Thus *Thomson* v. *Cremin*[27] will seem to fall, together with *Woodward* v. *Hastings*,[28] *Wilkinson* v. *Rea. Ltd.*[29] and *Pickard* v. *Smith*,[30] into that category of cases where it is generally recognised that the occupier is liable for the default of his independent contractor to an invitee. As such it does not displace the rule in *Hazeldine* v. *Daw*.[31] Nor is the reasoning any more than the decision in *Thomson* v. *Cremin*[32] necessarily inconsistent with the rule we have suggested. The rule in *Hazeldine* v. *Daw*[33] merely lays down that the mere finding and employment of a competent independent contractor may, under certain circumstances, amount to "due care and skill to make the premises reasonably safe." The warranty to which Lord Wright refers in *Thomson* v. *Cremin*[34] only states that the occupier cannot escape liability by delegating the performance of his duty; it does not say what that duty consists of. *Hazeldine* v. *Daw*,[35] however, formulates the extent of the duty in certain kinds of circumstances without excusing him from any responsibility for the performance of it.

In the upshot, *Thomson* v. *Cremin*[36] does not seem to affect the rule in *Hazeldine* v. *Daw*.[37] It is submitted that on their facts the two cases fall within different categories, *Hazeldine* v. *Daw*[38] being rather supplementary to the general principle stated in *Thomson* v. *Cremin*.[39] Strictly it does not even establish an exception to it, but merely an application of the general rule to particular kinds of facts, after the scope of the occupier's duty on those facts has been defined.

The conclusion is that the occupier is only liable to an invitee for the default of an independent contractor if it was reasonably possible for the work to be done by himself or by persons under his control or supervision.

P. E. NYGH, Case Editor — Third Year Student.

PERSONAL REPRESENTATIVES: SUCCESSION TO DECEASED'S CONTRACTUAL RIGHTS.

OTTER v. *CHURCH*

It has long been recognised that the rule "*actio personalis moritur cum persona*" does not apply to causes of action for breach of contract, and that a personal representative may, in general, sue on all contracts with the deceased broken in his lifetime.[1] The personal representative has also been permitted to recover damages where the breach of contract occurred after the death of the deceased, but would have occurred in his lifetime had he lived longer.[2] But in *Otter* v. *Church*[3] the Court was faced with a novel problem. There had been a

((1941) 2 K.B. 343) was held not to apply there as the former related to submarines. This decision was not, however irreconcilable with *Hazeldine* v. *Daw*, since it could be argued that the Admiralty with its large technical staff could have supervised the work if it had so chosen.

27 (1953) 2 All E.R. 1185.
28 (1945) 1 K.B. 174.
29 (1953) 2 All E.R. at 1190.
30 (1861) 10 C.B.N.S. 470.
31 (1941) 2 K.B. 343.
32 (1953) 2 All E.R. 1185.
33 (1941) 2 K.B. 343.
34 (1953) 2 All E.R. 1185.
35 (1941) 2 K.B. 343.
36 (1953) 2 All E.R. 1185.
37 (1941) 2 K.B. 343.
38 *Ibid.*
39 (1953) 2 All E.R. 1185.

1 *Raymond* v. *Fitch* (1835) 2 C.M. & R. 588; *Crotty* v. *Woolworths* (1942) 66 C.L.R. 603, 613. 1 Williams, *Executors and Administrators* (13 ed. 1953) 347-349. Law Reform (Miscellaneous Provisions) Act, 1934 (Eng.) 24 & 25 Geo. 5, c.41, s.l. Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.) Act No. 28, 1944, s.2(1).

2 Cases cited *infra* n.12.

3 (1953) I Ch. 280.

breach of contract in the lifetime of the deceased but the substantial damage did not and could not arise until his death. The problem was whether the personal representative could recover the substantial damage.

It should be pointed out that this problem arose out of the unusual nature of a fee tail, in that the tenant in tail of full age may, without consulting any of the persons interested in the estate, convert his interest into a fee simple.[4] Although fees tail have been abolished in N.S.W. the case is not entirely without local interest, as an analogous situation might arise in relation to a joint tenancy.[5]

The facts of *Otter* v. *Church*[6] were as follows: The plaintiff was the administratrix of M, her son, who had been killed in 1945 while serving with the Air Force in India. In 1941 M had become entitled to an equitable interest in tail male in certain property, and on attaining 21 in 1944 he had, through his mother acting as his agent, asked the defendants, a firm of solicitors, for advice concerning the property. They, being under the misapprehension that M was the absolute owner, advised that no steps need be taken to vest the property in M before he returned from India. It was held that they had been negligent in giving such advice, and in not having informed M that if he wished to turn his interest in to a fee simple he should execute a disentailing deed or make a will.

As a result of M's failure to take either of these courses, the property did not on his death form part of his estate, but passed to his uncle under the limitation in tail male. The administratrix claimed from the defendants the full value of the property, on the ground that M's estate had been decreased in value by reason of their negligence, which had resulted in M being deprived of the opportunity to disentail.

It was admitted that M in his lifetime would have had a right of action against the defendants for breach of contract, and that this right of action vested in his personal representative on his death. However, the defendants argued that the rights of a personal representative can be no higher than those of the deceased, and that as M in his lifetime could only have recovered a nominal amount, owing to the duty of a plaintiff to mitigate damages[7], the claim of the personal representative must also be limited to such an amount. They submitted also that the substantial damage resulted not from the breach of duty, but from the death of M.

Upjohn, J., however, accepted the submission of the plaintiff to the effect that as the right of action previously vested in the deceased was now vested in the personal representative, it was only necessary to consider the measure of damages, which need not be limited to those which the deceased could have recovered in his own lifetime. Applying the rules as to measure of damages[8], he considered that the loss to M's estate of the property flowed naturally from the breach of contract[9], and awarded damages of £6500.

From the facts it seems almost certain that M would have disentailed had he been aware of the true circumstances,[10] and once this is accepted, it is obvious

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[4] Law of Property Act, 1925 (Eng.) 15 & 16 Geo. 5, c.20, s.176, by executing a disentailing deed or making a will.

[5] Unless partition is effected by mutual agreement of order of Court before the death of a joint tenant, his interest vests in the surviving tenant or tenants.

[6] (1953) 1 Ch. 280.

[7] In this case to execute a deed of disentailment or make a will.

[8] *Hadley* v. *Baxendale* (1854) 9 Ex. 341; *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* (1949) 2 K.B. 528. Such damages are recoverable as might reasonably be expected to flow from the breach.

[9] It was held that the defendant must be taken to have foreseen that M would be likely to be killed before his return from India, and therefore that damage to the estate might result from their negligence.

[10] In relation to this point Upjohn, J. thought that although M probably would have disentailed, allowance must be made for the possibility that he might not have, and accordingly awarded only £6500, although the real loss was over £7000. He acted on the principle in *Chaplin* v. *Hicks* (1911) 2 K.B. 786) that difficulty in assessing damages does

that the negligence of the solicitors has resulted in a loss to those entitled to M's estate on his intestacy (his mother and sister). That the solicitors should be compelled to make good this loss and to pay to those persons the equivalent of what would have been theirs but for the breach of contract, seems reasonable. But it is submitted that in law it is difficult to reach such a conclusion.

The main difficulty involves the relation between the rights of M in relation to the contract and those of his personal representative. M when alive had a power and a right of which he was ignorant. The power, to convert his fee tail to a fee simple, was extinguished on his death, but the right of action against the defendants for breach of contract survived, and vested in M's personal representative. Considering the general position of a personal representative with respect to contracts made by the deceased with a third party and broken by that party, the principles of law seem to be as follows: If the breach and the substantial damage occur before death, the deceased's right of action vests in his personal representative.[11] But there are cases where the personal representative has been permitted to sue though there has been no breach until after death.[12] However, the basis of these cases is that representation effects an assignment by operation of law of the rights of the deceased under the contract to his representative for the benefit of the estate. The right of action then arises as a breach of the representative's contractual rights.

Returning to the present case, the liability of the solicitors could have arisen only out of the contract between M and them.[13] The rights in respect of this contract as surviving could (it may be said) be no more than those vested in M at the moment of his death; that is, a right to recover nominal damages for breach of contract.[14] Therefore, on this view of the principles, the administratrix should not have been entitled to claim substantial damages by reason of the right of action which vested in her on M's death. If, on the other hand, we treat the estate as a separate legal personality from the deceased, there is no difficulty in establishing the substantial damage, but on this assumption it seems that no action could be brought on behalf of the estate as it was not a party to the contract. Faced with these difficulties, Upjohn, J. nevertheless reached a decision conformable to the layman's commonsense by considering the right of action as a right distinct from the amount of damages recoverable by it. He thus held that M's right of action, which was in respect of nominal damages only, survived to his administratrix, and then allowed her to recover by this right of action damages which did not arise until M's death. Although this decision is difficult to support if the above technical legal problems are considered, it must be admitted that it seems reasonable considering the merits of the parties.

A sound technical basis might conceivably have been found for this decision by holding that the legal personality of M continued after his death in his administratrix. The right of action would then be vested in this legal person, in respect of nominal damages only so long as M was alive, but for substantial damages as soon as death made it impossible to mitigate the loss. However, it is doubtful whether this can be the position under English law, legal personality being generally considered to end on death.[15]

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not prevent the Court from making some assessment. This was criticised in (1953) 69 *L.Q.R.* 160 on the ground that it is irrelevant to consider what M might or might not have done had he known the facts.

[11] *Supra* n.1.

[12] *Chapman* v. *Dalton* (1565) 1 Plowden 284. *Husband* v. *Pollard* (1719) cited in *Randal* v. *Randal* (1728) 2 P.Wms. 464, 467.

[13] *Lake* v. *Bushby* (1949) 2 All E.R. 964, 968; *Bailey* v. *Bullock* (1950) 2 All E.R. 116. These cases hold that a solicitor has in general no duty to his client other than in contract. But see *Nocton* v. *Ashburton* (*Lord*) (1914) A.C. 932, 956, (H.L.)

[14] Though termed nominal, these damages would have included any extra expenses to which M had been put by reason of the delay.

[15] G. W. Paton, *A Text-Book of Jurisprudence* (2 ed. 1951) 319. But see A. Kocourek, *Jural Relations* (2 ed. 1928) 291-304.

In conclusion it may be said that the decision in *Otter* v. *Church*[16] though apparently reasonable, is one which nevertheless seems difficult to support on a purely legal basis, considering the above principles. If these principles are correct, and *Otter* v. *Church*[17] is founded on a wrong view of the law, the apparent justice of the decision would seem to suggest that some modification of the law may be necessary to enable legal personal representatives to recover damage caused to the estate in such circumstances. But it seems that the doubts created by this rare case will not be resolved unless a similar case should arise in the future, which, though not impossible, seems rather unlikely.

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POWERS OF APPOINTMENT AMONG A CLASS WHOSE MEMBERSHIP IS UNCERTAIN THOUGH LIMITED
IN RE GESTETNER SETTLEMENT.
BARNETT AND OTHERS v. *BLUMKA AND OTHERS*

A settlor may vest property in a person intending that he should hold it as trustee for certain third parties, with a power to appoint among them. As the settlor intends that at least some of these persons must benefit from the trust, if the trustee fails to exercise this power to appoint, which is not a mere discretionary power of appointment, but which is coupled with a trust, the Court will enforce the trust by equal apportionment among the third parties.[1] But such apportionment cannot be made unless the class of persons from whom the beneficiaries must be chosen is clearly defined. Consequently, if it is uncertain who are the members of the class, the trust is invalid.[2]

A settlor may also vest property in a person together with a power of appointment among a class of persons with the intention that the members of such class should receive no benefit, and have no interest in the property, unless and until such an appointment is made. In such a case the Court will not intervene in default of the exercise of the power, which is a mere discretionary power of appointment not coupled with a trust.[3] One of the questions raised in the recent case of *In re Gestetner*[4] was whether such a power will be valid if the membership of the class among whom the appointment is to be made is uncertain, even though limited.

The facts were that a settlor conveyed a fund to trustees for a specified class of persons[5] on the following trusts: (1) For five years the trustees were to hold so much of the income as they thought fit on discretionary trusts for the members of the class, to accumulate the balance, and to hold the capital for such members of the class as they might appoint. (2) After five years the income was to be held on trust "to pay or apply the same for the maintenance or

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[16] (1953) 1 Ch. 280.
[17] *Ibid.*

[1] *Re Hughes* (1921) 2 Ch. 208; *Re de Cateret* (1933) Ch.103. The *cestius que trustent* may end the discretion of the trustee by joining together and agreeing to take in equal shares.

[2] *In re Ogden* (1933) Ch.678.

[3] *Brown* v. *Higgs* (1799) 8 Ves. 561; *Harding* v. *Glyn* (1739) 1 Atk. 469. Even if the person in whom the property and the power are vested is a trustee of the settlement, nevertheless he is not a trustee of the property for the members of the class unless and until he makes an appointment.

[4] (1953) 1 Ch.672, a decision of Harman, J.

[5] The class comprised four named persons, any person living or thereafter to be born who was a descendant of the settlor's father or uncle, any spouse, widow or widower of any such person, five charitable bodies, any former employee of the settlor or his wife or any widow or widower of such employee, any director or employee or former director or employee of a named company, or any company of which the directors included any director of the named company, but so as to exclude the settlor, any wife of the settlor, and any person who was a trustee of the settlement.