Velox at a price of approximately £780. The interview took place at F.'s place of business ("Eden Car Sales"). At or about the same time as this arrangement with F., P. telephoned A. Motors at Palmerston North, and requested to be allowed to sell the Velox. Permission was granted, provided the balance owing was paid immediately the car was sold. During February, 1952, F. suggested to P. that the car should be put into a garage to have one or two scratches taken out, and to "bring it up to standard." P. agreed, and handed the car over to F. for this purpose. On or before March 5, P. handed over to F. the registration certificate for the car. On March 17, or thereabouts, it came to the knowledge of A. Motors, the unpaid vendors of the car, that it was in the garage of F. Motors at Palmerston North, displayed for sale. The secretary of A. Motors, at once telephoned to P., at Wellington, and told him that his car was at Palmerston North, and asked for immediate payment of the balance owing of £556. P. sent a cheque for £200 at once, and said that the balance would be forwarded as soon as he received payment for the car, which, he said, was in the hands of a dealer, F. for sale. A. Motors got in touch with F. who paid out of his own moneys, the balance of £350 to P. Motors. P. never saw the car, or F. again. Unknown to P., on March 5, F. had sold the car to W. (the fifth party herein) for £600. At the time of the sale to W. the certificate of registration and a signed change of ownership form were handed over to him by F.; the latter was afterwards proved to be a forgery. On the same day W. sold it on to I. Motors (the fourth party) for £650. On March 11, I. Motors sold the car to F. Motors (the third party) for £720. This transfer was registered on March 20. The latter firm took the car to Palmerston North, where they displayed it for sale. This had come to the knowledge of A. Motors, who on March 17, had so informed P. as stated. Between P. and F., the balance due to A. Motors was immediately paid. F. Motors were then informed by A. Motors that the balance had been paid. On March 28, they sold it to G., the defendant, for £825. The learned Judge found that all the purchasing parties, G., the defendant, and the third, fourth, and fifth parties, had acted throughout in good faith and that all the purchases were for good and full consideration. F. was not shown as ever having been prosecuted, much less convicted of the theft of the car. In an action by P. against G. for the value of P.'s interest in the car (£450) the intermediate purchasers of the car being joined as parties by the defendant, *Held*, 1. That in the circumstances of this case, F. was a "mercantile agent" as that term is defined in s. 2 of the Mercantile Law Act, 1908, since in the customary course of his business (*i.e.*, in the generality of his transactions) he was shown to have had authority to sell the cars of his principals. (*Dexter Motors, Ltd.* v. *Mitcalfe*, [1938] N.Z.L.R. 804; [1938] G.L.R. 41, 461, referred to.) (*Pearson* v. *Rose and Young, Ltd.*, [1951] 1 K.B. 275; [1950] 2 All E.R. 1027, distinguished.) 2. That, although the sale of motor-cars in New Zealand differs from the sale of other chattels (in that purchasers require a certificate of registration issued under s. 18 of the Transport Act, 1949, to be produced and handed over with the vehicle, or at least available, together with a change of ownership form signed by the vendor in accordance with s. 26 of that statute), if F. sold a car in the exercise of his authority as a mercantile agent and was thereafter refused the requested papers by his principal, the property of the car would have passed; and the purchaser by making an appropriate application could obtain a duplicate certificate. 3. That, even if F. had obtained possession of the car in circumstances constituting larceny by a trick, the plaintiff had voluntarily handed over the possession of his car to F., and he had consented to F.'s retaining it in his possession; and such consent to F.'s actual possession of the car enabled F. as mercantile agent, to pass a valid title to it. (*Folkes* v. *King*, [1923] 1 K.B. 282, applied.) (*Du Jardin* v. *Beadman Bros.*, [1952] 2 Q.B. 712; [1952] 2 All E.R. 1609, referred to.) 4. That as F. was a mercantile agent, having possession of the plaintiff's car, with the plaintiff's consent, the sale by him of the car, in the ordinary course of his business as such to a purchaser in good faith, was in terms of s. 3 (1) of the Mercantile Law Act, 1908, a valid one; and the plaintiff accordingly failed in his claim. 5. That, in the circumstances of this case, the unsuccessful plaintiff should pay the costs of the action to the defendant, and the defendant should contribute towards the third party's costs, the third party should contribute towards the fourth party's costs, and the fourth party similarly to the fifth party's, recognizing as fully as possible the factors that all the defending parties took an active, but unequal, part in what was really a joint defence, and the circumstances of the contest before the Court. (*Bennett Ltd.* v. *E. Reynolds and Co., Ltd.*, [1929] N.Z.L.R. 119: [1929] G.L.R. 39, applied.) (*Klawanski* v. *Premier Petroleum Co., Ltd.*, (1911) 104 L.T. 567, referred to.) 6. That there should be an order that the plaintiff should pay the costs of the action to the defendant who would hold that sum as a costs fund on trust as to three-eighths for himself, as to one-fourth for the fourth party, and as to three-eighths for the fifth party (the third party notionally receiving some costs from the defendant and paying a similar contribution to the fourth party). 7. That the plaintiff should pay to the defendant his disbursements, excluding any which were occasioned by the addition of the third or subsequent parties (which the defendant would bear himself); that the third, fourth, and fifth parties would each bear their own disbursements; and that the plaintiff should pay each party the witnesses' expenses of such party. *Semble*, 1. That a defence based on s. 23 (1) of the Sale of Goods Act, 1908, did not avail the defendants, as the plaintiff was not stopped by his imprudent conduct from denying F.'s authority to sell, since mere conduct was insufficient to support that defence, as there must be something in the nature of a breach of duty to the parties setting up that defence; and that there was no breach of any duty owed by the plaintiff to any of the defending parties. (*Heap* v. *Motorists Advisory Agency, Ltd.*, (1923) 129 L.T. 146, followed.) 2. That, as there was no proof that any duty was owed by the plaintiff to any of the defending parties, the defence that the plaintiff should bear the loss as being the party whose conduct made the fraud possible also failed. (*Mercantile Bank of India* v. *Central Bank of India*, [1938] 1 All E.R. 52, and *Dexter Motors, Ltd.* v. *Mitcalfe*, [1938] N.Z.L.R. 804; [1938] G.L.R. 41 referred to.) *Paris* v. *Goodwin and Others.* (S.C. Palmerston North. July 29, 1954. Turner, J.)

BANKRUPTCY.

Discharge—Conditional Order of Discharge made—Bankrupt not fulfilling Condition—Application to make Order for Conditional Discharge Absolute—Proper Form of Application—Creditor accepting Part of Debt and agreeing not to oppose Any Application for Discharge—Agreement Illegal and tending to pervert Course of Justice—Bankruptcy Act, 1908, ss. 9 (e), 127 (a), (c), (d), 125 (2). The Court has no power under s. 131 of the Bankruptcy Act, 1908, to make absolute a conditional order of discharge made under s. 127 (*d*), as s. 131 refers to conditional orders of discharge under s. 127 (*c*) but it has power under s. 9 (*e*) to review, rescind or vary any decree made by it under the statute, including jurisdiction to revoke an order of discharge. The appropriate application to the Court, where a conditional order of discharge has been made under s. 127 (*d*) is for a revocation of that order, and for an immediate order of discharge under s. 127 (*a*), after notice of the application has been

advertised and sent to all the creditors under s. 125 (2). Where an order for discharge was made subject to the bankrupt's consenting to a judgment being entered against him by the Official Assignee for the total debt owing to a creditor, to which the bankrupt did not consent, an agreement entered into by that creditor, after payment to him by the bankrupt of the greater part of his debt, to offer no opposition to any application for discharge is illegal as tending to pervert the course of justice. (*Kearley* v. *Thomson*, (1890) 24 Q.B.D. 742, followed.) *Hubber* (*A Bankrupt*). (S.C. Invercargill. June 28, 1954. McGregor, J.)

CHARITY.

Charitable Bequest—Practicability—Inquiry—Form of Inquiry. By her will a testatrix directed: "The two cottages Kidbrook and Gretna to be used as missionary homes—[Mr. B.] . . . . also [Mr. S.] . . . both know my wish how they are to be used rest homes [for] retired aged missionaries". At the date of the proceedings the cottages were occupied by tenants who were entitled to the protection of the Rent Restrictions Acts and there was no indication that either or them proposed or would become liable to leave the premises. *Held*, Although the gift was charitable, there was no general charitable intention; the gift would fail if the purpose could not be carried out; and in order to avoid keeping the gift in suspense indefinitely the proper form of inquiry which would be directed was "whether at the date of the death of the testatrix it was practicable to carry her intentions into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time." (Form of inquiry in *Re James*, [1932] 2 Ch. 25, and *Re Wright*, [1954] 2 All E.R. 98, not followed.) *Re White's Will Trusts. Barrow and Another Gillard and Another*, [1954] 2 All E.R. 620 (Ch.D.)

COMPANY LAW.

Resolution—Entry in Minute-book—Authority given to Bank to honour Cheques signed by Named Persons—Later, Minute or Resolution of Company, Signed by Two Directors, authorizing Bank to Honour Cheques, etc., signed by Secretary only—Entry in Minute-book either Directors' entry or Company Entry insufficiently Signed—Article providing Cheques sufficient if signed by Certain Designated Officers—Such Article Declaratory only and not Restrictive of Directors' General Powers given by Management Clause in Articles to authorize Any Person to sign Cheques—Directors empowered to authorize Secretary to sign Cheques on Behalf of Company—Companies Act, 1933, s. 300. On July 10, 1947, the defendant company (herein termed "the company") opened with the plaintiff Bank a normal trading account, and its memorandum of association and the articles of association were produced to the plaintiff Bank (herein termed "the Bank") for perusal and noting. On that day, the Bank was authorized by the defendant company to honour cheques signed by H.F.F. and J.F., two directors, and N.F., the secretary of the company, in accordance with Art. 23 of that company's articles of association. That authority continued in full force and effect until November 5, 1947, on which date the then secretary of the company (N.F.) handed to the Bank a carbon copy of a minute or resolution of the company bearing the original signatures of H.F.F. and D.E.J. The signed copy minute or resolution was handed to the Bank as an instruction by the defendant company to the Bank that the banking account of the company was thenceforth to be operated pursuant to the authority expressed in the copy resolution or minute, which, as handed to the Bank, was as follows: "Resolution of directions of Furey and Associates Ltd. by entry in Minute Book pursuant to Section 300 of the Companies Act 1933 and dated 5th November, 1947: It appointed N.F. to operate the account. The resolution was signed in the minute-book by those persons only. This resolution was not in fact passed or completed in compliance with s. 300 of the Companies Act, 1933, in that less than three-fourths of the shareholders signed the resolution, and those who did sign held less than three-fourths of the nominal value of the shares of the company. Article 23 of the company's articles was as follows: "Instruments to which the seal of the company is affixed and all cheques bills of exchange promissory notes and other assurances and instruments shall be sufficiently executed on behalf of the company if signed by the Chairman alone or by any two Directors of the company or by one Director and the Secretary and Clause 71 of Table 'A' shall not apply." The Bank had no knowledge of and made no inquiry as to the total number of shareholders who held shares in the company on November 5, 1947, or as to whether the resolution complied with s. 300 of the Companies Act, 1933, or as to whether there had been any alteration in the articles of association of the company, before acting upon the resolution or minute referred to. On and after January 16, 1948, sums totalling £10,268 were paid into the company's account at the Bank. Between January 1, 1948, and November 1, 1948, cheques covering £11,376 2s. 2d. signed on behalf of the defendant company by N.F., in terms of the resolution or minute referred to, were presented to the Bank and paid by it from the banking account of the company. The total of £11,376 2s. 2d. included a sum of approximately £6,121 6s. 3d. expended by the company in fraud of building owners who had paid deposits in advance. The Official Liquidator of the company claimed against the Bank that the authority referred to above was invalid, and that the Bank was not entitled to act upon that authority. The Bank, in answer to such claim, asserted that it was legally entitled to rely and act upon that authority in the circumstances detailed. On originating summons upon an agreed statement of facts, *Held*, 1. That, as the entry in the minute-book could be read either as a directors' entry or as a company entry insufficiently signed, it was proper to read it as the former and so give it effect, rather than to read it as the latter and so give it no effect. (*In re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466, applied.) 2. That Art. 23 of the company's articles was not (as regards cheques) to be read so as to restrict the persons who may be authorized to sign them to those named in the Article, but it was to be read, regarding cheques as well as instruments under seal, as declaratory only and not restrictive of the general power given to directors under Art. 67 of Table A to appoint any person to sign cheques. 3. That the directors were empowered by Art. 67 of Table A. of the Companies Act, 1933, to authorize N.F. to sign on behalf of the company the cheques in question in these proceedings. 4. That, if the several matters referred to in the judgment should have put the Bank upon inquiry, it would have found, if it had inquired, that the minute had the effect of a directors' resolution validly passed. *The Commercial Bank of Australia, Ltd.* v. *Furey and Associates, Ltd.* (S.C. Wellington. February 8, 1954. Hutchison, J.)

CONTRACT.

Agreements to Benefit Strangers. *98 Solicitors' Journal*, 344.

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance—Covenant in Separation Agreement not to apply for Maintenance—Such Covenant not a Bar to an Order for Maintenance on Granting of Decree—General Application—Divorce and Matrimonial Causes Act, 1928, s. 33 (2). The jurisdiction of the Court to make an order for permanent maintenance on a divorce is based on public policy, and it cannot be ousted by private agreement of the parties. (*Bennett* v. *Bennett*, [1952] 1 K.B. 249; [1952] 1 All E.R. 413, followed.) Consequently, a covenant by a wife in an agreement for separation not to apply for maintenance is not a bar to an order of the Court on an application for permanent maintenance on the making of a decree absolute. This is of general application whether the covenant is not to apply for maintenance at all, or whether it is not to apply for maintenance in addition to that which is agreed to be paid in terms of the separation agreement. (*Amess* v. *Amess*, [1950] N.Z.L.R. 428; [1950] G.L.R. 204, explained and followed.) (*Hyman* v. *Hyman*, [1929] A.C. 601, referred to.) *Leighton* v. *Leighton*. (S.C. Timaru. June 13, 1954. McGregor, J.)

Practice—Trial—Right to begin—Burden of Proof—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2). The husband petitioned for dissolution of the marriage on the ground of the wife's desertion. The wife denied desertion, admitted that she had refused to cohabit with the husband for the three years immediately preceding the petition and alleged that she had just cause for her refusal. On a submission by the wife that, since on the pleadings the burden lay on her to prove "just cause," she had a right to begin. *Held*, that there was no doubt, especially having regard to the Matrimonial Causes Act, 1950, s. 4 (2), that in a suit for dissolution of marriage the burden of proof lay on the petitioner; in the present case the burden of proving desertion lay on the husband and, therefore, it was his duty to begin. (*Hewitt* v. *Hewitt*, [1948] 1 All E.R. 242, distinguished.) *Arding* v. *Arding*, [1954] 2 All E.R. 671 (P.D.A.)

Separation (as a Ground for Divorce)—Maintenance Orders varying Amounts payable under Separation Agreement—Question of Circumstance and Degree whether Agreement remains in Force and on Foot—Consequences of Breach of Such Agreement—Before Agreement can be rescinded Breach must go to Whole Consideration—Exercise of Discretion—Court to consider Inci-

dents of the Marriage, and Petitioner's Conduct in Relation to It—Divorce and Matrimonial Causes Act, 1928, ss. 10 (i), *16.* If a separation order is made during the existence of a separation by agreement, the separation order constitutes a new basis for the separation. It is a question of circumstance and degree whether the terms of a separation agreement are sufficiently altered by authority so that it can no longer be said to remain in force and on foot. (*Fairchild* v. *Fairchild*, [1924] N.Z.L.R. 276; [1924] G.L.R. 9; *Sleightholme* v. *Sleightholme*, [1934] N.Z.L.R. s. 153; [1934] G.L.R. 379; and *Nalder* v. *Nalder*, [1936] G.L.R. 166, considered.) A separation agreement in respect of consequences from breach (as in respect of payments under it) must be judged by the standard of ordinary contract; but, before the separation agreement can be rescinded, the breach must go to the whole consideration and not to part only. (*Mason* v. *Mason*, [1921] N.Z.L.R. 955; [1921] G.L.R. 635, followed.) (*Fearon* v. *Earl of Aylesford*, (1884) 14 Q.B.D. 792, and *Williams* v. *Williams*, [1933] G.L.R. 592, applied.) The Court, in exercising its discretion under s. 16 of the Divorce and Matrimonial Causes Act, 1928, is limited to a consideration of the incidents of the marriage and the conduct of the petitioner in relation to that marriage. Consequently, the Court cannot exercise its discretion to refuse a decree to a petitioner, against whom nothing has been established in relation to the marriage which was the subject of his suit, on the ground that he had been married three times and that he was a bad matrimonial risk. On November 29, 1946, the parties signed a separation agreement whereby the petitioner undertook to pay £1 5s. per week towards the respondent's maintenance during their joint lives. In March, 1948, the respondent sought a maintenance order, the arrears under the separation agreement being then £16 15s. The Magistrate ordered payment of maintenance to the respondent at the rate of £1 a week, and payment of 2s. 6d. a week off the arrears. On December 18, 1951, the petitioner was £44 7s. in arrears under the maintenance order (or £61 12s. 6d. in arrears at the rate prescribed by the agreement). On the application of the Maintenance Officer, the Magistrate, purporting to act by consent, increased the amount payable by the petitioner to the respondent to £1 17s. 6d. a week. The petitioner sought a divorce on the ground that the separation agreement had been in force for three years and upwards. At the date of the hearing of his suit, the total amount in arrear under the agreement was £36 7s. 6d., and, under the maintenance orders, £51 15s. It was contended for the respondent that the separation agreement was not in full force and effect when the suit was commenced, because (*a*) its "footing" was altered by the two successive maintenance orders, and (*b*) the petitioner, being in arrears with his payments of maintenance, could not enforce any rights under the agreement. *Held*, 1. That, even on the "footing" principle, there was not enough to make the agreement inoperative: the separation, which was the primary purpose of the agreement had continued without interruption and without any intention on the part of either party to it to alter or determine it; the agreement for separation and its terms were varied either by express or implied consent; and the petitioner had not at any stage questioned or tried to avoid his liability to maintain his wife, but had paid all he could in purported discharge of his obligations. 2. That the separation agreement could not be treated as rescinded by breach, as any breach by the petitioner went to part of the consideration only. *Redfern* v. *Redfern*. (S.C. Auckland. June 3, 1954. Finlay, J.)

LANDLORD AND TENANT.

Fitness for Human Habitation. *98 Solicitors' Journal*, 366.

Protection of Mortgagees against Tenancies. *217 Law Times*, 284.

Statutory Tenancy Replaced by Contractual Tenancy. *98 Solicitors' Journal*, 347.

NEGLIGENCE.

Res Ipsa Loquitur—*Rule of Evidence only—Onus of Proof shifting back to Plaintiff on Proof of Facts making Negligence or Absence of Negligence equally Probable Inferences from Circumstances.* The maxim, *Res ipsa loquitur*, is a rule of evidence only, with the consequence that the onus of proof will shift back to the plaintiff once facts are proved which make negligence or the absence of negligence equally probable inferences from the circumstances. (*Scott* v. *London and St. Katherine Docks Co.*, (1865) 3 H. & C. 596; 159 E.R. 665); judgment of *Fair*, J., in *Voice* v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1953] N.Z.L.R. 176, 184, and dictum of *Evatt*, J., in (*Davis* v. *Bunn*, (1936) 56 C.L.R. 246, 270, followed.) (*Woods* v. *Duncan*, [1946] A.C. 401; [1946] 1 All E.R. 420n; *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392, and *Turner* v. *National Coal Board*, (1949) 65 T.L.R. 580, distinguished.) *Auckland Transport Board* v. *M.F.G. and R. G. Coombes*. (S.C. Auckland. June 4, 1954. Finlay, J.)

NUISANCE.

Noise—Rifle Range—Nuisance affecting Plaintiff's Comfort—Noise of Shooting not Responsible for Harm to Plaintiffs' Dogs or Interference with Work of Their Farm Horses—Injunction and Damages. The owner and occupier of certain land (referred to herein as "F" Block) and his wife were plaintiffs in an action claiming an injunction and damages against the occupier of adjoining land (hereinafter referred to as "J" Block) and the president and committee members of a rifle club, whose range was situated in that land. The plaintiffs alleged that the conduct of the rifle club caused a nuisance to them on account of noise and danger. *Held*, 1. That the plaintiffs made no case on the ground of danger. 2. That, on the evidence, the noise of the shooting on the range amounted to a nuisance which seriously affected the comfort of the female plaintiff, and though her husband was not to any material degree distracted by the noise, he was entitled to be bracketed with his wife in her complaint, as her upset condition also affected him. (*Bloodworth et Ux.* v. *Cormack*, [1949] N.Z.L.R. 1058, and *Gaunt* v. *Fynney*, (1872) L.R. 8 Ch. 8, applied.) 3. That, in the absence of any expert evidence, the noise of the shooting was not responsible for any harm to the plaintiffs' dogs; and the evidence did not show that any serious amount of work of the plaintiffs' horses would be interfered with or that there would be any lasting effect on horses from their nervousness during the shooting. 4. That there was no evidence that the male plaintiff as a member of the rifle club, impliedly complained that, in consideration of the club's spending money on the range, he would not take action against it for nuisance caused by noise and there was not such acquiescence on the part of the plaintiffs as would make it a fraud on their part. An injunction was granted restraining the defendants and the rifle club from using the present rifle range, the injunction to be suspended until the end of the 1954-55 season. *Jerram and Another* v. *Hood and Others*. (S.C. Gisborne. July 15, 1954. Hutchison, J.)

POLICE.

A Case of Specificatio. *104 Law Journal*, 296.

PRACTICE.

Adjournment of Proceedings. *104 Law Journal*, 325.

PROBATE AND ADMINISTRATION.

Lost Will—Attesting Witnesses—Identity Uncertain—Execution—Sufficiency of Evidence—Illiterate Testatrix—Proof of Testatrix's Knowledge of Contents—Code of Civil Procedure, R. 521. The testatrix, a person of Lebanese blood and illiterate as regards the English language, died on September 26, 1949. Probate in solemn form of a will claimed to have been executed by her on or about February 21, 1935, was applied for by the plaintiffs, ten sons and daughters. The will could not be found on her death. On January 15, 1935, the testatrix gave instructions to her solicitor, a practitioner of long experience, to prepare a will which made certain alterations to the dispositions of an earlier will made on December 10, 1925. The solicitor had no recollection of the execution of the will; no draft of it was available; and no diary was kept by him. The solicitor thought it was highly probable that he was a witness as he was testatrix's personal solicitor. A deeds envelope held by his firm in connection with the testatrix's affairs had endorsed thereon entries by the managing clerk recording the will as being dated February 21, 1935, noting that the earlier will of 1925 had been revoked, and showing that the later will had been uplifted on November 2, 1936, by the testatrix who made her mark on the receipt column of the envelope. The managing clerk did not remember having made the entries; but it was his normal practice to see that documents were properly executed and dated before filing them away. He could not recollect whether he was a witness to the will or not. One of the plaintiffs, a son, had seen the will and had read it. He stated that it was executed by the testatrix's mark, but he did not notice whether or not there were signatures of witnesses. It was the practice of the solicitor to read wills over to testators before execution, and he did not doubt that, if he attested the will, he would have read it over and explained it to the testatrix. In an earlier oral judgment,

His Honour had found that the presumption that the will had been destroyed *animo revocandi* had been rebutted by the evidence. *Held*, granting probate of the will limited until the original or an authentic copy was brought into Court, 1. That the evidence of the plaintiff son, supported by the circumstantial evidence of the solicitor and his managing clerk, together with the circumstance that the will had been made by a solicitor and was not an informal one, established that the will had been duly executed and attested. (*Harris* v. *Knight*, (1890) 15 P.D. 170; *In the Estate of C. R. Phibbs*, [1917] P. 93; and *In re Campbell*, [1948] N.Z.L.R. 510, considered.) (*Re Hennebury's Will*, (1859) 4 Nfld. L.R. 288, distinguished.) 2. That the contents of the will were proved from the instructions given to the solicitor. (*Fincham* v. *Edwards*, (1842) 3 Curt 63; 163 E.R. 656, on appeal (1842) 4 Moore 198; 13 E.R. 277, applied.) 3. That, where an affidavit from an attesting witness in the case of a blind or illiterate or ignorant testator could not be provided, R. 521 of the Code of Civil Procedure does not preclude other means of proof from being put forward, and, if satisfactory, being accepted as proof of the testatrix's knowledge of the contents of her will. *In re Hannah (deceased)*: *Hannah and Ors.* v. *Hannah*. (S.C. Napier. December 10, 1953. Hutchison, J.)

WILL.

Construction—Gift of Annuities "clear of income-tax"—Will made in New Zealand—Annuitants then and since Resident in United Kingdom—Ascertainment of Testator's Presumed Intention from Words of Will—Testator's Knowledge a Relevant Consideration. The testator, by his will, bequeathed annuities to each of two persons, who were at all material times resident and domiciled in the United Kingdom. He declared the annuities to be "clear of income-tax." The two annuitants were step-great-grandchildren of the testator; and, although they were not blood relations, he took a deep and affectionate interest in them and he helped them financially. He was familiar with their circumstances and the position of their family, and knew that they had been for many years resident in England, were domiciled there, and were expecting to remain there. He was aware that annuities given by his will would attract income-tax. He was a cosmopolitan business man who lived at one time in New Zealand and later in Sydney, and travelled extensively. It was agreed by all parties that New Zealand income-tax fell to be paid by the trustees, and not by the legatees. On originating summons, asking whether the trustees must pay out of the testator's estate any income-tax payable in the United Kingdom in respect of the annuities; and, if so, out of what part or parts of the testator's estate such payments should be made. *Held*, 1. That, in the construction of a New Zealand will, the proper approach is not to regard the words "clear of income-tax" as relating to New Zealand income-tax only unless there are clear indications that foreign income-tax is also included; and the real principle is in each case to ascertain from the words of the will what the testator intended, any knowledge which might fairly be attributed to him being a relevant consideration. (*In re Paterson. Rennick* v. *Guardian Trust, and Executors Co. of New Zealand, Ltd.*, [1944] N.Z.L.R. 104; [1944] G.L.R. 72, considered.) 2. That, on a consideration of the testator's knowledge and the circumstances of his personal relationship with the annuitants, there could not be attributed to him an intention of relieving the annuitants of New Zealand income-tax and of leaving them to bear the burden of British income-tax personally. 3. That, accordingly, both New Zealand and British income-tax on both annuities were to be borne and paid by the trustees and not by the annuitants or either of them, and such payment was to be made out of the part of the testator's estate from which the annuitants themselves were paid. *In re Edmiston (Deceased)*: *New Zealand Insurance Co., Ltd. and Others* v. *I'Anson and Others*. (S.C. Auckland. July 6, 1953. Stanton, J.)

Devises and Legatees—Equal Share of Residue divisible on Death of Surviving Daughter "amongst all my grandchildren"—Son living aged Eighty-three Years—Grandchildren born at Testator's Death taking Vested Share Liable to be Divested pro tanto by Birth of Additional Grandchildren—Class of Grandchildren not closed while Son alive. The testator left the income of his residuary estate to his four daughters, and thereafter made the following provisions: "6. I DIRECT my trustees immediately upon the death of the survivor of my said four daughters or the attainment by the youngest child of any of my present children of the age of twenty-one years whichever event shall last happen to divide my residuary estate equally amongst all my grandchildren." Clause 7 of the will provided: "7. I AUTHORISE AND EMPOWER my Trustees during the minority of any grandchild to apply any part of the share whether of capital or income to which such grandchild shall be entitled but not exceeding one moiety thereof in or towards the maintenance education and advancement in life of such grandchild and after the death of my surviving daughter to pay to any grandchild who shall have attained twenty-one years of age not exceeding two-thirds of the estimated share of such grandchild in the capital of my estate." The four daughters had died, but one son was still alive aged eighty-three years. On the testator's death eighteen grandchildren were living. Three had died before the death of the survivor of the four daughters. No grandchildren had been born since the testator's death. On originating summons to determine among what persons the residuary estate of the testator was divisible, *Held*, 1. That all grandchildren born at the testator's death took shares vested at his death but liable to be divested *pro tanto* by the birth of additional grandchildren. 2. That if no more grandchildren were born, the eighteen grandchildren would be entitled to the residuary estate, the personal representatives of those who have died taking the share of such deceased grandchildren. (*In re Miller*, [1931] G.L.R. 417) and *In re Lodwig, Lodwig* v. *Evans*, [1916] 2 Ch. 26, applied.) (*Price* v. *St. Hill*, (1913) 33 N.Z.L.R. 1096; 16 G.L.R. 613, considered.) (*Browne* v. *Moody*, [1936] A.C. 635 and *Greenwood* v. *Greenwood*, [1939] 2 All E.R. 150, referred to.) 3. That the class of grandchildren could not be closed whilst the son was alive. (*In re Deloitte, Griffiths* v. *Deloitte*, [1926] Ch. 56; and *Mainwaring* v. *Beevor*, (1849) 8 Hare 44; 68 E.R. 266, followed.) (*Andrews* v. *Partington*, (1791) 3 Bro. C.C. 40; 29 E.R. 610, distinguished.) 4. That the income from the shares, as from the death of the life-tenants, was payable to the living grandchildren and the representatives of deceased grandchildren; and up to two-thirds of the share of each in the capital could be paid over if the trustees desired to do so. *In re Wilson (decd.), Wilson* v. *Adams and Others*. (S.C. Auckland. November 4, 1953. Stanton, J.)

Devises and Bequests—Interpretation—Businessman's Motor-Car—Bequest of "All other articles of domestic or household use"—Motor-car, registered as a "business car," used by Testator principally in going from Home to Business—Intention of Testator to regard Car as "article of domestic use"—Motor-car passing under Bequest. Family Protection—Widow entitled to Life Occupancy of Family Home—More Suitable House being purchased by Trustees in Substitution therefor—Lump Sum allowed to Widow to meet Expenses of Change of Residence—Family Protection Act, 1908, s. 33. The testator bequeathed to his wife "all my furniture plate plated goods linen china glass books (except books of account) pictures prints statuary musical instruments and other articles of domestic or household use or ornament." The motor-car owned by the testator at the time of his death was ordinarily garaged at the deceased's residence approximately half a mile outside the Wanganui City boundary. It was used by the deceased principally in going from his home to his place of business, and in taking his wife and his daughter to town and elsewhere. There was no public transport passing the residence, which was situate on a road badly lighted, without paths, and unsuitable for foot passage at night or in wet weather. The car had been registered as a "business car" and the insurance premium was paid by the company of which the deceased was a member, so that, if occasion required, the car could be used on the company's business, though there is no evidence that it ever was so used. On question of law argued before the hearing of a claim under the Family Protection Act, 1908, *Held*, That the word "household effects" as used in the will were sufficient to include a motor-car, as a motor-car used in the interests of all the members of the household is an "article" of household use; it ought to be attributed to the testator that he regarded his car as an "article of domestic or household use"; and accordingly, the car passed under the bequest. (*Re Liverton, Liverton* v. *Liverton*, [1953] N.Z.L.R. 612; *In re Sim*, [1917] N.Z.L.R. 169; and *In re Wavertree, Rutherford* v. *Hall-Walker*, [1933] Ch. 837, applied.) (*Collier* v. *Squire*, (1827) 3 Russ. 467; 38 E..R. 650, mentioned.) The testator, by his will, gave his wife a life occupancy of the family home, and provided that it could be sold and another house substituted for it. She applied for further provision in the nature of a sum in cash to enable her to move from her present home, when it had been sold by the trustees and another house more suitable as a home for her purchased. *Held*, That it was proper that a lump sum of £500 should be paid to the widow, in addition to the benefits taken by her under the will. *Dean* v. *Rees and Others*. (S.C. Wanganui. May 28, 1954. Gresson, J.)

Undue Influence in Wills. *104 Law Journal*, 292.

THE INTERNATIONAL CODE OF ETHICS FOR LAWYERS.

The subject of an International Code of Ethics for Lawyers was first discussed in 1948 at the second conference of the International Bar Association held at The Hague, when papers were presented by lawyers from the Netherlands, the United States of America, Austria, and Brazil.

At this stage, unanimity was not reached; but it was resolved that the Executive Council should be asked to consider the preparation, and to prepare, or have prepared, an International Code of Ethics based upon the broad principles which ought to govern the exercise of the Legal Profession.

Among the papers furnished in 1950 was one supplied by Dr. Eduardo J. Couture, of Uruguay, who was at that time President of his Society as well as President of the Association. The title of this was "The Commandments of the Lawyer," and its translation, as follows, may be of interest to readers :—

1. STUDY.—The law changes constantly. If you do not follow in its steps, each day you will be less of a lawyer.
2. THINK.—The law is learned by studying, but is exercised by thinking.
3. WORK.—The profession of the lawyer is arduous and fatiguing set before the service of justice.
4. STRIFE.—Your duty is to fight for the law, but the day in which you find the law in conflict with justice, strive for justice.
5. BE LOYAL.—Loyal to your client, whom you must not abandon until you understand he is unworthy of you. Loyal to your adversary, even when he is unloyal to you. Loyal to the Judge, who ignores the facts and must trust in what you say; and which, regarding the law, sometime or other, must trust in what you implore him.
6. BE TOLERANT.—Be tolerant of another's truth in the same measure as you wish that yours be tolerated.
7. BE PATIENT.—Time avenges that which is done without its collaboration.
8. HAVE FAITH.—Have faith in the law, as the best instrument for the human act of living together; in justice, as normal destiny of the law; in peace, as a kind of constituent of justice; and, above all, have faith in liberty, without which there is no law, no justice, no peace.
9. FORGET.—The profession of the lawyer is a battle of passions. If in each battle you were to burden your soul with rancour, a day would come in which life would be impossible for you. The struggle ended, forget your victory as quickly as your defeat.
10. LOVE YOUR PROFESSION.—Try to consider the profession of the lawyer in such a manner that the day in which your son asks your counsel on his destiny, you will consider it an honour to propose to him that he become a lawyer.

Following the reading of papers in 1950, a Committee (consisting of representatives of eleven countries) was established to consider the matter further and to furnish a report. At the same time, it was recommended that a course in Juridical Ethics in Law Schools be established, or where this was not possible, the making of arrangements for a series of lectures to be given dealing with the subject.

The Chairman of the Programme Committee suggested that a distinction should be made between the unification of *national* Codes of Ethics and an *International* Code of Ethics, which will apply only to cases where lawyers of more than one country are involved. He suggested that the Association should first make a survey of the national canons of ethics of the national Bar organizations. The second problem, he thought, was an international code which would apply to cases where lawyers in various countries co-operate with each other. Such code would have a limited importance and should, of course, take into consideration, the various concepts of the different countries.

It was decided that the Executive Council should continue its inquiries with a view to having the draft code prepared for consideration at the 1952 conference. The subject was not included, however, in the agenda for the conference held that year, although the special committee took the opportunity of exchanging views. One of the resolutions then carried, was that it was desirable that every law student should be instructed in the highest standards of professional conduct of the Bar. The conclusion then reached by the Committee was to confine the code to one which would apply only to cases where lawyers in various countries co-operate with each other.

Another attempt has now been made to submit a draft Code, and this was to have been considered by the Conference at Monaco, in July.

In the explanatory notes preceding the draft Code, it was pointed out that a sharp distinction should be made between the rules of honour for lawyers and the rules of law with which these lawyers have to work. It was not proposed that the Code should in any way encroach upon the national and local codes, but to comprise the main features common to all codes to which the Committee had access.

It is possible that the Code has been amended by the recent Conference, and that it will be improved upon in the years to come; but it is hoped that it may ultimately come to present an internationally-approved standard of conduct and of rights and duties of an advocate in all free countries, and that it will serve as an outline for national and local codes of ethics. A further purpose, which was visualised by the Committee, and one which will commend itself, is that the Committee should act in an advisory capacity to member-organizations as well as to individual members, who may require assistance.

The following is a copy of the draft Code of Ethics :—

1. This Code of International Ethics in no way is intended to supersede existing national or local rules of legal ethics or those which may from time to time be adopted.

A lawyer shall not only discharge the duties imposed upon him by his own national or local rules, but he shall also endeavour when handling a case of an international character to adhere to the rules existing in those other countries in which he is active.

2. A lawyer shall at all times maintain the honour and dignity of his profession.

He shall, in his practice, as well as in his private life,

abstain from any behaviour which may tend to discredit the profession of which he is a member.

3. A lawyer shall preserve independence in the discharge of his professional duty.

A lawyer shall not engage in any other business or occupation, if by doing so he may cease to be independent.

4. A lawyer shall treat his professional colleagues with the utmost courtesy and fairness.

A lawyer who undertakes to render assistance to a foreign colleague shall always keep in mind that his foreign colleague has to depend upon him to a much larger extent than in the case of two lawyers within the same country. Therefore, his responsibility is much greater, both when giving advice and when handling a case.

For this reason it is inappropriate to accept a case which the particular lawyer concerned for some reason is incompetent to handle, or which he cannot handle, with the required promptness because—*e.g.* of pressure of other work.

5. Any oral or written communication between lawyers shall be accorded a confidential character, unless certain promises or acknowledgments are therein made on behalf of a client.

6. A lawyer shall always maintain due respect towards the Court. A lawyer shall without fear defend the interests of his client and without regard to any unpleasant consequences to himself or to any other person. A lawyer shall never supply incorrect information to the Court. A lawyer shall never defend a cause of the righteousness of which he is not conscientiously convinced nor give advice which in any respect is contrary to the law.

7. It shall be considered improper for a lawyer to communicate about a particular case directly with any person whom he knows to be represented in that case by counsel. This rule applies to the opposite party as well as to clients on whose behalf he has been consulted by another lawyer.

8. A lawyer should never solicit business and he should never consent to hand a case unless at the direct request of the party concerned. However, it is proper for a lawyer to handle a case which is assigned to him by a competent body, or which is forwarded to him by another lawyer or for which he is engaged in any other manner permissible under his local rules or regulations.

9. A lawyer shall at all times give his client a candid opinion on any case. He shall render his assistance with scrupulous care and diligence. This applies also if he is assigned as counsel for an indigent person.

A lawyer shall at any time be free to refuse to handle a case, unless it is assigned to him by a competent body.

A lawyer should only withdraw from a case during its course for good cause, and if possible in such a manner that the client's interests are not adversely affected.

The loyal defence of a client's case may never cause an advocate to be other than perfectly candid or to go against the law.

10. A lawyer shall always endeavour to reach a solution by settlement out of Court rather than start legal proceedings.

A lawyer should never stir up litigation.

11. A lawyer should not acquire financial interest in the subject-matter of a case which he is conducting or has conducted. Neither should he, directly or indirectly, acquire property about which litigation is pending before the Court before which he practises.

12. A lawyer should never represent conflicting interests. This also applies to all members of a firm or partnership of lawyers.

13. A lawyer should never disclose what has been communicated to him confidentially in his capacity as a lawyer, even after he has ceased to be the client's counsel. This duty extends to his partners, to junior lawyers assisting him, and to his employees.

14. In pecuniary matters, a lawyer shall be most punctual and diligent.

He should never mingle funds of others with his own and he should at all times be able to refund money he holds for others.

He shall not retain money he received for his client for longer than is absolutely necessary.

15. A lawyer may require that a deposit is made to cover his expenses, but the deposit should be in accordance with the estimated amount of his charges and the probable expenses and labour required.

16. A lawyer should never forget that he should put first, not his right to compensation for his services, but the interest of his client and the exigencies of the administration of justice. His right to ask for a deposit or to demand payment for his services, failing which he may withdraw from a case or refuse to handle it, should never be exercised at a moment on which the client or prospective client may be unable to find other assistance in time to prevent irreparable damage being done. The lawyer's fee should, in the absence or non-applicability of official scales, be fixed on a consideration of the amount involved in the controversy and the interest of it to the client, the time and labour involved and all other personal and factual circumstances of the case.

17. A contract for a contingent fee, where sanctioned by the law, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation and subject to supervision of a Court as to its reasonableness.

18. A lawyer who engages a foreign colleague to advise on a case or to co-operate in handling it is responsible for the payment of the latter's charges.

When a lawyer directs a client to a foreign colleague, he is not responsible for the payment of the latter's charges, but neither is he entitled to a share of the fee of this foreign colleague.

19. It is contrary to the dignity of a lawyer to resort to advertisement.

20. No lawyer should permit his professional services or his name to be used in any way which would make it possible for persons to practise law who are not legally authorized to do so.

SECRET TRUSTS.

The Problem of Johnson v. Ball

By MALCOLM BUIST, LL.M.

(*Concluded from p. 227*)

B. SECRET BENEFICIARIES VIS-A-VIS A PERSON CONSTITUTED A TRUSTEE BY TERMS OF WILL.

It may sometimes be that "the legal position in terms of the Wills Act" spoken of by Lord Sumner is that the legacy is given expressly in trust, so that the beneficiary named in the will is such "as trustee." Two kinds of case arise under this heading: first, those in which the trust is enforced in favour of the undisclosed person for whose benefit the testator has constituted the trust, and secondly, those in which the trust is enforced in favour only of the residuary legatee. That is to say, some of these half-secret trusts take effect in the manner intended by the settlor, whilst others do not.

It will be noted regarding both kinds of case under this heading, however, that a trust is always enforced. It is impossible for the situation to arise that eventuated in *In re Falkiner*, for instance, where the persons intended to take in trust were able to take absolutely. In view of the intense criticism of half-secret trusts of the type of *Johnson* v. *Ball*, it is surprising that decisions such as *In re Falkiner* have not brought down similar complaints, for strict adherence to the terms of the will is the foundation of both these decisions. *Blackwell* v. *Blackwell*, [1929] A.C. 318, the representative and leading case where the half-secret trust took effect, seems to lie between *Johnson* v. *Ball* and *In re Falkiner*, and will now be considered.

Mr. Blackwell had been ill for many weeks, and was anxious concerning the welfare of a woman, not being his wife, and of his son by her. Friends agreed to act as trustees, so he completed the following codicil to his will:

> This is a codicil to the last will of me, John Duncan Blackwell. I give and bequeath to my friends, Mark Oliver, Arthur Ernest Harrison, Frank Wettern, Ernest Watson Barnett, and William Percy Cowley the sum of twelve thousand pounds free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit and to apply the income and interest arising therefrom yearly and every year for the purposes indicated by me to them with full power at any time to pay over the capital sum of eight thousand pounds to such person or persons indicated by me as they think fit, and to pay the balance of four thousand pounds to my trustees as part of my residuary estate, and upon the same trusts as are declared in my will and previous codicils.

His solicitor, at the time of the execution, made a memorandum of the trusts. On probate of the will and codicils, the testator's wife and her son objected that the trusts failed, and contended that the trustees held the £12,000 as part of the residue. The House of Lords, however, unanimously upheld the trusts.

Lord Buckmaster stated, at p. 327:

> The real difficulty lies in considering whether the fact that in the will itself it is made plain that the gift is fiduciary destroys the principle upon which verbal evidence has been admitted to show the nature of a gift purporting to be absolute and beneficial.

Here, he apparently had in mind the difference between half-secret and fully secret trusts. On p. 329, he stated a general principle applicable to half-secret trusts:

> . . . the personal benefit of the legatee cannot be the sole determining factor in considering the admissibility of the evidence. It is, I think, more accurate to say that a testator having been induced to make a gift on trust in his will in reliance on the clear promise by the trustee that such trust will be executed in favour of certain named persons, the trustee is not at liberty to supress the evidence of the trust and thus destroy the whole object of its creation, in fraud of the beneficiaries.

The *ratio decidendi* of Lord Buckmaster's speech seems to have included the point that for nearly fifty years the matter had been settled by *In re Fleetwood*, (1880) 15 Ch.D. 594.

Viscount Sumner did not, at the outset, think that mere lapse of time should consecrate the authority of *In re Fleetwood*. "It is a grave thing," he said, "to affirm a doctrine that violates the prescriptions of a statute, and especially such a statute as the Wills Act, even though the error is of long standing." But then he stressed that in itself the doctrine of equity, by which parol evidence is admissible to prove what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the Legislature has regulated the right of testamentary disposition. He said, at p. 334:

> A Court of conscience finds a man in the position of an absolute legal owner of a sum of money which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction.

This, of course, refers more strictly to the fully secret trust. Then he brought in the half-secret trust set up by Mr. Blackwell's will, where first the will stated on its face that the legacy was in trust but did not state what the trusts were, and further contained a residuary bequest, and secondly the legatees were acting with perfect honesty. After extensively reviewing the principles involved, at p. 339, he pointed out:

> The effect therefore of a bequest being made in terms on trust, without any statement in the will to show what the trust is, remains to be decided by the law as laid down by the Courts before and since the [Wills] Act and does not depend on the Act itself.

For this reason he treated the matter as one of construction under the ordinary rules of interpretation. Previous authorities such as *In re Fleetwood* he therefore declined to overrule—not (as Lord Buckmaster) because they were old, but because they stated the settled canon of construction applicable.

Finally Lord Warrington of Clyffe pursued the matter on similar lines, saying:

> I think the solution is found by bearing in mind that what is enforced is not a trust imposed by the will, but one arising from the acceptance by the legatee of a trust, communicated to him by the testator, on the faith of which acceptance the will was made or left unrevoked, as the case might be.

This seems to amount to saying that between a half-secret trust of this nature and a fully secret trust there is no difference in substance, and that the same general rules apply to both—and such indeed seems to be the tenor of all the judgments delivered in this case.

An anticipatory link between *Blackwell* v. *Blackwell*, as an example of a half-secret trust enforced according to the intentions of the testator, and *In re Keen, Evershed* v. *Griffiths*, [1937] 1 Ch. 236, as an example of a half-secret trust enforced in a manner other than that intended by the testator, is supplied by the remarks of Lord Sumner in the former case, at p. 339, where he says :

> A testator cannot reserve to himself the power of future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime : *Johnson* v. *Ball* (1851) 5 De G. & Sm. 85 ; *In re Boyes* (1884) 26 Ch. D. 531 ; *Riordan* v. *Banon* (1876) 10 I.R. Eq. 469 ; *In re Hatley* (1902) 2 Ch. 866. To hold otherwise would indeed be to " give the go-by " to the requirements of the Wills Act, because he did not choose to comply with them.

In *Blackwell* v. *Blackwell* itself this was *obiter*, because there the testator had not tried to reserve such power. But was the dictum wrong in principle ? The Court of Appeal, in *In re Keen*, thought not ; but it has been objected to as anomalous by such authorities as the late Sir William Holdsworth (*53 Law Quarterly Review*, 501). A typical comment is seen in Dr. Hanbury's *Modern Equity*, 5th Ed. (1949) at p. 135, as follows :

> Unfortunately the House of Lords, by certain dicta, has approved a distinction, established by Parker, V.-C., in *Johnson* v. *Ball* (1851) 5 De G. & Sm. 85, 91, between communications of the trust prior to or contemporaneous with the will on the one hand, and subsequent to it on the other. As the law now stands, the former are enforceable, but not the latter ; in the latter case a trust results for the next of kin. Thus a highly artificial wedge has been driven between these cases and those, such as *Re Gardner* [1920] 2 Ch. 523, where B appeared as a beneficial legatee on the face of the will, for in those a communication at any time during A's life is sufficient to give effect to the trust in favour of C.
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> As in *Blackwell* v. *Blackwell*, [1929] A.C. 318, the communication was prior to the will, it was unnecessary for the House of Lords to have approved of *Johnson* v. *Ball*, (1851) 5 De G. & Sm. 85, 91, and it is submitted that Holdsworth (*Essays in Law and History*, 199) presents cogent and unanswerable reasons why it should be overruled. For Parker, V.-C., misconceived the true basis on which the doctrine of secret trusts rests. This was pointed out by Page-Wood, V.-C., in *Moss* v. *Cooper* (1861) 1 J. & H. 352, 367, and has already been indicated in the present account. A will is revocable until death. The condition, therefore, in which a legatee takes a piece of property, is its condition at the time of the death. If it is burdened with a trust of which he knows, he must take it subject to that trust, and no difference can possibly be created either by the time of communication or by the fact that he is named as trustee. The real and only difference is between this case and the cases such as *Re Boyes* (1884) 26 Ch. D. 531, where the communication was subsequent to the death, and the property has already passed to the legatee. Unfortunately *Johnson* v. *Ball* (1851) 5 De G. & Sm. 85 has been granted yet a new lease of life by the Court of Appeal in *Re Keen* [1937] Ch. 236. Its principle is ignored by the American Restatement of Trusts.

In *In re Keen* (*supra*) the litigation arose concerning the operation of cl. 5 of the testator's will, which read as follows :

> I give to the said Charles Arthur Cheshyre Hazelhurst and Edward Evershed the sum of £10,000 free of duty to be held upon trust and disposed of by them amongst such person, persons or charities as may be notified by me to them or either of them during my lifetime and in default of such notification and so far as such notification shall not extend I declare that the sum of £10,000 or such part thereof as shall not be disposed of in manner aforesaid shall fall into and form part of my residuary estate.

This clause had appeared in an earlier will dated 31st March, 1932, on which date the testator handed to Mr. Evershed a sealed envelope containing the relevant notification. Mr. Evershed still held this envelope when the last will, which bore date August 11, 1932, was executed. After the testator's death, the envelope was found to contain a note of the defendant's name in respect of the whole sum of £10,000, and the executor sought the Court's directions whether he should pay this sum to the defendant or to the residuary legatee. The Court of Appeal directed that the latter be paid, chiefly on the grounds that the testator had endeavoured to retain a power of making a subsequent disposition of his property without complying with the provisions of the Wills Act.

Towards the end of the principal portion of his judgment, Lord Wright, M.R., said :

> As in my judgment cl. 5 should be considered as contemplating future dispositions and as reserving to the testator the power of making such dispositions without a duly attested codicil simply by notifying them during his lifetime, the principles laid down by Lord Sumner (*supra*) must be fatal to the appellant's claim. Indeed they would be equally fatal on the construction for which Mr. Roxburgh contended, that the clause covered both anterior or contemporaneous notifications as well as future notifications. The clause would be equally invalid, but, as already explained, I cannot accept that construction. In *Blackwell* v. *Blackwell*, [1929] A.C. 318, *In re Fleetwood* (1880) 15 Ch. D. 594, and *In re Huxtable*, [1902] 2 Ch. 793, the trust had been specifically declared to some or all of the trustees at or before the execution of the will and the language of the will was consistent with the fact. There was in these cases no reservation of a future power to change the trusts, in whole or in part. Such a power would involve a power to change a testamentary disposition by an unexecuted codicil and would violate s. 9 of the Wills Act.

The penalty for a breach of trust is that equity will require the holder of the legal estate to make good the trust. But the penalty for a breach of s. 9 of the Wills Act is that the will is invalid to the extent of the defect. Between cases of the type of *Blackwell* v. *Blackwell* and those of the type of *In re Keen* there stands, in the mind of the Court, the barrier of s. 9 of the Wills Act, 1837, in much the same manner as s. 4 of the Statute of Frauds, 1677, stands so often between the intention of the parties and the legal enforcement of their bargain.

Incorporation of Documents : *In re* Karsten.

That the way of the transgressor of a statute prescribing form is hard, was recently illustrated in New Zealand by the case which this series of notes commenced, *In re Karsten*, [1950] N.Z.L.R. 1022, aff. on app. [1953] N.Z.L.R. 456. The decision in *In re Keen* is linked with that in *In re Karsten* by the comments on the former (and on the similar case of *Re Jones*, [1942] Ch. 328) by Dr. R. E. Megarry, in *59 Law Quarterly Review* 23, when he points out that in general a legacy given on the trusts to be found in some document which the will refers to as existing and which in fact exists will not create a secret trust but will in effect secure the inclusion of the parol evidence in the grant of probate.

Miss Rona Permain Karsten, of Levin, was minded to make a will, and wished to benefit various charitable and other organizations. To accomplish this, however, she gave the whole of her estate to Esther Ellen Edwards, who was appointed executrix, " to be distributed as the said Esther Ellen Edwards has direction from me." Upon the application for probate by the executrix, Gresson, J., required an undertaking by her that she would before carrying out her declared intention to fulfil these trusts, seek the directions of the Court. His Honour explained (p. 1024) that it might

be that the legatee held the estate in trust for the next of kin. (In terms of the foregoing analysis of *Blackwell* v. *Blackwell* and *In re Keen*, this presupposed that the vesting provision in the will would stand.)

The case gives rise to a useful contrast. The testatrix gave to the beneficiary two sets of instructions concerning the disposal of the estate by way of secret trust. Before making her will, she gave oral instructions; after making the will, she left an envelope marked "Mrs. E. E. Edwards. Directions *re* will.", containing similar instructions, but with some variations from the oral instructions. The *prior* instructions, as was the case in *Blackwell* v. *Blackwell*, placed the legatee under a personal obligation "not altering or affecting the will," and, in enforcing this obligation, equity was able to keep every jot and tittle of the law. They were therefore treated by Cooke, J., and by the Court of Appeal, as constituting a valid secret trust (subject to a reservation excluding benefits to the trustee herself: *In re Rees, Williams* v. *Hopkins*, [1950] Ch. 204; [1949] 2 All E.R. 1003).

The *subsequent* instructions in writing were set aside in both Courts, apparently on two grounds. First, in point of construction, it was held that the terms of the will referred to a direction already given, which would expressly exclude any subsequent instructions. The second ground was that where there is a gift expressed to be in trust, but the purposes are not declared on the face of the will, then "in the present state of the law the terms of the trust must be communicated to and accepted by the trustee before the execution of the will: see *Johnson* v. *Ball* ((1851) 5 De G. & Sm. 85; 64 E.R. 1029)": per Northcroft, Hutchison, and North, JJ., at p. 474. This is the ground on which the Court of Appeal in England stood in *In re Keen*.

The Gist of Johnson *v.* Ball.

It will be of interest to see whether the second ground in *In re Karsten* is ever distinguished in New Zealand upon an argument that, in the light of the first ground, it is *obiter*. In any event, it is clear that the Court of Appeal here is satisfied to follow *Johnson* v. *Ball* notwithstanding the criticisms directed against that authority.

Now, if *Johnson* v. *Ball* be considered exclusively in the light of the equitable spirit of the doctrine of secret trusts, there may not appear to be any reason for saying, in effect, "If you declare A. to be a bare legatee under your will, then you may engraft a secret trust upon his conscience by a communication either before or after the date of your will, as long as you are alive. If, however, you declare him a trustee in your will, you may engraft the secret purposes upon his conscience only beforehand or contemporaneously, but not afterwards."

But, as we have seen above, in *In re Keen* and *In re Karsten* it was s. 9 of the Wills Act, not any principle of equity, that prevented the secret trust from operating. It was not that equity declined to enforce a trust communicated subsequently, but that the testator's reserving power to alter his will informally prevented the Court from giving effect to the relevant words of the will. Equity followed the law, and the gift could not vest in the trustee in terms that would enable him to administer the proposed trust, *whenever communicated.*

To this effect is the decision in *In re Boyes*: *Boyes* v. *Carritt*, (1884) 26 Ch.D. 531. In terms of the form of the will the case has to be classified amongst the fully secret trusts, but when the circumstances are looked into, the principles applied are drawn from s. 9 of the Wills Act, just as they were in the case of *Johnson* v. *Ball*. In a will dated June 1, 1880, the testator proceeded, "I give devise and bequeath all my real and personal estate whatsoever and wheresoever unto Frederick Blasson Carritt absolutely. And I appoint the said Frederick Blasson Carritt sole executor of this my will." In his defence Mr. Carritt said that in giving him the instructions the testator expressed to him verbally his desire to provide for a certain lady and child, whose names he did not wish to appear in the will, and he therefore desired to leave the whole of his property to the defendant as trustee to act with respect thereto according to any further written directions which might be given to him . . . No such directions were ever in fact given by the testator to Mr. Carritt in his lifetime, but after his death there were found amongst his papers two letters, one dated the 10th February, 1880 (which was proved to be a mistake for 1881), written at Antwerp, and the other bearing date the 4th June, 1881. Both letters indicated one Nell Brown as the intended beneficiary: neither was executed as a testamentary instrument. Kay, J., at p. 535, summed up the practical situation:

> Mr. Carritt admits that he is a trustee of all the property given to him by the will. He desires to carry out the wishes of the testator as expressed in the two letters, but of course he can only do so if they constitute a binding trust as against the next-of-kin.

This leads to a piece of logical analysis. Mr. Carritt has admitted that he holds on trust, therefore he cannot take the beneficial interest. The fact of the existence of the trust has come to his notice before the property has become vested in him—a point that seems to have been essential if the Court was to have jurisdiction in equity. He cannot hold in trust for himself (this point being tacitly assumed, though it was expressly dealt with by the Court of Appeal in New Zealand, in *In re Karsten*, [1953] N.Z.L.R. 456, under authority of *In re Rees, Williams* v. *Hopkins*, [1950] Ch. 204; [1949] 2 All E.R. 1003, as previously mentioned). Nor may he hold it in terms of the letters, because these purport to be testamentary directions, and, as was suggested at an earlier stage of these notes, s. 9 of the Wills Act "decapitates" interests set up in defiance of its requirements. The outcome is a kind of resulting trust in favour of the next-of-kin, and, notwithstanding the criticisms of *Johnson* v. *Ball* it seems not unreasonable to point out that the steps of logical analysis by which the decision in *In re Boyes* is reached appear to be the same as those by which the decisions in *Johnson* v. *Ball*, *In re Keen*, and *In re Karsten* are arrived at.

Johnson v. *Ball* was followed in *In re Gardner, Huey* v. *Cunnington*, [1920] 1 Ch. 501, where Eve, J., drew attention to the chief difference between a fully secret trust and a half-secret trust, by saying,

> The testator cannot make a gift to be held upon trusts thereafter to be defined by an instrument not executed as a will. I think this is clear from the judgment in *Johnson* v. *Ball*.

At this stage it is appropriate to quote a footnote appearing at p. 136 of Dr. Hanbury's *Modern Equity*, 5th Ed.:

> It is possible however to argue that *Re Keen* rests upon a very narrow and technical point, that the trust sought to be established by parol evidence was inconsistent with the very terms of the will.

(This was the first ground in *In re Karsten*). A rational principle, recalling the comment by Dr. Megarry quoted earlier in these notes regarding incorporation of documents, was however kept in view by the Court of Appeal in *In re Edwards's Will Trusts, Dalgleish* v. *Leighton*, [1948] 1 Ch. 440. The facts were briefly that the testator, Lionel Edwards, executed two documents as follows: (i) a settlement providing *inter alia* for payment to "such persons or for such purposes as the settlor shall by any memorandum under his hand direct," and (ii) a will of the same date but made subsequently to the settlement, under which will the balance of the residuary estate was given to the trustees of the settlement "to be held by them upon trusts and subject to the powers and provisions therein declared and contained so far as such trusts powers and provisions are subsisting and capable of taking effect." At p. 445, Lord Greene, M.R., said:

> The testator makes quite clear what his testamentary wishes are. He is directing that those concerned with the administration of his estate shall turn to the document, namely, the settlement, in order to find out what those wishes are. The identification of that document is a perfectly simple matter. There is no question what the document is, and there is no rule of law which makes it impossible to lead evidence to identify it. I say that at the outset, because reliance has been placed upon a decision of Simonds, J., as he then was, in *In re Jones* [1942] Ch. 328. That was a case in which the testator directed payment of a legacy to trustees "appointed or to be appointed under special declaration of trust for the benefit of Tettenhall College or otherwise as therein contained executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute". In the very gift itself the testator is endeavouring to reserve power to himself to modify or alter the gift at some subsequent date by means of a subsequent instrument not executed in accordance with the Wills Act. Simonds, J., pointed out that whereas in the case of a document in existence it is always possible to lead evidence to identify the document, in the case before him it never would be possible to lead evidence to identify any subsequent document. On that ground he held that if effect were given to the direction it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil in violation of the Wills Act. He held therefore that the gift failed for uncertainty.

It will be seen that, in this summary, the learned Master of the Rolls brought out the principle underlying the attitude of the Courts to half-secret trusts of the class of *Johnson* v. *Ball*, namely, that to approve the trust would in fact "give the go-by to the Wills Act." This a fully secret trust, or a half-secret trust of the class of *Blackwell* v. *Blackwell* never does. Then he went on to deal with the situation before him, in contrast to that in *In re Jones*:

> That seems to me to be a very different case from the present one. The settlement here is a document which can be perfectly well identified, and there is no rule of law to the contrary. It can accordingly be incorporated as a piece of writing into the testamentary disposition. Indeed, if the settlement, instead of being a thing having value and force in itself, had been merely a memorandum previously executed to which, in his will, he referred, it could perfectly well have been admitted to probate as a testamentary instrument.

It will be seen that in this manner the written directions are treated as being on the level of any other writing proposed to be incorporated into a will. If they can be identified within the limits imposed by the Wills Act, they are available to establish the details of the trust; if not, they are excluded and the beneficial interest under the trust is caught up with the residue. The further consequences are then discussed by Lord Greene:

> The question then would have arisen, what provisions in this instrument are valid and what are invalid I start then with the proposition that the incorporation of this document into this will is a permissible and easy matter. When I say incorporation, I am referring to what I may perhaps call the mechanical act of incorporation by reading the language of it into the will itself. We have now got therefore to a stage where there is a will, part of the directions of which cannot operate any more than they could operate if they had been contained, as in the case of *In re Jones*, in the will itself. The presence of that invalid provision in the case of *In re Jones* did not involve its being struck out of the probate and treated as not being part of the will, nor do I see any reason why the invalidity of a provision contained in this settlement should be any reason for excluding it from the testamentary directions of the deceased. The result of his having in that identifiable document included something which the law does not allow to have effect, is a matter to be considered after probate, when the question of the validity of his testamentary dispositions arises. The result therefore is that there is here a composite will consisting of a combination of the actual will itself plus the provisions of the settlement.

Conclusion.

It seems then that we end with the rule stressed in the two old cases of *Wallgrave* v. *Tebbs*, (1855) 2 K. & J. 313; 69 E.R. 800, and *Tee* v. *Ferris*, (1856) 2 K. & J. 357; 69 E.R. 819, that the Court cannot look at a document excluded by the Wills Act, 1837, and with *Johnson* v. *Ball* as a particular application of this rule. The Courts do not seem to be embarrassed as to principle by recognizing that fully secret trusts do not infringe this rule, that half-secret trusts of the type of *Blackwell* v. *Blackwell* do not infringe it, and that half-secret trusts of the type of *Johnson* v. *Ball* do infringe it. In other words, *Aequitas sequitur legem* where persons taking beneficially under a trust do so by virtue of, and not extraneously to, the provisions of a will.

Ham and Eggs.

In Mr. Justice Gorman's Court the other day some ham was produced in the course of demonstrating a number of bacon slicing machines. It appeared that one of these machines in a fit of enthusiasm had proceeded to slice not only some bacon but also its operator's thumb. The operator thought this was going too far and asked Gorman, J., to do something about it . . . but in the end everybody seems to have been satisfied—except presumably the plaintiff who lost his action.

To deal with the egg incident, we have to go to the Court of Appeal where my Lords Justices Singleton, Jenkins and Hodson gave careful consideration in a Divorce Appeal to the very interesting allegation that the throwing of a boiled egg by a husband at his wife amounted to an act of cruelty. Now it so happens that I have strong views on the proper boiling of eggs, and I have no difficulty in imagining circumstances in which a husband would be amply justified in demonstrating his disapproval of his wife's egg-boiling eccentricities by casting at her some mal-treated product of a hen.

The Court of Appeal, however, seem to have concerned themselves mainly with the cumulative effect of habitual egg-throwing as opposed to what Singleton, L.J., referred to as "an odd shot" and with the degree of hardness of the egg when thrown. This latter point is difficult to follow, for it seems reasonably clear that the harder the egg is cooked by the wife the greater the justification for the husband's action—unless, of course, he was so lacking in gastronomical appreciation as to prefer his eggs hard boiled, in which event, I am not afraid to admit, I lose all interest in him.—C.G., in the *Law Journal* (London).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Crime in New Zealand.—The Department of Justice is to be congratulated upon the brochure published this month in which the problem of crime is, in the words of the Minister of Justice, briefly surveyed and an outline given of the principles upon which the Department acts in fulfilling its duty to provide better protection for society. The brochure, which is attractively produced and printed at the Mount Crawford Prison, Wellington, deals with various phases of criminal administration and has an excellent section on the role of the probation service. It points out that, in relation to population, we have many more people convicted of all offences in the Courts than are convicted in England and Wales; almost as many convicted of crimes against property as in England and Wales; more convicted of crimes against the person than in England and Wales, and more than one and a half times as many people convicted of sexual offences as in England and Wales. Although our punishments were consistently higher, the rate of increase for sexual offences between 1949 and 1952 was considerably greater than that for England and Wales. Already we have 50 per cent. more people in our prisons daily than in England and Wales; one and a half times as many young people sentenced to Borstal; and twice as many young people sentenced to imprisonment. This is an extremely serious picture; and, even if it might be said that in a much smaller population crime is easier to detect, this is an explanation that is neither an excuse nor a remedy.

Caskets in the Case.—In *Lunn* v. *Coats*, which is the subject of a judgment by Mr. Raymond Ferner, S.M., the defendant was charged with failing to stop after an accident and with failing to ascertain whether he had injured any person. It seems that he did stop about 200 yards down the road and was brought back to the scene of the accident by an eye-witness, after he had sent away his mother and brother who were passengers in his car and had got out and made an examination of it. Counsel for the defendant submitted that the information charged his client with two separate and distinct offences, and was bad for duplicity; whereupon the Magistrate called on the informant to make his election upon which of the two offences he desired to proceed and the following discussion (which is included in the judgment) ensued:—

Ferner, S.M. (orally): "It seems therefore, Mr. Prosecutor, that you are somewhat in the position of the suitors of the fair Portia in Shakespeare's *The Merchant of Venice*. You will recall that they had to read the riddle of the caskets and choose correctly."

Dr A. L. Haslam, for the defendant: "Pause there, Morocco!"

Traffic Officer P. Lunn: "I elect to proceed on the charge that the defendant failed to ascertain whether he had injured any person after the accident."

Mr. Ferner, S.M.: "You have chosen correctly. Perhaps it is just as well, Mr. Prosecutor. You will recall that in the play, a suitor who made the wrong choice was subject on his oath to some very important personal restrictions."

Had the traffic officer been as familiar with the casket case as he probably is with its modern radio version (The Money—or the Bag) he would probably have plumped for the silver one with its injunction, "Who chooseth me shall get as much as he deserves." At least, he got a conviction on one of the charges. The unlucky one was the driver. If he had remembered the first suitor's self-imposed injunction, "Pause there, Morocco, and weigh the value with an even hand", he certainly wouldn't have been convicted at all.

Fair Value.—The story is told of a compromise of a claim under the Deaths by Accidents Act effected by a prominent practitioner on behalf of a childless farmer whose wife had been killed in an accident for which liability was ultimately admitted. What with one thing and another the case had dragged on, and a writ for £3,000 was issued just before the period of limitation had expired. From this point, negotiations for settlement proceeded more intensely and the matter was settled for £750 and full costs. On payment being received, the practitioner got his client into his office and apologized for the delay. "All things considered, you didn't do so badly," said the farmer cheerily as he pocketed his cheque. "I've got £750 and a new wife who is much better than the old one."

The Perils of Inaccuracy.—"I do not mind lying," observed Samuel Butler, "but I hate inaccuracy." This reflection may well have been present in the mind of one Dr. R. M. Withers who recently gave evidence for the defence at Fitzroy, Australia, on a prosecution laid against one Fitzgerald for driving a motor-car while intoxicated. In his evidence, the doctor stated that on examination he had asked the defendant to walk up and down some steps in his surgery, and he considered that the defendant had done so satisfactorily. The Police had given evidence that one of their number was present, and, on the first test of walking up the steps, the defendant had stumbled. On being questioned as to this, and making an explanation at variance with the Police, the Magistrate said to the doctor: "You didn't say this the first time when asked. That is prevarication of the truth. Do you know what prevarication means?" On the witness's replying in the affirmative, the Magistrate then turned to two Justices who were associated with him, inquired whether that was good enough, and then told the Police to take the witness into custody. On a review of this order for contempt, Martin, J., pointed out that everybody who exercises judicial functions must be ready and fearless at all times to protect the Court against unseemly behaviour, included in which is wilful prevarication; but, because of the immensity of the power to commit, nobody exercising judicial power should exercise it, unless he is very certain of the guilt and until he has stated in terms which cannot be misunderstood what is the gravamen of the complaint and, above all, without giving the person charged a full opportunity to answer the charge before he is adjudged guilty of it. In the case before him, he was not satisfied that the witness did in fact have the opportunity. The rule *nisi* to discharge the doctor from any penalty for contempt was made absolute. *Morriss* v. *Withers*, [1954] A.L.R. 233.

LAND TRANSFER: CHANGE OF NAME OF REGISTERED PROPRIETOR.

By E. C. ADAMS, I.S.O., LL.M.

EXPLANATORY NOTE.

The authority for the registration of a change of name under the Land Transfer Act will be found in Reg. 57 of the Land Transfer Regulations, 1948 (Serial No. 1948/137).

A precedent for the change of the name of a corporation will be found in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 607.

If the registered proprietor who has changed name is a natural person, existing precedents will require to be modified to bring them into harmony with the provisions of s. 2 of the Births and Deaths Registration Amendment Act, 1953, which provides that any person who has attained the age of twenty-one years, or who has at any time been married, may by deed poll change his name whether as to his surname or as to his first name or Christian name. Where the name of any person is changed under this section or has been changed before the commencement of the section by deed poll in accordance with the law in force at the date of the deed, the change of name may be registered by depositing the deed in the Registrar-General's office. Apparently registration of the change of name with the Registrar-General is permissive and not mandatory; but the procedure so authorized is so convenient that one may reasonably anticipate that in practice it will be almost universally adopted.

Where the change of name is duly registered in the office of the Registrar-General, the following precedent may be used.

PRECEDENT.

APPLICATION TO REGISTER CHANGE OF NAME OF A REGISTERED PROPRIETOR UNDER THE LAND TRANSFER ACT.

IN THE MATTER of the Land Transfer Act, 1952

and

IN THE MATTER of A. C. of in the Provincial District of Farmer.

I, A. C., of in the Provincial District of Farmer, do solemnly and sincerely declare as follows:—

1. That by a certain Deed Poll bearing date the day of , 19 duly executed by me, I being a person who had attained the age of twenty-one years, lawfully changed my name from A. B. to A. C. and notice of my said change of name was duly published in the *New Zealand Gazette* on the day of 19 .

2. THAT a true copy of the said Deed Poll is hereunto annexed and marked with the letter "A."

3. THAT on the day of 19 I duly registered the said change of name in the Registrar-General's Office in accordance with the provisions of Section 17A (3) of the Births and Deaths Registration Act, 1951, (as enacted by Section 2 of the Births and Deaths Registration Amendment Act 1953).

4. THAT a duly certified copy of my birth certificate is hereunto annexed and marked with the letter "B."

5. THAT I am the same person as the person named "A. B." and registered as the proprietor of an estate of freehold in fee simple in ALL THOSE pieces of land situate in the Provincial District of Wellington FIRSTLY containing ONE HUNDRED AND SEVEN ACRES (107 acs.) be the same a little more or less being Section 23 Block I on the Public Map of the Survey District deposited in the Office of the Chief Surveyor at and being the whole of the land comprised and described in Certificate of Title Register Book Volume folio Registry SUBJECT to Memorandum of Mortgage Registered No. Wellington Registry and SECONDLY containing ONE HUNDRED AND THREE ACRES THREE ROODS TWENTY PERCHES (103 acs. 3 rds. 20 pchs.) be the same a little more or less being Part of Section 21 of the Survey District and being the whole of the land comprised and described in Certificate of Title Register Book Volume folio Wellington Registry SUBJECT to Memorandum of Mortgage Registered No. Wellington Registry.

6. THAT I am not aware of any other person either at law or in equity having any estate or interest in the said lands other than the Mortgagee under the said Memorandum of Mortgage.

7. THAT I am lawfully entitled to be registered in my name of "A. C." as the proprietor of an estate of freehold in fee simple in the said lands AND I DO HEREBY APPLY to be so registered accordingly.

AND I MAKE this solemn declaration conscientiously believing the same to be true and under and by virtue of an Act of the General Assembly of New Zealand intituled the Justices of the Peace Act 1927.

DECLARED at this day of 19 before me:— } A. C.

D. F.

A Solicitor of the Supreme Court of New Zealand.

The Title Deeds of Freedom.

. . . It has been said that the price of freedom is eternal vigilance. The question arises, "What is freedom?" There are one or two quite simple, practical tests by which it can be known in the modern world in peace conditions, namely: Is there the right to free expression of opinion and of opposition and criticism of the Government of the day?

Have the people the right to turn out a Government of which they disapprove, and are constitutional means provided by which they can make their will apparent?

Are their Courts of justice free from violence by the Executive and from threats of mob violence, and free of all association with particular political parties?

Will these Courts administer open and well-established laws which are associated in the human mind with the broad principles of decency and justice?

Will there be fair play for poor as well as for rich, for private persons as well as Government officials?

Will the rights of the individual, subject to his duties to the State, be maintained and asserted and exalted?

Is the ordinary peasant or workman who is earning a living by daily toil and striving to bring up a family free from the fear that some grim Police organization under the control of a single party, like the Gestapo, started by the Nazi and Fascist parties, will tap him on the shoulder and pack him off without fair or open trial to bondage or ill-treatment?

These simple, practical tests are some of the title-deeds on which a new Italy could be founded . . . (Sir Winston Churchill, to the Italian people on August 28, 1944, from *The Second World War*: Triumph and Tragedy.)