NOTES OF CASES

Liability for dangerous premises—invitor and invitee—scope of duty—nature of possible defences.

In *London Graving Dock Co. v. Horton,*[1] the House of Lords was presented with the opportunity, which it took, to resolve the alleged ambiguity in the statement by Willes J. in *Indermaur v. Dames*[2] of the duty of an invitor towards his invitee. Unfortunately, the decision of the majority in this case, while laying to rest one difficulty, only served to raise others in its stead.

It may perhaps be convenient to recall the exact words in which Willes J. laid down the duty of an invitor[3]—

> ".... (the invitee), using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and .... where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

The alleged ambiguity arose from the meaning of the word "unusual" in the expression "unusual danger". Did this mean "unusual so far as this particular invitee-plaintiff was concerned," or merely "unlikely to be expected by persons of the class of which this particular invitee-plaintiff was a member"? If the former meaning were to prevail, it was clear that the invitor's duty would be merely to ensure that the invitee was aware of the particular danger—in other words, to give him notice of any trap there might be on the premises; the second meaning, on the other hand, was said to involve a higher standard of duty on the part of the invitor amounting, in fact, to making sure that the premises which were the subject of the invitation were reasonably safe.

In certain respects, all the members of the House who took part in the decision in *Horton's Case* were in agreement and, while deprecating any tendency to treat the words used by Willes J. as if they were to be accorded the same inviolability which would be their due had they been contained in a statute, they nevertheless treated those words

1 [1951] 2 All E.R. 1.
2 (1866) L.R. 1 C.P. 274.
3 *Ibid.*, at 288.

with very great respect and interpreted them almost literally. The word "unusual", they said, was to be interpreted in an objective sense; if members of the class to which the particular invitee-plaintiff belonged would have found the particular danger in question an unusual one, then it was still an "unusual" danger even though the particular invitee-plaintiff knew of it. Nor is the test confined to enquiring only whether the danger is usual for members of the class to which the plaintiff belongs; for Lord Normand made it clear that a danger may also be "unusual" in relation to the place where it is found as well as to the persons who found it.[4]

Up to this point it looked as though Mr. Horton would succeed in his claim against the appellant company, but unfortunately what the whole House had conceded, the majority then proceeded to take away. The duty of an invitor, said Lord Porter, was not to remove the danger, but to take reasonable care to prevent damage arising from its existence. Willes J., in the passage from his judgment which has already been quoted, had indicated various means open to the invitor in order to discharge this duty, and one of them was to bring the danger to the notice of the invitee. Furthermore, if the invitor were aware that the invitee already knew of the danger, there was no need to go through the formality of giving him notice, and the invitor's duty was at an end. It was here that Mr. Horton's claim failed, for the facts established that he was undoubtedly aware of the danger and also that he had frequently protested against its existence. In other words, he was certainly *sciens* but not *volens*. However, the majority held that an invitor could successfully defend an action under the rule in *Indermaur v. Dames* by showing that the plaintiff encountered the danger with a full appreciation of the risk involved even though he had in no way consented to accept that risk. Lords MacDermott and Reid dissented, holding that in the particular circumstances of this case it would have been necessary for the appellants to show that the respondent was *volens* as well as *sciens;* and this they had failed to do.

There are certain difficulties which arise out of the majority decision in the case. In the first place, up to the time of this decision, it has always been accepted that once the fact of damage from an unusual danger had been established, the defendant invitor would need to show the fact of assumption of the risk, as well as the knowledge of it. Indeed, this was the basis of the decision of the Judicial Committee of the Privy Council in the well-known case of *Letang v.*

4 [1951] 2 All E.R. 1, at 9.

Ottawa Electric Railway Co.,[5] one of the leading decisions upon the difference between *sciens and volens*. Lord Normand tacitly avoided this difficulty by saying that if the decision in *Horton's Case* were sound, then the defendants in *Letang's Case* assumed a greater onus than was necessary for their success. It was, he said, impossible to say what the result would have been if *Letang's Case* had been argued on the lines of the appellant's arguments in the present case, and accordingly *Letang's Case* could not be treated as an authority on the matter either way. Lord MacDermott, however, in his dissenting speech found himself unable to accept this argument, and thought that *Letang's Case* was a precedent for the view that the defence of *volenti* was as applicable in invitor-invitee cases as in others.

Secondly, there seems little point in stressing that the word "unusual" is to be given an objective interpretation, if at the same time knowledge of the danger on the part of the invitee is always to be a defence. The whole point of the objective interpretation is surely to rebut the view that the invitee's knowledge precludes him from bringing an action, and if the view of the majority in the instant case does not in the course of time receive some qualification, then the invitor's duty will in practice be no greater than that of giving warning of any trap which may exist on the premises. Such a duty would differ only very slightly, if at all, from that of a licensor towards his licensee, yet all of the Lords of Appeal stressed that there was a clear difference between the duties of these two different classes of occupiers.

The more reasonable interpretation of the rule in *Indermaur v. Dames* seems to be that suggested by Lord Reid in his dissenting speech. His Lordship pointed out that Willes J. mentioned a variety of methods which the invitor might adopt in order to discharge his duty to take reasonable care to prevent damage, and that what "reasonable care" requires in any particular circumstances is a matter of fact. This view, had it been adopted, would surely work more justly in the various cases which come before the courts, and would have been more in harmony with the general line of authority.

One incidental point requires some notice. There are certain passages in Lord Porter's speech which might be taken as suggesting that the defence of *volenti* is to be confined to actions between master and servant. Here again, in his dissenting speech, Lord Reid was at pains to point out that this defence is of general application. It may

[5] [1926] A.C. 725.

be, however, that these remarks indicate a desire on the part of their Lordships to restrict somewhat the ambit of the defence of *volenti* which has in recent years been carried to extreme lengths. Should this be so, the analysis of this doctrine which Professor Glanville Williams has recently provided in his *Joint Torts and Contributory Negligence* might well be a new starting point.

Presumptions—constructive intention—whether conclusive or not —applicability.

In *Simpson v. Simpson*,[1] Lord Merriman P., delivering the leading judgment in the Divisional Court, stressed that in the Divorce Jurisdiction the court should continue to use the "time-honoured maxim that a man must be taken to intend the natural consequences of his own conduct"; his Lordship, however, pointed out that this should not be taken to express an irrebuttable presumption of law. He criticised, in somewhat brusque language, certain remarks of Denning L.J. in *Hosegood v. Hosegood*.[2] There the learned Lord Justice pointed out that the "presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference, then it should not be drawn." His Lordship supported this statement by certain other remarks of his own, both extra-judicial and judicial, and also some remarks of Lord Goddard C.J.

With the utmost respect to the learned President, the view of Denning L.J. seems to be the better one. The so-called "time-honoured maxim" is of comparatively recent growth in the long history of our law. Its development is traced in *Russell on Crime*, (10th ed.) p. 27 *et seq.*; there it is shown that, although the presumption was foreshadowed by certain writers in the 18th century, it does not make its appearance in the cases before the early part of the 19th century when it constantly appears and is mentioned over and over again. During the 19th century and the early part of the present century, the maxim continued to be used and was cited on occasions

1 [1951] 1 All E.R. 955.
2 (1950) 66 T.L.R. (Pt. 1) 735, at 738.

in the highest tribunal, but it has recently received some severe setbacks, and has fallen into disfavour.

Nor did the maxim go unchallenged by the text-book writers. Holmes in *The Common Law* (Lecture IV) showed that the maxim was merely a misleading way of stating the proposition that in certain circumstances a man is held responsible for the consequences of his acts, and other text-writers, such as Sir John Salmond and Professor Thayer, have also challenged the correctness of the maxim.

It is, however, only in recent years that the courts have begun to listen to criticisms of this "presumption"; but there are signs that its long reign is reaching its end. The decision of the Judicial Committee of the Privy Council in *Sinnasamy Selvanayagam v. The King*[3] will no doubt assist in the process of banishing the maxim from the courts; for there the court refused to impute to the appellant a specific intention to annoy merely because annoyance would be the natural consequence of his acts. With this high authority, it seems unlikely that the somewhat defiant view of the learned President will prevail.

Indeed it is somewhat difficult to ascertain how it is that this maxim has for so long held sway. Unlike most of our legal maxims, both its form and its effect have been the subject of much doubt and uncertainty. Taylor in his book on *Evidence* stated that the maxim represented a conclusive presumption of law, but in the latest edition of *Phipson on Evidence* this view is contradicted. Again, the maxim has been stated in various forms—that a man is to be taken as intending "the natural consequences of his acts", "the necessary consequences of his acts", "the probable consequences of his acts," and so on. Indeed, Phipson gives two different versions of the maxim on the two different pages where he discusses it.

There are no doubt circumstances in which the common experience of mankind is such that, if certain acts are shown to have taken place, a person who is proved to have done those acts will not be believed if he denies that he intended the results which have flowed from them. Nevertheless, the matter must always remain a question of fact, and in the last analysis, it is for the jury to decide whether they believe the witness or not. To impose upon them a direction that they *must* disbelieve the witness would almost certainly lead to injustice, and if they are merely told that the presumption is one which *may* be applicable confusion is likely to result. The best course is to remove the maxim from our legal thinking as soon as possible.

[3] [1951] A.C. 83.

Husband and wife—interference with consortium—wife's right to maintain action.

In *Best v. Samuel Fox & Co. Ltd.*,[1] the Court of Appeal confirmed the decision of Croom-Johnson J. although they did not agree with the reasons which he had given for denying the plaintiff's claim to damages. The legal issue involved in this claim—that of a wife for damages for loss of consortium through a negligent injury to her husband resulting in his incapacity to have sexual relations with her—is discussed by Professor R. W. Baker elsewhere in this Review in an article written before the Court of Appeal's decision had been given.

The members of the court were at variance upon the question whether such a claim is maintainable by a wife, but dismissed the appeal in the instant case on the ground—upon which all the members were agreed—that even assuming the possibility of a successful action, the plaintiff wife had not made out her case, for she had only been able to show an impairment, as opposed to a loss, of her husband's consortium.

Unfortunately the arguments of counsel are not set out in the All England Law Reports; so it is not, at the moment, possible to discover how far this latter point was argued. It does appear, however, from certain remarks of Birkett L.J. that there had been some discussion of the matter. Nevertheless, it is submitted that the argument is a curious one. Among the many reasons which have been advanced in the courts of the United States of America and elsewhere, nobody, prior to the instant case, has apparently thought of taking this point. Furthermore, although the pleadings are not set out in the report, it is surely not too much to assume from the serious nature of Mr. Best's injuries (which resulted in his impotence) that he had spent some time in hospital, and that for at least part of this time he was not fully conscious. If this assumption is correct, then it would seem that during this period of time, however short it may have been, Mrs. Best had totally lost the consortium of her husband. Now, as the court pointed out, a temporary total loss of consortium will suffice; indeed such a temporary loss was the basis of the claim in *Guy v. Livesey*,[2] where it was alleged that the plaintiff had lost the consortium of his wife for three days.

Apart from this, the point taken by the Court of Appeal appears to be more verbal than real. "Consortium," said Birkett L.J., "is one and indivisible; it consists of a number of elements—companionship,

1 [1951] 2 All E.R. 116.
2 (1618) Cro. Jac. 501, 79 E.R. 428.

love, affection, comfort, mutual services, sexual intercourse." Loss of any of these elements would only amount to an impairment of the consortium, and the essence of the action was that a total, even though temporary, loss must be shown. Yet consortium is no more than an abstract conception, and it might surely as well be argued that, if one element in the complex which goes to make up this conception has been totally destroyed, then although the plaintiff may have left to her a "quasi-consortium", her consortium has been totally lost and replaced by some different relationship.

It is unfortunate that the court took this ground for dismissing the plaintiff's claim, for it enabled them to leave unsolved the issue whether a wife can maintain an action for the negligent injury of her consortium resulting in its loss, as opposed to a deliberate injury such as is found in enticement cases. Although the Court of Appeal has not had to pass on the question whether a wife can maintain an enticement action, the members of the court in the instant case had no doubt, following certain *dicta* of the court in *Place v. Searle*,[3] that such an action is maintainable. Birkett L.J. thought that no clear distinction could be made between the enticement action and an action for negligent injury to the consortium, and he was accordingly prepared to cede that, theoretically at least, a wife might maintain an action of the latter type. This is the conclusion reached by Professor Baker in the article to which reference has already been made, and it is submitted, with respect, that the arguments advanced in favour of this conclusion are far more convincing than those advanced against it. Cohen L.J. was content to leave the matter in doubt, although he inclined to the view that the action was not maintainable. His reasoning was not, however, very clear. He seems to have thought that a loss of servitium is involved in the action, and that as a wife has no right to the services of her husband she cannot maintain a claim. If this argument were correct—and it is submitted with respect that it is not—it does not explain why an action should be available to a wife in an enticement case but not in a case of injury by negligence. Cohen L.J. seemed to regard the enticement cases as being on a special footing, and suggested that the remedy in these cases may be treated as a natural extension of the principle in *Lumley v. Gye*.[4] He did not, however, explain how a type of action which became known as long ago as the year 1745 could be regarded as an extension of a principle which was not laid down until the year 1853, nor indeed settled, in its applicability

[4] (1853) 2 E. & B. 216, 118 E.R. 749.
[3] [1932] 2 K.B. 497.

to all forms of a contract, until the year 1881 (by *Bowen v. Hall*).[5] It may be added that the view of Cohen L.J. involves treating marriage as no more than a civil contract, a proposition which has little authority and does not as a matter of policy commend itself.

The other member of the court, Lord Asquith of Bishopstone, had no doubt that a wife cannot maintain an action of this kind. His reasoning was similar to that of Cohen L.J., and he took the further distinction—one which, as Professor Baker shows, is not supported by history—that the cases of negligent injury were always cases in trespass while the enticement actions were always actions on the case. This ignores the later development of the action for negligent injury, and again it does not explain why the wife should be able to recover in one case and not in the other. Lord Asquith was also troubled by the *dicta* of the court in *Place v. Searle,* but finally reached the conclusion that the husband's right to maintain an action for a negligent injury to his consortium was anomalous and that it should not be extended to a wife. Cohen L.J. had also made this point, but neither of the learned judges appeared to consider whether the right way of dealing with an existing anomaly is to introduce a further anomaly in order not to extend the existing one.

It will be interesting to see what effect this decision has upon the courts of this country. Both types of action have already arisen here. In *Johnson v. The Commonwealth and others,*[6] the wife claimed successfully in the New South Wales Court for an injury to her consortium, not resulting from the enticement of the husband, but from an assault upon him. However, in *Wright v. Cedzich,*[7] the High Court refused to allow a wife to recover in an enticement action on the ground that the essence of these actions for the loss of consortium is a loss of services, and that a wife has no right to her husband's services. The court did not expressly overrule *Johnson's Case,* but the latter is plainly inconsistent with the *ratio decidendi* of *Wright v. Cedzich.*

If the High Court continues to adopt its policy of following decisions of the Court of Appeal in order to ensure uniformity, it may reasonably be assumed that *Johnson's Case* must still be treated as overruled, since in *Best v. Samuel Fox & Co. Ltd.* the majority of the court was against allowing the wife to claim. However, the Court of Appeal appears to recognise that a wife can maintain an enticement action (although they have not had to decide the matter in

5 (1881) 6 Q.B.D. 333.
6 (1927) 27 S.R. (N.S.W.) 133.
7 (1930) 43 C.L.R. 493.

terms), and it may be that, should the issue again come before the High Court, the latter body will reverse its decision in *Wright v. Cedzich.*

One thing at least is clear from the foregoing discussion, and that is that the law upon this subject has got into a state of confusion, and requires reconsideration. Unless there is some likelihood that the House of Lords will be giving its attention to the subject within a fairly short period, it would be advisable for the legislature to intervene and restore some consistency to the law.

Misrepresentations—carelessly drawn accounts—liability where no fraud shown—scope of liability in negligence.

The Court of Appeal in *Candler v. Crane, Christmas & Co.*,[1] had to consider whether a false statement made carelessly, as opposed to fraudulently, by one person to another, and acted on by that other to his detriment, was actionable under the principle of proximity as laid down by Lord Atkin in his well-known speech in *Donoghue v. Stevenson.*[2]

The plaintiff in the case was considering investing money in a limited liability company, and before deciding to do so wished to see the company's accounts. The defendants, a firm of accountants, were accordingly instructed by the managing director of the company to complete the company's accounts, which they were then getting out, and to show them to the plaintiff. A clerk of the defendants accordingly completed the accounts and showed them to and discussed them with the plaintiff, and as a result the plaintiff invested his money in the company. The accounts were, however, carelessly prepared and gave a misleading picture of the financial position of the company and the plaintiff lost his investment. He accordingly sued the defendants for negligence. His action was heard by Lloyd-Jacob J. who dismissed it, and by a majority the Court of Appeal dismissed his appeal, Denning L.J. dissenting.

It will be remembered that in *Derry v. Peek*,[3] the House of Lords had dealt with a case of a carelessly false statement put out by the promoters of a company and had held that this would not form the basis of an action for deceit. Although the claim in that case was brought in deceit, and the decision of the House of Lords is accordingly strictly a decision on that tort only, there have been

1 [1951] 2 K.B. 164.
2 [1932] A.C. 562.
3 (1889) 14 App. Cas. 337.

numerous dicta to the effect that the members of the House impliedly accepted, in giving their opinions, that no action would lie in the circumstances mentioned unless fraud could be proved. Some four years later, in *Le Lievre v. Gould,*[4] the Court of Appeal dismissed the claim of a mortgagee against a surveyor (instructed by a building owner) for negligence in giving certificates regarding the progress of the building operations. These certificates had been obtained by the building owner from the defendant for the purpose of enabling him to know the amounts which he had to pay the builder. The plaintiff mortgagees were, however, shown the certificates and chose to advance money in reliance on them to the building owner instead of instructing their own surveyor. As a result of the decision in *Le Lievre v. Gould,* it had been generally thought that there was no liability for making a misrepresentation carelessly as opposed to fraudulently, but in the instant case the plaintiff argued very strongly that this notion was inconsistent with the idea of proximity as laid down by Lord Atkin in *Donoghue v. Stevenson.* One of the difficulties in his way was that in his speech Lord Atkin had expressly referred to *Le Lievre v. Gould* in terms which indicated approval rather than disapproval of that decision.

The majority of the court (Asquith and Cohen L.JJ.) held that they were bound by the decision in *Le Lievre v. Gould* to hold that the plaintiff could not succeed, and that an action for misrepresentation could only succeed where fraud was shown. Denning L.J., however, delivered a characteristically vigorous dissenting judgment. He thought that the facts of the case revealed a clear example of proximity, as that conception had been defined by Lord Atkin. He refused to regard himself as bound by any implications of *Derry v. Peek,* and held that that case related solely to the conditions necessary to establish a claim for fraud; and finally he gave a number of reasons whereby *Le Lievre v. Gould* could be distinguished from the instant case so that it should not form an adverse precedent.

The controversy which has raged around the exact implications of the decision in *Derry v. Peek* will no doubt not be settled until the House of Lords has a further opportunity to decide the question. It would be rash to prophesy what will happen when that occasion arises, but it may be noted that the leading text-writers are very doubtful of the possibility of maintaining an action unless fraud can be proved. Nevertheless, it is respectfully submitted that the reasons given by Denning L.J. appear to be sound, and that the policy which

[4] [1893] 1 Q.B. 491.

they express is one of good sense. No good reason has been advanced why a definite rule preventing any recovery for a misrepresentation, except in cases of fraud, should exist in our law, and indeed the majority of the court did not attempt to justify their decision on grounds of logic.

One point of interest in the case is that Cohen L.J. relied strongly upon the judgment of Cardozo C.J. in *Ultramares Corpn. v. Touche,*[5] and quoted extensively from it. There has recently been an increasing tendency for the Court of Appeal to pay attention to decisions of United States courts, and this is to be welcomed. It might not, however, be amiss to suggest that so far as the instant case is concerned, it is probable that Cardozo C.J. would have adopted a more pragmatic approach and have related his judgment to the particular circumstances of the case. In the case which that very learned American judge had to decide, the liability, if imposed upon the defendant, would have extended towards an indefinite class of persons. The situation was thus very different from *Candler's Case,* where only one person was involved and the defendants had no doubts as to the person they were dealing with or why they were dealing with him. In these respects *Glanzer v. Shepard,*[6] in which Cardozo C.J. allowed the plaintiff to recover, furnishes a much closer analogy.

Construction of penal statutes — whether mens rea necessary — scope of doctrine of vicarious liability.

The troublesome problems which arise from the application of the well-known maxim *actus non facit reum nisi mens sit rea* to modern penal statutes have again been before the Divisional Court during the current year, and produced three interesting decisions—*Barker v. Levinson,*[1] *Ferguson v. Weaving,*[2] and *Reynolds v. G. H. Austin & Sons Ltd.*[3]

In *Barker v. Levinson,* the court had to consider how far the manager of a block of flats was responsible criminally for the acts of a rent collector employed by him; on one occasion, he gave authority to the collector to grant a lease in respect of a certain flat if the collector should consider the proposed tenant satisfactory, but un-

5 (1931) 255 N.Y. 170.
6 (1922) 233 N.Y. 236.
1 [1951] 1 K.B. 342.
2 [1951] 1 All E.R. 412.
3 [1951] 2 K.B. 135.

known to him the collector, in granting the lease, demanded and received a premium of £100. This was in breach of section 2 of the Landlord and Tenant (Rent Control) Act, 1949. Lord Goddard C.J. delivered the leading judgment in the court, and held that the defendant was not liable under the provisions of the Act, inasmuch as what had been done by the collector was not within the scope of his authority. He restated the principle underlying the cases concerning the criminal responsibility of a master for the act of his servant in the following terms: "If a master chooses to delegate the conduct of his business to a servant who does an act in the course of doing the business which is absolutely prohibited, the master is liable."

There was an interesting comment by Denning L.J. on this case when giving his judgment in the case of *Navarro v. Moregrand Ltd. and another.*[4] The learned Lord Justice referred to the report in the All England Reports of the judgment of Lord Goddard C.J. and pointed out that, as there reported, the learned Lord Chief Justice was equating the master's criminal responsibility with his civil responsibility. This, said Denning L.J., was incorrect, but he noted that in the authorised Law Reports the offending passage, and others to the same effect, were struck out. The Lord Justice stressed that the test of criminal responsibility was whether the servant was a general agent acting within the general scope of his authority, which might be a very different thing from the question whether he was acting in the course of his employment.

Ferguson v. Weaving was a prosecution under the Licensing Acts in which the prosecutor sought to make the defendant liable for aiding and abetting in virtue of the fact that her servants were aiding and abetting the offence in question. The Divisional Court discussed the principles of vicarious responsibility for criminal acts once again at some length, and pointed out that the knowledge of a servant cannot be imputed to his master so as to make the latter an aider and abettor. It is of course essential, if a person is to be an aider and abettor, that he should know of the existence of the facts which are alleged to constitute the offence, and this had not been shown in the instant case.

In *Reynolds v. G. H. Austin & Sons Ltd.*, the court once again considered the problems of *mens rea,* the question on this occasion being whether an honest and reasonable belief in the existence of circumstances which, if true, would make the act an innocent act was a good defence to a statute imposing an absolute prohibition. The

4 [1951] W.N. 335.

court reiterated the principle that "*prima facie* this defence is always open, but it may be excluded by express wording or by necessary implication." Lord Goddard C.J. referred with approval to the analysis of the circumstances in which the court might hold that there is a "necessary implication" given by Wright J. in *Sherras v. De Rutzen*.[5] Devlin J. also delivered a long judgment in which he discussed the principles applicable to this problem at some length.

All three cases are to be welcomed as showing a tendency on the part of the Divisional Court to retreat from the extreme lengths to which some earlier decisions have gone in imposing vicarious liability or refusing to allow the defence of an honest and reasonable mistake of fact. It cannot be said, however, that these decisions have gone far towards qualifying the problems of statutory interpretation which arise, and it may well be asked why the courts have chosen, particularly during the last half century, to disregard on so many occasions the well-known common law requirement of *mens rea* where a statutory offence is created. No doubt Parliament can always exclude this requirement by express wording if it should choose, but there seems little justification for the Court's finding in considerations of social policy a necessary implication removing the requirement of *mens rea*. It has on many occasions seemed that the court in its decisions has, if one may use the words of Devlin J. in *Reynolds v. G. H. Austin & Sons Ltd.*, engaged not in punishing thoughtlessness or inefficiency and thereby promoting the welfare of the community, but in pouncing on the most convenient victim.

The problems involved in these cases are largely those of statutory interpretation. No doubt the court should not, in interpreting statutes, even penal statutes, set out to destroy them; but Parliament at the present day never finds difficulty in introducing new and clear provisions where an adverse decision of the court seems to require an amendment of an existing statute if the intention of Parliament is to be carried out. It is often difficult to collect the intention of Parliament from the terms of the statute, and it is respectfully suggested that social policy might be better served if courts were to announce that they would, in future, always assume that an absence of *mens rea* would be a good defence to a prosecution for infringing the terms of the statute unless the contrary intention were expressed in plain words. This would occasion little difficulty to draftsmen, but might well in the long run result in a greater measure of justice.

[5] [1895] 1 Q.B. 918.

Receiving stolen property—goods taken by child under eight—meaning of "stolen".

An interesting point came before the Divisional Court in *Walters v. Lunt and another*.[1] The respondents, a husband and wife, were charged before justices with receiving stolen property, namely a child's tricycle, knowing it to have been stolen. The tricycle had been brought home by the respondents' child, aged seven years. The justices held that as a child under eight[2] is incapable of committing a criminal offence there could be no charge of larceny, and hence that a charge of receiving could not be supported. The Divisional Court upheld this decision, but remarked that the respondents could be charged either with larceny as bailees or with larceny by finding. As to this, it may be noted that it is very doubtful whether there can be bailment where there is no intention to deliver either property or possession; but the suggestion that there was a larceny by finding has more to commend it.

On the main point—that the charge of receiving could not be upheld—the Court was content to follow the decision of the Court of Criminal Appeal in *R. v. Creamer*,[3] which therefore requires some consideration. Creamer was charged with receiving from a wife money "stolen" by her from her husband, knowing it to have been stolen; a strong Court quashed his conviction on the ground that the wife was not guilty of larceny, because at the time she took the money she was still living with her husband and so could not steal his property.[4] It may be observed that, apart from this point of law, it was by no means clear that there was a larceny, for the wife in her evidence at the trial claimed the money as of right.

In neither of these cases did the Court spend any time in considering the real point involved, namely, what is the meaning of the word "stolen" in section 33 of the Larceny Act, 1916?[5] It was assumed that "stolen property" is property in respect of which there has been committed an act which is punishable as stealing; yet this assumption is difficult to reconcile with the terms of subsection (3)

1 [1951] 2 All E.R. 645.

2 In Western Australia the age at which a child becomes responsible in the criminal law is seven. The various points mentioned in this article are dealt with by the Western Australian Criminal Code in manner similar to English law, but in order to avoid constant annotation section references are not given.

3 [1919] 1 K.B. 564.

4 See section 36 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50).

5 This provides that "every person who receives any property knowing the same to have been stolen.....shall be guilty of an offence....".

of the section, which provides that the receiver may be convicted even if the "principal offender" is not amenable to justice. As against this, subsection (4) of the section seems to support the Court's assumption; and it might also be argued that the word "offender" imports the existence of someone who is punishable in respect of the taking, though this would be difficult to maintain in face of *Barnard v. Gorman.*[6]

It is submitted, however, that it would be more sensible to construe "stolen property" as meaning property which has been fraudulently taken and carried away, without the consent of the owner and without a claim of right made in good faith, by a person who, at the time of taking it, intended to permanently deprive the owner of it.[7] The adoption of this approach would make any enquiry into the personal immunities of the taker irrelevant to a charge of receiving. So far as the Australian jurisdictions are concerned, there is a precedent for it in *Trainer v. The King,*[8] where the High Court held that, to support a charge of receiving, there must be evidence from which the jury may reasonably infer that the property was taken by some person *invito domino.* It is true that some old English decisions, notably *R. v. Harris,*[9] apparently insist that an indictable larceny must have occurred. But it cannot be too often said that the court's duty is to deal with the charge before it according to the terms, and meaning, of the statute under which that charge is laid; and that it is irrelevant, and wrong, to start by enquiring how another court dealt with a similar charge, laid at common law or under a different statute, a century ago. Failure to observe this rule has led the English courts into some extraordinary decisions on larceny in recent years, *R. v. Hudson*[10] and *Ruse v. Read*[11] being perhaps the most startling. In neither of these cases did the court think it worthwhile even to mention the requirement of the Larceny Act, 1916, that an intent to deprive the owner of the property must exist at the time of taking: in both a conviction for larceny was upheld as being in accord with pre-1916 precedents.

If the approach here suggested is adopted by the Australian courts, some awkward consequences of the English decisions will be

6 [1941] A.C. 378.
7 Adopting the definition of stealing in section 1 (1) of the Larceny Act, 1916.
8 (1906) 4 C.L.R. 126.
9 (1850) 14 J.P. 609; of doubtful authority since the decision in *R. v. Frampton,* (1858) Dears. & B. 585, 169 E.R. 1130.
10 [1943] K. B. 458.
11 [1949] 1 All E.R. 398.

avoided. Suppose, for example, that the Lunt child had been nine years old; he could then have been convicted of larceny if, and only if, he knew that he ought not to have taken the tricycle. How is the prosecutor to know whether he should lay a charge of larceny by finding or of receiving? How is he to decide whether the jury will find that the child had the necessary *mens rea*? He may have no information about the child's knowledge of right and wrong. He would perhaps be even more embarrassed if the receiver had accepted the property from an insane person; he will then have to judge how the jury will react to the combination of the medical evidence and the rules in *McNaghten's Case*.[12]

Again, suppose that the receiver is tried before the "principal offender", an insane person, on a charge of receiving. It appears from what was said in *R. v. Creamer* that, if properly instructed on the law, the jury may find that the insane person does not satisfy the *McNaghten* test and may convict the receiver accordingly. Later, the taker is tried on a larceny charge; the jury, not being in any way bound by the earlier verdict, finds that he is insane. What legal ground exists for quashing the verdict of receiving? Yet if *Walters v Lunt and another* is correct, the verdict cannot stand.

All these difficulties can be avoided if the court refuses, on a charge of receiving, to enquire into the existence or non-existence of personal immunities of the taker. It is submitted that there are compelling reasons for such a refusal; and that there is no compulsion on the court to undertake any such enquiry. It is to be hoped that these submissions will be accepted by the Australian courts when the problem comes before them.

P.B.

Prize law—seizure without overt act—hulls under construction—effect of enemy surrender.

The Hermes and Four Hulls[1] is noteworthy for the number of points which arose for detemination by the court. Three separate seizures in prize were concerned, each with its own special features. (a) On 2nd May 1945, Lubeck was captured from the Germans, and two hulls were then in the shipbuilding yards, almost completed. (b) On 6th and 7th May 1945, Emden was captured by H.M. Canadian Army. At this time the motor-vessel Hermes was lying in the port,

12 (1843) 10 Cl. & Fin. 200, 8 E.R. 718.
1 [1951] 2 Times L.R. 54.

damaged and aground. (c) On 10th May 1945, Flensburg was occupied and two further hulls were found there, though in an elementary stage of construction.

The German Army Group for the whole of north-west Germany had surrendered on 4th May, and total surrender of all German armed forces took place on 8th May. The occupying forces made no attempt to seize in prize the Hermes or the hulls, and the writ for their condemnation was not issued until 1947. In the meantime, on 5th June 1945, the occupying powers had abrogated by declaration their belligerent rights of prize. The owners of the ship and the hulls resisted the seizures in prize and claimed to be solely entitled.

After consideration of the many points raised, Lord Merriman held that the Hermes and the structures were good and lawful prize and decreed that they be condemned to the Crown. The decisions made, though the judgment itself is not a masterpiece of style, are clear enough. In effect, they are four in number:—

(1) The structures at Lubeck and Flensburg, though still on the stocks, were maritime property and proper subjects of seizure in prize. It was not considered necessary that they should be completed ships. "It is the convertibility to war-like use that matters" (p. 68), and this could be done simply by continuing with the structures on the lines already laid down. The fact that the Hermes was aground and unnavigable was not given any weight by the claimants, it being admittedly a proper subject of prize capture (p. 61). However, though this point was not specifically made in the case of the Hermes, it could be regarded as a seizable "ship" on the authority of *The Bellaman and The Agostino Bertani*[2] where two Italian ships partly submerged in Tripoli harbour were held to be lawful prize. The hulls in question were not completed "ships", but prize law did not demand that this be established.

(2) The shipbuilding yards at Lubeck and Flensburg, despite the claimants' contention, were part of the captured ports, and the hulls were therefore legitimately taken in a maritime town. It is well established that captures made on land may be good maritime prize; it is not necessary that they should be made on the high seas. Lord Merriman quotes (p. 67) from the judgment of Lord Chief Justice Lee in *Key and Hubbard v. Vincent Pearse* noted in *Le Caux v. Eden*:[3] "the jurisdiction (in prize) does not depend on the locality but the nature of the question." If the matter would be one of prize if the capture had been made on the high seas, then it is equally so

[2] [1948] 2 All E.R. 679.
[3] (1781) 2 Doug. (K.B.) 595, at 608; 99 E.R. 375, at 381.

though in fact made on land. This decision is eminently reasonable, but it should be mentioned in passing that there will of course be occasions when maritime property on land cannot be validly seized in prize. In the case of *The Anichab,*[4] some small German craft were seized in 1915 by H.M. military forces at distances of 148 and 310 miles inland in German South-West Africa. It was held that these captures were of property on land by the military forces, and were not the subject of maritime prize.

(3) A much-discussed question was when the right to seize vessels in prize came to an end. It was held that such belligerent rights ended with the *true* cessation of hostilities. The hulls captured at Lubeck were not concerned here, since that port was taken before the surrender of the German Army Group in the north-west on 4th May and also, of course, before the general surrender on 8th May. Emden, where the Hermes was found, was occupied on 6th and 7th May, but the surrender on 4th May could not, it was held, be regarded as a general cessation of hostilities. Enemy action might still be carried on in the north-west area by the remaining German forces, for instance by air. The sole remaining question then was the occupation of Flensburg, which took place on the 10th May. It was strongly urged by the shipowners that the right to make captures in prize had definitely come to an end by the total surrender on 8th May. Various cases, however, were discussed which showed that ships could be taken as maritime prize even after they had formally surrendered (for example, by striking their colours), since it did not necessarily follow that hostilities had thereby ceased. It is only on a true cessation of hostilities that prize rights end. It was not laid down in general terms when such a cessation might be said to have come about; undoubtedly a peace treaty would effect this, but it was also clear that the victors might themselves abrogate any rights they had *jure belli,* which in fact they had done by declaration on 5th June 1945. Before that date, however, rights in prize still subsisted, and the hulls at Flensburg were therefore properly seized. This decision would seem, particularly in the circumstances of the German collapse, to be beyond reproach.

(4) The fourth decision is perhaps the one which might well give rise to some dissent. In the case of all three ports, the Allied forces occupied the towns without taking formal possession of either the Hermes or the hulls, without indeed paying any attention to the question whether they were being captured in prize or not. In short,

[4] [1922] 1 A.C. 235.

there was no overt act of capture or conscious volition on the part of the captors. The argument that this was a necessary condition attaching to condemnation in prize was rejected by the court. The shipowners' claim that there was no attempt at capture and seizure in prize till 1947, by which time prize rights had been abrogated, proved unacceptable. It was held that once the ports had been captured, the maritime property within them was also captured, and the ships and structures there present were at that moment validly seized in prize. "The hand of the captor was on them from the moment when the ports respectively were occupied" (p. 65). In stating this, Lord Merriman had no difficulty in following his own decision in *The Bellaman and The Agostino Bertani,* where there was no special intention to take possession of sunken shipping in the harbour of Tripoli, when that town was captured by British troops in 1943. No action was taken to seize the ships in prize until 1947, but they were nevertheless condemned as lawful prize by the Court, since, it was said, to infer that no seizure had taken place when Tripoli was captured would be to ignore the realities of the situation. Lord Merriman also quoted with approval from *The Progress*[5] where, in a matter of prize salvage, it was considered that the ships' capture had been effected by the French on their taking possession of the port, without the matter having been in their immediate contemplation.

It is no doubt highly convenient for the captors to be able in this way to take prize proceedings long after the capture on the grounds that seizure was actually effected at the time the port was taken, and there is a healthy amount of authority on the subject. The case of *H.M. Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft*[6] is perhaps distinguishable on the ground that it involved an agreement to regard a fleet of small ships as seized by consent, though no further attention was given thereafter to the matter by the captors. *The Anichab* supports the proposition, and *The Giuseppe Mazzini*[7] follows *The Bellaman and The Agostini Bertani,* but this again is a decision of Lord Merriman, who has thus given the same judgment in three different cases. In *Wheaton's International Law*[8] it is said that "on completion of a capture it is the duty of the captor to bring his prize, as soon as his other duties permit it, before a competent court." Oppenheim[9] says also that "the prize must be taken

5 (1810) Edw. 210, 165 E.R. 1085.
6 [1919] A.C. 291.
7 [1949] 2 All E.R. 1094.
8 (7th Edition, Vol. 2, at p. 314).
9 (6th Edition Revised, Vol. 2, p. 380).

straight to a convenient port of adjudication." *The Sudmark (No. 2)*[10] is cited in support here. Further, the Naval Prize Act, 1864, s. 16, provides that every ship taken as prize and brought into port shall forthwith be delivered up to the marshal of the prize court. The delay in seeking condemnation in prize in the case of *The Hermes and Four Hulls* might then suggest that no seizure had in fact been made before 1947. However, Lord Merriman said that he regarded "the procedural laxity and confusion as deplorable, but not fatal" (p. 69), and he had indeed said the same in *The Bellaman and The Agostini Bertani.* In cases of this kind, he observed, where there was no possibility of ships which were aground escaping, failure to carry out the statutory duties of a captor should not be taken to imply the absence of effective seizure. The argument would be even stronger in the case of ships still on the stocks, and the position of ships brought in after capture on the high seas can be distinguished. One may be forgiven nevertheless for still retaining a lingering doubt. One is first required to admit a seizure of the ships automatically on capture of the port, and then to impute to this the specific nature of a seizure in prize without any particular thought having been given to the matter. The two together may perhaps be asking a little too much.

International law—independent Sovereign State—status of Pakistan—agreement in contract to submit to jurisdiction of English courts.

Cases concerning the status of foreign countries in English courts are not infrequent. *Kahan v. Federation of Pakistan*[1] is of interest because it involved an investigation into the position of a member of the British Commonwealth. The plaintiff, Kahan, sued the Pakistan Government for breach of contract, claiming he had not been paid for Sherman tanks which he had supplied under the contract. A clause of the document provided that the agreement should be governed by English law, that the Pakistan Government agreed to submit for the purposes of the agreement to the jurisdiction of the English courts, and that any legal proceedings might be served on the Government at the office of the High Commissioner for Pakistan in London. The Pakistan Government moved to set aside the writ issued against it insofar as it purported to implead the Government. The

10 [1918] A.C. 475.
1 [1951] W.N. 468 (Court of Appeal).

two questions which then arose for decision were (a) the status of Pakistan, and (b) assuming it had the immunity of a Sovereign State, whether it had submitted to the jurisdiction.

The case was heard by Jenkins and Birkett L.JJ. on appeal from the judge in chambers, Slade J. The latter, in order to determine the question of the Government's status, had sought information from the Secretary of State for Commonwealth Relations, who replied that Pakistan was a self-governing country within the British Commonwealth of Nations and, in his view, an independent Sovereign State. Four points might arise for mention:—

(1) It will be noted that in matters of recognition of states it is the long-established practice to seek the certificate of the appropriate Secretary of State. Usually this will be the Secretary of State for Foreign Affairs, as for instance in *Engelke v. Musmann*[2] and *The Arantzazu Mendi*,[3] or the Secretary of State for the Colonies, as in *Mighell v. Sultan of Johore*[4] and *Duff Development Co. v. Kelantan Government*.[5] In the case under discussion, however, application was made to the Secretary of State for Commonwealth Relations. Presumably, if the Court's request had been sent to the Foreign Office, it would, after consideration, have been forwarded to the Commonwealth Relations Office. By choosing the latter in preference to the former, the Court clearly made a preliminary choice as to the probable appropriate Secretary of State.

(2) The Secretary of State's certificate advised that Pakistan, a self-governing country within the British Commonwealth, was "linked through the United Kingdom, but in other respects independent of it." The phraseology is scarcely happy, since it seems to attribute to the United Kingdom a constitutional pre-eminence which in fact it does not possess amongst the equal, self-governing Dominions. Since King George VI is still recognised as King of Pakistan, the certificate could have referred more accurately to a link through the Crown.

(3) It is difficult to know in any case why the Secretary of State's certificate was thought necessary. Pakistan's status as a self-governing member of the British Commonwealth could scarcely be called in question, particularly in view of the terms of the Indian Independence Act, 1947, to which indeed the certificate drew the Court's attention. S. 1 (1) of that Act provides that "As from the fifteenth day of August, nineteen hundred and forty-seven, two independent Do-

2 [1928] A.C. 433.
3 [1939] A.C. 256.
4 [1894] 1 Q.B. 149.
5 [1924] A.C. 797.

minions shall be set up in India, to be known respectively as India and Pakistan", and further sections provide for the legislative competence and independence of the Dominions, including power to pass laws repugnant to the law of England, no subsequent United Kingdom legislation being thenceforth applicable. However, since Pakistan was a newly created state, the Court may have desired the certificate in order to make assurance doubly sure. In the end, it was agreed by the parties in the Court of Appeal (the judge in chambers having found that Pakistan was an independent Sovereign State) that the sovereign immunity of Pakistan should for the purposes of the appeal be recognised.

(4) It has been well established that the certificate of the Foreign Secretary or Colonial Secretary is conclusive and binding on the Courts. In *The Arantzazu Mendi* Lord Wright said (p. 267): "The Court is, in my opinion, bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty's Government for this purpose in a matter of this nature. Such a statement is a statement of fact, the contents of which are not open to be discussed by the Court on grounds of law." Counsel for the Pakistan Government, however, when counsel for the plaintiff intimated his acceptance of the certificate as conclusive, said that he wished that matter to be kept open on the grounds that membership of the British Commonwealth, established by an Imperial Act, might involve special consideration. Apparently the Court was not satisfied that the certificate of the Commonwealth Relations Office should be considered to be any less conclusive than one from the Foreign Office, but no decision was in the event necessary since the Pakistan Government's immunity was agreed to by both parties. The reservation by counsel for the defence may have been an indication of the Pakistan Government's desire not to commit itself on the question of conclusiveness without further consideration of any possible effect on its own position, but it would not appear that there is any sound reason why such a certificate should not be accepted as binding.

It was held also that the Pakistan Government had not submitted to the jurisdiction by its agreement under the contract. It was established by *Mighell v. Sultan of Johore* and *Duff Development Co. v. Kelantan Government* that actual submission before the court itself was necessary, and any conduct or agreement before the case was brought to the court could not be enquired into. These authorities were followed, but Jenkins L.J. hinted that in their absence he might have been prepared to hold that the Government had submitted to the jurisdiction under the terms of the contract. "Why

should the Federation be allowed to resile from the bargain contained in cl. 19 made in clear terms?" (p. 469). There is also Lord Carson's dissenting judgment in *Duff Development Co. v. Kelantan Government* in support of such a view, and it might well be claimed that the ends of justice would be best served by enforcing a clear submission made in advance.

L.J.D.