workable one. Other systems of law have devised principles which produce sufficient certainty and often operate far less harshly than the English principle since they only require, e.g., that at the time of the subsequent marriage of the child's parents the father shall be domiciled in a country by the law of which legitimation *per subsequens matrimonium* is recognized.

Although the passing of the Legitimacy Act in England in 1926[14] has done much to detract from the importance of the Common Law rules as to legitimation the exception that nothing in the Act shall legitimate a person whose father or mother was married to a third person at the time of its birth, together with facts such as those in *Luck's* case, shows that the Common Law principle has not completely lost its importance. That principle, though sometimes harsh in its effect does produce certain results where certainty is highly desirable and it is accordingly submitted that the principle applied by Farwell J. is bad in law, would result in unnecessary confusion, and should not be followed.[15]

—J. C. MORRIS.

14. 16 & 17 Geo. V c. 60. For Victoria see Registration of Births Deaths and Marriages Act, 1928, Part II.
15. Since this note was written *Luck's* case has been reviewed by the Court of Appeal ([1940] 3 All E.R. 307) and the decision of Farwell J. reversed by the majority (Greene M.R. and Luxmoore L.J.) for reasons similar to those expressed here. However, in view of the strong dissenting judgment of Scott L.J. and the cogent reasons there advanced this question cannot be regarded as finally settled until it is known whether advantage will be taken of the leave granted to appeal to the House of Lords. The decision of the Court of Appeal also contains a new and authoritative discussion on the law of domicil.—[EDITOR.]

RESPONSIBILITY OF OCCUPIERS TO PERSONS WHO ENTER AS OF RIGHT.[1]

It has been by no means easy for the law to keep distinct the duties of care owed by an occupier to such entrants as trespassers, licensees, invitees and those who enter under contract. But the duty owed to those who enter as of right is even more obscure. Where the visitor is using the premises of a public utility the courts have laid down that the occupier must use reasonable care to prevent injury. Normally, in such cases the relationship is an economic one.

What, however, is the duty owed to a person who enters, as of right, public gardens playgrounds and such places where no charge is made for admission ? This was the problem betore the High Court in *Aiken v. Municipality of Kingborough*.[2] The facts were that the owner of a boat was injured while using a public jetty under the control of defendants because of a concealed defect of which defendants were aware. Latham C.J. pointed out that no general principle has yet been established to govern the case of persons who enter as of right. The plaintiff was obviously not a trespasser and could not logically be said to have entered on the jetty with an express or implied licence. But, whatever the duty of care owed to the plaintiff, since there was here a danger of which defendants were aware, liability did exist and there was no need to deter-

1. The writers of this note acknowledge with gratitude the help received from discussion with the Honours class in The Law of Wrongs.
2. 62 C.L.R. 179.

mine the further question whether an occupier was liable to one who entered as of right, if the occupier was ignorant of the danger.

In the English courts, the majority opinion in the Court of Appeal favours the view that children in public playgrounds should be treated as mere licensees [3] but Dixon J. points out that it is rather anomalous to treat one who enters as of right as one who has no right to enter save with express or implied permission. He made an interesting attempt to lay down a general principle: "What then is the reasonable measure of precaution for the safety of the users of premises such as a wharf, who come there as of common right? I think the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such person through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the use of reasonable care."[4] How does this differ from the duty of care owed to an invitee or one entering under contract? This is not an easy question to answer. There is not, as in the case of invitees, an emphasis that the danger is one of which the occupier knows or ought to know—although since the duty is only to take reasonable care, presumably the occupier would not be liable for a danger of which he was reasonably ignorant. The liability under the principle propounded by Dixon J. is not the same as that owed to those who enter under contract, for in the former case if the danger is apparent, there is no liability. Dixon J. seems to be emphasizing that the flexible concept of negligence should be applied.[5]

Even if it be agreed that logically one who enters as of right does not fall within any other of the recognized categories of visitors, is it necessary to lay down another duty of care? The law has already become confused in its attempt to keep distinct the duty owed to those entering under contract and invitees; if another class is added, what is to be the result?

If the law becomes even more meticulous over the duty of care owed by occupiers and adds a different category for those members of the public entering as of right, the boundaries of the various duties of care, already confused and entangled, will become even more so; again, further division of the duty of care owed to entrants as of right can be expected to follow. Entry as of right could be divided into three categories, (*a*) people using public utilities such as railways, etc., when payment for entry is required: (*b*) entry as of right by public authorities such as firemen, police, etc.: and finally, (*c*) entry as of right to public property where entry is free. Different considerations apply to each of these cases.

This problem of an occupier's duty to visitors is one of the most confused and difficult in the law of tort. On the one hand, it seems illogical to treat those who enter as of right as either invitees or licensees: on the other hand, to invent special duties for each of the classes of persons who enter as of right will add extra pigeon-holes to an already overburdened part of the law of tort and inevitably cause further confusion. Probably the best method of approach is to attempt to evolve a broad doctrine depending on the flexible concept of negligence which can take

3. *Ellis v. Fulham Bor. Co.*, [1938] 1 K.B. 212.
4. *Aiken v. Kingborough Corporation* (*supra*) at p. 210.
5. See the discussion of this proposed test by Latham C.J. in *Burrum Corp. v. Richardson*, 62 C.L.R. 214, at pp. 229-230.

into consideration any special circumstances surrounding the entry as of right—this would leave the law fairly elastic and prevent the confusion that would arise from creating too many standards of duty.

—C. VICKERS-WILLIS.

—N. S. STABEY.

STATUTE BARRED DEBTS IN COURTS OF PETTY SESSIONS.

Hawkes Bros. Motors Pty. Ltd. v. Riddle.[1]

This decision is of great practical importance in Victoria since it settles the controversy concerning the true effect of s. 210 of the Justices Act, 1928[2] which has troubled Magistrates and practitioners in recent years.[3] The facts can be stated briefly.—The complainant sued in Petty Sessions in 1940 for a debt contracted in 1932 on account of which the defendant had been paying instalments until 1939. The Magistrate held that part payment did not create a fresh cause of action in Petty Sessions and that the complaint was made out of time. In so deciding he relied on the dictum of Irvine C.J. in *Victorian Producers' Co-operative Co. Ltd. v. Dye*[4] where he said: "I have very considerable doubt whether the doctrine of implied promise to pay a debt arising from an acknowledgment in writing has any application whatever to s. 210 of the Justices Act. In the Supreme Court Act the existence of such a doctrine is implied from the language used to limit its application. . . . But in the former Act there is an express and definite provision which is without exception. . . ."[5]

The decision was reviewed and fully argued before Mann C.J. who rejected this contention and followed *R. v. Shuter*; *Ex parte Johnson*[6] a decision of the Full Court in 1886 where it had been held that a provision closely resembling s. 210[7] did not limit the jurisdiction of Justices and was subject to the doctrine of acknowledgments in the same way as the original Statute, 21 Jac. I, c. 16. Mann C.J. refused to draw any inference from the enactment of s. 88 (1) of the Supreme Court Act, 1928, which expressly preserves this doctrine in relation to the periods of limitation laid down in Division 7. He held that Division 7 of the Supreme Court Act has no application to proceedings before Justices because s. 60 of that Act negatives such application where "express provision is otherwise made," thus accepting the view of Madden C.J. in *Cooper & Sons v. Dawson*[8] that s. 210 is such an "express provision."

1. [1940] V.L.R. 272.
2. S. 210. "Where a court of petty sessions or justices are authorised by law to make an order in respect of any offence or where any offence or act is punishable by summary conviction, if no time is specially limited for laying an information in the Act of Parliament relating to such case, such information shall be laid within twelve months from the time when the matter of such information arose and not afterwards, and all complaints for a civil debt recoverable summarily under this Act or for a cause of action determinable summarily shall be made within six years from the time when the matter of such complaint arose and not afterwards."
3. The conflicting views are clearly stated and discussed by Mr. Clifton McPherson in *Res Judicatae*. Vol. I., at pp. 233-5.
4. [1927] V.L.R. 572.
5. *ibid*, at p. 574.
6. (1886) 12 V.L.R. 676.
7. Justices of the Peace Act, 1885, s. 2.
8. [1916] V.L.R. 381, at p. 389.