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SALE OF GOODS: PURCHASER'S DEPOSIT ON UNPAID SELLER'S RESALE.

THE question whether the unpaid seller under s. 49 (2) of the Sale of Goods Act, 1908 (which reproduces s. 48 (3) of the Sale of Goods Act, 1893 (Eng.)), resells the goods in the capacity of an owner so as to be entitled to any profit which may be realized by the resale, *or* whether he resells the goods in a capacity analogous to that of a pledgee, or in any other limited capacity, was not judicially decided until the recent judgment of Mr. Justice Finnemore in *Gallagher* v. *Shilcock*, [1949] 1 All E.R. 921. No assistance is to be found in any reported New Zealand case.

The learned author of the title " Sale of Goods " in the Second Edition of *Halsbury's Laws of England*, Vol. 29, p. 186, para. 250, observed that the former of the alternatives seemed to be the correct view. Mr. Justice Finnemore, however, held the latter alternative to be the correct one.

Before considering the judgment in *Gallagher's* case in detail, it may be as well to recall the general common-law principles regarding the payment and refund of a deposit paid upon the making of a contract. In the absence of agreement to the contrary, the deposit is to be returned or treated as part-payment upon performance ; it is to be forfeited if the party giving it fails to perform ; it is to be returned if the party receiving it fails to perform.

Thus, the deposit paid by a purchaser of land is paid as security for the performance by him of the contract, although, on the completion of the contract, the deposit is to be credited to him as part of the purchase-money. If, therefore, the contract goes off through the default of the purchaser, the deposit is forfeited to the vendor without any express provision to that effect in the contract : *Howe* v. *Smith*, (1884) 27 Ch.D. 89. In this respect, a deposit is in a different position from that of a mere prepayment of purchase-money, which, as distinguished from a deposit, is not forfeited by the purchaser's default, even an express provision for such forfeiture being ineffective, inasmuch as the purchaser is entitled to relief from it : *Mitchell* v. *Parkinson*, (1915) 34 N.Z.L.R. 1004. Salmond, J., in *Munro* v. *Pedersen*, [1921] N.Z.L.R. 115, 116, after stating those principles, added that, if, on the other hand, the contract goes off through the default of the vendor, the purchaser is entitled to a refund of the deposit : *Ellis* v. *Goulton*, [1893] 1 Q.B. 350. If, in the third place, the contract goes off without the default of either party, but by reason of supervening impossibility of performance, then, since the enactment of the Frustrated Contracts Act, 1944, the loss no longer lies where it falls, and the ultimate destination of the deposit depends on the application, at the time of the discharge of the parties from further performance, of s. 3 of that statute to the contract itself. If a person who has received a deposit from another claims damages from that other for breach of contract, the deposit is, in the absence of agreement to the contrary, to be taken into account in estimating the damages due to the claimant : *Ockenden* v. *Henly*, (1858) E.B. & E. 485 ; 120 E.R. 590.

A contract for the sale of goods would appear to differ in some respects from contracts at common-law, but, in fact, it is governed by statutory provisions—in this country, the Sale of Goods Act, 1908—which embody the principles of the common law with only slight variations from it.

In *Howe* v. *Smith*, (*supra*), where a contract for the sale of land was before the Court, the contract provided that, in addition to the £500 which was paid as deposit and in part-payment of purchase-money, the purchase had to be completed on a certain day ; and there was also a clause that, if the purchaser should fail to comply with the agreement, the vendor should be at liberty to resell and to recover any deficiency in price as liquidated damages. In other words, that contract gave an express right of resale to the seller quite apart from the legal position about deposit. Towards the end of his judgment, Fry, L.J., at pp. 104, 105, said :

> Yet another point has been raised and demands decision. The eighth clause of the agreement gives . . . a power to the vendor to resell if the purchaser fail in his performance, and declares that the deficiency on such second sale shall be made good by the defaulting purchaser and be recoverable as liquidated damages. In the present case the defendant, the vendor, declined to perform the contract on the ground of delay on the part of the plaintiff, the plaintiff brought this action, and about six months subsequently the vendor resold the property at the original price ; and it is contended by the plaintiff that the defendant thereby lost all right of retaining the deposit. If the vendor had chosen to resell under this power and to sue the purchaser for the deficiency, he would, in my opinion, and in accordance with the case of *Ockenden* v. *Henly* (E.B. & E. 485), have been obliged to bring the deposit into account ; but that is not the course which he has pursued . . . in my opinion there has been such default as justifies the vendor in treating the contract as rescinded ; it affords the vendor an alternative remedy, so that he may either affirm the contract and sell

under this clause or rescind the contract and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency: if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause in question.

That case dealt with a sale of land and with the special contract there made: in *Gallagher* v. *Shilcock*, Finnemore, J., said that the position arising by virtue of s. 49 (3) of our Sale of Goods Act, 1908, is comparable, in that the seller who resells and so ensures the contract price and any damages he may have suffered is affirming and not rescinding the contract, and, accordingly, must bring the deposit into account.

The facts in *Gallagher* v. *Shilcock* (*supra*) were that on May 17, 1947, the plaintiff agreed to buy a boat from the defendant for £665, and he paid £200 as a deposit. The sale was "subject to survey" at the plaintiff's expense. The report being satisfactory, the plaintiff finally accepted the boat on May 21, and the defendant agreed to postpone payment of the purchase price pending registration of the boat to enable the plaintiff to raise a mortgage on it and pay the balance due. The boat was never registered, and, on July 16, the defendant's solicitors wrote to the plaintiff saying that, unless the balance of the purchase price was paid by July 31, the boat would be resold and the deposit would be forfeited. On August 22, the plaintiff saw the defendant and offered him the balance, but the defendant told him that the boat had been sold on August 7 for £700. The defence to the plaintiff's claim for the return of the deposit was that the contract was not performed by the plaintiff because he did not find the purchase price at the right date, and, therefore, he was not entitled to the return of the deposit.

The learned Judge, Finnemore, J., found, following *Howe* v. *Smith* (*supra*) and *Mayson* v. *Clouet*, [1924] A.C. 980, that the payment by the plaintiff of the £200 was a deposit, or "a security for the completion of the purchase," as Bowen, L.J., put it in *Howe* v. *Smith* (at p. 98); that the agreement of May 31 was not a new contract conditional on the registration of the boat; that more than a reasonable time had elapsed by August 22 for the plaintiff to have tendered the balance of the purchase price; and, accordingly, that the defendant was entitled to resell the boat. He further held that the property in the boat had passed to the plaintiff on May 31, and that, therefore, he was not entitled to specific performance of the contract or to the damages claimed.

On the claim for the return of the deposit, Finnemore, J., said, at p. 922:

> The point left is one of some considerable difficulty, and I am not sure that it has ever yet been decided in terms. It is whether or not in the circumstances of this case the deposit is forfeited. It depends on the construction of the relevant sections of the Sale of Goods Act, 1893.* As I have said, it is common ground that the property passed and the boat became the boat of the plaintiff on May 31. Had it caught fire and been burnt the next day the loss would have been the plaintiff's. Had it for some reason increased in value, the increase would have been to the plaintiff's benefit. He was entitled at any moment after that date to say to the seller: "Give me my boat," but the seller was entitled to say: "First give me the balance of money due," because payment and delivery are concurrent conditions unless the parties have otherwise agreed.

* In the remainder of this article, the sections to which His Lordship refers are, for convenience' sake, expressed as they are reproduced in our Sale of Goods Act, 1908.

His Lordship went on to say that mere failure to pay on the appointed day does not rescind such a contract as this unless the parties have otherwise agreed, and time is not of the essence of the contract unless it is expressly made so. This is dealt with in *Benjamin on Sale*, 7th Ed. 864, where the editor thus comments on the section reproduced as s. 49 (1) of the Sale of Goods Act, 1908:

> Whenever the property has passed and the goods have reached the actual possession of the buyer, the seller's *sole* remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt: all special remedies in his favour *qua* seller are gone.
>
> By the law of England, in this respect agreeing with the civil law, mere delay by the buyer in paying the price will not justify the rescission of the contract by the seller, unless the right to rescind be expressly reserved.

The leading case on the subject is *Martindale* v. *Smith*, (1841) 1 Q.B. 389; 113 E.R. 1181, in which Lord Denman, C.J., said, at p. 395; 1184:

> Having taken time to consider of our judgment, owing to the doubt excited by a most ingenious argument, whether the vendor had not a right to treat the sales as at an end and reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract . . . In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement.

After May 31, the seller in *Gallagher* v. *Shilcock* had two courses open to him. Under s. 49 (1), he could have sued for the price. That subsection provides:

> Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

It seemed to Finnemore, J., to be beyond argument that, if the seller in the case before him had taken that course, he could not possibly have sued for the full contract price (£665) and at the same time have kept the £200 without giving credit for it. If he takes proceedings under s. 50 (1), and so invokes the principle which it enshrines, he is not rescinding the contract. He is taking steps to get the contract price paid to him. Clearly, therefore, if the £200 was in part-payment of the purchase price as well as being a deposit—and, beyond any possibility of doubt, it was—he must bring that into account and give credit for it. He also has another remedy if the goods have not reached the purchaser. He may retain the goods, and so exercise the unpaid seller's lien, and in certain circumstances resell. He chose in this case to resell.

His Lordship went on to say that he thought it would be a curious thing that, if the vendor decided to sue the purchaser for the contract price, he should be limited to that price, but that, if he kept the goods and then sold them, he would be entitled, not only to get the full contract price, but also to keep in his pocket any deposit which had been paid beforehand. He continued, at p. 923:

> I think this must depend ultimately on whether, if the unpaid seller sells against the original purchaser, the contract has been rescinded and the goods have been revested in him or whether the view is that he is pursuing the remedy

under the Act given to him in order to become no longer an unpaid seller but a paid seller.

The special rights of an unpaid seller are contained in s. 41 of our Sale of Goods Act, 1908, subs. 1 of which enacts :

> notwithstanding that the property . . . may have passed to the buyer, the unpaid seller . . . has . . .
>
> (*a*) A lien on the goods, or right to retain them . . .
>
> (*c*) A right of resale, as limited by this Act.

It is important to remember that the only right to resell which the unpaid seller has is the one which is given to him by s. 49 of the Sale of Goods Act, 1908, which provides :

> (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu* . . .
>
> (3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.
>
> (4) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

The learned Judge said that the Act draws a distinction between the person who sells under s. 49 (3) and the person who sells because in the contract he has expressly reserved a right to resell. Subsection 4 provides in terms that, in the second case, the contract is rescinded. There are no such words in subs. 3 ; and the only inference to be drawn is that, under subs. 3, the contract is not rescinded. Had it been otherwise, nothing would have been simpler than to put into the Act : " Where the goods are of a perishable nature, or when the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the contract of sale is thereby rescinded." But, as the learned Judge observed, the Act does not say that. It says that the unpaid seller may resell the goods ; and, if that sale does not reimburse him, he may still recover damages for any loss which he has suffered. It is, His Lordship added, really in essence a way in which the seller makes sure of getting his contract price. He continued, at p. 924 :

> The general principle of English law is that mere lateness or unpunctuality in making payment for goods does not rescind the contract of sale. It would be a curious thing if, nevertheless, the exercise of the remedy of the seller because of delay should rescind the contract. When the unpaid seller sells the goods, does he sell them as a person who, by rescission of the contract, has had full title to the goods revested in him, or does he sell them in a capacity analogous to that of pledgee or in some limited capacity ? So far as I know, this matter has not been in terms decided . . . As I have indicated I have come to the other view. I do not think the unpaid seller sells as absolute owner. The property has already passed, and the lateness of payment does not rescind the contract.

There has been discussion at times whether the Sale of Goods Act, 1893 (Eng.), made new law or only declared the existing common law. In the main, the Act codified and clarified the common law ; and Finnemore, J., thought that it might be helpful to look at the position before the Act. There were many cases on this problem before the Act, and he was fortified in the view that he had taken by some remarks of Lord Blackburn in *Blackburn's Contract of Sale*, 3rd Ed. 495, where he is dealing with the lien which the seller has and the rights which follow from it :

> Assuming, therefore, what seems pretty well established, that the seller's rights exceed a lien, and are greater than can be attributed to the assent of the buyer, under the contract of sale, the question arises, how much greater than a lien are they ? It is clear that in no case do they amount to a complete resumption of the right of property, or in other words, to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale than to any other common-law rights.

His Lordship continued, at p. 924 :

> The power of resale which is given to the seller who has exercised his lien or right of retention is, I think, properly described in that way. There is no rescission of the contract. There is, therefore, no complete resumption of the right of property on the part of the seller and when he resells he does not sell as the full, complete and untrammelled owner. If that view be right it follows that the defendant must bring into account the £200 he has already received. The £200 was paid under the contract, and the contract has not been repudiated by the purchaser although he has failed to make his payment by the due date. Nothing which has happened has rescinded the contract. What has happened is that the seller has enforced his remedy to obtain the contract price by the right of resale given to him under the Act of 1893.

In those circumstances, His Lordship held that the deposit must be brought into account, and that all the seller who resold under s. 49 (3) of the Sale of Goods Act, 1908, was entitled to receive was a total of £665 (the agreed contract price), subject to the right given to him expressly by the Sale of Goods Act to claim any damages he might, in fact, have suffered by the purchaser's breach of contract : *cf.* the observations of Fry, L.J., in *Howe* v. *Smith* (*cit. supra*).

The position would, we think, be different if the seller had expressly reserved in the contract of sale a right of resale in case the buyer should make default. Then, if, on such default, the unpaid seller resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller might have for damages : Sale of Goods Act, 1908, s. 49 (4) ; and see *Lord* v. *Price*, (1874) L.R. 9 Exch. 54. Applying the maxim *Expressio unius est exclusio alterius*, it might almost be argued, on the construction of subss. 3 and 4 taken together, that the learned Judge could have come to the same conclusion.

As we have already said, Mr. Justice Finnemore was careful to point out that the matter had never been decided. He even took the trouble to refer to the title " Sale of Goods " in *Halsbury's Laws of England*. In the First Edition (Vol. 25, p. 264), the learned author expresses a doubt as to :

> Whether the unpaid seller . . . resells the goods in the capacity of an owner, so as to be entitled to any profit which may be realized by the resale, or whether he resells the goods in a capacity analogous to that of a pledgee . . .

The author of this article in a note (at p. 264) expressed his opinion that the Act as drafted re-enacted the common law, and his belief that the common-law cases show that an unpaid seller has no right of resale except upon the seller's repudiation. Here comes an interesting point—unearthed, apparently, by Finnemore, J., when preparing his judgment. In the Second Edition of *Halsbury's Laws of England* (Vol. 29, p. 186), those who revised this part of the article on " Sale of Goods," after reproducing the words quoted above, added " but *semble*, the former is the correct view [namely, that the unpaid seller is in effect the owner]." Finnemore, J., did not agree. When deciding in the opposite sense, he resolved the doubt expressed by the author in the First Edition of *Halsbury*. He was no less a person than Sir Mackenzie Chalmers. It is a matter

of history that, after Chalmers had written a book on the sale of goods, Parliament decided to codify the law. Sir Mackenzie was then invited to draft the Bill. That Bill, which subsequently became the English Act of 1893, reproduced in our New Zealand Acts of 1895 and of the Consolidation of 1908, was to all intents a reproduction of his book. That there should be some doubt as to the meaning of the language of a single subsection is no aspersion upon the memory of a great draftsman. After the Act was passed, Chalmers produced a second edition of his book. That which he had formerly put forward as his version of the law had then become—with very few alterations—an Act of Parliament. As he stated in his preface:

> The Bill in its original form was intended to reproduce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced on the authority of the Legislature.

It is clear from Finnemore, J.'s, judgment in *Gallagher* v. *Shilcock* that he appreciated the fact that he had to consider a statute which—unlike too many others—largely embodied the common law.

SUMMARY OF RECENT LAW.

ANNUAL HOLIDAYS.

Holiday Pay—Computation of Holiday Pay—Test whether Holiday Provision in Award, &c., more favourable to Worker than Provision in Statute—"Ordinary pay"—"Ordinary time rate of pay"—"Worker's normal weekly number of hours of work"—"Full pay" (in Awards)—Same Meaning as "ordinary pay"—Annual Holidays Act, 1944, ss. 2, 3, 7. The phrases "the ordinary time rate of pay" and "the worker's normal weekly number of hours of work" in the definition of "ordinary pay" in s. 2 (1) of the Annual Holidays Act, 1944, as amended, refer to a class of rate and to a class of hours which either exists for each worker when "fixed" by his terms of employment, or, if not so fixed, is agreed or determined by one of the other methods authorized by s. 2 (2). Two factors are specified for the calculation of "ordinary pay" as so defined in s. 2 (1) read with s. 2 (2)—namely, (*a*) the rate of pay belonging to the class of the ordinary rate of pay, which is distinct from any additional or special rates, and which is marked by regularity and uniformity of operation; and (*b*) the hours conforming to the weekly norm or standard, either as fixed, or (if not fixed) as agreed or as determined under s. 2 (2), that is, the ordinary hours which are remunerated at the ordinary time rate of pay. Thus, although the normal weekly number of hours may be fixed by agreement at a number which includes certain extended hours worked every week, the overtime rates of pay for those hours would not be included, without special agreement, in the worker's ordinary time rate of pay. Likewise, the normal weekly number of hours may be fixed to include Sundays or holidays; but the additional payment which is appropriate to the day, and which the worker receives as well as his ordinary time rate of pay, would not, without special agreement, constitute a part of his ordinary time rate. (*Moon* v. *Kent's Bakeries, Ltd.*, [1946] N.Z.L.R. 476, and *Booth, Macdonald, and Co., Ltd.* v. *McGregor*, [1941] N.Z.L.R. 181, distinguished.) (*O'Donnell* v. *Walter Buchanan, Ltd.*, [1947] N.Z.L.R. 906, referred to.) The term "full pay," when used in a provision for holidays in an award or industrial agreement, has the same meaning as the term "ordinary pay" as used in the Annual Holidays Act, 1944, apart from any special definition or special circumstances, and subject to the exclusion in some cases from the term "full pay" of the value of board and lodging. (*In re Southland Wool, Grain, Hide, and Manure Stores Employees' Award*, (1924) 25 Bk. of Awards, 640, *In re New Zealand Freezing Workers' Award*, (1940) 40 Bk. of Awards, 2329, and *Willis* v. *Auckland Farmers' Freezing Co., Ltd.*, [1941] G.L.R. 637, referred to.) The decision of the Court of Appeal in *Moon* v. *Kent's Bakeries, Ltd.*, [1946] N.Z.L.R. 476, a special case, laid down no principle requiring that any time rate other than the early time rate dealt with in the particular baking industry in question is to be treated as part of "the ordinary time rate": it only established an exception with respect to one particular rate in one particular industry, based on what amounted to a custom in that industry; and its authority must be limited to that of requiring the early time rate in the baking industry in question to be treated as an ordinary time rate, provided that the early time were worked during the particular worker's normal weekly number of hours of work. The effect of s. 3 of the Annual Holidays Act, 1944, is that "the ordinary time rate of pay," which is ruling at the time when the worker becomes entitled to his holiday, is the rate which must be taken for the calculation of "ordinary pay." Similarly, "the worker's normal weekly number of hours of work" then in operation constitutes the number of hours required for the same calculation. The foregoing is subject to the operation of the special provision of s. 3 (3), which, to meet a special case, provides that, where the employment is terminated before the annual holiday has been allowed, the employer shall be deemed to have allowed the holiday from the date of the termination of the employment. The first step in determining "the ordinary pay" of a worker who has been employed for a year is to inquire whether the worker's terms of employment have "fixed" the factors for calculating that ordinary pay—namely, (*a*) "the ordinary time rate" which is in force at the end of the worker's year when he becomes entitled to his holiday, and (*b*) "the worker's normal weekly number of hours of work" which is in force at the end of the worker's year when he becomes entitled to his holiday. The object of the Annual Holidays Act, 1944, is to provide an annual holiday of a minimum standard, but not to prevent, in lieu thereof, the enjoyment of a more favourable provision under some other Act, award, agreement, or contract of service. The test provided by s. 7, as to whether the provision outside the Annual Holidays Act, 1944, is more favourable to the worker than the provision under that statute, is to compare the total benefit provided under the award or contract of service, and the total benefit provided by s. 3, or by s. 4, or by s. 5, as the case may be; and, accordingly, this requires consideration of both the length of holiday and the rate of pay. A clause in an award provided as follows: "Subject to the provisions of the Annual Holidays Act, each worker shall be allowed four weeks' paid holidays to be taken at a time or times to be agreed upon." On the time construction of that clause, the word "paid" means "paid at the rate provided by the Annual Holidays Act, 1944," and the phrase "subject to the Annual Holidays Act," as a term of the award, means that the special provision of the four weeks excludes the two weeks specified in the Act. A worker under the award is, in terms of s. 7 of the Act, entitled to his annual holiday under the award upon the ordinary pay specified by s. 3 of the Act, as incorporated as a term in the award. *Leonard* v. *Auckland Electric-power Board.* (S.C. Auckland. March 22, 1950. Smith, J.)

COMPANY LAW.

Nomination of Directors by Third Parties. *94 Solicitors Journal*, 43.

CONVERSION.

The Penal Consequences of the Equitable Doctrine of Conversion. (A. K. R. Kiralfy.) *13 Conveyancer and Property Lawyer*, 362.

CONVEYANCING.

Options to Purchase in Leases. *100 Law Journal*, 158.

Words of Relationship. *94 Solicitors Journal*, 28.

COSTS.

Disbursements. *94 Solicitors Journal*, 6, 25.

CRIMINAL LAW.

Evidence—Confession—Confession of Two Crimes—Admissibility on Trial for One Crime—Murder—Charges of Murder of Wife and Child—Trial on Charge relating to Child—Admissibility of Confession of Murder of Wife. Following the apparent disappearance of his wife and child, the appellant made several statements to the Police, in the last of which he confessed that he had murdered both of them. At the trial, separate indictments were preferred against the appellant charging him with the murders, and the prosecution elected to proceed on the

charge of murdering the child. When the prosecution sought to put in evidence the appellant's confession that he had murdered his wife and child, the defence objected that it was inadmissible. *Held*, That the evidence was relevant, and, therefore, admissible. *Per curiam*, In the opinion of the Court, the real test we have to apply is: Was the evidence relevant—*i.e.*, did the statements which the appellant made with regard to the death of his wife bear on the question whether he was guilty or not guilty of the death of the child? In our opinion, it is impossible to say that the evidence was not relevant. Indeed, it was highly relevant in a case where, as here, two bodies, the body of the mother and the child, were found together in a house in which the appellant had been living. If the bodies of a mother and an infant child are found lying together, murdered, in a place, surely the evidence with regard to the death of the mother must be relevant to the question how the death of the child occurred and by whom the deaths were caused. *R.* v. *Evans*, [1950] 1 All E.R. 610 (C.C.A.).

As to the Admissibility of Relevant Facts in Evidence, see *9 Halsbury's Laws of England*, 2nd Ed. 183-185, paras. 267-270; and for Cases, see *14 E. and E. Digest*, 371-374, Nos. *3924-3942*.

Imposition of Fine coupled with Probation. *100 Law Journal*, 117.

Trial—Irregularity—Communication from Jury to Judge—Jury's Question while considering Verdict—Answer by Judge—Question and Answer not announced in Court until after Verdict and Discharge of Jury—Irregularity not going to Root of Case. While enclosed to consider their verdict, the jury sent a written question to the Judge asking whether they could convict one of the appellants of stealing some, but not all, of the property. The answer written by the Judge was: "Yes, certainly, if that was what you found." Question and answer were not read in open Court until after the jury had been discharged, but they were read in the presence of the appellants before sentence was passed. The Court of Criminal Appeal took the view that no argument could possibly have taken place on the question and answer. *Held*, That the irregularity did not go to the root of the case, and the appeal would be dismissed. (*R.* v. *Neal*, [1949] 2 All E.R. 438, and *R.* v. *Green*, [1950] 1 All E.R. 38, distinguished.) *R.* v. *Furlong and Others*, [1950] 1 All E.R. 636 (C.C.A.).

As to Communications with a Jury out of Court, see *19 Halsbury's Laws of England*, 2nd Ed. 312, para. 650; and for Cases, see *30 E. and E. Digest*, 236, 237, Nos. *312-327*.

DIVORCE.

Adultery—Onus of Proof—Charge of Adultery by Husband—Plea by Wife that Adultery committed without Her Consent during a Rape on her by the Co-respondent. If, in a husband's suit for divorce on the ground of his wife's adultery, the husband proves that an act of intercourse between the wife and the co-respondent has taken place, the burden then shifts to the wife to prove that that act occurred against her will and in the course of a rape committed on her by the co-respondent. *Redpath* v. *Redpath and Milligan*, [1950] 1 All E.R. 600 (C.A.).

As to Proof of Adultery, see *10 Halsbury's Laws of England*, 2nd Ed. 660-665, paras. 973-978; and for Cases, see *27 E. and E. Digest*, 294-303, Nos. *2708-2801*.

Connivance—Encouragement of Situations likely to lead to Adultery—Only Motive to obtain Conclusive Evidence. In 1947, Mr. and Mrs. M., a married couple, became friendly with Mr. and Mrs. F., another married couple, and the following summer the two families took their holidays together. On this occasion, a certain degree of familiarity developed between each husband and the other's wife, but neither husband resented the conduct of the other. In July, 1948, M. and Mrs. F., having begun to suspect an adulterous association between their respective spouses, consulted their solicitor, and, thereafter, acted on his advice. In August, 1948, Mrs. M., realizing that she was having an increasing affection for F., requested her husband to help to break the association, but he refused to take any steps in the matter, and permitted F. to continue to visit his house, frequently leaving the two alone together. About this time, M. set up a microphone in his sitting-room, with wires leading to the garage. On September 21, 1948, by means of this device, M. and Mrs. F. overheard a conversation between their spouses suggesting that adultery was likely to take place. On entering the room and finding that nothing untoward had occurred, M. and Mrs. F. pretended to accept the explanation of the couple as to their presence together. On October 2, having told his wife that he would be away for the night, M. went to the garage, and, as a result of what he then heard, he entered the room to find F. and Mrs. M. in the act of adultery. At no time up to this date had M. or Mrs. F. given any indication of their suspicions, and they had continued to have intercourse with their respective spouses. On petitions by M. and Mrs. F. for divorce, *Held*, That the petitioners had allowed and encouraged certain situations to arise which they knew were likely to lead to adultery; the fact that their motive in so acting was to obtain conclusive evidence of the offence was immaterial; the principle *volenti non fit injuria* applied; and they had connived at the adultery, and were not entitled to relief. *Manning* v. *Manning, Fellows* v. *Fellows*, [1950] 1 All E.R. 602 (C.A.).

As to Connivance, see *10 Halsbury's Laws of England*, 2nd Ed. 674-676, paras. 995-999; and for Cases, see *27 E. and E. Digest*, 326-332, Nos. *3052- 3122*.

Connivance—"Passive acquiescence"—Wife watched by Husband—Act of Adultery observed—No Intervention by Husband. A husband, who was living apart from his wife, had reason to believe that she was living in adultery. On the night of December 8, 1948, he and certain detectives concealed themselves outside the house where the wife was living, and, on looking through the window, they saw her and the co-respondent in the act of adultery. The husband having filed a petition for divorce on the ground of the adultery in question, the wife, by her answer, denied the charge, and also pleaded that, if she had committed adultery, the husband had connived at it, in that he had failed to intervene and prevent the commission of the act. *Held*, That the position was the same as if the husband had not kept watch personally, but had merely sent agents to watch his wife; the husband had not lulled his wife into a sense of security to enable himself to obtain evidence against her; he had not passively acquiesced in her adultery with the intention of promoting its initiation or encouraging its continuance; and, therefore, he was not guilty of connivance. *Mudge* v. *Mudge and Honeysett* (*Goodwin cited*), [1950] 1 All E.R. 607.

As to Connivance, see *10 Halsbury's Laws of England*, 2nd Ed. 674-676, paras. 995-999; and for Cases, see *27 E. and E. Digest*, 326-332, Nos. *3052-3122*.

Nullity—Impotence—Sole Evidence of Petitioner—Need of Corroboration. In 1935, the parties went through a ceremony of marriage, but the husband failed to consummate the marriage, and in February, 1949, he left the matrimonial home. On a petition by him for a decree of nullity on the ground of his own impotence, the only evidence as to his physical condition was the uncontradicted evidence of the husband himself and of a doctor. The learned Commissioner disregarded the medical evidence, and held that the uncorroborated evidence of the husband was insufficient on which to found a decree. *Held*, That no higher standard of proof was required in a case of nullity than in one of divorce; in the present case, corroboration of the husband's evidence, although desirable, was not essential; and there should be a new trial. (Dictum of *Lord Penzance* in *U.* (*falsely called J.*) v. *J.*, (1867) L.R. 1 P. & D. 461, applied.) Per *Hodson*, J., In this class of case, corroboration is in practice required, unless its absence can be satisfactorily accounted for. I think the position is the same with regard to nullity as it is with regard to cruelty. *Hodgkins* v. *Hodgkins*, [1950] 1 All E.R. 619 (C.A.).

As to Impotence as a Ground for Nullity, see *10 Halsbury's Laws of England*, 2nd Ed. 640-645, paras. 937-945; and for Cases, see *27 E. and E. Digest*, 265-272, Nos. *2328-2407*.

Points in Practice. *100 Law Journal*, 144.

EVIDENCE.

Privilege—Factories—Inspector of Factories subpoenaed to give Evidence—Privilege claimed on Grounds of Statutory Prohibition and of Public Interest—Inspector not to be asked Questions in Exercise of his Functions—Claim of Privilege on ground of Public Interest not made by Minister of Labour—Affidavit by Secretary of Labour claiming Such Privilege insufficient—Questioning of Inspector as Expert allowed if not infringing Statutory Prohibition against disclosing Information acquired in Exercise of His Functions—Factories Act, 1946, s. 5 (3). An Inspector of Factories had been subpoenaed as a witness by the defendant in an action in which a worker employed in a timber-mill claimed damages against his employer for injuries alleged to be caused by negligence. The Secretary of Labour filed an affidavit to claim privilege for the Inspector, and so to prevent him from giving evidence of such matters as came to his Department. Objection to any evidence which the Inspector could

give which would be relevant to the case was made on two grounds—namely, (*a*) the provisions of s. 5 (3) of the Factories Act, 1946, and (*b*) the public interest. *Held*, 1. That, in accordance with the purpose of s. 5 (3) of the Factories Act, 1946, the sawmill in question being a factory, the Inspector could not be asked any questions which would require him to disclose any information with respect to that sawmill, which he acquired in the exercise of his functions as an Inspector, whether he acquired that information from his own examination of the sawmill, or from any other person in it. 2. That, if objection, on the ground of public interest, was to be taken to an Inspector's giving evidence as an expert, on the ground that the exclusion of such evidence as he could give as an expert was necessary for the proper functioning of the branch of the Public Service to which he belonged, that objection should be taken by the Minister in charge of the Department, after careful consideration by him of the whole matter. (*Duncan* v. *Cammell, Laird, and Co., Ltd.*, [1942] A.C. 624; [1942] 1 All E.R. 587, followed.) 3. That there was nothing to show that the Minister was not the effective head of the Labour Department, and that he could not himself have considered the matter in issue; and the affidavit of the Secretary of Labour was not sufficient to claim privilege on the ground that his giving evidence would be contrary to the public interest. 4. That, accordingly, the Inspector could not be asked any question which would infringe the provisions of s. 5 (3) of the Factories Act, 1946, but he could be asked questions as an expert which would not infringe those provisions. *Hiroa Mariu* v. *Hutt Timber and Hardware Co., Ltd.* (S.C. Hamilton. March 22, 1950. Smith, J.)

FACTORIES.

Safe System: Duty to provide Goggles. *94 Solicitors Journal*, 23.

INCOME-TAX.

Points in Practice. *100 Law Journal*, 159.

LANDLORD AND TENANT.

Relief against Forfeiture—State Rental House—Covenant against Assignment—Tenant purporting to Assign—Order for Possession against Purported Assignee—Application by him for Relief against Forfeiture—No Privity of Contract or Estate between Lessor and Him—"Lessee"—"Assign"—Property Law Act, 1908, ss. 93, 94. The term "assign" as used in the definition of "lessee" in s. 93 of the Property Law Act, 1908, does not include a person to whom a tenant has purported to assign his tenancy, when the tenant had no right to assign, and the lessor had declined to recognize his purported assignee. Where, therefore, in the circumstances set out in [1950] N.Z.L.R. 72, the rights of the original tenant were not assignable, the person in possession could not be an "assign," save by the agreement, express or implied, of the lessor. (*Blake* v. *Official Assignee of Rendell*, (1909) 28 N.Z.L.R. 571, distinguished.) *Strong* v. *State Advances Corporation of New Zealand.* (S.C. Wellington. May 14, 1950. Hutchison, J.)

MUNICIPAL CORPORATIONS.

Encroaching on Street under Council's Control—Tent erected Six Months before Laying of Information and since occupied by Defendant—Continuing Offence—Municipal Corporations Act, 1933, s. 203 (1) (a)—Justices of the Peace Act, 1927, s. 50. Section 203 (1) (*a*) of the Municipal Corporations Act, 1933—which is as follows, "Every person who, not being authorized by the Council or by any Act—(*a*) Encroaches on a street by making or erecting any building, fence, ditch, or other obstacle or work of any kind upon, over, or under the same, or by planting any tree or shrub thereon; or is liable to a fine not exceeding ten pounds for every day upon which such offence is committed or suffered to continue," creates an offence continuing so long as the encroachment remains. (*Rumball* v. *Schmidt*, (1882) 8 Q.B.D. 603, and *London County Council* v. *Worley*, [1894] 2 Q.B. 826, applied.) A tent, which encroached upon a street under the control of the Gisborne Borough Council, had been erected over six months before the filing of the information charging its owner and occupier with committing an offence within s. 203 (1) (*a*) of the Municipal Corporations Act, 1933. *Held*, That, as the occupation had continued to within a fortnight of the laying of the information, the defendant committed the offence, as, being a continuing one, it was not complete when the tent was erected. *Denham* v. *Paneora.* (Gisborne. March 28, 1950. Walton, S.M.)

OBITUARY.

Mr. Justice Lewis, who has been a Judge of the King's Bench Division since 1935, died on March 20.

PRACTICE.

Pleading—Damage—Special Damage—Wrongful Dismissal—Remuneration during Period of Alleged Contractual Notice. In an action for wrongful dismissal, the plaintiffs, in their statement of claim, pleaded an oral agreement of employment and that it was an implied term thereof that the plaintiffs' service should be terminable only by reasonable notice, which, they alleged, was six months. The plaintiffs then alleged that they had been summarily dismissed without notice, and in the prayer claimed, *inter alia*, "damages for wrongful dismissal." It appeared that the damage in respect of which they sought to recover was the loss of salary and commission which they would have earned during the period of notice to which they claimed to be entitled, if it had been given. *Held*, That the damage complained of was special damage, and, as it had not been specifically pleaded, the statement of claim was defective. (*Monk* v. *Redwing Aircraft Co., Ltd.*, [1942] 1 All E.R. 133, followed.) *Hayward and Another* v. *Pullinger and Partners, Ltd.*, [1950] 1 All E.R. 581 (K.B.D.).

As to Special Damage, see *10 Halsbury's Laws of England*, 2nd Ed. 84, 85, 145, paras. 103, 186; and for Cases, see *17 E. and E. Digest*, 153, 154, Nos. *549-553*.

Service—Service out of Jurisdiction—Breach of Contract committed within Jurisdiction—Proof of Such Breach—Contract to pay Pension—Contract made in Czechoslovakia—Pension payable in England—R.S.C., Ord. 11, r. 1 (e)—R.S.C., Ord. 11, r. 4. The plaintiff applied under R.S.C., Ord. 11, r. 1 (*e*), for leave to serve notice of a writ of summons out of the jurisdiction on a Czechoslovak company in an action claiming (*inter alia*) sums of money alleged to be due to him under an agreement for a pension, on the ground that, under the contract between the parties, the pension was, in the events that had happened, payable in England. The plaintiff had been an officer of the company, and the agreement was made in Czechoslovakia. Shortly after his retirement in March, 1938, he came to live in England, where he had remained ever since. In support of his allegation that the pension was payable to him in England, the plaintiff, in his original affidavit, sworn on April 17, 1946, relied on a letter from the company, dated January 18, 1929, which stated that "should the value of the Czech crown be reduced by more than 10 per cent. of its present gold value, the difference in value will be made good to you." In a letter, dated November 23, 1938, which was written by the plaintiff to the company in the course of a dispute in regard to the correct manner of calculating his pension, he stated that he had particularly requested the gold clause to be inserted, as he was going overseas. The plaintiff had not kept a copy of this letter, but it was exhibited to an affidavit sworn on behalf of the company, and, on rereading it, he swore a second affidavit, on June 9, 1948, saying that the letter had brought to his mind details of an oral agreement, made in January, 1929, between him and the manager of the company, whereby it was agreed that he was to receive his pension abroad in the country in which he was living at the time it accrued, and it was for this reason that the clause providing for the payment of the full gold value of the Czechoslovak crown was inserted in the letter of January 18, 1929, which contained the agreement between him and the company on the matter. *Held*, (i) (*Bucknill*, L.J., dissenting) That, on an application under R.S.C., Ord. 11, r. 1 (*e*), unless the plaintiff could show to the satisfaction of the Court that a breach of contract, if there was one, was committed within the jurisdiction, the case was not a "proper one for service out of the jurisdiction," within R.S.C., Ord. 11, r. 4. (*Malik* v. *Narodni Banka Ceskoslovenska*, [1946] 2 All E.R. 663, applied.) Per *Bucknill*, L.J., dissenting, "On principle, I do not see why there should be a different standard of proof on the issue whether the act or omission on which the jurisdiction is alleged to be based occurred within the jurisdiction from the standard of proof required of the act or omission of the defendants which is alleged to give rise to their liability to the plaintiff. It may well be that the same set of facts will be relied on, both to found liability and to found jurisdiction. I do not see why there should be a different standard of proof required for each allegation . . . In each case the plaintiff must, as I think, make out a *prima facie* case, and, if that case is based on facts which are put in issue, nevertheless leave should be given." (ii) Per *Denning*, L.J., dissenting, That, on the plaintiff's affidavits, it was shown that the breach, or breaches, of contract had been committed within the jurisdiction, and, therefore, he was entitled to an order for service out of the jurisdiction. (*Malik* v. *Narodni Banka Ceskoslovenska* (*supra*), distinguished.)

Korner v. *Witkowitzer Bergbau und Eisenhuetten Gewerkschaft*, [1950] 1 All E.R. 558 (C.A.).

As to Service out of the Jurisdiction, see *26 Halsbury's Laws of England*, 2nd Ed. 31-35, paras. 44-50; and for Cases, see *E. and E. Digest*, Practice, 344-351, Nos. *610-666*.

Stay of Proceedings—Action by Worker in Supreme Court claiming under Contract of Indemnity Insurance—Claim by him for Workers' Compensation pending—Latter Claim Alternative in Nature—Separate Actions in Different Courts—Stay of Proceedings refused—Inherent Jurisdiction of Supreme Court to restrain Vexatious and Oppressive Litigation—Jurisdiction discretionary—Code of Civil Procedure, R. 243. Rule 243 of the Code of Civil Procedure relates to two actions, in the Supreme Court which arise from the same subject-matter. It does not apply where one of the actions is in another Court, such as the Compensation Court, which has independent jurisdiction, when that jurisdiction is not subject to control or interference by the Supreme Court. (*New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, referred to.) The inherent jurisdiction of the Supreme Court to avoid multiplicity of suits by restraining litigants who bring actions on the same matter in different Courts is discretionary, and will not be exercised in favour of a defendant unless the litigation is clearly vexatious and unnecessary. As claims for workers' compensation cannot be brought in the Supreme Court, a plaintiff may bring an action in the Compensation Court claiming compensation as an employee, and, in the alternative, an action in the Supreme Court claiming the same amount under a contract to insure or to pay an amount equivalent to compensation. (*McHenry* v. *Lewis*, (1882) 22 Ch.D. 397, considered.) The plaintiff, claiming as an employee of the defendant, commenced an action in the Compensation Court in respect of injuries received in an accident. Later, and before the hearing of that action, he commenced an action in the Supreme Court, claiming that the defendant had undertaken to insure him, so that, in the event of such an accident as had happened, the plaintiff would receive compensation as if he were a worker employed by the defendant. The defendant asked for an order that proceedings in the latter action be stayed. *Held*, dismissing the summons, That the continuance of the two actions was not so vexatious as to justify the Supreme Court to require the plaintiff to elect between them or to stay the action in that Court. *Shannon* v. *Kia Ora Fish Market.* (S.C. Auckland. March 23, 1950. Stanton, J.)

PROBATE AND ADMINISTRATION.

Lunatic—Distribution of Estate—Lunatic entitled, on Father's Death in 1906, to Undivided Share in Freehold Estates—Freeholds Unsold and held by Trustees on Statutory Trusts—Nature of Lunatic's Interest—"Beneficial interest in real estate"—Administration of Estates Act, 1925 (c. 23), s. 51 (2). By his will, dated January 22, 1853, W.B., who died in 1855, devised certain freehold estates on trust for his son, T.B., for life, and, on the death of T.B. (in the events which happened), on trust for the children of T.B. equally. In 1906, T.B. died, leaving five children, one of whom, C.B., was born in 1877, and now became entitled to a one-fifth undivided share in the property. In 1912, C.B. became of unsound mind, and in 1935 a receiver was appointed of her property, and had not been discharged when, on September 2, 1948, she died, a spinster and intestate. The freehold property was still unsold, and, under the Law of Property Act, 1925, s. 39, Sched. I, Part IV, para. 1, was vested in the trustees of W.B.'s will on the statutory trusts for sale set out in s. 35 of that Act. The question arose whether the application of Part IV of the Administration of Estates Act, 1925 (dealing with the distribution of an intestate's residuary estate), was precluded by s. 51 (2) of that Act. *Held*, That C.B.'s interest in the property existed and belonged to her on January 1, 1926, and at the date of her death; it was such that, on, or immediately before, the coming into operation of the Administration of Estates Act, 1925, it would have devolved as real property; and (*Jenkins*, L.J., dissenting) her interest was a "beneficial interest in real estate" within the meaning of s. 51 (2), and, therefore, it devolved on her heir-at-law in accordance with the general law in force before 1926 applicable to freehold land. (*Re Donkin*, [1947] 2 All E.R. 690, distinguished and criticized.) Decision of *Danckwerts*, J., [1949] 2 All E.R. 905, reversed. *Re Bradshaw (deceased), Bradshaw* v. *Bradshaw*, [1950] 1 All E.R. 643 (C.A.).

As to Distribution of Estate of Lunatic, see *10 Halsbury's Laws of England*, 2nd Ed. 592, 593, para. 856.

RABBIT NUISANCE.

Rabbit Board—Rabbit Poison laid under Instructions of Board's Inspector—Excessive Quantity of Poison used—Dairy Stock grazing in Poisoned Area—Three Heifers lost through Poisoning—Poison laid negligently and in Unreasonable Way—Board liable for Damages—"Notice given"—Rabbit Nuisance Act, 1928, ss. 21, 26—Rabbit Nuisance Amendment Act, 1947, s. 16. On June 23, 1949, an Inspector employed by the defendant Board called upon the plaintiff and asked if he could poison an area of 48 acres at the back of the plaintiff's farm. The plaintiff agreed, but said that, as he was shortly going on a fortnight's holiday, and wished to graze his stock on this 48 acres during his absence, the poisoning would have to stand over until his return. It was arranged between them that the actual work of laying the poison on behalf of the Board should be done by one H., who had previously been employed by the Board. Later on the same day, the plaintiff telephoned to H. and told him of the arrangement made that no poison was to be laid while the plaintiff was on holiday. He told H. he would be going away in three days' time and would be away for a fortnight, and arranged that the poisoning be deferred until his return. The plaintiff left on holiday on June 26. On that day, his wife and daughter drove forty-three head of dairy stock on to the 48 acres to graze. On June 29, the Inspector told H. to lay poison on the 48 acres that afternoon. The plaintiff was still away on holiday. The Inspector said in evidence that he instructed H. to shift the stock off the 48 acres before poisoning and to secure the gates. The poisoning was done on June 29 and 30 by H., who said that, before commencing, he had shifted from the area to be poisoned some fifteen or sixteen cattle, thirty to forty sheep, and three horses, and had secured the gates. On July 8, while plaintiff was still absent, three dead dairy heifers and a sick cow were found in that area. Rabbit poison had been laid. The baits were laid on spits; and six, seven, eight, and up to nine baits had been laid on each spit. The poison used was a mixture of pollard and phosphorus, and the three heifers died as a result of eating the baits. In an action for damages for the poisoning of the three heifers, *Held*, 1. That a notice of entry on the plaintiff's land under s. 16 (2) (*a*) of the Rabbit Nuisance Amendment Act, 1947, need not be in writing; and no trespass was committed by the Inspector, and the Board was not liable in any way because he failed to observe his private undertaking to defer the poisoning until the plaintiff's return from his holiday. (*Thompson* v. *Ayling*, (1849) 4 Exch. 614; 154 E.R. 1359, and *Wilson* v. *Nightingale*, (1846) 8 Q.B. 1034; 115 E.R. 1163, applied.) 2. That the protection afforded by s. 21 of the Rabbit Nuisance Act, 1928, to an Inspector, in respect of any damage occasioned by him in exercise of the powers conferred upon him by that statute, enures unless such damage is occasioned otherwise than in the reasonable exercise of such powers; and what is a reasonable exercise of such powers is a question of fact for the Court to decide. 3. That, on the facts, the poisoning was done negligently and in an unreasonable way, and the poison was likely, from its constituents and from the excessive quantity used, to attract dairy stock; and, further, that the whole of the plaintiff's stock was not removed from the area poisoned before the poisoning was begun; and the method of laying the poison was contrary to the Board's policy and instructions. 4. That the Board was liable to the plaintiff, to the value of the three dairy heifers, for the acts of its servants in acting negligently or unreasonably in performing their work, those acts not having been authorized by the Board as appearing to it to be necessary or expedient. (*Manchester Corporation* v. *Farnworth*, [1930] A.C. 171, and *Robinson* v. *Sunderland Corporation*, [1899] 1 Q.B. 751, followed.) *Pendray* v. *Meringa Rabbit Board.* (Taumarunui. January 19, 1950. Coleman, S.M.)

STATUTE LAW.

Civil Right for Breach of Statutory Duty. *94 Solicitors Journal*, 5.

TREES.

Willow-trees growing Midway on Common Boundary—Trees cut down and removed by One Party—No Tenancy in Common in Trees or Easement in respect of them—Action claiming Damages for Trespass and in Trover—Trees planted before Either Party Occupier of Land—Fencing Act, 1908, not applicable—Each Party owning Moiety of Trees—Plaintiff holding Land as Lessee—Willows not Timber Trees—Produce thereof, when cut down, not reverting to Plaintiff's Landlord—Nominal Damages awarded for Trespass—Measure of Damages awarded in Trover. The parties occupied adjoining farms, the plaintiff being the lessee of his property and the defendant owning his land in fee simple.

The trunks of willow-trees stood almost midway on the common boundary, and were from 1 ft. to 3 ft. in diameter. These trees had been planted when neither party was an occupier of the land. The plaintiff cut away the overhanging branches and portions of the trunks of fifteen trees on the boundary; but he did not cut them down or take away any part of them which stood vertically above the defendant's land. Later, the defendant cut down to above post height, and removed the whole of the produce of, the remaining seventy trees standing on the boundary. He did not account to the plaintiff for any share of such produce. The plaintiff claimed damages for the removal of the portions of the trees cut down by the defendant, and also for trespass to his land. The defendant counterclaimed for damages for the wood cut away by the plaintiff. *Held*, 1. That, as the willows had been planted some years before either of the parties was an occupier of the land, s. 26 of the Fencing Act, 1908, did not apply to the cutting down or destruction of the trees carried out by either party; and the matter had to be determined on common-law principles. (*Flamank* v. *Read*, [1917] G.L.R. 622, and *Spargo* v. *Levesque*, [1922] N.Z.L.R. 122, followed.) 2. That neither party was liable to the other for trespass or in trover in cutting or removing so much of the trees as projected into or over his land, or the wood resulting therefrom; and, in consequence, the defendant's counterclaim failed. (*Lemmon* v. *Webb*, [1895] A.C. 1, followed.) 3. That there was no common ownership in the whole of each tree, and the parties were not tenants in common thereof; but each party owned the moiety of the tree which stood on his land; and that no easement existed to use the moiety of the trees on each party's ground in support of the moiety on the other's (*Minister of Lands* v. *Australian Joint Stock Bank*, (1900) 21 N.S.W.L.R. 209, referred to.) 4. That the defendant had not cut down timber trees, as there is no New Zealand statutory enactment which declares willow-trees to be timber trees, and there was no proof of any custom establishing the fact that it was well understood in the locality that they were timber trees; and, as, in consequence, the produce of the trees did not revert to his landlord, the action was maintainable by the plaintiff. (*Honywood* v. *Honywood*, (1874) L.R. 18 Eq. 306, and *Moult* v. *Halliday*, [1898] 1 Q.B. 125, applied.) 5. That, as the defendant, in removing some of the produce of the trees, had trespassed on the plaintiff's land, the plaintiff was entitled to nominal damages. (*Lemmon* v. *Webb*, [1894] 3 Ch. 1, followed.) 6. That, as the plaintiff had a right to the immediate possession of the wood from his moiety of the trees removed by the defendant, he was entitled, in trover, to the pecuniary value of that wood. (*Smithies* v. *Universal Supply Co., Ltd.*, (1904) 23 N.Z.L.R. 1090, referred to.) *Browning* v. *Nyhon*. (Alexandra. December 6, 1949. Dobbie, S.M.)

TRANSPORT.

Heavy Motor-vehicle Regulations, 1950 (Serial No. 1950/26). These regulations will revoke and replace the Heavy Motor-vehicles Regulations, 1940 (Serial No. 1940/78), and all surviving Amendments thereof as from June 1, 1950.

WILL.

Construction—Gift contained in Direction to pay Income—Contingent on Happening of Future Event—Whether Gift vested. Testator directed his trustees to pay dividends and bonuses from shares to his sister, M.S., during the period of six years from his death, "but should she die at any time before the expiration of the said period" he directed his trustees to pay the same to H.S. "for the remainder of such period of six years." Testator died on August 6, 1940, H.S. on March 23, 1942, and M.S. on October 25, 1942. *Held*, That the income from the shares for the period between the death of M.S. and the end of the six years from testator's death did not belong to the estate of H.S., but fell into residue. Where a gift is contained only in a direction to pay, and the event on which payment is to be made is one which may or may not happen, the gift is not vested in the sense of being transmissible. (*Smell* v. *Dee*, (1707) 2 Salk. 415, approved.) (*Booth* v. *Garraway*, (1824) 2 L.J.O.S. Ch. 183, *Pinbury* v. *Elkin*, (1718) 2 Vern. 758, 766, and *Browne* v. *Kenyon*, (1818) 3 Madd. 410, distinguished.) *In re Stewart*, [1950] V.L.R. 4.

Investment Clause—"Shares of public company"—Inclusion of Stock. By his will, a testator directed that all moneys to be invested under his will might, in addition to the investments allowed by law to trustees, be invested in or on, *inter alia*, "the debentures or debenture stock or shares of any public company which shall have paid dividends upon its ordinary capital for at least three years prior to the time of investment . . . but not in any stocks funds bonds shares or securities to bearer." *Held*, That *prima facie* the reference to the shares of any public company included a reference to the stock of such a company, and, there being nothing in the context of the will to displace that construction, the trustees' power of investment extended to stock in a public company having the qualification indicated. (*Re McEacharn's Settlement Trusts*, [1939] Ch. 858, considered, and dictum of *Bennett*, J., therein (*ibid.*, 859) applied.) *Re Boys's Will Trusts, Westminster Bank, Ltd., and Another* v. *Boys and Others*, [1950] 1 All E.R. 624 (Ch.D.)

As to Investment of Trust Funds, see *33 Halsbury's Laws of England*, 2nd Ed. 232-244, paras. 415-430; and for Cases, see *43 E. and E. Digest*, 926-928, Nos. *3640-3663*.

The Commonwealth of Letters

There is no reason why legal arguments or judicial judgments should not be expressed in good English. There is every reason why they should. The advocate who can impart a literary flavour to his address adds to its persuasiveness and attraction. "Nor pleads he worse who with a decent sprig Of bay adorns his legal waste of wig." Exotic flowers of oratory are not suitable adornments for our modern law Courts, but the Temple has never disdained to deck its plots with the classic blossoms of the English flower garden. It is of even more importance that those who sit in judgment should have a mastery, not only of law, but of letters, so that they may be able to use with ease and freedom—and I should like to add, with distinction—the vehicle of language in which their decisions must be conveyed. The craftsman comes to take a joy in his sheer craftsmanship. I venture to think that there are few higher intellectual pleasures than success in the task of expressing an argument or a conclusion in just precisely the right language, so that the thought is caught and poised exactly as we would have it. Clear thinking always means clear writing, and clear writing is always good writing.—Lord Macmillan: "Law and Letters" (*American Bar Association Journal*, October, 1930).

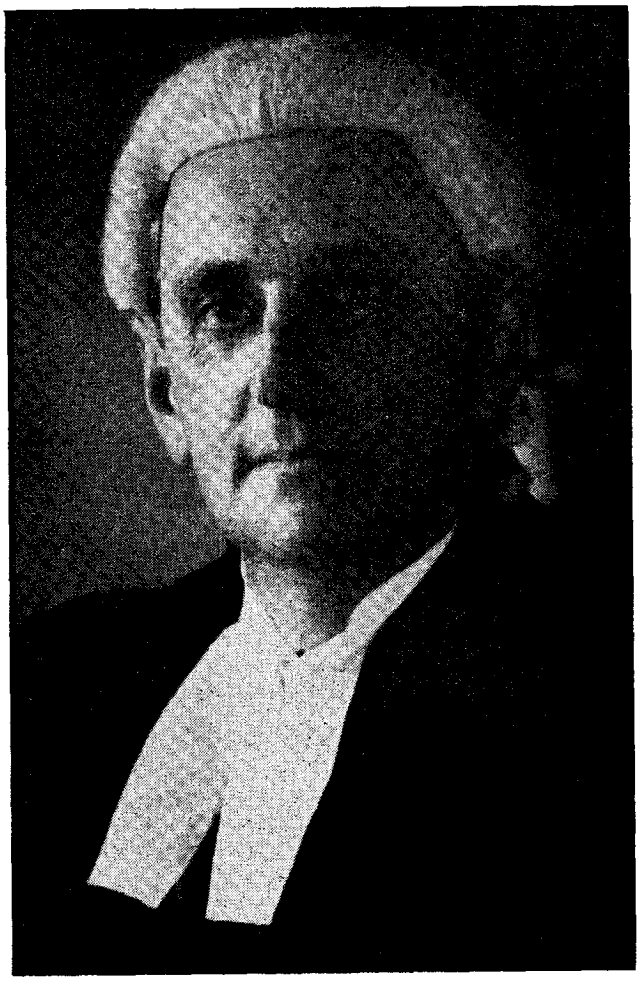
The Lawyer's Function

Our men of the law have not been wise to let slip a standing which, in this country, they used to have. They used to be, as of course (along with preachers, prophets, and successful generals), the people on whom other people called to tell them what any trouble was all about. They used, also, and again as of course (along with political leaders), to be the people to whom other people turned when they wanted to know how to get things done. A century or so ago, names like John Adams, Alexander Hamilton, Andrew Jackson, Daniel Webster, Abraham Lincoln, carried a sure flavor of knowing whither and of telling how, for *All*-of-us. Such knowing of whither and such discovering of how, for *All*-of-us, is still of the essence. It is, in essence, what the institution of law and the men of law are for. Both we and those whom we exist to serve should get that clear. But it seems that things have gotten in the way.—Karl K. Llewellyn: "Law and the Social Sciences—Especially Sociology" (*Harvard Law Review*, June, 1949).

MR. JUSTICE COOKE.

THE appointment of Mr. Philip Brunskill Cooke, K.C., to fill the vacancy on the Supreme Court Bench has been received with warm approval by the public and the profession alike.

To the public, he has been known for many years as one of the most eminent members of the profession, and for over three years past as the President of the New Zealand Law Society. In the main, however, his work has not been associated with those *causes cèlebrés* which most attract public attention, but has been in the more exacting, but less spectacular, fields of advocacy in Banco and in the Court of Appeal. There his work has been marked with a lucidity, thoroughness, and polish which only his former colleagues at the Bar, and his present colleagues on the Bench, can properly assess. His arguments mirrored his natural gifts, his learning in the law, and the qualities of industry and care which he brought to the discharge of the task in hand; but above all they displayed an intellectual integrity which refused to by-pass difficulties or to accept anything superficial or second-rate, however attractive it might appear to be.



S. P. Andrew & Son, Photo.

Mr. Justice Cooke.

The new Judge's first work will be at Palmerston North, where he was born fifty-seven years ago, and where his father, the late Mr. Frank H. Cooke, was in practice for many years. He was educated at Wanganui Collegiate School, where he was a contemporary of the present Mr. Justice Gresson, and at Victoria University College. After completing his degree course, he spent a year as Associate to the then Chief Justice, Sir Robert Stout, and at the end of 1913 entered the office of Chapman, Skerrett, Tripp, and Blair. There, after his war service, he was to become a principal, and to remain until January, 1936, when he took silk at the age of forty-two years, and achieved the distinction of being the youngest barrister in New Zealand, either before or since, to become a King's Counsel. In the meantime, he had seen two of his partners in his firm go to the Bench, Mr. C. P. Skerrett in 1926, and Mr. A. W. Blair in 1928.

Mr. Cooke served in the 1914-1918 War, rising to the command of the New Zealand Divisional Signal Company, with the temporary rank of Major. In 1918, he was awarded the Military Cross for distinguished services during operations in France and Flanders. In the late war, in the height of his practice as a leader, he again offered his services. After giving part-time service for over a year in the Adjutant-General's Branch at Army Headquarters, he served for a further two years on a full-time basis as Director of Personal Services, with the rank of Lieutenant-Colonel.

Mr. Cooke had only returned to his chambers for a short time when he undertook a further period of service, this time to his own profession as President of the New Zealand Law Society. He was elected to this office in September, 1946, following upon the appointment of Sir Humphrey O'Leary to the office of Chief Justice. He also became chairman of the Disciplinary Committee, and a member of the Council of Law Reporting for New Zealand, and served on other committees of the Society; and the manner in which he sacrificed time and attention to the discharge of the duties of these offices is fresh in the minds of all the profession. It is safe to say that no President did more to earn the gratitude of the members of the profession for his ungrudging services than did our last President.

Mr. Cooke at no time allowed any outside interests to take precedence over the demands of his professional work. Nevertheless, he was able to find time to take a prominent part in varied activities outside the Law. In sport, tennis, badminton, golf, and cricket all claimed his keen interest and active participation, not only as a player but in most cases as an administrator.

Mr. Justice Cooke goes to his judicial duties with the warmest wishes of all the members of the profession to which he has given such yeoman service. They are confident that his work on the Bench will display the same qualities of outstanding ability and inflexible adherence to the rule of law as distinguished his work at the Bar, and will be carried out with the same courtesy as marked his dealings with his fellow-practitioners.

OF WRITING BY LAWYERS.

By G. V. V. Nicholls, Editor of the *Canadian Bar Review*.*

I.

We lawyers are in general poor writers of English. The observation is not new; almost two hundred years ago a similar judgment was passed by Henry Fielding, also a lawyer, when he said, "And as to the lawyers, they are well known to have been very little acquainted with the commonwealth of literature, and to have always acted and written in defiance to its laws."[1] Fielding's phraseology is probably better, since "poor" is a vague word in need of explanation. We are poor writers, not by comparison with the followers of other callings, who often write as badly or worse, but in the sense that we write, most of us, in defiance of accepted standards of correct and graceful English.

I have been asking myself why this should be so. If the old saw about practice making perfect were true, we might be expected to write well, for we have more occasion to use words than the members of any other profession; as others have said before, words are the tools of the lawyer's trade. Yesterday he drafted a private agreement or a legislative Bill; today he speaks in the give and take of a trial; tomorrow he will dictate letters to clients; the day after, start a brief or a law-review article. Perhaps part of the trouble is that he uses words so much. His tools are employed in different circumstances and for different purposes and the principles governing one use are not necessarily the principles governing another; if he practises in one the habits appropriate to another, or at least defensible in another, he is likely to write poorly.

My subject is what I think of as the ordinary writing of the lawyer, as a lawyer: a letter of advice to a client, for example, or a brief, or a judgment (if he is a Judge), or a law-review article. When the lawyer's ordinary writing is poor it is usually poor for one or both of two reasons: because he is writing as if he were drafting a legal instrument or because he is writing as he would talk informally, say, in Court. I know that the language of some legislative draftsmen, and it is perhaps the best, would not be inappropriate in ordinary writing, and that the words of the rare orator will read well when transcribed to paper exactly as they fell from his lips. It is still true that the overriding aim in drafting is certainty and if certainty is achieved some sacrifice of literary grace can be tolerated; on the other hand, the circumstances surrounding advocacy in Court tend to repetition and a looseness of organization and phrasing that may be tolerable there but intolerable on paper. Somewhere in between comes the lawyer's ordinary writing; it must manage to avoid both the formality common in legal instruments and the informality of the spoken language.

The keeping of a balance between the two extremes is often a matter of personal judgment and taste, and no one should presume to be dogmatic about it. There are no binding precedents in the matter of good writing; no rules not subject to exception; no formulas that cannot be ridden to excess. Nevertheless, most of us can recognize good writing when we see it and some guiding principles have received general acceptance.

The qualities the lawyer should strive for in his writing are conditioned by the kind of writing he does. Not for him are the tenuous "feelings" of the poet or the imaginative flights of the novelist and playwright; his is, comparatively, a pedestrian kind of writing. Where they make their primary appeal to the emotions, the lawyer, when he is writing as a lawyer, makes his to the reason. Where they strive to create an effect, an artistic impression, the lawyer tries to convince by the soundness of an argument; he would hardly write at all unless he wanted to convince someone of something. Essentially his writing is factual, expository, analytical, argumentative. And so, without any claim to originality, I suggest that the lawyer should choose words that are familiar, concrete, and precise, and that, in a broader sphere, he should try to make his writing clear, concise, and simple.

II. The Choice of Words.

Lawyers have been heard to lament the unpopularity of their profession with the lay public. Whether they exaggerate the public's attitude or not, certain it is that the writing habits of lawyers have made them the butt of literary men for centuries. The truth is that the layman judges the legal profession largely on what lawyers write. Out of their writing has grown the tradition that they are dull dogs thrashing about in a net of fine distinctions and verbose obscurities. In that cutting poem of Carl Sandburg's, *The Lawyers Know Too Much*,[2] appears this stanza:

> In the heels of the higgling lawyers, Bob,
> Too many slippery ifs and buts and howevers,
> Too much hereinbefore provided whereas,
> Too many doors to go in and out of.

Too many *ifs*, *buts*, *howevers*, *hereinbefores*, *provideds*, *whereases*; therefore, lawyers are higgling and slippery.

In an early seventeenth century play by John Webster, *The White Devil*, there is a satiric scene in which the heroine, Vittoria Corombona, is being tried for behaviour thought a trifle too unconventional—her virtue was easy, it was alleged, and she had murdered her husband. The lawyer-prosecutor is made to open his case in Latin and when Vittoria's objection to his choice of language is sustained he continues:

> Most literated judges, please your lordships
> So to connive your judgements to the view
> Of this debauched and diversivolent woman;
> Who such a black concatenation
> Of mischief hath effected, that to extirp
> The memory of't, must be the consummation
> Of her and her projections,—

Naturally enough, Vittoria cannot see that this is much improvement over the initial Latin and she turns to her Judges with:

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* By courtesy of the *Canadian Bar Review*.

[1] Fielding: *The Commonwealth of Letters* (1752). In this essay, first published in the *Covent Garden Journal*, Fielding was presumably speaking of English lawyers. We live in a new world of easy communication, when a Canadian journal may be read almost anywhere, and I should add that I presume to speak only of (and to) Canadian lawyers.

[2] From: *Smoke and Steel* (1920).

> Surely, my lords, this lawyer here hath swallowed
> Some pothecaries' bills, or proclamations;
> And now the hard and undigestible words
> Come up, like stones we use give hawks for physic:
> Why, this is Welsh to Latin.

In the sequel, the lawyer's "learn'd verbosity" leads to his exclusion from the Court.

Lawyers need look no farther for the cause of a large part of their unpopularity than their own choice of words, their vocabulary. Let us therefore resolve to avoid the cant and pedantic terms so beloved of the profession. Paradoxical though it may seem, the ideal for the lawyer in his ordinary writing should be to sound as little like a lawyer as he can, or at least as little like the layman's conception of a lawyer. Naturalness should be the goal; not what happens to seem natural to the man who is writing but what would be likely to seem natural to any educated person who picks up what he has written. "The words in prose," said Samuel Taylor Coleridge, "ought to express the intended meaning, and no more; if they attract attention to themselves, it is, in general, a fault."[3]

Of two words that accurately express the intended meaning, prefer the familiar word. Adherence to this rule will not in itself guarantee naturalness, because of course there are some technical and, to the general public, unfamiliar words that a lawyer cannot avoid using when writing on legal subjects: *ex parte*, *mandamus*, *tort*, and *ultra vires*, for example. But the strict avoidance of the unnecessarily unfamiliar word will improve our writing. Besides the *hereinbefore* and *whereas* mentioned by Sandburg, examples of words (and word-phrases) to avoid are *aforesaid*; *de novo*; combinations of *here* like *hereinafter*, *hereto*, and *heretofore*; *inter alia* and *inter se*; *ipso facto*; *onus*; *per* (in such phrases as *per year* and *per se*); *said* (as an adjective); combinations of *there* like *thereafter*, *thereat*, *thereby*, *therefor*, *therein*, *thereof*, *thereon*, *thereupon*, and *therewith*; combinations of *where* like *whereby* and *whereunder*. I am tempted to add to the list abbreviations like *e.g.* (*exempli gratia*, for example), *etc.* (*et cetera*), *i.e.* (*id est*, that is), and *viz.* (*videlicet*, namely), particularly in a text having any pretensions to the literary. Some of the examples given are more objectionable than others, but all could be dropped from the lawyer's vocabulary with advantage. Most of them find their way into ordinary English from the conventionalized language of statutes and legal instruments. Possibly the lawyer uses them from some vague feeling that they will add distinction to his writing and impress his readers; if this be his reason, he had better find some surer way of impressing them. To anyone with an ear for English prose they are ugly, and to the layman they are a hall-mark of the mannered writing he calls "legalese."

An unfamiliar word in a different category is *same* when used as a pronoun, as in the phrase, " . . . the Police officer tore a couple of pages out of his note-book and handed *the same* to one of the accused." This usage is not peculiar to lawyers, though it appears often enough in their writing to justify comment. Most cultivated readers will think it ugly, which is a sufficient reason for avoiding it. The example just quoted would have been better as " . . . the Police officer tore a couple of pages out of his note-book and handed *them* to one of the accused" (it might have bee still better had the officer torn the pages *from* rather than *out of* his note-book, but the subject of circumlocutions must remain for later discussion). Another example occurs in the sentence, "Payment of the premiums was secured by a promissory note of the mortgagor and, upon his failure to honour *same*, the insurance company cancelled the policy and sued the mortgagee for the earned premium," where *it* or *the note* should be substituted for *same*.

Nothing that has been said is intended to imply that the lawyer should not always strive to find the precise word to convey his meaning. Indeed, in the realm of vocabulary, the requirement of precision should, I think, override the advantages of naturalness; if the only word that exactly expresses the intended meaning is an unfamiliar word, then it must be used, however regretfully. What I have been arguing for, let it be repeated, is the avoidance of the *unnecessarily* unfamiliar word. Law needs to move closer to the people, not farther from them. As Mr. Charles Morgan has recently written, in a vivid passage:

> A reason for this [the loss of our principal means of communicating with one another] is the centrifugal movement of modern knowledge into remote and distinct compartments, each with its own cipher. The ambition of converging and universal knowledge, the ambition of Plato and Leonardo and Bacon, has had to be abandoned. Learned men are driven to apply themselves more and more exclusively to their own specializations. Each branch of philosophy, of physics, of mathematics, has its own terms and symbols which are, as it were, blocked currencies, not intended to be used in exchange. For want of a common speech, the learned are, in a sense, trapped within their special areas of knowledge, and knowledge itself, in its technical development, has grown farther and farther away from language. The area of experience which cannot be described in the ordinary language of cultivated men extends year by year. We are beginning to make signs at one another across impassable gulfs, for the subjects which cannot be spoken of, except in dialects peculiar to them, continuously increase. Less and less can there be a confluence from the many sources of knowledge into wisdom, for the channels of communication are silting up.[4]

From time to time pleas are made for a more precise legal terminology.[5] If by this is meant that one word should symbolize only one concept, a good deal can be said for the suggestion. Some expansion in the technical vocabulary of the law may well be necessary, and useful results should come from sorting out the different meanings of those words, like *right*, that have several distinct meanings and giving to each meaning a separate name. But to invent a new vocabulary is not necessarily to invent a more precise one.[6] If the suggestion is, not only that one word should symbolize one concept, but that the word should be capable of exact definition as in mathematics or the physical sciences, it is impracticable.[7] I do not know that any useful purpose is served by drawing too close an analogy between law and the exact sciences. As Professor Williams points out, apart from words of multiple meaning like *right*, many words (perhaps most words) have what he calls a "penumbra of uncertainty." Here part of the difficulty of exact definition is inherent in the limitations of language itself; and for the lawyer the difficulty is further complicated by the fact that law is a living and a growing thing, and the concepts

[3] Coleridge: *Table Talk* (1835).

[4] Morgan: *The Death of Words*, in 7 *English*: *The Magazine of the English Association* (Summer, 1948), at p. 56.

[5] *E.g.*, Arthur T. Vanderbilt: *Men and Measures in the Law* 1949), at pp. 47, 48, 49, 57.

[6] I am reminded of the famous headline in the theatrical magazine, *Variety*—Stix Nix Hix Pix—which to initiates means that small-town moviegoers are against farm, or hick, pictures.

[7] See Glanville L. Williams: *Language and the Law*, (1945) *61 Law Quarterly Review*, 179, 180, 301, 302.

the lawyer seeks to symbolize by exact terms living and growing too. Perhaps the answer will be made that, equally with a precise legal terminology, we need a realistic analysis and clarification of concepts, and certainly we do, but if the concept cannot be fixed once and for all can the definition of the word standing for it be fixed ?

An appreciation of the plea for a more precise legal terminology, in all its implications, would lead too far into the study of meaning, semantics, for this article. Although that study certainly deserves the attention of lawyers,[8] I think it can fairly be said for us that we are more aware than most people of the dangers implicit in words ; with our training and experience it would be strange if we were not. Here it will have to be enough to emphasize the particular danger of abstract words, of which *democracy*, *duty*, *freedom*, *justice*, *possession*, *property*, *right*, *state*, *wrong*, and *law* itself, are examples familiar to every lawyer. The danger in such words is that they have no " correct meaning " ; each of us is likely to use them in a different sense, and sometimes we use them in different senses in the same passage. Although the nature of a lawyer's writing is such that he cannot avoid them altogether, he can use them only when he has no alternative, and then with care. A writer should be sure of the sense in which he intends to use an abstract word ; he should make clear to his reader the sense in which he is using it ; and then he should use it consistently in that sense.

Two abstract words I should hope will disappear from the vocabulary of Canadian lawyers are the adjectives *practical* and *academic* when applied to members of the profession or their works. A lawyer who speaks of himself as " practical " and of a confrère as " academic " may defend his distinction by saying that he is a member of the practising branch of the profession and the confrère of the teaching branch ; if these are the meanings in which he intends to be understood, he would do better to say so. By different people *practical* and *academic* are used in so many senses (often they are used as opposites, though they are not opposites), they have acquired so many overtones, that to the average reader they have come to be little more than vague terms of approval or disapproval. Not only do they convey the writer's judgment on the subject to which he applies them, which is legitimate enough, but they disguise the grounds on which he arrived at the judgment, often from himself as well as the reader. And such is the influence of words on thinking that their continued currency leads us to assume unthinkingly that the profession is in fact divided into two opposing camps.

[8] See Williams : *Language and the Law*, (1945) *61 Law Quarterly Review*, 71, 179, 293, 384 ; (1946) *62 Law Quarterly Review*, 387 ; and the authorities cited there.

(To be continued.)

QUASI-CONTRACTS.

Some Recent Developments.

Quasi-contracts are a neglected branch of the law, mainly because they receive little attention in current legal education, though passing reference is made to such common cases as money paid under a mistake of fact or money paid for a consideration which has wholly failed.

However, claims in quasi-contract arise more often than the average practitioner realizes. They are particularly useful in commercial transactions which for some reason have proved abortive. Moreover, the Courts have been more willing to recognize these claims since the decision of the House of Lords in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 ; [1942] 2 All E.R. 122, where Lord Wright said, at p. 61 ; 135 :

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

Recent case-law on this subject raises a number of interesting points. These are conveniently dealt with under a few main headings, but it should be remembered that these headings are only a selection from the various possible causes of action in quasi-contract : their selection depends on the arbitrary facts which have formed the subject-matter of reported cases during the past year or so.

1. Money paid under a Mistake of Fact.—In the leading case of *Kelly* v. *Solari*, (1841) 9 M. & W. 54 ; 152 E.R. 24, Parke, B., said, at p. 58 ; 26 :

> where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue . . . an action will lie to recover it back.

In that case, insurers had paid out certain policy moneys under the mistaken impression that the policy was still in force at the date when the policy-holder died ; and it was held that they were entitled to recover the money. It is important to note that the directors had been told by their actuary that the policy had lapsed, but they paid out the money in forgetfulness. This did not bar the right to recover, for the only question is : Was there a mistake operating at the time of payment ? This point is further illustrated by the modern case of *Anglo-Scottish Beet Sugar Corporation, Ltd.* v. *Spalding Urban District Council*, [1937] 2 K.B. 607 ; [1937] 3 All E.R. 335, which concerned payments for the supply of water. One officer of the plaintiff company was aware that the minimum charges for this supply had been reduced, but another officer did not know of the reduction, and continued to pay the defendants at the old rates. Atkinson, J., held that the excess payments could be reclaimed.

As is well known, an action must be based on a mistake of fact, and not on a mistake of law. Thus, if, through a misreading of an Act of Parliament, the plaintiff pays taxes which are not legally due, he cannot insist on

repayment: see, for instance, *National Pari-mutuel Association, Ltd.* v. *The King*, (1930) 47 T.L.R. 110. (As will be seen, the position in such a case may be different if the action is based on extortion, as distinct from mistake.)

A mistake in the construction of a document ranks for this purpose as a mistake of law. This was held by Wynn-Parry, J., in *In re Diplock's Estate, Diplock* v. *Wintle*, [1947] Ch. 718; [1947] 1 All E.R. 522, where, on a mistaken construction of the relevant clauses of a will, executors paid to charities certain legacies which proved to be invalid. On this point, the learned Judge's decision was upheld by the Court of Appeal: [1948] Ch. 465; [1948] 2 All E.R. 318.

There is a current of authority which suggests a further limitation on the right to recover money paid by mistake, This is best summed up in the following dictum of Bramwell, B., in *Aiken* v. *Short*, (1856) 1 H. & N. 210, 215; 156 E.R. 1180, 1182:

> the right to recover money paid under a mistake of fact must have reference to a belief of the existence of a fact which, if true, would have given the person receiving a right against the person paying the money.

If this dictum were sound, no mistake would ever be sufficient to found an action unless it affected a legal liability. Consequently, a voluntary payment made under the influence of a mistake could never be recovered. In *Morgan* v. *Ashcroft*, [1938] 1 K.B. 49; [1937] 3 All E.R. 92, Scott, L.J., thought that the dictum could not be "regarded as final and exhaustive," and that some mistaken payments could be recovered, though wholly voluntary. This view has now been adopted and acted upon by the Court of Appeal in *Larner* v. *London County Council*, [1949] 1 All E.R. 964, in which an employee of a local authority joined the R.A.F., and the authority, quite voluntarily, made up the difference between his Service and civilian pay. Unfortunately, the man did not keep the authority informed when his pay was increased, and, in consequence, he was paid too much. It was held that the excess payments could be recovered. Denning, L.J., in giving judgment, treated the payments as due under a debt of honour which was analogous to a legal liability.

The further point was raised in this case that the authority were estopped from reclaiming the payments as they had led the employee to believe that they were due. This point could hardly succeed, since the error arose from the employee's own default.

2. Failure of Consideration.—If money is paid to obtain a certain consideration and no part of that consideration is received, then an action may be brought to recover the money. This principle is not confined to payments under contracts. In an old case, a litigant was allowed to recover conduct-money from a witness who failed to appear at the trial. The meaning of the word "consideration," in this context, was explained by Viscount Simon, L.C., in the *Fibrosa* case (*supra*), where he said, at p. 48; 129:

> in the law relating to the formation of contract, the promise to do a thing may often be the consideration; but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.

This statement of the law was quoted and applied by the House of Lords in *Comptoir d'Achat et de Vente du Boerenbond Belge S.A.* v. *Luis de Ridder, Limitada*, [1949] 1 All E.R. 269, 278, 279, a case where goods were sold but (owing to enemy action) were not delivered, though the buyers received the appropriate delivery documents, Once it was established that the consideration bargained for was the goods, and not the documents of title, the buyers were entitled to recover their money. (This was not a case of a c.i.f. contract in the strict sense: in a c.i.f. contract, it is a term of the contract that the seller fulfils his obligations by tendering the documents of title.)

The *Comptoir d'Achat* case must be contrasted with *Linz* v. *Electric Wire Co. of Palestine, Ltd.*, [1948] A.C. 371; [1948] 1 All E.R. 604. There the plaintiff had received an allotment of shares, and, after transferring them for value, claimed repayment of her money on the ground that the issue was invalid. The plaintiff had evidently received the consideration she had bargained for—the shares—and, whatever the position might have been if at the start she had alleged that the shares were valueless, she could not put forward such an allegation after receiving money for them. The Judicial Committee advised that the claim should be dismissed.

3. Extortion colore officii.—The action for extortion *colore officii* lives in a twilight world. Though the validity of the action was accepted by the House of Lords as recently as 1936, its limits have not been precisely defined in the higher Courts, and there is a decision of Walton, J., in *William Whiteley, Ltd.* v. *The King*, (1909) 101 L.T. 741, which, if it is to be followed, deprives the action of much of its value. The recent case of *Sebel Products, Ltd.* v. *Customs and Excise Commissioners*, [1949] 1 All E.R. 729, contains some critical observations, but does not carry the law any further.

It must first be noted that all the actions for extortion have been developed by analogy to duress. Money obtained by common-law duress (threats of bodily injury to the plaintiff or his family) could be recovered from the earliest days.

In the second stage, the right of recovery was extended to quasi-duress by seizure or threatened seizure of goods —for instance, by threat of illegal distress: *Maskell* v. *Horner*, [1915] 3 K.B. 106.

Thirdly, the notion of quasi-duress was further extended to cases where ferrymen or carriers or similar persons refused to afford their facilities unless excessive fees were paid; and in these cases the Courts allowed the excess payments to be reclaimed.

Now, the action for quasi-duress lay against private persons as well as against public officers. Clearly, then, when the common law recognizes a distinct action for money extorted *colore officii*, there must be some differentiating element. The difference can only be this: that, if a public officer exacts money by exercising the authority of his office, that is enough to support an action for the recovery of the money, if not lawfully due, though no duress has been applied to the plaintiff's goods, and though he has not been deprived of any facilities to which he was entitled.

This view of the scope of the action is supported by a current of nineteenth century authorities which it would be tedious to set out here. They rested on the following two points: (i) a public officer and a member of the public are not on equal terms; (ii) a public officer is expected to be honest: he should know how much is due to him, and should not retain anything in excess: see, for instance, the observations in *Steele* v. *Williams*, (1853) 8 Exch. 625; 155 E.R. 1502.

A departure was made from the line of authority by Walton, J., in *Whiteley's* case (*supra*). This was a case where excise duties were paid on certain male

servants, at the instance of the tax authorities, though not legally due. In the first place, the learned Judge held that the action for extortion *colore officii* did not lie in the absence of quasi-duress (thus holding that the action is in no way different from an action of extortion against a private person). In the second place, he held that the payment was made under a mistake of law as to the construction of an Act of Parliament. (This seems to be a confusion of categories : mistake of law can hardly be a defence unless the claim is based on mistake of fact, as distinct from extortion.)

In the recent case of *Sebel Products, Ltd.* v. *Customs and Excise Commissioners* (*supra*), taxpayers had paid purchase tax on certain swings, pending a decision of the Courts as to whether it was legally payable. Vaisey, J., accepted without dissent the decision in *Whiteley's* case that *prima facie* the money could not be recovered, as being paid under a mistake of law ; but he got over the difficulty by inferring an agreement by the Commissioners to repay the money if the swings were held to be exempt. The learned Judge also indicated that, as a matter of administration, the duty of public officers to be scrupulously honest made it inadvisable to raise the defence of mistake of law in such a case ; but, curiously enough, he did not link this up with the dictum in *Steele* v. *Williams* that this public duty of honesiy renders the public officer accountable at law in the action *colore officii*, and not merely as a matter of policy.

The action for extortion *colore officii* is of great potential utility ; and it may be hoped that, when a case comes before the higher Courts, the action will be restored to its full scope and *Whiteley's* case will be overruled.

There are, however, two complications. First of all, it is firmly established that, if money is paid, however unwillingly, under the threat of legal proceedings, it cannot be recovered in the absence of fraud. Cases of this kind cannot be brought under the heading of extortion. Secondly, if there has been a dispute and the plaintiff pays quite voluntarily, with full knowledge of the facts, and intending to close the transaction, he cannot re-open it. Possibly on the facts *Whiteley's* case was a case of this character. Among other things, this second rule has the result that the plaintiff in an action of extortion should allege and prove that he paid the money under protest.

4. Agent's Liability to account for Profits.—The common-law liability of an agent to account for money received on behalf of his principal is lineally descended, through the action for money had and received, from the medieval writ of account, which lay chiefly against stewards and bailiffs of land. In principle, therefore, the action is quasi-contractual, and rests on the relationship between principal and agent rather than on the terms of their contract. This point is an important one, because the liability is not confined to money which the principal would have been entitled to receive direct if acting on his own account. It extends also to profits which the agent makes for himself by virtue of his position as agent. Thus, in *Boston Deep Sea Fishing Co., Ltd.* v. *Ansell*, (1888) 39 Ch.D. 339, a director of a fishing company received bonuses (as a shareholder) from an ice company which he had employed to supply ice to the fishing company's trawlers ; and the Court of Appeal held that the fishing company was entitled to claim these bonuses. Nor is this type of action confined to receipts in the nature of bribes which may affect the financial interests of the principal. In *Attorney-General* v. *Goddard*, (1929) 98 L.J. K.B. 743, the Crown recovered bribes from a detective in the Metropolitan Police, though no financial interest of the Crown could have been affected.

The law on this subject was considered recently in *Reading* v. *The King*, [1949] 2 All E.R. 68. An Army Sergeant in Cairo, while off duty, had received large sums as bribes in return for standing, in his uniform, on certain lorries carrying contraband goods and taking them past the Egyptian Police. It was held that the Crown was entitled to these sums. The Court of Appeal laid some stress on the fact that the Sergeant obtained the money by the use of his uniform, which was the property of his master, the Crown. The substance of the matter is that the principal can recover sums which have been obtained by his agent by virtue of his position and without the authority of the principal.

5. The Equity of Restitution.—The equity of restitution has been explained lucidly and at considerable length in the judgment of Lord Greene in *In re Diplock's Estate, Diplock* v. *Wintle*, [1948] 2 All E.R. 318, but it is difficult to reduce it to a small compass. In *Diplock's* case, large sums of money had been paid out to charities under the terms of a will, but it was afterwards held by the House of Lords that the bequests were invalid. The next-of-kin claimed repayment of the money. It was held by the Court of Appeal that there was no liability at common law (the payments having been made under a mistake of law), but that in equity there was (i) a personal liability in the legatees to refund, and (ii) a liability to account for the assets received, so far as they could be traced.

The personal liability of a supposed legatee to refund money to which he was not in fact entitled is not of great general importance ; it is founded on a rather special line of cases in the early Chancery Courts, and it is doubtful whether it will be extended to anything except legacies.

The proprietary remedy, the right to trace assets in equity, is very important, and may be relied on in many cases where the common-law rights fail.

To succeed in such a claim, it must be shown that (i) the plaintiff had, at the outset, an equitable right to certain funds ; (ii) these funds have come into the hands of the defendant ; (iii) the defendant is not a purchaser for value without notice.

If the funds are preserved intact and unmixed, the defendant is a constructive trustee, and will be ordered to pay them over. If the funds are mixed with other assets, the plaintiff has an equitable lien on the mixed fund, always provided that the mixed fund can be severed, by sale or realization, so as to give to both parties substantially the assets which they put into it. (In *Diplock's* case, some of the charities used their legacies to extend existing buildings : it was held that the built-up land could not equitably be severed so as to give back the legacy to the next-of-kin and the land to the charity, and that the proprietary remedy was defeated.)

An interesting illustration of how the doctrine of tracing the assets can be applied in commercial transactions is to be found in *Tauranga Borough* v. *Tauranga Electric-power Board*, [1944] N.Z.L.R. 155. In that case, electricity had been purchased under an *ultra vires* contract which could not be enforced—*i.e.*, the Board could not be sued for the price. However, the proceeds of sale of the electricity could traced (as part of a mixed fund), and the Court of Appeal held that the Board was liable to account for these, subject to a set-off for expenses.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Capital Punishment.—In view of the possible change in this country of the position regarding the death sentence for murder, it is interesting to note the memoranda furnished in January by Lord Goddard, L.C.J., and Humphreys and Byrne, JJ., to the Royal Commission on Capital Punishment presided over by Sir Ernest Gowers. Lord Goddard, L.C.J., thought that there was a real fear of capital punishment among the criminal classes, and that that was why it was considered by professional burglars undesirable to carry weapons. He pointed out that it was often difficult to know the grounds of reprieve, and regretted the tendency to exercise them in cases of men who murdered their wives because there was either an accusation, true or false, that the wife had committed adultery, or because there was an admission of adultery; and he assented to the proposition that the Royal Prerogative was exercised a little too freely. This topic was adverted to by Humphreys, J., who has had sixty years' close connection with the practical administration of the criminal law, and who was recently described by Sir Patrick Hastings, K.C., as one of the greatest of England's criminal Judges. No one, he said, would want to see the prerogative of mercy abolished, but, as now exercised by a Secretary of State, it presented an example of the power of an individual who was not present at the trial, who had not heard any evidence, and who had held such an inquiry as he thought proper in secret, and without the assistance of the trial Judge, deciding upon the question of the life or death of a convicted murderer. As he was not required to take the public into his confidence as to the reasons for his decision, the practice introduced an element of secrecy and uncertainty—the two worst things that could happen in a criminal case. For his part, Byrne, J., was of opinion that capital punishment should be a deterrent, and it certainly was, so far as concerned those persons who were disposed to commit crimes of violence, and would not necessarily hesitate to kill in order to effect their escape.

Probation Note.—Speaking of probation, which has been, and will continue to be, a thorny, disputatious subject with sections of the weekly Press, E. S. P. Haynes, in his *Life, Law, and Letters*, cites the following paragraph:

> Mme. Guigne, twenty-five years of age, has been sentenced to two years' imprisonment for killing her husband by shooting him because he failed to come home to dinner. As, however, she is granted the benefit of the First Offenders Act, she will not have to serve the sentence. The prosecution alleged that on the evening of the crime Mme. Guigne, after waiting for her husband to come home so long that the dinner was spoiled, set out to find him. Going to a café, she found him there drinking with his friends. She was so infuriated that she drew a revolver and shot him dead.

This paragraph had its origin in a Parisian newspaper, and the attention of Scriblex was directed to it by his wife. Why, he is at a loss to know.

Indelicate Touch.—Counsel for the Public Service Commission, in a case before the Court of Appeal at its Sessions, having stressed the difficulty that his client had in knowing precisely what a Communist was, counsel for appellant said in reply that a Communist could vary between a mere passive philosopher who thought that capitalism carried within itself the seeds of its own destruction and an active adherent to the Russian doctrine that a rapist should get probation because his was a crime against the person, while a thief who stole a shilling's worth of goods from a factory should be shot, because his was a crime against the State. "I didn't quite catch who was to receive probation," said the Chief Justice. "A rapist," replied counsel. "Ah, yes," said the C.J., pensively, "but perhaps I shouldn't have inquired!"

From Voltaire.—*On Divorce.*—Divorce is probably coeval with marriage. Naturally, marriage is a few weeks more ancient, I believe; men quarrelled with their wives after five days, beat them after a month, and separated from them after six weeks.

On Adultery.—It would appear that, in order to assure a just verdict in an action for adultery, the jury should be composed of six men and six women, and, in the event of a tie, a hermaphrodite, to cast the deciding vote.

On Justice.—That justice is extremely unjust is more than a present-day observation. *Summum jus, summa injuria*, is one of the most ancient of proverbs. There are many dreadful ways of being unjust. An innocent man may be racked on equivocal evidence. A man may be condemned to execution when he deserves no more than three months' imprisonment.

From a Letter.—I advise you to go on living, solely to enrage those who are paying your annuities. It is the only pleasure *I* have left.

Here and There.—"The British Parliament and the Privy Council have been the two great institutions which the Anglo-Saxon race has given to mankind. On January 26, our Supreme Court will come into existence and join the family of the Supreme Courts of the democratic world, of which the Privy Council is the oldest and perhaps the greatest": Shri K.M. Minshi in the Indian Constituent Assembly.

"The facts showed that from time to time the defendant had placed bets on greyhounds with the plaintiff, and had settled with the plaintiff at the end of each week. One day he placed some bets and lost £15,000": Tucker, L.J., in *Law* v. *Dearnley*, [1950] 1 All E.R. 124, 128.

"That excellent Judge and Common Sergeant of the City of London, Sir Albert Bosanquet, K.C., author of the adage 'The Yiddish language is unique in that it appears impossible to tell the truth in it,' once said to me during a part-heard case, 'Young man, don't go on too long. You appear to have got your jury. Beware lest you lose your Judge'": Sir Travers Humphreys, in *Criminal Days*.

"The task of a Judge called on immediately after the conclusion of a trial to sum up to a jury is always a difficult one": Lord Porter in *Turner (otherwise Robertson)* v. *Metro-Goldwyn Mayer Pictures, Ltd.*, [1950] 1 All E.R. 462.

PRACTICAL POINTS.

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1. Land Transfer.—*Memorandum of Transfer under the Land Transfer Act—Two Transferees—No Expression as to Joint Tenancy or Tenancy in Common—Intention Tenancy in Common—Rectification of Register—Procedure.*

QUESTION: Fourteen years ago, my clients, A and B (then represented by a different solicitor), purchased a parcel of land under the Land Transfer Act. They now assure me that they intended to purchase as tenants in common in equal shares; the transfer and the Registrar's memorial of the transfer are silent as to whether A and B are tenants in common or joint tenants.

Are A and B joint tenants or tenants in common at law? If they are joint tenants, how can the Register be rectified so as to show that they hold the land as tenants in common in equal shares? Can the matter be put right by a statutory declaration as to the facts by A and B?

ANSWER: A and B at law are joint tenants: s. 57 of the Land Transfer Act, 1915. They must transfer to themselves as tenants in common in equal shares. In such transfer, the relevant facts must be set out, so as to satisfy the Stamp Office that *ad valorem* stamp duty is not payable. It is considered that the District Land Registrar has no authority to amend the Register on the strength of a statutory declaration alone; there is certainly no provision for the registration of such a declaration, and Reg. 57 of the Land Transfer Regulations, 1948 (Serial No. 1948/137) (dealing with change of name), is not applicable.

X.1.

2. Trusts and Trustees.—*Land Transfer Land—Change of Trustees—Retiring Trustee of Unsound Mind—Appointment of New Trustee by Continuing Trustee—Procedure for vesting Title in New Trustees.*

QUESTION: A died in 1943, leaving B and C his trustees and executors. B has become of unsound mind, and C, in pursuance of his powers under s. 78 of the Trustee Act, 1908, has now appointed D to act in B's stead. One of the assets is a parcel of Land Transfer land. There is the usual vesting clause in the deed appointing the new trustee. Can C and D get on to the Land Transfer by transmission? At present, B and C are registered as executors by transmission. If transmission procedure is inapplicable, then my difficulty is that B, being *non compos mentis*, cannot sign a transfer.

ANSWER: C and D cannot get on to the Land Transfer by transmission: *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839, and s. 80 (4) (*b*) of the Trustee Act, 1908.

Application should be made to the Supreme Court under s. 3 of the Trustee Act, 1908, for an order vesting the land in C and D: see *In re H.W.*, [1942] N.Z.L.R. 462.

X.1.