different sort of right from that held by the owner. But since by the operation of the limitation statute the title of the owner of land may be extinguished, a merely possessory right is always in process of ripening into ownership, and so is a sort of inchoate ownership. This conception, it may be remarked, is vigorously attacked by Hargreaves in the article referred to above. Hargreaves also attacks the conception of possession creating an interest, insisting that in this connection possession is no more than *prima facie* evidence of seisin in fee simple. If from the possession seisin in fee simple can be inferred, a title is established, though it may only be a second-best or third-best title. If in the circumstances seisin in fee simple cannot be inferred the possession creates no title.

W. N. HARRISON*

LAW OF TORTS

Summary

The year produced the usual cluster of decisions on the liability of the occupier. Though not all judges share the impatience of Denning L. J. with the distinction between invitees and licensees, there is now manifest in England a tendency to look at the problem through the medium of concepts which will avoid a decision on the question to which category a particular plaintiff belongs. In any event the imminent passage of the *Occupiers' Liability Bill* will now make exploration by English Courts of many of the old familiar rules and fact situations unnecessary and Australian judges will in future have to furrow their brows over these questions without help from contemporaneous cases in the English jurisdiction. Some light has also been shed on the perennial problem of the child entrant. The principle of *Rylands v. Fletcher*, in eclipse for many years, has emerged for further examination in some cases whilst, apart from the usual flood of decisions on breach of statutory duty, there has been some examination of the basis of the liability of the employer for the torts of his servant.

The Liability of Occupiers—General

The view of Denning L.J. that the invitee-licensee distinction has no application where the damage complained of flows not from the static condition of the premises but from some activity permitted thereon seems now, with the decision in *Slater v. Clay Cross & Co.*,[1] to have gained the approval of the Court of Appeal. There the plaintiff, who sustained an injury in walking through a railway tunnel owing to the negligent driving of a train, was held entitled to damages because, whether she was a licensee or an invitee, the defendants

1. [1956] 3 W.L.R. 232.

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were under a duty in carrying out their operations of running trains to take reasonable care not to injure anybody lawfully walking on the railway. The view was accepted by all members of the Court of Appeal that the distinctions between liability to licensees and liability to invitees had no relevance when the injury arose from current operations on the premises. This distinction between static condition and current operations, originally propounded by Denning L.J. with remarkably little backing from precedent, appears to have made no impression on Australian Courts which in the main and apart from special cases such as *Thompson v. Bankstown Council*,[2] have continued to apply the old categories. Thus in *Keato v. Commissioner for Railways*,[3] a case of current operations, the rules appropriate to the status of licensee were applied; in *Lewis v. Sydney Flour Pty. Ltd.*[4] the New South Wales Full Court in an invitee situation declined to find a duty to take care based upon the wider principle laid down in *Donoghue v. Stevenson*. Nor would an Australian lawyer be disposed to accept the sweeping assertion by Denning L.J.[5] that, apart altogether from the suggested static condition-current operations distinction, the Courts have virtually obliterated the distinction between invitees and licensees.

The defendant in the *Slater* case urged the application of the defence of *volenti non fit injuria*. This argument was rejected but this point is dealt with later in this note. Apart from the suggestion that the plaintiff was *volens*, one would have expected that possibly her mere *knowledge* of the risk might have barred her from recovery in accord with the decision in *London Graving Dock v. Horton*.[6] Denning L.J. met this by the view that the *Horton* decision was confined to situations where the plaintiff was free to act on his knowledge so that the injury could be said to be due solely to his own default. It is difficult to see that the House of Lords had in mind any such limitation though it is possible that *Horton's* case might have been distinguished on other grounds.[7]

A decision which seems to ignore the distinction which is the basis of the *Slater* decision is *Ashdown v. Samuel Williams & Sons*.[8] Employees of a particular factory had always been accustomed to use a short-cut across neighbouring land which was not owned by their

2. (1952) 87 C.L.R. 619.
3. (1956) 73 W.N. (N.S.W.) 198.
4. (1956) S.R. (N.S.W.) 189.
5. See [1956] 3 W.L.R. at 235.
6. [1951] A.C. 737.
7. It is but fair to add that Denning L.J. had in some prior decisions relied on this method of distinguishing the *Horton* case, *e.g. Greene v. Chelsea Borough Council* [1954] 2 Q.B. 127.
8. [1956] 3 W.L.R. 128.

employer but by the defendants who were owners of a dock estate. The plaintiff was a cleaner employed at the factory and had been told by her employer that she could use the short-cut. Whilst so using it, she was injured owing to railway wagon shunting operations negligently conducted by the defendants. She however, was held disentitled to recover because the defendants had posted on the land notices disclaiming liability for injuries however caused and whether or not due to negligence on the part of the defendants or their servants. The plaintiff was clearly a licensee in relation to the defendants but to hold that she was debarred from recovering clearly ignored the distinction now accepted by the English Courts between static condition and current operations. Even had the damage been due to something arising from the static condition of the premises, in which case the liability of the occupier would have been merely to warn, it seems highly anomalous that a mere general warning couched in language which would be unlikely from the technical nature of its phraseology to be read by the average layman and which in fact was not fully read by the plaintiff in the instant case should be held to be a sufficient performance of that duty.

Occupiers' Liability—the Position of Children

A salutary corrective to much loose thinking on this topic and to decisions which have perhaps been over-generous to the child in these situations had been given in 1955 by the remarks of Devlin J. in *Phipps v. Rochester Corporation*.[9] On the same lines is the decision of the Court of Appeal in *Dyer v. Ilfracombe Urban District Council*[10] wherein the infant defendant sustained injuries through falling through the rails on the platform of a chute on a children's playground. The chute was of proper design and sound construction. It was argued for the plaintiff, who was obviously a licensee, that the chute was in the nature of a concealed trap. Whilst the Court recognised that certain things, by virtue of constituting an allurement to young children, might well be regarded as "traps" which would not be so in relation to adult entrants, it was pointed out that the mere existence of "allurement" was not enough. There had to be a *danger* and moreover a danger of a *concealed* nature. The danger of falling from a high platform was one that should have been obvious to a child of the age of the plaintiff. The chute was an "allurement" but not a "trap". The Court did not find it necessary to pronounce upon the distinction suggested by Devlin J. in the *Phipps* case between children of tender years and children of greater maturity.

9. [1955] 1 Q.B. 450.
10. [1956] 1 W.L.R. 218.

Employer's Right of Indemnity Against Employee

The case of *Romford Ice & Cold Storage Co. Ltd. v. Lister*[11] represents a landmark of considerable importance. The decision has been very adequately discussed elsewhere so that all that is attempted here is a very short note. The substantial point was whether the plaintiff company, who had been held liable in damages for the tort of their servant, was entitled as against such servant to recover indemnity or damages. In actual fact the position was slightly complicated by the fact that the action was brought in the name of the plaintiff by underwriters under a liability insurance policy and was launched just before the plaintiff had been held liable to the injured person. The plaintiff claimed firstly damages for breach of an implied term of the contract of service, secondly contribution or indemnity under the *Law Reform (Married Women and Tortfeasors) Act*, 1935. The trial judge gave judgment for the plaintiff on both claims and this was affirmed by the Court of Appeal with the vigorous dissent of Denning L.J. The Court decided that there was an implied term in the defendant's contract of employment that he would carry out his duties with reasonable care so that on a breach of this term the plaintiff was entitled to recover the amount of damage which it had suffered by virtue of his negligence subjecting it to liability to a third person. The fact that the plaintiff was technically a joint tortfeasor did not defeat this claim since the liability was only vicarious and as the plaintiff did not share in the actual commission of any tort the rule in *Merryweather v. Nixan* did not apply. The result was that the right of the plaintiff as against the defendant did not rest on the provisions of the *Law Reform Act of* 1934 though the action of the trial judge in granting the plaintiff an indemnity under that Act received approval.[12]

Rylands v. Fletcher

In *Perry v. Kendricks Transport Ltd.*,[13] the Court of Appeal held that there was no liability on the defendants, the owners and occupiers of a garage and vehicle park, for injuries to the plaintiff caused by the action of two boys who had thrown a lighted match into the petrol tank of a motor coach which was parked in a corner of the vehicle park. The defendants' servants had previously removed the petrol from the tank and had replaced the screw petrol cap. This had later been removed though it was not clear whether the removal was by the two boys in question. The decision evinces an intention to give a wide interpretation to the defence of "act of a stranger" as the Court

11. [1956] 2 Q.B. 180.
12. *Ibid* at pp. 205-6 (Birkett L.J.).
13. [1956] 1 W.L.R. 85.

did not find that it was necessary for the exception to apply that the act should be one of conscious and deliberate volition; it was enough that the person intervening was a person over whose acts the occupier had no control. There was also an allegation of negligence but the Court held that the defendants could not reasonably have foreseen both or either of the two acts *viz.* the removal of the cap and the dropping of the match. The Court did not of course find it necessary to decide the interesting question whether the rule of *Rylands v. Fletcher* applied to personal injuries[14] though Parker L.J. was of opinion that it did.[15] The members however seem to be of the view that it was enough to invoke the principle that the motor coach was a "dangerous thing" without reference to what seems to be a distinct question *viz.* whether any non-natural user of land was involved.

Loss of Services

Previous decisions by Australian Courts, or at least on facts emanating from Australia, *viz. Commonwealth v. Quince*[16] and *Attorney General for New South Wales v. Perpetual Trustee Co.*,[17] on the action by the Crown for loss of services owing to injuries to its employees had relation to types of personnel who could be regarded as being in a somewhat exceptional position, to wit members of the armed forces and policemen. The decision in *Inland Revenue Commissioners v. Hambrook*[18] is therefore something of a milestone inasmuch as it denied a remedy where the employee was in the category of what might be styled an ordinary public servant. Here the injured employee was an established civil servant, a tax officer in the Internal Revenue. Lord Goddard C.J.[19] had held that the employment of a civil servant, by virtue of the fact that the Crown could dismiss at pleasure, did not involve a contractual relationship and dismissed the action on that ground. The Court of Appeal decision goes much further and holds that the right of action exists, even in the case of a plaintiff private employer, only in the case where the services rendered are those of a menial or domestic nature. The decisions of the High Court and that of the Privy Council do not proceed on this ground but are based rather on the difference in the incidents of the service of a member of the armed forces or of a policeman from those incidental to private employment. It seems impossible to predict how the High

14. Strong opinions in the negative were of course expressed in *Norah Read v. Lyons & Co.* [1947] A.C. 157.
15. [1956] 1 W.L.R. at 92.
16. (1944) 68 C.L.R. 227.
17. [1955] A.C. 457.
18. [1956] 3 W.L.R. 643.
19. [1956] 2 W.L.R. 919.

Court or the Privy Council would treat the case of a Crown employee who was not a soldier or a policeman. It is suggested that they would certainly not embrace the "menial servant" theory of Denning L.J. in the *Hambrook* case (which of course is destructive of the applicability of the action even where private employment is involved); in fact the reasoning in *Quince's* case and in the "policeman" case is inconsistent with such a theory and Denning L.J. is, to say the least of it, very disingenuous in his treatment of the remarks of the Privy Council in the latter case.[20] Nor would they probably be impressed with the views of Lord Goddard regarding the lack of the contractual flavour in the relationship as they have not based the denial of the existence of the cause of action in the two previous cases on this ground. It is submitted tentatively that they would deny the Crown right of action where the service rendered was substantially of a "public" nature so that a distinction would probably be drawn between, say, the case of a tax inspector or a school teacher on the one hand and that of the driver of a Government vehicle on the other.

EDWARD I. SYKES

20. For a strong criticism of the reasoning of Denning L.J. see article by Professor Sawer in 32 A.L.J. 387.