

preserved by s. 61 (2).³ It was held, however, that the principle of market overt was inconsistent with the express terms of s. 24 (1)⁴ and that it formed no part of the law of Queensland.

ROSS ANDERSON.

CRIMINAL LAW.

Arrest without Warrant.

The decision of the English Court of Appeal in *Tims v. John Lewis and Co. Ltd.* [1951] 1 All E.R. 814, which was discussed in the last number of this Journal (at page 67), has been reversed by the House of Lords *sub nomine John Lewis and Co. Ltd. v. Tims* [1952] 1 All E.R. 1203. The House of Lords drew a distinction between the obligation imposed upon a person who arrests another without warrant in exercise of the power given to him by the common law and the obligation imposed upon a person who arrests another without warrant pursuant to a Statute which requires him to take the arrested person before a magistrate "forthwith" or "immediately"—as, for example, the obligation imposed by Section 552 of *The Criminal Code*. The House of Lords accordingly held that where the arrest took place pursuant to the exercise of the common law right the arrested person should be taken before a justice of the peace or a police officer not necessarily forthwith, but as soon as was reasonably possible.

In his judgment Lord Porter said, at p. 1209—"Where the right of arrest is given to a private person it is obviously desirable that the arrested person should be entrusted to some official care as soon as possible and statements to that effect are to be found in I think all the text books old or new. But it does not appear that in earlier days it was essential that the accused man should be brought before a magistrate in order that he might be bailed." The House of Lords considered that a regulation of the store, John Lewis and Co. Ltd., which authorised only a senior officer of the store to institute proceedings was a reasonable regulation and therefore held that where store detectives had properly arrested the respondent on suspicion of shop lifting and had taken her to the appellants' office to obtain authority to prosecute and she was there detained against her will for a reasonable time before she was handed over to the police, there was no unreasonable delay on the part of the store detectives, the imprisonment was justified and the appellants were not liable for false imprisonment. It is a matter for the Judge to

3. "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, . . . continue to apply to contracts for the sale of goods."
4. "Subject to the provisions of this Act, when goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

decide whether there is evidence that the steps taken were unreasonable or the delay too great and a matter for the jury to decide whether, if there be such evidence, the delay was in fact too great.

Habitual Criminals.

In the case of *R. v. Barber* [1952] Q.W.N. 45, the Court of Criminal Appeal held that on an application for leave to appeal against a declaration made by a trial judge that the applicant is an habitual criminal the court should apply the same principles as it applies where the sentence is one of a term of imprisonment, the rule being that the court will not interfere with a sentence imposed by the judge of trial unless it appears to the court either that the sentence is manifestly excessive or that there has been some misapprehension of fact or some misapprehension of law which has led to the imposition of the sentence. This decision recognises the fact that subject to the statutory requirements for the making of a declaration being satisfied, the making of the declaration is discretionary on the part of the judge of trial and so the court will only intervene on the grounds above stated even though the individual members of the court might not have made the declaration in the first instance.

Provocation.

That there is a marked difference of judicial opinion as to the meaning to be given to the term "provocation" in Section 304 of the Criminal Code, is shown by the decision of the Court of Criminal Appeal in the case of *R. v. Sabri Isa* [1952] St. R. Qd. 269. The appellant had been convicted of wilful murder and had appealed on various grounds, but the only ground on which the Court of Criminal Appeal was asked to set aside the conviction was the ground that on the evidence it was open to the jury to find that the killing was provoked and the trial judge had failed to direct them that if they were left in reasonable doubt whether the killing was provoked their verdict should be one of manslaughter. No such direction was sought at the trial. The court unanimously dismissed the appeal, holding that on the facts of the Crown case and of the defence as raised at the trial the jury could not reasonably have found manslaughter on the evidence and there was no occasion for the trial judge to direct the jury as to the effect of provocation in accordance with Section 304 of the Criminal Code.

Dealing with the term "provocation" in Section 304, Macrossan C.J. expressed the opinion that Section 304 introduced no change into the law and did no more than state in statutory form what was the common law of England and consequently the English decisions on the effect of provocation in homicidal killing are applicable. Stanley J. on the other hand expressed the view that the term provocation in Section 304 bears the same meaning as the term provocation in Section 268, and does not mean and include the whole common law doctrine of provocation. He also considered that in the words "with reference to an offence of which

an assault is an element" which appear in Section 268, the words "offence" and "element" relate to the actual circumstances of the particular matter being investigated by the tribunal. The opinion expressed by O'Hagan A.J. was that Section 268 defines provocation for the purposes of Section 304 and that the words "offence of which an assault is an element" are not to be limited in their application to offences of which an assault is expressed to be an element in the definition of the offence but mean an offence of which an assault is an element in the charge actually before the Court whether an assault is part of the definition of the offence or not. He also held that the law in Queensland as to provocation in homicidal killing is not the same as the common law.

R. F. CARTER*

EQUITY (GENERAL).

Injunctions: Discretionary Nature.

The plaintiff in *Pride of Derby &c. Association v. British Celanese Ltd.*¹ complained of pollution of the waters of its fishery due to the discharge of effluent from the works of a company and of sewage effluent from the sewage works of a local authority. The trial judge had found for the plaintiff and had granted injunctions against both the company and the local authority. The latter on appeal contended *inter alia* that the injunction should not have been granted and that the plaintiff should have been left to his remedy by way of damages. It put this firstly on the broad ground of its position as a local authority, secondly on the narrower ground that the injunction would necessitate the issue of a licence for the conducting of building operations and that any money required could be borrowed only with the consent of the Minister for Health.

The Court of Appeal held that whilst special circumstances might remove the *prima facie* right of a person injured by a nuisance to an injunction, the mere fact that the defendant was a local authority was not such a circumstance, nor was the existence of an obligation to approach a governmental authority for permits or for finance, though the latter factor might justify a suspension of the operation of the injunction. Such suspension had in fact been ordered by the trial judge. Evershed M.R. thought it was fallacious to describe the injunction remedy as "purely discretionary" if by that it was meant that the question should be determined merely on the balance of convenience. If a person proves that his proprietary rights are being wrongfully interfered with by another, then he is *prima facie* entitled to an injunction and he will be deprived of that remedy only if special circumstances exist.

1. [1953] Ch. 149.

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