CONSTITUTIONAL LAW

Section 92: Repairs and Interstate Trade

The extent of s.92 has been again considered by the Supreme Court in *Schwerdt* v. *Telford* [1960] S.A.S.R. 41.

The defendant was charged with having driven an unregistered vehicle on a road between Adelaide and Mount Gambier, South Australia. The defendant admitted that the vehicle was unregistered, but his defence was that at all material times it was being used exclusively in and for the purposes of interstate trade and commerce and was, therefore, within the protection of s.92 of the Constitution.

The defendant was engaged in the business of a carrier with his headquarters at Mount Gambier. His business was mainly, if not entirely, carrying interstate between South Australia and Victoria, and for that purpose he had three semi-trailers. The vehicle in question had been involved in a collision while taking a load of wool to Melbourne and after the accident it had been towed back to Mount Gambier. Normally the vehicle would have been repaired at Mount Gambier. However, the insurers of the vehicle took the matter out of the hands of the defendant and took the "prime-mover", the part of the semi-trailer requiring repair, to Adelaide for repair. The repairs having been effected about one month later, the defendant came to Adelaide and drove the prime-mover back to Mount Gambier. It was on this journey that the alleged offence occurred. Three days later the vehicle was engaged again in interstate trade.

The defendant admitted that he could have carried the "prime-mover" back to Mount Gambier on one of his other semi-trailers, but he explained that these were in use, and he wanted to get the "prime-mover" back on to the road as soon as possible.

The complaint was dismissed by the magistrate on the view that the case was within the principle of *Fry* v. *Russo* (1958) S.A.S.R. 2121 (see note 1 Adelaide L.R. 78). He found that up to the time of the accident the vehicle had been used exclusively in and for the purposes of interstate trade or commerce, and further that the defendant's intention throughout had been to repair the vehicle and return it to its former use. The defendant was, therefore, protected by s.92.

The complainant appealed, the question raised being whether the vehicle on the return trip to Mount Gambier was being used on a transaction within the ambit of s.92. Napier C.J. and Ross J. allowed the appeal, but Mayo J. dissented. Napier C.J. and Ross J. had also been the majority in *Fry* v. *Russo*. The Chief Justice was of the opinion that the magistrate had carried the principle of *Fry* v. *Russo* beyond anything decided in that case. He continued: "s.92 must be reasonably understood and applied, and it may be a question of fact and degree (a test he used in *Ridland* v. *Dyson* (unreported), noted in 1 Adelaide L.R. p. 80) whether the particular use of the vehicle is for the purposes of interstate trade". It is the *use* of the vehicle and not the *vehicle* as such that is protected. Since the vehicle while being repaired and driven back was not being used for the purposes of interstate trade or commerce, the occasion in question was, therefore, not protected by s.92.

The "prime-mover" could not be used for the purpose of interstate trade without the trailer. The operation was preparation for carrying and not commencement of carrying. It was ancillary to and not an incident of interstate trade.

The qualifications which his Honour suggests might be allowed are interesting:

> (1) If the interruption of use was "transitory" and not substantial it may be possible to regard the vehicle as being used exclusively for interstate trade. Had the interruption been for a few days instead of a month, the occasion may have been protected.
>
> (2) Had the trailer been kept close to where the "prime-mover" was being repaired, it may have been possible to regard the driving to the place where the trailer could be picked up as an incident of interstate trade. But a long journey was not such an incident.

Both qualifications may be subjected to the same criticism, namely —"Where is the line to be drawn?" Is an interruption of 14 days transitory or substantial? Is a journey of 150 miles (Mount Gambier is about 300 miles from Adelaide) to pick up a trailer too long? The test of "fact and degree" provides no real answer. Either such a transaction as this is or is not one under the aegis of s.92.

Mr. Justice Mayo asked whether the delivery of a new vehicle acquired solely for use in interstate transactions was protected by s.92. The implied answer was, No. Similarly every vehicle in constant use requires repair, which is a concomitant of interstate trade, where the vehicle was entirely devoted to that kind of trading, and therefore within s.92. Again, all vehicles are subject to the risk of collision and consequential repair which will also be a part of interstate trade if the vehicle is being exclusively used in such trade. "But the steps taken must be convenient, economical and reasonable".

To distinguish transactions necessary for interstate trade and those merely antecedent, regard will be had to the *degree* of association of these matters. This is the same test as the "fact and degree" test of Napier C.J. noted above. The greater expense involved in the journey to Adelaide must be weighed against the possibility of better work being done in Adelaide. The magistrate found that the bringing of the repair job to Adelaide "was the most economical thing to do". Mayo J. agreed and, therefore, would have dismissed the appeal.

While Ross J. accepted the facts as found by the magistrate without qualification, he drew his own inferences from the facts and concluded that the vehicle on its trip to Mount Gambier was not being used exclusively *in* interstate trade, nor for the purposes of such trade.

The warning of the High Court in *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955), 93 C.L.R. at 79 was repeated by Ross J., who also held that the present case was very different from *Fry* v. *Russo*, where only a short journey had been undertaken.

The question of how far back the protection of s92 extends, though formulated several times, has never been settled. (These tests sug-

gested are outlined in 1 Adelaide Law Review at p. 78 and the articles there referred to.) Though the test in *Grannall's Case* is often cited, its application is often elusive. Napier C.J. has applied a test of fact and degree (See *Ridland* v. *Dyson* (supra); *Fry* v. *Russo* (supra) and the present case).

Both the test and conclusion are often arbitrary and a different answer could easily be made, as in most s.92 cases, if there were some differences of fact and circumstance to be considered. This is, of course, a most unsatisfactory position.

THE M'NAUGHTEN RULES

Medical Evidence and Insanity

The practical and conceptual difficulties of applying the M'Naughten Rules in the contemporary criminal trial appear to have been accentuated by the judgment of the Privy Council in *Attorney-General for South Australia* v. *Brown*.[1] The extent of the law's dilemma is more fully revealed when it is recognised that the views of the High Court on this matter, which the Privy Council modified considerably in setting aside the judgment of the High Court[2] and restoring the verdict and judgment of the trial court, were themselves open to strong theoretical and practical objections, some of them outlined in the previous issue of this journal.[3] The High Court had developed the view, first expressed in *Sodeman* v. *R.*,[4] that "domination by uncontrollable impulse . . . may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong".[5] Such a view is closely related to the High Court's doctrine[6] that if a man is incapable of reasoning with a moderate degree of sense and composure as to the rightness or wrongness of an act, he cannot be said to "know that what he is doing is wrong"—and it is well known that this interpretation of the M'Naughten Rules is by no means the same as that advanced by the English Court of Criminal Appeal in, for example, *R.* v. *Windle*.[7] The Privy Council, however, took no advantage of their opportunity to give some unified direction to the Common Law (if, indeed, there is a Common Law to England, Australia, and the various Australian States), but preferred to dissent from the High Court's view of "irresistible impulse" on only the narrowest of grounds. In brief, their Lordships demanded medical evidence, in every case in which the prisoner's self-control is in doubt, as to the effect of any (medically demonstrable) irresistible impulse on that prisoner's ability to know the nature and quality of his act or that his act is wrong. The law, they said, will not presume any effect without such evidence.

1. [1960] I W.L.R. 558.
2. *Brown* v. *R.* [1959] Argus L.R. 808; 33 A.L.J.R. 89.
3. I Adel. L.R. 69-74, a full comment which may be thought to anticipate to a great degree (albeit fortuitously) the views of the Privy Council.
4. (1936) 55 C.L.R. 192.
5. *Brown* v. *R.* [1959] Argus L.R. at 814; 33 A.L.J.R. at 93.
6. *Stapleton* v. *R.* (1952) 86 C.L.R. 358.
7. [1952] 2 Q.B. 826.

It might be thought that the issue is unimportant, in that, "irresistible impulse" is not a psychologically meaningful term, and is not likely to be raised by either side at the trial (in view of the well-settled rule that irresistible impulse *per se* does not constitute insanity and is no defence to a criminal charge). Indeed, neither the High Court nor the Privy Council seem to have been convinced that the term need ever have been used by the trial judge at all. But such a view is probably too easy to be correct. The truth is that "irresistible impulse", as an ambiguous and discredited legal notion, is merely the cloak for something far more immediately intelligible and compelling—the inevitable tendency of a jury to ask, in any case where insanity has been discussed, "Could he help doing it?" The law must have some way of dealing with that question. The ordinary way has been to instruct the jury that they should put it out of their minds and answer a different set of questions. The High Court pointed out that the answer to the common-sense question might assist the jury in deciding the legally relevant questions defined in the M'Naughten Rules. The Privy Council have now ruled that (if the matter is raised) medical evidence must be given as to the connection between the conclusion, "He could not help doing it", and the (legally relevant) conclusions, "He did not know the nature and quality of his act" or "He did not know that he was doing wrong". To the tension between the common-sense question and the legal questions there has thus been added a tension between common-sense concepts, legal concepts and the concepts of contemporary psychology.

The present state of the law relating to criminal insanity cannot be said to be conducive to legal certainty, the professional integrity of witnesses, or the sound administration of justice by judge and jury.

CONTRACT

Implied Term in the Sale of Goods

A recent case involving the applicability of an implied term in a contract for work done and materials supplied is that of *Peters* v. *C. W. McFarling Floor Surfacing Ltd.*[1]

Peters had engaged the respondents to lay "Expanko" tiles on the floors of two rooms in his house. The manager of the company inspected the floor and the ventilation under it before commencing operations, and was satisfied that there was no undue dampness in the floor, and that the ventilation was sufficient. On completion of the work, the floor seemed entirely satisfactory. After 24 hours, however, the tiles began to buckle and lift, and the adhesive material had become quite ineffective. Tests of the flooring revealed that some of the wood contained twice the usual percentage of water, and this had caused the tiles to buckle. The excess moisture resulted from the floor being covered, and from insufficient ventilation under the floor. The appellant subsequently had additional ventilation installed, and the floor re-tiled by another company.

1. [1959] S.A.S.R. 261.

The respondents brought an action for the contract price which the appellant had refused to pay upon the ground that the work was valueless; the appellant counter-claimed for the additional expense incurred by having new tiles laid by another contractor. In the lower court it was found as a matter of fact that the excess moisture in the floor was unknown to both parties, and could not be detected by an examination of reasonable care, such as was made by the company's manager.[2]

On appeal before Reed J., the appellant claimed that the work was valueless, and that the implied term in the contract that the work should be done in a good and workmanlike manner had not been fulfilled.

But Reed J., applying the decision in *G. H. Myers* v. *Brent Cross Service Co.*[3] held that such an implied warranty in a contract for work done and materials used was analogous to a warranty of fitness implied in the sale of goods.[4] Thus, for the appellant to succeed on his claim, and for the implied term to arise, he had to prove that he had made known expressly or by implication the "particular purpose" for which the materials were required, so as to show that he relied on the contractors' skill and judgment.[5] This he had failed to do, as the particular purpose here was to cover a badly ventilated floor, and this had not been made known to the contracting company.

Obviously the particular purpose may be made known impliedly as well as expressly.[6]

Besides referring to *Myers* case[7] Reed J. relied strongly on two other cases—one relating to the sale of goods, and one relating to a contract for work and materials—where such particular purpose had not been made known to the seller or contractor, with the result that the plaintiff could not recover.

The first of these was *Griffiths* v. *Peter Conway Ltd.*[8] where the plaintiff bought a Harris Tweed coat which gave her dermatitis, and her action failed because she had not made known to the defendant the particular purpose for which it was required, namely, to clothe a person whose skin was allergic to Harris Tweed. At the time of buying the coat she did not know of her allergy,[9] and could hardly be said to be in a position to inform the defendants of this particular purpose. However, as was the case with Mr.

2. "In my opinion", the Court said, "the plaintiff company has proved that its employees did their work with reasonable skill, and in a good and workmanlike manner . . . and that the failure of their work was due to circumstances for which they were not responsible". (Ibid, at 265.)
3. [1934] 1 K.B. 46.
4. See Sale of Goods Act 1895-1937, sec. 14.
5. Sale of Goods Act sec. 14(1).
6. Thus a carpet cleaner has been held liable to injury due to his leaving the end of an adjoining carpet loose—*Kimber* v. *Willett* [1947] 1 K.B. 570. Motor repairers have been held liable for faulty repair of brakes on a customer's car, even though part of the work was delegated to a sub-contractor—*Stewart* v. *Reavell's Garage* [1952] 2 K.B. 545.
7. Supra n. 3.
8. [1939] 1 All E.R. 685.
9. A note in 29 A.L.J. at p. 349 suggests that the plaintiff did know of her allergy. This, it is submitted, was not found by the trial judge, who went to great lengths in his judgment to establish by medical evidence that she was allergic at the time of buying the coat.

Peters, who did not know of the peculiarity of his floor, she could not recover because she did not make this particular purpose known.

The other case on which Reed J. relied was *Ingham* v. *Emes.*[10] In this case Mrs. Ingham had her hair dyed with Inecto which required a test to be carried out on the customer's skin before it could be safely applied. In this case, the hairdresser carried out in the proper manner the test required by the manufacturers, and the customer's skin showed no reaction to it. A week later she had her hair dyed, and within a few days she was found to be suffering from acute dermatitis, which was undoubtedly due to the "Inecto". She thereupon claimed damages in the county court for breach of contract and for negligence, and was allowed the claim for breach of contract on the ground of breach of an implied warranty. She was "of the rare type to whom the ordinary test will not apply, but who is allergic to a large dose". It was proved that the customer knew that she was allergic to Inecto, but had not disclosed this fact to the hairdresser. The defendant appealed on the claim for breach of contract, and the Court of Appeal reversed the decision of the county court.

Denning L.J. held that the case was analogous to the sale of goods, and that Mrs. Ingham could not rely on an implied term because she did not make known to the hairdresser the particular purpose for which the dye was required: namely, the dyeing of the hair of a person known to be allergic to Inecto.

However, it is submitted, with respect, that *Ingham* v. *Emes*[11] was wrongly decided, and it not a case of an implied term at all, but rather of a breach of an express term. There were, on the bottle, instructions for the use of the dye as follows:

> "The manufacturers draw attention to a simple and easy test which in the opinion of eminent skin specialists will disclose any pre-disposition to skin trouble from the use of the dye. The test must, as a matter of routine, be employed on each occasion prior to using the dye, regardless of the fact that it has been used with success on the same persons on a previous occasion".

Then followed in large letters:

> "It may be dangerous to use Inecto Rapid without this test".

The test was described and the instructions continued:

> "If no irritation has been experienced and there is no redness or inflammation then the skin is free from predisposition and the colouring may be used".

Mrs. Ingham herself read these instructions, and as Denning L.J. said[12]: "She was apparently a perfectly normal person, and the assistant said, or as good as said, to her: 'If you pass the test you may safely have Inecto'". There, it is submitted, was the express term on which Mrs. Ingham should have recovered. Despite this the learned Lord Justice then proceeded to hold this to be an implied term: "There would in those circumstances be an implied term that

10. [1955] 2 Q.B. 366.
11. Ibid.
12. Ibid, at 373.

Inecto was reasonably fit for the purpose of dyeing the hair of this particular person if she passed the test". Once this is called an implied term, the onus is of course on the plaintiff to prove that she made known the particular purpose for which the dye was required, and this Mrs. Ingham failed to do, and so the appeal was allowed.

"The way this result is reached in law is this", said Denning L.J.[13]: "in a contract for work and materials (such as the present) there is an implied term that the materials are reasonably fit for the purpose for which they are required: see *Myers* v. *Brent Cross Service Co.*[14] This term is analogous to the corresponding term in the sale of goods: See *Stewart* v. *Reavell's Garage.*[15] In order for the implied term to arise, however, the customer must make known to the contractor expressly or by implication the "particular purpose" for which the materials are required so as to show that he relies on the contractor's skill or judgment. The particular purpose in this case was to dye the hair, not of a normal person, but of a person allergic to Inecto. Mrs. Ingham did not make that particular purpose known to the assistant. She cannot therefore recover on the implied term". This was undoubtedly a correct statement of the law, but it is submitted that it was misapplied in *Ingham* v. *Emes* where there was an express term in the contract.

A further question arises in this branch of the law on implied terms in the sale of goods, namely to what extent must the particular purpose be made known to the vendor or contractor? From *Griffiths* v. *Peter Conway Ltd.*[16] it would appear that the particular purpose which should have been made known was to supply a coat not for a normal person, but for one who is allergic to Harris Tweed. In *Ingham* v. *Emes*, the particular purpose was to dye the hair, not of a normal person (i.e., a person who had passed the test), but of a person allergic to Inecto. The Court of Appeal, however, appear to have equated Mrs. Ingham's knowledge with the duty to disclose her idiosyncrasy. Romer L.J. said[17]: "In my opinion the decisive fact in this case which precludes Mrs. Ingham from succeeding is that when she had her hair dyed with Inecto in 1954 she knew, but the assistant did not know, that she had in 1947 suffered ill-effects from the application of this dye". It is submitted that an implied term in a contract cannot be made to depend on knowledge of a particular fact which, only if undisclosed, will bring the implied term into operation. Here, it is respectfully submitted, the Court of Appeal confused the claim in contract on the implied term with a claim of contributory negligence in tort. Be that as it may, the particular purpose is defined as being for a person allergic to Inecto, and not a normal person.

Similarly in *Peters* v. *McFarling*, the particular purpose was not to cover a normal floor, but to cover an insufficiently ventilated floor, and this purpose, for Mr. Peters to succeed, had to be made known to the plaintiff company even though both parties had every reason to believe that the floor was adequately ventilated.

13. Ibid, at 374
14. Supra n. 3.
15. Supra n. 6.
16. Supra n. 8.
17. [1955] Q.B. at 377.

Thus it is submitted that for a person to succeed on such an implied term in a contract for the sale of goods or for work done, he must either:

(a) Have knowledge of the peculiarity which will cause damage, and make that known to the seller, or

(b) he must make known to the seller every conceivable consequence which may arise, and which he has no reason to believe may exist—a seemingly impossible duty to perform.

POLICE OFFENCES ACT

Police Rights on Private Property

On the morning of Anzac Day, 1959, a plainclothes police constable out driving with his wife observed a man "slumped over the wheel" of a stationary utility. As he watched, the man staggered from the vehicle and, assisted by another, made his way into his house. The constable followed, but on disclosing his identity, was ordered aggressively to leave the premises, whereupon he arrested the man on charges of driving under the influence of liquor and using indecent language.

On appeal[1] from dismissal of a count of resisting a member of the police force in the execution of his duty, Napier C.J. was called upon to construe s.75 of the Police Offences Act, which reads,

> "(1) Any member of the police force, without any warrant other than this act, at any time of the day or night, may apprehend any person whom he finds committing or has reasonable cause to suspect of having committed, or being about to commit, any offence."

As a matter of strict literal interpretation, the answer to the question whether a constable can lawfully enter or remain on the premises of a suspected person when denied permission or requested to leave is obvious; but the result, when pronounced by a court, is nevertheless alarming. Napier C.J. held:

> "that the plain intention of the enactment is to give the constable such authority as would be given by a warrant for the apprehension of the suspected person. I am therefore, unable to accept the suggestion that this gives the member of the police force no right or authority to follow the suspected person onto private property for the purposes of effecting the arrest.
>
> I can see no reason why any such limitation should be placed upon the general words of the statute."[2]

The once prevailing common law rules provide an instructive comparison with this result.

1. A constable has a power—indeed a duty—to arrest without warrant where a felony is suspected. This power extends to private

1. *Dinan* v. *Brereton* [1960] S.A.L.S. Judgt. Scheme, 172.
2. Ibid, p. 175.

persons if a felony has actually been committed; but "except in the case of an actual breach of the peace, no person—whether public or private—has by the common law any power of arrest for misdemeanour".3

2. In cases of actual felony or breach of the peace a policeman has always been authorised to force his way onto premises, "but mere suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony hath been actually committed: unless the officer cometh armed with a warrant from a magistrate grounded on such suspicion".4

3. Where a warrant is required, it is not only necessary that it should be in the possession of the officer5; it must also not be a general warrant.6

These rules were examples of the principles assuring the integrity of the individual from arbitrary interference with his freedom and property.

The present Police Offences Act is one of many statutes impinging on these common law principles, principles which previous generations have regarded as fundamental. Admittedly, it is bad to deny power merely because it may be abused, but in view of the possible —one hesitates to say probable—abuse of s.75, it is fortunate that most statutes encroaching on the common law rules of arrest have inherent or interpolated safeguards for the individual.7 The Tasmanian Criminal Code is such an enactment. S.27(b) reads

> "it is lawful for any person to arrest without warrant any person whom he sees committing a breach of the peace or whom he believes on reasonable grounds to be about to commit or renew a breach of the peace."8

This section is narrow in operation and easy of construction, yet obviously effective whilst retaining safeguards for the individual. It is limited to breaches of the peace and applies only where the offence is actually witnessed or anticipated.9 The unlimited possibilities underlying s.75 are grim in comparison.

What, then, is the justification for such a wide and indefinite administrative tool as s.75? Perhaps Scott L.J. provided the answer:

> "The ultimate object which the law has in view in authorising arrest is, of course, the protection of society; but arrest is not an end in itself. What the law grants is not a right, but only a power, although it may be imposing a duty—especially on a constable.
>
> When effected, the arrest is in essence just a step in the administration of criminal justice. . . . It is by bringing him (the offender) in person before the court, whether committing magistrate or judge and jury, that he is made a party; and the whole purpose of arrest, just as much as of the initial steps of information, warrant or summons, is to give the court jurisdiction over the alleged offender, in order that justice may be done and that he, if found guilty, may be punished. The corporal presence of the offender is just as essential to trial verdict and judgment as to punishment; and if he be innocent it is equally essential to him as well as to the prosecution. English justice could not be what it is without the fundamental feature."10

Undoubtedly this is very true; but what is more fundamental—the right to acquittal, or the right to personal freedom?

3. *Leachinsky* v. *Christie* [1945] 2 All E.R. 395 at 401.
4. Foster's Crown Law (3 edn. ch. viii s. 23).
5. *Galliard* v. *Daxton* (1862) 2 B. & S. 363; *R.* v. *Chapman* (1871) 12 Cox C.C. 4; *Codd* v. *McCabe* (1876) 1 Ex.D. 352.
6. *Wilkes* v. *Wood* (1763) Lofft 1; *Entick* v. *Carrington* (1765) 2 Wils 275; *Leach* v. *Money* (1765) 19 State Tr. 1001.
7. See the compilation of some sixty such enactments by Avory J. in *Halsbury*, Hailsham Edition, Vol. 9, at pp. 89-95.
8. The corresponding provisions in other States are:—
   (i) Victoria, Crimes Act ss. 457-463.
   (ii) Western Australia, Criminal Code, ss. 564-570.
   (iii) Queensland, Criminal Code, ss. 546-551.
   (iv) New South Wales Crimes Act, ss. 352-357.
   Whilst these provisions cover many of the situations embraced by s. 75 of the South Australian Police Offences Act, they do not extend as widely as s. 75.
9. *Dowling* v. *Higgins* [1944] Tas. S.R. 32. Compare also *Thomas* v. *Sawkins* [1935] 1 K.B. 218; and *Duncan* v. *Jones* [1936] 1 K.B. 218.
10. *Leachinsky* v. *Christie* [1945] 2 All E.R. 395 at 404.

STATUTORY INTERPRETATION

"Shop"—"Offered or exposed for sale."

The case of *Goodwin's of Newtown Pty. Ltd.* v. *Gurry*1 is of importance in determining what premises are "shops" within the meaning of the Early Closing Act 1926-1954. "Shop" is defined by s.4 of the Act to mean "the whole or any portion of a building . . . in which goods are offered or exposed for sale by retail or by auction".

The appellant company displayed television sets in premises open to the public. These sets were not for sale, but their counterparts could be ordered on the premises and would be supplied by another firm. The company was convicted, under s.34 of the Early Closing Act 1926-1954, of occupying premises not registered in accordance with the requirements of s.31, and appealed on the ground that their premises were not a "shop" within the meaning of the Act. It was contended2 that the appellant company were not offering goods for sale but were merely inviting members of the public to make an offer to buy.

Brazel J., rejecting this contention, found from an examination of the Act that the words "offered for sale" should not be given any such "legal meaning", but should be construed "in the sense in which these words are understood in ordinary, everyday use, and particularly in commerce".3 His Honour then construed the words "offer for sale" to mean "present for sale", or display goods for sale in a way calculated to "influence or induce the public to buy their counterparts" from the other firm.4

1. [1959] S.A.S.R. 295.
2. On the authority of *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists* [1953] 1 Q.B. 401.
3. [1959] S.A.S.R. 295 at 299.
4. Ibid. at 300.

This meaning is very similar to other interpretations which have been given to the words in question. Thus it has been said that goods were offered for sale when "people were meant to look at them today and buy tomorrow".[5] The meaning of the phrase "expose for sale" was not discussed by Brazel J. in the present case,[6] but has been similarly interpreted as "exposed for the purpose of sale—that is to say, exposed in order to attract offers to purchase from the public".[7] Similarly, Murray's Dictionary gives the meaning "to offer publicly", put up "for (or to) sale".

It seems, therefore, that the meanings of "offer" and "expose" in the phrase "offered or exposed for sale" correspond very closely. This section may thus be said to be one where the draftsman is "less concerned to use words which fit into one another, like a jig-saw puzzle, than he is to use language which covers the subject without leaving loopholes".[8] From the case of *W. Goodwin and Coy. Pty. Ltd.* v. *Bridge*[9] it might also be said that the words "offer" and "expose" do not have a separate independent meaning in this section; the court in this case treated the phrase as a whole, and found that goods are "offered or exposed for sale" when they are displayed for the purpose of inducing people who might be attracted by the display to "enter into some contract which would ultimately result in the passing of the property in the goods from the owner to an individual member of the public"[10]

It would follow from these interpretations that display rooms which remain permanently closed would be "shops". Similarly display rooms open to the public would be places where goods are "offered or exposed for sale" and so bound by the Early Closing Act, even though no goods could be bought or ordered at any time in the rooms. The former is clearly contrary to the intention of the Legislature, since Part V of the Act[11] contemplates premises which are open to the public; and there seems to be no reason to make display rooms of the latter type "shops" within the meaning of the Act. It is submitted, therefore, that if a case of this sort were to arise for decision, the court might restrict the interpretations cited above by deciding that goods are only "offered or exposed for sale" on any premises when the public are influenced or induced to make some sort of agreement on the premises, such as placing an order for delivery[12] or paying an option.[13]

The case of *Turnbull* v. *Cocking*[14] seems to be authority against this restricted meaning, since it was there said that goods were offered and exposed for sale on the premises despite the fact that the public had no opportunity of offering to buy the goods or of making any

5. *Turnbull* v. *Cocking* (1899) 25 V.L.R. 83 at 84 *per* Maddern C.J.
6. His Honour found it unnecessary to determine its meaning in the view he took of the meaning of "offer for sale". [1959] S.A.S.R. 295 at 300.
7. *Clark* v. *Strachnan* (1940) S.C. 29 at 31 *per* the Lord Justice-General (Normand). On this interpretation the premises in question would be a "shop" even if the appellant's contended "legal meaning" were adopted.
8. *O'Sullivan* v. *Rout* [1950] S.A.S.R. 4 at 6, *per* Napier C.J.
9. [1957] A.R. (N.S.W.) 181.
10. Ibid. at 185.
11. This deals with closing times and working hours in shops.
12. As in the principal case.
13. As in *W. Goodwin & Coy. Pty. Ltd.* v. *Bridge* (1957) A.R. (N.S.W.) 181.
14. (1899) 25 V.L.R. 83.

agreement or order for their purchase. However, in that case the premises in question were a shop, and the question was whether it was closed within the meaning of a section which was different in form and substance from s.4 of the Early Closing Act. Thus this case should not be binding in any determination of the meaning of s.4.

On the other hand, it is submitted that the case of *Bonarius* v. *Playfair*[15] supports the restricted meaning. On the facts of this case the people coming on to the premises clearly did not have the opportunity of making any order or agreement to purchase the goods, since they had already made contracts with the defendants to buy the goods they were inspecting. The premises were held not to be a "shop".[16]

The second important proposition laid down by Brazel J. in the principal case was that it is immaterial whether the goods on display are the actual articles offered for sale or whether they are offered as samples of the goods which are available to prospective purchasers.[17]

It does not seem to be placing an unnatural meaning on the words of the section to interpret "goods" as "*any* goods", and there is no need to confine "goods" to the samples actually displayed. Similarly, "sale" can mean "*any* sale", and need not connote sales of only those goods which are on the premises.

The "mischief rule" of statutory interpretation also justifies this conclusion, since the appellant company was carrying on transactions which the Early Closing Act was designed to prevent. It was trading, or actively effecting sales of goods after the hour when shops must close. Again, in ordinary everyday speech we say that a shop-keeper is "offering" us goods when he shows us samples, irrespective of whether we finally buy these actual samples or other identical goods taken from the shop's store. Hence it seems perfectly in accordance with the language and intention of the section to say that on the facts of this case television sets were "offered or exposed for sale".

NOTE.—The case of *Fisher* v. *Bell*[18] came to hand after this commentary had been written. In this case, a Divisional Court of the Queen's Bench Division had to determine the meaning of the words "offer for sale" in s.1(1) of the Restriction of Offensive Weapons Act, 1959. It was decided that since Parliament must be taken to know the general law of the country, the term "offer for sale" must be given the meaning attributed to it in the ordinary law of contract. Accordingly, to display goods in a shop window with a price ticket attached was merely an invitation to treat and not an "offer for sale" within the meaning of the section. Lord Parker C.J. observed that "in many statutes and orders which prohibit the selling and offering for sale of goods it is very common when it is so desired

15. (1903) 20 W.N. (N.S.W.) 125.
16. It could also be said that because of the existing contracts there was no "influencing or inducing" the public to buy. But whether this was so on the facts of the case is not stated in the report; it is possible that those inspecting the meat were induced to go to a nearby shop and buy additional supplies of similar meat.
17. See also *W. Goodwin & Coy. Pty. Ltd.* v. *Bridge* (1957) A.R. (N.S.W.) 181 at 186.
18. [1960] 3 W.L.R. 919.

to insert the words 'offering or exposing for sale', 'exposing for sale' being clearly words which would cover the display of goods in a shop window".[19] However, there were no such words in the section in question and even if this was a *casus omissus* it was not for the court to supply the omission.

It is submitted with the greatest respect that His Lordship gives an unfortunately narrow construction to the words "offer for sale", and that it would be more permissible and realistic to speak of Parliament's manifest intention in this case rather than its presumed knowledge. In the case under review Brazel J. reached his conclusion from the words of the Act. He pointed out that the definition of "shop" in the Early Closing Act includes a building in which goods "are offered or exposed for sale by retail or by auction". It has been decided that an auctioneer does not offer goods for sale in law, but each bid at an auction is an offer by an intending purchaser and the fall of the auctioneer's hammer is normally the acceptance of the offer contained in the highest bid.[20] Hence the definition of "shop" in so far as it was intended to cover the places where goods are offered for sale by auction would be rendered nugatory unless the words in question were interpreted in the sense in which these words are ordinarily meant and understood. His Honour also observed that if the legal meaning of the words was adopted the Act would have no application to the "exempted shops" contained in the Third Schedule to the Act or to retail shops as that term is ordinarily understood. This plainly led to an absurdity, and so he gave the words their everyday meaning.

19. Ibid. at 922.
20. *McManus* v. *Fortescue* [1907] 2 K.B.1.

EVIDENCE

The Unsworn Statement

The right of an accused to make an unsworn statement from the dock, while not submitting himself to the terrors of cross-examination by eloquent and experienced counsel, has recently received the attention of the Supreme Court of South Australia on two occasions. The first occasion was in the *cause célèbre* of *R.* v. *Stuart*,[1] where the matter was discussed by the Full Court (Napier C.J., Mayo and Abbott JJ.) on appeal from a decision of Reed J.[2] The second occasion was in *Lavender* v. *Petherick*,[3] a judgment of Napier C.J. on appeal from a court of summary jurisdiction. The judgments taken together have helped to clarify an otherwise confused section of the law.

In *R.* v. *Stuart* the facts relevant to the present discussion were as follows: at the trial (for murder) of an illiterate aboriginal native whose knowledge of English was extremely limited, counsel for the defence intimated that the accused wished to make an

1. [1959] S.A.S.R. 144.
2. The case went on appeal to the High Court of Australia ((1959) 33 A.L.J.R. 113), but the decision of the Full Court was affirmed without enlargement.
3. [1960] S.A.S.R. 108.

unsworn statement, proposing that he should be allowed to do so by his counsel producing a document previously read over to and signed by the appellant, and that, on the appellant adopting it as the statement that he desired to make, it should be read to the jury as his unsworn statement. Objection being made, His Honour ruled that this could not be allowed, but approved of a suggestion by the Crown Prosecutor that counsel for the accused could prompt him on any topic, ask questions and generally assist him to make his statement. This suggestion was not adopted by counsel, but the accused proceeded to make a statement "while holding a typed statement at his side" which he could not read. The words uttered by the accused were characterized by the High Court as "a few, and relatively inarticulate, words which denied his guilt and alleged ill-treatment on the part of the police officers who had interrogated him".[4]

On appeal, the ruling that the illiterate accused could not have an unsworn statement read out for him, was one of the grounds of complaint. In dismissing this ground, Their Honours looked to the history of the right of an accused to make an unsworn statement.

The right of a person accused of a felony to give evidence on his own behalf was not given until 1839.[5] Prior to this he had been allowed only to make an unsworn statement "to speak for himself and to make his defence as best he could".[6]

In cases of treason, even after the right to be defended by counsel had been granted in 1695,[7] the prisoner as well as his counsel was allowed to address the jury. In misdemeanour, on the other hand, where the defendant had always been allowed counsel, no such statement could be made.[8]

Thus after the right to give evidence on his own behalf was given to a prisoner accused of felony, analogies could be drawn either from the practice of treason trials or those for misdemeanour in determining what was to be the practice in relation to the "statement from the dock" in the case of felony. After an initial leaning towards the practice in misdemeanour,[9] the modern practice was laid down in *R.* v. *Shimmin*.[10] This right is expressly saved by the Evidence Act (S.A.) 1925. In S.A. however this right has been extended by the practice of the judges themselves in allowing the statement to be *read* from a written or typed statement.[11] Nonetheless, Their Honours, while recognising this practice, refused to allow a further departure from the earlier practice as suggested by counsel—"the right of a person to have his statement read out for him". While the conclusion reached is hardly capable of criticism in respect of precedent, the result in the instant case was indeed an anomalous one.

4. *Stuart* v. *R.*, Judgment of the High Court of June 19, 1959. This portion of the judgment is not reported in 33 A.L.J.R. at 114.
5. Trials for Felony Act 1836: 6 & 7 Wm. IV c. 114.
6. *R.* v. *Stuart* [1959] S.A.S.R. 148.
7. 7 & 8 Wm. III c. 3.
8. *R.* v. *White* (1811) 3 Camp. 98, *R.* v. *Maybury* (1863) 11 L.T. 566, both cited in *R.* v. *Stuart* [1959] S.A.S.R. at 149.
9. *R.* v. *Boucher* (1837) 8 C. & P. 141, and other cases cited in *R.* v. *Stuart* [1959] S.A.S.R. at 149.
10. (1882) 15 Cox C.C. 122.
11. *R.* v. *Stuart* [1959] S.A.S.R. 144 at 150-151.

The practice of the Court was to allow a written statement to be read by the accused.[12] This indulgence would be of little assistance to an illiterate aboriginal or a non-English speaking immigrant. Surely, assuming the policy of the law of Procedure to be the equal treatment of all prisoners, the better procedure would have been to allow the accused here, who was just such an illiterate aboriginal, to have someone read his statement out. Justice would at least have "seemed" to have been done.

The alternative suggested to counsel—that he prompt the witness and help him to make his oral statement—might have been of more benefit to the accused, as suggested by the High Court, but the effect on a jury of a statement adduced from an accused by promptings of counsel may well be thought negligible.

At a preliminary hearing of an indictable offence before a court of summary jurisdiction, the prisoner is entitled to make an unsworn statement, if he so choose.[13]

The position in a court of summary jurisdiction dealing with non-indictable offences was dealt with by Napier C.J. in *Lavender* v. *Petherick*.[14] The relevant facts were that the respondent was charged with failure to stop at a "stop sign", contrary to s.130a of the Road Traffic Act 1934-58. The respondent made an unsworn statement contradicting the evidence of the prosecution, and asserting that he had stopped at the sign. The justices dismissed the complaint, holding that the respondent had given a reasonable account of his actions and was entitled to the benefit of the doubt. On appeal Napier C.J. characterized the result as being indicative of "a little learning" being "a dangerous thing".[15] While dismissing the appeal, on the ground that to send the complaint for another trial would be oppressive, His Honour decided that in a court of summary jurisdiction dealing with a charge of a simple offence the defendant had no right to make any unsworn statement when defended by counsel. The courts of summary jurisdiction were a statutory creation and His Honour could find "nothing in the statutes which gives any support to the suggestion that a defendant who is represented by counsel is entitled to make an unsworn statement".[16] His Honour was referred to a passage in 69 L.Q.R. 24,[17] wherein it was stated:

> "Whatever the practice may be in trials on indictment, in summary jurisdiction unsworn statements are a commonplace. It is explained to the accused or defendant that there are three courses open to him—he may say nothing; he may go into the box and give evidence on oath, being warned that if he does so he will be subject to cross-examination; or he may make a statement 'from where you are' in which case he cannot be asked any questions, except occasionally to clarify what he has said."

12. A practice which Their Honours admitted would be very difficult to reverse —[1959] S.A.S.R. at 150-151. If this be so, it would probably be more correct to use the word "right" rather than "indulgence".
13. Vide, e.g., *R.* v. *Thimmin* (1852) 15 Cox C.C. 122: Justices Act 1921-56, s.110.
14. [1960] S.A.S.R. 108.
15. Ibid. at 109.
16. Ibid. at 112.
17. C. K. Allen, "Unsworn Statements by Accused Persons", 69 L.Q.R. 22 at 24.

As His Honour pointed out, the Justices Act 1921-56[18] expressly allows the unsworn statement in proceedings to committal. However no such provision is to be found in Part IV of the Act.[19] Indeed it is laid down by s.68(2) that:

> "Subect to the provisions of s.12 Evidence Act 1929[20] every witness shall be examined upon oath."

Under s.29 of the Justices Act, the defendant is at liberty to conduct his case personally or through his solicitor. His Honour concluded that there was no right to make an unsworn statement when the defendant was represented by counsel in proceedings under Part IV—Summary Jurisdiction.

The decision of His Honour is by no means without precedent. The Supreme Court of N.S.W. held in *ex. p. Holland*[21] that the defendant had no right to make a statement under a section similar to s.68.[22] Moreover, s.68 appears to contemplate that the Court will hear only the evidence on both sides and the usual addresses.[23]

Perusal of s.68 shows an alternative argument. S.68 reads:

> "(1) If the defendant does not admit the truth of the complaint the court shall proceed to hear . . .
>
> (b) the defendant and his witnesses and any other evidence which he adduces in his defence . . ."
>
> (2) Subject to the provisions of section 12(4) of the Evidence Act 1929, every *witness*[24] shall be examined upon oath.
>
> (3) The practice before a court of summary jurisdiction upon the hearing of any complaint with respect to the examination and cross examination of witnesses and the right of addressing the Court in reply or *otherwise*[25] shall be in accordance as nearly as may be with the practice for the time being of the Supreme Court upon the trial of an action."

This provision was heavily relied on by Napier C.J. in arriving at his conclusion.

However, sub-section 1(b) would seem not to affect the question of unsworn statements, for these do not amount to evidence in the ordinary sense, i.e., evidence as to the facts sworn to, but "evidence" in the entirely different sense of "evidence that this is what he has said or what he says—this is his version of the facts".[26] If this be so, then s.68(2) also does not apply to an unsworn statement—if the prisoner is not giving evidence how can he be a "witness"?

18. Section 110.
19. Part IV, Summary Jurisdiction—Section 42-100.
20. Evidence Act 1929 s.12 relates to taking evidence from a child under 10 years of age.
21. (1912) 12 S.R. (N.S.W.) 343.
22. Hannan—Summary Procedure of Justices, 3rd edition, at 85 and 86.
23. Ibid. at 86.
24. Italics inserted.
25. Italics inserted.
26. [1960] S.A.S.R. at 114. This view was also adopted in *R.* v. *McKenna* [1951] St. R.Q. 299; Cave J.'s practice appears to have been to direct a jury to accept the statement as true if the prosecution had made no inquiry into its truth or had failed to shake it—*R.* v. *Shimmin* (1882) 15 Cox C.C. 122. Vide quoque: *Peacock* v. *The King* (1911) 13 C.L.R. 119.

"Witness", in legal circles at least, usually refers to a person giving evidence.[27]

Turning then to sub-section (3), cited but not discussed by Napier C.J. in the instant case, one would certainly seem justified in understanding that the practice of the court of summary jurisdiction is to be assimilated to the practice of the Supreme Court in a criminal charge rather than to the practice in a civil case (as seems to have been assumed in His Honour's judgment). The word "action" is a generic term including criminal and civil cases, as was stated emphatically by the House of Lords in *Bradlaugh* v. *Clarke*.[28] Yet Napier C.J.'s reasoning seems, with respect, to have been based in some part on a view of an "action" as a "civil action". If the above definition of an action be applicable here, then the defendant in a court of summary jurisdiction has the right to make an unsworn statement. Certainly the words of the section could be interpreted to apply to such rights—"the right of addressing the court in reply *or otherwise*".[29]

In Napier C.J.'s opinion, the passage from the Law Quarterly Review could possibly be construed as relating only to an accused not defended by counsel and also only to summary trial of indictable offences. If this was not the true construction of the article, His Honour was unwilling to accept it as a statement of the law in South Australia.[30] The law, then, as it stands in South Australia after *R.* v. *Stuart* and *Lavender* v. *Petherick*, can be summarized as follows:

A. In the Supreme Court:—
   (1) The accused has the right to give evidence on oath or make an unsworn statement.
   (2) He is in practice allowed (although he may not be able to insist upon it as a *right*), to read the statement from a written document.
   (3) He has no right to have someone read his statement to the court on his behalf. If this is to be allowed at all it must be with the consent of the prosecutor.

B. In a Court of Summary Jurisdiction dealing with procedure to committal or summary trial of indictable offences:—
   (1) The accused has the right to make an unsworn statement.
   (2) The same principles apply as in the Supreme Court.

C. In a Court of Summary Jurisdiction dealing with non-indictable offences:—
   The defendant has no right to make an unsworn statement.

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27. Wharton's Law Lexicon, 14th edition, at 1073.
28. (1883) 8 A.C. 354.
29. Italics inserted.
30. [1960] S.A.S.R. at 111.