1953

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AND CASES IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

EDITOR - - - R. P. COLINVAUX,
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Chancery Division - - - { J. L. DENISON, K. R. A. HART, F. R. DYMOND, I. G. R. MOSES, } *Barristers-at-Law*

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C. A.
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Romer L.J.

"obliged to come to the conclusion that the testator did not in "the earlier allotments of shares any more than in the trans- "actions with the businesses intend to commit himself "irrevocably by way of out-and-out gifts. I take the view . . . "that these were only provisional arrangements not intended to "remove his freedom of action, and I find no principle of law "which prevents me from giving effect to that view." For these reasons I agree that the appeal should be dismissed.

Appeal dismissed

Solicitors: *Douglas & Co.; MacDonnell; Sidney Pearlman.*

B. A. B.

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PILKINGTON *v.* WOOD.

[1952 P. 1398.]

Damages—Solicitor—Negligence—Property conveyed with defective title—Negligence admitted—Mitigation—Measure of damage—Diminution in market value—Special damage—Whether within reasonable contemplation of parties.

In 1950 the plaintiff purchased freehold property in Hampshire; he had employed the defendant to act as solicitor in the transaction, and the vendor had purported to convey the property as beneficial owner. When the plaintiff attempted to sell the property in 1951, having changed his place of employment from Surrey to Lancashire, he found that the title was defective, since the vendor was a trustee of the property and had committed a breach of trust in purchasing it himself.

Negligence by the defendant was admitted, and the only issue was the quantum of damages. The plaintiff claimed, in addition to general damages for the difference in value of the property with a good title and its value with the defective title, special damage in respect of the following items: (a) expenses in connexion with his new employment, namely, hotel expenses for temporary accommodation in Lancashire, cost of running a car between Hampshire and Lancashire and telephone calls every night to his wife while in Lancashire; (b) cost of the valuation of the property required by his bankers at the time of the purchase; and (c) interest on his overdraft which remained because he was unable to sell the property.

The defendant contended that the plaintiff should, before bringing this action, have mitigated his damage by suing the vendor on the covenant for title implied under section 76 of, and Sch. II

to, the Law of Property Act, 1925, since the vendor was expressed to convey as beneficial owner; alternatively, that the plaintiff should have taken out a policy of insurance against the consequences of the defect in the title:—

Held, (1) that the duty to mitigate did not extend so as to oblige the plaintiff to sue under the implied covenant for title, it being no part of the plaintiff's duty to embark on such litigation in order to protect the defendant from the consequences of his own carelessness.

Payzu Ld. v. *Saunders* [1919] 2 K.B. 581; 35 T.L.R. 657 and *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Company of London Ld.* [1912] A.C. 673 applied.

(2) That no satisfactory evidence was adduced that any policy of insurance to cover the defect could be obtained.

(3) That the proper amount of damages was the difference between the market value of the property at the time of the breach in 1950 with a good title and the market value it would have then had with a defective title.

(4) That no items of special damage were recoverable, since none of them could have been within the reasonable contemplation of the parties at the date of purchase of the property in 1950.

Hadley v. *Baxendale* (1854) 9 Exch. 341 and *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.* [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997 applied.

ACTION.

The plaintiff claimed that the defendant, when acting as his solicitor, had been guilty of negligence in advising him on the purchase of a property known as Ewshott Corner, Ewshott, Hampshire. The negligence of the defendant was admitted after the close of pleadings in the action, and the only issue which remained for decision was the quantum of damages.

In 1950 the plaintiff, a civil engineer who had hitherto worked in Lancashire, obtained employment in Surrey, and in order to live within reach of his work, he contracted to purchase the property in question and employed the defendant to act as his solicitor in connexion with the purchase. The purchase was completed by a conveyance dated April 27, 1950, by which the vendor, one Colonel Wilks, conveying as beneficial owner, assured the property to the plaintiff in fee simple for £6,000. The plaintiff raised this sum by an overdraft at his bank on which interest was payable. He paid the defendant his scale fee of £63 for acting as his solicitor.

The plaintiff in due course went into occupation of the property. He spent £400 to £500 in improvements and repairs and purchased for a further £334 certain land surrounding his first purchase, the possession of which considerably added to

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the amenities and the value of the original land. In December, 1951, the plaintiff relinquished his employment in Surrey and, as he wished to be free to take employment elsewhere, he put the property into the hands of local estate agents. They found a purchaser willing to pay £7,500 for it with the additional plot, and he, in December, 1951, entered into a contract to purchase the property. The plaintiff again employed the defendant as his solicitor.

The purchaser's solicitors, on being supplied with an abstract of the plaintiff's title, pointed out that there was a defect in it, and they declined to go on with the purchase; in consequence the deposit had to be returned, and a claim arose for costs thrown away.

The defect was that it appeared on the face of the abstract of title that Colonel Wilks, the vendor to the plaintiff, had partly under a conveyance of July 22, 1937, and partly under a conveyance of February 28, 1938, purchased the property from the trustees of his father's will, of whom he was himself one. He was therefore in breach of the rule that a trustee cannot validly purchase the trust property either directly or through an intermediary.

The plaintiff, in his claim for damages, alleged that as a result of the defendant's negligence he had acquired a property with an unmarketable title, or alternatively, a property which he could only sell at a substantial loss. He also claimed as special damage the cost of a number of items, which he alleged resulted from his being unable to sell the property at the price which he gave for it, and his consequent inability to buy another house convenient for his new employment.

Charles Russell Q.C. and *R. Cozens-Hardy Horne* for the plaintiff. Negligence is admitted and the only question is as to the measure of damages. The plaintiff is entitled to damages on the principle of restitutio in integrum, that is, the difference between the value of the property at the date of purchase with a good title (that is what the plaintiff believed he had purchased) and the value it in fact had with a defective title: *Lake* v. *Bushby*.[1]

The defendant asserts that the plaintiff has not acted reasonably because he has not mitigated his damage by suing Colonel Wilks on the covenant for title under section 76 (1) (A) of and

[1] [1949] 2 All E.R. 964.

Sch. II to the Law of Property Act, 1925. Such litigation would have been extremely hazardous; the evidence is that Colonel Wilks would have denied his liability and blamed his solicitor, and it is doubtful, moreover, whether the plaintiff could sue under the covenant for title as Colonel Wilks was not really the beneficial owner though expressed to convey as such: see *Fay* v. *Miller, Wilkins & Co.*[2] The action was not therefore one which a reasonably prudent man would ordinarily take in the course of business, and the plaintiff was not under any duty to embark on such litigation: *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Company of London Ld.*[3] To hold that it was reasonable for the plaintiff to be obliged to bring such an action in order to minimize his damage would be to take the doctrine of mitigation much further than it has ever been taken before.

Although an action under the covenant for title might assist the court in assessing the damages, it is manifestly unreasonable that the plaintiff should be forced to take proceedings now; if, for instance, he recovered £x, and later the threat of ejection by a beneficiary became real, he would not feel secure in spending any money on the house, as he could only recover for the things actually proved to be improvements.

The defendant also asserts that the plaintiff could take out an insurance policy against any claim by a beneficiary, but there is no evidence that a policy of the type required could be obtained.

The question of mitigation is, therefore, irrelevant in assessing the damages. The defendant's negligence has resulted in the plaintiff having a permanently defective title; damages under the main head should be £3,500, being the difference between the value of house with a good title at the time of the breach and its value with a defective title. The amount, if any, to be attributed to the value of an action under the covenant for title, on the footing that Colonel Wilks might be willing to pay something to avoid litigation, should be merely nominal.

With regard to damages under the special heads, the plaintiff is entitled to such damages as could be reasonably expected to flow from the breach: *Hadley* v. *Baxendale*[4]; *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.*[5] The plaintiff claims as damages under these heads all the expenses which he has incurred as a result of his being unable to sell his house except

[2] [1941] Ch. 360; 57 T.L.R. 423; [1941] 2 All E.R. 18.

[3] [1912] A.C. 673.

[4] (1854) 9 Exch. 341.

[5] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

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at a sacrificial price. These include interest on his overdraft at the bank which he obtained in order to buy the house, and cannot pay off now by selling it; his travelling expenses between his home and his new work, and his bills for temporary hotel accommodation.

The defendant must be deemed to have known that the plaintiff might want to change his employment and sell his house in order to live elsewhere; that was not unreasonable, nor was it unreasonable that he should not wish to sell his house with a defective title at a loss.

J. Pennycuick Q.C. and *E. I. Goulding* for the defendant. The plaintiff's damages cannot be properly assessed in the manner proposed by him because he has not taken any reasonable steps to mitigate his damage: *Payzu Ld.* v. *Saunders.*[6] The plaintiff cannot recover from the defendant anything which he might have recovered by suing Colonel Wilks under the covenant for title. Colonel Wilks conveyed as beneficial owner and is therefore liable under section 76 of and Sch. II to the Law of Property Act, 1925. It is not in dispute that Colonel Wilks is a man of substance, and the defendant offered the plaintiff an indemnity against costs. There was no reason, therefore, why the plaintiff should not have brought that action before suing the defendant. The plaintiff was not obliged to wait until a claim had been made against him: *Turner* v. *Moon.*[7] The plaintiff could have obtained a policy of insurance to indemnify him against any claim; policies in respect of defective titles are well known, but he has not taken any such step.

The plaintiff's claim for damages under the special heads is too remote; those damages could not be said to flow directly and in the usual course of things from the defendant's wrongful act: *The Edison.*[8] The defendant could not reasonably have foreseen that as a result of a defective title the plaintiff would incur heavy travelling expenses and bills for hotel accommodation. The defendant cannot be liable for interest on the plaintiff's continued overdraft because he cannot sell his house; that is a result of the plaintiff's financial position and not of the defective title. None of these items was within the reasonable contemplation of the parties at the time of the contract: *The Edison*[8]; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ld.*[9] They do not come

[6] [1919] 2 K.B. 581; 35 T.L.R. 657.

[7] [1901] 2 Ch. 825.

[8] [1932] P. 52; 48 T.L.R. 224.

[9] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.

within the rule in *Hadley* v. *Baxendale* [10] as to the remoteness of damage, and they should all be disallowed.

The real loss is the result of the plaintiff's refusal to mitigate this damage.

Russell Q.C. replied.

Cur. adv. vult.

July 21. HARMAN J., reading his judgment after stating the facts: It was admitted before me that the class of persons claiming under the will of which the vendor Wilks was a trustee was not closed, and might embrace infants or persons unborn, and that for a number of years at any rate it would be impossible to say with certainty that no claim could arise to upset the transaction, although hitherto in fact no claim has been made. This is clearly a serious blot on the title, and not one that can be described with any propriety as a technical defect. There is a real danger that anyone acquiring this property with notice may be dispossessed of it hereafter. A beneficiary claiming to have the property restored to the trust must agree that the original purchase-money paid by Colonel Wilks and, in addition, money spent in improvements shall be repaid. That sum was assumed here to amount to £2,500. I ought to say that the defect in title does not extend to the further plot purchased by the plaintiff in 1951, but that plot by itself is of no greater value than the amount that the plaintiff paid for it.

It would appear then at first sight that the measure of the defendant's liability is the diminution in value of the property; that is to say, the difference between the value in 1950, the date of the plaintiff's purchase of the property with a good title and with the title which it in fact had.

The defendant, however, argues that it is the duty of the plaintiff before suing him in damages to seek to recover damages against his vendor Colonel Wilks under the covenant for title implied by reason of the conveyance as beneficial owner. It is said that this duty arises because of the obligation which rests on a person injured by a breach of contract to mitigate the damages. This suggestion seems to me to carry the doctrine of mitigation a stage further than it has been carried in any case to which I have been referred. The classic statement of the doctrine is that of Lord Haldane in *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Company of London Ld.*[1] The Lord Chancellor expressed it thus[2]:

[10] 9 Exch. 341.

[1] [1912] A.C. 673.

[2] [1912] A.C. 673, 688.

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"The quantum of damage is a question of fact, and the only "guidance the law can give is to lay down general principles "which afford at times but scanty assistance in dealing with "particular cases. The judges who give guidance to juries in "these cases have necessarily to look at their special character, "and to mould, for the purposes of different kinds of claim, "the expression of the general principles which apply to them, "and this is apt to give rise to an appearance of ambiguity. "Subject to these observations I think that there are certain "broad principles which are quite well settled. The first is that, "as far as possible, he who has proved a breach of a bargain to "supply what he contracted to get is to be placed, as far as "money can do it, in as good a situation as if the contract had "been performed. The fundamental basis is thus compensation "for pecuniary loss naturally flowing from the breach; but this "first principle is qualified by a second, which imposes on a "plaintiff the duty of taking all reasonable steps to mitigate "the loss consequent on the breach, and debars him from "claiming any part of the damage which is due to his neglect to "take such steps. In the words of James L.J. in *Dunkirk "Colliery Co.* v. *Lever*,[3] 'the person who has broken the contract "'is not to be exposed to additional cost by reason of the plain-"'tiffs not doing what they ought to have done as reasonable "'men, and the plaintiffs not being under any obligation to do "'anything otherwise than in the ordinary course of business.'"

For the present purpose it seems to me that it is apposite to state the plaintiff's rights in the words of Scrutton L.J. in *Payzu Ld.* v. *Saunders*[4] thus[5]: "he can recover no more than "he would have suffered if he had acted reasonably, because "any further damages do not reasonably follow from the "defendant's breach. . . ."

Ought then the plaintiff as a reasonable man to enter on the litigation suggested? It was agreed that the defendant must offer him an indemnity against the costs, and it was suggested on the defendant's behalf that if an adequate indemnity were offered, if, secondly, the proposed defendant appeared to be solvent, and if, thirdly, there were a good prima facie right of action against that person, it was the duty of the injured party to embark on litigation in order to mitigate the damage suffered. This is a proposition which, in such general terms, I am not

[3] (1878) 9 Ch.D. 20, 25.

[4] [1919] 2 K.B. 581; 35 T.L.R. 657.

[5] [1919] 2 K.B. 581, 589.

prepared to accept, nor do I think I ought to entertain it here, because I am by no means certain that the foundations for it exist.

It may be conceded that the indemnity offered would be adequate and that Colonel Wilks is a man of substance. It was clear, however, that he would resist any claim and would in his turn claim over against his solicitors, for that was his attitude in the witness-box.

About the third condition much more doubt exists. I listened to a considerable argument based upon the extremely difficult words in which is couched the contract to be implied under section 76 of and Sch. II to the Law of Property Act, 1925, the defendant averring and the plaintiff denying that liability would arise in this case under these words. This is a question which I do not propose to decide. Nor need I decide whether Colonel Wilks, having regard to his position, was the " beneficial owner " of the property so as to bring the covenant into operation, it being a sine qua non that the covenantor must be in fact, as well as being expressed to be, the beneficial owner; compare the observations of Sir Wilfrid Greene M.R. in *Fay* v. *Miller, Wilkins & Co.*,[6] where he was discussing the covenant implied in an assurance as personal representative.[7] It appears to be the law that a breach of the covenant can be sued on at once and that there is no need to wait till a claim is made against the covenantee: see *Turner* v. *Moon*.[8]

I do not propose to attempt to decide whether an action against Colonel Wilks would lie or be fruitful. I can see it would be one attended with no little difficulty. I am of opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party. The damage to the plaintiff was done once and for all directly the voidable conveyance to him was executed. This was the direct result of the negligent advice tendered by his solicitor, the defendant, that a good title had been shown; and, in my judgment, it is no part of the plaintiff's duty to embark on the proposed litigation in order to protect his solicitor from the consequences of his own carelessness.

Next the defendant suggested that the injury might be lightened by a policy of insurance designed to cover the consequences of the defect. As to this, it is enough to say that no

[6] [1941] Ch. 360; 57 T.L.R. 423; [1941] 2 All E.R. 18.

[7] [1941] Ch. 360, 363.

[8] [1901] 2 Ch. 825.

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satisfactory evidence was adduced that any such policy could be obtained. Policies to cover defects of title are, it appears, common enough when supported by cross covenants on the part of the author of the defect, here Colonel Wilks. It is clear that he would have been entirely unwilling to enter into such a covenant, and in the absence of that there was no evidence that a policy could be obtained nor what its cost would be. In any event, though a policy might mitigate the pecuniary damage, it would not mend the title or make the purchase more attractive to a person buying the property for a home as this property would be bought.

It remains then to consider what is a proper amount of damage. This is necessarily highly speculative. The plaintiff was not bound, in my judgment, to resell in order to quantify it, particularly having regard to the fact that until quite recently the defendant denied that he was guilty of negligence. It is clear enough from the plaintiff's experience with the purchaser he found, that an ordinary purchaser finding the title defective in this respect will merely throw up the purchase, and that it would be necessary to explain in advance by way of condition of sale the existence of the defect. The result would be, I think, to bring forward a different class of purchaser, namely, the speculator willing to chance the future, but only because the property can be had cheap. The several elements to be brought into account are on the one side, first the sum which would have to be paid before the property were returned to the trust; next, the chance that no claim will ever be made, and that the title will eventually ripen into security; and thirdly, the chance of recovering something against Colonel Wilks on his covenant for title. The sum involved under the first head may, having regard to the evidence, be put at £2,500, that under the second is not negligible after the lapse of fifteen years without a claim, and that under the third cannot be put very high as it would involve litigation with its attendant expense and delay and the uncertainty as to its result. On the other side of the account must be put the insecurity of the purchaser's tenure and the difficulties he would encounter should he wish to raise money by mortgage or to resell. On the evidence £6,000 may be taken as the true value of the property with a good title at the date of the breach in 1950.

Balancing one factor against the other as best I can after listening to the evidence, I think a fair estimate of the diminution in value of the property from its market price at the date of the

breach in 1950 of £6,000 with a good title ought to be set at £2,000.

Beyond this which may be styled the general damage, the plaintiff claimed damages under a number of special heads. These were: (1) the defendant's scale fee of £63; (2) the cost of improvements done by the plaintiff and of the extra purchase; (3) the plaintiff's expenses in connexion with his new employment; (4) the cost of a valuation of the property; (5) interest on an overdraft; and (6) costs thrown away. I will deal with these in order. The first is the scale fee. It was conceded that this could not be recovered in this action, The second was cost of improvements and of the extra purchase, This claim was abandoned at the hearing. The third was the plaintiff's expenses in connexion with his new employment. In order to understand this some further facts must be stated.

The plaintiff's contract for resale of the property at £7,500 was made in December, 1951, and it appears that it was not until this event that he felt free to look for further employment. This he found in Lancashire where he had formerly been employed, and he entered on his new job on February 1, 1952. On February 18, 1952, he was obliged to return the deposit of £750 made on the contract of the previous December, the defect in his title having by then been discovered. As a result, being unable to complete the sale of the Hampshire property, he had not the financial means to purchase another property within reach of his new work, and he has ever since found himself temporary accommodation in Lancashire during the week and returned to his Hampshire home, where his wife has continued to reside, at weekends. His claim under this head is first for hotel expenses, which he puts at £175, secondly for the running expenses of his car between Hampshire and Lancashire, which he puts at £250, and thirdly for the expense of telephone calls to his wife every evening during his periods of separation from her, in respect of which he claims £50.

In my judgment, none of these sums is recoverable against the defendant. They do not fall within the second rule in *Hadley* v. *Baxendale* [9] as to remoteness of damage. This rule has recently been canvassed by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.* [10] thus [11]: "What "propositions applicable to the present case emerge from the

[9] 9 Exch. 341.

[10] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

[11] [1949] 2 K.B. 528, 539.

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"authorities as a whole, including those analysed above? We "think they include the following:—(1) It is well settled that "the governing purpose of damages is to put the party whose "rights have been violated in the same position, so far as money "can do so, as if his rights had been observed: (*Sally Wertheim* "v. *Chicoutimi Pulp Co.*[12]) This purpose, if relentlessly "pursued, would provide him with a complete indemnity for all "loss de facto resulting from a particular breach, however "improbable, however unpredictable. This, in contract at least, "is recognized as too harsh a rule. Hence, (2) in cases of breach "of contract the aggrieved party is only entitled to recover such "part of the loss actually resulting as was at the time of the "contract reasonably foreseeable as liable to result from the "breach. (3) What was at that time reasonably so foreseeable "depends on the knowledge then possessed by the parties or, at "all events, by the party who later commits the breach."

These items were not, in my judgment, within the reasonable contemplation of the parties when the defendant assumed the duty of advising the plaintiff. The change of place of the plaintiff's employment was not one of the chances that could have been known to either of them. It was the voluntary act of the plaintiff, not a result of any contract existing when the bargain was made. The plaintiff chose a new job in Lancashire; he might as well have selected one more remote in Kamschatka or less remote in Hampshire. The defendant cannot be responsible for the expense. The plaintiff might have bought or rented accommodation suitable to his new employment, and there is no evidence that the defendant knew that his financial position might render this impracticable. Still less can the defendant be called upon to pay for the telephone calls, a luxury no doubt exemplary, yet uxorious.

The fourth head is a sum of 25 guineas paid by the plaintiff to a valuer who, in 1950, was employed by him to value the property in order to quiet the doubts of the plaintiff's bankers as to his financial position. He complains that he would never have incurred this expense had he know that his title was defective. No doubt this is true; but the defendant cannot be supposed to know that any such step was required by the plaintiff's position or contemplated by him. This claim I reject.

The fifth claim represents the sum paid by the plaintiff to his bank on an overdraft which he says would not have existed had he been able to sell the property as he contracted to do as

[12] [1911] A.C. 301.

before stated. Here again it is objected that the defendant is being asked to pay for the plaintiff's impecuniosity, and it is pointed out that there is no evidence that the defendant knew that the purchase-money had been borrowed by the plaintiff, and, moreover, that if the plaintiff had been able to sell he would have incurred a new liability similar to the old. In this connexion I was referred to *The Edison*,[13] and to *Trans Trust S.P.R.L.* v. *Danubian Trading Co.*[14] On the whole, I am of the opinion that the plaintiff does not make out his case on this point. His evidence was that it was his intention to purchase another house with the proceeds of sale of his present one and to finance the new purchase in the same way as before, namely, by an overdraft secured on the new property.

It appears to me, however, that, in order to put the plaintiff as far as possible in the position in which he would have been if there had been no breach, I must treat him as having sold the property at the date when the cause of action arose for what it would then fetch. This price I have assumed to be £4,000. He would then have been £2,000 out of pocket. The defendant therefore should recoup that sum with interest upon it. Under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, the court has jurisdiction to award interest on damages from the date when the cause of action arose, and accordingly the sum of £2,000 will carry interest at 4 per cent. per annum from April 22, 1950, till the date of this judgment.

The sixth head of damages for costs thrown away was a matter of agreement at the hearing, and that agreement will be embodied in the judgment.

Judgment for the plaintiff.

Solicitors: *Norton, Rose, Greenwell & Co.; William Charles Crocker.*

I. G. R. M.

[13] [1932] P. 52; 48 T.L.R. 224.

[14] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.