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## SUMMARY OF RECENT LAW.

### FRAUD.

*Civil Action—Alternative Causes of Action in Contract or for Fraud—Whether Standard of Proof Different for the Alternative Causes of Action—Degrees of Probability within a Standard of Proof, whether civil or criminal.* The plaintiff acquired a capstan lathe from the defendants under a hire-purchase arrangement with a finance company. The lathe proved defective, and the plaintiff brought an action for damages against the defendants, alleging that it had been represented to him on their behalf that the lathe was "Soag re-conditioned". The action was based alternatively on contractual warranty or fraudulent misrepresentation. At the trial, it was found that there was no contractual warranty because the misrepresentation, if made, was not intended to be contractual, but that, if the representation were proved to have been made, fraud would be established. On the question of fact whether the misrepresentation was made, it was found that, if the question were determined on the civil standard of proof (i.e., on the balance of probabilities), the representation was proved, but that, if the question were determined on the criminal standard of proof (i.e., on the basis of proof beyond reasonable doubt), the representation was not proved. The judge decided that the misrepresentation was proved but no damage was suffered. *Held*, That, in determining the question of fact, viz., whether the representation had been made, the same standard of proof should be applied whether the cause of action was contractual warranty or fraud, and, the standard of proof applicable was the civil standard of a preponderance of probability, which, however, was not an absolute standard, since within it the degree of probability required to establish proof might vary according to the gravity of the allegation to be proved; in the present case the judge had not misdirected himself on the question of proof, but, as some damage flowed from the fraudulent misrepresentation, the plaintiff was entitled to judgment. (Observations of Denning L.J., in *Bater* v. *Bater* [1950] 2 All E.R. at p. 459 on the degrees of proof within the legal standards of proof, whether civil or criminal, adopted.) Appeal allowed on the question of damage. *Hornal* v. *Neuberger Product Ltd.* [1956] 3 All E.R. 970 (C.A.).

### POLICE OFFENCES.

*Using Obscene Language—Obscene Matter coming from Defendant's Tape-recorder—Operation of Machine faithfully reproducing Human Voice, a "use" of "obscene language"—"Public place"—Police Offences Act 1927, s. 48.* The expression "uses obscene language" in s. 48 of the Police Offences Act 1947 includes the wilful operation of a machine which faithfully reproduces the human voice uttering obscenities where it can be heard by the public. (*Nicholson* v. *Fields* (1862) 7 H. & N. 810; 158 E.R. 695, followed. *Graves* v. *Ashford* (1867) L.R. 2 C.P. 410, applied.) *Police* v. *Hindle*. (Auckland. September 21, 1956. Astley S.M.)

### PRACTICE.

*Expert Witness—Expenses—Witness attending to give Evidence "strictly as an expert"—Personal Qualifications and Status of Witness—"Strictly as an expert"—Witnesses and Interpreters Fees Regulations 1954 (S.R. 1954-236), Schedule A, cl. 1.* The word "expert", as used in the phrase "strictly as an expert" in cl. 1 of Schedule A of the Witnesses and Interpreters Fees Regulations 1954, has reference to the personal qualifications and status of the witness rather than to the nature of the evidence he gives. A witness who is properly described as "an expert" may be giving evidence "strictly as an expert", even though his testimony does not consist entirely of opinion evidence. The question whether a particular witness is or is not "an expert" is frequently a pure question of fact. *Granger* v. *Attorney-General*. (S.C. Greymouth. February 22, 1957. F. B. Adams J.)

### SALE OF GOODS.

*Condition—Condition, Warranty and Misrepresentation distinguished.* In June, 1955, the defendant sold to the plaintiffs, who were motor dealers, a second-hand Morris motor car for £290, this sum being credited to the defendant on the purchase of a new car through the dealers. The car sold to the dealers had been obtained by the defendant's mother in 1954 under a hire-purchase contract, and was shown in the registration book to have been first registered in 1948. There had been five changes of ownership between 1948 and 1954. The defendant, who honestly believed that the car was a 1948 model, described it as such to L., the salesman who acted for the plaintiffs in the matter, and showed L. the registration book. L., who had frequently been given lifts in the car, also believed that it was a 1948 model, and the purchase price of £290 was calculated on this basis. In January, 1956, the plaintiffs sent the chassis and engine numbers of the car to the manufacturers and were informed by them that the car was a 1939 model. If the plaintiffs had known at the time of the purchase that the car was a 1939 model, they would have paid only £175 for it. In an action brought by them against the defendant eight months after the sale, the plaintiffs claimed the sum of £115 as damages for breach of warranty, either on the basis that it had been a condition, i.e., an essential term, of the contract that the car was a 1948 model or that there had been a collateral warranty that it was. *Held*, (Morris L.J., dissenting), That the defendant was not liable to the plaintiffs in damages for breach of warranty because, having regard particularly to the fact that the defendant had no personal knowledge (as the plaintiffs knew) of the date of manufacture of the car and the date was a matter on which the plaintiffs might well also form their own opinion, the true inference from the whole of the facts was that the defendant did not intend to bind himself in contract that the car was a 1948 model, but made an innocent misrepresentation as to the date of its manufacture. (Dicta of Viscount Haldane L.C., and Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. at 49-51, applied; *Routledge* v. *McKay* [1954] 1 All E.R. 855, applied.) Appeal allowed. *Oscar Chess, Ltd.* v. *Williams* [1957] 1 All E.R. 325 (C.A.).

### STREET TRAFFIC.

*Driving while under the Influence of a Drug—Over-action of Insulin properly taken by a diabetic—Whether insulin a "drug"—Road Traffic Act 1930 (20 & 21 Geo. 5 c. 43), s. 15 (1).* A diabetic, who had injected himself with his usual and prescribed dose of insulin and then consumed a regulated meal, drove his car some hours later on a public road while in a coma caused by the over-action of the insulin. He was charged under s. 15 (1) of the Road Traffic Act 1930, with driving a motor-vehicle while under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle. The charge having been dismissed by the Justices on the ground that the motorist was not under the influence of a drug within the subsection, the prosecutor appealed. *Held*, That the offence, under s. 15 (1) of the Road Traffic Act 1930, was established because insulin was a drug for the purposes of the subsection; and the case would be remitted to the Justices accordingly. (Per Lord Goddard C.J.: Drink [in s. 15 (1)] means, I think, alcoholic drink . . . drug means . . . something given to cure or alleviate or assist an ailing body. Appeal allowed. *Armstrong* v. *Clark* [1957] 1 All E.R. 433 (Q.B.D.).

# TOWN AND COUNTRY PLANNING APPEALS.

## Takapuna Rugby Football Club *v.* Takapuna Borough.

Town and Country Planning Appeal Board. Auckland. 1956. September 17; October 20.

*Building Permit—Rugby Clubhouse—Area zoned as "residential"—Club's Ordinary Training Operations not causing Undue Interference with Amenities of Neighbourhood—Site used for Club's Operations for over Twenty Years—Permit to issue—Town and Country Planning Act 1953, s. 38 (1)* (b).

Appeal by the Takapuna Rugby Football Club (Inc.) against a decision of the Takapuna Borough Council refusing a building permit for the erection of a clubhouse on freehold property owned by the Club in Tahoroto Road, Takapuna. The Club acquired this property in 1936 and on the back portion of it erected a gymnasium built in corrugated iron. This building comprises a gymnasium, small social room, and changing rooms, and is ideally situated for use by a football club, being immediately opposite Tahoroto Park which is the principal recreation ground in the Borough. During the football season the Club offers changing facilities not only for its own members but also for other teams using the grounds in Tahoroto Park, as there are no changing rooms on the Park.

When the Club commenced operations it had a membership of 90; its present membership is 750, of which 500 are junior members. It is common ground that the Club is very well conducted and that through its activities it makes a very substantial contribution to the sporting and social life of the community, particularly so in respect of the younger members.

The Club wishes to erect an additional clubhouse on the front portion of its land, first to augment the facilities provided by the Club, and secondly as a memorial to those former members of the Club who lost their lives in the Second World War.

The land in question is in an area zoned under the respondent Council's undisclosed district scheme as "residential" and under the relative code of ordinances the use to which it is put is a "conditional use" only. That code, para. 9 (1), under the heading of "Conditional Uses" lists, inter alia, "Halls, rooms, etc., including gymnasiums and training sheds, but excluding buildings required by s. 309 of the Municipal Corporations Act 1954 to be licensed".

The Council's undisclosed district scheme is now virtually ready for public notification under s. 22 of the Act. When the Council came to consider the appellant's application for a building permit it resolved that public notice would be given of the application, and that, provided no objections were received within one month, the application be granted subject to the building being erected 5ft. from the front boundary and 5ft. from the side boundaries in accordance with the plans and specifications submitted.

Following on the publication of this notice the respondent received four objections in writing from residents in the immediate neighbourhood and a petition from others, and thereupon resolved that the application be declined until such time as the appellant could overcome the objections received.

The judgment of the Board was delivered by

REID S.M. (Chairman). The appeal falls for consideration under s. 38 (1) (*b*) of the Act, that is to say that the proposed building would detract from the amenities of the neighbourhood likely to be provided or preserved under the Council's undisclosed district scheme.

Upon hearing the submissions of counsel and the evidence adduced, the Board finds:

(1) The appellant's use of its present building and site is a "non-conforming" use but the appellant cannot be precluded from continuing its activities with the limited facilities it at present enjoys. The question for determination is whether the proposed extension of its buildings will lead to greater interference with the amenities of the neighbourhood.

(2) Each of the four objectors gave evidence in support of their objections. Two of them, Messrs. Wilson and Jones, live immediately alongside the appellant's property. The former bought his section and built on it seven years ago. The latter has lived there for twenty years. The other two live in the immediate neighbourhood.

(3) Apart from its ordinary recreational and training operations, the appellant from time to time holds social functions—on an average six in a year. In the main the objections were directed not so much to the conduct of these functions as such but to the conduct of a small number of those attending the functions who on occasions remained behind after the official ending of the function on the vacant land in front of the existing building and held noisy beer-drinking parties which on occasions continued into the early hours of the morning. There was no substantial evidence that the Club's ordinary recreational and training operations caused undue interference with the amenities of the neighbourhood.

(4) In considering the question of interference with amenities, the Board must seek to weigh the amenities of the neighbourhood as they are at present and as they might be expected to be if the appellant were allowed to erect its proposed hall.

Prima facie the existence of gymnasiums, training halls, etc., must be deemed to interfere with the amenities of a residential neighbourhood, but in this particular case the Board is not considering an application by the appellant to commence operations de novo for it has been carrying on its operations on the present site for twenty years.

(5) There was no evidence of any complaints about the appellant Club's activities having been made by anyone to the Club's officials, the Borough Council, or the Police.

The Board takes the view that the erection of the proposed hall would not in any way increase interference with the amenities of the neighbourhood. On the contrary it considers that the filling-up of the present vacant land with an appropriate building might well minimize the nuisance complained of, that is the "after function" parties, by depriving persons of a vacant section on which to hold such parties.

The appeal is allowed subject to the hall being erected in accordance with the plans and specifications submitted to the respondent Council, and the perspective sketch plan submitted to the Board at the hearing.

The Board does not consider it necessary to impose any conditions in regard to the use of the hall. That use is in any case restricted by the code of Ordinances (9) (*supra*), but it does recommend the appellant Club's officials to do their utmost in future to control the "after function" activities of some few of their members and guests. No order as to costs.

*Appeal allowed.*

## O'Halloran *v.* Howick Borough.

Town and Country Planning Appeal Board. Auckland. 1956. July 20; August 24.

*Subdivision—Provision of Reserve—Subdiviser's Contribution—Computation of Contribution—Test whether Contribution unreasonably High in Particular Circumstances—No Standard Rate—Determination left to Municipality according to Individual Needs and Situation—Proper Method of Computation—Municipal Corporations Act 1954, s. 351 (2)* (c), (7).

Appeal under s. 351 (2) (c) and (7) of the Municipal Corporations Act 1954.

The appellant was the owner of a block of land in the Borough of Howick being part of Allotments 16 and 19 of Section 1, Small Lots near the Village of Howick.

In March, 1953, he submitted to the respondent Council a scheme-plan for the subdivision of this land into twenty-two residential sites. After some delay, due to consideration and revision of the Council's requirements in relation to roading, the Council approved the scheme under section 351 (2) (c), subject to the appellant's making a monetary contribution of five per cent. of the value. This was in December, 1954.

When the appellant went into the estimated cost of roading, he found that he would not have sufficient funds to meet the cost of roading the proposed subdivision until such time as he was able to sell some of the sections already having frontages to existing roads.

In 1955, he submitted another proposed subdivisional scheme-plan of eleven sections having frontages to Bleakhouse Road and the main Howick-Panmure Highway.

The Council approved this plan subject to the appellant's making a monetary contribution of £940, being ten per cent.

(*Concluded on p. 88.*)

# IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

**Viscount Brougham and Vaux.**—Scriblex observes from the *Memoirs of Harriette Wilson*, the great seventeenth century courtesan, that she seems by sheer force of personality to have won the friendship of Henry Brougham, later the Lord Chancellor, who, according to her uncontradicted testimony, gave her valuable legal advice on how to proceed in her case against the Duke of Beaufort. The great advocate, and the defender of Queen Caroline at her trial in 1820 for adultery, was a sufficient cynic to earn the nicknames of "Wickedshifts" and "Beelzebub", given him by the diarist Thomas Creevy, who himself for a period practised in London at the Bar. Creevy was perhaps the most understanding of all the Regency diarists, and, summing him up, Brougham is reputed to have said: "One who would let no principle of any kind stand in the way of his joke. . . . He spared no one. . . . He had that lively perception of the ridiculous which goes to make an entertaining man".

**Pre-trial Conferences.**—On May 1, the University of California is to release a new 25-minute 16 mm. black and white sound film to acquaint the legal profession with the pre-trial rules to be adopted this year. It dramatizes a pre-trial conference based upon the "exploding bottle" case, the judge, the attorney for the plaintiff, and the three defence attorneys, all performing roles appropriate to the situations that arise. Each attorney presents his theory of his client's case. The script was prepared by a Judge of the Los Angeles County Superior Court, who was also chairman of the committee that prepared the pre-trial rules now in force in California. The points to be covered by such pre-trial conferences are the medical examination of the plaintiff, discovery, the admission of exhibits, the limitation of the number of experts, the elimination of unnecessary parties, and the exploration of possible settlement. Our system, when contrasted with this elaborate paraphernalia, seems deceptively simple. Do we settle or do we fight? No Oscars, Scriblex is afraid, will ever come to us.

**Sir Norman Birkett.**—A writer in the *Law Journal* (London), paying a tribute to Sir Norman Birkett on his retirement after fifteen years' judicial work in the King's Bench Division and the Court of Appeal, recalls how, in the *Rouse* case (in which he was prosecuting counsel), he put to an expert witness for the defence a simple first question that had the effect of destroying the value of the witness's evidence-in-chief. The topic upon which the expert witness had spoken related to the manner in which the fatal fire had started in motor-car. "What is the co-efficient of the expansion of brass?" asked Sir Norman. The witness, an engineer who had given evidence on a number of occasions as a fire assessor, had to confess that he did not know. But, like all counsel, Sir Norman had his set-backs at times. "This case", he once said wearily to a solicitor who had briefed him at the Old, Bailey, "has taken ten years off my life". "Well," replied the solicitor, "it has added a number of them on to my client's".

**Wives as Chattels.**—Edited by R. H. Graveson and F. R. Crane, and a co-operative effort of the staff of the Faculty of Laws of King's College, London, *A Century of Family Law* (Sweet and Maxwell, 1957) deals with every concept of family relationships and quotes, as the view of the status of a wife that persisted for more than two centuries after Shakespeare:

> "She is my goods, my chattels; she is my house, my household stuff, my field, my barn, my horse, my ox, my ass, my anything."

Bacon, in his *Abridgement*, declares that a husband may, by force, keep his wife within the bounds of duty and may beat her, but not in a violent manner. In the reign of Charles II, this power of correction came to be doubted. Steele, writing in the *Tatler* in 1712, suggests that a wife may properly be "corrected with stripes"; but one of our famous lawyers is of the opinion that these ought to be used sparingly. As late as 1782 Mr Justice Butler (whom Gillray caricatured as Judge Thumb) is said to have held that a man might lawfully beat his wife with a stick if it were not thicker than his thumb. In the eighteenth century, the view of Dr Johnson was that "Nature has given women so much power that the law has wisely given them little"; while, in the nineteenth Century, a husband was attached for contempt of court when, after being injuncted for creating a nuisance, he continued to shut his wife up in a room where her cries and moans disturbed peace-loving neighbours. If anyone is shut up in these more modern times, it is likely to be the husband. Today, says the playwright, J. B. Priestley, a loving wife will do anything for her husband except stop criticizing and trying to improve him.

**Singleton and Ormerod L.JJ.**—Singleton L.J., who died suddenly on a shooting expedition in Yorkshire at the age of 71, was a Judge for 22 years and a member of the Court of Appeal since 1948. The author of a small book on "Conduct at the Bar," he is described as having been a man of great tact and personal charm. In a tribute to him in January, the Master of the Rolls said that there was about him a total absence of all conceit and affectations, and of that pomposity to which the holders of judicial office of less sincerity are sometimes subject. An incident illustrative of his warm and generous nature occurred not long ago when the proprietors of a little tobacco, newspaper and sweet shop at which he dealt wanted to see their daughter crowned queen of the local fete, and were in difficulty over leaving, he volunteered to look after the business for them and the presence there, temporarily, of the senior Lord Justice of Appeal produced a minor trade boom (£10 during the morning) for the proprietors. His place is being filled by Ormerod J. who was first a solicitor next a barrister, then a County Court Judge before his appointment to the High Court some eight years ago—a career said to be unique in English legal history. However, many famous advocates and Judges have first been solicitors, amongst them Lords Mansfield, Hardwicke, Tenterden, Thurlow, Macclesfield, Kenyon, and Sir Samuel Romilly.

# TOWN AND COUNTRY PLANNING APPEALS.

(*Continued from p. 86.*)

of the value placed on these sections by a valuer employed by the Council. The appellant appealed against the value placed on the sections and against the percentage rate applied in computing the contribution asked for.

The judgment of the Appeal Board was delivered by

REID S.M. (Chairman). The Board was invited by counsel to lay down a principle for the guidance of municipalities in determining at what rate and in what manner contribution to Reserve Funds under s. 351 (2) (c) should be computed, but no evidence was directed towards this submission.

The Board is not prepared to attempt to give a decision on this question.

Under s. 12 of the Land Subdivision in Counties Act 1946, the method of assessing contributions is specifically laid down; and the Board was informed that in practice where the Minister of Lands takes a monetary contribution in lieu of land the amount of contribution is ten per cent. of the value of the land being subdivided less one section, that value being determined by the Minister.

Under s. 351 (2) of the Municipal Corporations Act 1954, the local authority is the sole judge of how, and at what rate, the contribution is to be computed.

Section 351 first appeared in the Statute-book as s. 36 of the Municipal Corporations Amendment Act 1948. It must be assumed that, in framing that particular section, the draftsman and the Legislature would have been aware of, and have taken cognizance of, the provisions of s. 12 of the Land Subdivision in Counties Act 1946.

The intention of the Legislature must therefore have been to leave this matter to the municipalities for determination. This may well have come from a reluctance on the part of the Legislature to direct municipalities on the point, having regard to the varying demands of individual municipalities for reserves and domains. Some municipalities may be well endowed with reserves and domains, either by prudent planning in the past or by reason of private endowments or both. On the other hand, some rapidly expanding boroughs may be in urgent need of reserves and domains commensurate with the needs of a quickly expanding population and so justified in asking for higher contributions from potential subdividers.

The Legislature, having left this question to municipalities for determination according, presumably, to their individual needs and situation, the Board takes the view that in an appeal against a decision under s. 351, the appellant must assume the burden of establishing that the contribution called for is unreasonably high in the circumstances surrounding the particular case under consideration. The Board will not assume the responsibility of laying down a standard rate of contribution. If such a standard is desirable, then its determination is a matter for the Legislature.

Evidence was given as to the method of computing such contributions followed by nine other Boroughs in the Greater Auckland area which can be assumed to be in general similar to the Howick Borough.

That evidence showed some variation in the methods of computing such contributions adopted by those Boroughs. Summarized broadly, it showed that four Boroughs used a percentage rate of five per cent. on value, one took ten per cent. on the Government unimproved value, whilst four used ten per cent. of the value when the subdivision fronted on to existing roads and five per cent. when the subdivider was called on to provide roading. The methods of computing values varied; but it is not necessary for the purposes of this decision to review them. For some years down to July, 1955, the Howick Borough Council took five per cent. of the value, but in that month it altered its policy and asked for a ten per cent. contribution.

After hearing the submissions of counsel and the evidence adduced, the Board finds:

1. That the values placed on the land by the Council's valuer are reasonable. An experienced valuer called by the appellant stated in his evidence that he had seen and studied the Borough valuer's figures and that they represented a fair appraisal on current market values. It follows therefore that the appeal in so far as it relates to the value of the land under consideration must fail.

The amount originally claimed was £940, being ten per cent. on £9,400, but during the hearing the Council intimated that in October, 1951, and May, 1954, it had provisionally approved the transfer of two sections to members of the appellant's family on the basis of a five per cent. reserve contribution; and that it was prepared to amend its claim thus:—

| | £ | s. |
|---|---|---|
| Ten per cent. on £7,500 (being £9,400 less £1,900 valuation of two family sections)? | 750 | |
| Five per cent. of £1,075 (being actual value at which family sections were transferred) | 53 | 15 |
| | 803 | 15 |

2. That, in considering the question of the rate of contribution, some consideration should be given to the fact that when the original subdivisional scheme was first prepared in 1953 the rate of contribution asked for was five per cent. on the value of twenty-two sections.

Evidence was given that in a case having a similar background to this present case, the Mount Roskill Borough Council had approved the subdivision on the basis of a ten per cent. rate of contribution on sections having frontages to existing roads, but was prepared to treat that contribution as a payment on account of a five per cent. contribution over the whole area provided the whole subdivision was completed within two years.

The Board considers that such a method of computation can be reasonably applied here having regard to the circumstances of this particular case.

The appeal is allowed in part, that is to say: the appellant is to make a contribution of £803 15s. on the subdivision of eleven sections, but, if within two years from this date, he completes the subdivision of the remaining eleven sections in accordance with the original proposal including the provision of the 50ft. roadway called for, then the £803 15s. is to be treated as a payment on account of a five per cent. contribution over the whole twenty-two sections.

The Board emphasizes that this decision is not to be construed as being of general application; it is based only on the circumstances of this case. The Board makes no order as to costs.

*Appeal allowed in part.*

## Hay and Pizzey *v.* Christchurch City Corporation.

Town and Country Planning Appeal Board. Christchurch. 1956. February 9, 28.

*Erection of Roof over Loading Entrance—Area in City zoned as "residential"—Premises used as Furniture Factory—Furniture Loading difficult in Wet Weather—Refusal of Permit in Accordance with Town-and-Country-planning Practice and Principles—Town and Country Planning Act 1953, s. 38.*

Appeal under s. 38 of the Town and Country Planning Act 1953 against the decision of the Christchurch City Council refusing permission to erect a corrugated iron roof over the loading entrance to the appellants' furniture factory in Bangor Street, Christchurch.

The grounds for the appeal were that the loading of furniture on to trucks was difficult in the open in wet weather; that the proposed roof would cover a space already surrounded by buildings on three sides; that the erection of such a roof could not be a physical obstacle to any work likely to be undertaken under any proposed district scheme; and that the proposed work was not a "detrimental work" as defined in s. 38 of the Act.

The Council replied that the appellants' property was used for factory purposes in a predominantly residential locality which was being zoned for residential purposes under the undisclosed district scheme; that the granting of the original application could open the way to claims for further additions; that the proposed roof would increase and tend to perpetuate an existing use which was out of harmony with the uses permitted within that zone and that the proposed structure was a "detrimental work" within the meaning of the Act.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board finds: 1. That the proposal to zone this particular area as "residential" is appropriate.

2. That the respondent Council's attitude in refusing the permit is in accordance with town-and-country-planning practice and principles.

The appeal is disallowed. No order as to costs.

*Appeal dismissed.*