his wife, can it be said that the resulting child is informally adopted by him? As the procedure of a formal adoption would involve a disclosure of all the parties, would the courts be justified, in a question concerning the rights of an A.I.D. child to inherit through its mother's husband, in giving the child the status of a formally adopted child? The argument that consent to A.I.D. is tantamount to a formal adoption and confers legitimate status on the resulting offspring, met with the approval of Greenberg, J. in the American case of *Strnad* v. *Strnad*.[31] However, turning to the *In re Marshall* principles, it would appear to be a fraud on the testator,[32] in facts similar to *In re Marshall*, for an A.I.D. child conceived with the consent of the husband, and not of the husband's blood, to take a gift expressed to be for the children of the husband. Can such a child, without legislative affirmation, be considered to be a member of the "husband's family" for the purpose of inheritance?

It would seem, in conclusion, with regard to children conceived by A.I.D. and C.A.I., that unless the consent of the husband is treated as creating a quasi-formal adoption in law, it will be necessary for the legislature to provide for such cases by bringing the law on artificial insemination[33] into conformity with that on adoption and legitimation as regards the application of general legal principles such as those raised in *In re Marshall*.

*B. BEVAN, Case Editor — Fourth Year Student.**

MEASURE OF DAMAGES FOR NON-ACCEPTANCE OF GOODS

THOMPSON (W.L.) LTD. v. *ROBINSON (GUNMAKERS) LTD.*
CHARTER v. *SULLIVAN*
INTEROFFICE TELEPHONES LTD. v. *ROBERT FREEMAN CO. LTD.*

The state of the law concerning the measure of damages for non-acceptance of goods has been considerably clarified by a number of recent English decisions. In these the courts have examined the true meaning and scope of s. 50 of the Sale of Goods Act, 1893,[1] taking into account the effect of trade-protection and price maintenance agreements on the concept of an "available market", and also the applicability of the principles deduced from the section to cases of hiring as well as to the sale of goods.

The first recent decision is of Upjohn, J. in *Thompson (W.L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[2] Here the defendant company refused to accept delivery of a new Standard Vanguard car, which they had contracted to buy from the plaintiffs, who were dealers in motor cars. Under an agreement with the manufacturers, the plaintiffs were only permitted to sell new Vanguard cars at a price fixed by the manufacturers, the Standard Motor Company, and their profit on a sale was also fixed. At the time of non-acceptance there was

[31] (1948) 78 N.Y.S. (2d.) 390.

[32] See Lord Denning, "London Times", Feb. 27, 1958, p. 12. In the course of a discussion on A.I.D., Lord Denning said "that if this practice was done openly and without concealment there was no law against it, but if it was accompanied by secrecy and deception, it was unlawful. It was a criminal conspiracy. The child so produced was illegitimate. If the wife and doctor agreed to pretend the child was legitimate, they were guilty of a wicked conspiracy. If they did it without the knowledge or consent of the husband, it was a gross fraud on the husband. Even if the husband did know and consented it was no longer a fraud on him, but was it not a potential fraud on others?"

[33] See Debate in the House of Lords, "Artificial Insemination" (1949) 161 *Parliamentary Debates* (Lords) 386, 410.

* See the *In Memoriam* Notice *supra* p. 3.

[1] Section 50 of the English Act 56 & 57 Vic., c. 71 is reproduced in the Sale of Goods Act, 1923-1953 (N.S.W.), s. 52.

[2] (1955) 1 Ch. 177.

insufficient demand in the locality where the plaintiffs operated to absorb all the Vanguard cars available there for sale. When the defendant company repudiated the transaction, the plaintiffs mitigated their damage by inducing their supplier to release them from taking the car. The question then arose whether they were entitled to the profit of £61 which they would have made but for the defendant's repudiation of the sale, or only to nominal damages in view of s. 50(3) of the Sale of Goods Act.

Upjohn, J. declared that the principle to be applied was to be found in the decision of the Court of Appeal in *In re Vic Mill Ltd.*[3] In that case the contract was to make and supply machines to the particular specification of a purchaser, who later repudiated. The supplier then altered the machinery so as to conform to another order, and sold it to the second purchaser. It was held that the supplier could recover damages for loss of his bargain from the first purchaser, since he could have made other goods for the second customer and so have obtained his profit on both contracts.

Hamilton, L.J. said:

> It is conceded now that there was no available market in which the goods could have been promptly sold. . . . It follows that he was entitled to recover the damages directly and naturally resulting in the ordinary course of events from the buyer's breach of contract. . . . They did in fact at a small cost adapt the frames on their hands, and with them fulfilled the order of this other customer, and so made their profit on his contract. . . . That was a reasonable mode of mitigating the damages, but it by no means follows that the damages are confined to the cost, a trivial one, of adapting the machines to the needs of the second customer, and the loss on resale to him. . . . The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders and both profits . . . but they are still losers of the profits which they would have made on the Vic Mill contract, because they would, if they had been minded, have performed both the contracts, and have made the profit on both the contracts but for the breach by the Vic Mill Company of their contract.[4]

This reasoning was held by Upjohn, J. to cover the facts of the principal case.

Although the car was not sold to another purchaser but was returned to the supplier, the plaintiff's action had been reasonable. Had it been sold to somebody else, that would have been no defence to the plaintiff's claim, as another car in stock could have been sold and a double profit obtained. However, the application of the principle deduced from *In re Vic Mill Ltd.*[5] still left open the defendant's argument that s. 50(3) governed the case on the ground that there was an available market for the goods in question, and that as the market price and the contract price were exactly the same, being the price fixed by the manufacturers, only nominal damages were recoverable. In the *Vic Mill Case*[6] this question did not arise, for there it was conceded by the defendant that there was no available market.[7]

Upjohn, J. pointed out that there was "a comparative absence of authority" on the meaning of the phrase "available market".[8] The only authority on these words in s. 50(3) discovered by counsels' research was the decision of the Court of Appeal in *Dunkirk Colliery Co.* v. *Lever*[9] where James, L.J. said:

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[3] (1913) 1 Ch. 465.

[4] *Supra*, at 473, 474. See also *ibid.*: ". . . the respondents are, I think, entitled to both profits because they were not bound to give the appellants the benefits of another order that the respondents had received. The respondents were left with these goods on their hands. They altered them and sold them to another buyer, but they could have made, and would otherwise, I suppose, have made, other goods for that buyer, and not employed these goods for that purpose. If they had done so, they would have made both profits." *per* Buckley, L.J.

[5] *Supra.*

[6] *Supra.*

[7] *Supra*, at 472, 473.

[8] (1955) 1 Ch. 177, 185.

[9] (1878) 9 Ch. D. 20.

> What I understand by a market in such a case as this is that when the defendant refused to take the 300 tons the first week or the first month, the plaintiffs might have sent it in waggons somewhere else, where they could sell it, just as they sell corn on the Exchange or cotton at Liverpool: that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances.[10]

Should this definition be applied, said his Lordship, then s. 50(3) must be excluded because "it was proved that there is nothing in the nature of a market like a Cotton Exchange or Baltic or Stock Exchange, or anything of the sort, for the sale of new motor cars";[11] and on the authorities the definition was binding upon him. Upjohn, J. also proposed a somewhat wider definition which he would have applied had the matter been free from authority. On this test an available market existed wherever there was in the particular area a sufficient demand to absorb readily all goods of the relevant type, so that if a purchaser defaulted the goods could readily be sold. There was no available market in the present case on this view either, because at the material time the supply of Vanguard cars in the seller's locality exceeded the demand.

Finally, his Lordship declared that even if he accepted the defendant's contention that the term "available market" should be construed as including the whole marketing organisation for cars throughout the country in which the car may have been saleable without undue difficulty, the same result would still be reached on the facts as if James, L.J.'s test was applied. For s. 50(3) laid down only a *prima facie* rule which in the circumstances here it would be unjust to apply. In this connection regard must be had to the general principle laid down by Lord Haldane in *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.*,[12] where he said: ". . . he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."[13] Here it was clear that the plaintiff did in fact lose the sum of £61 on the sale as a result of the defendant's default. Once s. 50(3) was excluded and s. 50(2) was left as the test of the measure of damages, its application to the present case was governed by the principle laid down in the *Vic Mill Case*.[14]

The next recent case to be considered in this connection is *Charter* v. *Sullivan*,[15] a decision of the Court of Appeal. There the purchaser of a new Hillman-Minx motor car defaulted on his contract with the plaintiff, who within ten days of the breach sold the car to another purchaser. The plaintiff was again a motor car dealer, whose retail price was fixed by the manufacturers. He claimed the loss of profit on the first sale, amounting to £97/15/0. The defendant submitted that there was an available market for the car, and that since the fixed retail price was both the contract price and the market price, and the plaintiff had resold the car at that price, the plaintiff had not suffered any damage.

The principal judgment was delivered by Jenkins, L.J. He examined the previous authorities on the meaning of the term "available market", and expressed doubt whether James, L.J.'s observations in *Dunkirk Colliery Co.* v. *Lever*[16] should be literally applied as an exhaustive definition of an available market in all cases".[17] At the same time he found Upjohn, J.'s definition not "entirely satisfactory".[18] The language of s. 50(3), said his Lordship, appeared

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[10] *Supra* at 24, 25.
[11] (1957) 1 Ch. 177, 185.
[12] (1912) A.C. 673.
[13] *Supra*, at 689.
[14] (1913) 1 Ch. 465.
[15] (1957) 2 W.L.R. 528.
[16] (1878) 9 Ch. D. 20, 24, 25.
[17] (1957) 2 W.L.R. 528, 533.
[18] *Ibid.*

to postulate that in the cases to which it applied there would or might be a difference between the contract price and the market price, and this could not be the case where the goods could only be sold at a fixed retail price. The price of goods in an available market must be fixed by reference to the economics of supply and demand depending on what the price was at which a buyer could be found, whether it was equal to, greater or less than the contract price.[19] And as a learned commentator has pointed out, it follows from this view "that whenever the sale of a commodity is controlled by trade protection and price maintenance agreements, the concept of the "available market" is destroyed."[20]

Like Upjohn, J., Jenkins, L.J., too, held that whether or not his interpretation was correct the *prima facie* rule was in any case inapplicable and to be rejected in favour of the general rule laid down in s. 50(2). He pointed out that the answer to the question whether the plaintiff dealer incurred loss of profit on the sale as a result of the defendant's default depended on whether the demand for the cars exceeded the supply or *vice versa*. In the former case the default of the defendant would cause him no loss for he would still sell the same number of cars as if that purchaser had not defaulted. On the other hand, where the demand was insufficient to absorb all the cars available for sale, then on the default of a purchaser that sale is lost and together with it the predetermined profit allowed by the fixed retail price. Hence the *prima facie* rule cannot be a good criterion of the dealer's loss because it does not necessarily follow from the sale to a subsequent purchaser of the car that the defendant had agreed but failed to take at the same fixed price, that the dealer suffered no "loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract."[21] In the present case the plaintiffs' own sales manager had given evidence that the state of trade was such that a purchaser could be found for every Hillman-Minx car obtained from the manufacturer. It followed that the plaintiff sold the same number of cars and obtained the same number of fixed profits as he would have sold and made if the defendant had duly carried out his contract. "If a dealer had twenty cars available for sale, and twenty-five potential buyers, he still would make his full profit if he sold the twenty cars notwithstanding that two or three purchasers defaulted."[22] Accordingly the court held that the plaintiff was only entitled to nominal damages. *W. L. Thompson Ltd.* v. *Robinson*[23] was distinguished on the ground that it was based on the admitted fact that there, unlike *Charter* v. *Sullivan*,[24] the supply of cars exceeded the demand, and it was clear from the judgment that had the demand there exceeded the supply the decision would have gone the other way.

The third and most recent decision which comes up for discussion is that of the Court of Appeal in *Interoffice Telephones Ltd.* v. *Robert Freeman Co. Ltd.*[25] Here by an agreement in writing the plaintiffs undertook to instal, let and maintain, and the defendants to take delivery of and hire an automatic telephone installation for a period of twelve years and thereafter until either party should give notice to the contrary. Six years later the defendants were forced to leave their premises and to move to another office which was already equipped with an automatic telephone system, so that they had no further use for the equipment hired. Accordingly they repudiated the agreement, and an action was brought against them by the plaintiffs. In the court of first instance the plaintiffs

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[19] See also *supra*, at 538, 539: "The Act does not attempt to define a market and it may be conceded that one can exist in a variety of circumstances and apart, of necessity, from a defined place, but since its trading has to serve as a factor in measuring the damages it must at least be a market in which the seller could, if he wishes, sell the goods left on his hands." *per* Sellers, L.J.

[20] O. R. Marshall, "Measure of Damages for Breach of a Contract of Hire" (1958) 21 *Mod. L.R.* 180, 183.

[21] Sale of Goods Act, 1893, s. 50(2).

[22] (1957) 2 W.L.R. 528, 540, *per* Sellers, L.J.

[23] (1955) 1 Ch. 177.

[24] (1957) 2 W.L.R. 528.

[25] (1957) 3 W.L.R. 971.

proved that they held a sufficient stock of equipment to meet the demands of potential customers. Pilcher, J. held that the plaintiffs were only entitled as damages to six months' rent (being a reasonable period for re-letting the equipment) plus the expenses of removal and reconditioning. The plaintiffs appealed (to the Court of Appeal) on the question of damages, claiming that as there was always a supply to meet any demand, the substituted transaction with a new hirer would not diminish the loss suffered because the substituted customer would simply be hiring the equipment taken back from the defendants instead of other equipment which the plaintiffs could have provided.

Jenkins, L.J. (with whom Parker, L.J. and Pearce, L.J. agreed) upheld the appeal on the ground that the plaintiff's contention was supported by the principle of *In re Vic Mill Ltd.*[26] His Lordship pointed out that this principle was accepted and applied by Upjohn, J. in *Thompson* v. *Robinson*[27] which was also a case where the supply of the relevant goods (Vanguard motor cars) exceeded the demand, whilst in *Charter* v. *Sullivan*[28] it was recognised as the correct principle in relation to cases where the supply of the goods in question exceeded the demand. In that case, however, the demand exceeded the supply, so the decision went the other way. Jenkins, L.J. also referred to the case of *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes*,[29] a case of breach of a hiring contract, where Salter, J., on facts similar to those in *Interoffice Telephones Ltd.* v. *Robert Freeman*,[30] came to the same decision as Pilcher, J. had in the present case. His Lordship pointed out that it was inconsistent with the principle of *In re Vic Mill Ltd.*[31] which was not cited in that case, yet was clearly applicable as on the evidence in *British Stamp and Ticket . . . Co.* v. *Haynes*,[32] the supply of machines in question there was always sufficient to meet the demand for them, and consequently the decision was bad in law.[33]

His Lordship conceded that there was a possible point of distinction between cases like *In re Vic Mill Ltd.*,[34] *Thompson* v. *Robinson*[35] and *Charter* v. *Sullivan*,[36] on the one hand, and the *British Stamp and Ticket Company*[37] and the *Interoffice Telephones*[38] *Cases* on the other, in that the former dealt with the sale of goods while the latter dealt with cases of hiring. However, he adopted the decision of Barry, J. in the unreported case of *Telephone Rentals Ltd.* v. *R.C.A. Photophone Ltd.*[39] in February 1957, that one could find no substantial difference between the principles to be applied in claims for damages arising out of breach of a contract of sale or one of hire, and he held that the principle of *In re Vic Mill Ltd.*[40] was equally applicable to both situations.

Thus, summing up, the following propositions have been established as to the measure of damages for non-acceptance of goods. Where the demand for the particular goods exceeds the supply and the purchaser defaults, the seller is only entitled to nominal damages, since the same goods can be sold to another customer whose order could not otherwise have been met. On the other hand, where the supply of goods exceeds the demand, the seller is entitled, on the purchaser's default, to the profit he would have made from the sale, even

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[26] (1913) 1 Ch. 465 *(supra)*.
[27] (1955) 1 Ch. 177.
[28] (1957) 2 W.L.R. 528.
[29] (1921) 1 K.B. 377.
[30] (1957) 3 W.L.R. 971. [31] (1913) 1 Ch. 465. [32] (1921) 1 K.B. 377.
[33] The decision in *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes (supra)* was not considered by Upjohn, J. in *Thompson (W.L.) Ltd.* v. *Robinson (Gunmakers) Ltd.* (1955) 1 Ch. 177. This omission was pointed out and criticised by Dean O. R. Marshall in a Note in (1956) 34 *Can. Bar Rev.* 969, where he doubted whether the former decision was good in law in view of *In re Vic Mill Ltd.* (1913) 1 Ch. 465. The Court of Appeal in the *Interoffice Telephones Case* (1957) 3 W.L.R. 971, 978 has now confirmed this view by overruling the decision in *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes (supra)*, at any rate insofar as it conflicts with *In re Vic. Mill Ltd. (supra)*.
[34] *Supra*. [35] (1955) 1 Ch. 177. [36] (1957) 2 W.L.R. 528.
[37] (1921) 1 K.B. 377. [38] (1957) 3 W.L.R. 971. [39] Unreported.
[40] (1913) 1 Ch. 465.

if he can sell the goods to another customer, since, but for the default, he could have carried out, and profited on both contracts. That is particularly so in cases where the retail price is fixed but also appears from the *Interoffice Case*[41] to have been established generally as a basis for calculating damages due from a defaulting purchaser or hirer of goods. The greater justice of this rule is also to be seen, apart from the reasons given by the judges in the cases referred to, in that incidental expenses, such as solicitors' costs and advertising fees, which a seller may incur when attempting to re-sell the goods can now be recovered whilst under the old *prima facie* rule the rigidity of the latter prevented them from being brought within its scope. Finally, it may be noted that the apparent ease with which the courts have transferred the new rule from the statute-regulated field of the sale of goods to that of common law hiring appears to indicate that further extensions of the application of this principle are extremely likely.[42]

A. HILLER, Case Editor — Fourth Year Student.

CORPORATE PERSONALITY

CARRUTHERS CLINIC LTD. v. *HERDMAN*

The recent Canadian case, *Carruthers Clinic Ltd.* v. *Herdman*[1] focuses attention again on the circumstances in which the court will look behind the veil of corporate personality[2] and identify the company with its members. The case is of interest in that, firstly, by adhering to the rule in *Saloman* v. *Saloman & Co.*,[3] and, secondly, by lifting the veil, the court reached the same decision.

Carruthers Clinic Ltd. was incorporated to acquire the assets of a medical partnership of two brothers (the Drs. Carruthers), its objects as set down in its Letters Patent being to establish facilities for diagnostical medical activities, to sell, lease, or make available to licensed medical practitioners these facilities and equipment, and to hire and engage the services of licensed medical practitioners to carry out any of the objects of the company. A number of other doctors (including the defendant) became members of the company, each of them entering into an agreement with it which was terminable on giving requisite notice. The agreement recited that the member was desirous of availing himself of the facilities of the clinic for the purposes of carrying on his profession, and that the company was to provide the member-doctor for a period of two years with office space, equipment and technical services in return for which the member was to pay to the company all fees earned and the company was to pay him an annual sum. Except in the case of the two directors, Drs. Carruthers, all agreements contained a covenant by the member-doctor that after termination of the agreement the covenantor would not practise medicine in the City of Sarnia or within 20 miles from there for a period of two years. Subsequently, all the issued shares, except the qualifying shares, were transferred to the Carruthers Foundation, a non-profit company incorporated for charitable purposes. Some time later the defendant terminated his membership of the company and commenced practising medicine within the City of Sarnia in breach of the covenant. The company then applied to the court for an injunction to restrain the breach of covenant, which was refused.

The main issue, therefore, was whether the covenant in restraint of trade was illegal. The court referred to *Nordenfelt* v. *Maxim Nordenfelt Guns Co.*,[4] *Mason* v. *Provident Clothing & Supply Co.*[5] and *Morris* v. *Saxelby*,[6] and said

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[41] (1957) 3 W.L.R. 971.

[42] *Cf.* as to stocks and shares Mayne, *Treatise on Damages* (11 ed. 1946) 211-12, by W. G. Earengey.

[1] (1956) 5 D.L.R. (Second Series) 492 (Ontario High Court).

[2] See L.C.B. Gower, *Modern Company Law* (2 ed. 1957) 183.

[3] (1897) A.C. 22. [4] (1894) A.C. 535. [5] (1913) A.C. 724.

[6] (1916) 1 A.C. 688.