THE M'NAUGHTEN RULES

The High Court and Uncontrollable Impulse

The appeal taken by South Australia to the Privy Council against the High Court's ruling in *Brown* v. *R.*[1] has provided the first opportunity for this tribunal to analyse the High Court's decision in *Stapleton* v. *The Queen.*[2] It will be recalled that in *Stapleton* the High Court refused to follow *R.* v. *Windle*[3] and held that, if a person was suffering a disease, disorder, or defect of reason, he came within the M'Naughten rules if he was thereby incapable of reasoning with a moderate degree of sense and composure as to the rightness or wrongness of an act of killing or could not comprehend the significance of such an act. Brown was convicted of the murder of a station manager. His defence was that at the time he shot the deceased he was insane. Expert evidence was given as to the state of Brown's mind, and opinions differed as to whether Brown was able at the critical time to know that what he was doing was wrong. A police officer deposed that he asked Brown the question: "Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them?" and that Brown replied: "Yes. But I could not help myself." After being convicted and sentenced to death, Brown immediately appealed to the Court of Criminal Appeal on the grounds of misdirection and non-direction (amounting to misdirection) by the learned trial judge in the Supreme Court (Abbott J.), in that he, *inter alia*,

(a) failed to instruct the jury adequately as to the test in law to be applied by them in determining the issue of insanity as raised by the defence,

(b) failed to put the case for the defence to the jury,

(c) in directing the jury that the penalty was not their concern instructed them in such terms as were likely to deflect the jury from a calm and dispassionate determination of the issue of insanity.

It will be noticed that all of these grounds raised questions of interpretation of the trial judge's direction; there was no attempt to point out any erroneous statement of the law contained in the direction.

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1. 33 A.L.J.R. 89; [1959] Argus L.R. 808. It is interesting to note that in seeking leave to appeal to the Privy Council the South Australian Government did not follow the practice begun in England in the case of *Beard*, [1920] A.C. 479. In Beard's case the Crown appealed on a point of law against the quashing of the prisoner's conviction by the Court of Criminal Appeal. It was announced that whatever the result of the appeal for the re-instatement of the murder conviction, the sentence of execution passed on Beard would not be carried out. This practice has since been followed in England in such circumstances. On the other hand, in Victoria, no such action was taken in the case of *The King* v. *Lee and Others*, 82 C.L.R. 133. There the three accused, who had been convicted of murder, appealed to the Full Court of the Supreme Court of Victoria. This Court by a 2-1 majority quashed the conviction and ordered a re-trial. The Crown appealed against the Supreme Court's decision and the High Court discharged the order and restored the convictions and sentences of the prisoners. They were hanged.
2. (1952) 86 C.L.R. 358.
3. [1952] 2 Q.B. 826.

With regard to ground (a), the Court of Criminal Appeal saw nothing in the case calling for a special direction that the issue of insanity involved an enquiry as to how far Brown was capable of reasoning when the act was committed. (*R.* v. *Porter*[4]; *Stapleton* v. *R.*[5]) "It seems to us," the Court said, "that if the special direction were called for in this case, it would be required in every case, and in *Stapleton's Case* it is expressly stated that this is not so." The Court disposed of ground (b) by pointing to the rule in *Immer and Davis*[6] viz. "a summing-up is sufficient if it is not unfair to the accused and if points are not withheld which it is reasonable to suppose are not already properly before the jury."[7] They found that Brown's defence was "before the jury from first to last through the whole hearing", and that, although Abbott J. had been "less helpful to the defence . . . than another Judge might, perhaps, have been", the summing-up was sufficient. They found, moreover, nothing in what Abbott J. said that would be likely to have the effect of deflecting the jury from a calm and dispassionate determination of the issue of insanity.

Brown now sought special leave to appeal to the High Court. As interpreted by the High Court, s. 35 (i) (b) of the Commonwealth Judiciary Act confers on the High Court an unfettered discretion to grant or refuse special leave in every criminal appeal, though the term "special leave" connotes the necessity for making a *prima facie* case showing special circumstances. (*In re Eather* v. *R.*[8]) But it is not easy to see any special circumstances in *Brown's Case*, and the High Court's judgment, which granted leave to appeal and upheld the appeal *instanter*, discloses on its face no such special circumstances.

It is submitted that the High Court's failure explicitly to justify its hearing the appeal was in this case particularly unfortunate. The grounds of appeal were those rejected by the Court of Criminal Appeal, and, as has been remarked, were concerned with the interpretation of the trial judge's direction and with speculation as to the possible effect of such direction on the jury. In such a case, the words of Evatt J. in *Packett* v. *R.*[9] would seem to be applicable:

> "As to whether the summing-up gave a fair presentation of the prisoner's defence, I am not disposed to dissent from Clark J's conclusion that it was too one-sided. But ordinarily such matters should be remedied by the Supreme Court sitting as the Criminal Appeal Court. In criminal appeals the responsibilities and duties of the Supreme Court are even greater and more onerous than in the case of ordinary civil matters; and it will be an evil thing if the administration of appellate criminal justice ever comes to be regarded as of relatively minor importance. While this court must reserve to itself an unfettered discretion to intervene in any given case which it regards as 'special', on the whole I think that this is not such a case."

4. (1933) 55 C.L.R. 183.
5. (1952) 86 C.L.R. 358.
6. (1917) 13 Cr.App.R. 22.
7. Id. at 24.
8. (1915) 20 C.L.R. 147.
9. (1937) 58 C.L.R. at 218.

Since State Courts of Criminal Appeal consist of experienced trial judges, there seems no good reason for the High Court to depart from the self-denying rule it pronounced in *Kelly* v. *R.*[10]

> "Where on an application for special leave to appeal to the High Court against a conviction, on grounds of misdirection, no question of general importance is involved, the only question being the meaning to be put upon the precise words used by the trial judge in the summing-up, special leave should be refused."

To what extent the High Court's judgment in *Brown's Case* is concerned simply with the meaning and effect on the jury of the words of the trial judge's direction may be established by a brief examination of that direction and the comments on it of the High Court.

Having given an unexceptionable direction as to the crime of murder, the general nature of a defence of insanity, the burden of proof, and that part of the M'Naughten Rules dealing with the "nature and quality of the act", Abbott J. turned to the defence that owing to a defect of reason from disease of the mind Brown did not know that he was doing wrong. A portion of the charge on this matter the High Court found "very much open to objection", as being "clearly erroneous in point of law". Abbott J. had said,

> "You may, perhaps, think that . . . the accused . . . was acting on an uncontrollable impulse. . . . If that view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable impulse is unknown to our law, and if that, in your considered view, is the only explanation of the death caused by the accused on 23rd November [1958], it is your duty to bring a verdict of guilty of murder."

At a later point Abbott J. returned to the answer that Brown had given to a question whether he knew at the time that it was wrong to point a loaded rifle at a person and shoot him; namely, the answer, "Yes. But I could not help myself." His Honour said,

> "These words may suggest to you that the accused was thereby setting up the defence of 'uncontrollable impulse' which you may think is the true explanation of what he did. But, as you will remember gentlemen, I have directed you, if that be the true explanation of what the accused did, that is no defence, and he is guilty in law of the crime charged."

The High Court said of this direction,[11]

> "It is a misdirection to say that if the jury think that the true explanation of what the accused did was that he acted under uncontrollable impulse, that is no defence. . . . Whatever the learned judge may have had in mind in using the word 'only' when he first gave the direction about uncontrollable impulse, the second statement says in plain terms that because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder. . . ."

It is submitted with great respect that this is a strained and unreal interpretation of the trial judge's words. The learned judge's second

10. [1942] Q.W.N. 43.
11. [1959] A.L.R. at 814.

statement, above, was in terms referred back to his first statement, above; namely, that if uncontrollable impulse were the *only* explanation, it would be no defence. It seems plain that "true explanation" is therefore of the same force as "only explanation"; that is to say, an explanation to the exclusion of any other explanation. In the context of the direction, the only other explanation before the jury was that Brown did not know that he was doing wrong. Thus the reasonable interpretation of the judge's words is that if the jury considered that Brown did know that he was doing wrong, but considered further that he acted under uncontrollable impulse, they must nevertheless find him guilty. That this would be a good direction the High Court conceded:

> "It may be true enough that although a prisoner has acted in the commission of the acts with which he is charged under uncontrollable impulse a jury may nevertheless think that he knew the nature and quality of his act and that it was wrong and therefore convict him."

The High Court's interpretation gains whatever plausibility it may have from the ambiguity of "true": this is merely the ambiguity of isolation. But the High Court, pursuing their interpretation of Abbott J's direction, went on to hold that—

> "[a prisoner's domination by uncontrollable impulse] may afford strong ground for the inference that [he] was labouring under such a defect of reason from disease of the mind as not to know that he was doing wrong. The law has nothing to say against the view that mind is indivisible and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act. . . . For that reason, even if no more had been said than that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree."

Although the High Court quoted no authority for this proposition apart from an ambiguous *dictum* by Greer J. during the argument in *Ronald True*[12] it seems clear that this is not new doctrine in Australia. It appears to have been first formulated by Latham C.J. in *Sodeman* v. *R.*[13]:

> "Uncontrollable impulse in itself is not a defence, but uncontrollable impulse resulting from mental disease which brings about or is associated with an incapacity to know the nature and quality of an act or to know that it is wrong amounts to insanity which constitutes a defence. . . . Such an impulse may be one manisfestation of mental disease. It may have the effect of destroying or preventing knowledge that the act is wrong."

It is submitted that this whole doctrine is, if not unsound, unsafe. It may tend in practice to confuse the issue before the jury by putting before the jury what appears to be evidence but is in reality a mere label.

12. (1922) 16 Cr.App.R. at 167.
13. (1936) 55 C.L.R. at 203.

Uncontrollable impulse, it is said, may amount to evidence of the accused's inability to know that he was doing wrong. But the jury have before them, not a given state of uncontrollable impulse, but rather evidence of a state of mind which they may care to label uncontrollable impulse. The doctrine may therefore be accurately expanded to assert that evidence of a state of mind amounting to uncontrollable impulse may also amount to evidence of the accused's inability to know that he was doing wrong. While this seems, with respect, to be scientifically and legally accurate, as formulated by the High Court it appears to suggest that the mere application of the label "uncontrollable impulse" adds evidential force to the evidence to which the label is applied. The High Court's views may promote the fallacy that the state of mind labelled "uncontrollable impulse" can be evidence of M'Naughten insanity when the evidence deemed to be of that state of mind does not in itself indicate such insanity. Thus, in a case where the only evidence of the accused's insanity was, as in *Brown's Case*, the motiveless character of his act, the High Court's formula might well lead a jury to suppose that even if this motiveless character did not in itself establish M'Naughten insanity, nevertheless it might establish uncontrollable impulse, and that uncontrollable impulse "may afford the strongest reason for supposing that he is incapable of forming a judgment that his acts were wrong or even of understanding their nature." (Per Dixon J., *Sodeman* v. *R.*[14]) If the trial judge in such a case had adequately directed the jury that the *lack of motive* (as distinct from the hypothetical *uncontrollable impulse*) could be evidence of M'Naughten insanity—and there is nothing in the judgment of the High Court or in the judge's direction that suggests that in *Brown's Case* the judge failed in this respect—then he should be said to have given a sufficient direction. To direct the jury, further, that mere irresistible impulse is no defence can in no way affect the issue, unless of course the judge goes so far as to suggest that evidence of uncontrollable impulse overrules and invalidates evidence of the accused's inability to know that he was doing wrong. This suggestion may seem to be a radical departure from hitherto accepted views on the M'Naughten Rules, but it is submitted that the High Court's judgment in the *Brown Case* appears to stand or fall with their premise that Abbott J. *did in fact so charge* the jury.

To use the terminology of Evatt J. in *Sodeman* v. *R.*[15], Abbott J's charge was bad if he directed (as it is submitted, *contra* the High Court, that he did *not*) that evidence as to conation overrides evidence as to cognition. It is clearly correct to say, with Evatt J., that there is no absolute gap between cognition and conation, but it is submitted that the High Court in *Sodeman* and *Brown*, has tended to hold that evidence as to conation may be evidence as to cognition, compelling even in the absence of any further evidence as to cognition. In effect the High Court has gone a long way towards evading the ostensible prohibition against the defence of irresistible impulse by allowing evidence of abnormal states of mind to be considered by a jury under two categories, the first raising the question whether the evidence establishes lack of cognition in accordance with the M'Naugh-

14. *Id.* at 10.
15. *Id.* at 227.

ten Rules, and the second raising the question whether the *same* evidence, having failed to satisfy the jury under the first category, establishes lack of conation, which in turn by an ambiguous train of reasoning establishes the lack of cognition previously rejected on precisely the same evidence. Such an evasion seems worthy of an appeal to the ultimate tribunal.

If it can be said that the High Court's judgment up to this point in *Brown's Case* depends wholly on a confessedly "literal" interpretation of the trial judge's words in two isolated passages of his summing-up, much the same can certainly be said for the rest of the judgment. This has to do with ground (c) of the appeal, that dealing with Abbott J's direction to the jury that the consequences of their verdict did not concern them. The comments of the High Court on various other portions of the charge to the jury may be studied with profit: for example—

> "It is difficult to resist the impression that the position taken up by [the expert witness for the defence] was not placed before the jury by the summing-up in a way which could be understood or appreciated."

The Court of Criminal Appeal had met the same objection by pointing to the rule in *Immer and Davis*, which it considered to be the rule in England and South Australia, and, apparently, in N.S.W. and Victoria. They expressed some very slight doubt as to whether the High Court had had any intention of overruling the rule in the recent High Court decision in the case of *Athanasiadis* v. *R.*16. They decided that the High Court had, in fact, no such intention. But the High Court, by their complete failure in *Brown's Case* to consider or even mention this whole matter — or, indeed, any other question or opinion in the judgment of the Court of Criminal Appeal—have left the situation more uncertain and unsatisfactory than before.

The High Court's approach in the *Brown Case* highlights the difficulties of trying to put the ruling in *Stapleton* to practical effect in the trial court. Oliver Wendell Homes, Jr., in his letter to Harold Laski on December 17th, 1925, could perhaps be said to have pointed out a fallacy in the High Court's approach in these cases when he wrote:

> ". . . As to your doctors and judges on uncontrollable impulse I think the short answer is that the law established certain minima of social conduct that a man must conform to it at his peril. Of course as I said in my book it bears most hardly on those least prepared for it, but that is what it is for. I am entirely impatient of any but broad distinctions. Otherwise we are lost in the maze of determinism."

Without broad distinctions to put to a jury, there is little doubt that our trial courts, faced with insanity pleas, will continue to be lost in a maze which can only tend to hamper rather than aid the processes of the criminal law.

16. March, 1958. Unreported.

CAUSATION

Loss of Consortium and Child, Family Re-arrangement

In commenting on causation Denning J. (as he then was) in *W.* v. *Minister of Pensions*[1] stated:

> "The question of causation, as has been said in many cases is to be treated not in a metaphysical sense, but according to common-sense standards."

At the same time, however, it is often very difficult to determine what are these common-sense standards and to see how they have been applied in any particular case. Such a case is that of *Cameron* v. *Nottingham Insurance Company Limited*,[2] decided by Reed J. of the Supreme Court of South Australia.

The facts were as follows: the plaintiff had been injured in a traffic accident owing to the negligence of the driver of the motor cycle on which he had been riding as pillion passenger. The defendant company was sued pursuant to s. 70 d. (2) of the Road Traffic Act 1934-56 as the insurer of the motor cycle. Liability was admitted by the defendant company, the only matter left to be determined being the quantum of damages. The plaintiff as a result of his injuries had believed himself to be incapable of sexual intercourse to the extent necessary to cause his wife to conceive, had informed her of this belief, and she, believing it to be true, had thereupon left him, taking with her the child of the marriage. He claimed damages, *inter alia*, for loss of consortium with his wife, loss of custody of the child of the marriage, the re-arrangement of his life consequent upon the loss of his wife and child. It was contended for the plaintiff that the damages were recoverable, under the authority of *In re Polemis and Furness, Withy and Company Limited*[3] His Honour held that *In re Polemis* was binding on the Court, quoting the dictum of Asquith L.J. (as he then was) in *Thurogood* v. *Van der Berghs and Jurgens Limited*[4] which states:

> "Nor do I consider that the decision in *In re Polemis and Furness, Withy and Company Limited* has been overruled or its binding character so far as this court (Court of Appeal) is concerned in any degree shaken. The utmost that can be said is that certain of the Lords of Appeal in Ordinary have reserved the right to reconsider it if and when, before the House of Lords, its authoritative character should come directly in issue. Meanwhile it stands."

That being so,

> "foreseeability of the particular damage sustained is irrelevant to recoverability and directness of causation is the sole criterion."[5]

After reviewing the authorities, Reed J. held that there were two matters which could effect a break in the "chain of causation" (that is, that relationship between antecedent and consequent required by the law in a given fact situation for legal liability to be incurred) namely:

1. [1946] 2 A.E.R. 501 at 502.
2. [1958] S.A.S.R. 174.
3. [1921] 3 K.B. 560.
4. [1951] 2 K.B. 537 at p. 555.
5. [1958] S.A.S.R. 174 at p. 182.

the belief formed by the plaintiff and the communication of it to his wife, and the wife's conduct in leaving her husband.

His Honour found that the plaintiff's belief was reasonable, but that the action of the wife in leaving her husband was clearly unreasonable and any loss sustained thereby was too remote. The result achieved is obviously fair and just but the reasoning used to arrive at it may well repay analysis.

It is difficult to see how *In re Polemis*[6] applied to this particular case. In the former case, negligence on the part of the defendant's servant in kicking a plank into the hold of a ship was held to render the defendants liable for the loss of the ship when the plank struck something in the hold, causing a spark which ignited the benzene vapour therein. There was an original negligent act – the workmen owed a duty not to cause a dent in the hold of the ship—and the defendants were liable for all direct physical consequences of this act although foreseeability was expressly negatived. In *Cameron's Case*,[7] however, the question to be answered was whether particular voluntary human conduct (i.e. intending the act or formation of intention if not the consequences thereof) was such as to negative causal relationship between the original negligent act and the damages claimed. *Re Polemis*[8] was not concerned with intervening causes arising after the occurrence of the original negligent act, but with a cause operating upon a pre-existent condition (the inflammability of the hold)—a case of "take your plaintiff (and his goods) as you find them". Thus in *Liesbosch Dredger* v. *S.S. Edison* (*Owners*)[9] the defendants negligently caused the loss of the plaintiff's dredger and the plaintiffs, owing to their lack of means were forced to hire a dredger rather than purchase a new one, involving them in wasteful expenditure: Lord Wright, commenting on the possibility of recovering damages for the hire of the dredger, said in reference to *In re Polemis*[10]

> "that case however was concerned with the immediate physical consequences of the negligent act and not with the co-operation of an extraneous matter such as the plaintiff's want of means. I think therefore that it is not material further to consider the case here."[11]

An analogy between the present case and *In re Polemis*[12] could only be drawn, it would seem, had the question decided in the latter case been whether a person, standing on the wharf at the time of the explosion, who had panicked and jumped into the water, could

6. ibid.
7. [1958] S.A.S.R. 174.
8. ibid.
9. [1933] A.C. 449.
10. ibid.
11. [1933] A.C. 449 at p. 461. That the plaintiff's lack of means is not regarded as a mere condition in which the cause operates is probably best explained as judicial policy — the court will not take steps to "extricate parties from predicaments into which they would not have fallen but for their lack of means"—this would explain the apparent conflict between the decision and the general rule that abnormal circumstances existing at the time of the wrongful act will not negative causal connection — i.e. "take the plaintiff as you find him".
See 72 L.Q.R. "Causation in the Law II" at p. 407 by Professor Hart and A. M. Honoré.
12. ibid.

recover damages for hospitalization due to pneumonia, caused by his immersion.

This attempt to widen the purview of *In re Polemis*[13] has its own precedents. Thus in *Pigney* v. *Pointer's Transport Services Ltd.*[14] the deceased had suffered injury owing to the negligence of his employers. As a result of neurosis induced by his injuries, not being insane at law at the time, he committed suicide. His wife sought recovery under *Lord Campbell's Act*.[15] Pitcher J., purporting to apply *In re Polemis*,[16] acceded to her request. Having established causation in fact, he equated this "causa sine qua non", with causation in law, rejecting the usual test as to the reasonableness of voluntary intervening human conduct as expounded by Lord Wright in *The S.S. Oropesa*[17], substituting the test of direct traceability.

> "Whilst the death of the deceased was not the kind of damage one would expect to result from the injury he received, I am satisfied that his death was . . . directly traceable to the physical injury which he sustained, due to the lack of care of the defendants for his safety."[18]

This decision, purporting to extend *re Polemis*[19]—a case of direct physical consequences resulting from abnormal concurrent conditions —to a situation of injury brought about by a voluntary act of an human being as a result of nervous disorder itself resulting from the original negligent act seems, with due respect, to be an unwise extension of the principle of *In re Polemis*[20] and has been severely criticised.[21]

It is difficult to see what test, other than that of the reasonableness of the human action can be applied to decide liability or non-liability in such cases. If the "causa sine qua non" test be applied then the wife of a person who is inordinately proud of his nose will be able to recover under *Lord Campbell's Act*[22] for the death of her husband whose nose is broken owing to the negligence of his employers and who forthwith commits suicide. This example may render obvious the inapplicability of the principle of *In re Polemis*.[23] Indeed, Reed J. in *Cameron's Case*[24] appears to have realized the inapplicility of *Re Polemis*[25] for after deciding that the decision therein bound the court, he appears to have consigned it, in fact, to the limbo of inapplicability, applying in its stead the test of reasonableness of action i.e. foreseeability—the "common-sense" principles of causation.[26] The common-sense principles on which causation is based would seem to include the rule that human

13. ibid.
14. [1957] 1 W.L.R. 1121.
15. Fatal Accidents Act 1846-1908 (U.K.).
16. ibid.
17. [1943] P. 32 at p. 37.
18. [1957] 1 W.L.R. 1121 at p. 1124.
19. ibid.
20. ibid.
21. See e.g. 31 Aust. L.J. p. 587 "Liability for Suicide" by J. G. Fleming.
22. Fatal Accidents Act 1846-1908 (U.K.).
23. ibid.
24. [1958] S.A.S.R. 174.
25. ibid.
26. [1958] S.A.S.R. at 185, 186.

conduct or intervention does not necessarily negative causal relationship between the negligent act and the ultimate consequences. If it be voluntary in the fullest sense then it will do so. If, however, it is non-voluntary in that it would not have occurred but for the defendant's original act, then it will not negative causal relationship unless it is unusual—that is something unreasonable or unwarrantable.[27] The wife's conduct in leaving her husband owing to his supposed injury could not be described as reasonable, if only on public policy grounds. Indeed one of the most interesting points about the case was the illustration it afforded of the way in which the law is formed by public policy—the judicial interpretation of what marriage means to the community—

> "If she thought about her matrimonial obligations at all, she probably regarded them . . . as imposing upon her no duty to stand by and support her husband in sickness and in health. I decline to hold that her conduct was reasonable as being such as would occur in an ordinary case and with ordinary persons acting according to the accepted standards of the community."[28]

A very similar case to the present was *W.* v. *Minister of Pensions*[29] where Denning J. (as he then was) held that a soldier who claimed that his chronic state of anxiety had been caused by his wife's misconduct while they were separated owing to his war service, could not demand compensation for his illness as being due to his war service. The misconduct of his wife, though it would not have occurred but for his absence was not what could reasonably be expected. The plaintiff's separation from his wife merely provided the conditions in which the cause operated.[30]

27. See, e.g. (1) The Orepesa [1943] P. 32 at p. 37 per Lord Wright.
(2) *Summers* v. *Salford Corporation* [1943] A.C. 283 at p. 296 per Lord Wright.
(3) 72 L.Q.R. "Causation in the Law", p. 58, 260, 398, by Professor Hart and A. M. Honoré.
28. [1958] S.A.S.R. at p. 186.
29. [1946] 2 A.E.R. 501.
30. [1946] 2 A.E.R. 501 at p. 502-3 per Denning J. See also *Lynch* v. *Knight* (1861) 9 H.L.C. 577, *Lambert* v. *Eastern National Omnibus Co. Ltd.* [1954] 2 A.E.R. 719—as to what is "reasonable" conduct by a spouse.

CONSTITUTIONAL LAW

Section 92: What is Essential to Interstate Trade and Commerce

The test of how far the protection of Section 92 extends has always been elusive. Recently the value of the distinction between what is essential and non-essential to inter-State trade and commerce has been discussed.[1] The High Court in *Russell* v. *Walters*[2] preferred a test of "practical reality": "The question of when and

1. See: P. H. Lane, 32 A.L.J. 335, and Prof. Ross Anderson, 33 A.L.J. 276 and 294.
2. (1957) 96 C.L.R. 177.

where inter-State transit begins and ends is a question to be decided not upon the terms of a contract but as a matter of practical reality depending on the facts of each particular case."[3] Two illustrations of the application of this principle are to be found in decisions of the South Australian Supreme Court.

In *Fry* v. *Russo*[4] the respondent had driven an unregistered motor vehicle contrary to Section 7 (1) of the Road Traffic Act 1934-1956. The majority (Reed J. dissenting) accepted his defence that, at the time, he was engaged in an activity of inter-State trade and commerce. The respondent had for some years been engaged in carrying goods inter-State. Having returned from Melbourne, he drove his semi-trailer to a factory to enquire about another load, but, being unable to obtain one, he went to a service station to have his semi-trailer serviced. The Magistrate found that, on leaving the factory, the respondent had gone to the service station solely for the purpose of having his vehicle serviced. The Magistrate found, moreover, that the respondent had, at all times, travelled by the shortest possible route and, at the time when he was stopped by a police constable, was returning home by the shortest possible route. The charge was dismissed by the Magistrate on the ground that the vehicle was being used for the purpose of inter-State trade and commerce. The complainant, on appeal, accepted the Magistrate's view of the evidence but challenged the conclusion, contending that the servicing of the vehicle, though it may be an ancillary, was not an incident of inter-State trade and commerce.

Napier C.J. applied the language of the Privy Council in *Hughes and Vale Pty. Ltd.* v. *The State of N.S.W.*[5] and the High Court in *Nilson's Case*.[6] He concluded that the vehicle, while being driven to be serviced, was being "operated in course of and for the purpose of inter-State trade", or, using the High Court phrasing, was being "used exclusively in or for the purposes of inter-State trade". He did not restrict the course of inter-State trade to actually coming or going inter-State, but the vehicle must be on the road for no other purpose, nor, referring to the concession made by the appellant that the protection of Section 92 extended to cover the driving of the vehicle to the factory with a view to obtaining a load, could it divagate about the country-side "plying for hire if it was to remain under the protection of Section 92". Napier C.J. arrived at his decision without using any test. Having decided that the protection of Section 92 cannot be restricted to actually coming or going inter-State, he decided that the servicing of a vehicle is an activity of inter-State trade and commerce.

Ross J, too, was of the opinion that the protection of Section 92 extends further than actual transportation across the border. The problem is to say at what point that protection ends. Ross J. relied on the test in *Russell* v. *Walters* and found that practical reality demanded that Section 92 extend to the servicing of the vehicle, which was an "inseparable concomitant" of the respondent's business as an inter-State carrier: and so long as the journey taken was not

3. ibid at p. 184.
4. [1958] S.A.S.R. 212.
5. (1954) 93 C.L.R. at 35; [1955] A.C. 241.
6. (1955) 93 C.L.R. 292.

unreasonable, the service station need not be one closest to the respondent's home.

The appellant had relied strongly on a dictum in *Grannall* v. *Marrickville Margarine Pty. Ltd.*[7] There Dixon C.J., McTiernan, Webb and Kitto JJ. stated: "The idea that because the freedom of trade, commerce and intercourse among the States is assured by the Constitution, all matters that are incidental or ancillary to such trade, commerce and intercourse are in the same way protected from interference or control is quite fallacious."[8] Both Napier C.J. and Ross J. rejected the contention that the servicing of the vehicle could be regarded as being a matter merely "incidental or ancillary" to inter-State trade. On the other hand Reed J. concluded that the respondent's use of his vehicle in the present case must be "inseparable", "indispensable" or "essential" to the carriage of goods inter-State before Section 92 would protect him; and that the driving of the vehicle to be serviced was at most "an act preparatory to a transaction of inter-State trade or commerce, or accessory to it." In addition, Reed J. reserved his opinion as to whether a journey to ascertain whether goods were available for transport would be protected by Section 92.

Hence in the present case Napier C.J. cited no test to arrive at his decision; Ross J. relied on the "practical reality" test of *Russell* v. *Walters;* Reed J., having quoted several dicta, seemed to rely on the "essential or non-essential" test suggested by Dixon C.J., McTiernan J. and Webb J. in *Hughes and Vale Pty. Ltd.* v. *The State of N.S.W.* (No. 2).[9] The practical reality of vehicular transport, it would seem, demands the servicing of vehicles. Those vehicles used in inter-State trade must be serviced. It is not unreasonable, therefore, to extend the protection of Section 92 to the driving of a semi-trailer to and from a garage for servicing. However, that conclusion is an arbitrary one and a different answer could easily be made, as in most Section 92 cases, if there were some differences of fact and circumstance to be considered.

In *Ridland* v. *Dyson*[10] the question was not how far the protection of Section 92 extended but whether it covered the transaction at all. The facts were clouded by what Napier C.J. described in his judgment as a "fog of uncertainty." It was, however, common ground that the respondent had driven a vehicle on which goods were carried for hire without a licence contrary to Section 14 of the Road and Railway Transport Act 1930-1957. The Magistrate found that the vehicle was engaged in inter-State trade and, therefore, exempted by Section 92 from the provisions of that Act. Napier C.J., sitting alone, allowed the complainant's appeal. The respondent testified that he had been instructed to pick up timber at Mt. Gambier and take it to Port Adelaide. His wife owned and operated a truck per medium of a driver whom she employed and paid. The respondent had instructed his wife's driver to pick the timber up in Mt. Gambier and bring it—in her truck—to his depot at Dartmoor. There the load was off-loaded on to one of the respondent's vehicles, and so

7. (1955) 93 C.L.R. 55.
8. ibid at 77.
9. (1955) 93 C.L.R. 113 at 123.
10. [1959] S.A.S.R. 72.

transported from Dartmoor, in Victoria, to Port Adelaide, in South Australia. His Honour accepted the Magistrate's finding that the timber had been taken over the Victorian border and there transhipped to avoid the operation of the South Australian law. But "the fog of uncertainty" surrounded the question whether the respondent's wife was in fact carrying on a separate business at the material time. The wife had not kept separate books; at the relevant time she was in ill-health, and the respondent had directed the use of her vehicle and driver; the respondent had received all payments and arranged the cartage; and four months later no payment had been made to the wife for the use of her vehicle in the transaction. His Honour concluded from these facts that the arrangement to carry the timber was made between the respondent and the consignor company. The timber was carried, therefore, under the respondent's contract to transport it from Mt. Gambier to Port Adelaide. Instead of two contracts as alleged, there was only one.

The onus of proof was on the respondent to bring himself within the protection of Section 92, and, in default of evidence to the contrary, His Honour assumed that the respondent had engaged himself to carry the timber, if not by the shortest, by some recognized route. There was no contract providing for a deviation into Victoria, and, despite the fact that such a deviation was made, the transaction was in no way altered from a contract of carriage intra-State to one inter-State: no protection could be afforded, therefore, by Section 92.

Napier C.J. agreed that it was a question of fact and degree whether a journey across the border would invest a transaction with the character of inter-State trade and commerce. But in the present circumstance, he held that the deviation was not genuinely intended as a performance of the contract but was solely for some purpose of the carrier; he was "on a frolic of his own". For that reason the facts were not covered by the High Court's decision in *Naracoorte Transport Pty. Ltd.* v. *Butler*.[11] Here there was one single contract of hire; in that case there were two. For those reasons His Honour allowed the appeal. It would seem that, had the respondent been more precise in his conduct of the transaction, he may have brought himself within the sanctity of Section 92: had two contracts of carriage been made by the respondent the facts may have been covered by the *Naracoorte Case* and the same decision reached.

Be that as it may, Napier's C.J. approach to the problem is interesting to compare with that of the High Court in two 1959 decisions. In *Beach* v. *Wagner*,[12] a carrier contracted to carry wool from Bungunya, in Queensland, to Brisbane. The road from Bungunya to Goondiwindi is, in certain weather, unsuitable for the diesel and semi-trailer operated by the carrier. It was his practice, therefore, to drive to his depot at Boggabilla in New South Wales, tranship the load to his semi-trailer and proceed then to Brisbane. While driving from Bungunya to Boggabilla on such a journey the carrier was alleged to have committed an offence contrary to the State Transport Facilities Act (Queensland) 1946-1955. The Court in a joint judgment held that the transaction fell within the protection of Section 92. There

11. (1956) 95 C.L.R. 455.
12. (1959) 33 A.L.J.R. 62.

was no reason why the carrier should not have had a depot in New South Wales; nor was there any reason why he should not carry goods there from Queensland and there ship them back to Queensland. It was in the course of his business to do so, and the transaction was none the less one of inter-State trade and commerce, because the wool returned to Queensland. The Court regarded the case as complementary to the *Naracoorte Case*.

The facts of *Beach* v. *Wagner* are almost identical to those of *Ridland* v. *Dyson*. One distinction, however, is that the road from Bungunya to Goondiwindi is in certain weather unsuitable for a semi-trailer, though it will carry a smaller vehicle, while the road from Mt. Gambier to Port Adelaide is a bitumen road. Yet the carrier in *Beach* v. *Wagner* could as easily have established his depot in Queensland somewhere near Goondiwindi, whence the road is a bitumen one to Brisbane, as in New South Wales. There were not two separate contracts of carriage; nor were there two carrying companies. To grant the protection of Section 92 to a journey across the border which was not necessary is to stretch the interpretation of the Section to a doubtful limit and with respect it is submitted that the Court went too far. The place of the depot could have, at least, been questioned.

However, the High Court in the recent case of *Harris* v. *Wagner*[13] has made some attempt to limit the effect of *Beach* v. *Wagner* and the result is very similar to the decision of Napier C.J. in *Ridland* v. *Dyson*. A carrier contracted to carry wool from Jandowae in Queensland, to Brisbane. However, the terms of the contract of carriage were that the load should be carried from Jandowae to Tweed Heads and then from Tweed Heads to Brisbane. The payment would be for carriage from Jandowae to Tweed Heads, and a separate payment for the journey from Tweed Heads to Brisbane: the contract was of the nature that Napier C.J. suggested in *Ridland* v. *Dyson* would perhaps be invested with the protection of Section 92. The carrier was apprehended while driving from Tweed Heads to Brisbane. His conviction for driving not in accordance with the State Transport Facilities Acts 1946-1955 was upheld by the High Court.

The substance of Their Honours' judgments was that while the expression inter-State trade covered journeys across the State lines and such journeys were free by virtue of Section 92, unnecessary journeys across the border, though they could not be prohibited, did not change intra-State transactions into inter-State transactions, sheltering under Section 92. The carrier had driven to within eight miles of Brisbane from Jandowae, but then had detoured seventy miles south to Tweed Heads, stopped for a short period, and driven back to Brisbane. While at Tweed Heads nothing was loaded or unloaded on to the truck. The Court found that this was, therefore, an unnecessary journey and did not alter the true nature of the transaction: the contract remained one to carry goods intra-State: Section 92, therefore, afforded no protection. The journey to Tweed Heads was nothing more than what Taylor J. described as a "superficial excrescence". Napier C.J. described the carrier's journey in *Ridland* v. *Dyson* from Mt. Gambier to Dartmoor as a "frolic of his own". The different words express the same result. But the more direct

13. (1959) 33 A.L.J.R. 353.

approach of Napier C.J. may be preferred to the circuitous means used by some of the High Court.

Beach v. *Wagner* was relied on by the carrier in *Harris* v. *Wagner*. Those judges, who did distinguish that decision did so on the ground that it was necessary for the carrier in the *Beach Case* to go to Boggabilla, for his depot was there: at the same time, however, they did not query the fact that this depot was at Boggabilla and not Goondiwindi. *Harris* v. *Wagner* seems to be clearly complementary to *Ridland* v. *Dyson* although unfortunately only one member of the High Court refers to the South Australian decision. Menzies J. pointed out that Napier C.J. in *Ridland* seemed to stress the absence of any contractual obligation to divagate into Victoria. In reaching his decision Menzies J. however, refused in *Harris* v. *Wagner* to regard the existence of a contractual obligation to travel from Jandowae to Brisbane by way of Tweed Heads as decisive in favour of the appellant. This would seem to indicate that Menzies J. at least, would uphold the *Ridland* decision even if the original pean in *Ridland* had not been clouded by a "fog of uncertainty."

CONTRACT PENALTY CLAUSES

Principles to Apply in Determining Validity

The authoritative statement of the principles for ascertaining whether a contractual term is a penalty is that of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*[1]:

"1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages', may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. . . .

2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage. . . .

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach. . . .

4. To assist this task of construction various tests have been suggested which if applicable to the case under consideration may prove helpful or even conclusive."

In *Arlesheim* v. *Werner*,[2] Napier C.J. accepted this passage as the basis of a judgment concerning a damages clause in a contract of service to work as a ladies' hairdresser. The respondent agreed with the appellant company, Arlesheim Ltd., to give six months' notice before terminating her employment. If the appellant left without giving this notice the contract stipulated that she would pay the appellants the sum of £56/10/- as liquidated and ascertained damages.

1. [1915] A.C. 79 at 86-87.
2. [1958] S.A.S.R. 186.

The contract stated that this amount was arrived at "as a result of a careful consideration of the losses, damages and expenses likely to be occasioned" if the respondent failed to give six months' notice. In the absence of provisions in the contract to the contrary, the terms of employment were to be covered by the current determination of the Hairdressers' Board under the Industrial Code, 1920-1956. This provided in the absence of an express contract to the contrary, that all employees bound by the determination were employed by the week. The terms of employment were subject to a week's notice on either side or forfeiture or payment of a week's wages. The appellant left her employ without giving notice, and later acknowledged in a letter that she was liable to her former employer for the full £56/10/- stipulated in the contract of service. (At the same time she asked to pay this sum by instalments.) The respondents replied with a statement of account which stated that the appellant owed Arlesheim Ltd. £44/6/3 after various debits and credits had been accounted for. An offer by her to pay this sum in weekly instalments was subsequently accepted. She made four such payments to the appellants, but when no more instalments were forthcoming Arlesheim Ltd. brought the present action to recover £32/6/3 either as the balance due under the contract of service or on the account stated.

Purporting to apply the principles set out in the *Dunlop Case*, His Honour stated that as the respondent was a newcomer to Australia she never fully understood the contract and there was no real consent to a genuine pre-estimate of damages. The respondent could not read the contract, which was in English, and when it was read out to her all she remembered was that she was required to give six months' notice or pay her employer £56/10/-. No explanation was proffered as to how the sum was made up nor the relationship between the stipulated sum and any failure on the respondent's part to give six months' notice. In addition, the Chief Justice held that the sum could not be regarded as a genuine pre-estimate of the damages which would result from the respondent leaving her employment without notice, following the rule stated by Lord Dunedin in the *Dunlop Case* that a stipulated sum of liquidated damages will be regarded as a penalty if it is "extravagant and unconscionable" in comparison with the greatest loss that could conceivably be proved to have followed the breach for which the stipulated sum provides.

His Honour thus decided that the clause was a penalty clause by invoking two tests: one subjective—did the respondent's state of mind at the time of contracting reveal a real consent to a genuine pre-estimate of damages? And the other objective—was the amount an extravagant and unconscionable assessment? It is respectfully submitted that other authorities apply only the objective test. This is the approach used in recent cases concerning hire purchase agreements where penalty clauses have a place of prominence: *Cooden Engineering Co.* v. *Stanford*[3]; *Lamdon Trust Ltd.* v. *Hurrell*.[4] If both tests are to apply which is to prevail if they give opposite results? It could be agreed that if real consent is proved then the Court is precluded from further consideration of the question.

3. [1953] 1 Q.B. 86.
4. [1955] 1 W.L.R. 391.

EVIDENCE

Admissibility of Confessions—Judges' Rules

The question of the admissibility in evidence of confessions made by accused persons to police officers has been raised and fully discussed by the High Court of Australia in a number of recent cases: *MacDermott* v. *R.*,[1] *R.* v. *Lee and others*,[2] *Basto* v. *R.*[3] and *Smith* v. *R.*[4] In *R.* v. *Bailey*[5] the South Australian Court of Criminal Appeal (Abbott and Ross JJ. and Piper A.J.) considered the result of these cases particularly in relation to previous South Australian authorities on the subject, and to the effect and application of the English Judges' Rules.

Bailey was arrested in Queensland and charged with obtaining a motor car in South Australia by false pretences. He was given the usual caution by the detective who charged him. The detective then proceeded to question him with respect to the murder of two women and a man in South Australia. The questioning lasted the whole day and during that time the police alleged that the accused made four statements to them in each of which he admitted connection with the murders to a greater extent than in the previous one. The final statement admitted causing the death of all three victims, and was dictated to a policeman who typed it. The accused signed it and also signed an admission that the statement was made voluntarily. But it was not until the prisoner made the third of his statements that he was cautioned in respect of the murder charge.

The objections to the admission of the confession evidence were (1) that the Crown had not proved that the evidence objected to was given voluntarily by the prisoner and (2) that in any event the trial judge should have excluded the evidence in the exercise of his discretion as unfair in all the circumstances, in particular in that the absence of a proper caution until too late constituted a substantial departure from the Judges' Rules, which are in force in Australia only in Victoria.

The Court accepted the general statement of the law relating to admissibility of confessions laid down by the High Court in *R.* v. *Lee*.[6] There is a rule of law:

"Such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made by an exercise of free choice and not because the will of the accused has been overborne, or his statement made as the result of duress, intimidation persistent importunity or sustained or undue insistence or pressure, and such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed."[7]

1. (1948) 76 C.L.R. 501.
2. (1950) 82 C.L.R. 133.
3. (1954) 91 C.L.R. 628.
4. (1957) 97 C.L.R. 100.
5. [1958] S.A.S.R. 301.
6. 82 C.L.R. 133.
7. Ibid p. 141.

And a rule of discretion:

"If it is voluntary, circumstances may be proved which call for an exercise of discretion. The only circumstance which has been suggested as calling for an exercise of the discretion is the use of 'improper' or 'unfair' methods by police officers in interrogating suspected persons or persons in custody. . . . What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must depend on the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions."[8]

The Court considered that the law which had hitherto applied in South Australia was that stated by the Full Supreme Court in *R.* v. *Lynch*[9] and supplemented by Napier J. in *Lenthall* v. *Curran*.[10] The tests propounded in the former of these cases, are taken from the language of Lord Summer delivering the judgment of the Privy Council in *Ibrahim* v. *R.*[11]; they contain expressions which may, it is submitted, be usefully considered as supplementary to the statements the High Court quoted above. In relation to the rule of law it is said that a statement is not voluntary if it has been obtained "by fear of prejudice or hope of advantage exercised or held out by a person in authority". With respect to the rule of discretion, the judge may exclude statements "if he thinks they were unguarded answers made under circumstances that rendered them unreliable or unfair, for some reason to be allowed in evidence against the prisoner". [12]

The Court in this case found that the Crown 'proved beyond reasonable doubt that the confessions were not obtained under such circumstances as to render them non-voluntary and so inadmissible as a matter of law'.[13] They also found that the trial judge had correctly refrained from exercising his discretion to reject the evidence. They found that 'whatever may be said in the Judges' Rules or in any direction issued to police officers in any of the Australian States, the matter is not to be finally judged by such rules or directions, but by the circumstances of every particular case and by the tests laid down in *R.* v. *Lee*[14] and by Street J. in *R.* v. *Jeffries*.[15]

They refused to adopt the argument of counsel for the appellant that the decision of the High Court in *Smith* v. *R.*[16] modified the principles stated in *R.* v. *Lee* by requiring some higher standard of fairness on the part of questioning police officers. In particular the judgment by Williams J. (which contained a full discussion of the effect of the Judges' Rules) was read as limited by the former case. The Court was unable to find in the evidence itself or any inference to be drawn from the time taken in questioning the accused any reason why it would be unfair to use his own statements against the prisoner.

8. Ibid p. 150.
9. [1919] S.A.S.R. 325.
10. [1933] S.A.S.R. 248 at 262.
11. [1914] A.C. 599 at 609.
12. [1919] S.A.S.R. at 333.
13. [1958] S.A.S.R. at 315.
14. (1950) 82 C.L.R. 133.
15. (1947) 47 S.R. (N.S.W.) at p. 312.
16. (1957) 97 C.L.R. 100.

The case reiterates the view of the High Court that the exercise of the trial judge's discretion to reject confession evidence depends on the particular circumstances of the case, and affords an example of a contravention of the standards set by the Judge's Rules which was not considered unfair in all the circumstances.

PRIVATE INTERNATIONAL LAW

Jurisdiction in Nullity Suits—Choice of Law

Corlevich v. *Corlevich*[1] was an action by a husband for an order declaring his marriage to the respondent null and void upon the following facts:

In 1950 he went through a ceremony of marriage with the respondent in Italy; they migrated immediately afterwards to South Australia where they were both resident at time of the action. In 1943 the wife had married M. in Italy. She had lived with him until 1947 when he left her and went to Yugoslavia. He was then aged twenty-six. She received a letter from him in 1948 but heard no more of him until 1956 when a letter from her family in Italy spoke of him as still being alive. Expert evidence was called to establish that certificates of both ceremonies which were produced would be evidence of a valid marriage in an Italian Court, and further that the second ceremony would have no legal effect by Italian law and would be regarded as never having existed, without any proceedings being taken to declare it void (assuming that the husband was alive beyond question at the time of the ceremony).

Reed J. found that the onus was upon the plaintiff to show that M. was still alive at the date of the second ceremony, following the rule stated by Dixon J. in *Axon* v. *Axon*.[2] He found that this burden was discharged by the presumption of continuance of life as stated and limited in the same case.[3]

The case raises two questions of interest with respect to the private international law rules in nullity suits. The first concerns the jurisdiction of the Court.

This is assumed by Reed J.[4]: "The jurisdiction of this Court to declare the marriage void is clear, as both parties reside in this State; cf., for example, *Ramsay-Fairfax* v. *Ramsay-Fairfax* (*otherwise Scott-Gibson*)."[5] Strangely enough there does not seem to be any direct authority to this effect in relation to 'void' marriages.

A line of English cases have considered whether in the case of a *voidable* marriage there is a wider jurisdiction in the court than the rule applying to divorce proceedings that only the Courts of the domicil of the parties has jurisdiction: *Le Mesurier* v. *Le Mesurier*.[6] In *Inverclyde* v. *Inverclyde*[7] Bateson J. considered that the rule in

1. [1954] S.A.S.R. 131.
2. 50 C.L.R. 395 at p. 403-404.
3. Ibid at p. 404-405.
4. [1958] S.A.S.R. at 135.
5. [1956] P. 115 at p. 133.
6. [1895] A.C. 517.
7. [1931] P. 29.

Le Mesurier's case applied to nullity proceedings in the case of voidable marriages. This was not followed by Hodson J in *Easterbrook* v. *Easterbrook*[8] and Pilcher J. in *Hutter* v. *Hutter*[9]; it was overruled by the Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[10] But all these cases assume that the rule relating to void marriages is that jurisdiction exists in the courts of the country in which both parties are resident (see, for example, the passage referred to by Reed J. in *Ramsay-Fairfax* v. *Ramsay-Fairfax*[11]). This was the rule of the Ecclesiastical Courts before 1857 and departure from it in the case of a void marriage could not be maintained for the reason given by Bateson J. in the case of voidable marriage that the nullity suit affected the status of the parties and was therefore of a similar nature to divorce proceedings.

Reed J. therefore had firm authority on which to base his proposition but it should be noted that his is the first statement of the principle as part of the ratio decidendi of a case.

The second point of interest is that the learned trial judge seems to consider the choice of law as a question separate from that of jurisdiction. He discusses the expert evidence given as to the invalidity of the marriage under Italian law. He does not however indicate that he does so because that was the law of the domicil of the parties at the time of the second ceremony or because it was the lex loci celebrationis. It should be noted that if it is the latter proposition that has been applied then the case would represent a departure from previous authority. Be that as it may the learned judge has avoided the confusion which results when the lex fori is applied without further consideration once jurisdiction is established. This regrettable tendency has been a feature of the English decisions already discussed: *Easterbrook* v. *Easterbrook*, *Hutter* v. *Hutter* and *Ramsay-Fairfax* v. *Ramsay-Fairfax* (though the trial judge in the last case did consider the question in the way that Reed J. has done).

8. [1944] P. 10.
9. [1944] P. 95.
10. [1956] P. 115.
11. ibid at 133.

COMMONWEALTH IMMIGRATION ACT

Meaning of Offence Punishable by Imprisonment for One Year

The Commonwealth *Immigration Act* 1901-1949 s. 8A provides that "where the Minister is satisfied that within five years after the arrival in Australia of a person who was not born in Australia . . . that person —(a) has been convicted in Australia of a criminal offence punishable by imprisonment for one year or longer he may make an order for his deportation."[1] In *Ex Parte Tenuta*[2] acting under this section, the Minister of Immigration ordered Francesco Tenuta to be deported and kept in custody until so deported. An application for the issue of a writ of *habeas corpus ad subjiciendum* directed to the Minister

1. cf. *Commonwealth Migration Act* 1958 s. 13 (A).
2. [1958] S.A.S.R. p. 238.

and prison officials was thereupon made on his behalf. The applicant, eighteen months after arriving in Australia, had been charged before a court of summary jurisdiction on two counts of illegally having used a motor vehicle without the owner's consent. He pleaded guilty, and under s. 53 of the *Road Traffic Act* 1934-1957 (S.A.) was thus "liable to imprisonment for any period not exceeding twelve months," but was sentenced on each charge to "imprisonment for six months." The question referred to the Full Court (Napier C.J., Reed and Abbott JJ.) by Abbott J., was whether Tenuta, being a person convicted of an offence under s. 53 of the *Road Traffic Act* was a person convicted of a criminal offence punishable by imprisonment for one year or longer "within the meaning of the s. 8A of the *Commonwealth Immigration Act*."

The contention for the applicant that he was not so convicted depended on the true construction of *Regulation* 83 made under s. 14 of the *Prisons Act* 1936-1954, which empowered the Governor to make regulations "for the remission of any part of the sentence of any such offender upon certain conditions." The material regulation[3] states that "every prisoner sentenced to imprisonment with hard labour for a period exceeding three months whether by a single sentence or by cumulative sentences shall be discharged when he has served two-thirds of his sentence." The major contention was that the regulation created a right in every prisoner sentenced with hard labour to be discharged when he had served two-thirds of his sentence, and as a result, where he could be sentenced for twelve months' imprisonment for an offence, that offence was not really "punishable by imprisonment for one year." In its practical application, the regulation might seem to have created an effective right to be discharged but the Full Court could not accept this to be the true intention of *Regulation* 83.

The original regulation under s. 14 of the *Prisons Act* created a "marks" system whereby a diligent prisoner could be granted a one-third remission. The question whether such a "marks" system, established under a similar primary section, created an enforceable right in the prisoner arose in *Flynn* v. *The King*[4] where a prisoner claimed that he had earned his release under the system, and his detention was therefore illegal. Dixon J. held that the Governor in Council did not confer a legal right on prisoners to be set at liberty and there is a distinction "between the execution of the sentence imposed upon a prisoner by the Court and the exercise by the Crown whether under the Prerogative alone or under the Prerogative as affected by provisions of legislation of a power to remit sentences."[5]

Approving these observations, the Full Court held that *Regulation* 83 "for the remission of any part of the sentence . . . upon certain conditions", allowed a prisoner to earn his discharge but did not give him an automatic reduction of sentence. The effect of the regulation could here be circumvented by omitting the customary direction that the prisoner be kept to hard labour, which in the present case would render him liable to be detained for the full period of his sentence.

3. Proclaimed S.A. Gazette, 18 July 1957, p. 127.
4. (1949) 79 C.L.R. 1.
5. (1949) 79 C.L.R. 1 at pp. 7-8.

The principle applied in the present case to construe the words "punishable by imprisonment for a year or more" in s. 8A of the *Immigration Act* is to be found in the High Court decision of *In re Burley*.[6] Here a bankrupt was found guilty of statutory offences with a prescribed penalty of one year's imprisonment, but was tried by a summary court which could only imprison for six months. For the purposes of the *Crimes Act* s. 21 he contended that the maximum term of imprisonment for the offence was six months. In a joint judgment Rich and McTiernan JJ. said that "s. 21 (*Crimes Act*) refers to the maximum term to which the offender exposes himself when he commits the offence. It is distinguishing crimes according to their gravity and adopting a period of punishment as the test of their seriousness. It is not concerned with the powers of one Court or another, but with the nature of the crime."[7] The Court applied this definition to the instant case: "the legislature is dividing crimes into categories according to their gravity and using the permissible sentence as the criterion or measure of their gravity."[8] The *permissible* sentence, a fixed quantity, readily applicable is the proper criterion. If s. 8A refers to the *effective* sentence under Regulation 83, the criterion is neither certain nor applicable.

This principle perhaps finds its best illustration in *The King* v. *Governor of the Metropolitan Gaol*[9] where the same section of the *Immigration Act* was considered. The applicant had been convicted of larceny punishable in certain courts with five years' imprisonment, but was sentenced by a Court of Petty Sessions which could only impose twelve months. O'Bryan J. would not agree with the contention that s. 8A "has regard to the gravity of the offence which would be measured by the maximum term of imprisonment which could be imposed by the Court which tried the offence."[10] The general proposition is well covered by Asquith L.J. when he suggests that "the measure of gravity is to be sought in what *can* happen to persons guilty of that class of offence, not what *does* happen to the particular offender in the subsequent chapter of events as a result of the prosecution's choice to proceed in one way or another."[11]

Thus the words of s. 8A have reference neither to the actual effective period of detention nor to the actual sentence pronounced by the particular court. They refer rather to the maximum sentence which is pronounceable on the offender by the Court with the least limited jurisdiction over that offence. On these grounds a conviction under s. 53 of the *Road Traffic Act* was held to render the prisoner liable to deportation under s. 8A of the *Immigration Act* and the application for a writ of habeas corpus dismissed.

6. (1932) 47 C.L.R. 53.
7. (1932) 47 C.L.R. 53 at pp. 57-58. See also per Gavan Duffy C.J., Starke and Evatt JJ. at p. 55.
8. [1958] S.A.S.R. 238 at p. 242.
9. [1949] V.L.R. p. 91.
10. [1949] V.L.R. p. 91 at p. 93.
11. *Hastings and Folkestone Glassworks Ltd.* v. *Kalson* [1949] 1 K.B. 214 at p. 221.

BUSINESS AGENTS ACT

Rights of Purchaser under S. 39.

S. 39 of the *Business Agents Act* 1938 is a statutory provision peculiar to South Australia. It reads:

(1) Any contract for the sale of any business shall be voidable at the option of the purchaser at any time within six months from the making thereof, unless—

(a) the contract is in writing; and
(b) the contract contains the following particulars namely
  (i) the name, address and description of the vendor; and
  (ii) the name, address and description of some person to whom all moneys falling due under the contract may be paid; and
(c) the contract if the consideration mentioned is £200 or more, or if it is one of a number of contracts forming substantially one transaction in which the total consideration is £200 or more is executed by the purchaser in the presence of two witnesses neither of whom shall be the vendor, the vendor's agent, or any person employed by the vendor's agent.

(2) A purchaser shall not be deemed to have elected to affirm a contract which is voidable under this section by reason of any payments of money made by the purchaser pursuant to the contract within the period of six months aforesaid.

The question of the extent of the right given to the purchaser was raised in *Drozd* v. *Vaskas*(1). The plaintiffs purchased from the defendants a cafe business, including its equipment, goodwill and stock. The plaintiffs drew up a contract which was not in the form, nor was it executed in the way required by s. 39. Within six months of the date on which this document was signed the plaintiffs notified the defendant by letter from his solicitors that he was treating the agreement as rescinded on three grounds: (1) that the defendant had induced him to enter the contract by representing that the weekly profit of the business was greater than it was; (2) that the defendant had failed to execute a transfer of the lease; and (3) that he had a right to do so under s. 39 of the *Business Agents Act*.

Reed J. found the misrepresentation proved and that the plaintiffs had not affirmed the contract at any time before their solicitors wrote to the defendants; an express affirmation was necessary: *Abram Steamship Co.* v. *Westville Shipping Co.*(2). But the misrepresentation could not give rise to rescission of the contract in this case because the plaintiffs had ceased to carry on the business which it was therefore impossible to restore; there cannot be rescission when there cannot be a total *restitutio in integrum*: *Hunt* v. *Silk*(3); *Clough* v. *London and North Western Railway Co.*(4). Reed J. points out that in determining whether to grant rescission "the Court must fix its eyes on the goal of doing what is practically just"(5).

(1) [1959] S.A.S.R.
(2) [1923] A.C. 773 at 779; and see 23 Halsbury 2nd Ed. 110 Note (g).
(3) (1804) 5 East 449.
(4) (1871) L.R. 7 Ex 26 at 35.
(5) *Spence* v. *Crawford* [1939] 3 All E.R. 822 at 829.

But he concludes: "rescission involving compensation could not do justice to the defendants in this case."

With respect to the failure to transfer the lease. His Honour found that execution of the transfer was a fundamental condition of the contract, but that the plaintiffs in electing to treat the breach as terminating the contract gained no right to rescission but only to damages: *McDonald* v. *Dennys Lascelles Ltd.*(6).

This left the question whether s. 39 of the *Business Agents Act* gave the plaintiffs a right to rescind the contract. Reed J. considered that as the section did not specify the consequences of the exercise of the purchaser's right. The intention of the legislature must be ascertained from the language of the section. Subsection (2) recognises that the purchaser may elect to affirm the contract and so lose the benefit of the section. What amounts to an affirmance is to be determined by the general law in the absence of statutory expression to the contrary. In this case there was such an affirmance by the plaintiffs in allowing a situation to arise under which *restitutio in integrum* became impossible, i.e., if there cannot be rescission there is affirmance.

To reach this conclusion the learned judge has to take a different view of the section from that expressed by Abbott J. in *Veitch* v. *Easson*(7). The actual decision in that case was that there had been an affirmance of the contract for the sale of a business constituted in the continuation of the business and in the signing of a lease by the plaintiff purchaser. But His Honour also considered that s. 39 would give the purchaser a right exercisable despite the fact that it was not possible to restore the parties to their former positions. He found that the right was analogous to that of an infant to avoid his contract or to that of a party to a contract unenforceable under the Statute of Frauds. He rejected the argument that the right was similar to that of a person induced to enter a contract by fraudulent misrepresentation, i.e., the equitable right of rescission (as long as restitution is possible, there is no affirmance and the rights of third parties are not altered); otherwise a right to damages by common law action for deceit. Thus in his view the section is not to be limited by any condition that the purchaser, when he exercises his option to avoid, shall be able to remit the vendor to his former position.

It is submitted that while this portion of Abbott J.'s judgment states with clarity the arguments for and against limiting the operation of the section, by the equitable rules relating to rescission his conclusion is open to question. The analogies which he draws to infants' contracts and contracts contrary to the Statute of Frauds are not accurate in one important respect: the right of an infant to avoid his contract in effect exists only in respect to that part of the contract which is executory on his side, hence, he can recover money paid by him only if there is a total failure of consideration on the other side: *Steinberg* v. *Scala (Leeds) Ltd.*(8). And similarly the *Statute of Frauds* renders a contract *unenforceable*(9), i.e., it gives a defence to an action to enforce performance. Both Abbott J. and Reed J.,

(6) (1938) 48 C.L.R. 457, per Dixon J. at 476-7.
(7) [1949] S.A.S.R. 9.
(8) [1923] 2 Ch. 452.
(9) *Maddison* v. *Alderson* (1883) 8 App. Case 467 at 488.

however, were concerned with the question whether the remedy of rescission existed: return of purchase money in exchange for return of business. If the section is to be construed in accordance with the analogies drawn by Abbott J. the plaintiff still should not have succeeded in recovering his money because the consideration had not failed. His only right would be to avoid performance of any outstanding contractual duty. It is respectfully submitted that the analogy to the rights of a contracting party to avoid a contract for misrepresentation, which Abbott J. rejected, gives a more complete answer to the problems which arise in considering the extent of the remedy generating from the word "avoid". The rules relating to infants' contracts have been evolved to protect the infant insofar as he has not carried out his contract, and as such they provide no analogy in the case where a party claims to be able to go back on what has already been done.

In *Drozd* v. *Vaskas* Reed J. did not approach the problem as a question of applying the equitable principle of rescission. He found that an election to affirm the contract would be constituted in some occurrence which rendered *restitutio in integrum* impossible. Thus in effect the equitable rule is put into effect. But is this approach always good? Inability to restore may result from causes which have nothing to do with the purchaser. Can this then be construed as an affirmance? It is submitted that construction of the word "avoid" in s. 39 can only be completely achieved by analogy from the general law. If the section arises again for consideration the question to be asked should be: does this section give remedies akin to those given at common law and in equity for contracts induced by misrepresentation or undue influence, or does it give some greater or lesser right? The existence of the question illustrates the lack of definition which in general exists with respect to the exact rights arising when a contract is labelled "voidable".

HEALTH ACT

Suffer to Inhabit or Occupy—Relation to Landlord and Tenant Act

The extent of operation and relation of the *Health Act* 1935-1955 and orders made under it to general enactments like the *Landlord and Tennant (Control of Rents) Act* 1942-1957 arose for consideration on appeal before the Supreme Court in the case of *Piro* v. *Boorman*.1 Premises of the appellants let to a weekly tenant were declared unfit for habitation and an eviction order made under s. 116 of the *Health Act* 1935-1955. The appellants' son continued to call at the tenement to collect the weekly rent and no action was taken by the appellants to put out the tenants. They were convicted under s. 117 which states that "any person who, after the expiration of the specified time . . . suffers to be inhabited or occupied any such building" shall be guilty of an offence.

Counsel contended that there was a conflict between this order and s. 42 of the *Landlord and Tenant (Control of Rents) Act* which pre-

1. [1958] S.A.S.R. 226.

vented landlords from exercising their common law right to evict tenants except in certain circumstances, none of which were reasonably applicable to the appellants. At it was thus impossible for them to issue a valid notice to quit, they had not suffered unlawful occupation. The Court (Napier C.J., Reed and Ross JJ.), following observations of Ligertwood J.[2], regarded the purposes of the respective Acts as mutually exclusive in this field. The *Health Act* deals with the premises unfit for human habitation while the *Landlord and Tenant (Control of Rents) Act* deals with the occupation of premises by tenants. Both the intention and natural meaning of the words would deny the construction that a building, which no one could lawfully inhabit or occupy, or suffer to be inhabited or occupied by virtue of an order under the *Health Act*, could be a "dwelling house" or "premises leased for the purpose of residence" for the purposes of the *Landlord and Tenant (Control of Rents) Act*. Thus the contention that because of the *Landlord and Tenant (Control of Rents) Act* the appellants were not in a position to prevent the building from being occupied, failed.

This was undoubtedly sufficient to dispose of the appellants' case. The offence was suffering the building to be occupied and counsel based his whole argument on the inability of the appellants to terminate occupation. "A man cannot be said to suffer another to do a thing which he has no right to prevent": per Field J. in *Reg.* v. *Staines Local Board*.[3] Once the court had established that (a) there was a right to eject the tenants; (b) a failure to do so, and (c) indeed a positive act of collecting rent, then by applying its own ruling that "suffer" suggests inaction—not doing what one could do — it could have decided against the appellants.

The Court, however, was apparently not content to dismiss the appeal on these grounds, and went on to consider the position if they had refrained from collecting the rent. It would be an open question whether they had "abstained from action which under the circumstances then existing it would have been reasonable to take or, in other words, exhibited a degree of indifference from which permission ought to be inferred." This was the test propounded in the dissenting judgment of Knox C.J. in *The Adelaide Corporation* v. *Australasian Performing Right Association*[4] where it was held that the Corporation had not permitted a breach of copyright although they had received notice that an infringement may occur at a performance in the Town Hall, and which they could have prevented. The majority applied substantially the same test[5] but on the facts the appellants were held not liable.

In distinguishing the *Performing Rights Case* the Court drew a difference between "suffer" and "permit" and their respective use in Statutes. "We think that 'permit' suggests the idea of action—leave or licence given—whereas 'suffer' suggests inaction — not doing what one could do — and a person who has remained quiescent might, perhaps, be said to have 'suffered' something to be done, when it might be more difficult to say that he had permitted it."[6] Oddly enough, this seems to be in conflict with the definition quoted from the *Performing Rights Case* that abstinence from action may exhibit a degree of indifference from which permission could be inferred. The suggested definition recognises that abstinence from acts within the individual's power which could have averted the evil is necessary both to "suffer"[7] and to "permit".[8] In the case of "permit", there is a further step of active consent. The High Court decision in *Broad* v. *Parish*,[9] however, confuses the situation. There it was sought to make a hire-purchase company liable for "permitting" a client to drive an uninsured vehicle. Starke J. averted to the statement of Mackinnon L.J. that to be liable for permitting another to use a motor vehicle "it is obvious that he must be in a position to forbid the other person to use the motor vehicle".[10] The company, while remaining the owner, had alienated the right to control the use of the vehicle and it was not within its power to forbid a person to drive it. It was nevertheless held that they had "permitted" the use of the vehicle.

The clear-cut definition given may thus in the light of other decisions prove to be an over-simplification, and the fact that the analysis was not strictly relevant to the case in hand perhaps prevents it receiving the attention that it may deserve. The nett result of the distinction between the present case and the *Performing Rights Case* was the dismissal of the appellants' case on the ground that "the indifference exhibited by these acts of omission and commission, reaches a degree from which an authorization or permission to occupy the building can and should be inferred".[11] The Court thus went one step further than necessary and satisfied itself that not only "by taking the rent, they were suffering, and, indeed, authorizing the tenant to go on living in the building" but also that "authorization or permission" could be inferred. These two conclusions create their own difficulties for in addition to the superfluity of the latter, "authorizing" is treated as synonymous first with "permitting" and then with "suffering", which would logically seem to deny any distinction between the two.

It may be that the only safe conclusion to be drawn from the distinction here propounded is that "suffer" and "permit" indicate different degrees of authorization and wherever "permission" may be inferred "suffering" has also taken place, although the converse does not apply.

2. *Shiell* v. *Symons* [1951] S.A.S.R. 82 at p. 87.
3. (1889) 60 L.T. 261 at p. 262. See also *Rochford Rural Council* v. *P.L.A.* [1914] 2 K.B. 916 per Darling J. at p. 922.
4. (1928) 40 C.L.R. 481 at p. 488.
5. (1928) 40 C.L.R. 481 at p. 490 per Isaacs J.
6. [1958] S.A.S.R. 226 at p. 230.
7. See note (2) supra.
8. *Barton* v. *Reed* [1932] 1 Ch. 362 at p. 377; *Performing Rights Case* (1928) 40 C.L.R. 481 at pp. 487, 491.
9. (1941) 64 C.L.R. 558.
10. *Goodbarne* v. *Buck* [1940] 1 K.B. 771 at p. 774.
11. [1958] S.A.S.R. 226 at pp. 230-231.

JUSTICES ACT PROCEDURE

Change of Plea Not Permitted by Section 106a.

R. v. *Mills, ex parte Edwards*[1] is a decision concerning the procedural powers of justices when trying minor indictable offences summarily by virtue of s. 106a of the Justices Act 1935-1956. The defendant was charged with four counts of simple larceny contrary to the provisions of s. 131 of the *Criminal Law Consolidation Act* 1935-1956. In the court of summary jurisdiction for the conducting of preliminary examinations pursuant to the provisions of s. 106 of the *Justices Act* 1921-1956 the Special Magistrate was required by s. 106a of that Act to inform the defendant of his right to plead guilty to the informations. The defendant did in fact plead guilty to the informations, whereupon, without taking any evidence, the Special Magistrate heard the prosecution on the defendant's previous convictions. The question of penalty was then discussed with the defendant's counsel seeking and obtaining a remand to enable the defendant to set his affairs in order. One month later the case came on for hearing, with the defendant's counsel applying for leave for the defandant to change his plea to not guilty. The prosecution objected that the defendant had already been convicted, but the Special Magistrate made the order giving the defendant leave to change his plea. The prosecuting officer then brought a motion before the Full Supreme Court (Mayo A.C.J., Reed and Abbott JJ.), claiming that the Special Magistrate having convicted Mills had no power to permit the pleas to be changed.

S. 106a of the *Justices Act* 1921-1956, provides a means whereby a person charged with a minor indictable offence found in s. 120 may at his preliminary examination before committal plead guilty and have his case tried summarily. The section is in the following terms:—

(1) Where the defendant appears before a special magistrate or two or more justices and the information charges the defendant with an offence cognizable by a special magistrate or justices under section 120, the defendant at any stage of the proceedings, and whether any statement has been taken from any witness or not, may plead guilty to the offence or any of the offences charged against him, and the magistrate or justices shall at the commencement of the proceedings inform the defendant of his right so to plead.

(2) If the defendant pleads guilty to any such offence —

(a) the magistrate of justice shall, in relation to that offence, be a court of summary jurisdiction within the meaning of this Act; . . .

(d) the plea of guilty may be withdrawn as provided in subsection (3) of this section.

(3) If after the defendant has so pleaded guilty to an offence, the magistrate or justices, upon consideration of any facts stated by the prosecution or given in evidence, is or are of opinion that the time for taking the plea should be postponed—

(a) he or they may order that the plea of guilty be withdrawn; . . .

The Full Court found that the Special Magistrate in allowing the defendant to change his plea after conviction upon his counsel's application had acted outside the powers given him by s. 106a. Mayo A.C.J. and Abbott J. took the view that under s. 106a, if and when the defendant chooses to plead guilty, the court becomes a court of summary jurisdiction for the purpose of the charge, but, . . . only to deal with the matter on the plea of guilty, and that if and when the defendant intimates that he pleads guilty a duty is immediately cast upon the Magistrate to decide whether or not the time for "taking" the plea of guilty should be postponed. "Before anything else is done in continuation of the proceedings, the Magistrate must address his mind to the question (i.e. of taking the plea) and adopt an opinion based on the subject matter that has been brought to his notice."

If the Magistrate decides that the time for the taking of the plea of guilty ought to be postponed, then it is ordered that the plea be withdrawn under s. 106a (3) (a). If the Magistrate continues the proceedings in any way, either by expressly "taking" the plea of guilty or by impliedly doing so (for example, by entering a conviction and remanding the defendant for sentence), then the inference is that he has considered the matter and decided that the time for "taking" the plea need not be postponed.

The adjournment by the Magistrate was obviously not for the purpose of considering the postponement of "taking" the plea, but rather for the convenience of the *convicted* defendant; the information had been endorsed "Convicted" at the time that the plea was taken. The third Judge (Reed J.) suggested that if an order to withdraw the plea is not made because the Magistrate improperly failed to exercise his discretion to do so then there may be a remedy. But there was no proper ground in the present case to suggest that the Magistrate should have made such an order.

1. (1958) S.A.S.R. 54.

POLICE OFFENCES ACT, 1953-1957, s. 41

Elements of Offence of Unlawful Possession.

Wallace v. *Hansberry*[1] raises two interesting problems: what are the elements of the offence of unlawful possession of personal property constituted in s. 41 of the *Police Offences Act* 1953-1957; and how far may a Magistrate or a Judge take the conduct of a trial into his own hands in the interests of justice.

S. 41 provides:

"(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 the 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."

The section supersedes s. 93 of the *Police Act* 1936 and provides a complete departure from it. It is simpler in content and was clearly designed to render the body of case law surrounding the older section no longer applicable.

1. [1959] S.A.S.R. 20.

Ross J. found that under s. 41 the elements of the offence to be proved beyond reasonable doubt by the prosecution are:—(1) possession by the accused of personal property; (2) a suspicion entertained (either at the time of possession or at any subsequent time prior to the making of the complaint) that the goods have been stolen, or unlawfully obtained; (3) upon reasonable grounds. He continued: "The prosecution are not required to establish *mens rea* on the part of the defendant and if it proves the three elements above mentioned the defendant is liable to be convicted unless he can take advantage of the defence given him by sub-section (2) by proving that he obtained possession of the property honestly."

The learned judge's view that *mens rea* is not a constituent part of the offence must be compared with the decision of Ligertwood J. in *Palumbo* v. *O'Sullivan*.[2] In that case the precise definition of "possession" was raised because the defendant was charged with the unlawful possession of a wristlet watch found in his coat pocket, and he claimed that he had no knowledge of its presence there. The learned judge found that "the onus was on the prosecution to prove beyond reasonable doubt that the appellant knew that he had got the watch . . . either because such knowledge was a necessary element in the proof of possession or because such knowledge was a necessary element in the proof of *mens rea*".[3]

On the question of knowledge of possession he said: "in an enactment which makes possession itself a crime, one would expect that there ought to be a mental element in the conception of possession, and that a person should not in general be declared to be a criminal with respect to a chattel, if he does not know that he has got it." On the question of *mens rea* he said: "Some element of guilt in the accused must ordinarily be shown, and if a person is charged with unlawful possession of a chattel then in most cases he can hardly be said to be guilty if he does not know that he has got it. It is submitted that the requirement of knowledge for possession is in effect much the same thing as *mens rea* in a charge of unlawful possession. Possession is the only element of the offence in which the accused's state of mind can be relevant, and if it is to be taken into account it may be equally well described as 'knowing' or as 'being of a guilty mind'." It would seem then that the views of Ligertwood J. and Ross J. on the necessity of proving *mens rea* are opposed. But it should be remembered that *Wallace* v. *Hansberry* was not a case where the question of possession was in issue. Moreover, Ross J. speaks of the proof of *mens rea* as it might arise outside proof of the three elements of the offence. If the situation in Palumbo's Case were to arise again it is submitted that it would be open to the Court to regard Ross J.'s dictum as not excluding the necessity of showing that the accused knew that he was in possession of the property.

Ross J. was primarily concerned with the question whether there was proved a suspicion that the goods were stolen or unlawfully obtained held by some other person (in this case the arresting officer) on reasonable grounds. It was argued that as the officer had not sworn that he had entertained a suspicion, it was not proved beyond reasonable doubt. His Honour followed *Poidevin* v. *Hudson*[4] (a case dealing with s. 93 (1) of the *Police Act* 1936) and held that such suspicion need not be expressly deposed to if there is sufficient other evidence. On the question of reasonableness he adopted the test propounded by Napier C.J. in *Dent* v. *Hann*[5] (also a s. 93 (1) case): "The facts which bring the section into play and call upon the defendant for his explanation should be clearly disclosed to the Court, so that the Court can say whether the suspicion was one which it was reasonable to entertain in the circumstances." The test is thus an objective one and although the Court will pay considerable attention to any grounds of suspicion stated by the suspector it is not bound by them and must consider them in the light of all circumstances known to the witness at the relevant time. The learned judge's discussion of these two questions show that the case law relating to the predecessors of s. 41 of the *Police Offences Act* 1953-1957 will be considered highly relevant to its construction. Indeed, as Ross J. points out, s. 41 embodies the elements of the interpretation of s. 93 (1) contained in *Moore* v. *Allchurch*[6] and approved by the High Court in *O'Sullivan* v. *Reedy*.[7]

The other major ground of appeal concerned the extent to which a trial judge or magistrate may interfere with the conduct and course of trial. The defendant had been charged with unlawful possession of two bags of onions and potatoes. At the close of the case for the defence the Magistrate, having examined the contents of the bags, recalled the defendant and questioned him first concerning the facts that the bag of onions contained in addition six carrots and a large swede and that its weight was considerably greater than twelve pounds, the weight of onions which the defendant claimed he had lawfully purchased at a market; and secondly, with respect to evidence given about the bag by witnesses for the defence. He then ordered the bag to be weighed. The magistrate explained in his judgment that he had taken these unusual steps as being "necessary in the interests of justice and for the purpose of ascertaining the truth". Ross J. considered that he was entitled to examine the contents of the bag, to have it weighed and to draw attention to discrepancies, but that he should not have recalled the defendant and examined him concerning statements made in evidence by the defendant's witnesses. However he found that no miscarriage of justice had resulted and refused to quash the conviction. His Honour accepted the principle recently restated by the Court of Appeal in *Jones* v. *National Coal Board*[8] that while the object of the judge is to find out the truth and to do justice according to law, he should not himself conduct the examination of witnesses because "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict".[9] This aspect of the decision does not therefore break new ground; but it provides an example of where the line is to be drawn between proper and improper interference by the court with the course of trial.

2. [1955] S.A.S.R. 315.
3. Id. at 321.
4. [1935] S.A.S.R. 223.
5. (1949) A.L.R. 271 at 272.
6. [1924] S.A.S.R. 111.
7. (1953) 87 C.L.R. 291.
8. [1957] 2 Q.B. 55 at p. 63.
9. *Yuill* v. *Yuill* [1945] P. 15 per Lord Greene.