Tamlin v. *Hannaford,* but it was emphasised that a public authority might represent the Crown for some purposes but not for others, depending on the wording of the legislation applicable to it.

R.A.

CONTRACT

Gaming and Wagering

The most outstanding development in the realm of contract in 1949 was the decision of the House of Lords in *Hill v. William Hill (Park Lane) Ltd.*[28]—outstanding because it overruled certain decisions which had stood for many years and on which a regular practice had been based. The House of Lords held, by a four to three majority, that a promise to pay a lost bet in consideration of the winner refraining from taking some action which might be disadvantageous to the loser, *e.g.*, reporting him to an appropriate authority with a view to having him posted as a defaulter, is unenforceable. The decision of the Court of Appeal in *Hyams* v. *Stuart King*[29] was thereby overruled and Fletcher Moulton L.J.'s vigorous dissenting judgment in that case upheld.

The decision of the House of Lords was based on the second part of the first paragraph of section 18 of the *Gaming Act,* 1845,[30] which states, after the avoidance of all agreements by way of gaming or wagering, that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager . . ." The decision in *Hyams* v. *Stuart King* had been based on the view that this was a purely procedural provision adding nothing to the substance of the first part of the paragraph, so that a promise to pay a lost bet would be enforceable if some new consideration was provided, since the promise would then cease to be merely part of a wagering contract and become incorporated in an entirely new contract. The majority of the Lords, however, took the view that full effect must be given to this second part of the first paragraph of section 18, and that it was immaterial what new consideration was provided if the promise was still in fact a promise to pay the money lost on the wager. Their Lordships recognised that a promise by the loser of a bet made in consideration of a promise by the winner not to report his default is not necessarily unenforceable. The question turns on whether the loser's promise is or is not really a promise to pay the bet, and that is a question of fact to be determined according to the circumstances of each particular case.

Their Lordships also overruled, on the same grounds, an older case, *Bubb* v. *Yelverton,*[31] in which a bond given to betting creditors in order to prevent them from taking steps to have the debtor posted as a defaulter was held valid. A promise given under seal is therefore in no better case than a promise supported by consideration if it remains a promise to pay money lost on a wager. It must be remembered, of course, that *Hill's Case* has no application in Queensland to bets made with licensed bookmakers on the course, which are fully valid contracts by virtue of the *Racing Regulation Amendment Act of* 1930, section 22, provided that the conditions laid down in that section are satisfied.

28. [1949] A.C. 530.
29. [1908] 2 K.B. 696.
30. (Qld.) *Gaming Act of* 1850, section 8.
31. (1870) L.R. 9 Eq. 471.

Measure of Damages.

The decision of the Court of Appeal in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[32] does not lay down any new law, but it is important because it will probably supplant *Hadley* v. *Baxendale*[33] as the leading case on the measure of damages and remoteness of damage in contract. The judgment of the Court, delivered by Asquith L.J., is in no way inconsistent with the principles expressed in *Hadley* v. *Baxendale,* but it serves to illustrate very clearly their true application, and it contains[34] an excellent summary statement of the basic rules governing the measure of damages and remoteness of damage. The facts of the case were strikingly similar to those of *Hadley* v. *Baxendale,* but whereas in the latter it was held that the plaintiff was not entitled to any damages on account of loss of earnings due to delay in delivery of a piece of machinery essential to the operation of the plaintiff's plant, in the former the opposite conclusion was reached. The difference in the results was entirely due to the different degrees of knowledge possessed by the defendants of the purpose for which the articles were required by the plaintiffs. The test of remoteness, whether in respect of "general" or "special" damages, is one of foreseeability, which clearly depends on the knowledge of the relevant facts possessed by the party in default. It may be noted that Asquith L.J. emphasised that the foreseeability principle does not require that any loss, to be recoverable, must *necessarily* result from the breach of contract : it is enough that there is a "serious possibility" or a "real danger" of its resulting. Even laymen will appreciate his remark that "possibly the colloquialism ' on the cards ' indicates the shade of meaning with some approach to accuracy."

Resale by Unpaid Seller of Goods.

The case of *Gallagher* v. *Shilcock*[35] is worth noting because Finnemore J., of the King's Bench Division, was called upon to decide a question of practical importance under the *Sale of Goods Act* on which legal writers have for long been in conflict. When an unpaid seller exercises his *statutory* right of resale,[36] does it operate as a rescission of the contract so that the seller is entitled to retain any deposit paid by the buyer and any profit on the resale, or is it merely in aid of performance of the contract to enable the seller to obtain the contract price but no more ? Halsbury[37] takes the former view, Williams[38] the latter. Finnemore J. took the same view as Williams, referring to the contrast between the wording of sub-section (4) which, in regard to resale under a power expressly reserved in the contract, expressly states that in such a case the contract is rescinded, and the wording of sub-section (3) which, while conferring a power of resale even where none is reserved in the contract, makes no such express statement, implying that in such a case the contract is *not* rescinded.

Servant's Accountability for Secret Profits.

The duty of a servant to refrain from making any secret profits out of his employment and the right of a master to recover any such profits as money had and received to his use was clarified by the Court of

32. [1949] 2 K.B. 528.
33. (1854) 9 Exch. 341.
34. At pp. 539-540.
35. [1949] 1 All E.R. 921 ; 65 T.L.R. 496.
36. *Sale of Goods Act of* 1893, section 49 (3).
37. 2nd ed., vol. 29, p. 186.
38. Personal Property, 18th ed., p. 94.

Appeal in *Reading* v. *The King*.[39] It is true that the servant in that case was a very special kind of servant, namely, a member of His Majesty's forces on active service, but the principles on which the decision was based are quite general in their application. The soldier sought to recover from the Crown certain moneys which represented the unspent balance of some £20,000 which he had received from certain persons in 1942 for driving through Cairo while in uniform, civilian trucks containing illicit spirits or drugs, his uniform enabling him to pass the Egyptian police without challenge. The money was seized and held by the Crown while he was tried and convicted by court martial of conduct prejudicial to good order and military discipline. It was held that the soldier's uniform, which was the property of the Crown, was intended to be used for the Crown's interest and benefit and not otherwise, and that any secret profits or bribes acquired through an improper use of the uniform and of the opportunities and facilities attaching to it were recoverable by the Crown, whose interest included the maintenance and promotion of harmonious relations with the Egyptian Government.

The Court adverted to the argument which is often advanced that the right to recover secret profits depends on the existence of a fiduciary relationship between master and servant. While questioning whether this argument was sound, the Court said that even if it was, the term was to be interpreted in a very broad sense. The view of the Court would appear to have been that there is sufficient fiduciary relationship if the servant is entrusted with any property of his master or if his employment affords him special facilities. Any secret profit made by the servant through misuse of the property or abuse of the special facilities in such a way as to bring his own interest in conflict with that of his master is money had and received to his master's use.

Privity of Contract.

Finally, reference should be made to a very interesting judgment by Denning L.J. in *Smith* v. *River Douglas Catchment Board*,[40] where he made a bold frontal attack on the doctrine of privity of contract. Pointing out that this doctrine is of comparatively recent growth, having become firmly rooted in the law only in 1861,[41] he went on to state that it runs counter to the older principle "that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise ; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the merits." In this principle, as so stated, can be seen the origins of the action of *assumpsit* from which our modern law of contract has stemmed. Those cases which are usually cited as exceptions or qualifications to the doctrine of privity are seen by Denning L.J. as illustrations of the older and, in his view, dominant principles, and as examples of the kind of interest which the law deems sufficient to enable the promise to be enforced, *e.g.*, covenants running with the land, the rights of an undisclosed principal, and the spelling out of a trust in favour of a third party.

39. [1949] 2 K.B. 232.
40. [1949] 2 K.B. 500.
41. *Tweddle* v. *Atkinson*, 1 B. & S. 393.

It is unlikely that this radical departure from orthodox legal thought would win much support from contemporary judges, but we shall probably hear more of it. Recalling the equally startling judgment of Denning J., as he then was, in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*,[42] where he denied the necessity for consideration in all cases of simple contract, one may say that the learned Lord Justice has acquired a reputation for stimulating and provocative attacks on legal orthodoxy, attacks which are supported by a deep historical scholarship.

R.A.

CRIMINAL LAW

Appeals from Courts of Petty Sessions.

The *Justices Acts Amendment Act of* 1949, which came into force on April 22, 1949, made the first radical alteration in the Principal Act since that Act was passed in 1886. The provisions dealing with appeals from Justices—Part IX of the Act—were repealed and almost entirely new provisions were inserted in lieu thereof. Prior to the 1949 Amendment Act there were three modes of appeal to the Supreme Court from the decisions of justices—(1) Appeal by way of application to quash a conviction or order ; (2) Appeal by way of Special Case ; and (3) Appeal by way of procedure where appeal formerly lay to a District Court.

From time to time Judges of the Supreme Court had drawn attention to the limited nature of these modes of appeal and the limited powers of the Supreme Court when hearing such appeals.

In lieu of the original provisions there are now two modes of appeal open to persons seeking to challenge the decisions of justices—(1) Appeal by way of Order to Review ; and (2) Appeal to a Judge of the Supreme Court.

The appeal by way of Order to Review—which may be made returnable before the Full Court or a Judge—is open to any person who feels aggrieved as complainant, defendant, or otherwise by any conviction or order of any justices or justice, or against whom any warrant has been issued by any justices or justice. A new definition of "order" inserted in the Acts gives a very wide operation to this mode of appeal, but there is a limitation in regard to orders made on complaints for moneys recoverable summarily or for claims determinable summarily (Section 209 (5)).

The widest powers are given to the Full Court or Judge, as the case may be, on the return of an Order to Review (Section 215).

The appeal to a Judge of the Supreme Court under section 222 of the Acts is open to any person who feels aggrieved whether as complainant, defendant, or otherwise by any order made by justices or a justice in a summary manner upon a complaint for an offence or breach of duty. However, a defendant cannot appeal under this section unless (*a*) the fine, penalty or forfeiture exceeds the sum or value of £5 or the imprisonment adjudged exceeds one month ; or (*b*) he has upon application made within seven days after the decision obtained the leave of a Judge to appeal under the section.

Where a defendant has pleaded guilty or admitted the truth of the complaint, an appeal under this section only lies on the ground that the fine, penalty, forfeiture or punishment is excessive or inadequate. There can be no appeal against conviction.

42. [1947] K B. 130. See note, 22 A.L.J. 427.