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"If there is one spot in your country, or mine, which more than any other holds our common history, which more than any other is the focus of that community of sentiment and ideal, which, please God, will always bind our peoples, it is these Inns of Court where our common liberties were forged and fashioned by those members of our profession who have gone before."

—THE HON. JOHN W. DAVIS, Ambassador of the United States, at Gray's Inn, 1918.

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SLANDER OF GOODS.

"THE law," said an English Court in the fourth year of the reign of George II, "has always been very tender of the reputation of tradesmen": *Harman* v. *Delany*, (1731) 2 Str. 898, 93 E.R. 925. This tenderness has, indeed, been extended to their goods.

Words which disparage a man's goods but which do not impute carelessness or want of skill or otherwise reflect on his character, are not actionable upon the ground of libel or slander: *Evans* v. *Harlow*, (1844) 5 Q.B. 624, 114 E.R. 1384; *Linotype Ltd.* v. *British Empire Typesetting Machine Co., Ltd.*, (1899) 81 L.T. 331; *Griffiths* v. *Benn*, (1911) 27 T.L.R. 346. But, as Bramwell, B., put it in *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, (1874) L.R. 9 Exch. 218, "An untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable."

The action for slander of goods, or trade libel, is not part of the law of defamation, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title; and the statement may be written or oral: *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524, 527. The action arises from words which disparage a person's property without being defamatory of the person himself, in the strict sense, as being a libel or slander upon the person in his trade.

The *Linotype* case was an action for libel and came before the House of Lords on an appeal from a judgment of the Court of Appeal, dismissing an application to set aside a judgment entered for the respondents (the plaintiffs in the Court below) in an action against the appellants for libel. In the course of his speech, the Earl of Halsbury, L.C., with whom Lord Macnaghten and Lord Morris concurred, pointed out the essentials of an action for slander of goods. The case before their Lordships, he said, was an action for libel, and the only question with which he was able to deal was whether the words complained of were susceptible of a meaning which made them actionable. He went on:

> There is no doubt that, if the only meaning which a reasonable man could attach to these words amounted to a mere criticism of the machine as a mechanical appliance, it is not an actionable wrong to publish such a criticism. I think that principle is well-established, and I do not think it requires any authority to establish it.

His Lordship illustrated the principle by reference to two authorities to show that, if the tribunal before whom such a question comes is able to affirm that no injurious meaning can be attached to a writing, but that it is merely a reflection upon goods or machines, it becomes then a matter of law that such a writing cannot be the subject of an action. He then considered *Harman* v. *Delany* (*supra*) where the plaintiff had judgment, the Court being of opinion that the words complained of tended to discredit him in his business. On the other hand, in *Evans* v. *Harlow*, (*supra*) the Court decided that a statement that what a tradesman had described as "self-acting tallow syphons or lubricators" were not good for the purpose for which they were advertised, but that anyone who had adopted such lubricators "will find that the tallow is wasted instead of being effectually employed as professed," was not a libel upon the plaintiff. The Lord Chancellor, in commenting on these decisions said:

> The principle which distinguishes the two cases (and, as I have said, it is the principle, and not the particular words of either of the libels proceeded against) is that while mere criticism upon a manufacture or goods is lawful, an imputation upon a man in the way of his trade is, even without special damage, properly the subject of an action.
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> Now, this being the principle, let us see what, in this particular case, is the alleged libel.

It was as follows:

> The Empire Typesetter in America.—The *Union Printer and American Craftsman*, the most wide-awake and spirited of American trade journals, has recently contained several references to the Empire Composing Machines, which were installed in the office of the New York *Evening Sun* with

such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in February last, and the other four commencing operations on March 9 last. So short lived, however, does this installation appear to have been, that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Company is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine.

The Lord Chancellor continued that the plaintiffs were a company constituted apparently for the express purpose of dealing in the machines in question, and it would be impossible, he thought, to distinguish between the rights of an individual or the rights of a corporation to be protected from defamatory matter said of them in the way of their trade, the question being as he had said, whether the words were susceptible of a defamatory meaning, because if they were it was a question properly submitted to the jury, whether they were defamatory, and the jury were the proper persons to decide. He proceeded:

Now, the facts as proved showed that the machines were effective for their purpose, and the paragraph was untrue to the knowledge of those who wrote it. It may be said the untruth is only proof of malice, but I think that the mode of untruly describing what the writer describes as a serious blow for this machine does impute or at all events is capable of imputing that the plaintiff company does supply worthless and bad machines, and why is not that an imputation upon them in the way of their trade? The fallacy of the argument on the other side seems to consist in this—that because the criticism of a particular article may be merely a criticism of it without reference to the vendor or maker of it, it therefore becomes, and must be, only such a criticism. And I think that there is a further fallacy in suggesting that where it is a criticism, even if it does reflect upon the individual, it is within the ordinary privilege of free speech, and not the subject of an action. I think that to each of these two fallacious arguments there are separate replies. As to the first, it is quite possible to make a reflection which, by the mere form of expression would seem to be only a criticism of goods, but nevertheless would involve a reflection upon the seller or maker. Could it be gravely argued that to say of a fishmonger that he was in the habit of selling decomposed fish would not be a libel upon him in the way of his trade? And, if so, would it not be a mere juggle with language to alter the form of that allegation and to say that all the fish in A.'s shop is decomposed? Or to say of a baker that such a baker's bread is always unwholesome? In each of these cases you could adopt a form of speech which would seem only to deal with the article sold or manufactured, but in each case it would certainly tend to, and probably would succeed in, destroying the trade of the person thus referred to. And so with respect of the second argument—which must be kept quite apart from the first—the answer is that the thing done was not a fair exercise of any criticism which from grounds of public policy would be privileged, upon the general principle of right of free speech. But here there is ample evidence that it was not done in the fair exercise of any such privilege, but done maliciously. The jury have found, in answer to the question put by the Lord Chief Justice, that the words were not merely a disparagement of the particular machines in question, but defamatory of the plaintiffs in their business as the vendors of these machines. The jury also said that the defendants published the defamatory libel maliciously, intending to attack and injure the plaintiffs in their business. Something was said about other questions which ought to have been submitted to the jury, but I think the course of the trial rendered it unnecessary and inexpedient to do so. For these reasons I think this appeal ought to be dismissed.

Cozens-Hardy, M.R., summed the matter up in *Griffiths* v. *Benn*, (*supra*) at p. 350, when he said:

There are some general principles by which we must be guided. To disparage a trader's goods, which is often (though inaccurately) spoken of as a trade libel, does not give ground for an action of libel, although, if special damage is proved, the plaintiff may recover in an action on the case. On the other hand, the words used, though directly disparaging goods, may also impute such carelessness, misconduct, or want of skill in the conduct of his business by the trader as to justify an action of libel. *Evans* v. *Harlow* is one side of the line, and the *Linotype* case is on the other side of the line.

This passage was applied by the Court of Appeal in *Playle* v. *Riversdale Co-operative Dairy Factory Co., Ltd.*, (1913) 33 N.Z.L.R. 1, 17. This was a motion for nonsuit and motions for judgment in an action for libel wherein the company published a table of milk-tests showing an undue percentage of water, one column in the table being headed "added water." The table purported to show the results of "tests taken from samples of Willcock's milk according to lactometer and Babcock tests." In an action by the plaintiff for libel, evidence was given that the plaintiff was solely responsible for the delivery of Willcock's milk to the company's factory. The jury found that the words meant that some person connected with the supply of the goods had intentionally added water to the milk, and that they imputed dishonesty to the plaintiff. Part of the defence was that the words were not a libel on an individual, but a mere disparagement of the milk; and, that, therefore, the reference could only be to the owner of the goods, who alone was damnified. The judgment of the majority of the Court (Denniston, Chapman, and Sim, JJ., with whom Williams, J., concurred) said that this submission was answered at once by the fact that, while the words complained of might be said to contain incidentally a disparagement of the milk, they contained a direct charge of dishonesty against some person or persons who might not be the owner.

There are three elements which are necessary for a cause of action for slander of goods: a false statement, published or made maliciously, causing special damage.

In considering the first of these three elements, falsity, "it is not actionable for a trader to proclaim that his own goods are equal or superior to those of his rivals, even though the words be false and cause special damage, but it is otherwise when the words go beyond a mere puff and constitute definite untrue statements of fact about the goods of a rival": *20 Halsbury's Laws of England*, 2nd Ed., 538, 539, and the cases there cited.

In *White* v. *Mellin*, [1895] A.C. 154, 165, Lord Herschell, L.C., remarked:

If an action will not lie because a man says that his goods are better than his neighbour's it seems to me impossible to say that it will lie because he says that they are better in this or that other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better-cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another. Indeed, the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better."

To quote Lord Shand in the same case:

There must be a statement in disparagement of the plaintiff's goods, and the statement must be false and injurious. But I do think that disparagement in the popular sense would be enough for the plaintiff's case.

The second essential element in the cause of action is malice. There must be some indirect or dishonest motive: *Greer's Ltd.* v. *Pearman and Corder, Ltd.*, (1922) 39 R.P.C. 406. As put by Lord Coleridge, L.C.J., in *Halsey* v. *Brotherhood*, (1881) 19 Ch.D. 386, 388,

speaking of the publication to sustain an action, "besides its untruth and besides its injury, express malice must be proved, that is to say, want of *bona fides* or the presence of *mala fides*." The very essence of the case is the falsity of the publication complained of and the want of good faith in publishing it: *Brook* v. *Rawl*, (1849) 4 Exch. 521, 154 E.R. 1320, and see also *Wren* v. *Weild*, (1869) L.R. 4 Q.B. 730. This may be illustrated by a ghost story, *Manitoba Free Press Co.* v. *Nagy*, (1907) 39 S.C.R. 340. Under the heading "A North End Ghost," the defendant newspaper had published the following report: "There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John Avenue, near to Main. He appears late at night and performs strange antics, so that timid people give the place a wide berth. A number of men have lately made a stand against ghosts in general, and at night they rendezvous in the basement and close around the haunted house to await his ghostship, but so far he still remains at large." The owner of the house so described sued for damages for depreciation in the value of the property and loss of rental. Davies, J., in the Supreme Court of Canada, with whom Duff, J., concurred, and also Idington and Maclennan, JJ., said:

> Given the three ingredients of a false statement respecting plaintiff's property, the absence of *bona fides* in the publication, and the special damage following as the result, I cannot doubt that an action lies. In the case at bar I think the evidence only admits of one conclusion and that is that the article complained of was false and was published by defendant recklessly without regard to consequences, and that in this may be found the absence of good faith which imports the malice which is an essential condition of liability.
>
> Actual malice in the sense of a predetermined intention to injure plaintiff or his property cannot be necessary to be proved. If it was, there would be practically no restraint upon false publications by newspapers, causing the most serious damages to the property of others. The reckless publication by a defendant of an untruth respecting the complainant's property the natural result of which is to produce and where it does produce actual damage is sufficient evidence of the absence of *bona fides* and of the malice required by law.

In an action for slander of goods, it is material and essential that the plaintiff must prove special damage, that is, that the words complained of are calculated in the ordinary course to produce, and do produce actual damage: *Ratcliffe* v. *Evans* (*supra*); *Leetham* v. *Rank*, (1912) 57 Sol. Jo. 111; *White* v. *Mellin* (*supra*) approving *Evans* v. *Harlow* (*supra*). This third element also may be illustrated by a ghost story, *Barrett* v. *Associated Newspapers, Ltd.*, (1907) 23 T.L.R. 666. A Mr. Phillips, a poet and dramatic author, had moved out of the plaintiff's house, saying that it was haunted and the *Daily Mail* reported "about a year ago, the poet-dramatist moved into a house at Egham. It was not long before he was disturbed by strange knockings and rappings, accompanied by footfalls, soft and loud, hasty and stealthy. As he sat writing in his study, the door would open soundlessly. He found the obvious explanation of draught absurd. Draughts do not turn handles, and on my life the handle would turn and the door open, and no hand was visible. His little daughter had told him that she had seen a small old man creeping about the house, but there was no such person to be found. There was, however, a common and local tradition that an old farmer had strangled a child fifty years ago in the vicinity of the house. The servants having incontinently fled, the poet was constrained to throw up his lease and do likewise. There is no report that the disturbances pursued him." This story, however, had been published by other papers before the *Daily Mail* informed the public of the strange affair at Egham, and the house was already unlettable to a ghost-shy public. Consequently there was no evidence of special damage and the Court of Appeal directed judgment to be entered for the defendant.

On the other hand, in the Canadian case, *Manitoba Free Press Co.* v. *Nagy* (*supra*), Idington, J., at p. 353, dealing with the question of special damage, said that it had been proved beyond doubt that an actual sale of the property there had been so far negotiated that but for the publication it would have been sold; and that within the principle upon which the decision in *Ratcliffe* v. *Evans* (*supra*) proceeds, the property in question had become less saleable than it had been, and had thus depreciated in value.

Finally, it is interesting to note that Sir John Salmond (*Law of Torts*, 9th Ed. 620, 621) refers to a false and malicious depreciation of the quality of the merchandise manufactured and sold by the plaintiff as an example of the wrong of injurious falsehood; and he says that the fact that no action will be for any statement, however false or malicious, which is nothing more than a statement by one trader that his goods are better than those of a rival, is a special exception to the general rule of liability for injurious falsehood—an exception established to prevent traders from using litigation as a means of advertisement. He adds, on the authority of *Alcott* v. *Millar's Karri Forests, Ltd.*, (1905) 91 L.T. 722, that it is otherwise however, with, a specific allegation of some defect in the plaintiff's goods, even though made by a rival with a view to promoting the sale of his own. Pollock, in his work on torts, considers the actionable nature of the wrong as an extension of the application of the principle relied upon in actions for slander of title which, he says, is a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by the defendants' falsehood to act in a manner causing damage to the plaintiff.

Underhill (*Law of Torts*, 13th Ed. 266) takes a middle line, for, after heading his article "Slander of Goods," he says that actions of this kind belong to the class of tort known as injurious falsehood, and are not properly actions for libel or slander.

Whichever of the several views to which we have referred is the correct one, in *Royal Baking Powder Co.* v. *Wright, Crossley, and Co.*, (1900) 18 R.P.C. 95, where the words were a notice to the trade of intention to proceed against persons selling goods under certain labels, Lord Davey, at p. 99, described the action as "slander of title—*i.e.*, an action on the case for maliciously damaging the plaintiffs in their trade"; and he set out the three essentials of proof to which we have already referred. Lord James of Hereford, at p. 101, described it as "trade libel," as did Lord Robertson at p. 103; and the action is so described in the headnote. The modern expression seems to be now settled as "trade libel" or "slander of goods," and the author of the title *Libel and Slander* in the second edition of *Halsbury's Laws of England*, who was none other than Lord Hewart, then Lord Chief Justice, says "trade libel" is the term frequently though loosely applied, that the action is analogous to the action of slander of title, and there is no hard and fast line between the two.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Dunedin. 1941. September 2, 8. *Kennedy*, J.

MACKIE v. ECCLES.

Criminal Law—Police Offences—Telephone Regulations—Using Indecent Language in any Public Place—Indecent Telephone Message sent from Public Telephone Cabinet—Whether necessary to prove it was heard by Person in a Public Place—Sending a Telephone Message of an offensive nature—Whether Two Separate Offences—Police Offences Act, 1927, s. 48—Telephone Regulations, 1923 (as amended) (1923 New Zealand Gazette, 2449) *Reg. 74.*

Defendant from a telephone in a public cabinet in a public street held a conversation of an indecent nature with a woman in a hospital. He was convicted of sending a telephone message of an offensive nature, but an information against him for using indecent language in a public place—to wit, a telephone cabinet situated in A. Street, was dismissed.

On appeal from such dismissal,

F. B. Adams, for the appellant; *Osborne Stevens*, for the respondent.

Held, allowing the appeal, 1. That it had been proved that the defendant had committed the offence under s. 48 of the Police Offences Act, 1927, of using indecent language in a public place, which includes such a telephone cabinet, although no person in the public street actually heard the indecent language.

Purves v. *Inglis*, (1915) 34 N.Z.L.R. 1051, 17 G.L.R. 782, applied.

2. That the defendant had also committed a separate and distinct offence under Reg. 74 of the Telephone Regulations, 1923 (as amended) of sending a telephone message of an offensive nature.

3. That a conviction for one offence did not preclude a conviction for the other.

R. v. *Kendrick and Smith*, (1931) 144 L.T. 748, and *R.* v. *Burton*, *Ante*, 517, applied.

Solicitors: *Crown Solicitor*, Dunedin, for the appellant; *Osborne Stevens*, Dunedin, for the respondent.

SUPREME COURT. Napier. 1941. June 3; August 27. *Smith*, J.

***In re* GUTHRIE (DECEASED), GUTHRIE AND ANOTHER v. GUTHRIE AND OTHERS.**

Will—Devisees and Legatees—Substitutionary Trusts—Life Interest to Widow—Charged with Maintenance of Sons until Twenty-one and of Daughters under Twenty-one and unmarried—On Death of Widow, Estate to be invested as and when the Youngest Surviving Child attained Twenty-one to be divided among named Children with Substitutionary Trusts in case of Death—Whether in Circumstances Childrens' Shares vested in Trust at Testator's Death and were subject to be divested and as to effect of Substitutionary Clause.

Testator, by his will made in January, 1911, appointed his wife to be his executor and trustee during her lifetime, and after her death two other persons to be the executors and trustees. He gave to his wife control of his estate during her life with the right to the net income and profits, subject to their being charged with the maintenance, education, and bringing up in a manner suitable to their station in life of his two sons for the time under twenty-one, and his daughter under that age not being or having been married.

The will contained the following provisions: "I declare that on the death of my wife my real and personal estate shall vest in other trustees or trustee for the time being of my will (hereinafter called 'my trustee') upon trust to get in and convert into money all such portions of my real and personal property (hereinafter called 'my trust estate') as shall not consist of ready money at the time of her death at such time and in such manner as my trustee in his absolute discretion shall think fit and as and when my youngest surviving child shall have attained the age of twenty-one years (21). I direct my trustee to divide my trust estate as follows:—

"The sum of two hundred pounds (£200) to my son, William George Guthrie of Havelock North fruitgrower the sum of one thousand five hundred pounds (£1,500) to my daughter Elsie Isabel Guthrie of Havelock North spinster and the residue shall be divided equally share and share alike among my children Henry Lawrence Guthrie of Mangateretere fruitgrower Thomas Steel Guthrie of Hatuma contractor Hobart Allen Guthrie of Havelock North fruitgrower Stanley Gordon Guthrie of Havelock North grocer Florence Gertrude Cullen wife of Henry Crowhurst Cullen of Havelock North grocer Margaret Findlayson Butler wife of William John Butler of Hastings detective and Gladys Catherine Guthrie of Woodville spinster. But in case any of my said children shall die before such division takes place leaving a child him or her surviving I direct that the share of such child of mine shall be held in trust by my trustee for such child or children and shall be invested in the meantime as hereby authorized and such share and the income thereof shall be divided equally between such children as and when the youngest survivor of them shall reach the age of twenty-one years but with power to my trustee in his discretion to expend such share or the income thereof or any part or parts thereof upon the maintenace or education of any such child or children and, in case any of my said children shall die before such division takes place leaving no child or children him or her surviving I direct that the share of such deceased child shall be divided between my surviving children in equal shares as and when the youngest survivor of my said children shall have attained the age of twenty-one years."

Before the testator's death on November 1, 1917, all the testator's children had attained the age of twenty-one years. One child, a married daughter, Mrs. Butler, had predeceased the testator. She died on April 10, 1916, leaving her surviving her husband and two infant children. One of these children, Sybil Butler, died on September 30, 1926, of full age, unmarried and intestate. The other child, R. H. Butler, was of full age, but had assigned his interest in the estate to one of the plaintiffs, G. C. Guthrie. On October 29, 1918, the testator's son, W. G. Guthrie, died a bachelor, but leaving a will, under which his mother, J. Guthrie, was the sole beneficiary. On March 19, 1929, the testator's son, S. G. Guthrie, died leaving a widow, the defendant Gertrude Guthrie and two infant children, now aged fifteen and sixteen years respectively.

On an originating summons to determine the nature of the interest which the testator's children took in his estate and the effect of the substitutionary clauses in the said will,

D. F. Scannell, for the plaintiffs; *Amyes*, for G. Guthrie and her infant children; *Bannister*, for F. G. Cullen and H. L. Guthrie; *Holderness*, for T. S. Guthrie and his assignees; *Willis*, for W. J. Butler and the Official Assignee as administrator of the estate of J. Guthrie.

Held, 1. That the rights of the testator's children to possession of their interest in the trust estate were dependant on (*a*) the widow's death, (*b*) the creation of the trust estate; and (*c*) the attaining of twenty-one years by the testator's surviving child. The first and second of these events should be regarded as certain to happen. The third was a contingency that had happened at the testator's death, as all the children surviving him had then attained twenty-one years. Hence the testator's children who were alive at the testator's death took vested rights to their interest at the testator's death.

Hanson v. *Graham*, (1801) 6 Ves. 230, 31 E.R. 1030; *Cripps* v. *Wolcott*, (1819) 4 Madd. 11; 56, E.R. 613; and *Browne* v. *Moody*, [1936] A.C. 635; [1936] 2 All E.R. 1695, applied.

2. That the word "share" must be construed to refer to each gift to each named child.

Re Powell, *Campbell* v. *Campbell*, [1900] 2 Ch. 525, and *Re Whitmore*, *Walters* v. *Harrison*, [1902] 2 Ch. 66, applied.

3. That where named children had survived the testator but predeceased the widow, their gifts or shares which were vested in interest at the death of the testator were divested in accordance with the substitutionary clauses.

Browne v. *Moody*, [1936] A.C. 635; [1936] 2 All E.R. 1695, applied.

Therefore, the legacy of £200 to W. G. Guthrie, which was vested in interest, but subject to being divested, was divisible in equal shares among the testator's children who survived the testator. The share of S. G. Guthrie was likewise divested and was held in trust for his two children who survived him upon the terms of the substitutionary clause.

4. That as the gift to Mrs. Butler was a gift to a named person after a life interest and as she had died before the testator leaving children, her children took under the substitutionary clause; and, as that clause extended to all children taking by substitution, even though some be dead when the youngest survivor attained twenty-one years, the persons entitled to the share to which Mrs. Butler would have been entitled if she had lived to attain a vested interest in the estate were the legal representatives of her deceased child, S. Butler, who were entitled to one-half of such share, and her son, R. H. Butler, and his assignee, who were entitled to the other half.

In re Hannam, Haddelsley v. *Hannam*, [1897] 2 Ch. 39, and *In re Porter's Trust*, (1857) 4 K. & J. 188; 70 E.R. 79, distinguished.

Ive v. *King*, (1852) 16 Beav. 46, *In re Wood (deceased)*, *Miles* v. *MacBeth*, [1924] N.Z.L.R. 529; G.L.R. 84, applied.

In re Flower, Matheson v. *Goodwyn*, (1890) 64 L.T. 677, applied.

Solicitors: *Carlile, McLean, Scannell, and Wood*, Napier, for the plaintiffs; *H. R. Bannister*, Hastings, for F. G. Cullen and H. L. Guthrie; *Williams, White, and Co.*, Hastings, for T. S. Guthrie and his assignees; *Kennedy, Lusk, Willis, and Sproule*, Napier, for W. J. Butler and the Official Assignee.

COURT OF APPEAL.
Wellington.
1941.
June 16, 17, 18;
August 15.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

SIMONS PROPRIETARY, LIMITED AND ANOTHER v. RIDDELL.

Defamation—Libel—Advertisement not per se *Defamatory—News Items in Issue of Paper containing Advertisements and in subsequent Week's Issue—Whether admissible to make Advertisement susceptible of Defamatory meaning or upon the quantum of Damage—Innuendo—Whether Words of Advertisement reasonably capable of Defamatory meaning alleged in Innuendoes.*

The appellants, a brewery company and its manager, published in a newspaper on June 6 an advertisement that H. and R. "are no longer in our employ and are not authorized to canvass for us or collect cash or empties on our behalf." In the same issue of the newspaper there was a report that H. had been charged with issuing a valueless cheque with intent to defraud. In its issue of June 13 there was a report of his conviction.

On the trial of an action by the respondent, R., against the appellants claiming damages for libel, *Johnston*, J., admitted evidence of both these news items, and the jury awarded the respondent damages. A motion for a new trial was subsequently dismissed by him (*ante*, 283).

On appeal from such order,

Johnstone, K.C., and *Cooney*, for the appellants; *Henry*, for the respondent.

Held, per totam Curiam. 1. That the words of the advertisement were not *per se* capable of a defamatory meaning.

Capital and Counties Bank, Ltd. v. *Henty*, (1882) 7 App. Cas. 741, applied.

E. Hulton and Co. v. *Jones*, [1910] A.C. 20; *Cassidy* v. *Daily Mirror Newspapers*, [1929] 2 K.B. 331; *Tolley* v. *J. S. Fry and Sons, Ltd.*, [1930] 1 K.B. 467, aff. on app. [1931] A.C. 333; *Hough* v. *London Express Newspaper, Ltd.*, [1940] 3 All E.R. 31, 56 L.T. 758; and *Newstead* v. *London Express Newspaper, Ltd.*, [1940] 1 K.B. 377, [1939] 4 All E.R. 319, distinguished.

2. That the news item of June 13 was inadmissible and that its wrongful admission would adversely affect the course of the trial and entitle the appellants to a new trial. But

Held, (by *Blair*, *Kennedy*, and *Northcroft*, JJ.) That the case should have been withdrawn from the jury and judgment entered for the defendants for the following reasons respectively:—

Per *Blair* and *Northcroft*, JJ., That the news item of June 6 was also inadmissible, and that, if both were rejected, there was no evidence of a libel to go to the jury.

Mulligan v. *Cole*, (1875) L.T. 10 Q.B. 459; *Nevill* v. *Fine Art and General Insurance Co., Ltd.*, [1897] A.C. 68; *Frost* v. *London Joint Stock Bank, Ltd.*, (1906) 22 T.L.R. 760; and *Beswick* v. *Smith*, (1907) 24 T.L.R. 169, referred to.

Per *Kennedy*, J. That the news item of June 6 was admissible to prove knowledge of special circumstances on the part of persons to whom the advertisement was published.

Per *Kennedy* and *Northcroft*, JJ. That the words of the advertisement were not in the circumstances reasonably capable of the defamatory meaning alleged in the innuendoes.

Held, by *Myers*, C.J., and *Callan*, J., dissenting, That the news item of June 6 was admissible in evidence, but, that as that of June 13 was inadmissible, the appellants were entitled to a new trial.

Per *Myers*, C.J. 1. That there was evidence apart from the news items that made the advertisement capable of a meaning defamatory to the respondent.

Tolley v. *J. S. Fry and Sons, Ltd.*, [1930] 1 K.B. 467; aff. on app. [1931] A.C. 333; *Nevill* v. *Fine Art and General Insurance Co., Ltd.*, [1897] A.C. 68; and *Stubbs Ltd.* v. *Russell*, [1913] A.C. 386, applied.

2. That the news item of June 6, while admissible for the purpose of assisting in the interpretation of the advertisement, was not admissible on the question of damages.

3. That the learned trial Judge's direction might have misled the jury as to the facts that they were entitled to take into consideration on the interpretation of the advertisement. Appeal from the order of Johnston, J. allowed.

Solicitors: *R. S. Carden*, Paeroa, for the appellants; *Carroll and Foy*, Te Aroha, for the respondent.

Case Annotation: Capital and Counties Bank, Ltd. v. *Henty*, E. and E. Digest, Vol. 32, p. 21, para. 121; *E. Hulton and Co.* v. *Jones*, *ibid.*, p. 17, para. 77; *Mulligan* v. *Cole*, *ibid.*, p. 65, para. 931; *Nevill* v. *Fine Art and General Insurance Co., Ltd.*, *ibid.*, p. 72, para. 1010; *Frost* v. *London Joint Stock Bank, Ltd.*, *ibid.*, p. 27, para. 174; *Beswick* v. *Smith*, *ibid.*, para. 167; *Stubbs Ltd.* v. *Russell*, *ibid.*, p. 34, para. 292; *Cassidy* v. *Daily Mirror Newspapers*, *ibid.*, Supp. Vol. 32, para. 866a; *Tolley* v. *J. S. Fry and Sons, Ltd.*, *ibid.*, para. 167a.

SUPREME COURT.
Wellington.
1941.
September 26;
October 3.
Ostler, J.

NEW ZEALAND RAILWAY OFFICERS' INSTITUTE (INCORPORATED) v. ATTORNEY-GENERAL FOR NEW ZEALAND.

Government Railways—Retirement of Member—Superannuation Allowance—"Grade"—Whether including "Sub-grade"—Government Railways Act, 1926, s. 116 (1).

The omission from s. 116 (1) of the Government Railways Act, 1926, of the words "or sub-grade" was deliberate and intentional.

Hence, if a "member" of the Government Railways Department at the time of his retirement has within the previous three years served in a lower sub-grade but during the whole of that three years has been in the same grade, he is entitled to superannuation allowance computed on the salary he was receiving at the time of his retirement.

Counsel: *Spratt*, for the plaintiff; *Currie*, for the defendant.

Solicitors: *Morison, Spratt, Morison, and Taylor*, Wellington, for the plaintiff; *Crown Law Office*, Wellington, for the defendant.

SUPREME COURT. Wellington. 1941. September 5, 11. *Blair*, J.

NEW ZEALAND OIL CONCESSIONS, LIMITED v. WATKINS.

Company Law—Mining Company—Forfeiture of Shares—Basis of Forfeiture where Call made payable by Instalments—Whether such Method Valid—Companies Act, 1933, ss. 358-367.

Default by a shareholder in a mining company, to which Part XV of the Companies Act, 1933, applies, duly to pay the first instalment of a call made payable in two instalments on differing dates, does not alone constitute a basis of forfeiture of such shareholder's shares within s. 359 of the Companies Act, 1933.

To constitute such a basis of forfeiture there must be default to the extent defined in that section and such default must extend to the whole amount of the call made on such shares. If such call is made payable by instalments (of the validity of which method of making calls in the case of mining companies no opinion was expressed) there is not sufficient default to constitute a basis of forfeiture until some portion of the total amount of the call (whether payable by instalments or not) has remained unpaid at the expiration of twenty-eight days after the last instalment of call shall have become due.

Ambergate, Nottingham, and Boston and Eastern Junction Railway Co. v. *Coulthard*, (1850) 5 Exch. 459, 155 E.R. 616, referred to.

Counsel: *W. J. Sim*, K.C., and *Bergin*, for the plaintiff; *M. O. Barnett*, for the defendant.

Solicitors: *Brandon, Ward, Hislop, and Powles*, Wellington, for the plaintiff; *Barnett and Cleary*, Wellington, for the defendant.

Case Annotation: Ambergate, Nottingham, and Boston and Eastern Junction Railway Co. v. *Coulthard*, E. and E. Digest, Vol. 10, p. 1132, para. 7979.

COMPENSATION COURT. Wellington. 1941. July 25; September 19. *O'Regan*, J.

SMITH v. WELLINGTON CITY CORPORATION.

Workers' Compensation—Assessment—Concurrent Contracts of Service—Whether they must be ejusdem generis*—Whether Compensation payable to Casual Labourer in respect of Concurrent Contract—Worker under Unemployment Scheme No. 13 working Forty-hour Week, and thereafter engaged in "con-" current contract"—Whether Public Policy prevents adding Earnings of both Employments for Calculation of Compensation—Workers' Compensation Amendment Act, 1936, s. 7 (5).*

In the case of "concurrent contracts of service" under s. 7 (5) of the Workers' Compensation Amendment Act, 1936, the secondary or substitutionary contract need not be *ejusdem generis* with the principal contract.

Lloyd v. *Midland Railway Co.*, [1914] 2 K.B. 53, 7 B.W.C.C. 72, followed.

Semble, Compensation is payable to a casual labourer in respect of such a concurrent contract of service.

Cue v. *Port of London Authority*, [1914] 3 K.B. 892, 7 B.W.C.C. 447; *Brandy* v. *S.S. "Raphael" (Owners of)*, [1911] A.C. 413, 4 B.W.C.C. 307; and *Buckley* v. *London and India Docks*, (1909) 2 B.W.C.C. 327, distinguished.

Plaintiff, a hairdresser, who was employed in a hairdresser's shop from 4.30 to 8.30 p.m. on Friday and all day on Saturday, obtained employment from the defendant corporation under Unemployment Scheme No. 13, his full working week prescribed by the General Labourers' Award, to which the defendant was a party, being forty hours. He continued his work in the hairdresser's shop.

In an action for compensation for injuries suffered by plaintiff by an accident in the course of his employment by the defendant, the question arose whether his earnings from his hairdresser's work should be added to those that he received from the defendant, and his compensation increased accordingly.

F. W. Ongley, for the plaintiff; *J. O'Shea*, for the defendant.

Held, 1. That plaintiff's work as a hairdresser during the currency of his employment by the defendant was a concurrent contract of service within the meaning of s. 7 (5) of the Workers' Compensation Amendment Act, 1936.

2. That the plaintiff was not employed as a casual hairdresser.

3. That no question of public policy arose, either because Scheme No. 13 contemplated that no person employed thereunder should follow any other occupation, or because the principle of the forty-hour week legislation of 1936 was that there should be no concurrent contracts outside the hours of the full working week.

Printing and Numerical Registering Co. v. *Sampson*, (1875) L.R. 19 Eq. 462, referred to.

4. That plaintiff's earnings from his hairdresser's work should be added to those he received from the defendant for the purpose of the calculation of the compensation due to him.

Gyde v. *Boon Bros., Ltd.*, [1940] N.Z.L.R. 779, G.L.R. 457, applied.

Solicitors: *Ongley, O'Donovan and Arndt*, Wellington, for the plaintiff; *City Solicitor*, Wellington, for the defendant.

Case Annotation: Lloyd v. *Midland Railway Co.*, E. and E. Digest, Vol. 34, p. 426, para. 3468; *Cue* v. *Port of London Authority, ibid.*, p. 410, para. 3333; *Brandy* v. *S.S. "Raphael" (Owners of), ibid.*, p. 427, para. 3470; *Buckley* v. *London and India Docks, ibid.*, p. 410, para. 3332; *Printing and Numerical Registering Co.* v. *Sampson, ibid.*, Vol. 12, p. 244, para. 1992.

COMPENSATION COURT. Dunedin. 1941. August 19, 21; September 24. *O'Regan*, J.

McELREA v. BEATTY BROTHERS (NEW ZEALAND), LIMITED, AND ANOTHER.

Workers' Compensation—"Worker"—"Remuneration"—Deductions from Gross Income—When Justifiable to Reduce "Remuneration" to Statutory Minimum or Less—Workers' Compensation Act, 1922, s. 2.

The word "remuneration" in the definition of "worker" in s. 2 of the Workers' Compensation Act, 1922, means the same thing as "weekly earnings" or "average weekly earnings"; and like considerations arise when any question of deductions arises.

To justify deductions from a gross income of more than £400 so that the "remuneration" of a "worker" does not, after such deductions, exceed £400, there must be either (*a*) an arrangement by which a workman is to pay over part of what he receives for some purpose other than to remunerate himself; or (*b*) a payment made out of a sum received by him, for assistants or other purposes, so necessary to the performance of his duties that it must be taken that part of the sum paid to him is to be applied to such purpose.

Roper v. *Hussey-Freke*, [1915] 3 K.B. 222, 8 B.W.C.C. 604, followed.

Where a salesman whose gross income for the year preceding the accident when he was injured was £599, but his business made extensive motor-car travelling and assistance of a "crew" essential, for which expenses his employers made no allowance and the deduction of which reduced his net income to less than £400,

I. B. Stevenson and *F. W. McElrea*, for the plaintiff; *A. N. Haggitt*, for the defendants.

Held, That both parties to the contract of service had contemplated that these expenses should be deducted from the salesman's gross remuneration; hence, as his remuneration did not exceed £400, he was a "worker" and entitled to compensation.

Shipp v. *Frodingham Iron and Steel Co., Ltd.*, [1913] 1 K.B. 577, 6 B.W.C.C. 1; *Jones* v. *International Anthracite Collieries, Ltd.*, [1919] 1 K.B. 156, 11 B.W.C.C. 274; *Skailes* v. *Blue Anchor Line, Ltd.*, [1911] 1 K.B. 360, 4 B.W.C.C. 16; and *Skidmore* v. *Bullock, Lade and Co., Ltd.*, (1928) 44 T.L.R. 575, 21 B.W.C.C. 199, applied.

Canadian Knight and Whippet Motor Co., Ltd. v. *Frazer*, [1932] N.Z.L.R. 1295, G.L.R. 218; *Penn* v. *Spiers and Pond, Ltd.*, [1908] 1 K.B. 766, 1 B.W.C.C. 401; *Great Western Railway Co.* v. *Helps*, [1918] A.C. 141, 10 B.W.C.C. 654; and *Dothie* v. *MacAndrew and Co.*, [1908] 1 K.B. 803, 1 B.W.C.C. 308, referred to.

Watts v. *Niven and Co., Ltd.*, (1912) 15 G.L.R. 65, distinguished.

Solicitors: *Sinclair and Stevenson*, Dunedin, for the plaintiff; *Ramsay and Haggitt*, Dunedin, for the defendants.

INCOME-TAX.

Infant Beneficiaries Relieved.

In a recent article (p. 109, *ante*), after referring to the judgment in *Doody* v. *Commissioner of Taxes*, [1941] N.Z.L.R. 452, it was suggested that in view of the construction of s. 102 (*b*) of the Land and Income Tax Act, 1923, as amended by s. 27 (*b*) of the Amendment Act, 1939, in that case, and the anomalous results that followed, the matter might well receive consideration by the Legislature.

The matter has now been adjusted in s. 7 of the Land and Income Tax Amendment Act, 1941, by the addition to the section (as amended) of the following additional proviso:

> "Provided that where the income of the trustee is also income derived by any beneficiary who is an infant but whose interest in that income is vested, the beneficiary shall for the purposes of this section be deemed to be entitled in possession to the receipt of that income under the trust during the same income year."

The purpose of the amendment is to nullify the effect of the judgment in *Doody's* case. Now, the income of an infant with a vested interest therein is subject to the benefit of the deduction of £200 by way of special exemption conferred by s. 74 of the Land and Income Tax Act, 1923 (as amended), with the result that no tax is payable on such income if the infant beneficiary's income does not exceed £200. The position thus becomes the same as that of beneficiaries who are *sui juris*, who have had the benefit of the special exemption under s. 102 (*a*), and, although the income to which an infant is absolutely entitled remains in the possession of the trustee until the beneficiary comes of age, the amendment brings the income-tax law into line with the general law, and establishes—for income-tax purposes—that the possession of the trustee is the possession of the beneficiary, whose income is subject to the special exemption accordingly.

STOCK MORTGAGES.

Mortgages Extension Emergency Regulations Amended.

The Mortgages Extension Emergency Regulations, 1940, Amendment No. 1 (Serial No. 1941/191) which came into force on October 23, 1941, are intended to clear up the difficulty appearing from the judgment of His Honour the Chief Justice, Sir Michael Myers, C.J., in *In re a Mortgage, F. to State Advances Corporation*, [1941] N.Z.L.R. 5, where it was pointed out that there is no express provision in the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163) to enable the Court to join a stock mortgagee, where a land mortgagee has applied for leave to exercise his remedies under his mortgage; and to make an order by way of a pooling arrangement, which would bind all the parties. There must, he said, in all cases, under the regulations, be a substantive application by the stock mortgagee for leave to exercise the powers given by his security. In this judgment His Honour dissented from the judgment of Mr. Justice Ostler in *In re a Mortgage, C. to the Public Trustee*. [1940] N.Z.L.R. 810, where His Honour held that the Court had power under the regulations to make orders binding stock mortgagees, who had not made applications to the Court for leave to exercise their powers. Later, in *In re a Mortgage, C. to the Public Trustee* (*No. 2*), [1941] N.Z.L.R. 166, His Honour Mr. Justice Ostler dissented from the judgment of the Chief Justice, and held that the Court had the power, even against the will of the stock mortgagee, to exercise its powers under Reg. 12 of the regulations, if necessary to join the stock mortgagee and to make such order as it thought proper.

The matter has already been discussed in these pages: (1940) 16 N.Z.L.J. 277, and *ante*, p. 4; and there is no need now to add to what has there been said.

The amendment to the Mortgages Extension Emergency Regulations, 1940, now places the matter beyond doubt, gives the Court additional powers, and provides the machinery for doing what the judgment of the Chief Justice in *In re a Mortgage, F. to the State Advances Corporation*, (*supra*) held was, in effect, *ultra vires* the regulations.

"Stock mortgage" is defined as meaning

> A mortgage, assignment, or other instrument, whether executed before or after the commencement of these regulations by virtue of which any person (hereinafter referred to as the stock mortgagee) is entitled to receive delivery of the whole or any portion of the stock for the time being depastured on any land, or of the produce of any land or stock, or of the proceeds of the sale of any such stock or produce.

It is to be noted that the definition goes beyond a mere "stock mortgage" as the words "or the produce of any land" extends the definition to securities over growing crops, &c.

A new regulation, Reg. 7A, is inserted after Reg. 7 in the principal regulations. This provides that the mortgagor of the land and stock or the mortgagee of the land, or the lessor of the land (if any) or any other person having any interest in the land, may apply to the Court for an order in respect of the stock mortgage, whether or not any application for leave of the Court to do any act has been made under the Mortgages Extension Emergency Regulations, 1940, by the stock mortgagee, the mortgagee of the land, or any other person.

Thus, if the mortgagee of the land applies for leave to exercise his powers, the mortgagor—and this is the only case under the regulations in which an application

for relief may be made by the mortgagor—or the mortgagee who is before the Court, or, if the mortgagor is a lessee, the lessor of the land, may apply for an order binding the stock mortgagee with the intention of bringing about a pooling arrangement. Every order made by the Court is to be binding on the mortgagor, the stock mortgagee, the mortgagee of the land, the lessor of the land (if any), and such other persons as may be specified in that behalf in the order.

Upon any such application, the Court may make such order as it thinks fit with respect to the following matters:

(*a*) The keeping of accounts of all moneys received and expended by the stock mortgagee on account of the mortgagor, after the service on the stock mortgagee of a copy of the application:

(*b*) The application of moneys received as aforesaid as between the mortgagor the stock mortgagee, the mortgagee of the land, the lessor of the land (if any), and any other persons having a secured interest in the land or in the proceeds derived from the use of the land:

(*c*) Such other matters as the Court in its discretion thinks necessary or desirable for the purposes aforesaid.

Finally, any order made by the Court under the new regulation may, according to its tenor, operate retrospectively from July 1 immediately preceding the date of the order or from such later date as may be fixed by the Court in that behalf, and in any such case the stock mortgagee must bring into account all items of receipt and expenditure strictly identified with or incidental to the seasonal period commencing on the date fixed by the Court.

The effect of such an application may be gathered from the judgment in *In re a Mortgage, C. to the Public Trustee* (*No. 2*), which, with the amendment of the regulations, becomes directly in point, but only where application is made under Reg. 7A, as the Court cannot of its own motion make an order as was done in that case. The defects in the principal regulations, which the amendment is designed to overcome, may be gathered from the judgment in *In re a Mortgage, F. to the State Advances Corporation*, which, in so far as it refers to the lack of power in the Court to bind a stock mortgagee, must be considered as superseded by the new amendment.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held in the Supreme Court Library, Wellington, on September 5, 1941.

The following Societies were represented: Auckland, Messrs. W. H. Cocker, J. B. Johnston, A. H. Johnstone, K.C., and S. R. Mason; Canterbury, Messrs. A. W. Brown and A. R. Jacobson; Gisborne, Mr. J. G. Nolan; Hamilton, Mr. A. L. Tompkins; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. A. E. L. Scantlebury; Nelson, Mr. C. R. Fell; Otago, Mr. W. F. Forrester; Southland, Mr. N. L. Watson; Taranaki, Mr. J. H. Sheat; Wanganui, Mr. A. A. Barton; Westland, Mr. J. K. Patterson; and Wellington, Messrs. H. F. O'Leary, K.C., D. G. B. Morison, and G. G. G. Watson.

Mr. A. T. Young, Treasurer, and Messrs. S. J. Castle and H. E. Anderson were also present.

The President, Mr. H. F. O'Leary, K.C., occupied the Chair.

The President welcomed Mr. J. K. Patterson, who was attending the meeting of the Council for the first time.

Appointment of Auditors: Privity of Contract.—At the request of the Auckland Society, as set out in the following letter, it was decided to consider further the question of privity of contract:

> The question of legislation to bring about privity of contract between auditors and the New Zealand Law Society as set out in the Minutes of your Society of June 6 last under the above heading, has been carefully considered by my Council. They are of opinion that it would be wise to defer any action in the direction of promoting such legislation.
>
> It is understood that the main reason for the suggested legislation is to enable the New Zealand Law Society to be in a position to take action against an auditor, where it considers that the default of such auditor has involved the Society in liability for claims.
>
> My Council feels that already it is becoming increasingly difficult to get first-class accountants to undertake solicitors' audits, and feels sure that the action suggested would materially increase that difficulty. Probably conditions are worse at the present time than they may be later on, and the matter could be brought forward when the present difficulties are not so evident. Meantime, with the greater co-operation that is being secured from the Accountants' Society, it seems reasonable to expect that cases of negligence or carelessness on the part of auditors will not be numerous.
>
> My Council would be glad, therefore, if this question could be reconsidered by your Council.

The Wellington Society also asked that action be deferred, and the Otago and Canterbury Societies were opposed to legislation being sought in the matter. The Hawke's Bay Society was still of opinion that action should be taken.

It was decided that no action be taken meantime, but the matter be left in abeyance for consideration by the Council at some future time.

Pass Books: Cheques Entered by Numbers.—The suggestion of incorporating a form of receipt in the cheque form was not favourably regarded; but seven of the Societies considered that rules should be drafted to compel solicitors to authorize the bank to hand the cheques every month to the auditor.

The President stated that he had asked Mr. H. E. Anderson, one of the legal representatives on the Joint Audit Committee, to attend the meeting and give his views on this matter.

Mr. Anderson was of opinion, and he thought it would be shared by the accountants, that unless unavoidable, it was most undesirable in view of depleted staffs, to increase the responsibilities and work of both legal and accountants' offices at the present time.

Members of the Profession in England.—In reply to the President's cable, the following letter was received from the Law Society, London:

> I have read to the Council of this Society your cable reporting the resolution passed at the annual meeting of the New Zealand Law Society.
>
> It is a source of great encouragement to us here to feel that we have the sympathy of the Dominions with us in these difficult times, and to know of the magnificent contribution to our common cause made by the Dominion of New Zealand, as well as the other members of the British Commonwealth.
>
> The profession here have unfortunately all too few opportunities of getting to know their colleagues in the Dominions,

but the present war has served to show once again how closely akin are the peoples of the British Empire wherever they may live, and has certainly given me the opportunity of sending to you personally and to members of the legal profession in New Zealand our best wishes and our assurance that the profession of this country can have no doubt as to the outcome of the present struggle between law and order as we understand it, and the doctrine of force by which it is sought to dominate the world.

Following on the resolution of the Council at the June meeting, the President had written to the Law Society as follows :—

I duly received your letter of the March 12, and I also received your cablegram acknowledging mine of March 21.

I assure you that we sympathize with you all in your great ordeal, and our regret is that because we are so far away it is so difficult to give any effective aid.

As you know, last year it was contemplated that many children would be evacuated from Great Britain, but apparently because of shipping dangers and difficulties the scheme was temporarily suspended. I would like you to know that if the plan is revived we are willing to help by taking into our homes children of members of the profession. The matter was discussed at our recent quarterly meeting, and whilst it was realized that little could be done immediately, a unanimous resolution was passed that an offer be made to your Society and the Bar Councils to care for children of legal practitioners should it be possible to arrange for their evacuation.

This offer is accordingly made, and if anything is being done you know that we can be called on.

Another matter is this: I notice in law periodicals that requests are made on behalf of solicitors whose libraries have been destroyed that others more fortunate might assist in replacing the lost books. This is a direction in which we might assist. I have before me as I write a letter from a practitioner stating that he has a set of the English Statutes which he would be willing to give, and no doubt there are others who could similarly assist. Kindly let me know whether assistance in this direction is required, and if it is I feel sure that an organized effort here would have good results. An indication of what is specially required would be helpful.

We all hope that the war will soon be over, but it does look as if the task will be a long one . . .

Ruling.—The Auckland Society wrote asking for a ruling concerning the following matter :

My Council would be pleased if you would please place before your Council the facts set out in this letter.

Up till recently there were practising in partnership in Auckland two solicitors who, for the purpose of this letter, will be named William Smith and John Jones. These are not the correct names of the solicitors, but all the other facts set out in the letter are correct. The partnership name may be taken as "Smith and Jones." William Smith a short while ago was struck off the Roll for professional misconduct. The name of William Smith has been removed from the letterheads and the office premises used by the remaining partner. The practice is now being carried on by the remaining partner under the name of "Smith and Jones," which name appears on the premises and on the letterheads.

My Council has been unable to find any ruling by Law Societies in New Zealand or elsewhere that would exactly fit these circumstances.

It seems to my Council undesirable that the remaining solicitor should practice under the name of "Smith and Jones."

I would be glad if you would please place this matter before your Council in order that, if they think fit, a ruling might be given.

It was decided to adopt the following ruling :

"The Council is of opinion that it is improper for the remaining partner in a firm of solicitors to continue to practise his profession under a firm name containing the name of his former partner who had been struck off the Rolls for professional misconduct."

Scale of Fees for Renewal of Leases.—The following scale of fees for renewal of leases submitted by the Wellington members, was adopted :—

Minimum fee—£1 11s. 6d. for renewals of leases where annual rental fee does not exceed £50, increased by 10s. 6d. for every £50 of annual rental up to a maximum of £8 8s. which would be reached at an annual rental of £700.

The foregoing scale to apply only to renewals where the statutory form is used in accordance with s. 4 of the Land Transfer Amendment Act, 1939.

For reference purposes the following table shows the suggested scale as compared with the scale for new leases :

Rental.	New Lease.	Memo. of Renewal.
£	£ s. d.	£ s. d.
50	3 3 0	1 11 6
100	4 4 0	2 2 0
150	5 5 0	2 12 6
200	6 6 0	3 3 0
250	6 16 6	3 13 6
300	7 7 0	4 4 0

and upwards.

The suggested scale for Memo. of Renewal of Leases would therefore be :

£	£ s. d.
Rent not exceeding 50 per annum ..	1 11 6
,, ,, ,, 100 ,, ,, ..	2 2 0
,, ,, ,, 150 ,, ,, ..	2 12 6
,, ,, ,, 200 ,, ,, ..	3 3 0
,, ,, ,, 250 ,, ,, ..	3 13 6
,, ,, ,, 300 ,, ,, ..	4 4 0
,, ,, ,, 350 ,, ,, ..	4 14 6
,, ,, ,, 400 ,, ,, ..	5 5 0
,, ,, ,, 450 ,, ,, ..	5 15 6
,, ,, ,, 500 ,, ,, ..	6 6 0
,, ,, ,, 550 ,, ,, ..	6 16 0
,, ,, ,, 600 ,, ,, ..	7 7 0
,, ,, ,, 650 ,, ,, ..	7 17 6
Rent exceeding 650 ,, ,, ..	8 8 0

Benevolent Fund.—The Auckland Society wrote as follows :

This Society has recently established a Benevolent Fund under s. 43 of the Law Practitioners Amendment Act, 1935. Under this section assistance is limited to members of the Society, or to their wives or children, or to the widow, children, parent or parents of any deceased member.

It is pointed out that under this section assistance could not be given to a practitioner who had ceased practice and had in consequence ceased to be a member of this Society. Such a member may, of course, have been a subscriber to the fund for years and may have had to relinquish practice on account of continued illness or some other cause.

My Council suggests that if possible action might be taken to secure an amendment under this section to enable assistance to be given to any ex-member of the Society or to the wife or children of any such ex-member.

It was resolved that legislation be sought to meet the position.

Death Duties.—The Wellington Society wrote as follows :

The following letter was considered by my Council when it was decided to refer the matter to your Council for consideration :

In April last I was in touch with your Society on the question of rate of interest charged on unpaid death duties. At that time the Minister was not inclined to alter the rate.

In view, however, of the Minister having now reduced interest rates on deposits of all kinds it might seem that the time is opportune to make a further application, and, if you feel disposed to do so, my company would be pleased to co-operate.

It was resolved, in view of the general reduction in the rates of interest, that an application be made to the Minister of Finance for a reduction in the present rate of interest chargeable on unpaid death duties.

SEPARATION AGREEMENTS.

Circumstances Affecting their Duration or Enforceability.

By I. D. CAMPBELL.

(*Continued from p. 212.*)

9. ILLEGALITY OF OBJECT.

A separation agreement entered into for the purpose of facilitating adultery is void and unenforceable on grounds of public policy. If either party entered into the agreement with such an object in view, the other party, on discerning the position, may be relieved from all obligations under the deed. In *Evans* v. *Carrington*, (1860) 2 DeG. F. & J. 481, Lord Campbell said: "I am of opinion that the deed of separation was fraudulent and void in its inception on the ground that the wife, having before the marriage had illicit intercourse with Robinson, induced the plaintiff to execute the deed in contemplation of a renewal of that illicit intercourse, and that she might carry it on with more facility. If there be evidence reasonably to support such inferences, I cannot doubt that the deed ought to be set aside." It will be seen that this is said to be founded on fraud, but it has since been clearly recognized that this is really a case not of fraud but of illegality on grounds of public policy. Thus in *Fearon* v. *Earl of Aylesford*, (1881) 6 P.D. 68, Cotton, L.J., put it on the true ground when he said: "If the deed was prepared and so constructed as to enable the woman to commit adultery with impunity, and it was a deed executed with that object, no doubt the deed would be against public policy." The same view was expressed forcibly by Lord Shaw in *Hyman* v. *Hyman*, [1929] A.C. 601, when he said that an agreement which contemplated the commission of adultery would be "immoral in its nature, opposed to the fundamental sanctity of marriage, and contrary to the law of England."

If both husband and wife are aware of the immoral purpose the deed is void. If it is executed by one party for an immoral purpose not known to the other, it has been said that the deed is voidable and will be set aside at the instance of the other party: *16 Halsbury's Laws of England*, 2nd Ed. 717. It is certainly clear that the innocent party may have the deed set aside, but is the transaction merely voidable? If so, the innocent party could elect to affirm the deed on becoming aware of the facts. That would not seem to be consistent with authority.

In *Wild* v. *Harris*, (1849) 7 C.B. 999, a woman was held entitled to recover damages from a married man who had promised to marry her without disclosing that he was already married. Wilde, C.J., said: "It would be strange indeed to allow the defendant to rely upon his own wrong, to set up his fraudulent concealment of his marriage, in order to discharge himself from his promise." But it is not a universal rule that a man is barred from pleading the illegality of his own contract in order to escape liability under it. Until such time as the innocent party becomes aware of the immoral purpose of the other party, the separation deed is fully enforceable, and the guilty party cannot plead his own wrong. But as soon as the innocent party becomes aware of the true facts he not only ceases to be bound by the contract but he is no longer in a position to demand performance. Should he endeavour by Court action to compel the other to comply with the covenants of the deed, he could be met with the plea of illegality, even though this illegality arose from the intentions and conduct of the party raising this defence. In *Salmond and Winfield on Contracts*, p. 158, it is said:

> So soon as the innocent party obtains actual knowledge of the illegal nature of the contract which he has entered into he becomes no longer entitled to perform or continue the performance of it.

There is, however, a compensating remedy available to the innocent party in some cases of illegal contracts. Once aware of the true position he cannot institute proceedings to compel performance or to recover damages for breach, but he may have another remedy. As was said by Phillimore, J., in *Speirs* v. *Hunt*, [1908] 1 K.B. 720, 723, the innocent party cannot take action for breach on the footing that the other could fulfil the contract and had failed to do so, but may succeed upon the ground of estoppel or warranty. Where a married man promises to marry a woman without disclosing that he is already married, he is liable for breach of the promise implied on his part that he was then capable of marrying: *Millward* v. *Littlewood*, (1850) 5 Ex. 775. If a party to a separation deed is able to recover against the other party who procured the separation for an immoral purpose, it is not because he can, as the innocent party, affirm a voidable contract, but on a principle analogous to that relied on in the above cases. The situation does not seem to have arisen in reported cases on separation deeds.

(As to agreements for future separation, which are void as against public policy, see section 11, *infra*.)

10. DEATH OF THE HUSBAND.

Where the deed is so drafted that the husband's covenant expressly binds his executors, his undertaking necessarily and no doubt intentionally operates after his death if he has covenanted to pay maintenance during the life of his wife. That was the position, for example, in *Hyman* v. *Hyman*, [1929] A.C. 601.

Where the agreement provides for maintenance for the life of the wife, but does not in terms bind executors, there has been a judicial difference of opinion. *In re Gilling*, *Proctor* v. *Watkins*, (1905) 74 L.J. Ch. 335, is probably the first case expressly on the question.

In the earlier cases of *Clough* v. *Lambert*, (1839) 10 Sim. 174, and *Atkinson* v. *Littlewood*, (1874) L.R. 18 Eq. 595, covenants in separation deeds were held enforceable against the estate of the deceased husband, but the decision in the first case turned mainly on the question of consideration, while the other was decided simply on the doctrine of satisfaction of debts by legacies.

In *In re Gilling* the covenant was for payment to the wife "during her life if she should so long continue to live separate and apart." It was held that liability

for maintenance ceased with the husband's death. The decision was based on a simple and literal construction of the covenant. "She cannot be said to be living separate and apart from him when he is dead."

The decision was referred to by Salmond, J., in *Lodder* v. *Lodder*, [1923] N.Z.L.R. 785, when he observed that the effect of death was a difficult question. *In re Gilling*, he suggested, depended on the special wording of the covenant in that case. In *Buzza* v. *Buzza*, [1930] N.Z.L.R. 737, where the separation agreement stipulated for payments to the wife during life while remaining chaste or until remarriage after divorce, Blair, J., said: "It may be that this covenant may survive the death of the husband."

Kirk v. *Eustace*, [1937] A.C. 491, is now the authoritative decision on this question so far as concerns maintenance provisions expressed to be for the life of the wife. The Court of Appeal, by a majority, had held, following *In re Gilling* (*supra*), that the contract, being an agreement for separation, was based on the assumption that both parties should be living at the time when it was sought to enforce it; that on the death of the husband the whole substratum of the contract was gone, and therefore that all liability under the husband's covenant had come to an end. The covenant was to pay the wife the weekly sum of £2 during her life for her maintenance and support, but determinable on reconciliation. The House of Lords, reversing the Court of Appeal, held that as the deed provided that the weekly payment to the wife should continue during her life, and as there was nothing to show an intention that the husband's obligation should continue only during his life, his estate remained liable to pay the weekly sum to the widow. *In re Gilling* must be regarded as depending on a clause amounting to a valid conditional limitation of the period during which maintenance was payable, whereas *Kirk* v. *Eustace* holds that where the period is expressed absolutely, there is no implied condition subsequent making the agreement determinable on the husband's death.

In arriving at this decision the House of Lords relied on the Law of Property Act, 1925, s. 80, providing that a covenant binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed. This section, as Lord Atkin remarked, only restated in different words a well-known section in the Conveyancing Act, 1881—section 59. That section was never reproduced in the property legislation of New Zealand. It was unnecessary to do so, for statute had already provided in this country that real estate vests in the personal representative and devolves as personal estate. The absence of a similar statutory provision in New Zealand therefore makes no difference. It is immaterial either way that executors are not named. Nor would a different result be reached if the obligation were expressed by simple contract and not by deed.

Lord Thankerton said: "I know that sometimes the word 'frustration' is regarded in legal circles as blessed equally with the word 'Mesopotamia,' but I confess that I cannot see any justification for suggesting its applicability in the present circumstances."

Lord Atkin expressed similar views: "I fail to see any ground for invoking either the principle of frustration or any implied term which should make this stipulation on the part of the husband come to an end on his death." Dealing with the reasoning of *In re Gilling*, in which it was held that the wife could not be said to be living separate and apart once the husband was dead, Lord Atkin conceded that that was so. There was no longer any substance in the obligation to live apart. "But," he said, "what has that to do with the covenant by the husband that provided his wife does agree to live apart from him he will after his death continue to provide for her maintenance?"

Following on this decision it was held in *Fowke* v. *Fowke*, [1938] Ch. 774, that an agreement to pay maintenance to the wife for life was binding on the executrix of the husband and must be honoured by her.

It has yet to be decided, however, whether the death of the husband will determine the liability to pay maintenance where the agreement does not express any term during which it is to be payable. It may well be that in this case the Courts may hold that the presumed intention of the parties was to make provision limited to the period of their joint lives. This conclusion could be arrived at by reasoning parallel to that in *Watts* v. *Watts*, [1933] V.L.R. 52, in regard to divorce, but the cases are not so alike as to enable any useful prediction to be made. All that can be said in this case is that the general principle is as stated in *16 Halsbury's Laws of England*, 2nd Ed. 724:

> Where a covenant for the payment of an annuity to the wife is regarded as a permanent provision, it is enforceable against the executors and administrators of the husband after his death.

A summary order for maintenance is determined by death: Destitute Persons Act, 1910, s. 36.

(*To be concluded.*)

ST. THOMAS'S HOSPITAL.

Further Donations Received.

Contributions to the funds of St. Thomas's Hospital, London, in response to the appeal made in a recent issue of the JOURNAL, have been received from Mr. T. A. Gresson, Christchurch, and Miss M. E. Dodd, Auckland, and are gratefully received on behalf of the Treasurer, Sir Arthur Stanley.

War Legislation.—The recent anniversary of the outbreak of the war recalls that the great mass of legislation which accompanied that catastrophic event has now been in operation for two years. It is probably correct to say that it was Lord Haldane's foresight which, in anticipation of the last war, secured the preparation of war legislation ready for submission to Parliament as soon as the necessity arose. He had had reason to consider such an emergency both from the point of view of Minister for War and of Lord Chancellor, and the experience he had gained in these offices as well, perhaps, as his intimate knowledge of German mentality, made his legislative precautions sufficient, though by no means so complete as on the present occasion.—APTERYX.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Letters of Administration.—*Sealing before Execution of Administration Bond—When Fresh Application necessary.*

QUESTION: Letters of administration have been granted, and steps have been taken to obtain the execution of a bond, but difficulties have arisen in obtaining the signatures of the necessary parties—the administrator and the sureties—within one calendar month from the date of the grant. Is it possible to seal the letters of administration within the time prescribed by R. 531M of the Code of Civil Procedure—*viz.*, within one calendar month from the day on which the grant was made, and to have the bond executed later?

ANSWER: The bond must be executed before the sealing of the letters of administration; and, if it is not executed within the time prescribed under R. 531M, the grant lapses and a fresh application for letters of administration then becomes necessary: *In re Hamilton*, [1937] N.Z.L.R. 880.

2. Wills.—*Territorial or Home Guard—Testator under Twenty-one and Unmarried—Validity.*

QUESTION: Can a member of the Territorial Force or the Home Guard make a valid will if he is under the age of twenty-one years, and unmarried?

ANSWER: Yes, it would seem so. It is provided by Reg. 3 of the Soldiers' Wills Emergency Regulations, 1939 (Serial No. 1939/276) that "any member of His Majesty's Naval, Military, or Air Forces during any war in which His Majesty is now engaged may make a valid will notwithstanding s. 7 of the Wills Act, or s. 171 of the Native Land Act, 1931." The Territorial Force is part of the Defence Forces, and by Reg. 8 of the Defence Emergency Regulations, 1941 (Serial No. 1941/130) "every member of the Defence Forces shall be at all times subject to military law as established by the provisions of the Army Act, the King's Regulations, the Defence Act, 1909, and any regulations made thereunder." The Home Guard is part of the Defence Forces of New Zealand, and the above-quoted regulation applies to its members: Defence Emergency Regulations, 1941, Amendment No. 1 (Serial No. 1941/152); and every person who is over the age of sixteen years and is a natural-born or naturalized British subject is eligible to make application for membership.

3. Probate and Administration.—*Testator dying while Prisoner of War—Evidence of Death.*

QUESTION: I am acting for an administratrix who has applied for probate of the estate of a soldier whose death has been reported. A certificate of registration of death pursuant to the Registration of Deaths Emergency Regulations, 1941, has been issued. It is presumed that the certificate is issued under Reg. 14 (1), as it is on form A-R.G.-149. The certificate merely states that the deceased died in hospital while a prisoner of war in Greece, in 1941.

I presumed from the article in your issue of August 5 last (p. 163) that probate would be granted in such a case; but Mr. Justice Smith has minuted the application as follows:—

> "The evidence of death is vague. Some further information should be available to show the precise time and place of death and identity of deceased."

It seems clear that, for the duration of the war at any rate, no further information will be available; and, if the certificate of death is not going to be accepted by the Court in such cases, I cannot see that there is much purpose in having two different sorts of certificates as provided by the regulations. Certainly the certificate is vague as to the actual place and date of death, but it seems likely that there will be many such certificates and that the vagueness will enure at least until after the War. The position seems to me to be one likely to crop up quite frequently and I shall be grateful for any help in connection with it.

While there can be no gainsaying the correctness of the Judge's minute, if the information of death is available there would appear to be no reason why information of date and place of death should not also be available with similar information as to the means by which the deceased was identified.

ANSWER: In the circumstances at the time of the making of the minute, there was no other order that could be made by the learned Judge. But it is not clear, as the question states, that no further information will be available. There have already been several almost identical applications for probate, where a letter from a fellow-prisoner expressing sympathy with the deceased's relatives has been placed before the Court as confirmatory evidence and the delayed probate has then been granted. An inquiry through the International Red Cross organization could be made, in default of obtaining such a letter. If the deceased, since being taken prisoner, had written to his relatives, a relevant factor would be the cessation of correspondence.

As the Practice Note (p. 199, *ante*) states: "If, after the expiration of what the Judge considers in the circumstances of the case to be a reasonable period, it is impossible to obtain confirmatory evidence, the Judge will further consider the case and decide whether probate or letters of administration should be granted on the material before the Court."

[The article on p. 145, *ante*, referred to in the question, as on p. 163, *ante*, was written in July, over two months before their Honours' Practice Note was issued, circumstances arising in the intervening period having rendered the latter necessary: see p. 205 (2nd column)—ED.]

RULES AND REGULATIONS.

Health Act, 1920, and the Camping-ground Regulations, 1936. Camping-ground Regulations Extension Order, 1941. No. 2. No. 1941/182.

Customs Amendment Act, 1921. Customs Tariff Amendment Order, 1941. No. 1941/183.

Control of Prices Emergency Regulations, 1939. Price Order No. 59 (Whakatane Board Products). No. 1941/184.

Extradition Acts, 1870 (Imp.). New Zealand Extradition Act Order, 1941. No. 1941/185.

Electoral Amendment Act, 1940. Electoral (Members of the Forces) Regulations, 1941. No. 1941/186.

Social Security Act, 1938. Social Security (General Medical Services) Regulations, 1941. No. 1941/187.

Customs Amendment Act, 1921, the Trade Arrangement (New Zealand and Belgium) Ratification Act, 1933, and the Trade Agreement (New Zealand and Germany) Ratification Act, 1937. Customs Agreement Application Order, 1941. No. 1941/188.

Education Act, 1914. Education Amending Regulations, 1941. No. 1941/189.

Stock Act, 1908. Stock Importation Amending Regulations, 1941. No. 1941/190.

Emergency Regulations Act, 1939. Mortgages Extension Emergency Regulations, 1940. Amendment No. 1. No. 1941/191.

Fertilizers Act, 1927. Fertilizers Regulations, 1928. Amendment No. 2. No. 1941/192.

Meat Act, 1927. Meat Regulations, 1940. Amendment No. 1. No. 1941/193.

Emergency Regulations Act, 1939. Emergency Reserve Corps Regulations, 1941. No. 1941/194.

Law Practitioners Act, 1931. Solicitors Audit Regulations, 1938. Amendment No. 1. No. 1941/195.

Emergency Regulations Act, 1939. Expeditionary Force Emegrency Regulations, 1940. Amendment No. 2. No. 1941/196.

Agricultural Workers Act, 1936. Agricultural Workers Extension Order, 1941. No. 1941/197.