the above-mentioned *Suisse Atlantique* case the decision of the court would probably be the same. As the learned judge in *Cornwall Properties* case pointed out, the exclusion clause would be of no use to the defendant even if the representation as to licensing was held to be a mere, as distinct from fundamental, condition of the contract. The defendant had contracted to sell an eating-house and had delivered a mere refreshment room. There was a considerable difference insofar as profits were concerned and on discovery of this the plaintiff was entitled to treat the contract as terminated and to recover moneys paid by him under the agreement.

The case of *Multiplex Industries Ltd.* v. *Speer* [1966] N.Z.L.R.122, related mainly to the validity of a take-over offer for shares in a company, but the Court of Appeal also considered the question of a condition precedent to which the particular offer was subject. The offeror had acknowledged the fulfilment of the condition precedent and this acknowledgement was accepted and acted upon by the offeree. In fact the condition precedent was not complied with and later the offeree attempted to avoid the contract by pleading nonfulfilment of the condition. The Court of Appeal held that the contract could not be so avoided; Turner J. stated that the condition had been waived by mutual consent of the parties and that such waiver agreed to by the parties, may be expressed or implied. McCarthy J. stressed the fact that there was consideration moving both ways from the parties and each of them had altered his position in reliance upon an arrangement assented to by them both. The Court of Appeal also stated that the contract could not be avoided in the way attempted by the offeree whether or not the condition be regarded as imposed for the benefit of the offeror or for both parties.

C. E. French.

CRIMINAL LAW

The mere fact of participation by an accused in a fight which results in the death of the other participant will not support a prima facie inference of the accused's guilt in relation to that death. This is the ratio to be extracted from *R.* v. *Grant* [1966] N.Z.L.R.968 (C.A.). The accused, who participated in a fight which resulted in the death of the deceased, had been convicted of manslaughter. Whether the homicide was culpable depended on whether the killing resulted from an "unlawful act" of the accused: s.160(2)(a) of the Crimes Act 1961. Henry J. directed the jury that the accused, by taking part in such an episode, was necessarily a party to an unlawful act, and if death ensued he was guilty of culpable homicide. The Court of Appeal in holding this direction to be wrong, made two interesting observations; first that fighting *per se* was not unlawful. In the words of that Court "fighting is always the act of more than one person", and thus an innocent party may be involved in such an episode merely by reason of his legitimate act of self-defence in answer to unprovoked aggression. Secondly, that "unlawful" refers to the act of the person charged. It would appear to follow then that if neither the commencement nor the continuance of the fight was contributed to by the accused, except in so far as he lawfully protected himself, he cannot be convicted of culpable homicide

under this particular provision if death does ensue. However, as the jury, if properly directed, could only have concluded that the accused had committed an unprovoked assault on the deceased, from which death resulted, the appeal was ultimately dismissed.

In *R.* v. *MacMillan* [1966] N.Z.L.R.616, the Court of Appeal was called upon to give meaning to the words "*morally* wrong, *having regard to the commonly accepted standards of right and wrong*" used in s.23 (2)(b) of the Crimes Act 1961, which section defines insanity. The words in italics did not appear in the corresponding section of the Crimes Act 1908. The appellant had been convicted of attempting to break out of Mt. Eden prison. The Crown submitted that in 1961 the Legislature intended to change the law by imposing an objective test in order to determine the accused's sanity; the issue, it was contended, was whether the accused knew the act was morally wrong in the eyes of other people. The Court of Appeal in a judgment delivered by Turner J., rejected this submission. The test of the accused's knowledge of moral wrongfulness is a subjective test; so that if it is shown that the accused could not by reason of mental disorder think rationally of the reasons which to ordinary persons make the act or omission morally wrong he is entitled to an acquittal subject to s.31 of the Mental Health Act 1911. The New Zealand position differs from the English where the sole test as laid down in *R.* v. *Windle* [1952] 2 Q.B. 826, was "whether the accused knew his act was wrong as being contrary to law". However, the test arrived at in *R.* v. *MacMillan* accords with that settled for Australia in *Stapleton* v. *R.* (1952) 86 C.L.R.358, and the earlier decision in *R.* v. *Porter* (1936) 55 C.L.R.182.

In *Mancini* v. *D.P.P.* [1942] A.C.1, the House of Lords approved the principle that in considering provocation as a defence to a murder charge, the relationship between the mode of retaliation and the provocation should be a material consideration. Our Court of Appeal again acknowledged the existence of this "reasonable relationship test" in *R.* v. *Dougherty* [1966] N.Z.L.R.890, but placed definite limits on its status. The appellant and his wife (the deceased) returned home from a party and in the course of an ensuing conversation the wife gashed the accused's face with a meat-chopper. Sometime later the accused seized his rifle and shot his wife. The trial judge directed the jury as a matter of law that there must be a reasonable relationship between retaliation and provocation, and accordingly he virtually said that the defence of provocation was not available unless that relationship was reasonable. The Court of Appeal held this to be a sufficient misdirection to warrant quashing the conviction and a new trial was ordered. That Court then relegated this relationship to the status of "merely a factor, though indeed a weighty factor" to be considered by the jury when deciding on the matters referred to in s.169(4) of the Crimes Act 1961. The relevance of this consideration had previously been accepted by the New Zealand Court of Appeal, in *R.* v. *McGregor* [1962] N.Z.L.R.1069 and *R.* v. *Anderson* [1965] N.Z.L.R.29.

As in the New Zealand Court of Appeal decision of *Fraser* v. *Beckett & Sterling Ltd.* [1963] N.Z.L.R.480, the Queens Bench Division in *Lockyer* v. *Gibb* [1966] 3 W.L.R.84, held that the language and scope of the statute there under consideration rebutted the presumption that *mens rea* is an essential ingredient of every offence. The appellant had been convicted of a breach of Dangerous Drugs Regulations in that she was "in possession of" dangerous drugs. It was established that

she had knowledge that she was in possession of certain goods in a bottle but she was innocent as to the precise contents. Her appeal was dismissed and the provision in question was construed as giving rise to absolute liability and accordingly no relief could be granted although *mens rea* was absent. It was only necessary to show that the appellant knew she was in possession of goods which later turned out to be dangerous drugs, and her ignorance as to the precise contents of the bottle was irrelevant. In *Fraser's* case it was held irrelevant that the particular novel in question was unknown by the defendants to be indecent and the conviction was secured on the mere fact that the defendants had imported the particular novel.

The appeal in *Burns* v. *Bidder* [1966] 3 W.L.R.99 was upheld on the broad principle that criminal responsibility does not attach to an involuntary *actus reus*. The appellant had been convicted of failure to give precedence to a pedestrian on a crossing, despite his contention that his brakes failed. The magistrate held the regulations in question to impose an absolute duty. However, the Queens Bench Division considered that the regulations did not necessarily impose an *absolute* obligation to afford precedence and in fact held there was no breach in circumstances where a driver fails to give way solely because his control of the vehicle is lost by some incident outside his possible or reasonable control, and in respect of which he is in no way at fault. In the circumstances of this case the failure of brakes was deemed to be such an incident; thus a driver has a defence if he cannot stop in time to afford such precedence because of an unforeseeable failure of his brakes, provided he is in no way at fault himself. The reasoning is similar to that in the New Zealand decision of *Kilbride* v. *Lake* [1962] N.Z.L.R. 590 in that the accused is not criminally responsible if in the words of Woodhouse J. "he merely sets the stage" for the *actus reus*.

I. S. Hurd.

EQUITY AND THE LAW OF SUCCESSION

1. *Powers and duties of trustees*

(a) Remuneration: The Court of Appeal in *Re Spedding* [1966] N.Z.L.R.447, declined to hold that the Court has an inherent jurisdiction to review or reduce the amount charged by a trustee corporation for the administration of a trust so long as the charges fall within the statutory limits. In *Re Bourke* [1966] N.Z.L.R.327, Hutchison J. held that it was only in very special cases that commission on the gross income of a trust property would be payable to the trustee pursuant to s.72 of the Trustee Act 1956 and that in that case which concerned the carrying on of a farm business the net income was the correct basis of calculation. The trustee's claim for commission on the sale of the assets was also reduced for much of the amount realised (such as proceeds from life insurance policies) involved little work on the part of the trustee.

(b) Profit: Among the assets of the trust in *Boardman* v. *Phipps* [1966] 3 W.L.R.1009, were 8,000 shares in a company. The appellants (the trustees' solicitor and one of the testator's sons) acquired a controlling interest in the company with a view to its reorganisation although the will did not authorize such action. The profit resulting