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THE DEFAMATION ACT, 1954.

II.—Actions on The Case.

SECTION 5 of the Defamation Act, 1954,* is as follows :

5. (1) *In an action for slander of title, slander of goods, or other malicious falsehood, it shall not be necessary to allege or prove special damage if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff.*

(2) *This section applies for the purposes of any proceedings where the cause of action has arisen after the commencement of this Act, but does not affect any proceedings where the cause of action arose before the commencement of this Act, whenever the proceedings were commenced.*

This section differs from the corresponding section in the Defamation Act, 1952 (U.K.), in view of the distinction between libel and slander perpetuated by s. 1 of that statute, and its abolition by s. 4 (1) of our statute. The United Kingdom section is as follows :

3.—(1) In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage—

(*a*) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form ; or

(*b*) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

(2) Section one of this Act shall apply for the purposes of this section as it applies for the purposes of the law of libel and slander.

The Porter Committee on the Law of Defamation, in the course of its Report, said :

> Actions on the case, by which are meant, in the words of *Bowen*, L.J., in *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524, " actions for written or oral falsehoods not actionable *per se* or even defamatory, where they are maliciously published, and are calculated in the ordinary course of things to produce and do produce actual damage " require, as their definition shows, proof of special damage if they are to succeed. In this category are included actions for slander of title, slander of goods and other false, but non-defamatory, statements of fact made maliciously and calculated to cause damage.
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> The necessity of furnishing proof of special damage has rendered this type of action rare in the extreme ; but statements of these kinds may cause very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage. In the result, the injured person is left without any remedy for the loss which he has suffered. In our view, this constitutes an injustice which should be righted by an amendment of the existing law.
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> In such actions, no distinction is at present drawn between written and spoken words. Consequently, if the law were amended merely by eliminating the necessity for proof of special damage, it would indirectly effect a partial amendment in the existing law as to slander, since a plaintiff would have a remedy upon the case for a false statement, whether defamatory or not, spoken maliciously and calculated to cause damage, whereas an ordinary action for slander does not lie for a false defamatory statement so spoken unless it falls within one of the special categories of slanderous statements actionable *per se*.

In our s. 5 (1), in accordance with the removal by s. 4 (1) of the distinction between libel and slander, no distinction is made between written and spoken defamation, namely, between false statements which are calculated to cause damage to the plaintiff in his office, profession or trade, and false statements which, although calculated to cause damage to the plaintiff, are not calculated to do so in his office, profession or trade. Both are actionable without proof of special damage, irrespective of whether they are written or spoken. Proof of express malice, of course, remains a necessary ingredient of the cause of action.

The effect of our s. 5 (1) is, therefore, to amend the existing law as to actions on the case for slander of title, slander of goods, and other malicious falsehoods, so as to provide that an action lies without proof of special damage, whether the false statements are written or spoken.

Slander of Title, Etc.

Section 5 (1) amends the law relating to actions on the case, known variously as " trade libel ", " slander of goods " and " slander of title." In these actions in respect of injurious falsehoods, where a false and malicious statement about a person, his property, or business causes damage to his material interests, in these actions it will not be necessary to prove special damage if the words are calculated (*a*) to cause pecuniary damage to the plaintiff and are published in either form, including a broadcast, or (*b*) to cause pecuniary damage in respect of his office, profession, calling, trade, or business. Before the passing of the new Act, the law made no distinction between written and spoken words in these actions and special damages had to be proved whether the words complained of were written or oral. The section removes the necessity for proving special damage in these cases, whether the words complained of were published in permanent form or by the spoken word.

The effect of the section upon these actions in respect of spoken words is to remove a distinction which is analogous to that existing between libel and slander. Where words, however used, are calculated to cause

* *Erratum* : On p. 314, col. 1, l. 4, *ante*, it was incorrectly stated that the Defamation Act, 1954, would come into force on January 1, 1955. The date of the commencement of the statute is September 29, 1954.

pecuniary damage to the plaintiff in his office, profession or calling, they are actionable without proof of special damage.

III.—Unintentional Defamation.

The most interesting section of the new Defamation Act, 1954, is s. 6, which deals with what may be termed a new category of defamation, "unintentional defamation," so as to give some protection to authors and publishers, who, without any negligence on their part, have innocently defamed some one of whom, possibly, they have never heard.

The section is as follows :

6. (1) A person who has published words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this section ; and in any such case—

(a) *If the offer is accepted by the party aggrieved and is duly performed, no action for defamation shall be commenced or continued by that party against the person making the offer in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication) :*

(b) *If the offer is not accepted by the party aggrieved, then, except as otherwise provided by this section, it shall be a defence, in any action by him for defamation against the person making the offer in respect of the publication in question, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.*

[This reproduces s. 4 (1) of the Defamation Act, 1952 (U.K.)]

(2) Paragraph (b) *of subsection one of this section shall not apply in relation to the publication by any person of any words of which he is not the author unless he proves—*

(a) *That the author did not intend to write or publish them of and concerning the party aggrieved, and did not know of circumstances by virtue of which they might be understood to refer to him; or*

(b) *That the words were not defamatory on the face of them, and the author did not know of circumstances by virtue of which they might be understood to be defamatory of the party agggrieved,—*

and that in either case the author exercised all reasonable care in relation to the matter.

[This subsection differs from the corresponding s. 4 (6) of the Defamation Act, 1952 (U.K.), which is confined to freeing a publisher if he proves that the author's words were written without malice : see, further hereon, on p. 345, *post*.]

(3) An offer of amends under this section must be expressed to be made for the purposes of this section, and must be accompanied by an affidavit specifying the facts relied upon by the person making it to show that the words in question were published by him innocently in relation to the party aggrieved ; and for the purposes of a defence under paragraph (b) *of subsection one of this section no evidence, other than evidence of facts specified in the affidavit, shall be admissible on behalf of that person to prove that the words were so published.*

[This reproduces s. 4 (2) of the Defamation Act, 1952 (U.K.)].

(4) An offer of amends under this section shall be understood to mean an offer—

(a) *In any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words :*

(b) *Where copies of a document or record containing the said words have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.*

[This reproduces s. 4 (3) of the Defamation Act, 1952 (U.K.)].

(5) Where an offer of amends under this section is accepted by the party aggrieved—

(a) *Any question as to the steps to be taken in fulfilment of the offer as so accepted shall in default of agreement between the parties be referred to and determined by the Court, whose decision thereon shall be final :*

(b) *The power of the Court to make orders as to costs in any action by the party aggrieved against the person making the offer in respect of the publication in question, or in any proceedings in respect of the offer under paragraph* (a) *of this subsection, shall include power to order the payment by the person making the offer to the party aggrieved of costs on an indemnity basis and any expenses reasonably incurred by that party in consequence of the publication in question,—*

and, if no such action or proceedings as aforesaid are taken, the Court may, upon application made by the party aggrieved, make any such order for the payment of such costs and expenses as aforesaid as could be made in any such action or proceedings.

[This reproduces s. 4 (4) of the Defamation Act, 1952 (U.K.), with the exception that the words "action or" are twice inserted before the word "proceedings" in the last five lines.]

(6) For the purposes of this section words shall be treated as published by one person (in this subsection referred to as the publisher) innocently in relation to another person if and only if the following conditions are satisfied, that is to say—

(a) *That the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him ; or*

(b) *That the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person,—*

and in either case the publisher exercised all reasonable care in relation to the publication ; and any reference in this subsection to the publisher shall be construed as

including a reference to any servant or agent of his who was concerned with the contents of the publication.

[This reproduces s. 4 (5) of the Defamation Act, 1952 (U.K.)].

(7) *For the purposes of this section the term "Court", in relation to the publication of any words, means the Court in which any action in respect of the publication has been taken, and, if no such action has been taken, means the Supreme Court.*

[This definition is new, for application to New Zealand conditions, as the words "the Court" in the new section replaces the words "the High Court" in the United Kingdom corresponding section.]

On the subject of unintentional defamation, the Porter Committee gave its reasons for the change in the law, now brought about in New Zealand by s. 6 of the Defamation Act, 1954, the above section. It said:

> In an action of defamation, the question whether the words complained of are defamatory of the plaintiff is determined by an objective test: "Is the matter complained of defamatory, *i.e.*, does it in fact tend to lower the plaintiff in the estimation of right-thinking men or cause him to be shunned and avoided or expose him to hatred, ridicule or contempt?"
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> In ascertaining the meaning of the words, the criterion is not: "What did the defendant intend the words to mean?" It is: "What would the words reasonably be understood to mean in the light of the surrounding circumstances as known to the persons to whom they were published?"
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> That is the common-law rule. A considerable body of criticism has been directed against it. This is only to be expected in view of the fact that, in the past, heavy damages have been awarded in libel actions against defendants who had no idea that the words published would be defamatory of any existing person and, in some cases could not, by the exercise of any reasonable care, have ascertained that they would be. This result offends one's sense of justice.
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> A facile remedy for the injustice which may result from the application of the common-law rule would be to alter it by legislation and to substitute a subjective for an objective test, that is to say, to determine the question whether words are defamatory by the answer to the question "What did the defendant intend the words to mean?" instead of the answer to the question, "What would the words reasonably be understood to mean in the light of the surrounding circumstances as known to the persons to whom they were published?"
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> This remedy has simplicity to commend it. It would undoubtedly be welcomed by writers, publishers, and printers who, as the law stands, may find themselves involved in a liability for damages for a wholly innocent act. On the other hand, it is unquestionable that there are cases (although it is possible to exaggerate their number) where a person who has a really genuine grievance would be left without any kind of redress if the common-law rule were simply reversed. It would not seem right that a person whose reputation had been seriously affected by a defamatory statement should have no opportunity to claim to have his reputation vindicated in our Courts merely because no one had intended to defame him.

The types of defamatory statement in respect of which authors, publishers, and printers had suggested that protection from liability for damages is most needed fall into two classes:—

(1) Statement not *intended* to refer to the plaintiff at all, *e.g.*:

(*a*) Statements intended to refer to a fictitious character, but in fact defamatory of an existing person:

Example: "Whist! There is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing"—where Artemus Jones is intended to be a fictitious character, but is, in fact, the name of a real person: *Hulton* v. *Jones*, [1910] A.C. 20.

(*b*) Statements truthfully made of an existing person but in fact, defamatory of another existing person:

Example: "Harold Newstead, 30-year-old Camberwell man who was jailed for nine months, liked having two wives at a time"—where there are two persons named Harold Newstead living at Camberwell, one of whom—not the plaintiff—was convicted of bigamy: *Newstead* v. *London Express Newspaper Ltd.*, [1940] 1 K.B. 377.

(2) Statements intended to refer to an existing person which, although *ex facie* harmless are, by reason of facts unknown to the author or publisher, defamatory either of the person intended to be referred to, or of some other person.

Example: A caption under a newspaper photograph: "Mr. M. C. the racehorse owner, and Miss X., whose engagement has been announced"; where Mr. M. C., who himself gave the information to the newspaper, is in fact already married to Mrs. C., plaintiff in the action: *Cassidy* v. *Daily Mirror Newspapers, Ltd.*, [1929] 2 K.B. 331.

The Porter Committee's Report continued:

> It was urged by a number of witnesses that in these three classes of cases, which, for convenience, we refer to as cases of "unintentional defamation" the lack of any intention to defame, at any rate, if coupled with the absence of any negligence on the part of the defendant, should constitute a complete defence to any action for defamation. To accept so drastic a proposal, however, would leave the equally innocent victim of the defamatory statement not merely without any reparation of the injury sustained to his reputation, but also without any means of clearing his name publicly. The defamer might be willing to publish an apology; but to do so would be an act of grace on his part. There would be no method of compulsion, nor would there be any control over the form of the apology or of the publicity given to it.
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> While, in our view, some amendment of the existing law is required to deal with cases of "unintentional defamation" it is essential that any such amendment should ensure that all reasonable steps are taken to clear the reputation of the injured person by a correction and apology which should be given publicity appropriate to the circumstance of the original defamatory publication. If these steps are taken, we think that practical justice will be done without the award of monetary damages.
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> What is the appropriate form of the correction and apology and what is suitable publicity to be given to it must depend upon the circumstances of the particular case. It is impossible to generalize. No doubt in the commonest case, namely, of an unintentional libel published in a newspaper or periodical, a correction and apology published in one or more subsequent issues of the same newspaper or periodical would be proper. In the event of an unintentional libel contained in a book, its recall, together with a correction and apology published as an advertisement in a local or suitable national newspaper, might meet the case. But we do not recommend that this method of dealing with unintentional libels should be limited to libels published in newspapers, periodicals, and books. It should apply to all classes of "unintentional defamation" as, for example, unintentional libels contained in private correspondence, where an apology to which wide publicity was given would be unnecessary and might, indeed, be harmful.
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> We do not recommend that the publication of a suitable correction and apology should absolve from liability for damages a defendant who has *not* taken all reasonable precautions to ensure that what he proposes to write, publish or print is not defamatory. If there has been a want of reasonable care on the part of the defendant in publishing defamatory matter, he should be subject to the ordinary common law liability.
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> The principle which we recommend is easy to state. Its practical and procedural application presents difficulties. There will, no doubt, be cases which the defendant will contend are cases of "unintentional defamation" but which the plaintiff will contend are not, either because of an actual intention to defame, or, more often, because of a lack of reasonable care on the part of the defendant.
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> If a plaintiff, after accepting a correction and apology, were allowed to continue his action on the chance of establish-

ing either an intention to defame or a lack of reasonable care on the part of the defendant, our proposal would fail of its practical object. We therefore recommend that while, on the one hand, a defendant should not be entitled to force an unwilling plaintiff to accept a correction and apology, on the other hand, a plaintiff who elects to accept such correction and apology should be debarred from proceeding with an existing action or bringing any further action against the defendant in respect of the same words. If the plaintiff does not accept the offer by the defendant of a correction and apology, he should be permitted to continue his action, but the fact that such offer has been made should be a defence to the action unless at the trial it appears that the defendant was guilty of an intention to defame or of lack of reasonable care.

This proposal, however, would lose much of its practical efficacy unless there were some simple and expeditious way of determining what is the proper form of the correction and apology in any particular case, and what is the proper method of giving publicity to it. If the parties can agree on this—so much the better. But if they cannot, we think it should be open to either party to apply by summons to a High Court Judge sitting in Chambers to settle the form of the correction and apology and the manner in which it is to be published. The Judge's decision should be final; there should be no right of appeal.

The correction and apology, if it is to serve its purpose, should be made promptly. It should be offered by the defendant as soon as practicable after he has been given notice of the libel by the person defamed. Normally, such notice would be given by letter, but there may be exceptional cases—where, for example, an injunction might be appropriate if the defendant were unwilling to cease further publication of the libel—in which the plaintiff is justified in issuing a writ forthwith. In such a case, the writ would constitute the notice upon receipt of which the defendant should make his offer to publish a correction and apology; but the practice of issuing a writ which is not preceded by an ordinary letter giving notice of the libel should not be encouraged. When it is done unnecessarily, it can be dealt with under our proposals for dealing with the costs.

As a rule, where a case of "unintentional defamation" is disposed of by a published correction and apology, the person defamed will incur some legal costs—although these will be trivial in comparison with the costs of an ordinary action. We think that normally the reasonable costs of the person defamed should be met by the person responsible for the defamatory statement. Generally, no doubt, their amount will be agreed at the same time as agreement is reached as to the form and manner of publication of the correction and apology; but in order to avoid the possibility of inflated claims for costs, there should be a right to apply to have them taxed in the ordinary way by a taxing master. If the action has already been started by a writ before the offer of a correction and apology is made and accepted, it will be necessary to take out a summons in the action to stay all further proceedings upon the publication of the correction and apology. The question of costs, including the costs of the writ and proceedings in the action prior to the stay, can then be dealt with upon the summons. If the Judge in Chambers is of the opinion that, in the circumstances, the issue of a writ was unnecessary, he can, in his discretion, disallow the costs thereof. If no writ has been issued, but an application to the Judge in Chambers is made by originating summons owing to the inability of the parties to reach agreement either as to the form of the correction and apology or as to the manner and extent of its publication, the costs of such summons and of the procedure leading up to it will be in the discretion of the Judge, who should be entitled to deprive the person defamed of the whole or part of his costs if he had acted unreasonably in refusing to reach an agreement.

The above proposals under which the publication of a correction and apology or the offer to publish one would amount to satisfaction of a cause of action for defamation should, in our view, apply only to cases which fall within the classes which we have described as "unintentional defamation" and to such cases only where the publication of the defamatory statement was made without any want of reasonable care on the part of the person responsible therefor. The right of a defendant in other classes of cases to publish an apology—with or without an admission of liability and with or without the consent of the plaintiff—and to rely upon the apology in mitigation of damages, if any, would not be affected. It would, however, be necessary for the defendant, when offering to publish an apology, to make it clear to the plaintiff whether the offer is made in satisfaction of his claim under the statutory provision which will be necessary to implement our proposal, or whether it is an ordinary offer of an apology in mitigation of damages.

There is often more than one person who, if sued, would be liable for a defamatory publication. A common example is that of the writer of a newspaper article and the editor, the publisher and the printer of the newspaper in which the article appears. In some cases, each of these persons may satisfy the conditions necessary to bring the defamatory statement, so far as he is concerned, within the classes which we have described as "unintentional defamation." In other cases, one or more of such persons may have been guilty either of an intention to defame or want of reasonable care, and so fall outside the scope of our proposals, while the rest, although jointly responsible for the publication, may have been innocent of any such intention or want of care, and ought to be entitled to the benefit of them. We recommend at a later stage in this Report that the existing rule of joint liability in actions for defamation should be altered so as to abolish the liability of a defendant whose liability under the existing law arises solely as a result of the state of mind—*i.e.*, malice of a person other than himself who is jointly responsible with him for the publication complained of. It is accordingly necessary to make our proposals as to "unintentional defamation" consistent with this principle.

In our next issue, further attention will be given to s. 6 and its effect, and in particular, to the offer of amends.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Articles of Association—Inconsistency—Article giving Each Member of Company One Vote—Another Article giving Each Member on Show of Hands One Vote, and upon Poll One Vote for Every Share Held by Him—Latter Article inconsistent with Former Article and not applicable to Company. A company's articles consisted of some twenty-three articles specially drawn for it, and, in addition, the regulations contained in Table A of the Companies Act, 1933, which were applied to the company except in so far as they were modified or enlarged by or were inconsistent with the special articles. Article 5 of the special articles was as follows: "5. Each member of the Company shall have one vote but in the event of an equality of votes the Chairman shall have and exercise a casting vote." Article 65 of Table A was in the following terms: "On a show of hands, every member present in person shall have one vote, and upon a poll every member present in person or by proxy shall have one vote for every share held by him in respect of which there is no payment in arrear." *Held*, by the Court of Appeal, that, as Art. 5 of the special articles meant that, in all cases of voting, the shareholder should have one vote only, it was inconsistent with Art. 65 of Table A on the taking of a poll; and Art. 65 of Table A was, therefore, not applicable to the company. (*Paterson* v. *Paterson and Sons, Ltd.*, (1916) 54 S.L.R. 19, applied.) (*Fisher* v. *Black and White Publishing Co., Ltd.*, [1901] 1 Ch. 174, distinguished.) Judgment of *Fair*, J., affirmed. *McNeil* v. *McNeil's Sheepfarming Co., Ltd.* (S.C. & C.A. Wellington. July 14, 1954. Barrowclough, C.J., Stanton, McGregor, JJ.)

COSTS.

Negotiations. *98 Solicitors' Journal*, 549.

COVENANT.

Discharge or Modification of Restricted Covenant. *98 Solicitors' Journal*, 606, 616.

CRIMINAL LAW.

Constructive Housebreaking. *218 Law Times*, 147.

False Pretences—Post-dated Cheque—Representation of Payment of Cheque on Future Date not False Pretence—Ingredients of Offence—All Circumstances to be taken into Account—Crimes

LEGAL ANNOUNCEMENTS.

Continued from cover i.

R. G. BRICKELL.

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Act, 1908, s. 251. A representation that a post-dated cheque will be met on the due date—a promise to do something in the future—is not a false pretence within s. 251 of the Crimes Act, 1908. In each case, the matter for consideration is what present representation the accused person made when he gave the cheque; and the whole of the circumstances must be taken into account. (*R.* v. *Hattan*, (1913) 13 N.S.W. S.R. (L.) 410, applied.) (*R.* v. *Parker*, (1837) 7 C. & P. 825; 173 E.R. 160; *R.* v. *Miller*, (1868) 7 N.S.W. S.C.R. (L.) 185; and *R.* v. *Muston*, (1874) 12 N.S.W. S.C.R. (L.) 357, referred to.) *Smith* v. *Elder*. (S.C. Dunedin. September 11, 1954. McGregor, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty—Wife's Cruelty—Lesbianism alleged—Persistent Friendship with Other Woman—Injury to Husband's Health. The husband petitioned for divorce on the ground of the wife's cruelty, alleging that she had formed an unnatural relationship with the intervener by reason whereof he had been compelled to leave the matrimonial home, and that, although the parties became reconciled, the wife resumed, and, despite his pleas to her, continued the unnatural relationship. The unnatural relationship was alleged to be lesbianism. Both the wife and the intervener denied any unnatural relationship. During the hearing of the suit the wife, while maintaining her denial, stated that she would submit to a finding that her admitted persistent friendship with the intervener had amounted to cruelty. *Held*, the wife, having admittedly formed an affection for another woman such as to give her husband grave cause for anxiety as to the precise nature of that association, persisted in that association against the husband's entreaties; in so doing she had, on the evidence, occasioned the husband actual physical injury as well as a reasonable apprehension of future injury to his health, and the husband was entitled to the decree which he sought; and, there being no finding of any physical relationship between the wife and the intervener, the intervener would be dismissed from the suit. *Spicer* v. *Spicer* (*Ryan intervening*), [1954] 3 All E.R. 208 (P.D.A.)

Desertion—Wife leaving New Zealand to visit Parents in Scotland with Husband's Approval—Husband remitting Monthly Sum of Money and also Cost of Return Fare—Wife not attempting to obtain Return Passage—Husband writing to Her asking Her Intentions and saying Divorce only Alternative Solution—Wife refusing to return—Desertion without Just Cause—Conduct of Husband merely Passive Acquiescence in State of Abandonment forced on Him—Such Attitude not terminating Desertion—Divorce and Matrimonial Causes Act, 1928, s. 10 (b). In October, 1947, the wife, with her husband's consent, returned to Scotland on a visit to her parents, taking with her the two children of the marriage, and he provided their passage-money. Later, he sent her £200 to be used for the return fares. He regularly sent her £18 a month. Early in 1948, the husband commenced to press his wife as to her arrangements to return. The wife made no attempt to obtain return passages to New Zealand. On September 25, 1949, in response to two letters from her husband, the first dated June 16, 1949, and a subsequent more imperative letter written by the husband inquiring as to her intentions and as to there being only one solution—namely, divorce, if the wife did not want to come back to New Zealand, the wife replied that if the husband wanted to try to get a divorce she could not stop him, and she would imagine desertion would start from the time she had refused a passage to New Zealand in March of that year. *Held*, 1. That the wife, from her earlier conduct and from the expressions in her letter of September 25, 1949, did not intend to return to New Zealand, and that on or about that date she wilfully deserted the petitioner without just cause. 2. That the husband, after the wife had deserted him, continued to desire the return of his wife and family, and merely adopted the attitude that such return should be a willing return on the part of the wife and that she should resume the matrimonial relationship in a true frame of mind to enable the relationship to succeed. 3. That the conduct of the husband did not amount to more than a passive acquiescence in the state of abandonment forced on him by his wife; and that this attitude did not terminate the desertion. (*Pratt* v. *Pratt*, [1939] A.C. 417; [1939] 3 All E.R. 437, approving.) *Macaskill* v. *Macaskill*, [1939] S.C. (Ct. of Sess.) 187, followed.) *Harriman* v. *Harriman*, [1909] P. 123, distinguished.) *Hodgson* v. *Hodgson*. (S.C. Christchurch. August 9, 1954. McGregor, J.)

EVIDENCE.

Evidence-in-Chief. *98 Solicitors' Journal*, 547.

EXECUTORS AND ADMINISTRATORS.

Liabilities of a Surety on an Administration Bond. *98 Solicitors' Journal*, 581.

HOSPITALS.

Liability of Hospital Authorities. *98 Solicitors' Journal*, 628, 644.

HUSBAND AND WIFE.

When does a Marriage become a Marriage? *104 Law Journal*, 615.

Wife as Agent of Necessity: Claim by her Solicitor for Costs. *98 Solicitors' Journal*, 615.

LANDLORD AND TENANT.

Short Leases and Dead Hands Across the Sea. *104 Law Journal*, 595.

LAW PRACTITIONERS.

Solicitors' Fidelity Guarantee Fund—Client entrusting Sum of Money to Solicitor with Specific Direction as to Its Application—Solicitor paying same in Amounts and to Persons and for Purposes in Contravention of Such Direction—Fraudulent Misappropriation of Client's Funds held under Direction—Solicitor guilty of Theft of Moneys entrusted to him—Such Moneys to be reimbursed to Client out of Solicitors' Fidelity Guarantee Fund—Crimes Act, 1908, s. 244—Law Practitioners Act, 1931, s. 84—Evidence—Criminal Issue arising in Civil Proceedings—Allegation of Theft—Nature of Proof. A proposal was made to the plaintiff that he should make a loan of £10,000 to one H. Counsell, a client of McG., a solicitor, towards the cost of a number of second-hand American cars to be imported from Hong Kong and sold in New Zealand, the loan to be for six months with £1,500 for interest. The plaintiff's solicitors advised him not to entertain the proposal. However, on February 25, 1954, he paid £10,000 to McG. whom he instructed to act as his solicitor in relation to the transaction. He delivered to McG. a lengthy letter of instructions, stating, *inter alia*, that the £10,000 was "to be held by you in your trust account and dealt with only upon the following conditions." There followed thirteen clauses setting out conditions, the general effect of which was that no money was to be advanced until a certificate vouching the ownership of the cars had been obtained from a solicitor in Hong Kong, the cars had been landed and cleared from the Customs, all duties and charges had been paid and proper securities in favour of the plaintiff had been executed. McG. gave a trust account receipt for the money, dated February 24, in the usual form given by solicitors; it expressed the moneys to be received for the credit of "self" (*i.e.*, the plaintiff) and described them as "advance to H. Counsell for purchase of cars *ex* Hong Kong. At the request of the plaintiff, McG. added "in accordance with instructions dated 23:2:53 received from Mr. Cheape and acknowledged in writing." The receipt of the money was first recorded in McG.'s cash book as being for the credit of "self" (*i.e.*, C., the plaintiff); this, however, was struck out and in substitution "D. Counsell" was written. The amount was then posted in the ledger to the credit of an account kept in the name of D. E. M. Counsell which had been running from early in 1952. D. E. M. Counsell was the wife of H. Counsell, and it was the practice to use this account in her name though it was really that of H. Counsell, who was an undischarged bankrupt. From February 25 to August payments out of that account extinguished the whole credit. Each and every one of these payments contravened the specific directions which McG. had received when the plaintiff lodged the £10,000 with him. No explanation of any kind had been offered by McG. In an action against the New Zealand Law Society (as statutory administrator of the Solicitors' Fidelity Guarantee Fund, established under the Law Practitioners Act, 1931) for the sum of £10,000 and interest, founded upon an allegation that McG., while practising as a solicitor, committed the theft of that amount, being moneys which had been entrusted to him by the plaintiff. *Held*, 1. That, on the evidence tendered for the plaintiff, it was proved beyond reasonable doubt that McG. had committed theft within the meaning of s. 244 of the Crimes Act, 1908, of the moneys entrusted to him, in that, having received £10,000 with full and explicit directions as to how it was to be applied, he had applied it otherwise in a manner inconsistent with honesty and fair dealing, and, therefore, fraudulently. (*McQueen* v. *Great Western Railway Co.*, (1875) L.R. 10 Q.B. 569, applied.) 2. That, accordingly, the New Zealand Law Society was liable to reimburse the plaintiff, such reimbursement being limited to the moneys "entrusted" to McG.; and the claim for interest was thus disallowed. *Quaere*, Whether a criminal issue arising in civil proceedings must be proved beyond all reasonable doubt, or upon the balance of probabilities. (In the present case, the learned Judge adopted the higher standard, without deciding

which view was to be regarded as correct. (*Ellis* v. *Frape*, [1954] N.Z.L.R. 341, 343, referred to.) *Cheape* v. *New Zealand Law Society*. (S.C. Wellington. October 13, 1954. Gresson, J.)

NEGLIGENCE.

Contributory Negligence—Apportionment of Liability—Coal-mining Accident—Breach of Statutory Duty by Employers and of Statutory Directions by Employee—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1)—(Contributory Negligence Act, 1947, s. 3 (1)). The plaintiff, when employed by the defendants on work at their coal mine, was injured as result of he negligence of a shot-firer's sentry and for that injury the defendants, who employed the sentry, were liable. At the time of sustaining the injury the plaintiff, though acting in accordance with instructions of a deputy who was his immediate superior, was acting in contravention of directions (having statutory authority under s. 74 of the Coal Mines Act, 1911) given by the colliery training officer, and thus was guilty of contributory negligence. In addition, the employment of the plaintiff on work at the place where he was when he sustained injury was in breach of the Coal Mines (Training) General Regulations, 1945, reg. 4 (1). On the question of liability in respect of the accident being apportioned in view of the plaintiff's contributory negligence and breach of directions, *Held*: The plaintiff's share of responsibility for the accident was small since he was acting on the order of his immediate superior, and, therefore, the proportion of the damage attributable to him was assessed at 5 per cent. *Laszczyk* v. *National Coal Board*, [1954] 3 All E.R. 205 (Manchester Assizes).

Infant—Licensee or Trespasser—Merry-go-round—Proof of Licence—Person responsible for Control of Premises—Inference of Tacit Permission to Infant to enter upon Premises—Such Inference Question of Fact for Jury—Question of Law whether Evidence justifies Finding that Permission tacitly given—"Allurement." The person responsible for the condition and control of premises is he who is in actual possession of them for the time being, whether he is the owner or not, or whether his possession is *de facto* or *de jure*, for it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons. (*Hartwell* v. *Grayson Rollo and Clover Docks, Ltd.*, [1947] K.B. 901, followed.) *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.*, [1954] 1 All E.R. 578; *Excelsior Wire Rope Co., Ltd.* v. *Callan*, [1930] A.C. 404; and *Mourton* v. *Poulter*, [1930] 2 K.B. 183; and *Buckland* v. *Guildford Gas Light and Coke Co.*, [1948] 2 All E.R. 1086) referred to. In order to justify an inference that tacit permission has been given to an infant to enter upon another person's premises, it is necessary to prove either that such premises were habitually, or at least frequently, resorted to by children, and that this resort was in the knowledge of the occupier of the premises or his servants and with their acquiescence, or without the showing of any practical anxiety to stop the infant's frequenting those premises. There must be such assent to the user relied upon as amounts to a licence to use the premises. Whether or not that result can be inferred must be a question of degree, but a Court is not justified in lightly inferring it. (*Breslin* v. *London and North Eastern Railway Co.*, [1936] S.C. (Ct. of Sess.) 816; *Robert Addie and Sons (Collieries), Ltd.* v. *Dumbreck*, [1929] A.C. 538, and *Edwards* v. *Railway Executive*, [1952] A.C. 737; [1952] 2 A'l E.R. 430, followed.) Where there is no express permission, and permission can be inferred from evidence of user known to the occupier and not objected to by him, the matter is a question of fact for the jury; but whether there is evidence to justify that permission was tacitly given is a matter of law. Observations on the meaning of the term "allurement." *Napier* v. *Ryan and Another*. (S.C. Wellington. August 18, 1954. Barrowclough, C.J.)

PARTNERSHIP.

Partnership Agreement—Construction—Partner, in Event of other Partner's Death to have option (to be exercised within One Month of Death of Deceased Partner) of Purchasing Latter's Share—Notice of Intention to exercise Option "within one month of the date of the death of the deceased partner to be served upon the personal representative of the deceased partner"—Efforts made within Month by Surviving Partner to serve Widow with Notice of Exercise of Option before and after Grant of Letters of Administration to Her—Service after Expiry of Month—Widow "personal representative" at all Material Times—Sufficient Compliance by Surviving Partner with Requirements as to Service of Notice of Intention to Exercise Option—Vendor and Purchaser—Land Sales—Partnership Agreement giving Surviving Partner Option to Purchase Deceased Partner's Share—Share of Partner in Assets, including Land, to be regarded as Personalty—Such Option given without Court's Consent, not Contravening Statute in Force when Agreement Executed—Partnership Act, 1908, s. 25—Servicemen's Settlement and Land Sales Act, 1943, s. 43 (1) (d). By an agreement in writing, dated April 3, 1947, K., the plaintiff in this action, and his brother M. (since deceased) agreed to become partners as farmers and stock breeders upon the terms therein appearing, the partnership being deemed to have commenced on April 1, 1947. The capital of the partnership was to be contributed by the partners in equal shares, and it was provided by para. 6 that the net profits of the business should be divided between the partners equally, and that they should in like proportions bear all losses, including loss of capital. Paragraph 14 of the agreement was as follows: "14. In the event of the death of either partner during the continuance of the partnership the surviving partner shall have the option (to be exercised within one month after the death of the deceased partner) of purchasing the share of the deceased partner in the capital and assets of the business on the following terms:—(*a*) Notice in writing of intention by the surviving partner to make such purchase shall within one month of the date of the death of the deceased partner be served upon the personal representatives of the deceased partner. (*b*) The purchase price shall be the amount at which such share shall stand in the last balance sheet which shall have been prepared prior to the death of the deceased. (*c*) In addition to the purchase money the surviving partner shall pay a sum equal to interest on the amount mentioned in subclause (*b*) of this clause computed from the date of the then last preceding balance sheet up to the date of the death of the deceased partner after the rate of £5 per centum per annum in lieu both of interest in capital and of profits during such period credit being given for any sums drawn out by the deceased in respect of such period under the provisions of clause 9 hereof." The partners purchased, as tenants in common in equal shares, a farm of 1,492 acres and they carried on a profitable farming business in partnership on this land till March 8, 1953, on which date M. died. It being found that he had left no will, letters of administration were applied for by his widow, the defendant in this action. On March 20, 1953, the plaintiff gave notice to the defendant of his intention to exercise the option contained in para. 14 of the partnership agreement; and, on the same date, letters of administration were granted to the defendant. He made a number of attempts to have the notice served personally on the defendant, who was absent from her home; and she was not personally served with it until April 20. In an action for specific performance of an alleged agreement by the defendant to sell to the plaintiff his deceased partner's share in the partnership, it was contended for the defendant that the option to purchase contained in cl. 14 of the agreement was void in that the consent of the Land Sales Court in relation to it had not been obtained, and that the option had not been validly exercised as it had not been served in time. *Held*, 1. That by virtue of s. 25 of the Partnership Act, 1908, the "share of the deceased partner in the capital assets of the business" in cl. 14 of the partnership agreement had to be regarded as between the partners as personalty, and that accordingly, the provisions of s. 43 (1) (*d*) of the Servicemen's Settlement and Land Sales Act, 1943, had no application to a transaction between the partners or their representatives, in which no outsider was concerned; and, consequently, the option given by para. 14 of the partnership agreement did not contravene that statute, which was in force at the date of that agreement. (*Rodriguez* v. *Speyer Brothers*, [1919] A.C. 59; *Ashworth* v. *Munn*, (1880) 15 Ch.D. 363, distinguished.) (*Jaques* v. *Withy*, (1788) 1 Bl. H. 65; 126 E.R. 40; and *Hutt Valley Properties, Ltd.* v. *Gamages (N.Z.), Ltd.*, [1952] N.Z.L.R. 296; [1952] G.L.R. 172, referred to.) 2. That, alternatively, even if the interest of the deceased partner were to be regarded as an interest in land, the sale of a partner's half-share, containing land, could not be one to which the provisions of the Servicemen's Settlement and Land Sales Act, 1943, could relate. 3. That the words "personal representative as used in cl. 14 of the partnership agreement were the executors appointed under the will, if there were a will, or the person with the best right to apply for letters of administration, if there were no will; and, consequently, the defendant was the proper person to whom the notice and the amended notice were, in each case, to be directed, (*a*) as the person entitled to a grant and (*b*) as the person who had actually obtained it. (*Kelsey* v. *Kelsey*, (1922) 91 L.J. Ch. 382, applied.) 4. That, on the facts, the plaintiff was always ready to give the notice required by cl. 14 of the partnership agreement—and he made every reasonable effort to serve it; and that he was frustrated and prevented from so doing by defendant's deliberately keeping out of his way until the relevant period of time had expired. 5. That, while the plaintiff had not complied literally with the requirements of cl. 14 of serving a notice of his intention to exercise the option within one month of the deceased partner's death, he had, in all the circumstances, complied sufficiently with those requirements. (*Kelsey* v. *Kelsey*, (1922) 91 L.J. Ch. 382; and *Mackay* v. *Dick*, (1881) 6 App. Cas. 251, applied.) *Brannigan* v. *Brannigan* (S.C. Palmerston North. February 8, 1954. Turner, J.)

THE "HIGH TREES" PRINCIPLE.

By J. F. NORTHEY B.A., LL.M., DR. JUR. (Toronto).

(*Concluded from page 326.*)

THE VARIATION OR DISCHARGE OF CONTRACT.[27]

Two questions arise under this head. First, does the doctrine of consideration apply equally to the formation, variation, and discharge of contracts, and, secondly, what form must a variation of a contract take to be effective ? The *High Trees* and later cases have clarified both these problems.

A promise by a creditor to his debtor[28] to accept less than the amount of his debt is not *per se* actionable because of the absence of consideration.[29] No consideration is given by the debtor in return for the creditor's promise to release him from the balance of the debt. This is the rule at common law, but in New Zealand by virtue of the Judicature Act, 1908, s. 92, an acknowledgment in writing by a creditor of the receipt of part of his debt in satisfaction of the whole debt operates as a discharge of the whole debt. If the acknowledgment is not in writing, the statutory provision has no application and the common-law rule operates. The common-law rule stated in *Pinnel's* case, (1602) 5 Co. Rep. 117a ; 77 E.R. 237, will not apply if it is agreed that the debtor shall do something different from what he had earlier promised, *e.g.*, make payment of a smaller sum on the first of the month in lieu of on the fifteenth as promised. In *Pinnel's* case, it was said :

> Payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum : but the gift of a horse, hawk or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction . . . The payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time ; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material : so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10, it is a good satisfaction for the whole ; for the expenses to pay it at York is sufficient satisfaction.

Pinnel's case leads naturally to a consideration of accord and satisfaction which was defined by Scrutton, L.J., in *British Russian Gazette, Ltd.* v. *Associated Newspapers, Ltd.*, [1933] 2 K.B. 616, 643 ; 644, in these words :

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

The creditor's action in *Pinnel's* case succeeded because the debtor was unable to show that he had given consideration so as to make enforceable the creditor's promise to accept a smaller sum in full payment. There was no "satisfaction". The *High Trees* principle, in its application to the variation or discharge of contract, cannot be said to fall under accord and satisfaction. The person to whom the promise is made does not give consideration, but, nevertheless, if the requirements of that principle are satisfied, the promise is binding. Promises or representations in relation to a contract are binding under the *High Trees* principle despite the absence of consideration. This is demonstrated by the following cases.

The unfortunate results of the common-law rule were demonstrated in *Foakes* v. *Beer*, (1884) 9 App. Cas. 605, where the equitable principle revived in the *High Trees* case was not invoked. In that case, Mrs. Beer had secured a judgment against Foakes for £2,090. Foakes asked for time to pay and it was arranged that, if he paid £500 in part satisfaction and the balance by half-yearly instalments of £150, Mrs. Beer would not take proceedings on the judgment. After Foakes had paid £2,090, Mrs. Beer brought an action to recover interest on the debt. The House of Lords followed *Pinnel's* case and held that the agreement was not binding on Mrs. Beer because no consideration was given by Foakes. The debt of £2,090 was payable immediately judgment was entered and there was no new element in the arrangement which would constitute consideration. The Court took pains to distinguish a case of this kind from a composition with creditors where each creditor relinquishes part of his debt.

The House of Lords apparently regarded this as an unsatisfactory result and Lord Selborne remarked that it would be an improvement in the law if arrangements between a debtor and creditor such as that made in *Foakes* v. *Beer* were enforceable even if not under seal.[30] The *High Trees* principle is a possible solution ; in fact, Denning, J., expressly referred to *Foakes* v. *Beer* in his judgment.[31] As has been stated, the equitable principle of quasi-estoppel was revived in the *High Trees* case. It was overlooked in *Foakes* v. *Beer* and does not appear to have been often invoked during the nineteenth century. In the *High Trees* case, the arrangement of 1940 was binding on the plaintiff until 1945 because he was obliged to honour his promise. The promise affected the legal relations of the parties

[27] See Cheshire and Fifoot, (1947) 63 L.Q.R. 283, for a full discussion of this question.

[28] Different considerations apply to a composition with creditors and to a promise made to a third person by the creditor who has been paid by the third person.

[29] *Pinnel's* case, (1602) 5 Co. Rep. 117a, 77 E.R. 237). The relevance of consideration to the discharge of contracts has been doubted. See Cheshire and Fifoot, (1947) 63 L.Q.R. 283, and the authorities there cited. Of course, if the agreement were made by deed, consideration would not be necessary. . .

[30] The United Kingdom Law Revision Committee appointed in 1934 recommended a change in the law, but no action has so far been taken.

[31] The extract is cited on p. 324, *ante*. In *History and Sources of the Common Law* (Stevens 1949), p. 415, Fifoot describes the relationship between *Foakes* v. *Beer* and the *High Trees* case in these words : "If in the modern law it is an anomaly, the abolition of the forms of action offered the opportunity for its revision, and the failure of the House of Lords in 1884 [*Foakes* v. *Beer*] to grasp that opportunity reflects rather upon their timidity than upon the intelligence of their predecessors. It has now to be removed by statute or avoided by judicial virtuosity." [*e.g.*, *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1947] 1 K.B. 130, *per* Denning, J.]

and it had been acted on by the defendant.[32] The promise was binding despite the absence of consideration. The learned Judge added that a logical consequence of recognizing the binding force of the promise " no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding despite the absence of consideration."[33]

In *Ledingham* v. *Bermejo Estancia Co., Ltd.*, [1947] 1 All E.R. 749, moneys had been borrowed by a company when in financial difficulties. The moneys were required to enable the company to carry on business. In 1930, the lenders (the chairman of directors and his wife) agreed to suspend payment of interest until the company was in a position to pay it. In 1946, repayment of the moneys and interest was sought. The company pleaded that the interest had been waived; alternatively, it was contended that the action was barred by the Statute of Limitations. Both defences were rejected. Atkinson, J., who cited *Re William Porter and Co., Ltd.*, [1937] 2 All E.R. 361, and the *High Trees* case held that the arrangement of 1930 was made to induce the company to carry on business. Because the company had acted on the lenders' promise not to demand interest in the meantime and had incurred liabilities, the lenders' promise became binding on them.[34]

The effect of waiver of a condition by a purchaser was discussed in *Charles Rickards, Ltd.* v. *Oppenhaim*, [1950] 1 K.B. 616; [1950] 1 All E.R. 420. Denning, L.J., stated at p. 623; 423:

> If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it. I think not only that that follows from *Panoutsos* v. *Raymond Hadley Corporation of New York*,[35] a decision of this Court, but that it was also anticipated in *Bruner* v. *Moore*.[36] It is a particular application of the principle which I endeavoured to state in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[37]

The *High Trees* principle was also applied in *Plasticmoda Societa Per Azioni* v. *Davidsons (Manchester), Ltd.*, [1952] 1 Lloyd's L. Rep. 527, in which an extension of time for the expiration of a letter of credit was held to be binding on the person granting it, though made orally. Denning, L.J., stated at p. 539:

> If one party, by his conduct, leads another to believe that the strict rights arising under a contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not be allowed to insist on the strict rights when it would be inequitable for them to do so.

The learned Lord Justice considered that *Morris* v. *Baron*, [1918] A.C. 1,[38] did not apply. In that case, an oral variation of a written contract for the sale of goods, though it was held to be effective to discharge the original contract, could not be enforced because it was not in writing. In the opinion of Denning, L.J., the requirement of writing, like the requirement of consideration,[39] is overridden by the broad principle of " fair dealing and justice " laid down in *Hughes* v. *Metropolitan Railway Co.*, (*supra*), the *Tankerpress* case,[40] *Panoutsos* v. *Raymond Hadley Corporation of New York*,[41] and *Charles Rickards, Ltd.* v. *Oppenhaim*, (*supra*).

In *Tool Metal Manufacturing Co., Ltd.* v. *Tungsten Electric Co., Ltd.*, [1954] 2 All E.R. 28, the Court of Appeal held that a person who had waived compliance with his strict rights could not resume his former position without giving notice to the other party " specifying a fixed period of grace during which that party can put his house in order."[42] The giving of such a notice was held to be a condition precedent to the valid re-assumption of legal rights.[43]

The effect of these decisions [44] may be summarized in the form of propositions. First, the distinctions hitherto made between " waiver," " variation " and " forbearance " need no longer be made. If one party has indicated that his strict rights will not be insisted on and the other party has acted on the strength of the waiver, forbearance or variation, *those earlier* rights cannot be asserted without an opportunity being given to the other party to resume his former position [45]. Secondly, consideration need not be proved to have been given by the person to whom the promise or statement was made [46]. If that person can show that he acted on a statement intended to affect the legal relations of the parties the promise of statement is binding on the person making it, at least until he has given the other party an opportunity to resume his former position. Thirdly, the *High Trees* principle can be used only as a defence to an action unless a cause of action exists apart from the principle [47]. It can be pleaded *as a defence* when the plaintiff seeks to enforce his legal rights. The principle is a shield, not a sword. Finally, where the principle applies—*i.e.*, *where it is being used as a defence*, there are no requirements as to form to be satisfied in order effectively to modify or discharge a contract by deed or a contract falling within the Statute of Frauds, s. 4, or the Sale of Goods Act, 1908, s. 6. Such contracts may be varied or discharged

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[32] A bare promise is not enforceable; it must have been acted on by the promisee.

[33] At p. 135.

[34] Payment of interest became due when the company ceased to carry on business; the lenders' action was not barred by lapse of time.

[35] [1917] 2 K.B. 473. This case was also referred to in *Plasticmoda Societa Per Azioni* v. *Davidsons (Manchester) Ltd.*, *infra*.

[36] [1904] 1 Ch. 305.

[37] [1947] K.B. 130.

[38] Other cases dealing with the variation of contracts for the sale of goods are cited in Cheshire and Fifoot, (1947) 63 L.Q.R. 283, 289 *ff.*

[39] The learned Lord Justice must, of course, have been referring to the variation of a contract not to its formation: see p. 325, *ante*.

[40] (1948) 82 Ll.L.R. 43.

[41] [1917] 2 K.B. 473.

[42] At p. 41, per Romer, L.J.; see the extract from Mr. Wilson's article quoted on p. 324, *ante*.

[43] See also *Mitas* v. *Hyams*, [1951] 2 T.L.R. 1215, discussed at p. 337, *post*.

[44] Some of the decisions considered *infra* under Landlord and Tenant are also relevant here.

[45] See footnote 15, p. 324, *ante*.

[46] This aspect of the principle appears to have been overlooked by Stanton, J., in *Davis* v. *Snow*, [1953] N.Z.L.R. 887, which appears to be the only case yet reported in New Zealand where the principle was mentioned. At p. 893, Stanton, J., stated: " I hold that in the transactions between the parties, there was an intention to affect their legal rights, *that there was consideration for the defendant's waiver*, [italics inserted] that he was then aware of his rights and of all relevant facts, and that he cannot now assert a right to claim damages from the plaintiff."

[47] See pp. 324, 325, *ante*, and the extract from the judgment of Denning, L.J., referred to in footnote 56, p. 337, *post*.

orally or in writing [48]. An oral or written promise or statement in relation to a contract is binding on the person making it if it was intended to be acted on by the other party and was in fact acted on by him.

Landlord and Tenant.[49]

The *High Trees* principle extends to the contractual relationship created by a tenancy agreement. In fact, it was in relation to a lease that the principle was applied by Denning, J., in the *High Trees* case. Its application to licences can conveniently be examined along with tenancy agreements.

In *Foster* v. *Robinson*, [1951] 1 K.B. 149; [1950] 2 All E.R. 342, Robinson, a farm worker, had occupied a cottage on Foster's land for over twenty-five years at a rent of £3 5s. a half-year. In 1946, when Robinson was no longer fit for farm work, Foster told him that the tenancy was ended and that he could live in the cottage rent free until he died. Robinson accepted the offer and lived in the cottage until his death in 1950. The question was, did Robinson's administratrix have any right to occupy the cottage after Robinson's death. It was contended, *inter alia*, that because Robinson had not given consideration for Foster's promise in 1946 that he could occupy the cottage rent free there was no contract; therefore, the tenancy continued and was protected by the Rent Restriction Acts. Evershed, M.R., stated at pp. 155-6; 346:

> If there is a new arrangement which the tenant is asserting by his conduct, then he is estopped from denying that the landlord was capable of entering into that new arrangement; and, if the new arrangement could not be entered into while the old agreement subsisted, it follows that the tenant is equally prevented from denying that the old agreement has gone . . . My own conclusion from that statement of the facts is that the old tenancy was extinguished by the creation in its place of a licence for the tenant to occupy the cottage without any payment of rent for the rest of his days . . . I think that, although a licence of that kind may, apart from the terms of the contract, be revoked, it may now be taken that if the landlord, having made that arrangement, sought to revoke it, he would be restrained by the Court from doing so.[50]

Although it can be argued that there was a detriment to the tenant (and therefore consideration to support the 1946 arrangement) in that he had lost the protection of the Rent Restriction Acts by becoming a licensee, it would seem that the Court assumed that Foster's statement was binding on him because it was intended to affect the legal relations of the parties and had been acted on by Robinson.

This case was discussed in *Vaughan* v. *Vaughan*, [1953] 1 All E.R. 209.[51] Although a married woman is entitled to remain in the matrimonial home after desertion by virtue of the licence presumed to have been granted to her by her husband, that licence can be revoked, *e.g.*, by death or divorce. *Foster* v. *Robinson*[52] is not to be regarded as establishing that:

> where a promise has been made which is not contractual in form or effect and that promise has been acted on, then and without more a right is given to the promise to go on enjoying the subject-matter of the promisee indefinitely.[53]

The wife's licence in *Re Vaughan* was revoked by notice given by the husband after dissolution of the marriage. After dissolution of the marriage it is necessary for the former wife to establish a contractual right to remain in possession.[54]

The basis on which a tenant held land belonging to the landlord and on which he had encroached was discussed in *J. F. Perrott and Co., Ltd.* v. *Cohen*, [1951] 1 K.B. 705; [1950] 2 All E.R. 939. Denning, L.J., stated at p. 710; 943:

> The principle underlying the cases on encroachment is not perhaps strictly an estoppel, but it is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding it on any other footing. The tenant cannot, for instance, claim that he is holding it adversely to the landlord so as to acquire a title under the Limitations Act of 1939; nor can he claim that he is only a licensee, who has all the benefits of occupation but none of the burdens of the lease. The reason is not because of any doctrine of "blowing hot and cold"; for that, as Lord Atkin once said, is merely a descriptive phrase which does not express any precise legal concept: see *Lissenden* v. *C.A.V. Bosch Ltd.*[55] The reason is because the tenant has by his conduct made a representation that was intended to be binding, was intended to be acted on, and was in fact acted on; and he cannot be allowed to go back on it. The representation was an assertion which was equivalent to a promise or assurance that the terms of the lease should apply to the adjoining piece of land of which he was in possession and is binding on the principle which I endeavoured to state in *Central London Property Trust Ltd.* v. *High Trees House Ltd.* Conversely, if a landlord should allow a tenant to occupy adjoining property, and by his conduct represents to the tenant that it is included in the demise, and the tenant acts on it by using it as such, the landlord cannot afterwards turn round and eject the tenant from it during the term of the lease. That was decided in *Tabor* v. *Godfrey*.[56]

The Court of Appeal in *Mitas* v. *Hyams*[57] applied the principle where a lease under seal had been varied by a later oral agreement as to the dates on which the quarterly payments should be made. The landlord subsequently brought an action to enforce payments in accordance with the lease. It was recognized by the Court that at common law the landlord would have succeeded because a contract by deed could not be varied by an oral arrangement. But since the fusion of law and equity a deed could be varied by an agreement in writing or by an oral agreement evidenced by writing[58] or acts of part performance. The oral arrangement fell within the *High Trees* principle; it had been acted on by the tenant and therefore the land-

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[48] See M. Grantham, *Parol Variation of Contracts under Seal*, (1947) 97 L.J. 355. The *High Trees* principle was discussed in *John Odlin and Co., Ltd.* v. *Pillar*, [1952] G.L.R. 501, but mentioned in *Buckland* v. *Commissioner of Stamp Duties*, [1954] N.Z.L.R. 1201, and *Thomson* v. *Commissioner of Inland Revenue* (to be reported). In the *Buckland* case, North, J., discusses the *High Trees* principle at some length. In that case, the learned Judge stated: "I think it must now be accepted that, if the letters, or any of them, have the force of a contract, then equity will give effect to the contract even although it be an informal one varying the terms of a deed."

[49] The cases discussed under this head are separated from those already considered solely to emphasize the breadth of the principle and its application to tenancy cases.

[50] Denning, L.J., treats this case as one based on the *High Trees* principle although it was not mentioned in any of the judgments: see (1952) 15 Mod. L.R. 1, 6-7.

[51] This is one of the many cases dealing with a wife's right to occupy the matrimonial home, a question which has attracted as much attention, if not more, than the *High Trees* principle. For a recent article in which the earlier literature is referred to, see J. D. B. Mitchell, *Learner's Licence*, (1954) 17 Mod. L.R. 211.

[52] See *supra*.

[53] Per Evershed, M.R., [1953] 1 All E.R. 209, 211.

[54] Whether consideration is necessary to support the wife's right to remain in occupation after dissolution of the marriage is left open by Evershed, M.R.; see p. 210.

[55] [1940] A.C. 412, 429.

[56] (1895) 64 L.J. (Q.B.) 245. It should be noted that the estoppel was virtually treated as if it were a cause of action in this case; see p. 710; 943 where Denning, L.J., remarks that this is habitually done in cases of waiver.

[57] See footnote 43, p. 336, *ante*.

[58] In this case the receipts signed by the landlord for rent evidenced the oral agreement.

lord was bound despite the absence of consideration for the new arrangement.

This case must be distinguished from two earlier cases, both of which were decided in 1947. In *Foot Clinics (1943), Ltd.* v. *Cooper's Gowns, Ltd.*, [1947] K.B. 506, the statement by the landlord as to future occupation of the premises was held to be one not intended to create a legal relationship; because it was not intended to be legally binding the *High Trees* principle did not apply. *Panoutsos* v. *Raymond Hadley Corporation of New York*[59] was explained by the Court of Appeal in *Bird* v. *Hildage*, [1947] 2 All E.R. 7. The landlord there had accepted rent after due date on a number of occasions. Rent due on March 25, 1946, was tendered on May 16 when it was refused. The landlord commenced proceedings for possession on the date of tender. The tenant contended that the landlord's conduct in accepting rent in arrears without complaint amounted to a waiver by him of his right, without having first given notice to the tenant that punctual payments would be required in the future, to claim future payments on due date. Cohen, L.J., delivering the judgment of the Court, rejected this argument. Mere forbearance by the landlord did not amount to a waiver of his right to punctual payment of rent. It was recognized that in some cases the conduct of the parties will enable the Court to infer a variation of the original agreement[60]; but in this case the conduct of the parties did not support such an inference.[61]

Mortgages.

It is clear that similar considerations to those applicable to arrangements varying the terms of a lease apply to mortgages. If a mortgagee by his conduct leads the mortgagor to expect that the strict compliance with the terms of the mortgage will not be required and the mortgagor acts on that belief, the mortgagee will not be able to go back on the arrangement, no matter how informal it might have been, at least until he has given the mortgagor notice that he intends to assert his legal rights. The requirements of the *High Trees* principle must be satisfied. The mortgage in *Re Venning*, (1947) 63 T.L.R. 394, failed to bring himself within the principle. In that case the mortgagee suspended repayment of capital and reduced the interest rate from 5 per cent. to 2½ per cent. when the building covered by the mortgage was destroyed by a bomb. It was held that the mortgagor had not proved that his case fell within the Liabilities (War-time) Adjustment Act, 1941, s. 3. Somervell, L.J., remarked *obiter* at p. 395:

> In spite of the fact that the building society, no doubt very wisely, have made the concessions to which I have referred, I do not think that they have in law precluded themselves from exercising their rights under the mortgage deed, which has *not been altered or varied by any document under seal or any contrast for consideration in writing* . . .[62] I am not prepared to accept that case[63] as authority for the proposition that, in a case of this kind, the fact that the mortgagee says to the mortgagor that, in the events which have happened, he need not pay the mortgagee more than so much at present, precludes him *for all time*[64] from demanding the sums due under the mortgagee deed . . .

The remarks of Somervell, L.J., are quite consistent with the *High Trees* principle as defined by the subsequent cases. The mortgagee who has postponed payment of moneys due under the mortgage can, on notice, resume his former position. The principle merely precludes a creditor from enforcing his legal rights against his debtor when this would be inequitable. If adequate notice[65] of an intention to assert his legal rights were given, no injustice would be caused.

Conclusion.

The High Trees principle is admirably summed up by Asquith, L.J., in *Combe* v. *Combe*, [1951] 2 K.B. 215; [1951] 1 All E.R. 767, in these words:

> What that case decides is that when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee, and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it.[66]

The examples already given do not exhaust the possibilities of the principle[67]; they are intended merely to indicate its scope. It has been successfully pleaded in a great variety of situations, but perhaps it will prove most fruitful in relation to commercial contracts where one party grants an extension of time or in some other way relaxes compliance with the letter of the original contract. In such cases he will not be permitted to enforce his contractual rights where this would be inequitable. He will be obliged either to give notice before asserting his legal rights, or, where it is not possible for the former positions of the parties to be resumed, to accept the modification of the contract as binding on him. The principle makes intelligible a branch of the law which was hitherto confused by the rules governing waiver, discharge and common-law estoppel, but it is doubtful if it will have as much influence as Denning, L.J., argues that it should on the doctrine of consideration.

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[59] This case is cited on p. 336, *ante*. In that case the buyer was obliged to make payment for each shipment of flour "by confirmed bankers' credit." The seller had on previous occasions waived this condition. It was held that before he could cancel the contract for breach of this condition he must give the buyer a reasonable notice of his intention to cancel the contract so as to permit the buyer to comply with the condition.

[60] Had a variation been inferred, the amended arrangement would have been binding on the lessor to the same extent as variations already discussed at pp. 336, 337, *ante*.

[61] In the *Panoutsos* case a binding promise could be inferred. The fact that periodical payments were required from the tenant was another ground on which to distinguish the *Panoutsos* case where a single act was called for.

[62] This would be necessary at common law, but the position is different in equity: see pp. 336, 337, *ante*.

[63] *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1947] K.B. 30.

[64] Italics inserted.

[65] The length of notice required will be a question of fact in each case, but see *Charles Rickards, Ltd.* v. *Oppenhaim*, pp. 336, 337, *ante*.

[66] At p. 225; 773.

[67] The principle was relied on in a road haulage case, *Ostroumoff* v. *Road Haulage Executive* dijested in *1952 Current Law Digest*, 3552. It has also been suggested as the basis of a claim against an auctioneer who, having advertised a sale without reserve, fails to conduct the auction on that basis: see Professor Gower, (1952) 68 L.Q.R. 457, but it is doubtful whether the principle could be used in this way. Denning, L.J., is apparently prepared to accept its appreciation to such a case; see *The Changing Law*, (Stevens, 1953), pp. 58-59.

Corrigenda: Footnotes: The footnotes mentioned should read as follows:

p. 325, note 22: "See pp. 324, 325, *ante*, as to the use of the principle as a cause of action."

p. 325, note 23: "See pp. 335, 336, *post*."

SALES OF STATE HOUSES.

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

I have been asked to write a short article on the sale of State houses from the conveyancing point of view, as there appears to be a certain amount of misunderstanding on certain aspects, such as the tenure under which the purchasers hold, the nature of their title, and their ability to deal with it (as by sales and mortgages).

INTRODUCTORY.

Before the coming into office of the National Party, about five years ago, State houses could not be alienated: they were let on a rental basis. The State was the landlord and the fee simple was vested in it. There was no need for the boundaries between the various houses and sections on which they were built to be separately surveyed with the accuracy required by a State-guaranteed Land Transfer title. Groups of houses enjoyed certain easements in common, such as drainage, pipe-lines, and rights of way. Again, the exact position of these was not of much moment: if anything went wrong with these amenities, the State as landlord remedied the matter. It did not matter very much whether a certain common drain was under Smith's house or Brown's house, or ran through their sections. But when the National Government took office and brought in its policy of giving each tenant of a State house the right to purchase his home, which meant giving every purchaser a State-guaranteed title to the fee-simple, the various Government Departments concerned were set a difficult technical problem.

It must be admitted, I think, that the legislation which has been passed has, in the main, been well-drafted and appears to be filling the bill, by enabling each purchaser to deal with his home (*e.g.*, by way of transfer or mortgage or settling it has a Joint Family Home) and by giving him a good marketable title, limited, it is true, as to parcels, until such time as the small body of land surveyors in this country can survey each respective title with that degree of accuracy which our Land Transfer Act requires, as a prerequisite to the issue of an ordinary certificate of title.

I am satisfied that, until such time as these surveys are made the purchaser of a State house gets as good a title as the registered proprietor of land under the Torrens system gets in England, where they will, for example, issue a certificate of title for a cellar (based on no accurate plan) and describe land in a title simply as "all that shop and dwelling-house situate and known as 139 High Street, Deptford": *Re Deptford High Street, No. 139.* [1951] Ch. 884, [1951] 1 All E.R. 950.

I shall now proceed with a short examination of the relevant legislation.

ALIENATION OF STATE HOUSES.

There are special provisions for this which are contained in ss. 22-27 of the Finance Act, 1950.

In almost all cases there is extant a certificate of title in fee-simple in the name of Her Majesty the Queen. All licences, agreements for sale and purchase, and transfers of the fee-simple will be noted against this subsisting certificate of title: if this were not done, there would be two titles for the same parcel of land, which would be wrong, tending to confuse searchers.

State houses may be sold either for cash or on the deferred-payment system. Where all the purchase money has been paid, the State Advances Corporation may execute a transfer of the fee-simple in favour of the purchaser: Finance Act, 1950, s. 26. This is a simpler procedure than by Governor's Warrant. But, in all probability, if the land has been sold for cash, the survey is not yet sufficiently accurate or certain for the issue of an ordinary certificate of title. Hence, provision has been made for the issue of a licence to a purchaser: each licence forms a folium of the Register Book and is registered in the same manner as a Crown Lease. The licences are marked "Limited as to Parcels," and, so far as applicable, the provisions of Part XII of the Land Transfer Act, 1952, apply thereto. Dealings (*e.g.*, transfers, mortgages, and transmissions) may be registered against the licence; but the land is not fully guaranteed as to measurements, position, and area. Every dealing which is registered within seven years from the date fixed for possession must be consented to by the State Advances Corporation: S. 25 (5). It is understood that, in practice, consent is seldom declined.

If a State house is sold on the deferred payment system, an agreement for sale and purchase may be registered in the same manner by constituting it a folium of the Land Transfer Register. It, too, will probably be marked "Limited as to Parcels," owing to inadequacy of existing survey. The remarks in the immediately preceding paragraph as to registration of dealings and consent of the State Advances Corporation apply to these agreements. Where the Board rescinds any such agreement for non-compliance by the purchaser of the terms thereof, it may send a notice of rescission to the District Land Registrar, who, without further notice or inquiry, and without fee, must enter a memorial of the rescission upon the Land Transfer Register: s. 25 (7). The duty of the District Land Registrar under s. 25 (7) is purely ministerial: *Laffer* v. *Gillen*, (1927) 43 T.L.R. 694. The agreement constituting the folium of the register book will be marked "rescinded," and a similar note signed on the memorial thereof of the head title, *i.e.*, on the title for the fee-simple. This method of rescission resembles the corresponding procedure under the Land Act, 1948; and it is unthinkable that it would ever be harshly administered.

When eventually the transfer of the legal estate in fee-simple from the State Advances Corporation to the purchaser is presented for registration, the appropriate folium of the register-book in which the licence or agreement for sale is embodied, should be searched by the solicitor for the purchaser. The transfer must be in favour of the present registered proprietor of the licence or agreement and the transfer and the new certificate of title issuing off the transfer must be made subject to all encumbrances, liens, and interests registered in the appropriate folium of the register book: s. 25 (8). The certificate of title will be made subject

to s. 22 (1) of the State Advances Corporation Act, 1936, which prevents alienations without the consent of the State Advances Corporation.

Implied Easements.

Part II of the Finance Act (No. 2), 1953, makes provision for the registration of easement certificates in connection with the sale of State houses, and prescribes the effect of the registration of such certificates.

Sections 10 and 11 provide that Part II of the Finance Act (No. 2), 1953, shall be read together with and deemed part of the Housing Act, 1919. Section 14 defines the terms "owner" and "pipe line" as used in Part II of the statute.

Section 15 authorizes the State Advances Corporation to issue three classes of easement certificates—namely, pipe line certificates, right of way certificates, and party-wall certificates, thus altering the rule that the doctrine of implied easement does not apply to land subject to the Land Transfer Act.

Section 16 provides that the Corporation may issue a pipe line certificate in any case where a pipe line which serves several parcels of land has been constructed on land acquired by the Crown for State housing purposes, and one of the parcels of land is thereafter sold. The section specifies the form of the certificate; and it provides that, while the certificate is registered against the titles to the land, the owners for the time being of the several parcels of land specified in the certificate are to have the right to use the pipe line and to enter on the land and do all work necessary to keep the pipe line in repair. There is to be a ight of contribution between the owners of the land served by the pipe line towards the cost of keeping it in repair. *Where it is not practicable to show the true course of any pipe line its position shall be indicated as closely as possible on the certificate.*

Section 17 provides that the Corporation may issue a right of way certificate in any case where a right of way exists for the benefit of several sections acquired by the Crown for State housing purposes, and, after the right of way came into existence, one of the sections has been sold. The section specifies the form of the certificate, and provides that, while the certificate is registered against the titles to the land, the owners for the time being of the several parcels of land are to have the rights and obligations normal in such cases, including an obligation to contribute to the cost of the maintenance of the right of way.

Section 18 contains similar provisions governing the issue and registration of easement certificates in connection with the party walls in multiple-unit State houses, where one or more of the units sold. The ordinary rights and obligations between the adjoining owners are to be inferred.

Section 19 makes provisions for the registration of these easement certificates and for the variation and cancellation of the certificates after they have been registered. In each instance, the total registration fee payable is £1 only. Production of the outstanding duplicate certificate of title is not necessary.

A prerequisite is that the Crown has sold at least one of the affected Lots and that the position of the pipe line, right of way, or party-wall is shown with sufficient accuracy for Land Transfer purposes, subject to this qualification: that the District Land Registrar cannot insist on the exact location of a pipe line being shown. It is also necessary to observe very closely the definition of owner in s. 11, such definition reading:—

> "Owner," in relation to any land in respect of which there is registered an easement certificate issued under section twelve of this Act, means the person (including the Crown) for the time being entitled to the rack rent thereof or who would be so entitled if the land were let at a rack tent; and does not include the Crown in any case where any agreement for sale or licence to occupy under section twenty-three or section twenty-four of the Finance Act 1950 is for the time being in force in respect of the land:

This definition of "owner" appears necessary to get over the maxim, *Nulli res sua servit.*

Those of us who at times have to draft grants of easements consequent upon a private subdivision will often wish that such a code of implied easements, as is contained in Part II of the Finance Act (No. 2) 1953, applied to our transactions, so as to lighten our labours and remove the ever-present danger of a gap being left in the easements intended to be created.

Dissent.

Dissenting opinions are not in themsleves objectionable. There are very good reasons why the Judges of our highest Courts should not always agree. Nor does their occasional disagreement show a bad state of uncertainty in the law. Cases calling for everyday application of everyday rules of law do not as a rule go to the highest Courts, nor, if they sometimes go there, do they evoke dissents. Reasons for dissent exist chiefly in two types of cases. In one the case is not governed by a settled rule of law clearly covering it. It must be decided by a process of judicial reasoning proceedings upon some applicable principle. But in order to do this choice must often be made from among two or more equally authoritative starting points drawn by analogy from past adjudications. Hence the decision will turn ultimately upon a comparative valuing of these starting points. In the other type of case, the Court has to find the meaning of a statute which expressly covers a whole field and must be applied to all cases within it. But unfortunately it frequently happens that a state of facts within that field arises of which the legislator did not think and for which he made no provision or no clear provision. Here again a valuing is called for. The Court must value the possible interpretations and reach a rule for the case in hand as the legislator should have done. The difficulty at bottom is that the law does not and cannot provide an absolute detailed criterion of values for these cases. Ultimately the process of valuing gets down to the conception one has of the ideal relation among men of the ideal of a civilized human society. There are to some extent generally received ideals of this sort; to some extent so generally and authoritatively received as to be part of the law. But in the social and economic developments in the society of today these ideals are far from settled in their content and application. It cannot be expected that Judges will be agreed on all the novel questions of analogical reasoning for new states of fact and of interpretation of the huge output of legislation which come before them. (Roscoe Pound, *Cacoethes Dissentiendi*: The Heated Judicial Dissent, (1953) A.B.A.J. 794).

DR. OLIVER WENDELL HOLMES.

Reflections on Law and Lawyers by the Author-Father of Mr. Justice Holmes.

By MALCOLM BUIST, LL.M.

Only one whose mind has at some time been autographed by the Law could say, "Somewhere between the Sermon on the Mount and the teachings of Saint Augustine sin was made a transferable chattel." An apt metaphor may indeed disclose one's calling, and Oliver Wendell Holmes, M.D., showed thus in *The Poet at the Breakfast Table* the traces of the legal studies he followed before medicine claimed him as her own.

It is a curious fact that in the fascinating "Breakfast-Table" trilogy the Law as such makes few appearances —fewer indeed than the lawyers, who are not often presented in words of approval—and that at first her absurdities, foibles, and weaknesses occupy almost the whole of the time she is brought before us, the unseen hearers to whom the pearls and husks of boarding-house conversations are reported. First, the Autocrat (1857), then the Professor (1860), and lastly the Poet (1872), speaks. It may be but a catch at a passing thought, but one wonders why, after the two earlier recorders have each given a mere page or two of reflections upon things and persons legal, it should be left to the Poet to meet at this very table a representative of a branch of the Law in the person of a certain Registrar of Deeds. Artistic fancy might say that this is proper, and that only a Poet would thus vest a function with the insignia of a dynasty. But let us try Holmes with the historical yardstick of his contemporary, Sir Henry Maine, to see whether some renewed link with the Law refreshed the hidden memories in his mind and gave them creative force in his later literary life.

The Encyclopedia gives us "Dr. Holmes (1809-94)," and with him his son, better known to most of us as "Mr. Justice Oliver Wendell Holmes (1841-1935), of the Supreme Court of the United States, author of *The Common Law*. At the Harvard Law School, Holmes Jr. studied from 1864 to 1866, thereafter practised, and in 1870 became editor of the *American Law Review*. This point calls attention to a correlation of dates: the Autocrat and the Professor have been introduced by Holmes, Sen., made their bow, and departed, *before* Holmes, Jr., has entered the Harvard Law School, and upon the latter's entering the Brahmin caste (his father's phrase, in another context) of legal literature, the living figures who attend the practice of the Law appear again in the father's mind. What if Holmes, Sen., is now some 63 years of age? Forty years is not a great span when age begins to glean youth's memories.

THE AUTOCRAT.

Although the Autocrat reports the happening as a manuscript handed to him by the Professor, we have "Parson Turell's Legacy, Or, The President's Old Arm-Chair" as the former's solitary mention of matters juristic—and that near the end of his year of contributions. Moreover, the Professor is reported to have been still recovering from the pseudo-alcoholism of an anaesthetic when it was written. One does not feel the sting of this fact until after the poem is read. The story is unfortunately too long to give in full, but here is a kind of search or abstract, quoting the essential parts verbatim:

> Facts respecting an old arm-chair.
> At Cambridge. Is kept in the College there . . .
> Parson Turell bequeathed the same
> To a certain student,—Smith by name;
> These were the terms, as we are told:
> "Saide Smith saide Chaire to have and holde;
> When he doth graduate, then to passe
> To ye oldest Youth in ye Senior Classe,
> On payment of" (naming a certain sum)
> "By him to whom ye Chaire shall come;
> He to ye oldest Senior next,
> And soe forever" (thus runs the text)—
> "But one Crown lesse than he gave to claime,
> That being his Debte for use of same."

It is a pity to break in with an aside, but to the ear trained in the conventional language of English conveyancing, "saide Smithe saide chaire" recalls the syncopated effect of the omitted definite article by which one is put on guard when perusing documents from the great Republic. These little shibboleths mask wide differences in procedure. However, all went well until the "equity" had dropped to one crown, paid (for the sake of rhyme) by a certain Dunn.

> Dunn released the chair to Hall,
> And got by the bargain no crown at all.
> And now it passed to a second Brown,
> Who took it and likewise claimed a crown.
> When Brown conveyed it unto Ware,
> Having had one crown to make it fair,
> He paid him two crowns to take the Chair . . .

Perhaps "conveyed" was poetic licence. The years passed, and simple arithmetic took the *damnosa hereditas* up to the nine- and ten-score crowns (now paid in paper-money, inflated, but none the less a burden).

> Things grew quite too bad to bear.
> Paying such sums to get rid of the chair!
> But dead men's fingers hold awful tight,
> And there was the will in black and white,
> Plain enough for a child to spell.
> What should be done no man could tell,
> For the chair was a kind of a nightmare curse
> And every season but made it worse.

This was indeed Thellusson in reverse! Perhaps the late Lord Hewart might have been able to do something with his weighty dictum: "The exigencies of fact must be allowed to modify the conclusions of pure theory," or words to that effect. However,

> As a last resort, to clear the doubt,
> They got old Governor Hancock out.
> The Governor came, with his Light-horse Troop
> And his mounted truck-men, all cock-a-hoop . . .
> So he rode with all his band,
> Till the President met him, cap in hand.
> The Governor "hefted" the crowns, and said,
> "A will is a will, and the parson's dead."
> The Governor hefted the crowns. Said he,
> "There is your p'nt. And here's my fee.
> These are the terms you must fulfil.
> On such conditions *I break the will*!"
> The Governor mentioned what these should be.
> (Just wait a minute and then you'll see.)
> The President prayed. Then all was still.
> And the Governor rose and *broke the Will!*

Neither "heft" nor "break the will" has place in the late Sir Rowland Burrows's *Words and Phrases*

Judicially Defined. But they sound in a earthy realism, like " Every dog has his one bite." " Heft " goes back iuto the Anglo-Saxon from which we take " heave "; It is a past definite. The Governor, then, tested the weight of the bag of crowns. Apparently it had been decided, in a predecessor of the " gold clause " cases, that " crowns " were not satisfied by paper-money. " Break the will " recalls the *testamentum ruptum* of classical Roman days, which, however, was an act of the testator. To-day we have legislative Acts to " break " last wills and testaments, and it may well be that the Governor exercised not judicial or executive, but legislative, authority in this case. The poem was written in 1857, and speaks of the chair's being " old " in '69, which cannot have been 1869. The indefatigable encyclopedia shows that the Cambridge spoken of in the opening lines of the poem " is most famous as the seat of Harvard University (q.v.) founded as early as 1636." The opening lines were followed by,

> It was old in President Holyoke's day
> (One of his boys, perhaps you know
> Died *at one hundred, years ago.*)

We may be able to procure an affidavit from an expert in American history that there was a President Holyoke (of the College, that is), in or about the year 1669, *i.e.*, before the Declaration of Independence of 1776, and that the powers of a Governor in those days would be very, very wide. Benjamin Franklin's experiences might be quoted. But,

> About those conditions ? Well, now you go
> And do as I tell you, and then you'll know.
> Once a year, on Commencement-day,
> If you'll only take the pains to stay,
> You'll see the President in the *Chair*,
> Likewise the Governor sitting there.

The draftsmanship here is not unexceptionable : some ambiguity reveals the 'prentice or rusty hand. Does " there " refer also to the Chair ? However,

> The President rises ; both old and young
> May hear his speech in a foreign tongue,
> The meaning whereof, as lawyers swear,
> Is this : Can I keep this old arm-chair ?
> And then his Excellency bows,
> As much as to say that he allows.
> The Vice-Gub. next is called by name ;
> He bows like t'other, which means the same.
> And all the officers round 'em bow,
> As much as to say that *they* allow.
> And a lot of parchments about the chair
> Are handed to witnesses then and there,
> And then the lawyers hold it clear
> That the chair is safe for another year.

It appears that the Governor has substituted for the title of any trustees a recurring revesting in himself, of a notional character in practice, but kept alive by the fiction of an annual re-grant. This device may have ingeniously circumvented the Rule against Perpetuities—for Dr. Holmes possibly doubted whether the use of a chair by a student could be for the advancement of education and therefore of a charitable nature not caught by the Rule. If this be so, it reflects great credit on his ingenuity.

> God bless you, Gentlemen ! Learn to give
> Money to colleges while you live.
> Don't be silly and think you'll try
> To bother the colleges when you die,
> With codicil this, and codicil that,
> That Knowledge may starve while Law grows fat ;
> For there never was pitcher that wouldn't spill,
> And there's always a flaw in a donkey's will.

The last line is disrespectful to the Reverend the testator —but was not Dr. Holmes rather anti-ecclesiastical ? His epilogue has been a homely moral, brought often enough to the notice of even the skilful conveyancer by judicial comments on the inevitable slip. It may be submitted that, as well as urging testators to make settlements during their lifetime rather than by will, he has impressed it upon them that elaborate trusts may require expensive interpretations, and that it is better to let the beneficiary have wide latitude rather than risk wasting the corpus in litigation. This is the insight of experience.

And so we leave the Autocrat of the Breakfast-Table, alert, refined, cultured, a man discerning the weaknesses of the legal mind and skilful to jest at them with sincere irony born of inner acquaintance. Can it be that, like the Ephesians, he had " left his first love " ?

(To be concluded.)

IRRESPONSIBILITIES.

All kinds of scrips and scraps and oddments come my way. Here is a letter written by the plaintiff's solicitors at the conclusion of a law suit acknowledging a cheque for the costs awarded against the defendant (whose christian name, by the way, was Hannah). The parties, who were in different towns, found themselves at either end of a correspondence that began rather acidly, but, as settlement drew into sight, mellowed, and finally became quite cordial ; so, parodying Milton and shamelessly borrowing from C. S. Calverley (a bright soul, by the way, we don't know as well as he deserves), rather unconventionally the solicitors wrote :

> Dear Sirs,
>
> Your letter with its welcome cheque
> (And with exchange withal !), which our receipt
> Doth gratefully acknowledge, marks the close
> (A most obnoxious journalistic phrase
> For which I vow I do apologize)
> And happy ending of a long-drawn feud.
>
> 'Twere vain to tell of lawsuits now forgot,
> Of hard and bitter words whose echoes now
> Are echoes only of a buried past.
>
> Ill wind it is whose envious breath to none
> Blows aught of good. So runs the honour'd adage
> Whose wisdom once again we do applaud ;
> For in each other though we've never met
> We've found a kindred and a kindly soul
> Thrice blest, possessing that all-saving gift
> A sense of humour, which like Charity
> Doth cloak a multitude of sins.
>
> Some day
> I hope we'll meet ; whene'er and wheresoe'er
> That be " on this or that side the Equator
> " If I've not turned teetotaller then
> " And have wherewith to pay the waiter,
> " To thee I'll raise the modest cup
> " Ignite with thee the mild Havana,
> " And we will waft, while liquoring up,
> " Forgiveness to the wayward Hannah."

R. J.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Asquith, L.J.—Lord Asquith of Bishopstone, who died suddenly in August last, had a dry wit. Earlier in the year, when counsel in the course of an argument before him in the Court of Appeal observed, in illustrating a point, that Lord Simon had once said that he could never define a judgment but that he knew a judgment when he saw one, Lord Asquith intervened quietly: "I thought it was originally said of an elephant by Lord Morley. But the principle is the same." He was regarded by many as the finest classical scholar in the profession: at Balliol, he obtained firsts in two classical schools, won the Craven, Eldon, Ireland, and Hertford scholarships—a wonderful achievement. Simon, in his *Retrospect*, relates the incident of his chief in the House of Commons (H. H. Asquith, later the first Lord of Oxford and Asquith) producing a telegram from the pocket of his coat in which his son (Cyril) announced that he had been awarded the only great classical prize, which neither Raymond (his elder brother, killed on the Somme) nor his father had ever won. The telegram ran: "I have filled the lacuna in the family annals." You could see, says Simon, from the Prime Minister's expression that the achievement stirred him in a way that completely obliterated the political tension of the hour. The late Lord Justice contemplated making a trip to New Zealand on which he had heard much favourable comment from a life-long friend, the former Governor-General, Lord Bledisloe.

The Value of a Wife.—In *The Reason Why* (1953, Constable, London) Cecil Woodham-Smith deals with the bitter enmity between the two generals in command of the Cavalry at Balaclava, the Earl of Lucan and his brother-in-law, the Earl of Cardigan, and with the effect of this enmity and consequential muddlement upon the tragic blunder that Tennyson immortalized in his verses on the Light Brigade. Cardigan was a descendant of the famous Brudenell family, one of whom was, in 1823, the co-respondent in an action for damages (the first step in the long and cumbrous divorce process that then existed) brought by one Captain Johnstone. Lord Brudenell had eloped with the Captain's wife and they were living together at Versailles. He offered no defence and simply left it to his counsel to make a speech on his behalf unreservedly submitting to the jurisdiction of the Court. Lord Brudenell, said counsel, "was a nobleman of the strictest honour, who insisted that not the slightest reflection was to be made, either upon the lady or upon the plaintiff in the case . . . his client would willingly submit to such damages as the jury might think fit to award . . . Whatever occurred between Mrs. Johnstone and Lord Brudenell did not occur until the lady had quitted her husband . . . Lord Brudenell could not be accused of having recourse to the arts of the seducer." The jury awarded £1,000, and, immediately following the trial, Brudenell sent a message to Johnstone offering "to give him satisfaction" by fighting a duel with him for having run away with his wife. Johnstone burst out laughing in the messenger's face. "Tell Lord Brudenell," he said, "that he has already given me satisfaction: the satisfaction of having removed the most damned bad-tempered and extravagant bitch in the kingdom."

Time for Consideration.—It is reported that the Waipawa Hospital Board, which seven years ago placed an order with a Wellington firm for some engraving work that is still not completed, decided by resolution this month to send the firm a telegram as a reminder. This causes Scriblex to remember that he overheard a Napier counsel a short time ago declare that he had a perfect answer to anyone who charged him with delay in equity suits. "I shall refer my detractor," he said, "to the observation of Lord Chancellor Eldon, in *The Earl of Radnor* v. *Shafts*, (1805) 11 Ves. 448, 455; 32 E.R. 1160, when he remarked: 'Having had doubts upon this will for twenty years, there can be no use in taking more time to consider it.'"

Mr. Justice Jackson.—The Nuremberg Trial is recalled by the recent death of Mr. Justice Robert H. Jackson, a member of the United States Supreme Court. His role there was as chief counsel for the American prosecution, and in his opening address he described the case as "the first trial in history for crimes against the peace of the world." It is high time, he said, that we act on the juridical principle that aggressive war-making is illegal and criminal; and the very minimum legal consequence, in his opinion, of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes.

Solicitors and Clients.—Some worthwhile advice to young practitioners is to be found in "Old Crusty Rumbold's Letters to his Son" contained in the *Solicitors' Journal*. "Some solicitors act," he says, "as sheep, with their clients as sheep dogs. This, I think, is due sometimes to inexperience, particularly in young solicitors, but more often to a natural anxiety to keep on good terms with the client; the tendency is very marked in small practices where the loss of a valuable client may be disastrous; it is also observable in large practices where the client is important enough or the solicitor is pusillanimous enough; it is more or less endemic. Another cause of the phenomenon is bone idleness on the part of the solicitor. Another is a strong and dominant personality in the client. I would not weary you with a list of all the causes even if I knew them. I need only impress upon you that it is your business to advise your client; however much you may learn from him, it is not his business to advise you." There is, of course, a further type of client who neither wants to advise nor to be advised. What he requires is that his solicitor should bolster up his own bad decisions by, metaphorically, holding his hand; and what he needs is a kick in the pants.

Sobriety Test?—In the hillbilly country in America where they drink whisky like water, in sunshine or in moonshine, the local tippler lay in the centre of the road. It was high noon and a torrid sun beat down on him. Someone called the doctor and the sheriff. "He ain't dead, is he, Doc?" asked the sheriff. "No, I think he's plain drunk." A woman called from a nearby porch. "He ain't drunk, Doc. I jis' seen one of his fingers move."

THEIR LORDSHIPS CONSIDER.

By Colonus.

Defamation.—"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the Press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." Lord Herschell, L.C., delivering the judgment of the Privy Council in *Davis* v. *Shepstone*, (1886) 11 App. Cas. 187, 190.

Restitutio in Integrum.—"The assessment of the value of such a vessel at the time of loss, with her engagements, may seem to present an extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free from all engagements, either being laid up in port or being a seeking ship in ballast. though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damage will be simply the market value, on which will be calculated interest at and from the date of loss, to compensate for the delay in paying for the loss. But the contrasted cases of a tramp under charter or a seeking tramp do not exhaust all the possible problems in which must be sought an answer to the question what is involved in the principle of *restitutio in integrum*. I have only here mentioned such cases as a step to considering the problem in the present case. Many, varied, and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained." Lord Wright in *Liesbosch, Dredger* v. *Edison, S.S. (Owners)*, [1933] A.C. 449, 464.

Passing Off and Licence.—Early in 1928, the J. H. Coles Proprietary Limited (appellant) orally agreed with one J. F. Need (respondent) that the latter should take a shop and fit it up in the style used by the appellant, buy from the appellant a complete stock of the goods usually sold in what were known as the Coles Stores, and obtain all future supplies from the appellant at cash prices plus five per cent. On the front of the shop which Need accordingly took at Northcote, Melbourne, while there was no indication that he was owner, there were painted at his own expense and in large lettering the words, "J. H. Coles" and "3d., 6d., and 1s. J. H. Coles' Store." This was done with the appellant company's knowledge and assent. Later, some purchase and supply difficulties arose, and were met by temporary measures. By June, 1930, however, when the company was in voluntary liquidation, Need was buying only about ten per cent. of his requirements from it. In December, 1930, the liquidator required Need to remove the company's trade names from his premises and discontinue their use in his business. On his refusal, an injunction was sought. Lord Wright, by whom their Lordships delivered the judgment of the Privy Council, said :—

> ". . . All the right that the respondent ever had in regard to the user of the appellant's trade names was a revocable licence to use these names so long as the business arrangement continued between the appellant and the respondent. From these conclusions it follows that *prima facie* the appellant is entitled on well-recognized principles to an order restraining the respondent from the unauthorized use of the appellant's trade names after the licence was revoked, since the continuance thereafter of such user necessarily involves a passing off by the respondent of his business as being a business for the sale of the appellant's goods and as being a business in which the appellant has at least an interest, and in this way there would be practised a deception of the public to the prejudice of the appellant's business reputation and goodwill."

The case is *J. H. Coles Proprietary Limited* v. *Need*, [1934] A.C. 82, 87.

CANTERBURY LAW SOCIETY.

Golf and Cocktail Party.

The Canterbury Law Society's annual golf match for the Hunter Cup was played at Shirley Golf Links on October 19, in beautiful weather. The winner was Mr. G. C. Weston, 1 up; the runners-up being Messrs. N. S. Borrie and A. C. Fraser.

At the invitation of the President and Members of the Canterbury District Law Society, a large gathering of guests, members, and friends enjoyed a very pleasant cocktail party held later in the afternoon in the Mayfield Lounge.

The guests were welcomed by the President (Mr. A. I. Cottrell) and Mrs. Cottrell. A specially welcomed guest was Mr. P. R. Heydon, High Commissioner for Australia in New Zealand, who was paying a short visit to Christchurch.

At the party the winner of the Hunter Cup, Mr. G. C. Weston, was congratulated on his success by Mr. Cottrell, and as he received the cup from Mrs. Cottrell he was accorded musical honours by the large gathering. Mr. Cottrell thanked the officials of the Christchurch Golf Club for their co-operation. He also thanked the wives of members for providing the floral decorations, and the executive committee and Mr. Ivan D. Wood (the secretary) for their sterling work.

Guests of honour who were invited included: The Hon. Mr. Justice Adams, Judge Archer and Mrs. Archer, Mr. F. F. Reid, S.M., and Mrs. Reid, Mr. Raymond Ferner, S.M., and Mrs. Ferner, Mr. Rex C. Abernethy, S.M., and Mrs. Abernethy, Mr. L. N. Ritchie, S.M. and Mrs. Ritchie, Mr. E. A. Lee, S.M., and Mrs. Lee, Mr. and Mrs. W. E. Leicester, Superintendent and Mrs. D. Sugrue, Mesdames O. T. J. Alpers, E. C. Levvey, H. P. Lawry, H. A. Young, E. D. Mosley, M. H. Godby, and Miss Y. Raaff.