New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"In his recent great speech, President Roosevelt referred to the four great freedoms which every true democracy must seek. But there is also a fifth freedom: the freedom of every citizen to appeal to the Courts to protect him from injury and insult, even though the wrong was committed by the misuse of official power. It would be impossible to apply for a writ of habeas corpus *from a German concentration camp or sue the Gestapo for damages for wrongful arrest."*

—VISCOUNT SIMON, L.C.

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LIBEL: A NEW TERROR FOR PUBLISHERS.

"LIABILITY for libel does not depend on the intention of the defamer; but on the fact of defamation," said Russell, L.J. (as Lord Russell of Killowen then was) in *Cassidy* v. *Daily Mirror Newspapers, Ltd.*, [1929] 2 K.B. 331, 354.

As long ago as 1934, the High Court of Australia in *Arthur Lee* v. *Wilson*; *Clifford Lee* v. *Wilson*, 51 C.L.R. 276, held that if words, capable of referring to more than one person, are found to defame each of them, all may recover, notwithstanding the fact that the writer intended his words to refer to still another specified person. The High Court rejected the argument that *E. Hulton and Co.* v. *Jones*, [1910] A.C. 20, is to be limited to cases where the defamatory statement is published without the intention of referring to any existing person, but is proved to be understood to refer to the plaintiff.

Now, the Court of Appeal in England has laid down the rule that words which are true of A. may be defamatory of B., if other persons, knowing the circumstances, would reasonably think the words to be defamatory of B.

In *Hulton's* case, which is a text-book in itself, it will be remembered that the defamatory words were written of a fictitious person but were held to be defamatory of an existing person. Now *Newstead* v. *London Express Newspaper, Ltd.*, [1940] 1 K.B. 377; [1939] 4 All E.R. 319, emphasizes the responsibility of newspapers and other publishers of printed matter by applying the principles of *Hulton's* case to the new set of facts so that a statement, true in itself of an existing person, can in the appropriate case be held to be defamatory of another person. In other words, the fact that the words are true of an existing person or fiction about an imaginary person are immaterial: the fact that a person has been defamed by those words alone matters, so long as other persons reasonably think the words to be defamatory of him. The fact that the words are true of another person is not a defence, if they were capable of a meaning defamatory fo the plaintiff.

In the recent case, the plaintiff was Harold Cecil Newstead, a hairdresser, who assisted his father in business at Camberwell Road, Camberwell. The words complained of were published in the *Daily Express* (London) of March 30, 1938, under the title "Why do people commit bigamy?" and were as follows:

> Harold Newstead 30-year-old Camberwell man, who was jailed for nine months, liked having two wives at once. Married legally for a second time in 1932—his legal wife is pictured right, above—he unlawfully married nineteen year old Doris Skelly (left, above). He said "I kept them both till the police interfered."

The case for the plaintiff was that he was well known in the hairdressing trade in Camberwell and elsewhere as Harold Newstead, and that he was about thirty years of age, and a Camberwell man. He alleged that the words published were understood by a number of people to refer to him, and to mean that he had committed bigamy and been punished therefor. The defendants admitted publication, but denied that the words complained of were intended or understood to refer to the plaintiff, or that they were defamatory of him. They asserted that the words were published of an existing person of the name and description therein contained, and were intended, and were understood, to refer to that person, who was not the plaintiff. In relation to that person, they said, the words published were true, and they pleaded justification and fair comment.

The plaintiff, in his reply, submitted that, if the words were intended to refer to some other person, it was the absolute duty of the defendants, or at least their duty, to take reasonable care to give a precise and detailed description of such person, denoting him exclusively, and to ensure that the words published should not be capable of referring to any other person. In breach of such duty, they had recklessly struck out words giving the occupation and address of the person convicted.

Hawke, J., left the following question, *inter alia*, to the jury: Would reasonable persons understand the words complained of to refer to the plaintiff?

The jury were unable to agree on the answer to this question, and they assessed damages at one farthing, and were discharged.

The question as to what effect should be given to the findings of the jury was adjourned for further consideration. Having heard the arguments, Hawke, J., held (*a*) that the principle in *Jones* v. *E. Hulton and Co.*, [1909] 2 K.B. 444; [1910] A.C. 20, applied, and the fact that the words complained of were intended to refer to, and were true of an existing person, who was not the plaintiff, did not afford a defence to the action; (*b*) that an answer to the question whether reasonable persons would understand the words to refer to the plaintiff was essential to the success of the plaintiff in the action; and (*c*) that, therefore, no judgment would be entered, and the parties must be left to make up their minds as to the future course of the litigation. The defendants appealed.

Two questions arose on the appeal. The first was whether it was open to the defendants to plead that they had neither intended to defame the plaintiff or been guilty of negligence in so doing, and wrapped up in this question was the further question whether the fact that certain words are true of one person makes it impossible for them to be defamatory of another. Arising out of these questions certain passages in the judgment of Farwell, L.J., in *E. Hulton and Co.* v. *Jones* (*supra*) came under review. Special reliance was placed on the following two passages. The learned Lord Justice said, at page 480:

> But it is not enough for a plaintiff in libel to show that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understand it to be written of him: he must also show that the defendant printed and published it of him; for if the defendant can prove that it was written truly of another person the plaintiff would fail.

Again, His Lordship said, at p. 481:

> If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him.

In the course of his judgment, Sir Wilfred Greene, M.R., examining carefully the process of reasoning of which these passages form part, discussed the dictum of Farwell, L.J., at p. 481 (where he referred to the element of intention as being as essential to an action of defamation as to an action of deceit, and that it can be proved in the same way in both actions) said that the analogy of the action of deceit is not a true analogy. In that action the necessity for the presence of a fraudulent intention is satisfied if it be shown that the defendant made the statement in question recklessly, careless whether it were true or false. But this recklessness and this carelessness have nothing to do with the meaning of the statement—they are relevant only to the question of the fraudulent intent of the person making it. But in applying the analogy to the case of libel, Farwell, L.J., applied the test of recklessness to the meaning of the words used, which is quite a different matter. The Master of the Rolls added:

> If the words used when read in the light of the relevant circumstances are understood by reasonable persons to refer to the plaintiff, refer to him they do for all relevant purposes. Their meaning cannot be affected by the recklessness or honesty of the writer.

It may be seen from the report of *E. Hulton and Co.* v. *Jones* (*supra*) that in the House of Lords, Lords Atkinson and Gorell expressed "substantial concurrence" with the judgment of Farwell, L.J., while Lords Atkinson and Gorell also concurred with the opinion of Lord Loreburn, L.C., with whom Lord Shaw did not differ in any material particular. As Sir Wilfred Greene in *Newstead's* case said, the expressions of the learned Law Lords had given rise to much doubt and controversy. The learned Master of the Rolls preferred to base his own conclusions on the words of Lord Loreburn, at p. 23, where he said:

> Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it.

And Sir Wilfred Greene went on to say that in the case of libel:

> Once it is held that the words are capable of referring to the plaintiff, it is, of course, for the jury to say whether or not they do so refer. Subject to this, the principle is in truth an illustration of the rule that the author of a written document is to be taken as having intended his words to have the meaning which they convey when understood in the light of the relevant surrounding circumstances. In the case of libel, the same words may reasonably convey different meanings to a number of different persons or groups of persons, and so be held to be defamatory of more persons than one.

After giving careful consideration to the matter, the learned Master of the Rolls said he was unable to hold that the fact that defamatory words are true of A. makes it as a matter of law impossible for them to be defamatory of B., which was in substance the main argument on behalf of the appellants.

As to such a proposition leading to hardship, His Lordship said that the hardships are in practice not so serious as might appear, at any rate in the case of statements which are *ex facie* defamatory. Persons who make statements of this character may not unreasonably be expected, when describing the person of whom they are made, to identify that person so closely as to make it very unlikely that a Judge would hold them to be reasonably capable of referring to someone else, or that a jury would hold that they did so refer. This is particularly so in the case of statements which purpose to deal with actual facts. If there were a risk of coincidence, it ought, His Lordship thought, in reason to be borne not by the innocent party to whom the words are held to refer, but by the party who puts them into circulation. In matters of fiction, there is no doubt more room for hardship. Even in the case of matters of fact, it is no doubt possible to construct imaginary facts which would lead to hardship. There may also be hardship if words, not on their faces defamatory, are true of A., but are reasonably understood by some as referring to B., and as applied to B. are defamatory. But such cases must be rare. The law as he understood it, is well settled, and can only be altered by legislation.

In his judgment, du Parcq, L.J., said that it seemed to him to be impossible, consistently with the principle of *Hulton's* case that liability for libel depended on the fact of defamation, to make the defendant's liability depend on the accuracy of his words in relation to some person, other than the plaintiff, at whom he says he meant to strike. Nor did he think, with the greatest respect for the view expressed by Farwell, L.J., in that case in the Court of Appeal, that any doctrine which would make the defendant's liability depend upon his state of mind, or the degree of care which he exercised, was reconcilable with that principle. His Lordship went on to say:

> In the present case, and in any similar case in which a defendant says that he was only speaking the truth of another person and not meaning to attack the plaintiff, it may well be right to direct the jury that a reasonable man must be aware of the possibility (it is for them to say in each case whether it amounts to a probability) that in any district there may be more than one person of the same name, and that, in considering how a reasonable man would understand the words, they must assume that he will read them with such care as may fairly be expected of him, not ignoring any parts of the description which are inapplicable to the plaintiff. If a defendant has been careful and precise, he may by his care avoid the risk of a successful action; but he cannot in my opinion escape liability merely by showing that he was careful and that his intentions were good. The Master of the Rolls has dealt fully with this part of the case, and I would add that I find myself in complete agreement with all his observations upon it.

The appeal was accordingly dismissed.

Before the decision in *Newstead's* case, it was not settled law (if we except the *Lee* case in the High Court of Australia) whether or not a publisher was liable if he could disprove negligence or recklessness in verifying the facts upon which the defamatory statement was based; and it has been argued that such a defence might prevail in cases where an innuendo is needed to make the words defamatory. In terms, the Court of Appeal judgment states an unmistakeable rule of law, and it is not limited to render liable the publishers of newspapers, as the majority of the Court infer that their judgments extend to any defendant in an action for defamation.

The effect of the judgment in *Newstead's* case, as in the *Lee* case in Australia, seems to carry legal principles beyond the bounds of practical application, and in such circumstances, legislative action can alone remove the dangerous possibilities to newspapers and other publishers.* Of course, if, in the *Newstead* case, the *Daily Express* sub-editor had been so astute as to give the occupation of the bigamist (the *Law Reports* do not indicate what it was), the hairdresser of the same name and locality may have sought in vain for damages. Consequently, careful identification seems to be called for in every instance when truthful statements, which might be defamatory of someone or other, are published, so that the risk of coincidence mentioned by the Master of the Rolls may be eliminated. But, even if this be done, the very identification (as by occupation) may exactly fit someone, who, in a "gold-digging" claim, has every possibility of success as the law now stands. Every man, having acquaintance with him, on reading the alleged libel may not be prudent enough to think that it may refer to someone else of the same occupation and locality: as du Parcq, L.J., said, every reasonable man would not necessarily be so cautious.

As the rule now stands, it is immaterial whether the defamatory statement has been made without intention or whether it has been made negligently or recklessly in not ascertaining the existence of the plaintiff or without guarding against the applicability to him of the words used truthfully of another. This is, in effect, a rule of absolute liability, since the circumstances of the publication are relevant only on the assessment of damages. The dangers are indicated in the dissenting judgment of MacKinnon, L.J., in *Newstead's* case.

If the same words may reasonably be understood by different persons to apply to A., B., and C., there is no reason why A., B., and C. should not all have simultaneous and independent causes of action, notwithstanding the publisher's intent to refer to no existing person (as in *Hulton's* case) or to a specific person and none other (as in *Newstead's* case).

In other words, though the description which pointed out a plaintiff was supposed by the defendant publisher to point out another man, the defendant is equally liable as when the description was supposed to point out nobody, since he has no right to assume that there was, within the scope of his circulation, nobody, or nobody else, to whom the description answered. This was the effect of the judgment in the Australian case, and this, too, is the principle of *Newstead's* case. It is, in effect, what Mr. Justice Holmes said in delivering the opinion of the Court in *Peck* v. *Tribune Co.*, (1908) 214 U.S. 185, 189:

> If a man sees fit to publish manifestly hurtful statements concerning an individual without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable if the statements are false, or are true only of someone else.

It is for the jury in each case to determine the reasonableness of the inference made by a reader or group of readers in attributing a defamatory imputation to an innocent party, even if the statement complained of be true of another. This emphasizes and gives a special application to Lord Mansfield's dictum, "Whatever a man publishes, he publishes at his peril."

Cf. Law of Libel Amendment Bill, (Gt. Brit.) 1938, which was not proceeded with.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Gisborne. 1941. February 4; March 27. *Myers*, C.J.

F. (NOW H.) v. F.

Divorce and Matrimonial Causes—Alimony and Maintenance—Permanent Maintenance—Consent Order for Weekly Payments—Jurisdiction—Whether Court may discharge modify or temporarily suspend such Order—Divorce and Matrimonial Causes Act, 1928, ss. 33 (2), 41.

An order by consent, contained in a decree absolute, that the respondent pay the petitioner £2 per week for permanent maintenance, payable weekly, is an order within the terms of s. 33 (2) of the Divorce and Matrimonial Causes Act, 1928, which confers jurisdiction upon the Court to make an order for maintenance during the joint lives of the husband and wife. Therefore both the proviso to s. 33 (2) and the provisions of s. 41 of the Act are applicable, and the Court may discharge, modify or temporarily suspend the order.

Hall v. *Hall*, [1915] P. 105, and *Managh* v. *Managh and Goodger*, [1937] N.Z.L.R. 498, G.L.R. 323, referred to.

Maidlow v. *Maidlow*, [1914] P. 245, considered and explained.

Quaere, Whether *Maidlow* v. *Maidlow*, in which it was held that an order for payment to the wife during her life could only be made by consent, and that the order being so made could not be varied, applies in New Zealand, in view of the provisions of s. 41 of the statute.

Counsel: *Vickerman*, in support (for the husband); *Arndt*, to oppose (for the wife).

Solicitors: *Ongley, O'Donovan and Arndt*, Wellington, for the petitioner; *B. N. Vickerman*, Wellington, for the respondent.

Case Annotation: *Hall* v. *Hall*, E. and E. Digest, Vol. 27, p. 506, para. 5410; *Maidlow* v. *Maidlow*, *ibid.*, p. 505, para. 5408.

(*Continued on p. 84.*)

PART PERFORMANCE.

Limitations on the Equitable Doctrine.

There appears to be some difference of opinion among writers of legal texts as to the nature of part performance taking contracts out of the operation of the Statute of Frauds. In the well-known *Fry on Specific Performance*, 5th ed., p. 292, it is stated that :—

> The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one ; that they prove the existence of some contract, and are consistent with the contract alleged.

On the other hand, Professor James Williams's recent book on the Statute of Frauds, at pp. 250, 251, advances the view that the requirement is stricter than the above-quoted passage would indicate, that the acts of part performance must not only indicate the existence of some contract but be unequivocally referable to such a contract as alleged. An examination of the cases will show that the latter view is correct and will also clarify the meaning of the phrase " unequivocally referable."

In 1739, in *Gunter* v. *Halsey*, Amb. 586 ; 27 E.R. 381, a bill for specific performance of a parol agreement for the sale of lands, the Lord Chancellor said, " As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement." A more complete early statement is to be found in *Frame* v. *Dawson*, (1807) 14 Ves. 386, 387, 33 E.R. 569, 570, where a parol agreement for extension of a lease was not enforced, although the lessee had made considerable expenditure on repairs. Some colour is lent to the view taken in *Fry* by the words of the Master of the Rolls, where he said :

> The principle of the cases is, that the act must be of such a nature, that, if stated, it would of itself infer the existence of some agreement ; and then parol evidence is admitted to show what the agreement is.

The leading case on the subject, however, appears to limit more closely the nature of the acts of part performance. In *Alderson* v. *Maddison*, (1881) 7 Q.B.D. 174, aff. on app. 8 App. Cas. 467, the defendant claimed a life estate in an intestate's farm by virtue of a parol agreement whereby the defendant worked without wages for some years. It was held by the Court of Appeal that neither the continuance of the defendant in the service of the intestate nor the fact that the intestate executed a document which he intended as a will was part performance sufficient to take the case out of the Statute of Frauds. Baggallay, L.J., said at p. 178 :

> Now, it is a well-recognized rule, that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement ; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement ; it is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject matter. As was said by Lord Hardwicke in the case of *Gunter* v. *Halsey*, they must be such as could have been done with no other view or design than to perform the agreement. Thus payment of part, or even of the whole, of the purchase-money is not sufficient to exclude the operation of the statute, unless it is shown that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement.

On appeal to the House of Lords, the judgment of the Court of Appeal was affirmed. The Earl of Selborne, L.C., said, in part, at p. 479 :

> All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.

And Lord O'Hagan stated at p. 485 :

> But there is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words " as could be done with no other view or design than to perform that agreement." It must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

In *Britain* v. *Rossiter*, (1879) 11 Q.B.D. 123, a frequently mentioned case, Colton, L.J., said :

> The true ground of the doctrine of equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, *prima facie*, make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken.

The learned Lord Justice therefore concluded that the doctrine of part performance was confined to questions relating to land. This conclusion, however, was adversely criticized in *McManus* v. *Cooke*, (1887) 35 Ch.D. 681, where an agreement having been entered into between the plaintiff and the defendant to give each other an easement of light and the plaintiff had performed his part, the plaintiff was held entitled to have the agreement enforced.

In *Maddison* v. *Alderson* (*supra*), at p. 474, the Earl of Selborne, L.C., also dissented from the view expressed by Colton, L.J. :

> It has been recently decided by the Court of Appeal in *Britain* v. *Rossiter* that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject matter than land ; an opinion which seems to differ from that of Lord Cottenham : see *Hammersley* v. *De Biel*, (1845) 12 Cl. & F. 45, 8 E.R. 1312, and *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 572 ; 41 E.R. 1379.

It appears, therefore, that acts of part performance, in order to take a contract out of the operation of the Statute of Frauds, must be such that it would be a fraud in the defendant to take advantage of the contract not being in writing. The acts must also be unequivocally referable to the contract, that is, they must be such that they indicate the existence of some such contract as alleged and cannot otherwise be reasonably explained. In addition, there are two other limitations upon the doctrine of part performance, " The contract to which they refer must be such as in its own nature is enforceable by the Court " and " there must be proper parol evidence of the contract which is let in by the acts of part performance " : see *Fry on Specific Performance*, 291, quoted with approval in *Chaproniere* v. *Lambert*, [1917] 2 Ch. 356, and in *Rawlinson* v. *Ames*, [1925] Ch. 96.

CONTRACTS TO LEAVE PROPERTY BY WILL.

Remedies for Breach.

By I. D. CAMPBELL.

"A Court of Equity cannot enforce specific performance against a dead testator of a promise made during his life to leave property by will."

This proposition appears in the interesting judgment of Ostler, J., in *Young* v. *Anderson*, [1940] N.Z.L.R. 239. In this case a number of questions fell to be decided, but this article is concerned only with the decision on the question of remedies.

The facts relevant for the present purpose were these. William Abbott died in 1912 leaving the whole of his estate to his widow, Annie Abbott. The Abbott children thereupon claimed from Mrs. Abbott wages for work done for their parents and repayment of money lent. In consideration of these claims being withdrawn, Mrs. Abbott verbally undertook to leave the whole of her estate to the children. By her last will, however, she left the children only a life interest, while the *corpus* was to go to her grandchildren. Proceedings were taken by the executors to prove the will in solemn form, and the children counterclaimed *inter alia* that the testatrix was bound by contract to leave her estate equally amongst her six children.

The Judge held that the contract as alleged was proved; but the proponents of the will pleaded the Statute of Frauds, and applying *Horton* v. *Jones*, (1934) 34 N.S.W. S.R. 359, it was held that the contract came within the statute as Mrs. Abbott's estate at the date of the contract consisted in large part of real property. For the children it was then argued that the contract was taken out of the statute by part performance, in that, pursuant to the contract, the children had withheld any further action to enforce their claims. This submission was rejected, and among the reasons for its rejection was this:

> The doctrine of part performance is a doctrine of equity, and applies only in cases where a Court of Equity is being asked to enforce the remedy of specific performance. This is not a suit for specific performance. A Court of Equity cannot enforce specific performance against a dead testator of a promise made during his life to leave property by will. The remedy applied for here is in the nature of damages. Therefore the equitable doctrine of part performance does not apply.

Before commenting on this decision it may be mentioned that the next point decided is that even if the doctrine of part performance did apply, the alleged acts of part performance were insufficient, as they were not unequivocally referable to the contract. *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467, is cited as the leading authority on that point. With this part of the decision one readily agrees, but this very case of *Maddison* v. *Alderson* throws considerable doubt on the previous part of the decision.

In *Maddison* v. *Alderson*, the heir at law of an intestate claimed the title deeds of the intestate's farm, of which the defendant had taken possession on his death. The defendant counterclaimed for a declaration that she was entitled to a life estate in the farm and to retain the title deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper by his promise, which was a verbal one, to make a will leaving her a life estate in his farm. The plaintiff pleaded the Statute of Frauds. To this the defendant replied with the contention that the contract was executed on her part, and that the equitable doctrine of part performance took the case out of the statute. Before the trial Judge this contention was upheld: *Alderson* v. *Maddison*, (1881) 7 Q.B.D. 172. The plaintiff took the case to the Court of Appeal where he succeeded, and he was again successful when the defendant took the case to the House of Lords. These tribunals held that even if the alleged contract had been proved, the acts of part performance were inadequate, not being exclusively referable to the contract. But nowhere do the judgments in the Court of Appeal or House of Lords suggest that the equitable doctrine of part performance was not applicable in proceedings of such a nature. The trial Judge had held that if a contract was established the defendant was "entitled to what is the equivalent of specific performance of the contract." The House of Lords did not overrule this or question it in any way. It is inconceivable that the entire decisions of the Court of Appeal and the House of Lords should have been devoted to the adequacy of the acts of part performance unless (1) it was a contract of which specific performance might in a proper case be ordered, and (2) the equitable doctrine of part performance might be invoked. If there could be no question of specific performance (or the equivalent) why should the question of part performance have merited consideration at all? There would have been no necessity for the elaborate inquiry entered into by Lord Selborne as to whether the alleged acts of part performance were unequivocally referable to the alleged contract. If the housekeeper was entitled, at the best, to nothing more than damages, then the equitable doctrine of part performance could have no application. It was recognized expressly in the lower Court, and impliedly on the appeals, that the defendant was entitled, if a contract was duly established, to seek relief resembling a decree for specific performance.

What then, of *Young* v. *Anderson*? In this case, as in *Maddison* v. *Alderson*, there was an alleged oral contract to leave property by will. In the place of the heir-at-law we have the personal representatives seeking probate of the will. As in the former case the promisor has died without fulfilling the promise. In both cases real property is affected. In *Maddison* v. *Alderson* the defendant sought to retain possession of the land and title deeds, which would be equivalent to obtaining specific performance of the contract. In *Young* v. *Anderson* the defendants, if successful, would have sought an order declaring that the executors were trustees to carry out the terms of the contract. In what material respect do the cases differ? If the doctrine of part performance could be invoked in *Maddison* v. *Alderson* (even though on the facts its requirements were not fully satisfied) why is it not applicable in *Young* v. *Anderson*?

It is noteworthy that in *31 Halsbury's Laws of England*, 2nd Ed. 412 (title, "Specific Performance")

is still cited the decision of Stephen, J., in *Alderson* v. *Maddison* as authority for the proposition that specific performance may be had of such agreements. It is there said that:

> A contract in writing for good consideration to leave by will a definite property to a particular person may be enforced as against volunteers under the person who so agreed.

If specific performance may be had when such an agreement is in writing, the basis for excluding the equitable rule as to part performance of oral agreements is gone.

To the same effect is the statement in *34 Halsbury's Laws of England*, 2nd Ed. 16 (title, "Wills") where the following appears:

> A contract, duly evidenced, to make an ascertainable gift by will is as a rule enforceable, usually by way of damages, which may be claimed the moment the covenantor has put it out of his power to perform the covenant, even during his life. The Court may order specific performance of the contract against persons deriving title under the testator if contract is for valuable consideration, and that remedy is appropriate in the circumstances.

In a footnote it is added that:

> If the contract is to give an interest in land by will the contract must be in writing . . . subject to the equitable doctrine of part performance.

Jarman on Wills, 7th Ed. 30, says:

> A covenant (or apparently any contract for valuable consideration) to devise land in a particular way can be specifically enforced against the testator's heir-at-law or persons claiming under him as volunteers.

Various reported decisions support these views. It is found that many of them are of the type of *Maddison* v. *Alderson* (*supra*). That is to say, specific performance has been granted in a lower Court, but the decision has been reversed on appeal because some one or more of the many requirements for a decree of specific performance has been absent. There yet remains from these cases ample authority for the propositions from *Hailsham* and *Jarman* already quoted.

In the old case of *Goilmere* v. *Battison*, (1682) 1 Vern. 48, 23 E.R. 301, a woman had agreed for valuable consideration to leave property to J.S. if she died without issue. She failed to perform the agreement, and after her death specific performance was decreed against her husband.

In *Fortescue* v. *Hennah*, (1812) 19 Ves. 67, 34 E.R. 443, a father covenanted that at his death all the property he should die seised or possessed of should be left to his two daughters or their families equally. The Master of the Rolls (Sir Wm. Grant) held, *inter alia*, that "it is clear that [the covenantor] could not defeat the effect of that covenant by any testamentary act."

These two cases were referred to in the judgment of Stirling, J., in *In re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510, 517, when he said:

> Unquestionably these cases show that the Court has gone a long way in enforcing, by way of specific performance, contracts to leave property by will.

Another old case of similar type is *Needham* v. *Smith*, (1828) 4 Russ. 318, 38 E.R. 825. A man having covenanted to leave real estate in a certain way, it was held that all real estate of which he was seised at his death was bound by his covenant.

In *Caton* v. *Caton*, (1865) L.R. 1 Ch. 137, and (1867) L.R. 2 H.L. 127, a husband failed to carry out an oral promise, for valuable consideration, to leave his wife certain property by will. The Court of first instance held that part performance took the case out of the statute, and decreed that the widow was entitled to the property which should have been left to her. This was reversed on appeal on the ground that the only part performance was by the husband, and the acts of the person charged could not be relied on as part performance. But it was not suggested that the doctrine of part performance would not have been applicable had the acts been those of the person seeking to enforce the contract. The case is in some ways similar to the two New Zealand cases referred to by Mr. Justice Ostler in his judgment in *Young* v. *Anderson*, namely, *McKenzie* v. *Templeton*, (1915) 34 N.Z.L.R. 596, and *Simpson* v. *Simpson*, [1918] N.Z.L.R. 319. In both these cases the proceedings were virtually for specific performance of oral agreements to leave real estate by will, the doctrine of part performance being relied on. In each case this attempt failed as the acts done were not unequivocally referable to the contract. But implicit in both decisions—as in *Maddison* v. *Alderson* and *Caton* v. *Caton*—is the assumption that had there been suitable acts of part performance the doctrine would have applied and specific performance, or equivalent relief, might have been granted.

This was expressly recognized in *Humphreys* v. *Green*, (1882) 10 Q.B.D. 148, a case very similar to *Young* v. *Anderson*. As part of a compromise, the deceased had promised to devise land to the plaintiff and his son, but after making such a will he revoked it. Baggallay, L.J., said:

> No action would lie in respect of such breach unless there was evidence of a part performance sufficient to exclude the operation of the statute.

Hammersley v. *De Biel*, (1845) 12 Cl. & F. 45, 8 E.R. 1312, and *Coverdale* v. *Eastwood*, (1872) L.R. 15 Eq. 121, further develop the principle. *Leake on Contracts*, 8th Ed. 477, cites these two cases as authority for the following statement of the position:

> A promise may be made, upon a valid consideration, to make a certain disposition of property by will; and, although the promiser cannot be compelled to make a will according to his promise, his estate will be bound by the promise, after his death, either to make compensation in damages, or to the specific disposition of the property according to his undertaking.

In *Synge* v. *Synge*, [1894] 1 Q.B. 466, an offer in writing to leave property by will, made to induce a marriage, was accepted and the marriage took place on the faith of it. The one who made the offer failed to carry out his undertaking. After the death of the offeror what remedy was appropriate? Was it such a contract as could be enforced in equity? The decision of the Court (Esher, M.R., Lopes and Kay, L.JJ.) delivered by Kay, L.J., includes the following:

> What is the remedy where the proposal relates to a defined piece of real property? We have no doubt of the power of the Court to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.
>
> It is argued that Courts of Equity cannot compel a man to make a will. But neither can they compel him to execute a deed. They, however, can decree the heir or devisee in such a case to convey the land to the widow for life, and under the Trustee Acts can make a vesting order, or direct that someone shall convey for him if he refuses.

The careful and restricted reference to "a defined piece of real property" is prompted by the necessity

of employing a trust to carry into effect the equivalent of specific performance. It is by interposing a trust that volunteers are burdened with obligations arising from contracts to which they are not parties. All the usual requirements of a valid trust must be present, including certainty of subject matter. But so long as the property is clearly defined or can be ascertained with precision it need not be specific property, and it need not be comprised solely of realty. It may be, for example, an eighth share of an estate consisting of both realty and personalty. If the subject matter is personalty only, it is doubtful whether the doctrine of part performance can be applied, but there is certainly some authority in favour of its being so applied, notwithstanding the emphatic declaration to the contrary by Lord Atkin in *In re A Bankruptcy Notice*, [1924] 2 Ch. 76, 97.

Thus in *Ridley* v. *Ridley*, (1865) 34 Beav. 478, 55 E.R. 720, a trustee verbally promised his *cestuis que trust* that if they would concur in a sale of the trust estate (the trustee having an interest in the purchase) he would bequeath to them by his will "at least as much as they would get under their father's will." On his dying without carrying out his agreement, the question arose, as the Master of the Rolls (Sir John Romilly) said, "whether this Court could, in the circumstances of this case, legally enforce the specific performance of it." He held that it could be so enforced and decreed accordingly.

In *Bell* v. *Clarke*, (1858) 25 Beav. 437, 53 E.R. 703, a covenant by A.B. to leave one fourth of his real and personal estate to C.D. was similarly enforced against the executors of A.B.

The Privy Council has recognized the authority of *Synge* v. *Synge* (*supra*) in its decision in the case of *Central Trust and Safe Deposit Co.* v. *Snider*, [1916] 1 A.C. 266. There the contract was in writing, but the question of specific performance was in issue. A transferee of real estate was under contract to convey the property to the heirs of the transferor on the death of the latter, and had undertaken that he would so provide by his will. He died without having done so. The decision at p. 272 reads as follows:

> If the defendant M.C. has any interest in the property it can only be because an action would lie for specific performance of the testator's contract to settle the property in her favour. Their Lordships will assume that the contract is one in its nature capable of specific performance as against volunteers under the testator's will—as indeed would appear from the case of *Synge* v. *Synge*—and that the defendant M.C. is in the present action asking to have it specifically enforced.

It was then held that in the circumstances of the case the defendant was put to her election in regard to other provision made in her favour in the will.

Finally the persuasive authority of one Irish and one Canadian decision may be referred to. In *Walker* v. *Boughner*, (1898) 18 O.R. 448, the plaintiff went to work for her grandfather on his promising verbally to make the same provision for her as he should make for his own children. She worked for him for nine years without wages. By his will the grandfather made his daughters residuary devisees but left the granddaughter nothing. She sued his executors for specific performance of the contract or in the alternative for wages. The trial Judge held that the contract had been proved and offered the plaintiff either judgment for damages or judgment declaring the plaintiff entitled to share equally with the daughters. Plaintiff's counsel elected to take the latter, and judgment was pronounced accordingly. The defendant successfully appealed, it being held that the promise and consideration were too uncertain to entitle the plaintiff to specific performance. But the principle of decreeing specific performance in such cases where the contract was clearly proved was acknowledged. Street, J., in the Appellate Court opened his judgment with the following words:

> There appears to be no doubt upon the authorities that where a contract is clearly made out on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, the representatives of the testator may be compelled to make good his obligation.

Lowry v. *Reid*, [1927] N.I. 142, is a recent decision of the Court of Appeal of Northern Ireland. It was an action upon an oral contract between the plaintiff and his mother whereby the latter undertook to make a will leaving him two farms if he would make certain dispositions of his own property. The plaintiff carried out his part of the contract and the mother made a will giving effect to her verbal undertaking. But subsequently she revoked her will and made another under which the son received merely a life interest in the two farms. It was held by the Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.) that the son, having given up his own property pursuant to the contract, was entitled to a decree of specific performance to carry the mother's obligations into effect, and that acts of part performance by the son were sufficient to take the case out of the Statute of Frauds.

In the light of these authorities it is submitted that Courts of Equity can enforce specific performance of a contract to leave property by will, and that the doctrine of part performance applies, where the facts warrant it, to overcome the absence of a memorandum satisfying the Statute of Frauds. It would be unfortunate if the scope of this salutary equitable principle were restricted more narrowly than precedent requires.

In the Home Guard.—The presence of so many practitioners in the Home Guard shows that the man of law may be a man of action, too. But argument is sweet, and the lawyer's ruling passion persists, if not in the cannon's mouth, at any rate in the training field. We are reminded that No. 4 Platoon of the Inns of Court Reserve Corps (2nd County of London Volunteers), during the last war, had thirteen actual or embryo silks in its ranks. Among them were Lords Russell of Killowen, Roche and Romer, Lords Justices Clauson, Finlay, and Luxmoore, Roland Burrows, K.C., Martelli Gover, K.C., and Reginald Smith, the publisher K.C. On one occasion the lieutenant commanding, Dr. H. P. Bigger, the Canadian historian but not a lawyer, sent out a section under two sergeants (Chancery silks). They did not return, and on going to seek them he found that a dispute had arisen as to the exact terms and interpretation of the order given. Each K.C. had taken to himself a junior, and they were arguing the matter formally before a court consisting of the other members of the section (all being barristers). The argument was abruptly cut short and no judgment was given. "What have I done," was the lieutenant's comment, "that I should be put in command of a lot of lawyers?" *Inter arma silent leges*, but not the lawyer, it seems.

THE FAIR RENTS ACT, 1936.

Reported Decisions 1939–1940.

The Magistrates, in the main, are responsible for the interpretation of the somewhat complicated provisions of the Fair Rents Act, 1936. They have exclusive and final jurisdiction in matters arising under the Act, and consequently the higher Courts have few opportunities to express opinions on the enactment. Unless a question arises incidentally in other proceedings, the Act comes before the higher Courts only in proceedings for mandamus, certiorari, or prohibition.

In the first volume of *Magistrates Court Decisions*, covering the years 1939 and 1940, no fewer than twenty-four judgments relating to matters arising under the Act have been reported. It is proposed to review these judgments and where necessary to make comments and comparisons.

I. Section 2 of the Fair Rents Act, 1936; s. 4 of the Amendment Act, 1939.

In *Sievwright* v. *Marsh* (*No. 2*), (1939) 1 M.C.D. 115, the question in issue was whether the right to a statutory tenancy which comes into operation on the termination of a contractual tenancy, passes to the representatives of a deceased tenant. Goulding, S.M., had decided in previous proceedings between the same parties that the death of a tenant, whose tenancy was subject to s. 16 of the Property Law Act, 1908, did not put an end to the tenancy, and that a notice to quit must be served upon the personal representative of the deceased (or, if there was not one, then upon the members of the deceased's family who remained in occupation).

The tenancy was duly determined by a notice to quit, and the learned Magistrate made an order for possession. The decision was based on a number of English cases in which it was held that the statutory tenancy is a personal right, which is incapable of assignment, and does not pass to the Official Assignee in bankruptcy, nor to the personal representative of a deceased tenant.

The correctness of the decision in this case is open to doubt. The monthly tenancy had passed to the personal representative. It would seem that the principle decided in the English cases is applicable only after the statutory tenancy has commenced.

In *Carswell* v. *Larkin*, (1939) 1 M.C.D. 149, and in *McIntyre* v. *Wilson*, *ibid.*, 280, the tenements comprised a house and several acres of land in addition to the building site and it was held that neither tenement was subject to the Act. Luxford, S.M., considered that the definition of "dwellinghouse" limits the operation of the Act to the typical building section which contains a certain amount of land around the house for lawns, gardens, and sites for the garage, washhouse and similar buildings, and added, "Once land additional to the curtilage of the actual dwellinghouse is included in the tenement, it is outside the provisions of the statute." Coleman, S.M., came to the conclusion that the words of the definition, "does not include any land other than the site of the dwellinghouse, and a garden or other premises in connection therewith" must be construed according to the *ejusdem generis* rule, and that the meaning of the general word "premises" is influenced by the preceding specific words, "site" and "garden." This restricts "premises" to things of a similar kind. The learned Magistrate declined to follow *Mayor, &c. of Blenheim* v. *Glennie*, (1921) 17 M.C.R. 49, on the ground that the Court in that case gave too little weight to the relative proportions of the land occupied by and essential to the normal use of a dwellinghouse, and not so used or required for such normal user.

It is difficult to specify any area of land which automatically takes a tenement outside the Act. The question of fact in each case is: "Is the land domestically appurtenant to the dwellinghouse?"

In *Cotton* v. *Greaves*, (1939) 1 M.C.D. 168, the building was originally designed and erected to comprise three tenements: each was separated from the other by a brick partition wall running to the roof. The question in issue was whether each tenement was a flat, and so outside the scope of the Act. Goulding, S.M., held that the determining factor is the original design and construction of the building and the purpose of the letting, rather than any narrow interpretation of the words "flats or apartments." Consequently, as there was a single building under a single roof, originally designed and erected to comprise three tenements, the tenements were flats and outside the Act. The learned Magistrate distinguished a building of this kind from a "semi-detached house" which is in effect two conjoined houses.

Lower Hutt Amusements, Ltd. v. *Treanor*, (1940) 1 M.C.D. 445, is a case where it was sought to establish that two flats in a picture-theatre building came within the exemption. The building as originally designed and erected comprised a picture theatre and shops on the ground floor and two flats on an upper floor. It was held that as the whole building was not originally designed for flats, the two flats became dwellinghouses subject to the Act, by virtue of s. 4 of the Fair Rents Amendment Act, 1939.

This amendment made an important alteration to the exemption of flats or apartments from the provisions of the Act. It extends the meaning of "dwellinghouse" to include "every dwellinghouse that forms part of a building not originally designed and constructed for the purpose of being let as two or more flats or apartments whether it is let for the first time as a dwellinghouse before or after the passing of this Act."

The interpretation given to the section in this case is that if a building was originally designed and constructed to comprise a shop, picture theatre, or other unit, in addition to two or more flats, all the flats are subject to the Act.

The opposite view was taken in *Cooper* v. *Deckston Hebrew Institute*, (1940) 1 M.C.D. 470, where it was said:

> If the building was originally designed and constructed for the purpose of being let as two or more separate flats or apartments, the section has no application. The fact that the building was designed and constructed for other purposes as well, does not alter the position. There are buildings which have been designed and constructed principally for business purposes, but two or more flats have

been included in order to use the space not otherwise required. Such a building is "a building" within the meaning of s. 4.

The last sentence is ambiguous, but it is assumed that the learned Magistrate meant that the flats in such a building are outside the Act.

The decision in *Cooper* v. *Deckston Hebrew Institute* is preferable to that in *Lower Hutt Amusements, Ltd.* v. *Treanor* (*supra*). There is nothing in s. 4 to indicate that the building must be designed and constructed for the *sole* purpose of being let as flats or apartments.

The later case of *McDuff* v. *James Stellin and Co.*, (1940) 1 M.C.D. 529, supports this view. There the original design of the building contemplated the erection of shops on the ground floor and flats upstairs. Owing to certain difficulties the upstairs portion was left without partitions and was used for eight years as a gymnasium and dance hall. Then the owner completed his original intention by dividing the upstairs portion into four flats. Goulding, S.M., did not refer to his decision in *Lower Hutt Amusements, Ltd.* v. *Treanor* (*supra*), and held that the flats were outside the Act. He considered that where the original design had in contemplation the erection of flats as part of the completed work it is immaterial that the construction of the flats was postponed to a later date, or that in the meantime the premises were used wholly for business purposes.

This decision correctly states the law, but it must be assumed that the learned Magistrate was satisfied that there had been no abandonment of intention. *Prima facie*, eight years user of the upstairs portion, would constitute abandonment of intention, and it would seem that the decision applies only to cases where a presumption of abandonment of intention has been negatived.

An important *obiter dictum* was made by Luxford, S.M., in *Cooper* v. *Deckston Hebrew Institute* (*supra*, at p. 472) as to the effect of s. 4 of the 1939 Amendment, on flats generally. In his view, the amendment brought all flats under the Act, except those which form part of a building originally designed and constructed for the purpose of being let as flats or apartments *and are let for the first time after June 11, 1936* (the date on which the principal Act was passed).

This seems to be the correct interpretation. The principal Act exempted any premises originally erected for the purpose of being let as two or more separate flats or apartments. This exemption was repealed by the 1939 Amendment, and s. 4 (*ibid*) is the sole enactment dealing with flats and apartments. That section does not provide for the exemption of any flats or apartments from the restrictive provisions of the principal Act, but brings in certain tenements which would otherwise have been outside the Act. Consequently, the effect of the amendment is that flats or apartments which were originally exempted are now placed in the same position as dwellinghouses proper.

The real point in issue in *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Voller et Ux*, (1939) 1 M.C.D. 285, was whether a first mortgagee is entitled to an order for possession against a tenant who had been granted his tenancy by the second mortgagee. The Magistrates have always followed the decision in *State Advances Superintendent* v. *Campbell*, (1928) 23 M.C.R. 56, where it was held that a mortgagee can by virtue of s. 115 of the Land Transfer Act, 1915, maintain an action for possession against a mortgagor in default. The learned Magistrate agreed that *State Advances Superintendent* v. *Campbell* had been correctly decided: further that a mortgagee can get possession under s. 115 against a transferee or lessee from the mortgagor; but the Magistrates' Court had no jurisdiction under the section to make an order for possession against a person who claims to occupy as a result of a contract between himself and a second mortgagee, because the occupier does not derive his title "through or under" the mortgagor. This important *dictum* relating to the Fair Rents Act, 1936, is contained in the judgment: the Fair Rents Act has no application when a mortgagee claims possession of a tenement unless there is a tenancy created or consented to by him. Thus a mortgagee who enters into possession or buys in at a mortgagee's sale is entitled to an order for possession. Indeed it would seem that any purchaser at such a sale would acquire the tenement free from all tenancies. Nor is the mortgagee, or a purchaser from him, required to give the tenant in possession a notice to quit or make a demand for possession.

The question for decision in *Coulter* v. *Sleep*, (1940) 1 M.C.D. 503, was whether a dwellinghouse ceased to be subject to the Fair Rents Act when it became partially destroyed by fire. On the happening of this event, the landlord gave notice to the monthly tenant that the tenancy was *ipso facto* determined. The damage caused by the fire rendered the house uninhabitable, and the tenant had to find living quarters elsewhere. He refused to remove his furniture from the damaged building, and claimed that he was entitled to retain legal possession of the tenement; also that the rent should be reduced until such time as the house had been restored to its former conditions. He thereupon applied to the Court to fix a fair rent. The landlord had, by this time, formally determined the tenancy by notice to quit. In making an order for possession and dismissing the application to fix the fair rent, the learned Magistrate said:

> The portion of the building which now remains cannot, in my view, be regarded any longer as a dwellinghouse within the meaning of the Fair Rents Act, 1936. That being so, the Act has no application. What the Act seeks to prevent is the ejection of tenants from dwellinghouses in which they live. This dwellinghouse, having been substantially destroyed by fire, the tenant cannot seek the protection of the Act in trying to sustain his tenancy.

This judgment is in accord with the principle established in numerous cases relating to the reinstatement of licensed premises or to alterations or additions thereto. It is a question of fact in every case whether the identity of the original building has been lost or destroyed so that on reinstatement or addition or alteration a different house comes into being. In *Reg.* v. *Smith*, (1899) 63 J.P. 595, Lush, J., said he was not prepared to lay down as a matter of law that any addition made to a house alters the identity of the house. An alteration may be of such a character as to make it a different house or to leave it the same house. Cockburn, C.J., made a similar observation in *Mahon* v. *Gaskell*, (1878) 2 J.P. 582. The question was whether certain alterations and additions to licensed premises created new premises which required a new license. Referring to the effect of the alterations and additions, the Chief Justice said:

> I think this was entirely a question of degree for the Justices to consider. If what was added was a mere

accessory the Justices might treat it as of no importance, but, when there has been a large and substantial change of the structure, they might then consider the premises no longer the same or substantially the same building.

By analogy, a dwellinghouse may cease to be subject to the Fair Rents Act if changes by fire, alteration or addition enable the Court to find as a fact that the house is no longer the same or substantially the same building.

The first point decided in *Berry* v. *Coad*: *Bligh* v. *Berry*, (1940) 1 M.C.D. 447, is that:

> Where a leased residential tenement is wholly sublet by the tenant, who does not reside therein, it is used by the tenant exclusively for business purposes.

The second point is that the rent payable by a sub-tenant should be assessed on the basis of a reasonable profit to the lessee upon his weekly outgoings, and not upon the value of the freehold and the outgoings payable by the head landlord.

(*To be continued.*)

ANNUAL MEETINGS.

District Law Societies.

Auckland Law Society.

The annual general meeting of the members of the Auckland District Law Society was held on February 28, in the University College Hall, Auckland. The President, Mr. W. H. Cocker, occupied the chair.

ANNUAL REPORT.

The annual report and balance-sheet were adopted. The principal features of such report are as follows:—

Practitioners.—The following is the number of Certificates issued during the year, the figures for 1939 appearing in brackets: Barristers and Solicitors, 256 (263); Barristers only, 6 (4); Barristers already holding Solicitor's Certificate, 14 (13); and Solicitors only, 244 (250). The total number of practitioners on the Rolls during the year was 506, the number for the preceding year being 517. During the year six were admitted as Barristers and Solicitors, four were admitted as Solicitors and six as Barristers. In the preceding year fourteen were admitted as Barristers and Solicitors, eight as Solicitors and four as Barristers.

Obituary.—The Council records with deep regret the death of the following members and ex-members:—Messrs. C. J. Tunks, A. Buchanan and W. E. Hackett.

Benevolent Fund.—The Council after full and careful consideration decided that the establishment of a special War Relief Fund as contemplated at the last Annual Meeting was impracticable, but decided to establish a general Benevolent Fund, as authorized by the Law Practitioners Amendment Act, 1935. The Council transferred a sum of £200 to this Fund from the Members' Fund and the practitioner who styled himself "Small Practice" agreed that the sum of £300 donated by him should be added to the Fund. The meeting of employer-practitioners held on November 28, 1940, recommended that an annual levy of £1 1s. should be imposed for the benefit of the Fund on members practising on their own account, and the resolutions necessary to give effect to this recommendation will be placed before the Annual Meeting.

Legal Assistance to Soldiers.—The Society has during the year continued to provide facilities for the making of wills and powers of attorney free of charge for members of the Expeditionary Forces at Papakura Camp. To date approximately 4,500 wills and powers of attorney have been prepared and special accommodation has been provided by the Council for the safe custody of wills. General legal advice has also been given free of cost.

Members on Service.—Forty-four practitioners and fourteen unqualified clerks are now on service with the forces for the duration of the war in New Zealand or abroad. Difficulties have occurred in many offices on account of members of staffs entering upon military service. Members are reminded that the Council maintains a register of persons seeking employment and of situations vacant. Those seeking employment and practitioners having vacancies in their offices are invited to communicate with the Secretary.

The Council has taken steps with the object of protecting and preserving the practices of solicitors who are absent on military service, and has prepared and circulated a scheme setting out the procedure to be followed where work is undertaken by members of the Society for clients of members who are on military service.

Shortly before Christmas the Council wrote to all practitioners and clerks serving in New Zealand and cabled to all those serving overseas conveying the Society's greetings and good wishes. A number of acknowledgments have already been received.

Lectures by Professor Stone.—A further course of lectures to members of the profession was delivered by Professor Stone during the year. The Society is indebted to the Professor for these interesting and instructive lectures.

BUSINESS OF THE MEETING.

Mr. W. H. Cocker was declared duly elected President, Mr. S. R. Mason, Vice-President, and Mr. A. Milliken, Treasurer, they being the only nominees for these positions.

The President then gave the results of the postal ballot for the election of members of the Council and declared the following duly elected: Messrs. S. I. Goodall, V. N. Hubble, J. B. Johnston, A. H. Johnstone, K.C., L. P. Leary, and J. Stanton.

On the motion of the Chairman, seconded by Mr. L. A. Johnson, it was resolved that the meeting place on record its appreciation of the services rendered on the Council by Mr. H. M. Rogerson, who had not sought re-election.

The President, Vice-President and Messrs. A. H. Johnstone, K.C., and J. B. Johnston were re-elected members of the Council of the New Zealand Law Society.

The President then referred to the notice of motion to amend the rules of the Society, as follows:

To consider and if thought fit to pass with or without amendment the following resolution:

That the Rules of the Society be amended by adding the following :—

42 (*a*) The Society may by resolution impose on members of the Society who are engaged in practice on their own account whether in partnership or otherwise an annual levy not exceeding in any year the sum of two pounds two shillings for each such member.

(*b*) Such levy shall be payable in the same manner as the annual practising fee is payable unless the resolution imposing the levy shall otherwise provide in which case the levy shall be payable in manner provided by such resolution.

In the event of the passing of the above resolution to consider and if thought fit to pass with or without amendment the following resolution :—

That an annual levy of one pound one shilling be imposed on all members of the Society who are engaged in practice on their own account whether in partnership or otherwise, such levy to be paid to the Society, and to be applied for the purposes of the Law Society of the District of Auckland Benevolent Fund and to be payable in the year 1941 not later than March 31, and in each subsequent year not later than January 31, provided that where a member commences practice in any year after the dates specified the levy for that year shall be payable within one month of his commencing practice.

This motion was seconded by Mr. S. R. Mason. An amendment was made that the matter be deferred until the next annual general meeting. After some discussion it was resolved that the amendment be then put. On the amendment being put to the meeting, it was declared lost on the voices and the original motion was then put and carried. The motion to impose a levy of one guinea on members practising on their own account was then carried. This motion is set out in full on the notice of meeting, and details concerning the Benevolent Fund for the purpose of augmenting which the levy was imposed, are given in the annual report.

On the motion of Mr. R. L. Ziman it was resolved that a letter of sympathy be sent to the Hon. J. Alexander, expressing the hope that he might have a speedy recovery.

Otago Law Society.

The Annual Report showed that during the year, the Vice-President, Mr. C. B. Barrowclough, resigned on account of being called up for military duties. Mr. W. F. Forrester was appointed Vice-President in his place, and Mr. D. Ramsay was appointed to fill the casual vacancy on the Council.

During the year, 158 Practising Certificates had been issued as compared with 161 for the preceding year. Three gentlemen were admitted as barristers and solicitors.

The Council recorded, with deep regret, the death of Sir John Sinclair, who was for so many years a distinguished member of the legal profession.

Enlisted Practitioners.—It was decided that each enlisted practitioner should receive a presentation, and contributions from the profession were invited accordingly. The gift chosen was a leather wallet suitably inscribed, containing a fountain pen and pencil.

A scheme whereby the business of enlisting practitioners might be carried on was approved by the Council, and has been generally adopted.

Following on a suggestion made at the last annual meeting, the Council considered the question of financial assistance to members who have enlisted or to their families. No action was then thought practicable, but it is felt that the matter should be discussed by the members of the Society.

Queen Carnival.—Two successful performances of *Bardell* v. *Pickwick* were given by the profession in aid of the Army Queen Funds. His Honour Mr. Justice Kennedy having given his permission, the first performance took place in the Supreme Court; the other was given in His Majesty's Theatre, when the Orphans' Club was responsible for the first half of the programme. The two performances were the means of raising over £100 towards the Queen Carnival Funds. A complete script, with the text of the speeches and copies of the programme, has been lodged with the Secretary.

The following were elected to office for the coming year : President, Mr. W. F. Forrester ; Vice-President, Mr. G. T. Baylee ; Treasurer, Mr. H. L. Cook ; Council, Messrs. J. B. Thomson, J. C. Mowat, D. Ramsay, C. J. L. White, R. C. Rutherford, and A. J. Dowling.

Southland Law Society.

The annual meeting of the Southland District Law Society was held on March 27. The retiring President, Mr. Gordon J. Reed, in moving the adoption of the annual report and balance-sheet, reviewed the events during the past year. He referred to the absence of practitioners on war service, Messrs. I. A. Arthur, J. E. Mathieson, J. R. Hanan (Invercargill), J. D. Paterson and A. Smyth (Gore), all overseas, and Mr. R. B. Bannerman (Gore) in New Zealand. In lieu of a Bar Dinner the Society had held informal luncheons during the year and these had proved very successful. It was hoped that the new Courthouse would be completed during the year and the question of furnishing the new library would engage the attention of the incoming Council.

The following officers were elected for the coming year : President, Mr. N. L. Watson ; Vice-President, Mr. G. C. Cruickshank ; Secretary, Mr. J. H. B. Scholefield ; Treasurer and Librarian, Mr. T. V. Mahoney ; Council, Messrs. S. M. Macalister, M. H. Mitchel, J. C. Prain, G. J. Reed, and H. E. Russell ; delegate to the Invercargill Chamber of Commerce, Mr. B. W. Hewat ; delegate to the New Zealand Law Society, Mr. N. L. Watson ; Auditor, Mr. H. K. Carswell.

Soothsayers.—We are told that in the days of the Roman Empire, when the State was in danger, and the Senate was in doubt as to what course to adopt, they consulted the augurs, and they in turn guided their decision by examining the entrails of a newly-killed fowl. We have abandoned those barbarous practices, and now when in doubt consult an economic expert. And yet—and yet—all history and experience, and above all the history of the last twenty years, show that on the whole the Roman system was the better. Had our politicians during these years guided their action, not by the advice of economic experts, but by examining the entrails of a fowl, there would at least have been a fifty-fifty chance that commonsense would have prevailed, and that the present agony would have been avoided. (Sir Randle Holme, President of the Law Society (England), 1939-1940, in the course of his address on retirement from office.)

SUMMARY OF RECENT JUDGMENTS.

(*Continued from p. 75.*)

SUPREME COURT. Napier. February 19; March 28. *Johnston*, J.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND LIMITED v. PERRY AND OTHERS.

Trusts and Trustees—Farming Business—Carried on by Trustees pursuant to Settlement—Losses—Cattle, Sheep, Calves, and Lambs lost in Flood—Apportionment of Losses as between Capital and Income.

Although trustees by the terms of their trust are empowered to determine how extraordinary expenses and losses should be borne as between capital and income, where, instead of exercising their discretion, they apply to the Court for its guidance, the Court may exercise its jurisdiction and authorize capital or income to be drawn upon as seems to it equitable in the circumstances.

As a result of a flood which was unprecedented and unlikely to recur, and against the result of which in the event of recurrence provision might be made so as to prevent a repetition of the losses sustained, fences were washed away or so damaged as to necessitate the erection of new fences, cattle and calves at foot and sheep were destroyed and the lambing was affected, and in consequence, there was a diminution of the number of lambs normally expected.

Willis, for the plaintiff; *Mason*, for M. A. T. Perry, first defendant; *Lawry*, for N. A. E. Desha and M. F. C. McInnes, second defendants; *Robinson*, for T. H. R. Gifford, third defendant; *Martin*, for the third defendants other than T. R. Gifford.

Held, That all the said losses should be made good out of capital, but that those in respect of lambs and calves should be recouped out of income during a period of five years.

In re Robins, Holland v. *Gillam*, [1928] 1 Ch. 721, followed.

In re Bassett (deceased), Bassett v. *Bassett*, [1934] N.Z.L.R. 690; G.L.R. 537, and *In re McGaw, McGaw* v. *McGaw*, (1904) 4 N.S.W.S.R. 591, applied.

Knox v. *Roberts*, (1900) 21 N.S.W.L.R. 231, referred to.

Solicitors: *Kennedy, Lusk, Willis, and Sproule*, Napier, for the plaintiff; *Mason and Dunn*, Napier, for the first defendant; *A. E. Lawry*, Napier, for the second defendants; *Gifford and Robinson*, Napier, for T. H. R. Gifford, third defendant; *Carlile, McLean, Scannell and Wood*, Napier, for the third defendants other than T. H. R. Gifford.

Case Annotation: In re Robins, Holland v. *Gillam*, E. and E. Digest, Supp. Vol. 40, para. 1873.

COMPENSATION COURT. Auckland. 1941. March 7, 26. *O'Regan*, J.

WILSON v. RENOWN COLLIERIES, LIMITED.

Workers' Compensation—Accident arising out of and in the Course of Employment—Hernia—Direct Inguinal Hernia—Disablement precipitated by Effort in Course of Employment—Whether due to Injury by Accident—Workers' Compensation Act, 1922, s. 3.

There is no difference in principle between direct and indirect inguinal hernia. Both are due primarily to a diseased congenital condition both will cause disablement—at least discomfort and inconvenience—sooner or later, but in either case disablement may be precipitated by effort and in such event there is injury by accident, which, if it occurs in the course of the workers' employment, establishes the right to compensation.

Fenton v. *J. Thorley and Co., Ltd.*, [1903] A.C. 443, 5 W.C.C. 1, followed.

Gibbs v. *Thompson and Hills, Ltd.*, (1907) 10 G.L.R. 150, applied.

Riggans v. *Taupiri Coal-mines, Ltd.*, [1924] N.Z.L.R. 1226, [1925] G.L.R. 98, referred to.

Counsel: *O'Regan*, for the plaintiff; *Hore*, for the defendant.

Solicitors: *C. J. O'Regan*, Wellington, for the plaintiff; *Buddle, Richmond, and Buddle*, Auckland, for the defendant.

Case Annotation: Fenton v. *J. Thorley and Co., Ltd.*, E. and E. Digest, Vol. 34, p. 266, para. 2264.

SUPREME COURT. Auckland. 1940. December 5. *Johnston*, J.

RIDDELL v. SIMONS PROPRIETARY, LIMITED.

Evidence—Admissibility—Libel Action—Newspaper Advertisement that Plaintiff and another Employee (with a Reputation for Dishonesty) of Defendant no longer employed—Newspaper Reports of Charge involving Dishonesty against latter Employee and of his Conviction—Impression on Readers of meaning of Advertisement.

In a libel action, the libel complained of consisted of an advertisement which the defendants had caused to be published in the *Te Aroha News* on June 6, 1940, which read as follows:—

"New Paeroa Brewery. Mr. H. and R. [the plaintiff] are no longer in our employ and are not authorized to canvass for orders or to collect cash or empties on our behalf. The S. Proprietary, Ltd., S., Manager."

The learned Judge directed the jury that the association of plaintiff with H. in the advertisement was capable of damaging the reputation of plaintiff, since he, too, had been employed by the defendant company; and that, since in His Honour's view it was capable of a defamatory construction, the question whether or not it was in the circumstances defamatory was for them. The jury found for the plaintiff.

On a motion for a new trial on the ground, *inter alia*, of the wrongful admission of evidence,

Henry and *Foy*, for the plaintiff; *Cooney* and *Carden*, for the defendants.

Held, That the following evidence was properly admitted:

(*a*) Reports in the paper in which the advertisement was published (i) on the day of the publication of the advertisement of a charge, involving dishonesty, against H. in the Police Court and (ii) a week later of an account of H.'s conviction.

(*b*) The evidence of readers of the advertisement that the impression left on their minds by the advertisement by the coupling of the names of plaintiff and H. therein was that both of them had abused their trusts.

Solicitors: *Henry and McCarthy*, Auckland, for *Carroll and Foy*, Te Aroha, for the plaintiff; *G. P. Finlay*, Auckland, for *R. S. Garden*, Paeroa, for the defendants.

RULES AND REGULATIONS.

Fisheries Act, 1908. Sea-fisheries Regulations, 1938. Amendment No. 10. No. 1941/50.

Control of Prices Emergency Regulations, 1939. Price Order No. 26 (Whakatane Paper Mills, Ltd.). No. 1941/51.

Control of Prices Emergency Regulations, 1939. Price Order No. 27 (beeswax). No. 1941/52.

Emergency Regulations Act, 1939. Amusements-tax Emergency Regulations, 1941. No. 1941/53.

Shipping and Seamen Act, 1908. Marine Engineers' Examination Rules, 1939. Amendment No. 1. No. 1941/54.