land to which it was annexed, it is necessary that the benefit should have been annexed to the land as a whole and to each and every part thereof. He held that such annexation was not established by showing that at the time the covenant was entered into a plan of subdivision existed with respect to the land purchased by the transferee, especially as the benefit of the covenant was expressed to apply also to other lands not comprised in the plan of subdivision. And he refused to agree that the covenant should be construed as so annexed if there appeared any reason to doubt that the parties so intended. Such reason was provided here by the inclusion of streets and of unidentified areas in the plan of subdivision.

He also dealt briefly with the argument from statute, but did not feel that any of the provisions referred to, as usually interpreted, could support the contention of the plaintiffs.

Although discussion of the question of laches and acquiescence was thus not necessary for the decision of the case, Smith J. gave it full consideration in his judgment, and his conclusion that this defence would not have succeeded, as the only presumption which could be drawn was that particular breaches committed in the past were authorised, appears to be based on the analysis of the law hereon in Brunyate, *Limitation of Actions in Equity*.[3]

R.A.N.

[3] at pp. 185-261.

TORT — DUTY OF OCCUPIER TO PERSONS ENTERING PREMISES UNDER CONTRACT

Watson v. George[1] affords a useful illustration of the extent of the duty of an occupier to a person who enters his premises under contract.

Watson, who was a lodger for valuable consideration at the defendant's lodging house, died as the result of poisoning by carbon monoxide, emitted from the bath heater which he was using. At the hearing of an action by his widow in the Supreme Court of South Australia, under the S.A. Wrongs Act 1936-40, it was found that the heater, which had been installed for about twenty years, had suffered gradual deterioration. Further, it was found that the accident was due to the inward bulging of the water jacket and the accumulation of rust in the elbow of the flue; that these defects were easily discoverable by an expert; but that there was nothing to cause the occupier (who was in fact unaware of the defects), to believe that the heater required attention. The action having been

[1] (1953) A.L.R. 665.

dismissed, the case, on appeal, came before the High Court consisting of Williams, Kitto, and Fullagar JJ.

The plaintiff sought to make the defendant liable on two grounds. Her first contention was that the defendant was an invitor, and as such, was liable under the principle laid down in *Indermaur v. Dames,*[2] to prevent damage from unusual dangers of which he knew or ought to have known.

Williams J., dealing with the occupier's liability for invitees held (adopting the test of "unusual risk" laid down by the House of Lords in *London Graving Dock v. Horton*[3] as one which is not usually found in carrying out the task in hand) that the presence of carbon monoxide is an unusual risk for a lodger to encounter in a bathroom.[4] However, His Honour also held that on the evidence, it was clear that the occupier did not know or ought not have known of the "unusual danger".[5]

It is submitted, with respect, that there was no need for Williams J. to have discussed liability under this head at all for, as Fullagar J. stated, "The present case . . . is not a case either of invitee or of licensee. It belongs to that class of case in which the person injured is on the premises in pursuance of a contract and for valuable consideration paid or payable to the occupier".[6]

Upon the occupier's contractual liability, the plaintiff based her second claim. She argued that it was an implied term of the contract between the deceased and the defendant, that the premises were as safe as the exercise of reasonable care could make them. On this point, Williams J. cited with approval, a dictum of Scrutton L.J. in *Hall v. Brooklands Auto Racing Club* "This is not an absolute warranty of safety but a promise to use reasonable care to ensure safety".[7]

Applying this principle to the facts, the question was whether the defendant failed to exercise reasonable care in not having the heater examined periodically by an expert to see that it was functioning properly. Since nothing had occurred to cause the defendant to believe that the heater required attention Williams J. answered the question in the negative.

Fullagar J., though he dealt with the case solely on the footing of the occupier's liability under contract, expressed doubts whether decided cases had laid down a satisfactory formulation of the rule of law applicable.[8] After discussing the cases of *Francis v. Cockerell*[9]

[2] (1866) L.R. 1 C.P. 274, 288.
[3] [1951] A.C. 737.
[4] [1953] A.L.R. 665, 667.
[5] *Ibid.*
[6] *Ibid.* 671.
[7] [1933] 1 K.B. 205, 214.
[8] [1953] A.L.R. 665, 670.
[9] [1870] L.R. 5 Q.B. 501.

and *Maclenan v. Segar*[10] and accepting an oft-quoted dictum of McCardie J. in the latter,[11] as the correct statement of the law, Fullagar J. explained the occupier's contractual liability in this way: "The obligation is, in legal theory, contractual, but the liability depends on a breach by somebody at some stage of a common law duty . . . to use reasonable care. It seems clear that the rule does not impose liability in the absence of negligence on the part of anybody".[12]

Upon whom rests the burden of proving negligence in cases of this kind? "I think that the true rule is, that the burden rests on a plaintiff in this class of case of proving negligence . . . It may be thought that the position should be otherwise: the occupier is the person most likely to be in possession of material facts. But it does not seem to me that the authorities warrant saying that the occupier must satisfy the Court or a jury that an unsafe condition of his premises was not due to anybody's negligence. It does not, of course, follow that a plaintiff may not in some circumstances be able to launch a case without specifying an act or omission on the part of any particular person as responsible for the defect or danger".[13]

Kitto J. concurred in the judgments delivered.

HAROLD SEGAL

[10] [1917] 2 K.B. 325.
[11] *Ibid.* 332-333.
[12] [1953] A.L.R. 665, 674.
[13] *Ibid.*, 675.

BIGAMY — PROOF OF ABSENCE FOR SEVEN YEARS

A POINT of considerable importance in the administration of the criminal law was considered by the Full Court of the Supreme Court of Victoria in *R. v. Broughton.*[1] The accused, who was convicted of bigamy, claimed that the trial judge was incorrect in directing the jury:— (1) that the onus of proving his wife's absence for seven years lay on the accused and he was bound to establish this on the balance of probabilities (2) that an honest and reasonable belief by the accused that his wife had been absent for seven years would be no defence.

The second direction was held to be inconsistent with *Thomas v. R.*,[2] in which case the accused, who honestly but mistakenly believed that a prior marriage of the woman he first married had not been dissolved, because the decree nisi had not been made absolute, was acquitted. However the present writer finds it difficult to see how the principle applies to this case for the presence or absence of one's conjugal partner would hardly seem to be a matter for mere belief.[3]

[1] [1953] A.L.R. 866.
[2] (1938) 59 C.L.R. 279.
[3] Defined as "conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others"—*Bouvier's Law Dictionary* (1948) p. 118.

Moreover it could be argued that the *Thomas* case is not authority for the proposition stated, and for a defence to be made out under the statutory exceptions nothing short of actual fulfilment will suffice.

A difference of opinion occurred over the first direction. In a joint judgment Lowe A.C.J. and Barry J. denied that the defence could be separated into two distinct elements—absence of the other spouse for seven years and absence of knowledge on the part of the accused that the other spouse was living within that time—with the prisoner required to prove the former and the Crown to disprove the latter. . .[4] "when facts are in evidence putting in issue the existence of any one of the exemptions, the ultimate onus of establishing their non-existence lies on the Crown, and . . . the obligation does not rest upon the accused . . . to establish that they do exist."[5] Thus the Crown was bound to prove that the accused was aware of the existence of his wife during the last seven years. For this principle *D.P.P. v. Woolmington*[6] was cited.

Gavan Duffy J. (dissenting on this ground) adopted the remarks of Dixon J. in *Dowling v. Bowie*:[7] "A qualification or exception to a general principle of liability may express an exculpation . . . which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it."[8] On this principle the accused is required to prove the absence of his wife for seven years and until he has discharged this burden he is not entitled to the protection of the exception. However the practical impossibility of proving a negative—that he has not heard of her during this period—has been recognised in *R. v. Curgewen*[9] and *R. v. Spark*,[10] so that the Crown must then adduce evidence that he has heard of his wife during the seven years period. *Woolmington's* case did no more than establish that the crown must prove every constituent of the offence charged.[11]

While this is an important decision on the proper direction for

[4] [1953] A.L.R. 866, 868. [5] *Ibid.* 867. [6] [1935] A.C. 462.
[7] [1952] A.L.R. 1001, 1003. In this case it was held that before a prosecution could be launched under Section 141 of the Liquor Licensing Ordinance 1939-1952 of the Northern Territory the prosecution was required to prove the non-existence of a declaration exempting a person from its provisions; the argument proceeding on the ground that until this was proved the section was *prima facie* inapplicable. [8] [1953] A.L.R. 866, 869.
[9] (1865) L.R. 1 C.C.R. 1. [10] (1885) 11 V.L.R. 405.
[11] [1953] A.L.R. 866, 873.

the jury, the difference in views is not so extreme as might appear. According to both views the accused must adduce "some evidence which shows that it is a genuine and not a purely speculative question"[12] that he is within the exception. It is for the jury to determine the cogency of such evidence. It is submitted that not only is the first test more comprehensible to the lay mind but it is also correct in law. It is only in recent times that it has been possible for the accused and his wife to give evidence,[13] and to place the burden of proof on the accused in these circumstances would have been iniquitous. Moreover, although *Woolmington's* case can be avoided in that the Lord Chancellor excluded "any statutory exception"[14] the interpretation given to the case by Gavan Duffy J. is contrary to the principle that it is sufficient for a prisoner "to raise doubt as to his guilt; he is not bound to satisfy the jury of his innocence".[15]

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[12] *Ibid.* 867.
[13] In England, Criminal Evidence Act 1898; in Victoria, Crimes Act 1915. (No. 2). [14] [1935] A.C. 462, 481. [15] *Ibid.* 481.

CONSTITUTIONAL LAW (AUSTRALIA)
S. 92 — ANOTHER CASE

McNee v. Barrow Bros. Commission Agency Pty. Ltd. [1954] A.L.R. 105[1] a decision of a single judge of the Supreme Court of Victoria is an interesting contribution to the many judicial pronouncements on s. 92 of the Commonwealth Constitution.

Regulation 47(e) of the Egg and Egg Pulp Marketing Board Regulations made pursuant to s. 43 (1) of the Marketing of Primary Products Act 1935 (Vic.) prohibits the conversion of eggs into whole egg pulp without the consent of the Board. Sholl J. held that the regulation violated s. 92 in so far as it purported to prevent the pulping of cracked eggs imported as such from New South Wales by the defendant Company (in the course of its wholesale dairy produce business) for the sole and only practicable purpose of pulping and resale as egg pulp. Its operation upon the pulping of certain sound eggs imported as such (includings eggs which became cracked in transport or in regrading on arrival in Melbourne) was valid under s. 92 and severable,[2] but ultra vires the enabling statute.

[1] Also reported in [1954] 1 V.L.R. 1.
[2] [1954] A.L.R. 105, 118. The effect of s. 92 upon its operation is merely distributive, for it can in the words of Dixon J. "independently affect the persons or things within power in the same way and with the same results as if the full intended operation of the legislation had been valid". *The Commonwealth v. Bank of N.S.W.* (1948) 76 C.L.R. 1, 370.

In his analysis of the interesting question whether manufacture or processing of goods before their despatch interstate or after the arrival of the constituents from another state is or may be itself part of interstate trade, Sholl J. finds that American opinion would in general deny the proposition.[3] Nor do Australian decisions[4] require him to affirm it. It is, however, possible "that in some cases manufacture or processing might, notwithstanding the American decisions, be held to be itself 'part of' interstate trade and commerce, and not merely something the regulation of which might in appropriate circumstances be within the ambit of a power to regulate interstate trade and commerce". "That would demand upon whether 'trade' and 'commerce' in s. 92 connote only acts of buying, selling and transportation".[5]

Upon the present facts the pulping is held not to have been done in the course of interstate trade. Yet this does not conclude the matter for in his Honour's opinion, just as the American federal commerce power has been held to sustain legislative control of certain intrastate activities if interstate commerce was thereby regulated,[6] so in Australia, as a result of the Privy Council's decisions and reasoning in the *James* cases[7] and the *Bank* case[8] it should be held that legislation "in fact operating directly to interfere with interstate trade" may infringe s. 92 nothwithstanding that it is "in the first instance professedly imposed" upon an activity not itself part of an actual interstate trade transaction.[9] This involves the crucial issue of the case, for in informant's Counsel's well-illustrated submission[10]

[3] Notwithstanding the "curiously different bases" upon which the Supreme Court of the United States has upheld certain state legislation affecting interstate trade. [1954] A.L.R. 105, 110.

[4] *Ibid.* 110-1. See reference to judgments of Isaacs J. in the *Commonwealth v. South Australia* (1926) 38 C.L.R. 408 and Evatt J. in *Vacuum Oil Co. Pty. Ltd. v. Queensland* (1934) 51 C.L.R. 108, and also *The Field Peas* case (1948) 76. C.L.R. 414.

[5] [1954] A.L.R. 105, 111.

[6] *Ibid.* 109. See reference to (1946), 59 *Harvard Law Review*, pp. 645, 883. Recent American decisions have abandoned the earlier tests based upon identifying the boundaries of the power of "regulation of interstate commerce" given by Art. I, s. 8 (3) of the U.S. Constitution with the boundaries of interstate trade and commerce in favour of the doctrine that the power is a compound conception permitting Congressional legislation with regard to activities of a purely intrastate nature merely because they affect subsequent or antecedent interstate trade and commerce.

[7] *James v. Cowan* [1932] A.C. 542; *James v. The Commonwealth* [1936] A.C. 578.

[8] *The Commonwealth v. Bank of N.S.W.* [1950] A.C. 235.

[9] [1954] A.L.R. 105, 112. Note his Honour's examples.

[10] Mr P. D. Phillips refers to the recognised validity of restrictions such as liquor licensing requirements and sales tax laws. Sholl J. states that the former are "in a special position" having regard to s. 113 of the Constitution and the latter are "typical examples of indirect and valid burdens on interstate trade". *Ibid.* 115.