

## TRADING STAMP ACT, 1924-1935

### *Coupons and Cut Prices*

One of the closest points of contact between law and political economics is to be found in the trading stamp legislation which some governments have enacted in an effort to reduce what they regard as unfair competition.<sup>1</sup> The object of this legislation is to eliminate the practice of giving away coupons, called trading stamps in the statutes, with each purchase of certain goods, or of any goods from a given trader's premises, which if collected in sufficient number entitle the holder to exchange them for some more or less useful object without further payment.

The argument against this particular inducement to the prospective purchaser appears to be twofold: that it operates against the small trader who has not the resources to carry stock for the sole purpose of giving it away in return for worthless pieces of paper, and that it in effect compels the public to pay more for the original article than necessary because the trader offering the coupons will cover the cost of the subsequent "gift" in the price of the original purchase. It is occasionally perceived that these two lines of argument contradict one another, for if a large trader can cover the cost by putting up the price, so can a small one. A revised defence of trading stamp legislation is then put forward to the effect that the trader covers his additional costs, but at the same time increases his profits, not by putting up prices but by increasing his turnover through attracting more customers. This is said also to be against the interest of the purchasing public on the ground that they are induced by the free coupons to buy things they do not want. The answers to these points seem to be, first, that once again a small trader can increase his turnover by additional inducements to purchase in the same way as a large trader, although not of course in the same quantity, and secondly, that if the tendency of the public at large to buy things it does not want is to be taken seriously, a start ought to be made by drastically modifying the law relating to both hire-purchase and advertising.

It is not correct that trading stamps encourage cut throat competition because a much simpler, and more common, way of competing is by the use of discounts and trade-ins. Neither is it established that giving goods away free in return for coupons is a means of unloading stock which would not sell anyway. No doubt this happens sometimes, but if it were the rule rather than the exception trading stamps would not have flourished to an extent which required repressive legislation to eliminate them. Nevertheless some communities, of which South Australia is one, are fortunate enough to enjoy whatever elusive benefits are conferred by having a Trading Stamp Act on the statute book. It is, no doubt, no more than an unfortunate coincidence that

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1. Apart from the South Australian statute referred to below, see e.g., Trading Stamp Act, 1948 (W.A.); Trading Coupons Act, 1931 (N.Z.). Trading stamps have attained constitutional significance in Canada: *Fleming* (1962) 35 D.L.R. 2d 483.

although there has been legislation of this kind in force in South Australia since 1904,<sup>2</sup> the only two reported cases on these Acts<sup>3</sup> were both prosecutions against traders whose headquarters were in Sydney, N.S.W.

The second of these cases, which is the subject of this note, was *Goodwin v. Brebner*.<sup>4</sup> The defendant was charged with an offence against the Trading Stamp Act, 1924-1935 (S.A.), s. 5 (1) (b), which so far as relevant runs as follows.

"5. (1) No person shall, on the sale of, or in connection with the sale, free distribution, or advertising of any goods—

(a) . . .

(b) issue or deliver with or about or concerning, relating to, or in connection with such goods or any of them any writing promising, offering, or representing, or purporting to promise, offer, or represent, that the purchaser or any other person will be entitled to or will receive any refund, gift, allowance, reward, valuable consideration, benefit or advantage of any kind whatsoever dependent on the purchase of goods or of any quantity thereof. . . ."

The subsection concludes with a proviso that it does not prevent the offering, etc., of a genuine cash discount. At the time of the prosecution there was a widespread practice in Adelaide, which has since ceased, no doubt as a consequence of this case, of publishing advertisements in the press and by television offering what amounted to free gifts for the purchasers of specified goods. The defendant's particular variation on this theme was an advertisement offering the purchaser from his Adelaide branch of either an automatic washing machine or a "De Luxe" refrigerator the option of buying in addition any one of a variety of other objects, including a television set, for the nominal price of ten shillings. This offer was perfectly genuine, incredible though it seems. The prosecution claimed that the issuing of a newspaper advertisement of this kind was an offence under s. 5 (1) (b).

Since on the face of things the advertisement came squarely within the statutory words, the argument made on behalf of the defendant before the Full Court<sup>5</sup> was that the advertisement was not within the scope and intendment of the legislation, properly construed, and therefore did not amount to a "writing" within the meaning of s. 5 (1) (b). This contention was based on the view that the Act was directed at one particular form of commercial activity, the use of trading stamps, and that the wide and imprecise words of s. 5 (1) (b) would have an

2. The first such statute in South Australia was the Trading Stamp Act, 1904, repealed by the Trading Stamp Act, 1924. The 1924 Act was converted into the present Act by extensive amendment in 1935.

3. *Home Benefits v. Crafter* (1939) 61 C.L.R. 701; *Goodwin v. Brebner* [1962] S.A.S.R. 87. The first of these cases decided that s. 5A of the South Australian statute did not contravene s. 92 of the Constitution.

4. [1962] S.A.S.R. 78.

5. The defendant had been prosecuted summarily and convicted. From this conviction he appealed to the Supreme Court. The appeal was referred, by consent, to the Full Court for determination.

effect on the law far beyond what the legislature intended unless their *prima facie* meaning was cut down in accordance with this approach to the statute. Support for this argument was derived from the terms of the rest of the Act and its history.

The Full Court conceded that it might well be necessary<sup>6</sup> to imply some limit on the generality of the expression "benefit or advantage of any kind whatsoever", for it could hardly be the law, to take a random example, that a manufacturer of honey is forbidden to advertise that purchasers of his product will get the benefit of a container which can be used as a drinking glass when the honey is finished. The delimitation of this restriction on the section the court left to another time, however. The advertisement in the instant case, although admittedly not a trading stamp because it did not authorise anyone to get anything and made no reference to any such transaction, was "well within the scope and mischief of the enactment" because it was "designed and intended to produce the same result as a 'trading stamp'".<sup>7</sup> The defendant's appeal from conviction was therefore dismissed.

In any problem of statutory construction where a line has to be drawn between the literal meaning of words and a meaning so much in conformity with the rest of the statute as to make the section in question practically superfluous, the solution is bound to be arbitrary and to appear more or less satisfactory according to one's views on the utility of the legislation in question. There would therefore be no point in trying to prove that the decision of the Full Court was in some sense wrong. *Goodwin v. Brebner* establishes, and not before due time, that in South Australia the Trading Stamp Act is not a dead letter and, so far as the courts are concerned, will be given a reasonably wide interpretation where borderline commercial activities are in question.

Nevertheless it is to be regretted, in view of the rarity of reported cases on this statute, that the court did not take the opportunity to enlarge a little on the meaning of s. 5 (1) (b). Just what is meant by a benefit or advantage that a trader must not advertise as being dependent upon the previous purchase of goods remains almost as obscure as before. Suppose a shop receives a limited supply of some commodity much in demand and advertises, not unreasonably, that it will be sold to established customers only; or suppose a trader issues an advertisement which merely says that customers will learn something of advantage when they arrive at his shop, and when they get there they receive a verbal offer of the same kind as was made in writing in the *Goodwin* case; are these advertisements within the statute? If the answer in the first case is no, but in the second yes, as one is inclined to suspect, does this not reduce the statute to an elaborate cloak for the exercise of an almost unlimited discretion by the court?

Perhaps the basic problem is not so much obscure drafting, although no-one could pretend that this particular statute is a model of clarity, as the inherent difficulty of translating politico-economic policies into legal terms. One wonders, for instance, whether the omission of

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6. [1962] S.A.S.R. 78, 80.

7. [1962] S.A.S.R. 78, 81.

unwritten advertisements from s. 5 (1) (b) is deliberate or accidental. The utility of *Goodwin v. Brebner* would have been much increased if the court had seen fit to make some observations on these and similar questions.

## ANTICIPATORY BREACH

### *Right of Plaintiff to Perform*

The concept of anticipatory breach in the law of contract has not as yet been subjected to any systematic analysis by English or Australian Courts. The principle that a plaintiff is under a duty to minimise the consequences of the defendant's breach is likewise subject to considerable doubt in particular aspects of its operation. When the more obscure features of these doctrines interact, and the issue involves a principle fundamental to the law of contract, one might expect some enlightening analysis from reports and appraisals of the case, particularly if the decision is given by a bare majority of the House of Lords. The decision in *White and Carter (Councils) Ltd. v. McGregor*<sup>1</sup> presented such an opportunity but, although the consensus of opinion regards it as unfortunate in its practical consequences, criticism seems to have generally ignored important questions of law which appear vital to the issue it involved.<sup>2</sup>

In this case, advertising agents agreed with the representative of a garage proprietor to display advertisements for his garage, on refuse containers, for a period of three years. On the same day the proprietor wrote requiring them to cancel the contract on the ground that his representative had mistaken his wishes. They refused, however, and began the display in accordance with the contract. A clause provided for acceleration of payments, making all due when an instalment was in arrears for a certain time. The garage proprietor having refused to pay any sums due under the contract, the appellant sued him for the whole amount.

The action was heard at first instance by the Sheriff-Substitute of Dumbarton, who found for the defendant. The Second Division of the Scottish Court of Session unanimously dismissed an appeal from this decision. From there the appellants proceeded to the House of Lords. The House of Lords (Lord Reid, Lord Tucker and Lord Hodson; Lord Keith and Lord Morton dissenting) held that the advertising agents were entitled to carry out the contract and claim the full contract price and were not obliged to accept the repudiation and restrict their remedy to an action for damages.

The substantial issue in the case seemed relatively simple: could the appellant be prevented from earning his right to the defendant's performance after the latter had repudiated the contract? The comparative novelty of this issue in English Law has been explained by the fact that in most cases of this type the plaintiff would require the co-operation of the defendant in order to complete his performance

1. [1962] 2 W.L.R. 17.

2. Notes appear in 36 A.L.J. 86; 25 M.L.R. 364; 233 *Law Times* 381; 78 L.Q.R. 265.

and earn the agreed price.<sup>3</sup> Whilst this may be so, it is probably also true that it would rarely give a tangible business advantage to a plaintiff to persist in performance and claim the contract price, when compensation is available by an action in damages for lost profits, expenses incurred, etc. The present case shows that exceptional circumstances may render it advantageous to complete the contract and sue for the price.<sup>4</sup> Since contract cancellations are not an uncommon business phenomenon, it is of some practical importance that businessmen and their advisers should have a clear picture of the legal consequences that result.

The consensus of opinion among commentators has been fairly unanimous that a plaintiff should not be allowed to continue his side of the contract after the other party has deserted it.<sup>5</sup> In the present case, the onerous consequences of allowing the plaintiff so to continue were particularly in evidence; first, because the respondent was technically bound by his agent's negotiating outside his express authority, secondly, because, being a contract for advertising, the continued publication might prove not only devoid of benefit, but perhaps even injurious to the respondent's business.

The essence of the opinions given by the majority who delivered speeches (Lord Tucker concurred) was contained in the simple proposition that "repudiation by one of the parties does not itself discharge it".<sup>5a</sup> In other words, an unaccepted repudiation continues the contract in full effect. Taking this proposition conjointly with the axiom that one may recover a legitimately incurred debt, there would seem to be little room left for argument.<sup>6</sup> In fact, the only available

3. Goodhart, 78 *L.Q.R.* 263.

4. It is not clear why the appellants took this course. By bringing suit for the liquidated sum, one avoids the difficulties involved in proving the actual damage. In particular, one avoids the risk that a court might assess damages on an unrealistic assumption that the plaintiff should reasonably have taken certain steps to avoid damage.

5. An interesting note in 233 *Law Times* at 381 points out the unfortunate consequences to various common types of contract. Particularly relevant is the observation that it would give the plaintiff a right "to extort a settlement giving far more than reasonable compensation for loss".

5a. *White and Carter (Councils) Ltd. v. McGregor* [1962] 2 *W.L.R.* 17 at p. 36.

6. It has been argued against the majority decision that an unaccepted repudiation does not continue the contract in full effect because by repudiating his own duty the repudiator must lose his right to enforce the other party's obligation, hence there is no longer a corresponding duty on the innocent party to perform (78 *L.Q.R.* 265). This argument may be dealt with independently of the contention, implicit in the mitigation argument dealt with below, that an unaccepted repudiation constitutes a breach and therefore gives rise to a duty to mitigate, for the existence of a breach may nevertheless preserve a contract in full effect, e.g. if the breach is merely a breach of warranty. The argument appears to beg the question because, on present authority, the repudiating party only loses his right to enforce the other party's obligation if the other party exercises his option to determine the contract for the breach of a condition, so that the argument is merely a denial of his right of election. Cases affirming the election are: *Frost v. Knight* [1872] *L.R.* 7 *Ex.* 111; *Hochster v. De la tour* (1853) 2 *E. & B.* 678; *Avery v. Bowden* (1856) 6 *E. & B.* 953; *Johnstone v. Milling* (1886) 16 *Q.B.D.* 460, 467, 472; *Heyman v. Darwins Ltd.* [1942] *A.C.* 356, 361; *Martin v. Stout* [1925] *A.C.* at 363-5; *Danube Ry v. Xenos* (1862) 11 *C.B. (N.S.)* 152; *Wilkinson v. Verity* (1871) *L.R.* 6 *C.P.* 206 at 209. See also *Chitty* 21st ed. 192, 248; *Leake* 8th ed. 675; *Sutton and Shannon* 5th ed. 298-301; *Salmund and Williams* 2nd ed. 541; *Wilson: The Law of Contract*, 438; *Cheshire and Fifoot* 5th ed. 488; *Halsbury* 3rd ed. vol. 8, S. 344.

legal argument seemed to be the principle that requires the victim of a contract breach to "take all reasonable steps to mitigate his damage".<sup>7</sup> Thus a plaintiff would presumably be required to refrain from performance, since it caused unnecessary expense to the respondent.

This principle, although ignored by the majority, was invoked by both Lords Morton and Keith in their dissenting opinions. Their view is given considerable force if close attention is paid to the terms of Lord Reid's opinion, particularly this passage:<sup>8</sup>

It may well be that if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. . . . So it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.

This could be interpreted as a recognition of the principle of mitigation in a somewhat broader sense, the reason why Lord Reid failed to reach the same conclusion as the minority on this point being the comparatively minor issue of proof, the respondent having merely failed to prove the lack of interest to Lord Reid's satisfaction.<sup>9</sup> If this is so then it would appear that relatively minor additions to the respondents' case could have produced a decision in their favour, the result being conclusive authority that the principle of mitigation can prevent a plaintiff claiming for the price of a performance persisted in despite the defendant's previous repudiation. It is submitted that the present state of the law both on anticipatory breach and on the principle of mitigation, is such as to preclude this result.

The duty to mitigate is a duty to minimise, counterbalance or avoid the injurious consequences of the defendant's breach. It is therefore relevant only to an action for compensation for the damage flowing from the breach. This duty cannot arise until a breach has occurred. Even if such a breach has occurred, the duty is not relevant if the

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7. This "duty to mitigate" though little discussed in English Law, is well supported by authority, including *British Westinghouse v. Underground Railways* [1912] A.C. 175; *Jamal v. Moolla Dawood* [1916] A.C. 175; *Banco de Portugal v. Waterlow* [1932] A.C. 452; *Dunkirk Colliery Co. v. Lever* (1872) 26 L.J. 706 (H.L.).

8. [1962] 2 W.L.R. 17, 23.

9. The onus of proving a breach of the duty to mitigate rests on the defendant: *Roper v. Johnson* (1872) L.R. 8 C.P. 167 at 181; *James (Finlay) v. N.V. Kwik Hoo Tong Maatschappij* [1928] 2 K.B. 604 at 614. *Criss v. Alexander* 28 (N.S.W.) S.R. 587.

action is not strictly for damages for the breach, but is an action brought for the specific enforcement of an obligation to pay a debt.<sup>10</sup>

I. *An unaccepted repudiation is not a "breach"; therefore no duty to mitigate can arise.*

The proposition that the duty to mitigate arises only from the time of a breach of contract is too well supported by authority to be doubted.<sup>11</sup> It is somewhat more difficult, however, accurately to assess the effect of an unaccepted repudiation, and Scrutton L.J. is certainly not alone in confessing that he has "never been able to understand what effect the repudiation of one party has unless the other party accepts the repudiation."<sup>12</sup> Despite a general lack of analysis, the consensus of opinion in the English texts holds that no breach is constituted until acceptance.<sup>13</sup> This is in agreement with the dictum of Lord Esher M.R. in *Johnstone v. Milling*<sup>14</sup> that:

A renunciation of a contract, or in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action.

At least one case has been decided on this point. In *Avery v. Bowden*<sup>15</sup> the question was whether there had been a complete breach of the contract before the declaration of war. The defendant by a

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10. The arguments developed in this note are admittedly incompatible with American Law on the topic. Since *Clark v. Marsiglia* 1 Denio, 317 (1845), there have been many American cases in which the principle of mitigation was used to prevent a plaintiff performing despite repudiation. Although these American decisions cannot now be disputed (*Corbin*, SS. 983, 1053; *Williston*, S. 1298; *Restatement of the Law of Contract* S. 388), it is submitted that they must be regarded as anomalous, since formulation of the principle of mitigation is the same as in English law. The apparent neglect of American texts to analyse the implications of using the principle of mitigation where the action is for enforcement of a debt, leads to some puzzling theorisation. Corbin speaks of the relevance of the principle of mitigation to the analogous claim for specific performance in equity: "The rule as to avoidable consequences is very materially affected by the plaintiff's asking and obtaining a decree for specific performance by the defendant. Such a decree presupposes the continued readiness of the plaintiff to render his agreed performance in exchange; and very generally it will either specifically require or be conditional upon his rendering that performance. Subject to this modification, however, the rule as to avoidable consequences is still applicable. The plaintiff will not be awarded damages for an injury that he could reasonably be expected to avoid; *but it is no longer reasonable to expect him to avoid injury by refraining from rendering the performance upon which his right to specific performance by the defendant is dependent.*" (Italics added.) The same argument is clearly applicable where the action is for performance at common law. In fact perhaps more strongly so, since the discretion incident to an equitable remedy is lacking.
11. *Eg. Harris v. Edmonds* (1845) 1 Car. & Kir. 686; *Wilson v. Hicks* (1857) 26 L.J. Ex. 242; *Shindler v. Northern Raincoat Co.* (1960) 2 A.E.R. 239.
12. *Golding v. London & Edinburgh Insurance Co., Ltd.* (1932) 43 Ll. 1 Rep. 487, 488.
13. See eg., *Chitty* 21st ed. 192-193, 249; *Cheshire & Fifoot* 5th ed. 488, n. 2; *Sutton and Shannon* 5th ed. 299; *Leake* 8th ed. 675; *Morison: The Principles of Rescission of Contracts* 34-35.
14. (1886) 16 Q.B.D. 460, 467.
15. (1855) 5 E. & B. 714.

charter-party had agreed to supply a cargo for plaintiff's ship within a specified time after it reached Odessa. At the port, the defendant's agent told the Master that no cargo was available, and advised him not to remain in the expectation that a cargo would be supplied. The Master refused to treat this refusal as a ground of excuse from further performance, and continued to demand that a cargo be supplied. In these circumstances, and before the time for loading the ship had expired, war broke out between England and Russia, making performance of the contract impossible. Thereafter the plaintiff sued for breach of contract and the court held that, as the plaintiff had not accepted or acted upon the renunciation, there had been no actual breach prior to the contract's frustration and that consequently there was nothing on which to ground his action. Whether this authority is consistent with a rational exposition of the doctrine of anticipatory breach is another question. The subject has been little written on and must be regarded as open to speculation.

The doctrine of anticipatory breach has developed from cases of repudiation where the repudiation went to the substance of the repudiator's performance. It was therefore historically restricted to cases of anticipatory breach of what, in the modern terminology, would be referred to as a condition. (Theoretically it is conceivable that there might be anticipatory breach of a warranty, a matter incidental to the main purpose of the contract. In fact this would rarely occur, because repudiation is almost always a desertion of the contract.) It is submitted, accordingly, that the sole effect of the doctrine is to anticipate the breach of condition technically occurring only after the time for performance, and give it the status of a present breach of condition. Thus as with normal breach of condition, the plaintiff is given an option to either affirm or disaffirm the contract, plus an independent action for damages.<sup>16</sup> This theory is consistent with the policy of the doctrine, which is evidently to free the innocent party as much as possible from the entanglements of a contract the other has deserted without prejudicing his position vis-a-vis enforcement. It was sufficient for this purpose merely to ensure the plaintiff his option to continue the contract or to rescind it and claim damages; it was never necessary to decide the exact details of this process, whether for instance the repudiation was: (1) a breach of warranty which if accepted constituted a breach of condition; or (2) not a breach proper, but an event which if the plaintiff treated it in a certain way (i.e., accepted it) was constituted a breach of condition; or (3) a breach of condition subject to the formal disability that it must be acknowledged before suing on it. Of these alternatives, the only one

16. Against this must be weighed the dictum in *Johnstone v. Milling* op. cit. n. 14, that a plaintiff who affirms the contract cannot also recover for consequential damage flowing from the repudiation (e.g. he may suffer a loss of credit on the cancellation becoming known). This point does not seem to be finally settled, however, and it is submitted that the issue remains open. Some support for the view tendered is apparent in recent dicta of Devlin J. in *Universal Cargo Carriers Corporation v. Citati* [1957] 2 W.L.R. 713 at 732. An alternative thesis regards repudiation as an offer to rescind, which may or may not be accepted. *Ehrensperger v. Anderson* (1884) 3 Exch. 148 per Baron Parke at 188; Morison: *The Principles of Rescission of Contracts*, 34. This "mutual rescission" theory fails to account for the action in damages on acceptance.



that appears consistent with *Avery v. Bowden*, *Johnstone v. Milling* and the opinions referred to is the second. That is, "acceptance" is technically necessary in order to constitute a breach of contract from a mere repudiation.

Finally, it should be mentioned that there is authority that the limitation period for the purposes of the limitations legislation does not begin to run from an unaccepted repudiation.<sup>17</sup> The holding seems to be based on the incompatibility of the alternative view with the elective right of the plaintiff. Since the limitation period always runs from the time when a complete cause of action first accrued,<sup>18</sup> it follows that there could not have been a breach merely on the repudiation.

II. *The action for the price is not an action for damages for breach of contract and is therefore not subject to the principle of mitigation.*

If it were established that an unaccepted repudiation nevertheless constitutes a breach of contract, it still does not follow that the duty to mitigate can be invoked by a defendant as suggested by the minority Lords in *White's Case*. The duty is confined to the action claiming damages for the injurious consequences of the breach; for here, although a breach may have occurred and a duty may arise in respect of consequential damage flowing from it, yet the action is not for the damage sustained from the breach, but for the debt incurred by the plaintiff's completing his performance subsequent to the breach. In this sense the dictum of Lord Keith of Avonholm that "the party complaining of the breach also has a duty to minimise the damage he has suffered . . ." is misleading, for the party in question is not complaining of the breach of a duty not to anticipatorily repudiate, but of the non-payment of a debt incurred at a later stage.

The principle of mitigation has since its first appearance, invariably been defined, somewhat restrictively, in terms of a duty to mitigate "damage".<sup>19</sup> Consistently, analysis has tended to present it as a qualifying rule to, or subsidiary rule of, those rules used by the courts to ascertain the recoverable damage, viz. the so-called rules of remoteness.<sup>20</sup> The notion of such a duty is by definition wholly alien to a suit for performance. In such an action there can be no question of "damage", and no determination of "damages".

17. *Wilkinson v. Verity* (1871) L.R. 6 C.P. 206 at 209. This is also the rule in American Law; *American Jurisprudence* vol. 34, 113.

18. *Reeves v. Butcher* [1891] 2 Q.B. 509, 511; *Board of Trade v. Cayzer Irvine* [1927] A.C. 610, 617.

19. This is without exception true of judicial formulations of the principle. For examples in leading cases see *Dunkirk Colliery Co. v. Lever* (1872) 26 L.T. 706 per James L.J.; *Jamal v. Moolla Dawood* [1916] A.C. 175 per Lord Wrenbury at 179; *British Westinghouse v. Underground Railways* [1912] A.C. 673 at 689.

Inexact expression has sometimes led to its description as a duty to mitigate "damages". This is true only in the sense that a reduction in damages is the natural consequence of mitigating the damage. "Damages" includes, however, exemplary, punitive, nominal, etc. damages to which the concept of such a duty is inapplicable.

20. See, e.g., Viscount Haldane in *British Westinghouse v. Underground Railways* [1912] A.C. 673 at 689; Street: *Principles of the Law of Damages*, 37; Schmitthoff: *The Journal of Business Law*, Oct. 1961, 363.

One might be tempted to think that the action for payment of the price is an action for damages, but this is not so. Such an action, before the seventeenth century popularization of *indebitatus assumpsit*, was brought under the Writ of Debt.<sup>21</sup> Paradoxical as it sounds, this is a common law action for performance, entirely distinct from the action of *assumpsit* for compensation for the breach of an undertaking.<sup>22</sup>

By endorsing the fiction of a latter promise to discharge a pre-existing debt, *Slade's Case* (1602)<sup>23</sup> effectually extended the damages remedy of *assumpsit* to those fact-situations where the remedy was previously limited to enforcement. This was an important step in the amalgamation of enforcement and damages remedies into a composite and adequate law of contract. The creditor of a debt created by simple contract could now have *indebitatus assumpsit* for compensation or Debt for enforcement.<sup>24</sup>

Blackstone defined the scope of these writs very clearly when he said:<sup>25</sup>

The legal acceptance of *debt* is, a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. *The non-payment of these is an injury, for which the proper remedy is by action of debt, to compel the performance of the contract and recover the specific sum due.* . . . So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate contract*.

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21. The present argument, necessitating reconsideration of these forms of action in order to determine the propriety of the proposed operation of the principle of mitigation, seems to vindicate Maitland's adage that they continue to "rule us from their graves".
  22. This argument is concerned with the status of the principle of mitigation in English Law. The historical background to the Scottish Law of contract is quite distinct. The concept of performance in Scots Law appears much broader; "specific implement" seems to share at least equal status with the damages action as a primary and entitled remedy: Gloag and Henderson: *Introduction to the Law of Scotland* (6th ed.) 116.
  23. (1602) 4 Co. Rep., 92 a.
  24. The conceptual distinction between "enforcement" and "damages" actions is still often confused. An example occurred in *Re Schebsman* ([1944] Ch. 83). Members of the Court of Appeal reviewed a contract between A and B whereby B was to pay C a sum of money. Du Parq L.J. said: "It is open to parties to agree that, for a consideration supplied by one of them, the other will make payments to a third person for the use and benefit of that third person and not for the use and benefit of the contracting party who provides the consideration. Whether or not such an agreement has been made in a given case is clearly a question of construction, but assuming that the parties have manifested their intention so to agree, it cannot, I think, be doubted that the common law would regard such an agreement as valid and as enforceable in the sense of giving a cause of action for damages for its breach to the other party to the contract." (Italics added.) If "enforcement" was available at common law, that certainly could not be by an action for damages, for the prospective plaintiff cannot prove any injury to himself to sustain such a claim.
  25. Blackstone *Comm.* Bk. III, 155. (Italics added.)

and further down,

But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non performance, the implied *assumpsit* and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration.

The opening passage of Bacon's *Abridgement* states:<sup>26</sup>

An action of debt is said to be founded upon contract, either express or implied; in which the (a) certainty of the sum or duty appears, and therefore the plaintiff is to recover the same *in numera*, and not to be repaired in damages by the Jury, as in those actions which sound only in damages, as *assumpsit*, trover, etc.

By a close analogy, an action brought to enforce a contract term specifying a valid pre-estimate of damages cannot be prejudiced by considerations of mitigation, because it is an action for performance of a payment due under the contract, not an action for damages for the breach thereof.<sup>27</sup>

It may somewhat explain confusion on this matter that in the common case of an action for the price of goods it is a plausible explanation of the availability of the action that it is really an action for damages on the breach of the term requiring payment, and the damages are assessed on the evaluation of the chattel thereby "lost", i.e., the title to which has been transferred. In this way, the action of *assumpsit*, originally designed to provide compensation by way of unliquidated damages for the breach of a bare undertaking, may seem to have become a method of achieving effective enforcement of the promise to pay the purchase price. That this is so, however, is more or less accidentally due to the fact that title had passed, and hence the damage was the value of the "lost" chattel, and damages were assessed by the price fixed on the chattel by the parties. Hence Lord Chief Baron Gilbert could say,<sup>28</sup> in 1760,

If any Contract be made to transfer the Right of Chattels, if it be immediately executed the Property is altered. Therefore if A contracts to sell B a Horse for ten pounds. . . . So if A tenders the Horse he may bring debt or *assumpsit* for the money, for the right of the money is transferred by the bargain. . . .

Obviously this could not account for the recovery in Debt where

26. Vol. II, 617.

27. There appears to be no authority on the question. It is submitted that the alternative view is incompatible with the principle by definition. This does not mean that the avoidability of damage will not be considered in deciding whether the stipulated sum is a penalty (*Schroeder v. California Yukon Trading Co.*, 95 Fed. 296 (1899)). The point is that once the "pre-estimate" is held to be valid, then a plaintiff's recovery of his debt will not be prejudiced by mitigatory considerations.

28. *Gilbert's Cases in Law and Equity* (1760), 365.

the action is brought for the purchase price of anything other than goods, e.g. of work and labour. It cannot, therefore, be regarded as an adequate explanation.

### III. *Additional considerations affecting the proposed operation of the principle of mitigation.*

There are some other arguments, of a comparatively minor nature, which deserve mention for the support they lend to the present view. First, the principle of mitigation primarily requires that the plaintiff reduce his own loss; no case has required him to lessen the burden on the defendant where that is not consequential on lessening the immediate loss to himself.<sup>29</sup> Secondly, some authority suggests that a plaintiff need not destroy or sacrifice his own rights in order to mitigate his loss.<sup>30</sup> In view of the rule that it is a question of fact what are reasonable steps to take in the circumstances,<sup>31</sup> this objection may be invalid.

Finally, it could be argued that to deprive the plaintiff of his contractual right to perform or to release the defendant from his debt for performance rendered, is contrary to the principle of *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate and Trust Agencies (1927) Ltd.*<sup>32</sup> which, by deciding that an executor or administrator could never justify a refusal to perform a contract on the ground that this was cheaper to the estate, presumably settled the basis of the English law of contract to lie in performance rather than in the availability of damages for breach. There is some obvious support for this basis in the common practice of contracting parties to express themselves adequately on the matter of performance and yet entirely delegate the issue of non-performance to the general common law.

If the arguments developed above are sound, it is fairly clear that the principle of mitigation cannot be used to prevent the innocent party performing after repudiation in order to claim the agreed price. However, there may be a more acceptable argument which will have the same effect.

In *White's Case*, Lord Reid referred<sup>33</sup> to an argument from equitable principles. This argument originated in a dictum of Lord Watson in *Grahame v. Magistrates of Kirkaldy*,<sup>34</sup> to the effect that a superior court, having equitable jurisdiction, would have a discretion in certain "exceptional" cases to withhold remedies to which parties were normally entitled. Although qualified by the requirement of "some very cogent reason", it was briefly disposed of by Lord Hodson as introducing "a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable

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29. *Elliott Steam Tug Co. v. The Shipping Controller* [1922] 1 K.B. 127 per Warrington L.J. at 138. American authority is more explicit: *Van Schaick v. Sigel* 9 Daly, 383; *Western Grain Co. v. Barron G. Collier, Inc.* 163 Ark. 369 (1924).
30. See, e.g., *Shindler v. Northern Raincoat Co.* [1960] 2 A.E.R. 239; *Heaven and Kesterton Ltd. v. Etablissements Albiac et Compagnie* [1956] Lloyd's Rep. 316 per Devlin J.; *Elliott Steam Tug Co. v. Shipping Controller* *ibid.*; *Mayne & McGregor on Damages*, p. 147. Sale of Goods Act 1895-1952, S. 30.
31. *Payzu v. Saunders* [1919] 2 K.B. 581.
32. [1928] A.C. 624, 635.
33. [1962] 2 W.L.R. 17, 23.
34. (1882) 9 R. (H.L.) 91, 92.

so to do".<sup>35</sup> It is submitted that the argument from Lord Watson's dictum would involve an incorrect view of the effect of the Judicature Acts, for it implies that because a Court of Chancery could in theory give equitable remedies at its discretion, therefore a Superior Court invested with equitable jurisdiction could *ipso facto* use its equitable discretion also in regard to common law remedies that parties were previously entitled to as of right from common law courts.<sup>36</sup>

In conclusion it is submitted that a satisfactory solution to this problem might have been found in a liberal interpretation of the maxim that contracts are to be construed according to the expressed or implied intention of the parties. Thus the nature of the contract and the circumstances of its inception would be scrutinised in order that the court may determine whether it was within the intention of the parties that if one party repudiates, the other should have a right to perform in addition to his remedy in damages.<sup>37</sup>

This is open to the obvious counter that the right to continue performance can always be expressly deleted from a contract. However, if it is true, as submitted, that the common man would not have anticipated the survival of the right to perform in cases like the present, it seems preferable that such contracts should be construed as containing an implied term to that effect, leaving the right to perform to be protected, if desired, by express provision.

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35. [1962] 2 W.L.R. 17, 37.

36. This submission concerns the validity of the argument in English Law. The status of equity in the Scottish Jurisprudence provides some support for Lord Watson's dictum and in this respect Lord Hodson's refutation may be somewhat dogmatic. See Walker: *Equity in Scots Law* (1954) 66 Jur. Rev. 103.

37. *Ahmed Angullia*, which suggests that parties primarily contract for performance, is interpreted accordingly. Although contracts are primarily for performance, the express or implied intention of the parties may show otherwise.

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## NEGLIGENCE

*Novus actus interveniens* — rescuer killed by negligence of third party — apportionment of liability — contributory negligence of rescuer.

*Chapman v. Hearse*<sup>1</sup> is a rescue case which, because of its involved and rather unusual facts, is more interesting than most reported cases of this kind. It is unusual in that, while the rescuer had been placed in a perilous position by the negligence of the original wrongdoer, he was in fact killed by the subsequent negligence of a third party. It was necessary to decide whether this act of negligence had broken the chain of causation thereby relieving the original negligent actor from liability.

The case arose as the result of a collision which occurred on a main road near Adelaide. A car driven by one Chapman struck the rear of another vehicle, which was making a right-hand turn at an intersection, and Chapman was thrown out of his car. He was lying unconscious near the centre of the road when a Dr.

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1. (1961) 106 C.L.R. 112.

Cherry, who happened to be driving past, stopped and went to his assistance. It was dark and raining at the time, and visibility was poor. Shortly afterwards, while the doctor was stooping over attending to Chapman, he was struck and killed by another car driven by Hearse. Dr. Cherry's executors brought an action against Hearse for damages under the provisions of the Wrongs Act 1936-1959, and Hearse joined Chapman as a third party and claimed contribution from him.

Napier C.J. found that both Hearse and Chapman had been negligent, but that Dr. Cherry had not been guilty of contributory negligence. His Honour ordered Chapman to contribute one quarter of the damages and costs awarded to the plaintiffs.<sup>2</sup> The Full Court of the Supreme Court of South Australia dismissed an appeal from this decision, and a further appeal to the High Court of Australia was also dismissed.

To determine the question of contributory negligence, Napier C.J. considered whether Dr. Cherry had acted unreasonably in assisting Chapman and thereby exposing himself to risk.<sup>3</sup> His Honour thought that it might have been more prudent for the deceased to have watched for and warned oncoming traffic of Chapman's presence on the road, and to have postponed the examination of the injured man until more help arrived.<sup>4</sup> However, His Honour found that in all the circumstances he had not acted unreasonably, and the Full Court<sup>5</sup> and the High Court<sup>6</sup> saw no reason to disturb this finding.

It appears that the questions of the extent of the duty of care owed to a rescuer and of the application to a rescuer of the doctrine of *volenti non fit injuria* are now well settled,<sup>7</sup> and in future rescue cases the crucial question will often be whether the rescuer was guilty of contributory negligence. It may therefore be of some interest briefly to summarize the effect of the authorities on this question in the light of the case under review. In the first place, it seems that the reasonableness or otherwise of the rescuer's conduct should be considered not in the light of after knowledge, but in all the circumstances as they reasonably appeared to him at the time of his rescue attempt.<sup>8</sup> Secondly, a rescuer's conduct will not be reasonable unless some person or property was in imminent danger.

2. *Executor Trustee & Agency Co. v. Hearse* [1961] S.A.S.R. 51.

3. This test was applied by Maughan L.J. in *Haynes v. Harwood* [1935] 1 K.B. 146, 162. See also *Baker v. T. E. Hopkins & Son Ltd.* [1958] 1 W.L.R. 993, 1003; [1959] 1 W.L.R. 966, 976-7. In the case under review, the High Court of Australia asked itself whether, in the unusual circumstances of the case, Dr. Cherry's conduct involved any departure from the standard which reasonable care for his own safety demanded: (1961) 106 C.L.R. 112, 119.

4. The case was not as clear on its facts as *Baker v. T. E. Hopkins & Son Ltd.* (*supra*), where the doctor had taken a number of precautions to minimize the risk to himself.

5. [1961] S.A.S.R. 51, 74.

6. (1961) 106 C.L.R. 112, 119.

7. See *Haynes v. Harwood* [1935] 1 K.B. 146, 152-3, 161; *Wagner v. International R.R.* 232 N.Y. 176 (1921), 133 N.E. 437; *Baker v. T. E. Hopkins & Son Ltd.* (*supra*). In the case under review, the Courts took it for granted that the plaintiffs were not barred by the doctrine of *volenti non fit injuria*.

8. See *Executor Trustee & Agency Co. v. Hearse* [1961] S.A.S.R. 51, 56; *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1, 38.

or the rescuer reasonably believed that this was so.<sup>9</sup> Thirdly, the question to be considered is whether the rescuer was guilty of contributory *negligence*, and for this purpose the fact that his actions were misguided and of no assistance to the person or property in imminent danger is immaterial.<sup>10</sup> The important question is whether his conduct involved any departure from the standard which reasonable care for his own safety demanded.<sup>11</sup> He may recover whether he acted on a sudden impulse or only after a deliberate decision.<sup>12</sup> It seems that a rescuer may expose himself to greater risk in cases where human life is in danger than in cases where only property is in danger.<sup>13</sup> Finally, the question of contributory negligence is to be considered in all the circumstances of each case, and if the rescuer has some characteristic different from that of an ordinary person, the court may, it seems, take this into account. Thus, in the case under review, Napier C.J. thought that conduct which might ordinarily have been imprudent was not unreasonable, partly because the rescuer was a doctor and had the ability to give skilled assistance to Chapman.<sup>14</sup>

In the High Court of Australia the dispute turned mainly on whether Chapman was "liable in respect of the same damage" at the suit of the plaintiffs as Hearse within the meaning of the Wrongs Act 1936-1956,<sup>15</sup> and, if so, whether Hearse was entitled to recover a contribution from Chapman.

The Court had little hesitation in deciding that Chapman was under a duty of care to the doctor. It was not necessary that the

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9. *Cutler v. United Dairies (London) Ltd.* [1933] 2 K.B. 297; *Haynes v. Harwood* [1935] 1 K.B. 146, 157; Goodhart, *Rescue and Voluntary Assumption of Risk* (1934) 5 *Cambridge L.J.* 192, 200. An example of a case where the only imminent danger was to property is *Hyett v. Great Western Railway Company* [1948] 1 K.B. 345.
  10. *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1, 38. If this fact should reasonably have been apparent to the rescuer at the time of his rescue attempt, it would, of course, be important in determining the question of *novus actus interveniens* and remoteness of damage.
  11. See *Chapman v. Hearse* (1961) 106 C.L.R. 112, 119. If the rescuer's conduct was sufficiently rash, it seems that he would not simply be held guilty of contributory negligence, but that any injury to him would not be the result of the negligence which caused the danger: *Baker v. T. E. Hopkins & Son Ltd.* [1959] 1 W.L.R. 966, 977.
  12. *Haynes v. Harwood* [1935] 1 K.B. 146, 159.
  13. *Hyett v. Great Western Railway Company* [1948] 1 K.B. 345, 347-8. Cf. *Wardrop v. Santi Moving and Express Co.* 233 N.Y. 227 (1922).
  14. [1961] S.A.S.R. 51, 56, 74. Cf. *Cutler v. United Dairies (London) Ltd.* [1933] 2 K.B. 297, 306 and *Hyett v. Great Western Railway Company* [1948] 1 K.B. 345, 348 where it was thought that the relationship of the rescuer to the person in danger would be a relevant circumstance. The question whether negligence and contributory negligence are to be determined by a subjective or an objective test is discussed by Fleming: *The Law of Torts* 2nd Ed. 119 and 241, and by Parsons, *Negligence and Contributory Negligence*, 1 Melbourne University Law Review 163.
  15. s. 25 (1) provides: "Where damage is suffered by any person as a result of a tort (whether a crime or not)—(c) Any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

precise sequence of events leading to the doctor's death should have been reasonably foreseeable by Chapman at the time of his negligence, but in the circumstances of this case it was sufficient to ask whether "a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow a collision between two vehicles on a dark wet night upon a busy highway."<sup>16</sup> Napier C.J. also disposed of this aspect of the case briefly, saying that rescue cases are no more than a special application of the general principle upon which a wrongdoer is held responsible for what the law treats as a natural and probable result of the wrongful act.<sup>17</sup> It was decided that it made no difference to a determination of the duty of care that the original wrongdoer had imperilled himself by his own negligence and that he was the person being rescued.<sup>18</sup>

The question whether Chapman's negligence was to be regarded as a cause of Dr. Cherry's death was more difficult. The Privy Council delivered its well known decision in *The Wagon Mound*<sup>19</sup> shortly before the appeal to the High Court of Australia was argued. However, the High Court made it clear that the test of "reasonable foreseeability" laid down in that case should only be applied to mark the limit beyond which a wrongdoer would not be responsible. In other words, the test is to be used to determine whether the defendant should be liable for a particular item of damage which was in fact caused by his conduct. In *Chapman v. Hearse*, however, the problem was to decide whether the doctor's death should be attributed to one of several "causes", and it was first necessary to decide whether Chapman's negligence was, in fact, a cause of his death. It was only when this was established that the court had to consider whether the ultimate consequence was reasonably foreseeable at the time of Chapman's original negligent act.<sup>20</sup>

In the course of argument, it was emphasized that Hearse's intervening act was negligent, and it was contended that on the analogy

16. (1961) 106 C.L.R. 112, 120. Cf. *Dwyer v. Southern* (1961) 78 W.N. (N.S.W.) 706. A similar view was expressed in *Marshall v. Nugent* 222 Fed. 2d. 604, 610-11 (1955). Magruder C.J. said that one should contemplate a variety of risks which are created by negligent driving, and that "in a traffic mix-up due to negligence, before the disturbed waters have become placid and normal again, the unfolding of events between the culpable act and the plaintiff's eventual injury may be bizarre indeed."
17. [1961] S.A.S.R. 59-60. Cf. *Baker v. T. E. Hopkins & Son Ltd.* [1959] 1 W.L.R. 966, 981. It was stated that Chapman would have owed a duty of care to his rescuer even if he had not been a medical practitioner: *Ibid.*, 72; (1961) 106 C.L.R. 112, 120; cf. *Dwyer v. Southern* (1961) 78 W.N. (N.S.W.) 706. In that case it was said that nervous shock cases should be disregarded in rescue cases for the purposes of determining the existence of a duty of care.
18. If the existence of a duty of care to a rescuer depended on the breach of a primary duty to someone else, as was said by Evatt J. in *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1, 41, Chapman would not have been liable to his rescuer, since he was under no legal duty to himself to preserve his own safety. However, it was decided that the duty owed to a rescuer is an independent duty based on the creation of a perilous situation which provokes the rescuer to expose himself to undue risk. The authorities on this point are discussed exhaustively in the judgment of Reed J.: see [1961] S.A.S.R. 51, 60, 67-72.
19. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*) [1961] A.C. 388.
20. (1961) 106 C.L.R. 112, 122.



of the last opportunity rule this should relieve Chapman from responsibility.<sup>21</sup> However, the High Court, while acknowledging that the last opportunity rule had been treated in many cases as if it had assumed the role of a test causation, pointed out that the rule only applied in cases where the plaintiff's negligence was in fact a cause of the damage. It was invoked simply to enable the plaintiff to succeed in cases where his contributory negligence would otherwise preclude him altogether from recovery. Their Honours doubted the assumption that the rule still existed where apportionment legislation was in force, and said that in any event it was clearly not a test of causation.<sup>22</sup> It was further decided that, quite apart from the analogy of the last opportunity rule, it was impossible on principle to exclude from the realm of reasonable foresight subsequent intervening acts merely on the ground that they are in themselves wrongful. Where a clear line could be drawn, the subsequent negligence was the only one to look to; but the Court thought that in most cases of this kind no such clear line could be drawn. Once it was established that reasonable foreseeability is the criterion for measuring the extent of liability for damage, the test must take into account all foreseeable intervening conduct, whether wrongful or otherwise.<sup>23</sup>

The Court then examined the facts of the case in the light of these principles, and concluded that a casualty of the kind which in fact happened was reasonably foreseeable, and so Chapman was "liable in respect of the same damage" as Hearse within the meaning of the Wrongs Act 1936-1956.<sup>24</sup> The High Court agreed with Napier C.J.'s view that it was Hearse who was "principally responsible" for the fatality, and did not interfere with the order for apportionment which His Honour made.<sup>25</sup>

In the Supreme Court, Napier C.J. and Chamberlain J. had some difficulty in reconciling their decision with the earlier case of *Kane v. Hill*.<sup>26</sup> In that case a cyclist riding in a city street at night was struck by a motor cycle and thrown on to the roadway. While attempting to rise he was run down by a motor vehicle and injured. Both drivers were held negligent, but it was decided that the motor cyclist was not liable to contribute to the damage caused by the second collision, since the chain of causation had been broken by the "ultraneous and unwarrantable" act of the driver of the utility. Their Honours might, perhaps, have been less troubled by that case

21. In his dissenting judgment in the Supreme Court, Reed J. treated as important the fact that Hearse had a reasonable opportunity of avoiding the doctor, and was negligent in not doing so: [1961] S.A.S.R. 51, 79-83.

22. (1961) 106 C.L.R. 112, 123-4. Cf. *Fleming op. cit.* 229-239, where the various views on this question are summarized.

23. *Ibid.*, 124-125.

24. Here again it is apparently not necessary for the defendant to foresee the exact sequence of the events which occurred, or the exact nature of the damage in question. Reed J. thought that Hearse's intervening conduct was not reasonably foreseeable in the circumstances of the case: [1961] S.A.S.R. 51, 83-86.

25. Chamberlain J. considered that the determination of a just and equitable apportionment between wrongdoers involves a comparison of culpability, and moral blameworthiness could be taken into account in some cases: *ibid.*, 92-93.

26. [1951] S.A.S.R. 162.

if they could have foreseen *Teubner v. Humble*, which was only recently decided by the High Court of Australia.<sup>27</sup> There Windeyer J. stated that decisions on the facts of one case do not really aid the determination of another case. His Honour said:

Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application that a pedestrian is always entitled or that a motorist is always obliged, to act in some particular way. That would lead to the substitution of a number of rigid and particular criteria for the essentially flexible and general concept of negligence.

This dictum should, perhaps, be kept in mind in future rescue cases which arise as the result of a road accident, and *Chapman v. Hearse* should be referred to simply for the propositions of law which it contains.

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27. (1963) 36 A.L.J.R. 362.

## CONTRACT

### *Parol Evidence*

The business convenience<sup>1</sup> supporting a general rule prohibiting the introduction of parol evidence to vary the terms of a written contract has been extensively deferred over the years to the no less compelling requirements of justice in the particular case. Most of the rules now accepted as qualifying the parol evidence rule have long been recognised.<sup>2</sup> There are others whose operation, though no less effective, is less frequently acknowledged. The *High Trees* principle, which is not restricted to cases where the representation relied upon as modifying the promisee's rights is contained in a written document, is a notable example.<sup>3</sup>

There are other exceptions to the parol evidence rule which, because they derive from the substantive law of contract, are not usually found in standard texts on the law of evidence. In each of these cases a verbal representation may govern the parties' rights despite the presence of a written document purportedly dealing with those same rights. In the first place, the prior verbal representation may be understood as a promise the consideration for which is the representee accepting the written contract.<sup>4</sup> Here there are independent contracts, the intention being that the verbal contract will control that which is written. Secondly, the verbal representation,

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1. *Pollock*, 13th ed. 199. There does not appear to be unanimity as to the true basis of the rule: *Phipson*, 9th ed. 599.

2. *Phipson*, 601-613; *Cross*, 476-495; see also 472.

3. This follows from the formulation of the doctrine by Denning L.J. in *Combe v. Combe* [1951] 2 K.B. 215 at 220, that "words or conduct" are sufficient. This formulation is adopted in 15 *Halsbury's Law of England*, 3rd ed., p. 175, para. 344.

4. Per Lord Moulton in *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, 47; *City and Westminster Properties Ltd. v. Mudd* [1901] 2 K.B. 215.

although not amounting to an independent contract, might stipulate a condition precedent to the validity of the written contract.<sup>5</sup> Thus the parties can tender parol evidence to show that the written contract is not valid although it may appear to be so. Thirdly, it might be that the "total contract" is not restricted to the written terms, but is part written and part verbal.<sup>6</sup> Fourthly, although the written document might embody a complete contract, a subsequent verbal novation may have altered it.<sup>7</sup> Finally, the contract might be wholly verbal although it includes by implication from the circumstances the contents of certain printed terms. This latter forms the basis of the decisions in *Couchman v. Hill*<sup>8</sup> and *Harling v. Eddy*,<sup>9</sup> both auction cases, where the auctioneer made verbal representations, giving the purchaser more security than the standard printed terms, in order to induce bids. These contracts were concluded not on the printed terms but on the verbal contract offered by the auctioneer.

In the recent South Australian case of *Stuart v. Dundan and Another*,<sup>10</sup> the not uncommon situation arose where the purchaser, having negotiated verbally, subsequently alleged that the vendor did not accurately document the terms of the bargain. In the course of the litigation, three of the above methods of circumventing the parol evidence rule, together with a fourth and somewhat novel approach, were raised and considered.

The facts as found by the Special Magistrate of the Local Court of Naracoorte were as follows: The plaintiffs had by verbal agreement purchased several cows at a price of £59 per head. This verbal agreement, but not the subsequent written document, contained the stipulation that the cows were to be in calf, such calves were to be the progeny of a short horn bull, and to be born in April or May, so as to be ready for the Christmas market. A written contract, purporting to contain the agreement, was presented to one of the plaintiffs who without bothering to read it signed at the bottom as purchaser. It subsequently became evident that, whilst some cows were not in calf at all, others had been served by a Hereford bull, and several more were born too late for the market.

The plaintiff's claim was for damages of £280, representing the reduction in value of the cows supplied, at £14 per head, due to their lack of compliance with the verbal contract. The magistrate gave judgment for the plaintiffs on the basis of the verbal agreement, finding expressly that "the real purpose for which they bought the cattle in question was completely defeated."

On appeal to the Supreme Court (Travers J.)<sup>11</sup> the defendant relied on an inclusion clause in the written contract, stating that:

The parties hereto acknowledge that this contract contains the whole of the agreement between the parties and each of them agrees with the other that no writing whether in the form of a letter memorandum or otherwise sent, given or

5. *Pym v. Campbell* (1856), 6 E. & B. 370.

6. *S.S. Ardennes (Cargo Owners) v. S.S. Ardennes (Owners)* [1951] 1 K.B. 55.

7. *Goss v. Lord Nugent*, 5 B. & Ad. 58.

8. [1947] 1 A.E.R. 103.

9. [1951] 2 A.E.R. 212.

10. Unreported at date of printing; judgment was delivered on 13th May, 1963.

11. 1962 Law Society Judgment Scheme Reports 390.

statutes of limitation,<sup>87</sup> Sunday Observance laws,<sup>88</sup> statutes dealing with the criminal law and police offences,<sup>89</sup> lotteries,<sup>90</sup> land legislation,<sup>91</sup> Statutes of Distribution<sup>92</sup> and laws dealing with Master and Servant Relationships.<sup>93</sup>

#### PROBLEMS IN APPLYING PRINCIPLES

As the cases on this issue have demonstrated, however, problems on the applicability of British statutes can arise if the Statutes contain general provisions as well as others which are particularly related to special British conditions. The weight of judicial opinion would seem to favour the view that the whole of a British enactment need not be applicable before it can become part of the received statutory law of an overseas possession.<sup>94</sup> The situation in this regard was perhaps best summed up by Chief Justice Griffith in the High Court cases of *Quan Yik v. Hinds*<sup>95</sup> and *Mitchell v. Scales*.<sup>96</sup> In the first of these cases the Chief Justice stated that if the general provisions of a British statute were not unsuitable to the conditions of the Colony, "the mere fact that some minor or several provisions could not come into operation owing to local circumstances is not sufficient reason for denying the applicability of the Statute as a whole. On the other hand, if the general provisions of a Statute were inapplicable, it would seem to follow that it is not competent to select a particular provision of the Statute which if it stood alone might be applicable, and to say that it is therefore applicable".<sup>97</sup> In *Mitchell v. Scales* His Honour re-asserted that an isolated provision could not be extracted from a British statute and applied in Australia, if the main structure of such an enactment

87. See for examples: *Griffith v. Bloch* (1878) 4 V.L.R. (L) 294; *Attorney-General for N.S.W. v. Love* [1898] A.C. 679; *White v. McLean* (1890) 24 S.A.L.R. 97; *South Australian Company v. City of Port Adelaide* [1914] S.A.L.R. 16.

88. See for examples: *Ronald v. Lalor* (1872) 3 V.R. (E) 98; *Garton v. Coy* (1873) 4 A.J.R. 100, 10 Austn. Digest 506; *Scott v. Cawsey* (1907) 5 C.L.R. 132; *Walker v. Solomon* (1890) 11 N.S.W. L.R. 88; 6 W.N. 167; *Cox v. McAllister*, [1962] N.S.W.R. 1429.

89. See for examples: *R. v. Black Peter* (1863) 2 S.C.R. (N.S.W.) 207; *R. v. Packer* (1864) 3 S.C.R. (N.S.W.) 40; *R. v. Wood* (1862) 1 W. and W. 371.

90. See for examples: *Mutual Loan Agency Ltd. v. Attorney-General for New South Wales* (1909) 9 C.L.R. 72; *R. v. De Baun* (1901) 3 W.A.L.R. 1; *Attorney-General for Victoria v. Moses* [1907] V.L.R. 130.

91. See for examples: *Cannon v. Keighran* (1843) 1 Legge 170; *A'Beckett v. Matthewson*, (1861) 1 W and W (c) 29.

92. *Skeeles v. Hughes* (1877) 3 V.L.R. (E) 161; *Re Kinderlin* (1861) 1 W. and W. (I.E. and II) 11; In *Will of Ryan* (1881) 7 V.L.R. (I. P and M) 38.

93. *Bilby v. Hartley* (1892) Q.L.J. 137; *Walsh v. Kent* (1862) 1 Q.S.C.R. 44.

94. In addition to *Quan Yik v. Hinds* and *Mitchell v. Scales*, cited below see: *R. v. Colan* (1878) 1 S.C.R.N.S. (N.S.W.) 1; *Anderson v. Ah Nam* (1904) 4 S.R. (N.S.W.) 492.

95. (1905) 2 C.L.R. 345.

96. (1907) 5 C.L.R. 405.

97. Op. cit. at p. 364.

enough that there appears to be one contract only which is subsequently documented, for the validity of that contract may have been intended to be governed by the representation which induced it. In this context it is submitted that the principle enunciated by Lord Moulton in *Heilbut Symons v. Buckleton*<sup>15</sup> and referred to by the Full Court is not helpful. Lord Moulton says:

It is my Lords of the greatest importance . . . that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation no matter in what way or under what form the attack is made.

This principle stops short where the innocent misrepresentation happens also to be a term, for the law of contract makes no distinction between honest and dishonest breaches. It follows that the principle cannot be invoked to determine whether a representation amounts to a contractual term; this is one "form of attack" that is unimpeachable.

In the judgment of Travers J., the suggestion was made that the court will allow parol evidence of a condition to be added to a written contract if that condition would have the status of a fundamental condition were it expressly incorporated in the contract.<sup>16</sup> The Full Court, without expressly saying so, rejected this method of introducing a parol undertaking, by holding that the question whether the term is fundamental must always be subsequent to the question whether it actually is a term.<sup>17</sup> On principle alone this view seems clearly correct. The "weight and gravity" test<sup>18</sup> of a fundamental condition was regarded by Travers J. as satisfied on the Magistrate's finding that, but for the oral stipulations, the plaintiffs would not have entered the contract at all. The same may well be said of a stipulation amounting only to a condition, for the choice of rescinding the contract which the law gives for the breach of a condition is explicable only on the assumption that the plaintiff's contracting was dependent on the defendant's compliance with the condition. Moreover, since any representation might induce a contract without subsequently forming a part of it, the test suggested by His Honour for identifying a fundamental condition would be of doubtful value.

Neither Travers J. nor the Full Court found it necessary to elaborate on the "integration clause" which expressly defined the contents of the document as containing the whole of the contract between the parties. It is respectfully submitted that in cases of this type the written instrument should not be allowed to subvert the true intention of the parties merely by defining itself as the total contract, for this would not allow for cases where the written document is subject to a condition precedent, is collateral to another,

15. [1913] A.C. 30, 51.

16. 1962 Law Society Judgment Scheme Reports, 395.

17. "Whatever the principle may be, it stands to reason that a breach cannot be 'fundamental' or 'go to the root of the contract' unless it is a breach of the contract." (p. 7, Transcript of Judgment.)

18. A test suggested by Holroyd Pearce L.J. in *Yeoman Credit Ltd. v. Apps* [1961] 2 A.E.R. 281 at 289.

verbal contract, or has been modified by subsequent verbal negotiations. Since proof that the legal relationship is broader than the written documents indicate is not prevented merely because the only evidence that this is the case is parol, it would seem both illogical and unjust that such an integration clause should be treated as anything more than presumptive evidence to the contrary. The parol evidence rule so far as the exceptions outlined above are concerned, cannot be a strict rule of law, but a rule, the effect of which is merely to raise a rebuttable presumption as to the intention of the parties. This intention is to be concluded from a consideration of all the circumstances.<sup>19</sup>

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19. See per Lord Russell in *Gillespie Bros. v. Cheney, Eggar & Co.* [1896] 2 Q.B. 59 at p. 62.

## POLICE OFFENCES ACT

### *Unlawful Possession*

The recent decision of the South Australian Supreme Court in *Beard v. Brebner*<sup>1</sup> demonstrates once again a recurrent difficulty that has perplexed the minds of many of our jurists: attempting to define the concept of possession in the common law.

The problem arose in *Beard v. Brebner* in the context of s. 41 of the Police Offences Act, 1953-60 which creates the offence of unlawful possession of personal property.<sup>2</sup> This offence contains several inherent difficulties: first, it is constituted not by the commission of an act or pursuit of a course of conduct but by the existence of a certain state of affairs. That criminal liability should arise in such circumstances is of course far from exceptional. For example, s. 172 of the Criminal Law Consolidation Act 1935-57, enacts the crime of being found by night in certain circumstances. Legislation relating to aliens is a further illustration.<sup>3</sup>

Secondly, the prosecution is by the phrasing of the section absolved from the onus of establishing *mens rea* on the part of the defendant.<sup>4</sup> This departure from principle is again far from novel and in this case might be considered as a statutory formulation of the doctrine

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1. 1962 Law Society Judgment Scheme reports 516.
  2. s. 41: (1) Any person who has in his possession any personal property which either at the time of such possession, or at any subsequent time before the making of a complaint under this section in respect of such possession, is reasonably suspected of having been stolen or unlawfully obtained shall be guilty of an offence. Penalty: One hundred pounds or imprisonment for two years.  
(2) It shall be a defence to a charge of an offence against this section to prove that the defendant obtained possession of the property honestly.  
(3) If any personal property is proved to have been in the possession of a person, whether in a building or otherwise, and whether the possession had been parted with before the hearing or not, it shall for the purpose of this section be deemed to have been in the possession of that person.
  3. See e.g., *R. v. Larsonneur* (1933) 97 J.P. 206 which demonstrates the injustice of which this type of offence is capable.
  4. *Wallace v. Hansberry* [1959] S.A.S.R. 20; unless the mere knowledge of possession (*animus possidendi*) is to be construed as constituting this element; *Palumbo v. O'Sullivan* [1955] S.A.S.R. 315.

of recent possession<sup>5</sup> with the significant and startling modification that the defendant is not merely obliged to adduce sufficient evidence to rebut the presumption of dishonesty, but to do so by establishing the affirmative defence of honest acquisition.<sup>6</sup> Whether this onus involves proof beyond reasonable doubt or merely on the balance of probabilities is far from clear. *Harrison v. Trotter*<sup>7</sup> is authority for the former view, *Wallace v. Hansberry*<sup>8</sup> for the latter. The trend of authority suggests the latter view to be correct.<sup>9</sup>

Thirdly, the section imports into the offence the unruly notion of "reasonableness" in the form of a test whether the suspicion of unlawful possession is entertained upon reasonable grounds. Finally, the foundation of the offence is a concept as complex and contentious as any in English Jurisprudence: the concept of possession. That an offence which contains on the one hand no *actus reus* as commonly conceived, and no *mens rea* (other than as relevant to the statutory defence) but which contains on the other hand the notion of reasonableness, and further, a judicial concept of such complexity as possession, has resulted in much litigation occasions no astonishment.

It was principally with the final element adverted to that *Beard v. Brebner* was concerned. The facts of the case were unexceptional: the charge arose out of the appellant's possession of a theatre speaker which had been stored in premises to which several persons had access, but deposited there in such a way as to give no indication to them of its presence. The submissions made by the appellant were chiefly directed to the issue of possession. Mr. Justice Hogarth, following a line of South Australian decisions, adopted the meaning attributed to the term by the High Court of Australia in *Moors v. Burke*<sup>10</sup> in interpreting the corresponding section of the Victorian statute. "Having actual possession" was defined by the court in that case as meaning simply:

. . . having at the time, in actual fact and without necessity of taking any further step, the complete present physical control of the property to the exclusion of others not acting in concert with the accused and whether he had that control by having the property in his present manual custody or by having it where he alone has the exclusive right or power to place his hands on it and so have manual custody when he wishes.<sup>11</sup>

5. Cross and Jones: *An Introduction to Criminal Law* (4th ed.) at p. 233.

6. sub. sect. 2.

7. [1937] S.A.S.R. 7.

8. *supra*.

9. Per Humphreys C.J. in *R. v. Carr-Briant* [1943] K.B. 607 (C.C.A.), 612. "In our judgment, in any case where either by statute, or at common law, some matter is presumed against an accused person "unless the contrary is proved," the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish"; see also *Sodeman v. R.* [1936] 2 A.E.R. 1138 (P.C.).

10. (1919) 26 C.L.R. 265.

11. *Ibid.*, at p. 520.

The question then arose on the facts of the instant case whether, in applying this test, the power of control in the appellant was sufficiently "exclusive". His Honour, in dismissing the appeal, felt compelled to elaborate on this test, which as he acknowledged, on its face appeared very strict:

. . . it operates to deny possession where a person having placed property out of his present manual custody had deposited it in a place where any other person independently of him has an equal right and power of getting it.<sup>12</sup>

His Honour proceeded to explain this proposition, saying that where such interference by a third party is "likely" (as distinct from possible), then it may in an appropriate case be inferred that there is an equal right and power in that third party to get the property in question. This issue is of course relative and gives rise to difficult decisions of fact.<sup>13</sup>

His Honour adverted to the further point raised by the appellant that at the times material to the alleged unlawful possession he was detained in custody in connection with another matter. Since there was sufficient evidence that the appellant was present on the premises on which the speaker was stored during part of the material day, it is a matter of speculation whether the introduction of this element, had it been proved, would have made any legal difference. It was suggested in the judgment that the requisite degree of exclusiveness might be difficult to establish in such circumstances.<sup>14</sup> It seems, however, that the fact of custody would only be evidence of the appellant's extent of control and could not as a matter of law preclude a finding that he had possession during such time.

The possibility that the appellant might have been in custody at all material times indicates the inadequacy of the "exclusion" test, which may well place the concept of possession on too narrow and unsatisfactory a footing. The "finding" cases<sup>15</sup> demonstrate that this test in fact tends to be arbitrary and unpredictable in its operation and often imports or embraces considerations not articulate. An approach suggested by the analysis of possession by D. R. Harris in *Oxford Essays in Jurisprudence*<sup>16</sup> seems the most satisfactory method yet advanced for contending with this type of difficulty. He demonstrates convincingly that no general formulation of the concept of possession can be made to fit all the fact situations

12. *Ibid.*, at p. 522.

13. Compare e.g., *Wilby v. Gilder* [1942] V.L.R. 28 and *Williams v. Douglas* (1949) 78 C.L.R. 52.

14. "If it could be shown that throughout the day in respect of which the offence is charged, the appellant had been in custody at the City Watch-house then it is at least arguable that he did not have either sufficient control over the property, or power to control it, to constitute the factum necessary to amount to possession" (at p. 521).

15. e.g., *Armory v. Delamirie* (1722) 1 Str. 505; *Bridges v. Hawkesworth* (1851) 21 L.J. Q.B. 75; *South Staffordshire Water Company v. Sharman* [1896] 2 Q.B. 44. See also *Wilby v. Gilder* and *Williams v. Douglas supra*, n. 13.

16. "The Concept of Possession in English Law", p. 69.



found in the cases: "decisions preclude us from laying down any conditions such as physical control or a certain kind of intention as absolutely essential for a judicial ruling that a man possesses something."<sup>17</sup> Rather, the concept of possession can be analysed into a number of more meaningful "factors" which the cases indicate as relevant to possession. These factors he enumerates;<sup>18</sup> some relate to physical control, both of the propositus and of third parties, some to the knowledge and intention of these two classes, some to considerations such as the occupation of premises, and some are concerned with special legal relationships. The importance of the study lies in its demonstration that the common law concept of possession is not explicable on the assumption that there is an identifiable factor common to all those cases where possession has been judicially found. The notion is rather one of "family resemblance": in some cases the coincidence of certain factors might be sufficient, in other cases a different combination would suffice.

This analysis is consistent with the fact that "possession" like similar conceptual terms which by nature seem incapable of precise definition, has a history in the common law of considerable perplexity and confusion. Decisions relating to the determination of possessory titles, particularly the "finding"<sup>19</sup> cases, afford examples of the difficulties under which both court and commentator have laboured in the attempt to reconcile what is often irreconcilable. As Glanville Williams has said,

The only intelligent way to deal with the "definition" of a word of multiple meaning . . . is to recognise that the definition to be of the ordinary meaning must itself be multiple.<sup>20</sup>

Without suggesting that the conclusion reached in *Beard v. Brebner* was anything but just or satisfactory it nevertheless seems fair to comment that the decision as relevant to the question of possession has added little of value to a subject of some confusion. One cannot resist the conclusion that many of the difficulties to which s. 41 of the Police Offences Act has given rise are the result of the sweeping terms in which it is framed. A residual offence of this nature, clearly intended to provide for situations outside the ambit of specific offences involving dishonesty, is peculiarly susceptible to such difficulties. It is submitted that a more exactly drawn section defining the offence by reference to factors of the kind referred to above (which for the purposes of the section could be taken as constituting possession), would not only prove more satisfactory in practice, but would accord with principle in ensuring that responsibility for defining statutory crimes rests primarily on the legislature rather than the courts.

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17. at p. 69.

18. at p. 72.

19. *Supra*, n. 15.

20. Glanville Williams: "International Law and the Controversy Concerning the Word Law", (1945) 22 B.Y. B.I.L. 146.

## RIPARIAN RIGHTS AND DUTIES

*Prevention of Surface Flow from Higher Land*

Many aspects of the law relating to riparian rights and the closely allied problem of the natural flow of surface waters are far from settled. Authorities often conflict and there is a paucity of academic comment on the principles involved. The judgment of the High Court in *Gartner v. Kidman*<sup>1</sup> is therefore welcomed as an important and authoritative decision in this area of the law. In particular the potential usefulness of the judgment of Windeyer J., in which Dixon C.J. concurred, must be acknowledged. By considering the general principles involved in rights relating to the flow of water his Honour not only brought the issues involved in the case before the court into perspective but also provided a useful instrument for future general reference.

Litigation arose in the following manner. The appellant Gartner's parcel of land was adjacent to that of the respondent Kidman, the plaintiff in the Supreme Court action. A large swamp was situated on Kidman's land and extended into Gartner's land. At times the water overflowed at a point on Gartner's land, flowed for about three hundred yards to a sandpit on his property, and there escaped into the ground. Predecessors in title to Gartner had allowed Kidman's predecessors in title to facilitate this flow by digging a drain along the same route. This substantially reduced the area of the swamp, and provided what is now Kidman's property with more grazing land. In 1958 Gartner discovered that the sand into which the water drained was of commercial value, and erected barriers to block the canal, with consequential effects on Kidman's land. Kidman brought an action in the Supreme Court of South Australia for an injunction against Gartner requiring him to remove the barriers and restraining him from obstructing the free passage of water along the canal.

The first argument put up by Kidman was that as the upper riparian owner he was entitled to the free flow of water from his land along a natural watercourse, and that the passage obstructed by Gartner was a natural watercourse. In the Supreme Court Chamberlain J. held that a natural watercourse had existed before the drain was made. In the High Court, McTiernan J. agreed with this finding but held that the work done on the channel was of a major character and that riparian rights therefore no longer attached to it. He held that Kidman was relegated to such rights as he had enjoyed before the extension operations commenced. Dixon C.J. and Windeyer J. refused to find that a natural watercourse existed at any point of time.

What in law constitutes a natural watercourse? In *Lyons v. Winter*<sup>2</sup> Hood J. said that there must be more than a mere depression in the ground which sometimes receives rain water. To constitute a natural watercourse there must be,

a stream of water flowing in a defined channel or between something in the nature of banks. The stream may be very small and

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1. (1962) 36 A.L.J.R. 43.

2. (1899) 25 V.L.R. 464.

need not always run, nor need the banks be clearly or sharply defined. But there must be a course, marked on the earth by visible signs, along which water usually flows.

In the present case Windeyer J. accepted the "bed, banks and water" requirement and acknowledged that the water need not flow continuously. However, he emphasised the distinction between "a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which in times of freshet or melting of ice and snow descend from the hills and inundate the country".<sup>3</sup> His Honour held that merely because on some occasions the swamp overflowed and ran down into the sandy basin, this did not make a watercourse in law.<sup>4</sup> It seems that this approach is an acceptance of the test propounded by Hood J. along with an elaboration of the words "usually flows". In order to constitute a watercourse to which riparian rights attach there must be more than the physical signs of bed and banks and the occasional flow of water, for if that flow is merely occasional it fails to comply with the test as interpreted by Windeyer J.

The majority judgment pointed out that, even if the watercourse as it originally existed had complied with the above test, nevertheless it would still fail to qualify as a natural watercourse to which riparian rights attached because the actual flow of water was confined within the limits of the appellant's land. Thus the respondent could only claim to be a riparian owner in respect of the drain after it had been extended into the swamp on the appellant's land.

Kidman also contended that even if, as the court found, there was no natural stream but only an artificial watercourse, nevertheless, it had originally been made under such circumstances and had been so used as to give rise to all the rights which the plaintiff would have had if it had been a natural stream. This argument was accepted by Chamberlain J., who relied upon the following passage from the judgment of the Privy Council in *Maung Bya v. Maung Kyi Nyo*<sup>5</sup>:

A watercourse originally artificial may have been made under such circumstances and have been used in such a way that an owner of land situate on its banks will have all the rights over it that a riparian owner would have had if it had been a natural stream.

However, Windeyer J. held that this passage did not leave the way open for owners to acquire rights in an artificial channel independently of grant, prescription, implication of law or contract. There could be no undefined way of creating such rights. He said that the passage from *Maung's Case* refers to, and is based upon the principle referred to in *Gale on Easements*:

In the case of some artificial watercourses the origin of which is unknown the proper conclusion from the user of the water and other circumstances may be that the watercourse was originally constructed upon the condition that all riparian owners should

3. *Angell on Watercourses* (5th ed., 1854) 3.

4. (1962) 36 A.L.J.R. 43.

5. (1925) L.R. 52 Ind. App. 385, 395.

have the same rights as they would have had if the watercourse had been a natural one.<sup>6</sup>

Thus an important distinction is drawn between artificial watercourses whose origin is unknown and watercourses (such as the one in this case), the circumstances of whose construction are known to the court. The principle seems to be that if nothing is known of the origin of an artificial watercourse, but the occupiers of the land through which the stream flows make the same use of the water as they would if they were riparian owners of land bordering a natural watercourse, then it is reasonable to conclude that when the watercourse was originally made adjoining landowners were intended to have normal riparian rights. This is known as a presumption of a lost grant.

Substantial justice may be done in many instances by conferring riparian rights on the owners of land adjacent to an artificial watercourse of a permanent character. Nevertheless,

that an underground pipe made by a landowner to convey water to a mill, or a small stream made to convey water to a farm, can in any case, or after any length of time, be deemed a natural watercourse, and that it shall invest the owner as against other landowners, though it may be miles away, with the important rights which the law annexes only to natural streams is, without doubt, a serious proposition.<sup>7</sup>

By interpreting the passage from *Maung's Case* as applying only to cases dealing with a permanent watercourse whose origin is unknown, Windeyer J. has set important limitations on this "serious proposition", for the principle has been held not to apply to facts such as those before the court in the present case, where the court was conversant with the circumstances connected with the origin of the artificial watercourse.

The Court then dealt with the problem as arising from the flow of water other than in a natural watercourse. This was perhaps the most important point of law considered by the court in *Gartner v. Kidman*. It arose from the final contention of the plaintiff that, regardless of the existence of a natural watercourse, the defendant's land was subject to a "natural servitude" in favour of the plaintiff's land, that the plaintiff was therefore entitled to discharge upon it any water that would naturally flow there from his land in the normal use by him of his land, and that the defendant was therefore obliged to receive that water.

This argument gives rise to the problem whether the positive praedial rustic servitude of the Roman Law,<sup>8</sup> or the rule referred to by courts and writers in the United States as the "common enemy" rule is to apply. The former principle obliges the owner of land to receive water naturally flowing from the surface of adjoining land. According to the "common enemy" rule, water is regarded as an enemy against which man may defend himself, hence such an obligation is not recognised. *Rylands v. Fletcher*<sup>9</sup> does not provide a solution because here there is no "non-natural" user of land.

6. *Gale on Easements* (13th ed., 1959) 204.

7. J. L. Goddard: *The Law of Easements* (8th ed., 1921) 80.

8. Digest, Bk. XXXIX, Title III.

9. L.R. 3 H.L. 339.

Halsbury<sup>10</sup> states that where water overflows from the higher land to the lower as a result of the natural use of the higher land, the owner of the higher land is not liable for the consequences. But there is an obvious "non-sequitur" from this to the conclusion that the lower owner is under a duty to receive such overflow. The dichotomy of "right" and "duty" is a familiar one, but not every "right" is accompanied by a correlative "duty". The higher owner may have a right to allow the water to overflow in the sense that he is not liable for the consequences thereof, but it does not necessarily follow that the lower owner has a duty to receive it. Professor Derham<sup>11</sup> remarks that this has not always been perceived and that some of the authorities have fallen into a trap by failing to consider "whether or not the upper holder's 'right' may not be a mere 'liberty'."

Little help is to be gained from a review of the relevant English cases. This may be due to the fact that special authorities have always been present in England to deal with drainage problems, and the courts have therefore not been regularly called upon to settle disputes. Whatever its reason, the uncertainty in this area of the law is excellently demonstrated by the extensive review of the authorities made by Windeyer J. in the present case.

In *Butcher v. Borough of Woollahra*<sup>12</sup> the Supreme Court of N.S.W. held that the owner of lower land had a right to pen back surface drainage from higher land as long as it was not flowing in a defined channel. There was a contrary holding by the Full Court of the Supreme Court of Victoria in *Vinnicombe v. MacGregor*,<sup>13</sup> where the civil law rule of the "natural servitude"<sup>14</sup> was held to apply, although there was a strong dissent by a Beckett J. In the High Court case of *Nelson v. Walker*<sup>15</sup> both Griffith C.J. and O'Connor J. strongly criticized the decision in *Vinnicombe v. MacGregor*.

In the 1915 Privy Council case of *Gibbons v. Lenfestey*<sup>16</sup> Lord Dunedin held that the Roman Law doctrine had been accepted by the common law. The case came before the court on an appeal from Guernsey and the statement was obiter<sup>17</sup> but its effect may be traced through a number of later decisions.<sup>18</sup> On the other hand Napier C.J. in *Dubois v. District Council of Noarlunga*<sup>19</sup> considered that the dicta in *Gibbons v. Lenfestey* should be limited to the facts of the case. Finally in *Bell v. Pitt*<sup>20</sup> Burbury C.J. held that the civil law rule was not part of the law of Tasmania and refused to follow *Vinnicombe v. MacGregor*.

10. 2nd ed., Vol. 33, 630.

11. "Interference with Surface Waters by Lower Landholders" (1958) 74 L.Q.R. 361.

12. (1876) 14 S.C.R. (N.S.W.) 474.

13. (1903) 29 V.L.R. 32.

14. Note 8 supra.

15. (1910) 10 C.L.R. 560.

16. (1915) 84 L.J.P.C. 158.

17. The customary law of Guernsey is not the common law of England.

18. E.g. *Bailey v. Vile* [1930] N.Z.L.R. 829; *Righetti v. Wynn* [1950] St. R. Qd. 231; *City of Oakleigh v. Brown* [1956] V.L.R. 503 per Sholl J.

19. [1959] S.A.S.R. 127.

20. [1956] Tas. S.R. 161.

After a consideration of these authorities Windeyer J. concluded that the civil law rule that the owner of higher land has a right to insist upon his lower neighbour receiving surface water running off his land

is not part of the common law as it exists in Australia and that so far as the dicta in the Privy Council case suggest that it is, they should not be followed by this court.<sup>21</sup>

The lower owner may block the flow of surface water by works on his land so long as they are "reasonably necessary to protect his land for his reasonable use and enjoyment".

Hence one might briefly conclude that there is now binding authority in Australia that the general principles involved in the "common enemy" rule are part of our law. In disputes of this nature the court's duty is to balance conflicting interests. If the Civil law doctrine had been followed the higher owner would have been placed in an unduly dominating position in relation to the lower owner.

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21. (1962) 36 A.L.J.R. 43, 57.

## REAL PROPERTY ACT 1886-1961

### *Equity and the Torrens System—Scheme of Development*

The decision in *Black's Ltd. and Others v. Rix and Others*<sup>1</sup> is significant for two reasons. First, it endorses the propriety of noting by way of an encumbrance on the certificate of title restrictive covenants concerning land held under the Torrens system. Secondly, by invoking the equitable doctrine of a scheme of development, it throws some light on the obscurity surrounding the status of equitable interests in land registered under the Real Property Act 1888-1961.

Both the facts and the central issue were relatively simple. One of the plaintiffs, Springfield Ltd., had sub-divided an estate for the sale of separate lots to purchasers prepared to build residences of a certain minimum standard. Each lot was sold subject to certain restrictions of user, a particular restriction being the prohibition of further sub-division of any such lot. This was done by following a common conveyancing practice whereby the purchaser accepted a transfer subject to covenants comprising the restrictions, and providing for the payment, if demanded, of a perpetual and nominal annual rent charge.

In these circumstances, the substantial question before the court (Napier C.J.) was whether the plaintiffs, Springfield Ltd., and others who had purchased lots, could enforce such a covenant against the defendant, who was assignee of an original covenantor. Since the covenants existed only between original purchasers and the common vendor, and not between the covenantors inter-se, the necessary right of enforcement between the latter could be estab-

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1. 1962 Law Society Judgment Scheme 289.

lished only by employing the equitable doctrine of a "scheme of development".

This was in fact done by His Honour, who, after enumerating the now well-settled criteria for such a scheme,<sup>2</sup> concluded that the necessary conditions were fulfilled, and allowed the plaintiffs their claim for a declaration of right to enforce.

The first point of interest in the case concerns the finding that the plaintiff's use of the encumbrance provisions to note the relevant restrictive covenant on the certificate of title was a proper procedure. Although this has long been the practice of the Lands Titles Office, it appears that the present case contains explicit judicial recognition of its propriety in South Australia.

There has always been a body of opinion that only registrable interests could be placed on the certificate of title, and that the protection of restrictive covenants is properly relegated to the caveat process.<sup>3</sup> In arriving at his decision, His Honour alluded to the settled Victorian practice allowing such notation, and also to the form of "encumbrance" in the tenth schedule of the Real Property Act 1888-1961 which expressly includes "any special covenants". Read in conjunction with Sections 77 and 128, this would seem to provide a sound basis for the procedure.

Once the covenant is properly noted on the certificate of title, Section 69 will presumably operate to preserve it as an interest "notified on the original certificate of such land". Whilst it does not strictly follow from the mere fact of the covenant being on the title certificate that the equitable interests sought to be enforced are thereby "notified on the original certificate", (such equitable interests derive only from the coincidence of the covenants with the factual circumstances of a building scheme), yet it appears that the noting of the covenants will itself sufficiently satisfy this requirement.<sup>4</sup> Thus an equitable interest is indirectly placed on the certificate of title and is enforceable by virtue of that fact. This aspect of the present case involves the important conclusion that the protection of equitable interests is not in all cases necessarily relegated to the caveat process; those equitable interests for which legal ingenuity can devise a means of noting on the certificate of title will come under the blanket protection of Section 69. This would include equitable interests arising out of mortgage agreements as well as those arising from restrictive covenants.

His Honour also held that an independent support for the equit-

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2. See *Elliston v. Reacher* [1908] 2 Ch. 374, 384; C.A. (ibid.) 665.

3. See *Re Arcade Hotel Pty. Ltd.* [1962] V.R. 274, 283 per Sholl J. (dissenting.) (Dealing with the same question, the Victorian Supreme Court held that restrictive covenants could be noted as encumbrances.)

4. But see Baalman (27 A.L.J. 366, 367) who argues: "In order to show that any of the neighbours had an interest in the enforcement of such a covenant it would be necessary to invoke the common building scheme doctrine, and to look beyond the four corners of the instrument containing the covenant for attendant circumstances, as laid down in *Elliston v. Reacher* ([1908] 2 Ch. 374). If such a course is to be permissible in a Torrens title, then the key section of the Real Property Act must be held to be partly meaningless."

able interest might be found in Section 249, the enacting portion of which states:

Nothing contained in this Act shall affect the jurisdiction of the courts of law and equity in cases of actual fraud or over contracts or agreements for the sale or other disposition of land or over equities generally.

If this was the operative section, then the only obstacle would be the requirement of notice, since equitable interests arising from a scheme of development cannot be enforced against a bona fide purchaser of the legal estate for value without notice.<sup>5</sup> His Honour found this requirement of notice to be satisfied by the encumbrance itself.

It appears that the defendants bought or acquired their registered titles subject to the encumbrance, that is to say, well knowing that the land had been bought on the faith of the restrictive covenants, as covenants running with the land, and enuring to the benefit of all the purchasers under the building scheme.<sup>6</sup>

Such an encumbrance apparently guaranteed that whoever took a legal interest in the present case could not do so without notice of the equitable interests. This requirement of notice may cause difficulty in future cases where the form and content of the encumbrance is not so readily identifiable with a scheme of development.

In this context, His Honour did not find it necessary to discuss Section 186 which provided that :

No person contracting or dealing with, or taking or proposing to take a transfer or other instrument from the registered proprietor of any estate or interest in land shall . . . be affected by notice direct or constructive of any trust or unregistered interest, any law or equity to the contrary notwithstanding.

A literal translation of this provision appears inconsistent with the equitable doctrine of a scheme of development. A consistent interpretation would afford the purchaser immunity from notice if and when he does become registered, and not before. This is Hogg's view,<sup>7</sup> and is the view endorsed by Knox C.J. in *Templeton v. Leviathon Proprietary Ltd.*<sup>8</sup> when dealing with the equivalent section 179 of the Transfer of Lands Act 1915 (Vict.). With regard to this question, and also the question of equitable interests deriving from a registered encumbrance, it is a matter for regret that the action was undefended. It is not often that a case arises which invites the consideration of equitable interests under the Torrens system; when it does, the vigorous presentation of both sides of the question will undoubtedly assist its lucid exposition.

5. Preston and Newsom: *Restrictive Covenants* pp. 30-31.

6. 1962 Law Society Judgment Scheme, 292.

7. *Hogg on the Registration of Title to Land throughout the Empire*, at pp. 125-127.

8. (1921) 30 C.L.R. 34, 55.