III. *Multiplex Industries Ltd.* v. *Speer* [1966] N.Z.L.R.122. This case concerned the interpretation of s.4 of the Companies Amendment Act 1963. As a result of the decision it is now quite clear that the prohibition against making a take-over offer for shares in a company contained in s.4 except on the conditions contained in that section, applies only if the take-over offer is made in writing. Consequently if a take-over scheme is carried into effect by making an oral offer there is nothing in the statute to render the actions of the offeror illegal.
IV. *Richard Bevan Ltd.* v. *Beecher* [1966] N.Z.L.R.740. Following *Brown* v. *Associated British Motors Ltd.* [1932] N.Z.L.R.655, Richmond J. held that s.99 of the Bankruptcy Act 1908 is not one of the provisions applied by s.307 of the Companies Act 1955 to the winding up of an insolvent company. Section 307 provides *inter alia,*

> In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

V. *Re Best, Ex Parte Cascade Publishing Co. Ltd. (in Liquidation)* [1966] N.Z.L.R.761. In this case Perry J. held that an order made by the Court under s.254 of the Companies Act 1955 for the payment of a call by a contributory in the winding up of a company is a final order which will support the issue of a bankruptcy notice under s.26(f) of the Bankruptcy Act 1908 which relates to the commission of acts of bankruptcy.

J. C. Turnbull.

CONTRACT

Before the decision of the House of Lords in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1966] 2 W.L.R. 944, it was a widely held belief that a contracting party could not rely on an exclusion clause limiting or exempting his liability from a breach of contract where that breach could be classed as fundamental. This doctrine, arising in its modern form in *Smeaton Hanscomb* v. *Sassoon I. Setty* [1953] 1 W.L.R. 1468, had already been dealt a heavy blow by the decision of the High Court of Australia in *Council of Sydney City* v. *West* (1965) 39 A.L.J.R. 323, and was almost totally rejected by the House of Lords in the *Suisse Atlantique* case. All their Lordships in this case gave a different definition of fundamental breach but perhaps Lord Upjohn's statement that a fundamental breach is "such as to go to the root of the contract which entitles the other party to treat such breach . . . as a repudiation of the whole contract" (p.978) is most satisfactory. The House held that there was such a thing as a fundamental breach but the courts were no longer to assume that such a breach automatically overcame an exclusion clause but were to consider the exclusion clause in relation to all the circumstances of the case. In fact, in most situations a breach which could be classed as fundamental would override an exclusion clause but the breach by itself, however fundamental, does not bring the contract to an end. Thus the question of whether or not a fundamental breach of contract overrides an exclusion clause is a matter of construction. How-

ever, it is of particular interest to New Zealand that in the unreported Privy Council case of *Philip Boshali* v. *Allied Commercial Exporters Ltd.* (unrep. 1961 November 14 and referred to by Lord Hodson in his judgment in the *Suisse* case at p.969) the Board stated unequivocally that a breach which goes to the root of a contract disentitles a party from relying on an exemption clause.

The English Court of Appeal in the case *Beswick* v. *Beswick* [1966] Ch.538, came to a decision which appears to substantially alter the fundamental legal principle that a person is unable to enforce a promise for his benefit in a contract to which he is not a party. The facts were that Peter Beswick, a coal merchant, transferred his business to his nephew, who, in the agreement which was drawn up, agreed that after the death of his uncle, he would pay to the widow a weekly sum of £5 for the rest of her life. It was held that the widow could enforce this promise. It is important to note that she sued both in her capacity as administratrix of her husband's estate and in her personal capacity. The Court was unanimous in deciding that the equitable remedy of specific performance was available to the widow in her capacity as administratrix. So far as the doctrine of privity of contract is concerned, this common ground of decision breaks no new territory. Lord Denning and Danckwerts L.J (Salmon L.J not deciding the point) further held that, *suing in her personal capacity,* she could rely on s.56(1) of the Law of Property Act 1925 (U.K.) which provides that a person may take the benefit of any covenant or agreement respecting property (which includes any thing in action) although not named as a party to the instrument. It was generally thought before *Beswick* v. *Beswick* that this section would assist the unnamed third party only where the parties named in the document intended to contract with him. This ground of decision has less relevance in New Zealand, where the statutory counterpart, s.7 of the Property Law Act 1952, is in different terms. The third ground upon which Lord Denning based his decision was that at common law a third party may sue in his own right, by adopting the procedural device of joining with the promisee as co-plaintiff, or if the promisee refuses to sue, by suing in his (the third party's) own name and joining the promisee as a defendant. With respect, this ground, at least, appears to conflict with the views of the majority of the House of Lords in *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C.446, which reaffirmed the rule in *Tweddle* v. *Atkinson* (1861) B. & S.393, that a person not a party to the contract cannot sue upon it, a rule which Lord Denning described in *Beswick* v. *Beswick* as "at bottom . . . only a rule of procedure". Lord Denning was alone in basing his decision on this third ground, and while Danckwerts L.J. did not decide the point, Salmon L.J. expressly held that the plaintiff *in her personal capacity* could not sue on the contract. It is to be hoped that the House of Lords, which has granted leave to appeal, will squarely face this important conflict of opinion.

In *D & C Builders Ltd.* v. *Rees* [1966] 2 Q.B.617, the Court of Appeal held, on the facts of the case, that a creditor could enforce his strict legal rights and claim in full a debt owed when, in fact, he had accepted a lesser sum in apparent satisfaction of the full debt. The reason for the Court's decision, which appears at first sight to be contrary to the "High Trees" doctrine, was put forward by Lord Denning M.R. and he was expressly supported by Danckwerts L.J. Lord Denning stressed the fact that the enforcement of the strict legal right must be

inequitable before equity will grant relief. In the present case there was no true "accord" between the parties because the debtor, with the knowledge that the creditor was in desperate financial straits stated that unless the lesser sum was accepted the creditor would receive nothing. This was intimidation and clearly it was not inequitable for the creditor to insist upon his strict legal rights. *Goddard* v. *O'Brien* [1882] 9 Q.B.D. 37, in which case it was stated that a cheque as distinct from cash might be accepted in satisfaction of a cash debt for a greater amount because it would be payment in a different form, was overruled. Winn L.J. who was the third member of the court in *D & C Builders Ltd.* v. *Rees* also pointed out that to constitute accord (for the purposes of accord and satisfaction) the agreement which purported to create such accord must be binding at law. The accord in this case was thus not binding because it was not under seal or supported by consideration. Since the receipt for the lesser sum stated that the sum was received "in completion of the account" the creditor's claim for the balance might, in New Zealand, have been barred by s.92 of the Judicature Act 1908.

The New Zealand Court of Appeal in the case *Scott* v. *Rania* [1966] N.Z.L.R.527, considered the formation of a contract which was subject to finance being arranged by the intending purchaser of an area of land, such finance to be arranged by a specific time. The purchaser arranged the finance and informed the vendor of this fact but not until some four days after the expiration of the specified time. The majority of the Court of Appeal, (North P, and McCarthy J., Hardie Boys J. dissenting) overruled the decision of Barrowclough C.J. at first instance who had held that the purchaser was entitled to a decree of specific performance. The Court of Appeal stated that the condition as to the arranging of finance was a condition precedent to the formation of a binding contract and when the purchaser did not fulfil this condition or exercise his right to waive it before the expiration of the specified period, the conditional contract came to an end. Time was of the essence and even although the purchaser took all reasonable steps in an effort to arrange the finance, the vendor was held entitled to treat the conditional contract as at an end when the specified time expired. The Court in *Scott* v. *Rania* followed the decision of the Privy Council in *Aberfoyle Plantations Ltd.* v. *Cheng* [1960] A.C.115, where it was held that where a contract fixes the date by which the condition is to be fulfilled then the date so fixed must be strictly adhered to and the time allowed is not to be extended by reference to equitable principles.

A sale of premises where the vendor undertook to sell and deliver a business licensed to sell food cooked on the premises as well as food cooked elsewhere was considered in the New Zealand Supreme Court case of *Cornwall Properties Ltd.* v. *King* [1966] N.Z.L.R.239. In fact the business was not licensed as an eating house, as both parties believed it was, but merely as a refreshment room which entitled the occupier to sell only food which had been cooked elsewhere. On discovering the lack of, and need for, an eating house licence the plaintiff rescinded the contract and sued for recovery of the moneys paid by him. The agreement for sale and purchase contained a clause that the purchaser bought the business solely in reliance on his own judgment and not on any representation or warranty made by the vendor. Perry J. found for the plaintiff on the grounds that the defendant had breached a fundamental condition of the contract and his exemption clause was not wide enough to exempt him from liability for such a breach. Even in the light of

the above-mentioned *Suisse Atlantique* case the decision of the court would probably be the same. As the learned judge in *Cornwall Properties* case pointed out, the exclusion clause would be of no use to the defendant even if the representation as to licensing was held to be a mere, as distinct from fundamental, condition of the contract. The defendant had contracted to sell an eating-house and had delivered a mere refreshment room. There was a considerable difference insofar as profits were concerned and on discovery of this the plaintiff was entitled to treat the contract as terminated and to recover moneys paid by him under the agreement.

The case of *Multiplex Industries Ltd.* v. *Speer* [1966] N.Z.L.R.122, related mainly to the validity of a take-over offer for shares in a company, but the Court of Appeal also considered the question of a condition precedent to which the particular offer was subject. The offeror had acknowledged the fulfilment of the condition precedent and this acknowledgement was accepted and acted upon by the offeree. In fact the condition precedent was not complied with and later the offeree attempted to avoid the contract by pleading nonfulfilment of the condition. The Court of Appeal held that the contract could not be so avoided; Turner J. stated that the condition had been waived by mutual consent of the parties and that such waiver agreed to by the parties, may be expressed or implied. McCarthy J. stressed the fact that there was consideration moving both ways from the parties and each of them had altered his position in reliance upon an arrangement assented to by them both. The Court of Appeal also stated that the contract could not be avoided in the way attempted by the offeree whether or not the condition be regarded as imposed for the benefit of the offeror or for both parties.

C. E. French.

CRIMINAL LAW

The mere fact of participation by an accused in a fight which results in the death of the other participant will not support a prima facie inference of the accused's guilt in relation to that death. This is the ratio to be extracted from *R.* v. *Grant* [1966] N.Z.L.R.968 (C.A.). The accused, who participated in a fight which resulted in the death of the deceased, had been convicted of manslaughter. Whether the homicide was culpable depended on whether the killing resulted from an "unlawful act" of the accused: s.160(2)(a) of the Crimes Act 1961. Henry J. directed the jury that the accused, by taking part in such an episode, was necessarily a party to an unlawful act, and if death ensued he was guilty of culpable homicide. The Court of Appeal in holding this direction to be wrong, made two interesting observations; first that fighting *per se* was not unlawful. In the words of that Court "fighting is always the act of more than one person", and thus an innocent party may be involved in such an episode merely by reason of his legitimate act of self-defence in answer to unprovoked aggression. Secondly, that "unlawful" refers to the act of the person charged. It would appear to follow then that if neither the commencement nor the continuance of the fight was contributed to by the accused, except in so far as he lawfully protected himself, he cannot be convicted of culpable homicide