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LAW AND THE ENGINEER

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THE LAW OF CONTRACT AND NEGLIGENCE
AS AFFECTING ENGINEERS

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by

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WITH A FOREWORD

by

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Foreword

I expect that many an engineer can get along very well without knowing anything about the law; but I cannot help thinking that he would get along a good deal better if he had some knowledge of it. If cases that come before the Courts are any criterion, there are many occasions when engineering questions are mixed up with legal ones, particularly in cases about the Factory Acts and the Regulations thereunder. And in building or engineering contracts it is common practice to provide that disputes or differences are to be decided by the engineer; and he must then of needs have regard to the legal background if he is to come to a right decision.

This new work by Mr. Christopher Mayson should serve admirably to give engineers sufficient knowledge of the law to be able to deal with simple points, and even more important, to know when they should seek expert legal advice. Mr. Mayson himself practised as an engineer before he studied the law and he is therefore well qualified to write a legal book for engineers. He has covered it so well that many a lawyer could learn much from it. The fundamental principles are clearly stated and illustrated by all the recent cases. I hope it will prove itself of real value to the engineering profession.

A. T. DENNING

Preface

"We hear of those to whom a lawsuit is an agreeable relaxation; a gentle excitement. One of this class, when remonstrated with, retorted, that while one friend kept dogs, and another horses, he, as he had a right to do, kept a lawyer."

ISABELLA BEETON.*

The aim of this book is to present to engineers, in a practical and understandable manner, certain aspects of the law as are likely to be of interest or concern to those engaged in the design, manufacture, sale, installation, maintenance and repair of all kinds of engineering equipment. It might also appeal to the more advanced engineering student, for it is well established that a knowledge of the law is an essential part of the broader type of education which the present-day professional engineer requires; in fact, in at least one university college, law is an optional subject for the final engineering degree course. But it is not intended to be a *vade-mecum*, a kind of "Every Engineer His Own Lawyer." Although a little knowledge, particularly of the law, has its dangers, some is advantageous if it serves to put a person upon enquiry by warning him when it would be advisable to take expert advice, or enables him to avoid those pitfalls which may ultimately land him in the toils of that expensive pastime, litigation.

It is appreciated that the first question an engineer will ask himself when he picks up this book is, "What benefit shall I obtain from reading it?" Such a question is not an easy one to answer, for much depends upon the engineer's situation and his attitude to his responsibilities. If he has an enquiring mind (and no real engineer has not), he will realise that, his professional life being beset as it is with regulations, it is to his advantage to understand what the law requires of him. He may not be aware, for instance, that if he is asked to give professional advice it is his duty to know when that advice should include a warning that certain legal aspects must also be considered. For that he needs a working knowledge of the law, and such knowledge will be imputed to him. On a broader basis, he will find that an understanding of basic principles will assist him enormously in getting

* "Household Management." (2nd Edn., 1869, p. 1125.)

to grips with numerous problems, such as those he will meet when faced with the fulfilment of contract conditions, the employment of staff, or the administration of a department or a business. If he be a consultant, a knowledge of the law as it affects him professionally is absolutely essential.

No excuses are offered for presenting the subject very much in the manner employed for teaching law students. If a knowledge of law is to serve any practical purpose, it is necessary to master basic principles. This does not mean that an engineer must necessarily learn what a lawyer has to learn. But to understand the impact of the law upon his work, it is vital that he has some insight into the way lawyers think and reason; and it will be found that the lawyer's methods are as logical as those of any other profession.

The law dealt with in this book is the civil, as opposed to the criminal; that is, it is concerned more with the rights and obligations of individuals *vis-à-vis* one another than with those delinquencies which attract the attention of the police and occupy the time of the Criminal Courts. It is true that an offence under, say, the Factories Acts may result in a penalty being imposed by the magistrates, just as a parking offence will render a motorist liable to a fine. Both offences are "criminal" in the technical sense, but no-one would ordinarily regard either as being a "crime" in the usual meaning of the word.

Those branches of the law about which the engineer needs to have at least a working knowledge include the law of contract in most of its aspects, the law appertaining to negligence and nuisance, the law relating to employment, and the safety rules laid down by such enactments as the Factories Acts. All these are dealt with in a manner which, it is hoped, will fulfil the dual purpose of explaining those aspects of the law to practical effect and of inculcating a general knowledge of legal principles. Highly specialised matters, such as patent and trade mark law, are purposely omitted, for they would require extensive treatment and have, in any event, been adequately dealt with elsewhere in a manner suitable for the understanding of non-lawyers (as a glance at the Bibliography will show).

To the best of the writer's knowledge, nothing quite on these lines has been written in recent years. Sir William Valentine Ball's *Law Affecting Engineers* was published in 1909 and has not been re-issued; in any event, it was directed mainly to consultants.

PREFACE

Builders and architects have had considerable attention paid to them, but engineers, particularly those concerned with mechanical and electrical matters, have been sadly neglected. If, therefore, there appears to be some bias towards mechanical and electrical engineering, let that be the excuse. It is hoped that this book will meet a need, one of which the writer was only too conscious during the years he was engaged as an engineer in the engineering industry.

One of the difficulties encountered in the writing of any form of legal textbook is that the law is apt to change so rapidly. These changes do not normally affect fundamental principles, but some of the more practical aspects are constantly being modified by one or other judicial decision, Act of Parliament or statutory regulation. Whilst considerable care has been taken to note any changes which have occurred since the writing of this book was commenced, it is more than likely that, by the time it gets into the reader's hands, a number of further changes will have taken place. This should not, however, detract from its value to the engineer.

The law as stated herein is correct to the end of 1954. Changes which have occurred up to May 1955 are noted in the Corrigenda and Addenda on p. xix.

C. F. M.

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Acknowledgements

I should like to express my gratitude to Lord Justice Denning for so kindly contributing the Foreword. Many of his judgements, some already classics, have been quoted in this book, and it can truly be said that, without them, the law of England would indeed be the poorer.

My thanks are also due to:—

Messrs. Sweet and Maxwell, Ltd., for permission to take the definitions of “tort”, “act of God” and “nuisance” from the late Sir Percy Winfield’s *Text-Book of the Law of Tort*. Also for kindly checking the list of books in the Bibliography.

The Institution of Civil Engineers, the Institution of Mechanical Engineers, the Institution of Electrical Engineers, the Institution of Structural Engineers, the Royal Institute of British Architects, the Association of Consulting Engineers and the Federation of Civil Engineering Contractors for permission to quote from the forms of Conditions of Contract published and approved by them and listed in Appendix II.

The Editor of *Engineering* and the Editors of the *Electrical Review* for permission to make use of matter already published in those Journals in the form of articles; and to the latter for kindly allowing me to quote from reports of cases (not reported elsewhere) which have appeared in the *Electrical Review*.

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References and Abbreviations

References are collected at the end of each chapter, and are numbered consecutively throughout the book, thus (345). The majority are to decided cases, the sources of which are indicated by standard abbreviations, explained at the commencement of the TABLE OF CASES in APPENDIX IV on page 416.

The following abbreviations are used in connection with Acts of Parliament and Statutory Regulations.

S. or s.	Section.
SS. or ss.	Sections.
Sub-s.	Sub-section.
Reg.	Regulation.
Art.	Article.

(NOTE that "sub-s. (2) of s. 1" is usually expressed as "s. 1 (2)".)

Corrigenda and Addenda

Certain changes in the law, which have occurred between December 1954 and May 1955, are noted below.

Pages 69 and 363.

By the ELECTRICITY REORGANISATION (SCOTLAND) ACT, 1954, which came into force on 25th November 1954, the "British Electricity Authority" is now called the "Central Electricity Authority."

Page 237.

In *Lamdon Trust, Ltd. v. Hurrell and Hope* [(1955) 1 W.L.R. 391], Lord Justice Denning (sitting as an additional Judge of the Queen's Bench Division) followed the decision of the Court of Appeal in *Cooden Engineering v. Stanford*, and held that a depreciation figure in a hire-purchase agreement of approximately three-quarters of the purchase price could not be regarded as a genuine pre-estimate of damage, but was an extravagant and extortionate sum amounting to a penalty, and as such was not recoverable at law.

Page 345.

In *Hughes v. McGoff & Vickers, Ltd.* [(1955) 1 W.L.R. 416] Mr. Justice Ashworth held that the installation of electrical conduit in a large workshop was a building operation to which the Building Regulations, 1948, applied.

Page 349.

In *John Summers & Sons, Ltd. v. Frost* [(1955) 2 W.L.R. 825] the House of Lords affirmed the decision of the Court of Appeal in *Frost v. John Summers* that grinding machines must be properly guarded, even though to do so would render them unusable. Three of the learned Law Lords pointed out that s. 60 of the FACTORIES ACT, 1937 empowers the Minister of Labour and National Service to modify the absolute obligation of s. 14 as regards any particular class of machine. Doubtless some suitable steps will be taken by the Minister in due course.

Page 355.

The decision of the Court of Appeal in *Cummings v. Richard Thomas* was reversed by the House of Lords in *Richard Thomas & Baldwins, Ltd. v. Cummings* [(1955) 2 W.L.R. 293]. It was held that movement of a machine with the power cut off does not render that machine "in motion or in use" within the meaning of s. 16 of the FACTORIES ACT, 1937. There is, therefore, no obligation to fence in those circumstances.

Page 363.

As the result of the ELECTRICITY REORGANISATION (SCOTLAND) ACT, 1954, responsibility for all electricity supply in Scotland has been transferred to the Secretary of State for Scotland as from the "vesting date" (1st April 1955). The South of Scotland Electricity Board has taken the place of the South East and South West Scotland Boards (previously under the British Electricity Authority), and, with the North of Scotland Board, is the responsibility of the Secretary of State. Enforcement of the ELECTRICITY SUPPLY and OVERHEAD LINE REGULATIONS in Scotland has, therefore, become a matter for the Secretary of State, and responsibility for compliance is with the North and South of Scotland Boards. Any further regulations are to be made jointly by the Minister of Fuel and Power and the Secretary of State.

Page 367.

Referring to the definition of "danger" in the ELECTRICITY (FACTORIES ACT) REGULATIONS, Lord Justice Parker (sitting as an additional Judge of the Queen's Bench Division) held in *Lane v. London Electricity Board* [(1955) 1 W.L.R. 106] that the words "or other injury" must be construed strictly *ejusdem generis* with the words "shock, burn" and could not include injuries resulting from some purely mechanical defect in electrical apparatus. This decision should be contrasted with that in *Gatehouse v. John Summers* (see p. 370).

PART ONE

THE ENGLISH LEGAL SYSTEM

Introduction

Scope and Purpose

Although the primary purpose of this book is to consider certain aspects of English law as they are likely to affect engineers in the exercise of their calling, it goes almost without saying that some knowledge of the general law is essential, not only because constant repetition of fundamental explanations is thereby avoided, but also to provide a background against which more particular matters can be set in perspective.

Chapter 1 is devoted, therefore, to a general survey of the machinery of the law as it is to-day, with the addition of such historical matter as may be needed to provide interest and explain apparent anomalies. Chapters 2 and 3 are concerned with evidence and the interpretation of documents. A knowledge of the rules of evidence enables one to pick out relevant from irrelevant facts, to differentiate between matters which require proof and those which prove themselves, and to appreciate that, however relevant some particular fact may be, it will not necessarily be admissible as evidence in a Court of Law. Some idea of how a document is construed is valuable in any endeavour to ascertain its true meaning, and is essential if one wishes to draw up a written contract which will be neither ambiguous nor invalid on the face of it. To assist those readers who may, at some time or another, be called upon to "tell the truth, the whole truth and nothing but the truth", part of Chapter 2 deals with the conduct of witnesses (whether "expert" or otherwise) and the giving of evidence in Court.

The Importance of Decided Cases

It may be felt that the general treatment pre-supposes that legal disputes are always brought to Court. This is far from being true, but as it is in Court that legal decisions are made, the efficacy of any transaction can be judged only by ascertaining from past cases the rights and obligations involved. It is because of this that any discussion of the law applicable to a particular

situation necessitates the citation of decided cases, which represent the law just as much as any Act of Parliament.

The law of England consists of the common law and statute law. The latter is enacted by Parliament and the former is founded upon custom and the decisions of the Judges.* They are not separate entities, for one may influence the other (although Parliament has the final word). For example, a statute may do no more than codify a portion of the common law, with or without some modification; or it may make entirely new law. But the Courts can, in effect, vary the statute by giving it an interpretation which was not in the minds of the legislators; and Parliament may nullify that decision by some new enactment. This does not mean that there is a perpetual contest between the legislature and the judiciary; it is merely that each is complementary to the other. The common law is the true basis of the English legal system, and no statute stands alone, for it is always subject to whatever construction may be put upon it by the Courts in accordance with common law rules.

English and Scottish Law

English law is applicable only to England and Wales; Scotland has its own system, as has Northern Ireland. Prior to the formation of the Irish Free State (Eire), Irish and English law was one, and for this reason many Irish decisions are still applicable in English law. But the Scottish system has always been different. Nevertheless, many Acts of Parliament (and any decisions upon them which have been come to by the House of Lords) are applicable to both England and Scotland. For example, the SALE OF GOODS ACT, 1893, and the FACTORIES ACT, 1937, both of which receive extensive consideration in this book, apply to both countries. House of Lords decisions upon these Acts are binding in both, and Court of Appeal decisions in England, and Court of Session decisions in Scotland, have a persuasive authority in Scotland and England respectively.

It is not only statute law which applies to both countries. Two of the leading cases on the law of negligence, *Donoghue v. Stevenson* (see pp. 289 and 322-3) and *Bourhill v. Young* (see pp. 291-2), are

* The term "common law" as here used includes all judge-made law. It will be seen in Chapter 1 that its usual meaning is more restricted, and it is in that restricted meaning that "common law" is used throughout the remainder of this book.

INTRODUCTION

Scottish cases decided in the House of Lords which have had a direct effect upon both the law of Scotland and the common law of England. There are others, too numerous to mention.

Despite this amount of common ground, however, it is not possible in a treatise of this kind to draw a firm line by saying that such and such a decision also applies to Scotland. Apart from any other consideration, treatment of that kind would be wholly misleading, for the basis of English law is fundamentally different from that of Scotland. All that has been done, therefore, is to indicate in Appendix IV (*see* p. 406) those Acts of Parliament and statutory regulations which apply, whether with or without modification, to Scotland, and those cases, cited in the text, which were decided in the House of Lords on appeal from the Scottish Courts.

CHAPTER 1

The Scope and Machinery of the Civil Law

IN order that the characteristics of any legal system may be understood, it is necessary to know something about the forms of law embraced by that system and the machinery which administers them. Neither can be explained satisfactorily unless their origins are ascertained and their development is traced, at least in outline.

English law is largely judge-made, and in this it differs fundamentally from some continental systems which are based on more or less rigid codes. It is a living thing which does its best to keep pace with the growth of human knowledge and experience; that the time lag is often considerable is perhaps due to innate caution in the English character. The English legal system, like the Constitution which supports it, is unique, and has developed over the course of centuries in accordance with the changing needs of society. The history of English law is, therefore, an essential part of the history of England itself.

HISTORICAL BEGINNINGS

Those who learned history at school may, perhaps, recall that William the Conqueror came over from Normandy and ascended the English Throne in the year 1066; they may also recollect that there was a famous English King before him called Edward the Confessor. William of Normandy was a shrewd and sensible man, and he realised that, if he were to win the loyalty of the inhabitants of the England he had conquered, he must preserve, what in these days would be called, the "English way of life." He therefore made a point of continuing the existing customary laws which had been established by Edward, who had acquired a great reputation as a law maker. The foundations of the law of England were thus preserved and, whatever may have been

changed or added in the next thousand years, the roots remain to this day.

Since Norman times the law's development has been irregular, and expediency has been the governing factor. But throughout its growth (except for the short Cromwellian interlude in the seventeenth century), the power and authority of the English Courts of Law have derived from the Crown. This has both influenced its development and ensured continuity without violent change.

We speak of the law of England, by which we mean the law appertaining to England and Wales. It is not the same as Scottish law, which is founded upon the great system of Roman law, adopted by almost every European country. Not that England has entirely resisted the reception of some Roman law. In the early days the application of principles founded upon that system was inevitable, for most of the judges were ecclesiastics (at one time virtually the only educated people), and ecclesiastical, or Canon, law is basically Roman. But these judges, faithful to King William's instructions, resisted the temptation to supplant the customary English law by a more highly developed foreign system, and preferred to incorporate some commonsense principles of their own devising. By the time England and Scotland came to be united under the Stuart Kings, the English system had developed too far, and the differences between the two systems were too fundamental, for any attempt at amalgamation to be successful.

The Common Law Courts

The customary law of England, called the "common law," was administered in pre-Norman times by local Shire and Hundred Courts (or "Moots"). Because of the conditions which prevailed in those days, and the fact that government was parochial rather than national, both the law itself and the methods by which it was administered were far from uniform. William changed all this by setting up his own Royal Court, the "Curia Regis," and wherever the King might be, so was his Court. But he went further than that, for his Justices, styled "Justices in Eyre," were sent out from the capital to attend to the "King's Peace" throughout the land; and they administered justice with the aid of juries (another innovation of William's) drawn from local "good men and true."

In course of time the *Curia Regis* was split into three Royal Courts, which sat wherever the King's household happened to be (eventually at Westminster). There was the Court of Exchequer, concerned with the collection of revenue and the supervision of the Royal Accounts; not at first a Court of Law in the true sense, though it eventually became one. There were also the Court of Common Pleas, which dealt with disputes between subjects, and the Court of King's Bench, concerned principally with criminal matters. At a later date various other Courts came into existence, notably the Court of Admiralty and the Ecclesiastical Courts, and in the fourteenth century lay Justices of the Peace were created, to assist the itinerant Justices in Eyre in administering their criminal jurisdiction.

The Court of Chancery

The common law, divided at an early stage into what are known to-day as the criminal and civil jurisdictions, tended to become rigid in its application. In the civil jurisdiction, concerned with disputes between subjects, this was due to the development of "forms of action," which had the effect that, if one subject had a claim against another, he had no remedy unless his case came within one or other of the set formulæ. If it did not do so, then he could not obtain the appropriate writ, necessary to start the proceedings. This led to the King being petitioned for justice "of the King's Name and Charity." Some of these petitions were dealt with by Parliament, who provided the appropriate remedy by passing a statute. Others were referred to the Lord Chancellor, who was not only the Keeper of the Royal Seal and the head of Chancery, but also, because he was an ecclesiastic, the Keeper of the Royal Conscience. He was thus well fitted to deal with matters of Grace, Charity, Favour and the like. The parties were summoned to appear before him, and he would then apply equitable principles of fairness and natural justice to the settlement of the case, ordering the offender "of his conscience" to make amends.

From then onwards the civil jurisdiction was split into two parallel streams. The Court of Common Pleas (together with the two other King's Courts, which, as time went on, poached more and more upon the Common Pleas' preserves) administered the common law, whilst the Court of Chancery was concerned only with what later came to be known as the law of equity. The

object of a common law action was to compensate the injured party by means of an award in monetary damages; there was no power to force the wrongdoer to put matters right by other means. But the Court of Chancery was a court of conscience (for equity means, primarily, fairness or natural justice), and in every case a wrongdoer could be compelled to right his wrong by doing whatever the Court considered appropriate in the circumstances. However, in course of time this jurisdiction became as rigid as that of the common law.

The Appeal Courts

All these Courts were courts of "first instance;" that is, it was they who heard the case as originally brought by the litigants. At first, there was virtually no appeal from these decisions, but, by the time of Elizabeth I, when the Courts were becoming stabilised, provision for appeals was well established. Appeal from Common Pleas lay to King's Bench, and thence to the House of Lords; appeal from Exchequer lay to the First Court of Exchequer Chamber. From King's Bench appeal in criminal matters lay to the Third Court of Exchequer Chamber, and thence to the House of Lords. (The Second Court of Exchequer Chamber was not really a Court at all, but a conference of the Judges who happened to use the Exchequer Chamber as their place of meeting.)

The Law Merchant

It has already been mentioned that some principles of Roman law were inevitably absorbed, through the Canon law, into the common law of England. Another system of law, the Law Merchant, has also been absorbed, and to a very much greater extent. It is a form of truly international law, and is of great antiquity, with its origins in the customs of early Greek and Roman traders, and embodying some Roman law. As long ago as the twelfth century it was codified in the Laws of Oléron, to cover trade along the western coasts of Europe. A similar code called "Consolato del Mar" was compiled in the fourteenth century for Mediterranean trade, and at about the same time the Laws of Wisby were drawn up for the Baltic. Merchants and traders have always had international interests, and Courts Merchant were established in England in the fourteenth century to settle disputes between foreign traders and their English

customers. They were known as the "Courts of Pie-Powders" after the dusty feet (*pieds poudrés*) of the traders who went to them (the Liverpool Court of Passage and the Tolzey Court at Bristol are their lineal descendants).

The existence of "Pie-Powders" Courts was suffered by the Courts of Common Law, who could not quite accept the idea of these "foreign" courts. In fact, England took a very long time before absorbing the Law Merchant into the common law. Its acceptance, and eventual absorption, was almost entirely due to the efforts of the great Lord Mansfield, who, in the eighteenth century, adopted into the common law such of the rules of the Law Merchant as were deemed consistent; the mysteries of such documents as bills of lading, bills of exchange, insurance policies and letters of credit have thus become commonplace in the Law of Contract.

The Law Merchant is a continuing source of law and alive at the present day. Any mercantile convention or custom, universally acknowledged amongst merchants, or in a particular trade, will be received into the common law, even though it may be of very recent origin.

Nineteenth-Century Reforms

Between the seventeenth and nineteenth centuries there was little change in the administration of the law. But it had gradually come to be realised that the multiplicity of Courts and jurisdictions frequently resulted in a denial of justice. This was because, if an action was started in the wrong Court, there was no alternative but to try again in another. True, the Court of Chancery could, by means of the Common Injunction, remove a case from a common law Court and deal with it itself; but this could be disadvantageous if it turned out that an award of damages was the appropriate remedy, for Chancery could not grant them.

By the 1830's a strong movement for reform had developed, and in the period between 1832 and 1880 revolutionary changes were made in the administration of justice. These reforms were due in no small measure to the efforts of Jeremy Bentham (whose skeleton is preserved in University College, London), Charles Dickens, Charles Reade and others. Many Courts were swept away (including the Court of Exchequer, whose Chancellor was thereby deprived of his judicial function), and the system as we

know it to-day, with one Supreme Court of Judicature, was established by the JUDICATURE ACT, 1873.

THE COURTS

The Supreme Court of Judicature

The Supreme Court is housed in the Royal Courts of Justice in the Strand in London, which were opened by Queen Victoria in December, 1882. It consists of three Divisions and the Court of Appeal. There is the Chancery Division, at the head of which is the Lord Chancellor. He, being the head of the legal profession and having many duties elsewhere, notably in the House of Lords, is provided with a deputy, the Master of the Rolls, who is also in charge of the Public Record Office and the Roll of Solicitors of the Supreme Court. Then there is the Queen's Bench Division, which took over the business of the old Courts of King's Bench and Common Pleas; * it is presided over by the Lord Chief Justice. The third Division is called the Probate, Divorce and Admiralty Division, at the head of which is the President; it is an amalgamation of the old ecclesiastical jurisdiction in divorce and probate matters with that of the Court of Admiralty.

The Judges (entitled "Mr. Justice") usually sit alone, but when hearing appeals from inferior Courts (such as those presided over by magistrates), two or (generally) three Judges sit together to form what is known as a Divisional Court. The Judges of the Court of Appeal are "Lords Justices of Appeal," and three normally sit together; the Master of the Rolls is an *ex officio* member of the Court, and presides over the section dealing with appeals from the Chancery Division. The Lord Chief Justice and the President preside over the Divisional Courts of Queen's Bench and Probate, Divorce and Admiralty respectively. Matters ancillary to the main trial of an action are dealt with in interlocutory proceedings by a Master of the Chancery or Queen's Bench Division, and by a Registrar in the Probate, Divorce and Admiralty Division. Appeal from their decisions lies to a Judge of the Division concerned, and thence to the Court of Appeal with two Lords Justices sitting.

The JUDICATURE ACT, 1873, abolished the distinctions between

* There was a Common Pleas Division at first, but it was merged into the Queen's Bench Division in 1880.

the various jurisdictions in common law and equity, and provided that any Division could administer both systems. Now, a case primarily concerned with common law matters will be heard by a Queen's Bench Judge, and one involving equity matters (such as those relating to trusts and the transfer of real property) by a Chancery Judge. But a Judge of either Division is at liberty to apply a common law or equitable remedy as he thinks fit.

Assizes

The Judges of Queen's Bench, as the direct descendants of the Justices in Eyre, go out on Assize with both criminal and civil jurisdiction. Their powers are no different in civil cases from when they sit in the Supreme Court in London, and appeal lies similarly to the Court of Appeal.

The County Courts

In order that the Supreme (or "High") Court should not be overburdened with small business, and to give litigants a cheaper remedy, County Courts were formed by the COUNTY COURTS ACT, 1846. They are "inferior" Courts, presided over by specially appointed Judges, which deal mainly with claims for debt or damages not exceeding £200. They also deal with certain chancery matters, and with cases brought under the Rent Restriction Acts; they have both probate and bankruptcy jurisdiction to a limited extent.

Their organisation is on a regional basis which does not follow county boundaries. "County" is, in fact, a misnomer, for the county authorities have nothing to do with them, and they come directly under the control of the Lord Chancellor. Appeal from County Court decisions, which used to lie to the Divisional Court, is now to the Court of Appeal.

The High Court of Parliament

The ultimate appellate tribunal is the House of Lords, known as the High Court of Parliament. Appeal lies to that House from the Court of Appeal by leave, either of the Court or of the Appeal Committee of the House; there is no absolute right of appeal.

The House, when sitting in its judicial capacity, consists of three or more Lords of Appeal in Ordinary (known as "Law Lords," who are Life Peers), of whom there may be nine, and not

less than seven, appointed. Appeals are heard, not only from the Court of Appeal in London, but also from the Inner House of the Court of Session in Scotland, and the Court of Appeal in Northern Ireland. It may be noted that the Law Lords do not deliver "judgements," as do all other Judges, but make speeches, thus demonstrating that the House has a legislative as well as a judicial function.

The Judicial Committee of the Privy Council

Another appeal tribunal of considerable importance is the Judicial Committee of the Privy Council, the direct descendant of the ancient Curia Regis. Its jurisdiction covers appeals from Ecclesiastical and Prize Courts of Admiralty, from the highest Courts of the Dominions and Colonies, and from the Channel Islands and the Isle of Man. Its importance in Dominion appeals is waning, because the Dominions, with their increasing independence, are now abrogating their rights of appeal beyond their own tribunals. Normally it is the Lords of Appeal in Ordinary who sit, assisted by assessors, and by Dominion or Colonial Judges or ex-Judges; but any Privy Counsellor who holds, or has held, high judicial office has a right to do so.

THE CIVIL JURISDICTION

The civil side of the law, as opposed to the criminal, is concerned with what are termed "civil wrongs." Of these there are three kinds, and one of them is breach of contract. A contract is an agreement between two persons, and one who does not keep to the agreement is said to be "in breach" of it. Another is breach of trust. A trust is a legally enforceable obligation based on confidence, whereby one person holds property on behalf of, or for the benefit of, another; he is said to hold it "in trust." The third kind of wrong is a "tort," which requires rather fuller explanation.

Torts

"Tort" is derived from the Latin "*tortus*," meaning "twisted, crooked, contorted." It involves what is called "tortious liability," which arises

"from the breach of a duty primarily fixed by the law; the duty is towards persons generally and its breach is redressible by an action for unliquidated damages." (*I*)

The words "primarily fixed by law" indicate that the duty has nothing to do with any agreement, and this is supported by "persons generally," which means that the duty is not one which is owed to a specific person or persons. "Unliquidated damages" means such monetary compensation as the Court sees fit to award to the injured party (there are, in fact, other remedies applicable to certain torts).

The scope of the law of tort is really the provision of a remedy for injury suffered by the infliction of harm by one person upon another. Not all wrongful acts raise a tortious liability, for some forms of harm amount to criminal acts, punishable by law. Thus, manslaughter and the infliction of "grievous bodily harm" are criminal, not tortious, acts. On the other hand, assault may be either criminal or tortious; so may libel, although there is a distinction between criminal libel and that which is treated as a civil wrong. Negligence and nuisance (with which Part III of this book is concerned) are torts which raise no criminal liability.

In some cases an Act of Parliament lays down a duty which raises both criminal and civil liabilities. For example, certain provisions of the FACTORIES ACT, 1937, make it obligatory for occupiers of factories to take certain safety precautions, and if they are not taken (and whether or not some accident occurs as a result) an occupier can be prosecuted and fined in a Magistrate's Court. But if an employee is injured as a result of such neglect, he may sue the occupier and claim compensation for breach of statutory duty. The two obligations are quite distinct, the first being criminal and the second tortious; but precisely the same facts may give rise to both.

Division of Jurisdiction

Breach of trust is the concern of the Chancery Division. But if such a breach has occurred incidentally to some other civil wrong, it will be dealt with by the Queen's Bench Division. The jurisdiction of the Chancery Division covers matters relating to real property, company law, patent and trade mark law, and the wardship of infants, as well as trusts and settlements.

Actions in tort and for breach of contract are dealt with by the Queen's Bench Division, unless the case concerns real property or some other purely Chancery matter. Contracts of sale and employment (as dealt with in Part II of this book), and the torts of negligence and nuisance, would normally come within the jurisdiction of this Division.

THE TRIAL OF CIVIL ACTIONS

The majority of civil actions are tried by a Judge alone without a jury. The reasons for this are discussed elsewhere (*see* p. 380), and it need only be said here that a jury cannot be demanded in any of the types of cases discussed in this book; if one is asked for, it is entirely at the discretion of the Master whether it will be allowed.

In certain types of case the Judge is assisted by assessors; in Admiralty cases, for example, the assessors would be Elder Brethren of Trinity House. Where there are many cases in the list for hearing, and particularly on Assize, some of them may be tried by a Commissioner, who is a barrister (possibly a retired Colonial Judge) specially appointed for the occasion.

Costs

The successful party to an action, whether plaintiff or defendant, is usually awarded his costs, which are then said to "follow the event." But this is a matter entirely within the Judge's discretion, and he may refuse to make an order where he is satisfied that the conduct of his case by the party who would be entitled to costs has caused an undue burden to be laid upon the other. Costs on appeal also follow the event as a general rule. This means that if an appeal is successful the respondent will have to pay the appellant's costs; if unsuccessful, the appellant may be ordered to pay those of the respondent.

All costs awarded are subject to "taxation," which has nothing to do with the Inland Revenue, but means that only certain costs, determined in accordance with a fixed scale, will be allowed by the Taxing Master. Taxed costs are always less than those which a solicitor is entitled to charge his own client.

The Official Referee

If the matters in dispute are complicated, and prolonged examination of documents or accounts is involved, the Court may refer the case to an Official Referee. This usually occurs in contract cases concerned with building works and the like, where bills of quantities and specifications have to be gone through, and

many detailed questions have to be settled. The procedure is similar to that of any other Court, although there may be a certain air of informality. Appeal is to the Court of Appeal.

Commercial Cases

For many years now there has been a Commercial Court, although, in one sense, it does not exist at all, there being no statutory authority to support it. It is, in fact, an ordinary Court of the Queen's Bench Division presided over by a Judge with considerable experience in mercantile and similar matters. By agreement of the parties, the procedure is modified and simplified in order to obtain quicker settlement of cases concerned with the Law Merchant. It is particularly valuable in enabling the parties to a contract to obtain a ruling on the interpretation of some commercial or mercantile document, such as a bill of lading or an insurance policy, although there may be no actual dispute. Its usefulness does not, unfortunately, appear to be as widely known as it should, for it is the least costly way of obtaining a judicial decision upon the validity or otherwise of a mercantile or trading contract.

Arbitration

It is frequently provided in contracts that disputes shall be referred to arbitration. The effect of this is that the parties themselves choose one or more persons called arbitrators to whom they agree to submit points of difference which may arise under the contract. Arbitration is often a convenient alternative to an action, for its procedure is both speedier and cheaper than that of an ordinary Court. Its conduct and procedure is governed by the ARBITRATION ACT, 1950, which has repealed and replaced earlier Acts.

A reference to arbitration is called a submission, and the finding of the arbitrator is an award. Appeal against an award on the ground that there was a mistake of law lies to the High Court, to whom the arbitrator may himself refer (by what is termed a "Special Paper") on any point of law about which he requires a ruling before he decides upon his award. Provided an award is valid (*i.e.* there is no error of law), it will be enforced by the Courts.

JUDGEMENTS AND THE DOCTRINE OF PRECEDENT

The common law being largely judge-made law, it follows that, to ascertain it, the decisions of the Judges must be looked to. It is now the universal practice for all Judges to set out the reasons for their decisions, and the practice dates from very early times. There is, in fact, no strict legal rule that this must be done, but it is obvious that a Judge will not make law unless he gives a reasoned exposition of the grounds of his decision. A judgement is, in substance, an authoritative lecture on a branch of the law, delivered under the sense of immediate responsibility for deciding the fate of the parties, and to be taken as binding until overruled by a higher Court or by Parliament.

Judgements

A judgement of the Court consists of a statement of the relevant facts of the case, the *ratio decidendi* or the grounds of the decision, and one or more *obiter dicta* or "sayings by the way." It is the *ratio* which is binding and forms the precedent; an *obiter dictum* is any observation upon a legal point suggested by the case, but not one which affects the decision itself. It is not always easy to distinguish between the *ratio* or *rationes* (for there may be decisions upon more than one legal point) and sayings of the Judge made *obiter*; but that is something which only lawyers need worry about.

At whatever level they are delivered, judgements vary in the weight of their authority. This applies particularly to decisions of the Court of Appeal and the House of Lords. An unanimous decision will obviously carry more weight than one arrived at by a majority, and a "reserved" judgement (one delivered after an interval of some days or weeks) will be of more authority than one given without the Court taking time to decide. In the older cases, the reputation of the Judge is a considerable factor.

Precedent

The key to all case-law is the doctrine of precedent or, as it is sometimes called, *stare decisis*. A decision of law made in a Court of first instance is binding on that Court, and will probably be

followed by any other Court at that same level, although there is no absolute rule in that regard. But a Court of first instance is bound by the decisions of higher Courts, such as those of the Court of Appeal and the House of Lords; it is also bound by those of the Divisional Court of its own Division. Divisional Courts are bound by their own decisions and by those of the Court of Appeal and the House of Lords; the same applies to the Court of Appeal itself. The House of Lords is the final authority, and it cannot change its own decisions, except by promoting a Bill which is eventually passed into Law (for all Acts of Parliament abrogate judicial decisions which are inconsistent with them).

The House of Lords is the final appellate tribunal from the Inner House of the Court of Session of Scotland, and if the decision affects a rule of law or a statute which is common to both England and Scotland, that decision will be binding on all Courts. It follows that a decision of the Court of Session itself must, in like circumstances, be of great persuasive authority to the Court of Appeal and any lower Court in England. Decisions of the Judicial Committee of the Privy Council are followed only where the law dealt with is on all fours with some rule of English law; they are not necessarily binding upon any other Court in England (though they may be of persuasive authority).

REPORTS OF JUDICIAL DECISIONS

Decided cases being the basis of judge-made law, it goes without saying that past judgements must be available for all to read. This has been secured by the system of reports, which go back to very early days. Only cases of legal interest are normally reported, although some with unusual facts are occasionally noted.

The Old Reports

The earliest known reports are to be found in the "Year Books," which cover approximately two and a half centuries prior to the reign of Henry VIII. They are not very reliable, and most of the reports are far from complete. More authoritative reports began to appear in the sixteenth century under the names of individual reporters, all lawyers. A very considerable number of these reports, extending from Elizabethan times to the middle of the

nineteenth century, have been edited and collected in modern times within the 176 volumes of the "English Reports."

The Modern Reports

Really authoritative reports were rare until, in 1831, the great "*Law Journal*" series of reports was commenced. These were privately produced, however, and it was only when the present "LAW REPORTS" were started in 1865 under the auspices of the Incorporated Council of Law Reporting (set up by the Bar itself) that anything like "official" reports appeared. Actually, there are no reports which can be said to be "official," but the judgements which appear in the "LAW REPORTS" are all revised by the Judges themselves, and to that extent are considered official.

Since 1865 several series of private reports have appeared. The "*Law Times*" Reports (which actually began in 1859) were absorbed by the new "ALL ENGLAND" Reports in 1936. "*The Times*" LAW REPORTS began in 1884, and only ceased publication in 1952. Other specialised series of reports have appeared, and many are still active.

The reason for private series of reports competing with the semi-official "LAW REPORTS" was that, in the earlier years, the latter failed to cover the ground sufficiently. Admittedly, the Incorporated Council started a series called "*Weekly Notes*" in 1866 to report a large number of cases not included in the "LAW REPORTS," but these were in abbreviated form and not always satisfactory. As from 1953, the Incorporated Council have abandoned "*Weekly Notes*" and now issue in its place a new series called the "WEEKLY LAW REPORTS," the more important cases in which are republished, with the judgements revised, in the "LAW REPORTS."

All cases are reported by barristers, and, for that reason, may be cited in Court. Because the judgements in the "LAW REPORTS" are revised by the Judges, these reports are cited in preference to others.

STATUTE LAW

Judge-made, or "case," law is only one source of English law. The other is statute law, which consists primarily of Acts of Parliament. Unless specifically provided otherwise in the Act itself, the date upon which an Act of Parliament becomes law is

the date it receives the Royal Assent; this date is usually printed in square brackets immediately following the "Preamble" (*i.e.* the part at the beginning which sets out the purpose of the Act).

Statutory Instruments

For many years there has been insufficient Parliamentary time to allow every Act to be so detailed as to contain provision for every eventuality. So Parliament gives specific authority for Regulations to be made by the appropriate Minister in order to facilitate the operation of the Act. These take the form of Statutory Instruments, which, since 1948, have taken the place of Statutory Rules and Orders. Provision has been made for Parliament to give specific sanction to these Instruments, and this is a safeguard to ensure that a Minister does not overstep his authority. There is another safeguard provided by the Courts. The terms of any Instrument may be questioned by the judiciary if they appear to be *ultra vires* ("outside the scope of") the provisions of the Act itself.

Judicial Interpretation

No Court may question an Act of Parliament. But the language used in statutes is not always as clear as it might be, and the judiciary are then faced with providing an interpretation. This is done in accordance with set rules which have been evolved over the centuries in the same way as the rest of the case-law. Similarly, Statutory Instruments may have to be interpreted, but the Court need not stop there, for it is at liberty to challenge the very validity of an Instrument if it has good reason to hold that it is either wholly or partially *ultra vires* the Act which has delegated law- or rule-making powers to a Department of the Government.

THE LEGAL PROFESSION

The profession of lawyer is divided into two quite distinct branches, barristers-at-law and solicitors of the Supreme Court. Barristers are also known as counsel (which is used in both singular and plural); solicitors were formerly "attorneys."

Barristers

A barrister becomes qualified by satisfying certain examination and other requirements, and by being "called to the bar" (*i.e.*

invested with the degree of barrister-at-law) by the Masters of the Bench (senior members) of the Inn of Court which he has joined as a student. There are four Inns of Court (known as "Honourable Societies") which are, in order of age, Lincoln's Inn, the Middle Temple, the Inner Temple and Gray's Inn. They are all of considerable antiquity, and were originally voluntary associations of those who pleaded in the King's Courts at Westminster in the twelfth and following centuries. The Inns gradually took on the status of legal universities, and their members resided for the most part within their walls.

All barristers have a right of audience in any of the Queen's Courts. They conduct cases for their clients, and advise in their preparation. Direct contact with the lay client is not allowed, except through a solicitor. Professional conduct is regulated by the General Council of the Bar, an elected body of barristers; but actual disciplining, such as by disbarring, is a matter for the Inns of Court.

The majority of barristers are "juniors" who practise in Court "behind the bar;" that is, they occupy the second row of seats in the High Court. Most of them remain juniors all their lives, but some of the more successful "take silk" and become Queen's Counsel. A "silk" (so called because he wears a silk, instead of a "stuff," gown), sits "within the bar;" that is, he occupies the front row of seats in Court. He is, technically, a Crown official, but this has little significance in these days. There is certain work he may not do, and he cannot appear in Court without a junior.

Certain specialised branches of the law require that a barrister shall have other qualifications. Thus, at the Patent Bar the majority of practitioners are scientists or engineers as well as lawyers; and there are some practising in this and other specialised branches who are also members of one or more of the senior Engineering Institutions.

The Bar is the recruiting ground for many legal offices, such as that of Attorney-General. Judges, Stipendiary Magistrates, Recorders, and others, all begin their careers as barristers.

Solicitors

It is the solicitor who has direct contact with the lay client, and it is he who "briefs" the barrister, whose client he is.

The solicitor, unlike the barrister (whose status is entirely

traditional), is controlled by Act of Parliament and, although the Law Society stands to him much as an Inn of Court stands to the barrister, the position of the former as regards qualification, admission and discipline is regulated by laws which it is the duty of the Law Society to administer. As an official of the Supreme Court, his name is entered on the Roll of Solicitors, and he may not practise unless he is both on the Roll and has taken out an annual Practising Certificate. For professional misconduct he can be struck off the Roll by the Master of the Rolls or the Council of the Law Society; the latter may inflict less drastic punishment, such as ordering suspension from practice for a period.

Right of audience in Court being primarily reserved to barristers, a solicitor cannot appear in the High Court on behalf of a client. But he may appear in the County Court and in Magistrates' Courts.

Relations with Lay Clients

The relationship between barristers, solicitors and lay clients is a fiduciary one; that is, it is one of confidence, and breach of professional confidence amounts to misconduct. Although both sides of the profession owe a duty to the client, they also have a duty to the Court. A barrister must present his client's case to the best of his ability, and it is his duty to advise him when he considers that there is no case, or nothing to be gained by continuing proceedings. On the other hand, he must bring every relevant matter to the notice of the Court, whether it favours or goes against his client's case. Very much the same applies to a solicitor, for, as an officer of the Court, he must not be a party to deceiving or misleading it.

REFERENCE

- (1) Winfield, Sir P. H. *Text-Book of the Law of Tort*, 5th Edn., p. 5. Sweet & Maxwell (London, 1950).

CHAPTER 2

Evidence

THE purpose of a hearing in Court is to establish the facts of the case in dispute and to argue the law applicable. It is then the task of the Judge to weigh the facts, apply the law to them, and give his judgement, in which he "finds" for one or other party. If he is sitting with a jury, he sums up the case as regards the facts, points out the relevancy or otherwise of those facts, and explains the law applicable to them. It is then for the jury to decide the case on the facts as presented to them.

PLEADINGS

In order that the dispute may be narrowed as far as possible, and the issues placed clearly before the Court, the case is set down in writing in the form of "pleadings," which are formal documents drawn up by counsel. The writ having been issued by the plaintiff in the action and served upon the defendant, the plaintiff's case is then set out in a "statement of claim," which details the main facts and claims remedy from the defendant, who is alleged to have offended in this and that particular. The defendant follows by "entering an appearance to the writ" (*i.e.* formally acknowledging its receipt and saying that he proposes to defend the action), and in due course he delivers his "defence," in which he sets down his side of the case, either admitting the facts and saying that they do not amount in law to the wrong alleged (this is called "confession and avoidance"), or denying that he is under any liability at all (which is "traversing"). He may, in addition, include a counterclaim, in which he alleges that, far from his being under any liability to the plaintiff, the plaintiff is liable to him. The plaintiff may reply to the counterclaim by putting in a defence himself. Certain other procedure is then gone through, as by one side requesting to see documents held by the other, or asking for further particulars of the claim or defence.

A perusal of the pleadings reveals the facts in issue, and these must be proved to the Court. This is done by evidence, which may be oral or contained in documents.

THE MEANING OF EVIDENCE

In its ordinary meaning, "evidence" is a means whereby facts are established to the satisfaction of those persons who are enquiring into them. But this is not necessarily sufficient in law, because the Courts require that the evidence presented to them shall conform with certain legal rules. The aim of these rules is to ensure that the facts before the Court are proved by means which are both admissible and relevant. There is no code of evidence in English law, and, with certain statutory exceptions, the rules which are applied have developed over the centuries in the same way as the law itself.

THE CLASSIFICATION OF EVIDENCE

Evidence is variously classified in accordance with its importance. **Direct** evidence is that given by a witness who deposes to a fact of his own knowledge; it is also called **original** evidence. But a document which constitutes a fact in itself, or some object, may also be direct evidence. It is to be contrasted with **circumstantial** evidence, which merely helps to establish some fact; and with **hearsay** evidence, which may be called "evidence at second hand." There is also **primary** and **secondary** evidence, usually applied to the contents, as opposed to the purpose, of documents; production of an original document is regarded as primary, of a copy as secondary, evidence.

Presumptions

In addition to evidence as so classified, facts may be established by certain presumptions which the Court is entitled to draw; or, if a matter is sufficiently notorious, the Court may hold that it "proves itself" by taking judicial notice of it. Further, the Court may draw inferences from observing the demeanour of witnesses, from examining some object which has been produced as an exhibit, or from the inspection of the site of an accident or of defects in a building.

Relevancy

Whatever is given in evidence must be both admissible and relevant. Not all facts which are relevant are admissible. Hearsay evidence is often relevant, but it is not admissible because, being second hand, its weight is too slight, and it might cause confusion if there were a jury. Certain facts may be very relevant indeed, but they may infringe upon personal privilege or public policy, and are therefore not admissible. Some evidence, even though both relevant and admissible, may not, for various reasons, be material in helping to decide the issues.

MATTERS NOT REQUIRING PROOF

Judicial Notice

The Courts require no proof of the law of England and Wales. But foreign law must be proved just like any other matter of fact, and this includes Scottish law (except in the House of Lords) and Dominion and Colonial law (except in the Judicial Committee of the Privy Council). Matter contained in the Official Gazettes of London, Edinburgh and Belfast is noticed merely by production of the particular Gazette; and official seals and signatures on official documents do not have to be proved.

General customs, once established, are recognised, and matters of common knowledge, such as public festivals and holidays, weights and measures, and the meaning of ordinary language, are judicially noticed. But foreign languages and customs must be proved, and private knowledge which a Judge may have on any subject, or knowledge gained by him in other proceedings, is irrelevant. Consequently, such a judicial question as, "Who is Gracie Fields?", is not so silly as it may sound.

Admissions

Certain facts may be admitted by the parties in their pleadings, or may be agreed between them at or before the trial of the action.

Presumptions

Presumptions of fact are inferences, logically drawn from the proved existence of other facts. Presumptions of law may be conclusive, or they may be rebuttable. If conclusive, they are really rules of law, which annex arbitrary consequences to certain

facts or combinations of fact. Rebuttable presumptions are those which have a *prima facie* effect, but may be displaced by contrary evidence. For example, it is a rebuttable presumption that a person accused of a crime is innocent, the burden of proving guilt being upon the prosecution.

THE RULE OF ESTOPPEL

A person who has made a statement or asserted a state of facts may be precluded from denying the truth of that statement or the existence of those facts, whether or not the statement was true or the facts existed. He is "estopped" from denying what he has previously said or asserted.

Although an estoppel is, in a sense, a presumption, it differs in that it is a pure rule of evidence and no more, and affects only the immediate parties. An estoppel must be pleaded by the party who asserts that the other party is not in a position to deny certain facts; if not pleaded, it is waived and cannot afterwards be claimed. A presumption cannot be pleaded and cannot be waived.

There are three kinds of estoppel; by record, by deed and by conduct.

Estoppel by Record

A person who was a party to legal proceedings in which a judgement was given cannot, if that judgement is pleaded as an estoppel in subsequent proceedings, deny the facts upon which that judgement was based. This is because of the rule of *res judicata*, which is that "a thing adjudicated is received as the truth." If the judgement affected his legal status (*e.g.* he was adjudicated bankrupt), the estoppel extends to any subsequent proceedings. But if it did not so affect him, as where he has had to pay damages in an action for negligence, he is estopped only in subsequent proceedings from denying the judgement itself; the facts proved in the case will not found an estoppel unless the subsequent proceedings are between the same parties.

Estoppel by Deed

A party to a deed (such as a contract under seal) is estopped from denying its contents in actions on the deed against parties to the deed, provided that the matters are material and there is no taint of fraud or illegality (*see* p. 78).

Estoppel by Conduct

This is the commonest form.

"Where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act in that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." (2)

There must be a clear and unqualified representation of an existing fact, apparently intended to be acted upon, and in fact acted upon, by the party to whom it was made, who must have thereby altered his position for the worse.

CIRCUMSTANTIAL EVIDENCE

This is evidence which establishes acts which are so connected with the fact to be proved that they support an inference or presumption of that fact. This type of evidence is used mainly in criminal cases. For example, a murder is often proved entirely on circumstantial evidence. Smith is heard quarrelling with Jones shortly before the latter is found stabbed to death by a knife proved to belong to Smith, whose clothes are bloodstained; that would be sufficient to show that Smith killed Jones.

In civil cases, such evidence is normally confined to that of opportunity, incidents accompanying and explaining the transaction in issue (called *res gestæ*), and to show course of business. Thus, proof that a person was not in a position to do a certain act would show lack of opportunity; words spoken at the time an act was done would be admissible as *res gestæ*; and evidence by a clerk that, although he did not remember posting a particular letter, he took all the letters to the post in the usual way, will serve to prove the posting of that letter in the ordinary course of business.

HEARSAY EVIDENCE

Hearsay evidence is not generally admissible, mainly because the person giving it is not in a position to swear to its truth of his own knowledge. To admit it would afford opportunity for fraud and, in any case, the process of repetition brings with it an inevitable depreciation of the truth. There are, however, exceptions, such as declarations by deceased persons. These, if made in the regular course of duty, or against pecuniary or proprietary interest,

will be admissible. But the duty must have been actually to make the statement, and there must have been no motive to misrepresent. An admission by such a person that he owes money, or has received money owed to him, or that some object in his possession belongs to another, would be a sufficient statement against his interest, provided, again, there was no motive to misrepresent the facts.

PRIVILEGE

Certain matters are privileged from disclosure in evidence.

Statements "Without Prejudice"

Statements made, or letters written, with the *bona fide* intention of settling a dispute, need not be disclosed in the action which follows failure to effect such a settlement. They are usually expressed to be "without prejudice," but it seems that, even though they may not be so expressed, non-disclosure will apply if it appears from the circumstances that the statements were not intended to be used in evidence. Privilege will be excluded, however, if the particular issue to which the statement was directed has been settled, or an offer to settle had been accompanied by threats.

Statements Likely to Incriminate

No witness can be compelled to incriminate himself or his spouse. There must, however, be a real apprehension of criminal proceedings; mere liability to an action for debt or in civil proceedings is not enough.

Certain statutes make provision for full disclosure, however, although there may be some protection against further proceedings. Thus, in bankruptcy proceedings there is a duty to disclose everything that may be relevant, but immunity is provided against further proceedings being taken where there has been fraud by an agent. Promoters and directors must make a full disclosure in a company winding-up, and immunity from proceedings for fraud is very limited.

Professional Privilege

Communications made in the legitimate course of the professional employment of legal advisers are privileged. This does

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not extend to confidential communications between a party and other professional advisers, such as accountants, medical practitioners, etc.

Communications Between Husband and Wife

The EVIDENCE AMENDMENT ACT, 1853, s. 3, provides that no spouse can be compelled to disclose any communication received from the other spouse and made during marriage.

Bankers

By the BANKERS' BOOKS EVIDENCE ACT, 1879, s. 6, no banker can be compelled to disclose the state of a customer's account in any proceedings to which the bank is not a party, unless ordered by the Court to do so for some special purpose.

WITNESSES

Witnesses are required in order that the facts of the case, as set down in the pleadings, may be proved to the Court.

If a witness objects to being called, his appearance in Court can be compelled by the issue and service upon him of a type of writ called a *subpœna*. Where he is required to give oral evidence only, a *subpœna ad testificandum* is used; but if he is required to produce certain documents, he will be served with a *subpœna duces tecum*, which will specify the documents required. The service of a *subpœna* is accompanied by tender to him of his legitimate expenses, and if he does not appear, he will be subject to a penalty. Ordinary witnesses are not entitled to any remuneration other than expenses, but expert witnesses can command a fee.

It is only at first instance that witnesses are required. In appeals their evidence, which will have been transcribed from the official shorthand note, is read to the Court by counsel. It is very rarely that additional evidence will be called for, or allowed, by the Court of Appeal.

Affidavits

Sometimes evidence is given by means of a statutory declaration called an "affidavit." This is a document in which the witness deposes on oath to certain facts relevant to the issues in the case.

It is usually drawn up in legal form by counsel, and is then sworn to by the witness in the presence of a Commissioner of Oaths. In all proceedings preliminary to the hearing of the action itself affidavits are used, but they will be accepted by the Court at the hearing only in very special circumstances. This is because there is no opportunity for cross-examination by the other side.*

An alternative method is for evidence to be taken on commission, when the witness is examined by counsel for both sides before a specially appointed Examiner. This is preferable to affidavit evidence, but may not always be possible when the witness is abroad.

The Giving of Evidence

When a witness is called upon, he is first sworn by being asked to take the testament in his right hand and to repeat the words of the oath after the Associate (who sits in robes below the Judge; in the Chancery Division he is the Registrar). The form of oath varies in accordance with the religious belief of the witness. If he has no religious belief, or the taking of the oath is contrary to a rule of his religion, he is allowed to affirm. He is then required to give his full name, followed by his address, which must be that of his home and not his business. If he has been called as an expert, he must state his qualifications.

He is asked various questions by counsel of the side for which he is appearing. There should be little difficulty about this, because the witness will have furnished the solicitor with a statement of the evidence he will give, called a "proof." If he is one of the parties to the dispute (*i.e.* the actual plaintiff or defendant or, in the case of a company who is a party, the responsible representative of that company), but not otherwise (except in the case of an expert), it is probable that counsel will have been through his proof with him beforehand.

His own counsel is not permitted to ask "leading" questions, except on matters which are purely introductory or not in dispute. (A "leading" question is one which suggests the answer). But after his own counsel has examined him, he will then be cross-examined by counsel for the other side, who may ask as many leading questions as he likes. Within limits, questions in cross-

* Recently promulgated Rules of Court are likely to make the use of affidavits at hearings more frequent in the future. This is really in the nature of a concession, aimed at saving time and expense at the trial. It applies particularly to expert evidence.

examination may cover a wide field, and are frequently put with the object of trapping the witness or impugning his credibility. A witness who is liable to be upset by such treatment need have no fear, provided he sticks to the truth, for Judges have had long experience of human nature, and can usually spot a lying witness immediately.

A witness is allowed to speak only of those facts which are within his own knowledge, and he may not give his opinion as to their effect. For example, in an accident case he may inform the Court of everything he saw, but he may not express an opinion as to who was at fault. He is allowed to refresh his memory from any document made by himself, or made by someone else, if made or verified by him contemporaneously with the facts recorded. Although such a document may be inadmissible in evidence, the other side has a right to inspect it, and may cross-examine on it.

The golden rule for a witness is to answer counsel's questions clearly and deliberately, and to remember that there are four persons at least who must hear every word—the Judge, both counsel, and the official shorthand writer. It is inadvisable to go beyond the question that has been put, but there is no objection, if the witness desires it, to add matter which may explain his meaning more fully. He may at any time be addressed by the Judge, whom he should call "my Lord" or "your Lordship" (the Judge in a County Court is "your Honour"). Witnesses usually stand, but a polite request to the Judge to be allowed to sit will invariably be granted. Lounging in the witness box is discouraged, as is the habit of putting one's hand in one's pocket.

EXPERT WITNESSES

In cases concerned with technical matters, expert witnesses are frequently called. It is for the Judge to decide whether a particular witness is to be considered an expert, but that question will not usually arise in the case of scientific and engineering witnesses.

Apart from the fact that the expert is called upon to explain technical matters to the Court, he is also allowed to express his opinion, which, as has been seen, is not allowed of an ordinary witness. (This was decided in *Folkes v. Chadd* (1782) (3), a case concerning a breakwater at Wells Harbour in Norfolk. The expert witness was John Smeaton, who had a great reputation as a civil engineer, having rebuilt the Eddystone Lighthouse some

twenty years previously. It can truly be said, therefore, that at least one engineer has helped to "make law.")

Engineers who are called as experts should remember that the Judges acquire quite an appreciable understanding of technical matters in the course of the cases they try over the years; and so do counsel, some of whom have technical qualifications. Attempts to "blind the Court with science" are, for that reason, best avoided.

Opinion Evidence

The kind of opinion which the expert is allowed to express is one concerning physical effect only, as opposed to legal effect. If he is asked to give his opinion upon a question which involves elements other than those of which he professes expert knowledge, he must confine himself to the latter. It is possible that he will be asked a question which is the very one the Court has itself to answer. This is permissible if the expert has himself observed the facts, but if they have been proved by others, he cannot be asked that question. The difficulty is usually got over by his being asked a similar question put in hypothetical terms.

Suppose he is asked about a specification. He may explain the meaning of technical terms, and deal with the state of scientific or technical knowledge at the date when the specification was drawn up. He may also explain the nature and working of the apparatus specified, and deal with its characteristic features and technical or practical limitations. But he may not give his opinion as to the meaning, in the context, of words or expressions used, except to give their usual meaning in that type of specification.

In an accident case which concerns, for example, the guarding of a machine, he may give factual evidence as to the state of that machine after the accident, and he may be asked his opinion as to the existence and application of a more efficient type of guard for such a machine. But it is not permitted that he should say whether a particular guard does, or does not, comply with the provisions of, say, the FACTORIES ACTS, though he may give technical reasons why, in his opinion, a certain type of protection would be inadequate to prevent a particular type of accident.

References to Notes

In giving his evidence, an expert is entitled to refer to treatises or notes in order to correct or confirm his opinion. He may quote

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from books which are recognised in his profession as being authoritative, or from papers read before a learned society or institution by someone with an established reputation in his own field. He may also give details of any experiments which he himself has carried out, either in the course of his normal work, or with the object of finding a solution to any special problem raised by the facts of the case in which he is a witness. As with any other witness, he may refer to notes made at the time of, or shortly after, any inspection or examination he may have carried out in connection with the case.

Court Experts

Although experts are usually called as witnesses by the parties themselves, the Court may call for independent reports from experts of its own choosing. Such reports will be considered by the Judge, notwithstanding that they may not have been agreed to, or accepted, by the parties. In especially difficult cases, experts may be appointed as assessors to sit with the Judge, their function being to advise upon all points about which guidance is required. A lawyer acting as an arbitrator may also require an assessor to assist him on technical matters.

REFERENCES

- (2) *Freeman v. Cooke*. (1848) 2 Exch. Rep. 654, 663; 154 E.R. 652, 656.
- (3) *Folkes v. Chadd*. (1782) 3 Doug. 157; 99 E.R. 589. **K.B.**

CHAPTER 3

Documents

DOCUMENTS must be considered, firstly, in regard to their admissibility as evidence in proceedings and, secondly, with a view to their interpretation. The first is simply a matter of knowing the rules which, like other rules of evidence, are concerned with relevancy and materiality. Consideration of questions of interpretation has, however, a twofold purpose. The rules of construction must be followed in drawing up any document, such as a contract, if its purpose is not to be defeated by some invalidity; knowledge of the rules enables obvious pitfalls to be avoided. Secondly, the Courts apply these rules when construing documentary evidence which has been placed before them.

DOCUMENTS AS EVIDENCE

All documents which are not admitted by the other side and do not prove themselves (*i.e.* the Court does not notice them judicially), must be proved by the oral evidence of the person who produces them, whether in the original or by copies.

Where a document is to be put in evidence because its contents are in dispute, the law requires that it be proved by the production of the original, unless there is good reason for not so doing, when a copy will be allowed. This does not apply to cases where it is merely the existence of the document which is in issue, or the other side has admitted the contents.

Copies

Certified copies will be allowed where the original is in the possession of the other side, who refuse to produce it; or it is held by a stranger to the action who cannot be compelled to produce. They will also be permitted when the original has been lost or destroyed (provided the loss or destruction is clearly proved), or

where its production would involve undue delay or expense. Public documents, such as entries in the Register of Companies, are usually proved by certified copies. Difficulties over the production of copies in cases where originals are normally called for may be overcome to some extent by the use of photographs.

Original Documents

The production of original documentary evidence of facts in issue must comply with the conditions laid down by the EVIDENCE ACT, 1938. Books, maps, plans, drawings, photographs, written records and reports, and the like, may be produced providing:—

- (a) The maker (*i.e.* the person making or keeping the document, or under whose instructions it is made or kept) either has personal knowledge of the matters dealt with, or is under a duty to keep a continuous record of information supplied to him by someone who has personal knowledge of the matters dealt with, and
- (b) The maker is called as a witness in the proceedings.

Requirement (b) WILL be waived if the maker is dead, ill or beyond the seas (it being impracticable to secure his attendance), or all reasonable efforts to find him have failed. It MAY be waived if the Court is satisfied that to call the maker would entail undue delay or expense.

If the maker of the document is personally interested in the result of the proceedings (that is, if he is likely to be affected by it), then the document will not be admissible under the ACT.

Recordings

Electrical and mechanical recordings are documents in the strictest sense of the word. An original recording, whether on tape, wax cylinder, disc or film, must be proved as an original document in accordance with the provisions of the EVIDENCE ACT, 1938. The “maker” within the ACT is, of course, the person who was responsible for actually making the recording, and not the one whose voice has provided the subject-matter.

The Court may wish to hear the recording, or it may be satisfied with a transcript. In the latter event, both the actual recording and the transcript will require formal proof, for which two witnesses at least will usually be needed.

THE INTERPRETATION OF DOCUMENTS

Any document, such as a contract in writing, is always interpreted on the basis of what the parties intended, and this intention must be gathered from within the confines of the document itself. It is to be found only in that which has actually been written down; what might have been written, or was, perhaps, included in a draft but not adopted, is irrelevant and cannot be considered. External evidence is, however, admissible in certain circumstances to assist interpretation.

The Principal Rules

The document must be construed as a whole. Should the intention which emerges from a perusal of the whole not fit in with actual words, then the intention will prevail. But if the words are clear and unambiguous, their meaning will be preferred to any apparent intention disclosed by the rest of the document. The Court will direct every effort to giving effect to the whole, and a particular part will be discarded only when it is impossible to reconcile it with other parts which have been more clearly expressed.

It is from the actual words, frequently far from apt, that the intended meaning must be gathered. Where ordinary, everyday language has been used, the ordinary canons of interpretation will apply and words will be given their literal meaning. By "literal" is meant, not so much the dictionary, but the ordinary, popular sense. Words used in a technical context will, of course, be allowed their ordinary technical meaning, unless it is apparent that a special meaning was intended, when that will be adopted.

Legal words and phrases are given their technical legal meaning. But certain commonly used words can also have a restricted meaning. For example, such terms as "negligence" and "nuisance" when used in contract clauses which seek to impose or avoid liability under those heads, will be construed in their meaning in law.

An apparent ambiguity (sometimes referred to as being "patent") is allowed to be explained by whatever evidence the document itself affords, or by admissible external evidence. But no evidence is allowed to be given by the parties themselves as to their intentions. Where an ambiguity does not appear until an attempt is

made to apply the terms of the document (in other words, the ambiguity is "latent"), and the means already mentioned do not resolve the difficulty, then and only then may resort be had to evidence of intention by the parties.

The *Ejusdem Generis* Rule

Ejusdem generis means "of the same kind," and the rule of interpretation which bears this name is based upon the axiom that the meaning of a doubtful word may be ascertained by reference to the words associated with it. The rule is as follows:—

Where particular words, which describe a category of persons or things, are followed by general words, then the general words will be confined to the same category.

The point of this is that general words are usually added to particular words in order to guard against some accidental omission.

To take some simple examples. "Copper, brass and other metals" would presumably include bronze as being an alloy of copper; but "other metals" would not include iron, as that is in a different category. However, if the particular words exhaust the category, all the known alloys of copper being listed, "other metals" would widen the scope (although "precious" metals, such as gold, platinum or silver, would be excluded). On the other hand, "steel, gold, aluminium, bronze and other metals" do not form a category, and the general words are, therefore, not restricted. Where the particular words are in descending order, the general words do not include those of higher rank. Thus, "Motors may be obtained rated at 100, 50, 25 and other horse-powers, according to requirements," would exclude motors of over 100 h.p.

The rule is excluded where its application would not carry out the intentions of the parties, or where the particular words do not fall into any possible category. There is a related rule to the effect that the express mention of a person or thing implies the exclusion of other persons or things of the same category. This only applies, however, where the particular words stand alone and are not followed by general words; and it is excluded where some person or thing in the same category received no mention due to mistake or oversight.

Corrections and Alterations

It is a general rule that, in order to preserve a document in the form intended, the Court may add, transpose or reject words or phrases, and may correct wrong grammar or spelling. Where descriptions of persons or things are obviously erroneous, they may be rejected, provided there is otherwise certainty as to the persons or things intended. If a description is partly true and partly untrue, the untrue part will be ignored if the other part is, by itself, sufficient identification. Omissions or errors in names and descriptions may be repaired by external evidence.

When alterations and erasures occur, it is a presumption that they were made before the document was signed or executed. (An initial or signature against such an alteration is not, therefore, strictly necessary.) However, the presumption may be displaced by evidence, and the onus of showing when the alteration or erasure was made, and by whom, lies with the party who relies on the document. A material alteration, made after execution, will undoubtedly affect the document's validity, but no general principle can be stated here as to what would make such an alteration "material." (As to the effect of such an alteration, *see* p. 168.)

Printed Documents

In the case of printed documents, there are one or two special considerations which may provide pitfalls for the unwary. "Printing" includes duplicated typescript as well as all forms of "real" and "imitation" printing; but ordinary typescript is classed with handwriting.

Where there are written additions or alterations to the printing, such written words have a greater effect than the printed ones. Deleted words are ignored absolutely, and they may not be looked at even to explain a doubtful meaning or an ambiguity. Clauses which are not struck out, but which can have no possible reference to the particular transaction, are rightly ignored in construing the whole. But, if such a clause can have an effect on the matter, even though it might appear that it should have been deleted, it will be taken into account.

External Evidence

It is a general rule that, as the meaning of a document, such as a contract, must be gathered from within the document itself,

external or oral evidence (also called "extrinsic" or "parol" evidence) is not admissible to explain or vary any part of it. There are, however, certain exceptions, and external evidence is allowed:—

- (1) To show the meaning of a foreign language.
- (2) To explain terms having a technical, trade or customary meaning.
- (3) To show the terms of an agreement where the writing is merely a portion of an otherwise oral contract not required by law to be in writing.
- (4) To prove a collateral oral agreement which is not inconsistent with a written contract (such as a verbal warranty or an option).
- (5) To show that a contract was not to become operative until some condition had been fulfilled; and that that had not yet happened (*see* p. 98).
- (6) To show an oral variation of an agreement not required by law to be in writing, and not under seal (*see* pp. 55 and 57).
- (7) To show that a contract has been rescinded.
- (8) To prove fraud, illegality, mistake, or any other matter affecting the validity of an agreement (*see* Chapter 6).
- (9) To explain ambiguities and to correct misdescriptions; but not to fill in blanks.

Words and Phrases

Over the years the Courts have seen fit to attribute particular meanings to certain commonly used words and phrases. Such meanings are not employed, however, in cases where it is apparent that some other interpretation is intended. Thus, where a word is defined in a statute, that definition will be applied in any matter with which the statute is concerned. To compile a list of all words and phrases which have a special meaning at law would amount to writing a dictionary, but some of the commoner ones are referred to below.

In general, it can be said that the singular includes the plural, the masculine includes the feminine, and vice versa. "Person" includes "corporation," unless the charter or statute which grants the corporate status decrees otherwise. A company which has been incorporated under the COMPANIES ACTS is a definite "legal person," with most of the rights and obligations of a private individual so far as they are relevant and within the memorandum and articles of association (*see* p. 70).

Many of the rules are concerned with time and date. Thus, a month is not a lunar but a calendar month; a quarter is 91 days and a half-year 182 days, irrespective of whether there are 365 or

366 days in the year. A "day" is the period of 24 hours from midnight to midnight, and fractions of a day are ignored unless material to deciding for example, which of two events happened first. "Working days" are days on which it is lawful or customary to work, as well as days when work is actually done.

A person attains the next year of his age on the day before his birthday, and if, for example, he was born on 1st June 1934, he will attain full age on 31st May 1955. But if, in any connection, he must be "not more than," say, 25 years of age, he will fulfil the condition until he actually reaches his 25th birthday.

"From" is variously construed. "From 14th March for fourteen days" is the period 15-28th March, and 14th March is itself excluded. But a period "from" the doing of an act or the happening of an event includes the day upon which the act is done or the event happens. "Till" and "until" are ambiguous expressions; "till 23rd September" could intend either to include or exclude that day. "On" is always definite, however, and to say, "My holiday begins on 23rd August" makes that date the first day of the holiday.

Expressions such as "directly" and "as soon as possible" are inclined to be vague and uncertain. The law implies that, where no time is specified, a contract shall be completed within a time which is reasonable in all the circumstances (*see* p. 117). This is not quite what is meant by "as soon as possible," which imports a desire for an act to be done in the shortest possible time; nor by "forthwith" or "directly," which really mean "without loss of time." The criterion for all these expressions is "reasonableness," a word which has been explained many times, in different connections, in the Courts. Perhaps the most satisfactory definition is that what is reasonable is what the average, prudent "man-in-the-street" * would consider reasonable in the circumstances as he saw them.

Payment of money is frequently expressed as being so much "per annum" or "in each year." These, and like expressions, mean that unless whatever is being paid for lasts for the whole year, no payment is due. On the other hand, "at the rate of £1,000 per year" allows payment to be proportioned to the actual time taken. This rule does not, however, apply to rents, salaries, pensions, dividends and the like, for, by the APPORTIONMENT ACT, 1870, such periodical payments by the year, however expressed,

* Lord Bowen called him "the man on the Clapham omnibus."

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must be proportioned to the actual length of lease, service, etc., which the payer has enjoyed. Operation of the ACT may be expressly excluded in any particular case.

The expression "E. & O. E." ("Errors and omissions excepted") is frequently inserted in invoices. This may suffice to excuse purely arithmetical errors, but it was held in *Berg v. Landauer* (1925) (4) that these letters cannot make a document, providing inaccurate information, answer the description of one which provides correct information, at any rate when the inaccuracy is material, as by the insertion of a wrong date.

REFERENCE

- (4) *V. Berg & Sons v. Landauer*. (1925) 42 T.L.R. 142. K.B.

PART TWO
THE LAW OF CONTRACT

Introduction

A contract may be defined as an agreement, made between two parties, which is enforceable at law. Not all agreements are contracts, and contracts which may appear to be valid are not necessarily enforceable. These statements are explained and amplified in the following chapters.

Chapters 4 to 11 set out the general law of contract, with particular reference to contracts of sale, which may or may not come within the SALE OF GOODS ACT, 1893. That ACT is a very important one, and its provisions are fully dealt with in order to show how the general law has come to be applied to the special requirements of the sale of goods. At the same time, it is hoped that the two objects of explaining basic principles and demonstrating practical applications have been achieved.

The remainder of this Part is devoted to some specialised applications of the law of contract. A knowledge of the law affecting agency, employment, hire, storage and carriage is essential if one is to understand the full implications of any commercial transaction; and the rather special features of hire-purchase agreements and export contracts have frequently to be considered. Of late, the questions of monopoly and restraint of trade have received some attention from Parliament, and a brief statement of the position is given in Chapter 17.

CHAPTER 4

The Formation of Contracts

THERE is a widely held but mistaken belief that a "contract" is a formidable document without which no business transaction of any importance can safely be accomplished. That this is not so should very quickly become apparent after reading the first few pages of this chapter. Almost every transaction one enters into in the course of the daily round is a contract of some kind, whether it be travelling in a train, eating a meal in a restaurant or buying a newspaper.

A contract need not be in writing except in certain cases. Whether it has been made orally or is in writing, it will be what is called a "simple" contract, unless it is in the form of a deed, when it will be a "contract under seal" (sometimes referred to as a "specialty" contract).

I. SIMPLE CONTRACTS

The basis of a simple contract is the agreement between the parties, arrived at by a process of offer and acceptance; it is made when a bargain is reached, the parties being at one as to the matter and purpose of their agreement. In other words, one party promises something to the other, who accepts the promise and, in return, gives a consideration, "the price of the promise;" and the law implies that the parties, by these acts, intend that their relationship shall be on a legal basis. There are, therefore, **four essentials** to the making of a contract: the **offer**, the **acceptance**, the **consideration**, and the **intention to create legal relations**.

The Offer

An offer must, as a general rule, be directed to a particular person. In the commercial world it is usually made as the result of an enquiry, and is the quotation or tender given to the prospective customer; it is an offer by the seller to sell to the enquirer.

But an advertisement or catalogue, even though priced, is not such an offer, for it is made to the world at large. In most cases this is not an offer at all, but is a mere communication of information and, probably, an invitation to make an offer. True, the advertiser may anticipate receiving orders for his product as the result of advertisement; such orders are, however, merely offers, which he is not bound to accept. Were it otherwise, he might find himself in serious difficulty when his stock became exhausted.

Sales in Shops.—In the same way, the display of goods in a shop or shop window is simply an invitation, and the seller is not bound to sell. This was recently confirmed by the Court of Appeal in *Pharmaceutical Society v. Boots* (1953) (5), where it was held that a transaction in a "self-service" shop is no different to any other, and that a customer who picks up an article and takes it to the counter is making an offer, which is accepted by the assistant who takes the cash. Thus, in a sale "over the counter," it is the buyer who offers to buy, and the acceptance is the acceptance of the purchase money, whether the seller actually hands over the goods or allows the buyer to help himself.

A price marked on a ticket attached to goods, or in an advertisement or catalogue, is merely an indication of the figure for which the seller is willing to sell. If that figure is incorrect, the seller can get out of his difficulty either by refusing to sell at all, or by making a counter-offer at a revised price. As a counter-offer amounts to a rejection of the original offer (*see* p. 49), it would then be for the customer to accept or refuse as he thought fit. However, most traders prefer to sell at the marked price rather than risk their goodwill and reputation; which is, perhaps, why it is so generally assumed that an article placed on display must be sold when asked for, unless it is marked "Not for sale."

The use of the word "offer" in this context is not to be confused with its use in connection with price control by regulation. An offence may be committed if goods are "offered" to the public at other than the controlled price, and such an offer has been held to include the display of goods, with price attached, in a shop window (6).

Offers to the Public.—It is possible for an offer to be effective even when made to the world at large, as by advertisement. The best known example is where a reward is offered for the return of lost property. Such a contract is termed "unilateral," and the offer must be a promise to pay or do something in return for an

act or service, the full or partial performance of which constitutes the acceptance.

The classic illustration is the case of the firm who advertised a product called "Carbolic Smoke Balls" as a specific against influenza, stating that they would pay £100 to anyone who used their smoke balls in the prescribed manner and yet succumbed to the complaint. A Mrs. Carlill bought and used some of these as advertised, but nevertheless caught influenza; she therefore claimed the £100. The firm tried to argue that the advertisement was a mere "puff," that the offer was made to no particular person and was therefore not a true offer, and that in any event it had not been accepted by Mrs. Carlill. These arguments were rejected by the Court of Appeal, who held that Mrs. Carlill's acts of buying and using the smoke balls amounted to an acceptance sufficient to complete the contract, of which the payment of £100 upon the contraction of influenza was a condition. The firm had to pay up, and the decision in *Carlill v. Carbolic Smoke Ball Co.* (1893) (7), that an offer may be made to the world at large, is still good law.

Termination of Offers.—An offer may be withdrawn at any time before acceptance, but withdrawal has no effect until the other party actually knows of it. In the case of a withdrawal by letter, this may be troublesome, for, until the letter reaches the person to whom the offer was made, the offer remains open. On the other hand, a letter of acceptance is effective the moment it is posted. Where such letters cross in the post, therefore, it is more than likely that the withdrawal will be of no avail.

Express revocation of an offer, either orally or in writing, is not essential. If the person who makes the offer afterwards does anything inconsistent with that offer, such as by concluding a contract for the same subject-matter with someone else, then, so soon as the other person hears of it, however indirectly, the offer is revoked.

Where a date for acceptance of an offer has been specified, the offer will lapse automatically when that date has passed. If, however, the matter has been left open, the offer will lapse after the expiry of a reasonable time. As to what is a "reasonable time" can only be determined when all the circumstances of the case, including the nature of the offer and the intentions of the parties, have been taken into account.

A bare promise to "keep the offer open" does not preclude its

withdrawal at any time. But if that promise is made the subject of a separate contract, involving a separate consideration, it is binding and is a true "option."

Acceptance

Acceptance of the offer binds both parties by completing the contract, which is then "executory;" that is, agreement has been reached but nothing has yet been done.

Conditional assent to an offer is not acceptance, and, as it introduces a new term, it amounts to a counter-offer; and a counter-offer is equivalent to a final rejection of the original offer. But an acceptance which includes a condition or stipulation normally implied in law (*see* p. 104), and which has not been expressly excluded by the offer, is not a counter-offer but a good acceptance rendering the contract executory.

It is necessary to distinguish between a conditional acceptance (or counter-offer) and a request for information, as the latter still leaves the offer open. For example, Smith & Co. make an offer to Jones Ltd. for the supply of a machine "for delivery in 3 months," and Jones Ltd. reply by telegram "Please wire whether can make delivery 2 months." This is obviously asking for information. But, if Jones Ltd. wire instead "Will accept if delivery 2 months," that will be a conditional acceptance amounting to a counter-offer and, therefore, a rejection. Of course, there is nothing to prevent Smith & Co., if they choose, accepting the counter-offer and thereby making a contract upon the varied terms.

Mode of Acceptance.—The person making the offer may specify the method of communicating the acceptance. He may even, as in the "Smoke Ball" case (*see* p. 48), intimate that the performance of some condition will be sufficient. More usually, however, the method is to be inferred from the circumstances, or from the custom of a particular trade. Thus, an offer by letter would normally call for acceptance by the same means. Though an offer by telegram will pre-suppose acceptance by telegram, an offer by letter could be accepted by quicker means.

In contrast to the withdrawal of an offer, acceptance is complete at the moment the telegram is handed in or the letter actually posted; and it makes no difference that, through some accident in transmission, the communication never reaches the person to whom it is addressed. As a matter of evidence, the time of

handing in the telegram, or the Post Office date stamp on the envelope enclosing the letter, would determine when the acceptance became effective. In the case of a lost letter, the entry in the firm's post-book would probably be sufficient proof of posting.

Cross Offers.—Whether identical offers which cross in the post can be construed as constituting offer and acceptance is a question which has never been properly decided. Assuming that the intentions of the parties are similar, the one offering to do what the other is offering to pay for, it would seem both logical and realistic to infer the formation of an agreement, on the ground that each intends to contract with the other. Strictly, however, it is difficult to imply an acceptance in such circumstances, for it is a *sine qua non* that an offer cannot be accepted until it has been received. But any discussion of this topic is bound to be somewhat academic, for the situation is rarely met in practice.

Consideration

The consideration is generally, but not necessarily, in money or its equivalent. It must be "valuable" consideration; that is, it must be of some worth. The law does not enquire into its adequacy, but lack of substance may be evidence of fraudulent dealing. Moral obligation or good motive is not sufficient, and a promise to do something on the basis of a "gentleman's agreement" is a mere *nudum pactum*, a promise unsupported by consideration.

It is said that consideration must be either of benefit to the party receiving it, or detrimental to the party who gives it. While this is often the case, it does not invariably apply. What of the business man who orders goods on credit? His supplier promises to deliver the goods, and he promises to pay his supplier for them. There are mutual promises, the undertaking to deliver the goods being consideration for the promise to pay, and vice versa. It is surely more correct, therefore, to say that consideration is the price of the promise. Certainly it is easier to understand when looked at in that way.

Who Gives Consideration.—There is a rule, best explained by illustration, that "Consideration must move from the promisee." Thus, Smith enters into a joint agreement with Jones and Evans that he will pay Evans £50 in return for Jones building him a television set. Though Evans is a party to the contract, he cannot

claim the £50, even though Jones has finished the set, for it is Jones, and not Evans, who has given the consideration. A practical example of this is afforded by the case of *Dunlop v. Selfridge* (1915) (8) (see also p. 74).

Dunlop sold tyres through wholesalers on the terms of a price maintenance agreement, the wholesalers not only maintaining the schedule prices to their customers, but obtaining an undertaking that the tyres would be sold to the public at not less than list prices. One of the retailers was Selfridge, who agreed with their wholesaler to pay Dunlop £5 for every tyre sold at less than list price. Dunlop sued Selfridge for breach of the agreement, but it was held by the House of Lords that, as the promise by Selfridge to pay £5 per tyre was unsupported by consideration on Dunlop's part, the claim was not valid.

"Past" Consideration.—Money paid or something promised or done before the contract becomes "executory," cannot normally be treated as consideration. Nor can an unfulfilled obligation, already imposed upon a person by a previous contract between him and another, be taken as consideration for a fresh contract. For example, Brown agrees to decarbonise the engine of Green's motor car for £10, but, when the job is done, Green is reluctant to pay the money because, he says, he now thinks it too expensive. So Brown, not wanting to quarrel, tells Green that he will re-wire the ignition system as well, provided he can be sure of getting his money; to this Green agrees. Suppose Brown then refuses to do the re-wiring. Green cannot compel him to do it, because he has given no consideration; all he has done is to promise to pay money which, under the first contract, he is already obliged to pay.

This kind of situation must not be confused with the case where something has been done on one side and, though nothing has been said on the other about recompense, there has been a tacit understanding that there will be some reward. Provided the act or service has been done by way of business, and not on a merely friendly basis, a subsequent promise to do or pay something will be enforceable, even though the act or service (the consideration) is in the past at the time the promise is given. Thus, in *Stewart v. Casey* (1891) (9), the owners of certain patent rights wrote to Mr. Casey, a former employee, that, in view of the services he had rendered them in working their patents, they now wished to give him a one-third share in them. Mr. Casey sued on that promise, and the Court of Appeal held that his past services were a sufficient consideration.

Forbearance to Sue.—A promise not to pursue a claim in the Courts is well recognised as constituting a sufficient consideration; it makes no difference that the proceedings have been started. The claim must be *bona fide*, and not frivolous, mischievous or fraudulent. It is sufficient that the claimant has an honest belief that he will succeed, even though, upon examination, it appears that his claim is without substance. This is the basis of the settlement of actions in Court, though it is usual to ask for judgement upon the agreed terms, because a judgement is binding and cannot be questioned except upon appeal to a higher tribunal (*see p. 26*).

Forbearance to sue in tort may or may not be good consideration. Remedy for assault may be obtained by action in tort or, alternatively, by prosecution for the offence; withdrawal of either action or prosecution can be treated as consideration. But, if it has been prosecuted (successfully or not), action may not be brought thereafter.

The facts of a particular case may be such that both a felony and a tort have been committed. For example, to take the property of another to one's own use may amount to the tort of conversion (*see p. 219*); but if there is "intent permanently to deprive" the owner of that property, the facts may constitute stealing, which is a felony. As it is unlawful to compromise a prosecution for a felony, its withdrawal is not possible. Further, action in tort will only be allowed after the prosecution has taken place, unless there is good reason for not prosecuting.

The "Hightrees" Principle.—This principle, based upon the equitable rule that a party to a contract will be prevented from enforcing his strict legal rights when it would be unjust to allow him to do so, was enunciated by Mr. Justice Denning (as he then was) in 1946 in *Central London Property v. Hightrees House* (10). It provides that in certain rather closely defined circumstances a promise may be binding even though there is no consideration for it. Exactly what those circumstances are was explained when the case was considered by the Court of Appeal (of which Lord Justice Denning was a member) in *Combe v. Combe* (11) in 1951.

Lord Justice Asquith stated the principle thus (11a):—

"When a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee, and (3) is in fact acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it."

Consideration for such a promise is not required. Lord Justice Denning explained it more fully (11b):—

“Where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his words.”

Such a promise does not stand alone, but is a part of a larger transaction in which consideration is essential. In other words, a subsidiary promise within the framework of an existing contract, though not itself requiring consideration, does not do away with the necessity for that consideration which is a necessary part of the transaction.

Two examples may help to make the matter clear. In *Charles Rickards v. Oppenheim* (1950) (12) a buyer continued to press the seller for delivery of goods after the date stipulated in the contract, saying in effect, “Although you have exceeded the contract time, I still want the goods.” He is not allowed thereafter to say that the seller has failed to deliver to time, for, by his conduct, he has waived the stipulation. In *Foster v. Robinson* (1951) (13) a landlord told his tenant that, although his tenancy agreement had expired, he could continue to live in the house he had occupied for the remainder of his life at no rent. Relying on that promise, the tenant stayed on. The landlord could not deny his promise, even though it was given for no consideration.

It should be noted that the person to whom such a promise is given cannot sue on it, even though he may have acted upon it. This is because the *Hightrees* principle is analogous to that of estoppel (see p. 26), and is, in fact, referred to as a quasi-estoppel. Estoppel proper is a rule of evidence, but the *Hightrees* principle is purely contractual. The first involves a statement of existing fact, whereas in the second there is a promise as to the future; therein lies the difference, although the result may appear the same.

Intention to Create Legal Relations

The mere making of a contract implies an intention to create a legal relationship between the parties, and a clause therein expressly denying such a relationship will have the result of barring

any action by either party in a Court of Law. The transaction will be, not a contract, but a "gentleman's agreement."

An unusual instance of the effect of such an agreement is afforded by the leading case of *Rose & Frank v. Crompton* (1925) (14).

The plaintiffs were dealers in carbon tissues, which the defendants manufactured, and the parties entered into an agreement for the supply of these goods by the defendants over a period against specific orders given by the plaintiffs from time to time. Before the agreed period had expired, the defendants terminated the agreement, without giving the plaintiffs requisite notice; they further refused to execute specific orders already received.

The plaintiffs brought an action for damages, firstly for breach of agreement, and secondly for non-fulfilment of orders given before the breach. The House of Lords decided that the claim for breach of agreement must fail, because of a remarkable clause which specifically excluded action at law and stated that the parties "each honourably pledge themselves" that the agreement "will be carried through by each of the parties with mutual loyalty and friendly co-operation."

But the claim in respect of non-fulfilment of specific orders was successful, for the House decided that the giving and acceptance of each individual order constituted a fresh and separate contract. Because the agreement was unenforceable there was no obligation to give or accept such orders; any accepted orders were, therefore, unconnected with the agreement and stood upon their own merits.

In *Jones v. Vernon's Pools* (1938) (15) the plaintiff sued on a football-pool coupon which, he alleged, would have entitled him to recover more than £2,000 for an outlay of 6s. 9d., but which had apparently been lost by the defendants. There was a condition printed on the coupon which stated that "it shall not be attended by or give rise to any legal relationship . . . or be legally enforceable or the subject of litigation." This was held sufficient to exclude action in the Courts, and this decision was approved by the Court of Appeal in *Appleson v. Littlewood* (1939) (16), where a precisely similar clause had to be considered, and where it was decided that such a condition was not contrary to public policy (see p. 81).

Simple Contracts Need Not be in Writing

A simple contract may be wholly oral, or partly oral and partly in writing, or may be evidenced by conduct. Until recently,

however, it was a statutory requirement that certain contracts had to be in writing if they were to be capable of enforcement in the Courts. These provisions were contained in the STATUTE OF FRAUDS, 1677, and in s. 4 of the SALE OF GOODS ACT, 1893, but were repealed on 4th June, 1954, by the LAW REFORM (ENFORCEMENT OF CONTRACTS) ACT, 1954. The repeal is retrospective and applies to all contracts, whether made before or after the coming into force of the repealing measure.

The STATUTE OF FRAUDS, passed in 1677 for the "prevention of many fraudulent practices," was rendered necessary by the confused conditions which prevailed in Cromwellian and Restoration times, and which encouraged the bringing of many false claims by dishonest litigants. (S. 4 of the SALE OF GOODS ACT was merely a re-enactment, two centuries later, of part of the STATUTE OF FRAUDS.) For many years now these provisions have been the subject of almost universal criticism for, although the Courts have done their best to prevent them being used "as an instrument of fraud" by unscrupulous persons whose unfortunate opponents could not produce the necessary written evidence, many a hardship was suffered because there was no writing or memorandum of the transaction in existence. Now, at long last, this blot on the face of the law of England has been removed.

It is, however, still necessary for CONTRACTS OF GUARANTEE (*see* p. 99) to be evidenced in writing, for the unrepealed portion of s. 4 of the STATUTE OF FRAUDS reads as follows:—

"No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The "memorandum or note" must set out all matters necessary to give the contract validity. But, as it is really a question of evidence, it can come into existence at any time before action at law is taken, and even after the contract has become executory. It need not be contained all in one document, and an exchange of letters between the parties could be sufficient, even though liability is repudiated by one party in the course of correspondence. Provided it is possible to spell out an agreement from letters, notes, memos or other documents, the evidential requirements will be satisfied.

The phrase "signed by the party to be charged" means that the memorandum must be signed by the person (or his agent) who is the defendant in any action brought upon the contract of guarantee; the plaintiff need not have signed as well. "Signed" is broadly interpreted, for the signature may be rubber-stamped, typewritten

or printed; facsimile is unnecessary. For example, an undertaking to guarantee a debt, written by the guarantor on a printed form headed with his name, but not actually signed by him, will contain a sufficient "signature."

II. FORMAL AND WRITTEN CONTRACTS

The principal distinction between simple and formal contracts is difference in form. The rules as to formation of the agreement, and other fundamental matters yet to be considered, are equally applicable to both. But, whereas a simple contract need not (except in the one special case) be in writing, a formal one must, by its very nature, be wholly in writing; and what is more, it must be contained, either notionally or in fact, in one document.

There is one fundamental difference between a simple and a formal contract, and it is that, in the latter, consideration is not required. (This is not an inviolate rule, but the exceptions do not concern engineering contracts.) The reason is historical. The deed, which goes back to very early times, has always been associated with gift, and in particular with the passing of property "within the family" by way of settlement, where the promises are mainly one-sided. The concept of consideration has grown up from quite different roots and, though of long standing, is comparatively modern.

Contracts under Seal

A formal contract is a contract under seal and is, strictly speaking, a deed. Its use in transactions relating to real property and conveyancing matters is compulsory, whilst corporations and companies must always contract under seal unless specifically exempt (*see* p. 69). It may be employed, at option, for any type of contract, but, under ordinary conditions, it is reserved for matters of considerable value or complexity.

Essential Formalities.—The document must be drawn in customary legal form and either "engrossed" or printed on paper or parchment. (An "engrossed" deed is a fair copy in "copper-plate" handwriting, though, at the present day, typewriting is invariably used.) Originally it had to be sealed and delivered only, but the LAW OF PROPERTY ACT, 1925, provides that it must be signed as well by any individual who is a party to it; otherwise it is not "duly executed." The operations of sealing and delivery

are now purely symbolic, though corporations and limited companies use a wax seal. Strictly speaking, the signatures need not be witnessed, but it is usual to arrange for witnesses to sign as well, purely as a matter of evidence. It is a presumption that a deed which has been duly signed and witnessed has also been sealed and delivered.

Stamping.—An important matter is the stamping. A stamp or stamps of the correct monetary value as required by the STAMP ACT, 1891, must be duly impressed (an adhesive stamp will not do), otherwise the document will be invalid (although "late stamping" is allowed upon payment of a fine). For a contract the fee is ten shillings, with five shillings for the counterpart. It may be noted that a wholly written simple contract requires a sixpenny stamp, which may be adhesive provided it is duly cancelled. No stamp is needed on a simple contract for the sale of goods.

Dating.—Inclusion of the date is not essential, though it might be inconvenient to omit it. Here again, the reason is historical, for the date of the deed is the date of its delivery, which in past times was no mere formality. If, in fact, the date is left out, oral evidence may be called to prove the date upon which the document was signed, or from which it was intended to be operative.

One Document Required.—A deed consists of one document, but this does not mean that it must all be contained in one piece of paper. It is, however, essential that the principal part, the signed and sealed agreement itself, makes definite and unequivocal reference to all other parts, including maps and plans. Thus, a contract may consist of the agreement, the conditions, a specification and drawings. The conditions, specification and drawings must all be incorporated into the agreement by reference, and in that way they are "deemed" to be part of the contract.

Variation.—At common law a deed was always irrevocable, save by another deed. Equity, however, allowed revocation by subsequent oral or written agreement (not under seal), and the equitable rule now prevails. But another deed is required to vary any matter, and oral evidence is inadmissible to prove a variation.

Contracts "Under Hand Only"

The term "formal contract" is sometimes used to mean one which is evidenced by a document to which the parties "in witness whereof have hereunto set their hands." It is a contract

"under hand only," and may be virtually indistinguishable from a contract under seal; but, unless it is, in fact, "signed, sealed and delivered," it is merely a simple contract.

This type of document is frequently used for engineering contracts, because, perhaps, of the difficulties attendant upon the subsequent variation of sealed agreements. There is also the point that the period of limitation (*see* p. 169) is only 6 years for a simple contract, compared with 12 for a contract under seal. From a practical point of view there is little difference between this form and a truly formal contract when it comes to documentation. What follows is, therefore, largely applicable to both forms.

Formal Engineering Contracts

A formal engineering contract consists of a number of documents, all notionally held together by an agreement. To begin with, there are the drawings and the specification, the responsibility of the engineer. There is the schedule of prices, the joint concern of the engineer and the contractor, for it is virtually the latter's accepted tender. Then there are the conditions of contract, usually drawn up by the lawyer in consultation with the engineering side. Finally, there is the agreement, the sole concern of the lawyer, who must see that all the documents, including the drawings and the conditions, are expressed in the agreement as being embodied in the contract. It will be appreciated that the combined skill of both engineer and lawyer is required if satisfactory results are to be obtained.

The lawyer is primarily responsible for the conditions of contract and the agreement, but the engineer has an even greater responsibility in seeing that his drawings, specification and schedule of prices are as accurate, complete and consistent as possible. Experience tends to show that many of the troubles which occur in the later stages of a contract are due to lack of care in the first place. It is notorious that many engineers pay little attention to documentation, preferring to meet trouble when it arrives. Trouble of that kind is apt to be expensive, and could be avoided if engineers realised that a contract is a legal entity in the formation of which their part is at least as important as that of the lawyer.

Tenders.—The issue of tender forms is an invitation to make an offer, and as the offer, to be acceptable, must be on lines

envisaged by the purchaser, it is necessary to ensure that the invitation to tender includes all the information needed, and that the tender form is so worded that the conditions of contract and other documents are effectively embodied. If it is intended that there shall be a "formal" contract (whether or not under seal), this must be stated in the invitation. Further, copies of the conditions of contract and the proposed agreement must be supplied with the form of tender (together with the specification, drawings, etc.), or at least made available for inspection.

When tenders are received, they should be scrutinised with care to see whether they conform to the terms of the invitation. A well-drafted tender form, and the use of standard conditions of contract (*see* p. 103), will go a long way towards ensuring this. Any alteration of terms by the tenderer should be considered with a view, firstly, to seeing whether they are acceptable, and, secondly, to investigating what effect, if any, they are likely to have, in law, on the conditions of contract.

Acceptance of Tenders.—At this stage, matters are in the process of negotiation and no-one is contractually bound. In due course a tender is selected as being the most suitable, and a letter of acceptance is sent to the successful tenderer. This is when the main difficulty is likely to be encountered, particularly where it is intended that there shall be a formal contract, and everything will depend upon the wording of the acceptance.

Should the acceptance letter make no reference at all to the necessity for a formal contract, it is probable, despite anything that may have been said in the invitation to tender, that it will, with the tender, constitute a valid simple contract. Suitable wording can, however, provide for the subsequent completion of a formal agreement. But the wording must be in the right form if it is to have the desired effect.

Wording of Acceptance.—It was settled long ago, in the case of *Winn v. Bull* in 1877 (17), and has been affirmed in the Courts on many later occasions, that the use of such phrases as "subject to contract" and "subject to formal contract" in letters of acceptance precludes the formation of an agreement and leaves the matter still in the process of negotiation. In other words, for all the effect it has, such a letter might never have been sent at all.

What, then, is required to ensure that the acceptance is binding whilst, at the same time, the way is left open for a formal contract? There is no magic phrase to achieve this result, but one of the

more successful attempts was made in an agreement for the sale of a lease, which was considered in 1947 by the Court of Appeal in *Branco v. Cobarro* (18). The final clause of this agreement was:—

“This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed.”

The late Lord Greene, then Master of the Rolls, considered that the word “until” clearly showed that the “provisional agreement” was intended to be binding until the formal document was executed. The wording of the clause did not make the efficacy of the agreement subject to a condition as the use of the familiar words “subject to contract” would have done. All the terms of the proposed contract were contained in this agreement, and they would continue to govern the parties whether or not a more formal agreement was subsequently signed.

Applying these findings to our problem, it is suggested that the inclusion of the following paragraph in the letter accepting the tender should have the desired effect:—

“This letter of acceptance, together with the tender submitted by you, constitutes a provisional agreement until a formal contract under seal, embodying all the conditions upon which the tender was submitted, is duly signed and executed by you and us in accordance with law.” *

A similar paragraph, with suitably altered wording, could be embodied in the form of tender. But, on the authority of the House of Lords’ decision in *Rossiter v. Miller* (1878) (19), this is not necessary, provided the invitation to tender makes explicit reference to the fact that the successful tenderer will be required to enter into a formal agreement.

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- (5) *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern), Ltd.* (1953) 1 Q.B. 401; 2 W.L.R. 427. C.A.
- (6) *Wiles v. Maddison.* (1943) 1 All E.R. 315. K.B. Div.
- (7) *Carlill v. Carbolic Smoke Ball Co.* (1893) 1 Q.B. 256. C.A.
- (8) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (1915) A.C. 847. H.L.
- (9) *Stewart v. Casey.* (1891) 1 Ch. 104. C.A.
- (10) *Central London Property Trust, Ltd. v. Hightrees House, Ltd.* (1947) K.B. 130.

* The writer does not claim this wording to be infallible; nor does he guarantee its unqualified acceptance by a Court of Law.

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- (11) *Combe v. Combe*. (1951) 2 K.B. 215. C.A.
 - (a) at p. 225.
 - (b) at p. 220.
- (12) *Charles Rickards, Ltd. v. Oppenheim*. (1950) 1 K.B. 616. C.A.
- (13) *Foster v. Robinson*. (1951) 1 K.B. 149. C.A.
- (14) *Rose & Frank Co. v. J. R. Crompton & Brothers, Ltd.* (1925) A.C. 445. H.L.
- (15) *Jones v. Vernon's Pools, Ltd.* (1938) 2 All E.R. 626. Assize.
- (16) *Appleson v. H. Littlewood, Ltd.* (1939) 1 All E.R. 464. C.A.
- (17) *Winn v. Bull*. (1877) 7 Ch. D. 29.
- (18) *Branco v. Cobarro*. (1947) 2 All E.R. 101. C.A.
- (19) *Rossiter v. Miller*. (1878) 3 App. Cas. 1124. H.L.

CHAPTER 5

The Parties to a Contract

NOT everyone has full contractual capacity, and contracts with minors, married women, lunatics and drunken persons may very easily constitute traps for the unwary. Contracts entered into with small private firms, societies and clubs must also be watched carefully, for various difficulties can arise if it is proposed to take action for breach. Corporations, which include limited companies, are governed by rules which may be easily ascertained if one knows where to look, and there is no reason why any person dealing with such bodies should, if he exercises reasonable prudence, find himself at a disadvantage. So far as the Crown is concerned, it is now, since the passing of the CROWN PROCEEDINGS ACT, 1947, in approximately the same position as any other legal person, and will not be further mentioned.

Two related matters are also referred to in this chapter. One is the matter of business names (for it is always advisable to know precisely with whom one is dealing), and the second is the question of the assignment of rights under a contract. Both these can be of considerable importance.

I. INDIVIDUAL CAPACITY

Those with obvious contractual disabilities include lunatics and drunken persons. Minors, on the other hand, are specially privileged rather than disabled, and any incapacity would seem to be on the side of the parties who contract with them, rather than with the minors themselves. The position of married women has undergone a vast change in recent years, and a married woman now enjoys not only full contractual capacity in her own right, but also has inherent authority to contract on behalf of her husband for the necessities of life.

Minors

The personal incapacities of minors (or "infants" as they are known to the law) are privileges intended for their protection until they reach majority, which is attained on the day before twenty-first birthday (*see* p. 40). It is presumed that, thenceforth, they will be able to carry the burden of unlimited legal responsibility upon their own shoulders.

In the sphere of contract an infant can be made liable in a limited number of cases only, although he can himself take action on agreements which are unenforceable against him. Because of this, contracts with infants are usually regarded as hazardous undertakings, better avoided. Their contracts are regulated by the common law, as modified by the INFANTS' RELIEF ACT, 1874. It is unfortunate that the language of the ACT is not entirely clear, for there is some doubt, even to-day, as to its effect in certain cases.

Binding Contracts.—The only contracts which invariably bind an infant are those for the supply of necessities, and those which are for his personal benefit. "Necessaries" include not only the bare necessities of life, but also goods suitable to the infant's station or position. If he has a sufficient supply of such goods already, a further supply will not be classed as necessities. Articles of mere luxury are always excluded, but luxurious articles of an utilitarian nature, appropriate to the infant's position, may be held to be necessary to him. The SALE OF GOODS ACT, 1893, s. 2, compels him to pay "a reasonable price" (which is not necessarily the contract price) for necessities "sold and delivered" to him. The inference to be drawn from this is that, whereas the infant will be able to enforce the contract at any time after it is made, the seller cannot compel payment until he has actually delivered the goods.

To be "of benefit" to an infant, a contract must be primarily to his advantage. Beneficial contracts are those for education, apprenticeship or employment; trading contracts are never included in this class, though one for necessities will be unenforceable if it is detrimental. Provided the contract is for the infant's benefit at the time it is made, it is immaterial that it later ceases to bear that quality. The inclusion of terms prejudicial to the infant will not affect the matter, if they are of a kind usually to be found in such agreements. These contracts are fully enforceable by

both parties and are, in fact, the only contracts which show infants no substantial privilege.

Other Contracts.—The INFANTS' RELIEF ACT, 1874, s. 1, provides that all contracts for the supply of goods other than necessities "shall be absolutely void." The words "absolutely void" are misleading, for, although an infant cannot be compelled to pay for such goods, anything he has paid certainly cannot be recovered by him. Furthermore, not only can the infant sue on the contract and compel delivery to himself, but goods delivered to him become his property, whether or not he has paid for them. The position of infant traders, and of others in business on their own account, is no different, and goods supplied to them in the course of business, say for resale, are always considered to be "goods other than necessities."

Should it be that an infant, in order to persuade a trader to supply him with goods (other than necessities), falsely represents that he is over twenty-one, he can, at a later date, repudiate his false representation and so avoid payment; his misrepresentation does not operate as an estoppel. But, if he obtains goods by some other representation which amounts to fraud, he can be ordered by the Court to make restitution by restoring them to the trader.

Payment.—In cases where an infant fails to pay for necessities (but not other goods) supplied to him, resort may be had to his parent or legal guardian. Strictly speaking, the parent or guardian is not liable unless his authority has been given; but such authority may usually be inferred without difficulty.

An infant cannot be held liable upon a dishonoured cheque, even though it may have been given in payment for necessities. It makes no difference that the cheque is post-dated to after his majority. Until recently it was commonly thought that an infant could not be made bankrupt, but the Court of Appeal has now held that this view is erroneous (20).

Persons of Unsound Mind

Contracts with lunatics (or "persons of unsound mind" as they are now called) are always presumed to be valid. However, if it can be proved that one of the parties to a contract was so insane at the time it was made that he was incapable of appreciating what he was doing, and that the other party was aware of it, the insane person may avoid the contract. Both these factors must be

present, and they must be proved to the satisfaction of the Court. A contract made by an insane person in a lucid interval will be valid, even though the other person knew at the time that he was insane.

In the case of contracts for the supply of necessities, there is an implied obligation that they will be paid for either by the insane person himself or out of his property; and this will be so despite the fact that the other party knew him to be insane, provided it was expected at the time that payment would be made. The standard of necessities is the same as for infants, and the SALE OF GOODS ACT, 1893, s. 2, also applies, in that a reasonable price must be paid for necessary goods which have been sold and delivered.

Drunken Persons

A drunkard is in a similar position to a person of unsound mind so far as contracts are concerned. Thus, although all contracts are presumed valid, if the drunkard can prove that, at the time a contract was made, he was drunk, and that the other party knew it, he can avoid liability. He may, however, ratify the contract when he is sober, and it will then be binding upon him. As to necessities, the position is again the same as for infants, and the provisions of the SALE OF GOODS ACT, 1893, s. 2, in regard to "reasonable price," apply to him.

Married Women

A married woman had, at common law, no contractual capacity whatsoever, for, when she married, everything she possessed became the property of her husband. The first considerable step in her proprietary emancipation was taken in 1882, when the first MARRIED WOMEN'S PROPERTY ACT was passed. By that ACT women who married after 1882 were allowed to hold everything acquired by them as their separate property absolutely. The process was completed in 1935, when the LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT of that year gave every married woman the status of a *feme sole*. Thus, all women, be they single, married, widowed or divorced, have the same capacity to contract as have men, and, if they be minors, suffer from the same disabilities, and enjoy the same privileges, as other minors.

The Husband's Liability.—The liability of a husband for his

wife's contracts or debts is now confined to cases where she has acted as his agent, for she is personally liable upon her own contracts. Such agency may be expressed, presumed or implied, but difficulty may sometimes be found in deciding whether an agency exists, or whether the wife is contracting on her own behalf.

Where a husband and wife are living together, it is presumed that she has his authority to pledge his credit for necessities, and the presumption extends to the case where a woman is living with a man as his wife, though not married to him. Necessaries (which must be suitable and not extravagant) include, for this purpose, food, medicines and clothing for the wife and children, the usual household necessities and equipment, and the wages of indoor staff, if any. The standard is set, not by the husband's position in life, but by his chosen mode of living; it is irrelevant that he lives beyond his means. To succeed in a claim against the husband, the trader who supplies the goods must prove that they are necessities. But this presumptive authority may be rebutted by the husband, in which case the wife will be personally liable.

The husband may, however, have expressly held his wife out as his agent, either by actually telling a trader that he will be responsible for whatever is purchased by her, or, more usually, by honouring accounts for goods supplied to her order. Such express agency can be terminated by the husband only by his giving specific notice to each and every trader concerned.

Wife as an "Agent of Necessity."—A wife who is living apart from her husband will, if he has deserted her or driven her from home, have an implied authority to pledge her husband's credit for necessities. The standard is presumably set by the husband's mode of living, and not by that which the wife, in changed circumstances, is compelled to enjoy; this would appear to be confirmed by the attitude of the Courts to the measure of maintenance granted to wives who have divorced their husbands. The wife is, in such a case, an "agent of necessity," for, by the common law, her husband is bound to maintain her. But the mere fact of their living separately is not enough, for, if the wife has deserted her husband, she has no rights at all against him (though she may have on behalf of their children). When the separation is mutual, as in the case of a separation agreement, or where the couple are judicially separated, or the wife has been awarded maintenance by the High Court or a Court of Summary Jurisdiction, there is no

implied agency; but it may be inferred if the husband fails to pay the agreed or ordered allowance. A divorced wife has no claim at all, for, after decree absolute, she ceases to have a husband and cannot, therefore, be an agent of necessity.

Disclaimer by Husband.—It is usual for a husband to advertise in a newspaper when he desires to disclaim responsibility for his wife's debts. Such a notice is, in law, quite ineffectual, for the following reasons. If her agency is merely presumed, it is enough that he has forbidden her to pledge his credit; if there is an express agency, nothing short of specific notice to each and every trader will be effective; and if she is an agent of necessity, he cannot avoid his liabilities.

II. CORPORATIONS AND OTHER BODIES

Engineering contracts are almost invariably made between groups of persons which, in law, are either corporate or unincorporated. These include local authorities, the nationalised industries, chartered companies, limited liability companies, firms and societies. It is particularly desirable, therefore, that any special characteristics which may affect contractual relationships should be understood.

Unincorporated Societies

Organised bodies of individuals, formed to carry out some common enterprise, are, *prima facie*, unincorporated associations having no separate legal personality. Consequently, they cannot sue or be sued; nor can they enter into contracts with strangers. (But this does not apply to Friendly Societies, Industrial and Provident Societies and Trade Unions, registered under their respective Acts.) Many societies and clubs are unincorporated, but, despite legal disability, they effect to make contracts with others. This is inevitable, for even an unincorporated body has to take what amounts to corporate action, otherwise it could not fulfil its functions.

Liability under a contract made in these circumstances does not lie with the club or society as such; nor can its committee or executive be held responsible. It is the individual member or officer who must be looked to, and he is primarily and personally liable if he actually entered into the contract, whether or not he did so under the authority, and on behalf, of the society. If he

had instructions from other members, then they, also, will be personally liable (21). In practice, this probably means that the secretary and the individual members of the committee will be responsible; it is unlikely that the members as a whole can be bound, for the rules usually provide that a member is liable only to the extent of his subscription.

Partnerships.—A partnership is an unincorporated body with one or two rather special characteristics. It is defined by the PARTNERSHIP ACT, 1890, as “the relation which subsists between persons carrying on business in common with a view to profit.” Although a partnership is usually evidenced by a properly drawn up agreement, it may be implied from the words or conduct of those who belong to it. It is normally referred to as being a “firm,” but, despite that, it has no separate existence of its own. All the partners are jointly liable upon the firm’s contracts (and jointly and severally liable for torts), though the firm may, as a matter of convenience, be sued as a firm. An authorised act of one partner will bind the others, for he is virtually an agent of his firm.

There is a form of partnership known as “limited partnership,” which is regulated by the LIMITED PARTNERSHIP ACT, 1907. It is a cross between an ordinary partnership and a limited company, and it resembles the latter in having to be registered with the Registrar of Companies (*see* p. 70). There must be at least one general partner in the firm as well as one or more limited partners. A limited partner is liable for the firm’s debts only to the extent of his contribution to the firm’s capital. He cannot act as agent of the firm unless specially authorised by the general partners, nor has he any right to take part in the firm’s management, which is a matter for the general partners only, who are liable as in an ordinary partnership. It is, perhaps, significant that there are comparatively few such partnerships registered.

Corporations

An association may, upon the fulfilment of certain conditions, become a legal entity known as a “corporation.” This requires the consent of the Crown, and corporate status is granted either by Royal Charter on the recommendation of the Privy Council to the Sovereign, or by Act of Parliament. A corporation, being a “legal person,” is capable of perpetual existence, and is entirely independent of the individuals who are its members. CLASSIFICATION

is twofold. Firstly, a corporation may be “**sole**” or “**aggregate**”; secondly, it may be **prescriptive**, **ecclesiastical**, **chartered** or **statutory**. Ecclesiastical incorporation is by virtue of the common law; a body incorporated by prescription is simply one which has been regarded as a corporation “from time immemorial,” though it can produce no evidence of having been granted a charter.*

Corporations Sole.—A corporation sole consists of a single person and his successors in office. For example, a bishop or vicar is an ecclesiastical corporation sole; the Postmaster-General is a statutory corporation sole (as provided by the POST OFFICE ACT, 1908). Contracts are made with the corporation and not with the holder of the office in person; as there is a perpetual succession, the death or retirement of the holder does not affect the matter.

Corporations Aggregate.—It is with corporations aggregate, either chartered or statutory, that we are particularly concerned. The granting of a charter is the Crown’s prerogative, which has, in the past, been widely exercised to grant corporate status to many different types of body ranging from university colleges to trading concerns. Thus, the Hudson’s Bay Company is a chartered corporation, as is the mayor and corporation of a city; the senior Engineering Institutions are also incorporated by charter. At the present day trading companies are usually incorporated under the COMPANIES ACTS, the first of which was passed in 1844; but the ACT of 1948 now regulates all companies incorporated under any of them. Public utility concerns have almost invariably been incorporated under special Acts. Local authorities, such as county, borough, urban district and rural district councils, are incorporated under the provisions of the LOCAL GOVERNMENT ACT, 1933, which consolidated a number of previous Acts. The British Electricity Authority and the Area Electricity Boards are incorporated under the ELECTRICITY ACT, 1947. All these are statutory corporations.

Form of Contracts.—The rule is that a corporation must always contract under seal; and its seal must actually be used (*see* p. 56). There are, however, a number of exceptions. Thus, any corporation, whether chartered or statutory, may use a simple contract for matters of trivial importance or of frequent occurrence.

* A prescriptive right is acquired by reason of lapse of time. The presumption is that a charter existed from the beginning of legal memory, that is, from 1189, the year of the passing of the first STATUTE OF WESTMINSTER, in the reign of Richard I.

Trading corporations may do likewise for the purposes for which they were incorporated. Limited liability companies incorporated under the COMPANIES ACTS may use simple contracts for all purposes, and must contract under seal only in cases where a private individual would need to do so.

Scope of Contracts.—A statutory corporation is limited in its powers of contracting to the objects specified in the Act under which it was incorporated, but a chartered corporation has the same scope as an individual. A contract entered into by the former which is outside the powers granted to it by the statute which raised it to corporate status is *ultra vires* ("in excess of authority"), and cannot be validated, even, in the case of a limited liability company, by a special resolution of all the shareholders in general meeting. On the other hand, any contract made by a chartered body will be valid, though, if it is outside the terms of the charter, there will be the risk that the charter might be revoked.

Application of the doctrine of *ultra vires* as applied to limited companies may be illustrated by *Ashbury Railway Carriage v. Riche* (1875) (22). The plaintiff's memorandum of association stated that the company was formed "to carry on the business of Mechanical Engineers and General Contractors." In order to define the scope of the words "General Contractors" it was necessary to refer them to those going immediately before (the *ejusdem generis* rule: see p. 37), and it was decided that the company was restricted in its powers of contracting to those connected generally with mechanical engineering; it could not, for example, contract to build a railway.

Limited Companies.—The doctrine of *ultra vires* applies to all statutory corporations, including companies incorporated under the COMPANIES ACTS. The latter may not contract outside the objects covered by their memorandum and articles of association. (The memorandum embodies the constitution of the company, the articles being regulations made thereunder for its conduct.) These are public documents and may be inspected by anyone who applies to the office of the Registrar of Companies and pays a small fee.* Because of this, a person entering into a contract with a company is credited with knowing whether or not it is *ultra vires*, for he is deemed to have inspected the company's file at the Registry, even though he may not actually have done so.

* COMPANIES ACT, 1948, s. 426. The Registry is at Bush House (South-West Wing), Strand, London, W.C.2.

This "constructive notice," as it is termed, of the contents of the company's articles, etc., "operates adversely to a person who neglects to inquire; it does not entitle such a person to claim for his own advantage to be treated as having knowledge of the facts which enquiry would have disclosed." (23). This means that only a person who has in fact inspected a company's file at the Registry, and has relied on what he has discovered there in making a contract with that company, can counter any claim by the company that the contract was *ultra vires* or otherwise unauthorised. This modifies to some extent the rule (known as the Rule in *Royal British Bank v. Turquand* (1856) (24)) that an outsider, in dealing with a company, is entitled to assume that an act done by the company, not inconsistent with its memorandum and articles, has been done properly.

Companies Not Yet Formed.—The foregoing presupposes that in every case the company is actually in existence. A non-existent company cannot, of course, contract, but, as every corporate body must, of necessity, act through its employees or agents, it is possible for someone who represents himself as being the agent of such a body to become a party to a perfectly good contract. The authority for this is *Kelner v. Baxter* (1866) (25), in which case it was held that a person who signs a contract "as agent" for a principal who does not exist is personally liable. Thus, Smith signs a contract, "John Smith, by authority of Jones & Co. Ltd.;" he will be liable if it is found that there is no such firm. But if he signs "per pro. Jones & Co. Ltd., John Smith," the contract would be a nullity. In the second case Smith has signed as an employee of a non-existent company, and he would have no standing at all; to have added the word "Director" to his signature would have made no difference. This was the effect of the decision in *Newborne v. Sensolid* (1953) (26), where a proposed director of a company, which he was in the process of forming, signed a contract on behalf of the company two months before it was registered. It was held that the contract was a nullity, and, even though goods had been delivered under it, the director could not be made personally liable.

III. BUSINESS AND COMPANY NAMES

As it is as well to know precisely with whom one is contracting, the legislature has made provision to ensure that no-one need be

mistaken as to the true business identity of the other party. There is many a "one-man" business which goes under a name other than that of the proprietor, and firms are frequently named deliberately to indicate the type of business they conduct. Concerns known by "business" names are required to register such names, under the provisions of the REGISTRATION OF BUSINESS NAMES ACT, 1916 (as amended by the COMPANIES ACT, 1947). Limited companies who use business names must register them under that ACT, as well as being registered in their corporate name under the COMPANIES ACT, 1948.

Unincorporated Associations

Registration.—S. 1 of the 1916 Act provides that any individual or unincorporated firm (which includes a partnership), known by a business name which does not consist, in the case of a firm, of the true surnames of all the partners "without any addition other than the true Christian names of individual partners or initials of such Christian names," and, in the case of an individual, of "his true surname without any addition other than his true Christian names or initials thereof," must register that name. ("Christian name" includes any forename.) A change of business name must also be registered, and where a woman has carried on business under her true name, and continues after marriage to use that name, she must register it as a business name.

The body responsible for administering the ACT is the Board of Trade, and the Registrar under the ACT is the Registrar of Companies. Registration particulars are filed, and an Index of Business Names is maintained, by the Registrar, and may be inspected by anyone on payment of a small fee (*see* p. 70, footnote).

Names and Particulars.—The Registrar has a complete discretion to disallow any name which he considers undesirable or misleading. Thus, the word "British" may not be used unless the business is under British ownership and control; and the use of "Limited" as the last word in the name of a firm which is not incorporated under the COMPANIES ACTS will render that firm liable to a fine of £5 per day (COMPANIES ACT, 1948, s. 439). Permission to introduce "Royal," "Imperial," "Municipal," "Chartered," "Co-operative" or like words into business names will not be granted without good reason. It should be noted that the ACT does not confer any sort of monopoly in the use of a name,

though, in practice, a name would not be registered if it were so like another as to cause confusion. The only way to ensure the exclusive use of a particular name is to register it as a trade-mark, but that is another matter.

A firm registered under the ACT must, by s. 18, give particulars, in trade catalogues, trade circulars, showcards and business letters, of the present names (and previous names, if any) of all partners, and must state their present nationality if other than British. This information must be mentioned "in legible characters." Similar particulars have to be given by individuals trading under business names. Showcards are defined in s. 22 as "cards containing or exhibiting articles dealt with, or samples or representations thereof."

Effect of Not Registering.—The penalty for not registering is a fine of £5 per day. Generally speaking, a person or firm in default of registration cannot take any legal proceedings under a contract to which he is a party, unless he was not a defaulter at the time the contract was made. Such disability does not, however, prevent him from being sued by the other party, though, if he is so sued, he may counterclaim in that action.

Incorporated Companies

A company incorporated under the **Companies Acts** is registered in the name contained in the first clause of its memorandum of association, and it is so entered in the Companies' Register as its corporate name. If it uses "a business name which does not consist of its corporate name without any addition," that name must be registered as a business name. The COMPANIES ACT, 1948, provides that the name chosen for use as a corporate name must not be one which "in the opinion of the Board of Trade is undesirable" (s. 17), and the principles applied by the Board are those to which reference has already been made in connection with business names.

Use of "Limited."—The corporate name of a limited liability company must always include the word "Limited" (which may be abbreviated) as the last word; inclusion of "Company" is optional. Omission of "Limited" could have a serious effect, for the directors would be personally liable on a contract in which their company had been thus incorrectly described. There is, however, one exception. A limited company which is formed for

promoting any useful object, and prohibits the payment of any dividend, may obtain a licence from the Board of Trade to dispense with "Limited" (s. 19).

Exhibiting the Name.—It is essential that the corporate name be kept "painted or affixed" on the outside of "every office or place" where the company carries on business, "in a conspicuous place, in letters easily legible." The name must also be "mentioned in legible characters" in all business letters, official publications (including advertisements or catalogues), cheques, orders, receipts and the like (s. 108). This is, of course, to ensure that all persons having dealings with a company are clearly informed that the shareholders have a liability limited to the extent of their shares. The corporate name must be shown in addition to any registered business name which may be in use. Trade catalogues, trade circulars, showcards and business letters must also have particulars of the directors stated therein "in legible characters" in the same way as those of partners of firms with business names (s. 201).

IV. ASSIGNMENT TO THIRD PARTIES

In order to understand the reason for the rules relating to assignment, it is first necessary to know something about privity of contract. "Privity" is the relationship which exists between persons having a common interest, and it exists in contract as between, and only between, the immediate parties. "Assignment" is the legal transfer of rights or property and, in contract, it is the transfer of an interest to a stranger.

Privity of Contract

No-one can have an interest in a contract unless he is "privity" to it; in other words, only an original party can claim under it, be bound by it, or benefit from it.

Suppose Jones promises Smith to build him a television set, and Smith promises Jones in return to pay £50 to Evans. Evans cannot sue Smith for the money because he is not privity to the contract between Smith and Jones. This situation should be compared with the similar example given in illustration of the rule that "consideration must move from the promisee," for there all three were parties to the contract (*see* p. 51—*Dunlop v. Selfridge*, there referred to, can also be explained on the ground that Dunlop

were not privy to the contract between Selfridge and the wholesalers). Evans is not a party in this case, but he might be able to enforce the contract, provided there is a clear intention on the part of both Smith and Jones that he shall be paid. Such an intention could have the effect of creating a trust in favour of Evans; and a beneficiary under a trust is always entitled to protect his interest. Though frequently used in commercial transactions to ensure payment of commission to a third party who has carried out preliminary negotiations, the device of the trust is not wholly reliable, for there must be very clear proof of the original parties' intention that one of them shall hold a benefit, to be derived under the contract, on behalf of the third party.

Assignment

Assignment of Liabilities.—The imposition of liability upon strangers to a contract is not generally permitted, even by way of assignment. An apparent exception to this is where a creditor agrees, at the request of his debtor, to accept another person in his place; but this is really the making of a fresh contract. Another is the case of partnership, for the rule is that an act of one partner, which is within the scope of the business of the partnership, binds all the other partners. In fact, a partner acts as the agent of his firm, and no question of assignment arises. (PARTNERSHIP ACT, 1890, s. 5.)

Assignment of Rights.—It is possible, however, to assign a right under a contract, so long as it is within the definition of a *chose in action*, which is the right of proceeding in a Court of Law to procure the payment of a sum of money. The assignment of such a right occurs, for example, when debts are "sold" to a debt-collecting firm. The LAW OF PROPERTY ACT, 1925, s. 136, allows the person to whom the debt is assigned to sue the debtor in his, the assignee's, own name, provided the assignment is in writing, and express notice of the assignment has been given, also in writing, to the debtor.

The benefit of a trading contract may be assigned where express provision has been made for that eventuality. Suppose that Brown agrees to supply Green with a certain quantity of goods over a period, and during that period Green sells and transfers his business to White as a going concern. If the original contract with Brown has been expressed to be made by "Green, his

successors and assigns," there will be no difficulty. But where the right to assign has not been so expressed, it will be a question of the construction of the contract whether its benefit can be assigned to White on the basis of Brown's consent being inferred. Such an inference will not be made, however, if Brown would thereby be compelled "against his will to accept something essentially different from that which he stipulated for" (27a). Putting it the other way round, the contractor's consent will be inferred only in "those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it" (27b). But if it is Brown who wishes to assign his obligations, he will not be able to do so without the express concurrence of Green.

Special statutory provision has been made from time to time permitting the specified assignment of certain forms of contract, such as policies of insurance, bills of lading, patents and the like.

Automatic Assignment.—Upon the death or bankruptcy of a contracting party, assignment, if it occurs, is automatic. The executors or administrators of a deceased person step into his shoes, as it were, and assume both the liability and the benefit of all contracts not founded upon personal factors alone. Thus, in contracts between principal and agent, or employer and employee, all obligation ceases on the death of either party where individuals and not corporations are concerned. A contract with a consulting engineer who was not a member of a firm could not survive his decease, as he would have been contracting for purely personal services which only he could render.

Contracts for the sale of goods or for work and materials survive intact, though one for work, with or without the supply of materials, made with a "one-man" firm might not devolve upon the deceased proprietor's executors, depending upon the actual circumstances and whether he was a "working" proprietor. When a party to a contract becomes bankrupt, the benefit of that contract will pass to his trustee in bankruptcy. The burden will not usually pass, because bankruptcy proceedings are directed to the collection of all possible assets, and the trustee will do his best to disclaim contracts which are likely to prove a liability.

REFERENCES

- (20) *In re a Debtor* (No. 564 of 1949). (1950) 66 T.L.R. 313. C.A.
 (21) *Bradley Egg Farm, Ltd. v. Clifford*. (1943) 2 All E.R. 378. C.A.

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- (22) *Ashbury Railway Carriage and Iron Co. v. Riche*. (1875) 7 H.L. 653.
- (23) *Houghton & Co. v. Northard, Lowe & Wills, Ltd.* (1927) 1 K.B. 246. **C.A.**
- (24) *Royal British Bank v. Turquand*. (1856) 6 El. & Bl. 327; 119 E.R. 886. **Q.B.**
- (25) *Kelner v. Baxter*. (1866) 2 C.P. 174.
- (26) *Newborne v. Sensolid (Great Britain), Ltd.* (1953) 2 W.L.R. 596; (1954) 1 Q.B. 45. **C.A.**
- (27) *Tolhurst v. The Associated Portland Cement Manufacturers (1900), Ltd.* (1902) 2 K.B. 660. **C.A.**
 - (a) at p. 670.
 - (b) at p. 668.

CHAPTER 6

Factors which Nullify Contracts or Enable them to be Avoided

A TRANSACTION which purports to be a contract may, for some reason, be no contract at all, in which case it is a nullity or, to use the more usual term, it is "void *ab initio*" ("from the start"). On the other hand, a contract may be good in all respects save that it contains some vitiating element which does not operate until one party chooses to take advantage of it. Such a contract will subsist until it is avoided; that is, it is "voidable." As the consequences can be of considerable importance, it is necessary to consider why a contract, seemingly entered into in accordance with the rules already discussed, may be either voidable or void. The possible causes are dealt with, for convenience, under the headings of **illegality, duress and undue influence, mistake and misrepresentation.**

I. ILLEGALITY

A contract will be void if it is illegal. It is clear that an unlawful promise or consideration will nullify a contract, and it is equally clear that one which is legal on its face will be void if entered into for some unlawful purpose. A contract to commit a crime must, of course, be illegal in the narrowest sense of the term; and one to commit a civil wrong in the nature of a tort is similarly unlawful.

Classification of Illegal Contracts

Illegal contracts may be divided into those which are rendered void by statute, those prohibited by statute, and those declared illegal by the common law. Strictly speaking, the first are not illegal in themselves; they are merely void, and therefore unenforceable in the Courts, though collateral transactions are not necessarily affected. But the other two classes are void to the

extent that the law does not even recognise their existence as contracts, and collateral transactions arising out of them are void equally with them.

The use of the word "illegal" in this connection must not be misunderstood. The making of an illegal contract is not necessarily, of itself, an unlawful act; nor will the purpose of the contract, if carried out, expose the parties to penalties unless that purpose is the commission of a criminal act, or is contrary to a statutory prohibition which provides for penalties for its non-observance. It is, however, possible for the makers of such a contract to be guilty of the criminal offence of conspiracy, which is "the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means" (28).

Contracts Void by Statute

Apart from infants' contracts (*see* p. 63), the only contracts of this nature which need be considered are wagering contracts, rendered void by the GAMING ACT, 1845. Besides the ordinary betting transactions with bookmakers, these include any contract in which the element of chance is a considerable factor. Such a contract has been defined as:—

"One by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake" (29).

For example, a contract of insurance is not a wager, as there is the additional element of an insurable interest. But an insurance against bad weather would be a wager if the proposer had no financial interest in whether it turned out wet or fine.

Commercial Contracts.—It is the substance and not the outward form of the agreement which determines whether or not a contract is a wager. White enters into a contract for the sale of certain articles to Black, but they fail to agree about the price, White saying that on a previous occasion Black paid him sixpence per article. Ultimately they decide that if White's recollection proves correct, the price shall be sixpence, but, if not, Black will pay fourpence. The correct price turns out to be sixpence, but Black refuses to pay more than fourpence, and White sues him for the difference. It has been held in similar circumstances (30) that, despite there being a real intention that the goods shall change

hands, such a contract is in the nature of a wager, the stake being the difference in price. White would therefore fail in his claim.

Contracts Prohibited by Statute

Whereas any contract whose terms are contrary to a statutory prohibition is illegal, it is not always easy to determine whether a particular statute is a prohibitory one, except where the prohibition is specific. The fact that a particular statute imposes penalties is not conclusive. Thus, it was held in *Victorian Daylesford Syndicate v. Dott* (1905) (31) that a statute which imposes penalties merely for the protection of the revenue is not prohibitory, unless its purpose is also to protect the public. But if the purpose of a statute is the protection, either of the public as a whole, or of a class of persons, and penalties are imposed if a particular type of contract does not comply with certain formalities or contain certain conditions, then, it was said by Lord Justice Scrutton in *Anderson v. Daniel* (1924) (32) "the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties."

It follows, then, that to enter into a contract to defraud the Customs of duty would be illegal, because the object of the Customs is not merely to collect duty, but also to control imports, in the interests of the public as a whole. But a contract having as its aim the avoidance of liability to income tax (as opposed to the avoidance of the payment of such tax), could be lawful, for direct taxation is a means solely of obtaining revenue.

The Truck Acts.—The best example of specific prohibitory legislation is afforded by the TRUCKS ACTS, 1831 to 1940, which have as their object the protection of a class of persons, namely manual workers. The ACTS provide, *inter alia*, that the entire wages paid to such a worker shall be given him in the coin of the realm, and wages not so paid can be recovered by him in full. Any contract, therefore, which, in return for a wage deduction, endeavours to give the worker some other benefit, however valuable or desirable, is illegal and void (*see* p. 267, where the ACTS are dealt with in detail).

Statutory Licences.—A particular class of contract which may be rendered illegal by a specific statutory prohibition is that where a licence is required to authorise the carrying out of its purpose, penalties being provided for non-compliance. Such a prohibition

is in the interests of the public, and the effect of no licence is that the contract is unlawful.

Penal statutes of this kind are construed strictly, and any apparent breach of a provision must be clearly established, for "a man is not to be put in peril upon an ambiguity" (33). This means that, even if a licence has not been obtained, a contract will not be illegal unless there is a clear liability to the penalty (although criminal proceedings need not actually have taken place).

Contracts Illegal at Common Law

Contrary to Public Policy.—The majority of contracts which are held at common law to be illegal fall into that category because, in one way or another, they offend against public policy. It is a fundamental principle of law that freedom of contract is to be upheld, and the intentions of the parties are to be allowed to prevail whenever possible. But that principle is qualified when a contract interferes with the administration of justice, affects the safety of the State, or tends to injure social and economic wellbeing. These grounds of public policy are "based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals" (34), and they have now become crystallised within the common law. As Lord Wright has said, "I find it difficult to conceive that in these days any new head of public policy could be discovered" (35).

Affecting the Administration of Justice.—Contracts which attempt to interfere with the due administration of justice do not necessarily contain a criminal element in themselves, though they may concern criminal proceedings. For example, any agreement to stifle or prevent a prosecution for a public offence, such as forgery, the obtaining of money by false pretences, or the obstruction of the public highway, would be unlawful. But if the offence is one which may be made the subject of either civil or criminal proceedings, as in the case of assault, it may be compromised by agreement, and it would not be unlawful in such a case to withdraw a prosecution which had already been started (*see* p. 52).

Affecting the Safety of the State.—The safety of the State might be affected by a contract which would disturb our friendly relations with a foreign power. For example, a contract for the export of arms and like equipment to subversive elements in a friendly state

is unlawful; and so is one for the running of liquor into a country which enforces prohibition. By the same principle, contracts with enemy aliens (*i.e.* those with whom we are in a state of war) are void, unless specifically permitted by the Crown. With such aliens are included British and neutral subjects resident within hostile territory.

Offending Against Social Wellbeing.—The most important of the contracts which tend to injure social and economic wellbeing are those in restraint of trade, which are dealt with at length in Chapter 17. Others include agreements to defraud the revenue, or to assign the salary of a public office by way of mortgage or charge. An agreement that a person shall use his position and influence to enable the other party to obtain a beneficial Government contract is likewise unlawful as being contrary to public policy (36).

The Consequences of Illegality

A contract is not necessarily illegal because it can be performed in an illegal manner. This is illustrated by *Hindley v. General Fibre* (1940) (37):—

A contract was entered into for the shipment of jute from Calcutta to any of the four ports of Antwerp, Bremen, Hamburg or Rotterdam (to be nominated by the buyers), between 1st September and 31st October 1939. After the outbreak of war with Germany on 3rd September 1939, the buyers nominated Bremen as the port of delivery, and the sellers then declared the contract cancelled as being illegal and contrary to the TRADING WITH THE ENEMY ACT, 1939. Later, the buyers withdrew the nomination of Bremen and substituted Antwerp.

It was held that, as the contract could be performed in a legal manner, the buyers were entitled to substitute Antwerp for Bremen, and the sellers were bound to deliver to that port if they were not to be in breach of the contract.

But if such a contract, legal on the face of it, is entered into for some unlawful purpose which is known to both parties, it will be equally as void as though its illegality were obvious; and this will be so even when the unlawful intent is on one side only, if the other party is aware of that intent, though not actively interested.

Collateral transactions.—Collateral transactions, though apparently innocent in themselves, will also be illegal, on the ground that they are tainted with the illegality of the principal contract, and, for that reason, the Courts will not sever the good

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from the bad. (In fact, severance is rarely allowed except of contracts in restraint of trade, *see* p. 280). In *Napier v. National Business Agency* (1951) (38):—

Mr. Napier was engaged by the defendants as secretary and accountant at a salary of £13 per week, plus £6 per week for expenses. Both knew that the expenses could not exceed £1 per week, but in every week income tax was deducted from the salary by the P.A.Y.E. system, and the £6 was entered as expenses in the return to the Inland Revenue authorities. The plaintiff was summarily dismissed, and he brought an action to claim salary at the rate of £13 per week in lieu of notice.

It was decided that the terms of the service agreement were such that there was an intention to mislead the revenue authorities in order to evade the payment of tax; the agreement was therefore illegal. The Court refused to sever the provisions relating to salary from those covering expenses, and the plaintiff could not sustain his action.

Restitution.—Money paid or goods delivered under an illegal contract cannot, generally, be recovered. For example, in *Berg v. Sadler & Moore* (1937) (39):—

A retail tobacconist named Berg, a member of the Tobacco Trade Association, was placed on their stop-list as a cut-price retailer. He arranged with one Reece, also a member of the Association, to obtain supplies on his behalf from a wholesale member. One of Berg's assistants went to the wholesaler's warehouse with an employee of Reece, and paid over the money. The wholesaler had doubts about the *bona fides* of the transaction, and refused to hand over the goods or return the money. Berg sued the wholesalers for money had and received by them.

The Court held that, as Berg could establish his claim only by proving facts which showed that he was attempting to obtain goods by false pretences (a criminal offence), he could not obtain repayment.

Where the parties are not *in pari delicto* ("equally at fault"), the innocent party, unaware of any illegal purpose, may rescind the contract, provided nothing has been done under it. Even if both parties are knowingly concerned in an illegal contract, the law allows a *locus penitentiae* ("opportunity of repentance") between the payment of money or delivery of goods, and the carrying out of the illegal purpose. In that interval the money or goods may be recovered (40). But if the time for performance of the contract has passed, there can be no recovery, even though

the illegal purpose has not been carried out (41). However, where the illegal purpose has been performed, and there has been fraud by the other party, the innocent party may recover (42). One of a class for whose benefit contracts are made illegal may also recover, as he, too, is deemed not to be *in pari delicto*. An example of this is afforded by the TRUCK ACTS (*see* p. 80), under which a manual worker can claim to recover the whole of his wages in the coin of the realm.

Judicial Notice of Illegality.—Whether or not an illegality is apparent on the face of a contract, and whether or not it is pleaded by either party in an action upon that contract, the Court will take judicial notice of it. It has been said that, where a contract can be performed lawfully, and one party elects to perform it unlawfully, he cannot use his own unlawful act as a defence against the other party who is innocent. This is true where there is a statutory prohibition for the benefit of a class of persons; but it is not applicable where a prohibition is for the benefit of the public as a whole.

II. DURESS AND UNDUE INFLUENCE

A contract entered into under duress or because of undue influence is voidable. The whole basis of contract is the element of free consent, and without that there can be no true agreement between the parties. Any factor which tends to diminish that freedom is therefore repugnant.

Duress

Duress is present where one party has been compelled by the other to consent to contract, because of actual, or even threatened, personal violence. It is difficult to imagine that such a thing could happen in these days. However, the mere threat of prosecution is sufficient, whether such threat is directed to the person himself or to one of his family. A modern example is afforded by *Kaufman v. Gerson* (1904) (43). Mrs. Gerson's husband had misappropriated money entrusted to him by Kaufman, who then threatened prosecution unless Mrs. Gerson repaid him out of her own property. She entered into a written contract to this end with Kaufman, but it was held that it could not be enforced.

Undue Influence

In contrast to the limited scope of duress, undue influence covers a wide field. This is because equity includes it in its jurisdiction over fraud, whereas duress is a purely common law matter. It has been defined as "an unconscientious use of powers arising out of circumstances," and might be called, shortly, "sharp practice."

Where there is a confidential relationship existing between the parties to a contract, there is a presumption of undue influence. The confidence reposed in a solicitor by his client, or in his parent by a child, imposes upon the former a duty not to take advantage of his position, or to place his interest before that of the client or child. The presumption is that the one possesses influence over the other; not that he has exercised it. Where such influence is alleged, the onus of disproving it is upon the person presumed to possess it. But where there is no such presumption, it is for the party who has been influenced to show that the other had acquired dominion over his mind, or had abused a confidence. Curiously enough, there is no presumption as between husband and wife.

Contracts with monopolistic nationalised concerns do not necessarily fall within this doctrine. A person who contracts with such a concern is bound to accept its terms, and the fact that there is no one else with whom he can deal for a particular commodity does not, of itself, render those terms onerous. Thus, in *Gnapp v. Petroleum Board* (1949) (44):—

The plaintiffs were garage proprietors who had entered into a contract for the supply of petrol by the Board at a time when the Board were the sole suppliers. In a dispute with the Board they averred that the terms of the contract were onerous, and alleged that there was duress or undue influence.

The Court of Appeal held that the plaintiff had no right of action against the Board so long as the latter imposed reasonable terms of business which were within its statutory powers.

III. MISTAKE

It is fundamental that there can be no valid contract unless there is *consensus ad idem* (literally, "agreement as to the same thing"); that is, there must be common consent by both parties as to the subject-matter and purpose of their agreement. Such consent

may, however, be merely apparent, for mistake by one or both parties as to some factor going to the root of the contract could vitiate it. The mistake must be one of fact; if it is as to the law the validity of the contract will not be affected, unless there is, in the result, a taint of illegality sufficient to render the contract void for that reason.

Kinds of Mistake

Lack of *consensus ad idem* will render a contract void where there is:—

- (1) **Common mistake** as to the EXISTENCE of the subject-matter.
- (2) **Mutual mistake** as to the IDENTITY of the subject-matter.
- (3) **Unilateral mistake** as to
 - (a) the IDENTITY of the other party,
 - (b) the PROMISE of the other party, or
 - (c) the NATURE of the contract.

There is **common** mistake when both parties make the same mistake; **mutual** mistake when they mistake each other; and **unilateral** mistake when one party is mistaken and the other is, or ought to be, aware of it. Only certain kinds of mistake are recognised in law, and they are considered under these three headings.

Common Mistake

This means a mistake as to an underlying assumption; it must be fundamental or basic. The interpretation which the Courts have given to this is very restricted, in that the mistake must relate exclusively to the existence of the subject-matter at the time of the making of the contract. For example, in *Scott v. Coulson* (1903) (45) a contract for the assignment of a life insurance policy was entered into in the belief, held by both parties, that the assured (appropriately named Death!) was alive, whereas, in fact, he had died some time before. The contract was declared void.

Mutual Mistake

The classic case exemplifying mutual mistake is that of *Raffles v. Wichelhaus* (1864) (46).

The defendant bought a quantity of Surat cotton, which was to be shipped by the "Peerless" from Bombay. There were two ships called "Peerless," both due to sail from Bombay, one in October

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and the other in December. The defendant was referring to the one sailing in October, whereas the plaintiff thought the other one was intended.

It was held that there was a mistake as to the subject-matter sufficient to render the contract void.

The mistake must be "as to the existence of some quality which makes the thing without the quality different from the thing as it was believed to be" (47). In *Nicholson and Venn v. Smith Marriott* (1947) (48), linen of the period George I was sold in the belief by both parties that it was of Charles I period. It was held that the contract had been entered into under such a mutual mistake of fact as to vitiate the consent of the parties.

The mistake must be "in respect of the underlying assumption of the contract" (49). Now, mistake excludes intention, and in deciding whether a mistake has occurred, the Court must look at the contract to ascertain what intention is to be inferred. Thus, Smith in making his promise may mean one thing; Jones may think he means something else. What the Court has to decide is whether the sense of the agreement is as Smith intended it, or as Jones understood it. Although it may appear that there is no *consensus ad idem*, the law may hold otherwise. If the reasonable inference drawn by the Court coincides with Smith's intention, *consensus* is assumed, and Jones cannot be heard to say that he misunderstood and would not have assented otherwise. In other words, there must be virtually an ambiguity sufficient to prevent the formation of any contract at all, as was the case in *Raffles v. Wichelhaus*.

Unilateral Mistake

As to the Identity of the Other Party.—A mistake as to the identity of the other contracting party will render a contract void only when it can clearly be shown that the one party did not intend to contract with the other, and that the other party knew it.

For a proper understanding of that statement, it is necessary to consider three cases, the first of which is *Cundy v. Lindsay* (1873) (50).

In 1873 a man named Alfred Blenkarn hired a room at 37 Wood Street, Cheapside, in London, and wrote to a firm of linen manufacturers in Belfast, called Lindsay & Co., in regard to the purchase of cambric handkerchiefs. He gave 37 Wood Street as his address, but signed the letter in such a way that the signature looked like

"Blenkiron & Co." There was a firm named W. Blenkiron & Son carrying on business at 123 Wood Street, and known to Lindsay's by reputation. Lindsay's sent the goods ordered by Blenkarn to "Blenkiron & Co., 37 Wood Street," and they were received by Blenkarn, who then sold them to another firm, Cundy & Co., but omitted to pay Lindsay's for them. He was eventually convicted, in his right name, of obtaining goods by false pretences.

The House of Lords decided that there was no contract between Blenkarn and Lindsay & Co., on the ground that the latter never intended to contract with Blenkarn, but thought they were doing so with W. Blenkiron & Son, whom they knew.

The next case in chronological order is *King's Norton Metal v. Edridge* (1897) (51), in which the facts were somewhat similar.

The plaintiffs were wire manufacturers and, sometime in 1896, they received an enquiry for brass rivet wire from a firm called Hallam & Co. with an address in Sheffield. The letter heading was elaborate and indicated that "Hallam & Co." carried on business at the "Soho Hackle Pin and Wire Works" in Sheffield, and had depots and agencies in Belfast, Lille and Ghent. Having supplied goods to this concern on a previous occasion, and having received payment by cheque drawn by "Hallam & Co.," the plaintiffs quoted for the wire, and their quotation was duly accepted, and the goods were supplied. As no payment was received, enquiries were made, which revealed that one Wallis had adopted the name of "Hallam & Co." in order to obtain goods by fraud. The wire in question had been sold to the defendants, a firm of metal merchants in Birmingham.

The Court of Appeal held that, as there was no other firm of the same name, the plaintiffs clearly intended to contract with "Hallam & Co.," and the contract was good, though voidable (but not void) on account of the fraud.

The view has been expressed by Lord Justice Denning, in *Solle v. Butcher* (1950) (52), that, in the light of the *King's Norton* case and later decisions, *Cundy v. Lindsay* was wrongly decided, and the contract with Blenkarn was good because Lindsay's clearly intended to contract with "Blenkiron;" it was voidable for fraud, but not void for unilateral mistake. Whether or not that view is the correct one, *Cundy v. Lindsay* was a decision of the House of Lords, and is therefore still the law. Moreover there is this, perhaps vital, difference between that case and the *King's Norton* one—there was no other firm called Hallam, whereas there was a real Blenkiron & Son.

Phillips v. Brooks (1919) (53) produced a decision similar to that in the *King's Norton* case.

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The plaintiff was a retail jeweller, and one day a man named North came into the shop and asked to be shown jewellery, from which he selected various items to a total value of some £3,000. He then wrote out a cheque for the amount, saying, "You see who I am, I'm Sir George Bullough," and he gave an address in St. James's Square, London. Phillips, having checked the address in a directory, offered to allow "Sir George Bullough" to take the articles with him, but North refused, suggesting the cheque should be cleared first; but he agreed to take a ring, value £450. On the next day North, in the name of Firth, pawned the ring for £350 with the defendants. He was subsequently convicted of obtaining the ring by false pretences, for his cheque to the plaintiff was, naturally, dishonoured.

Although Phillips had said in evidence that he had no intention of making a contract with anyone but Sir George Bullough himself, Mr. Justice Horridge held that he had intended to sell the ring to the person who claimed to be Sir George Bullough, whether or not he was in fact that gentleman. The contract was therefore good, though voidable for fraud.

As to the Promise of the Other Party.—Where the mistake by one party is as to the promise of the other party, and the other party knows he has been mistaken, the contract will be void if the misunderstanding of the nature of the promise is sufficient to prevent the formation of a true *consensus ad idem*.

An example of this kind of mistake is afforded by *Scriven v. Hindley* (1913) (54).

Hemp and tow were being sold by auction, and the catalogue showed two separate lots, both apparently of hemp, contained in a total of 223 bales, which all bore the same markings and were virtually indistinguishable in appearance. In fact, the second lot, consisting of 176 of the 223 bales, was tow and not hemp. Both lots were knocked down to the defendants, who believed they were buying hemp only; they had no wish to buy tow. The plaintiffs, knowing the second lot consisted only of tow, thought the defendants had made a mistake as to the price of tow, the market value of which was considerably less than that of hemp.

It was held that in these circumstances there was no *consensus*, and the contract was therefore void.

An inadvertent misdescription of goods by the seller may be a sufficient mistake if the buyer realises that there is such an error. In *Hartog v. Colin & Shields* (1939) (55):—

Argentine hare skins were offered for sale at so much per pound weight, whereas it was shown to be a trade custom for them to be sold by the piece. The price quoted "per pound" was a reasonable one "per piece," and, as there were approximately three pieces to the pound, the buyer could not be held to have supposed that the offer expressed the seller's real intention.

Accordingly, the contract was void. This "snapping at" an offer by a prospective buyer is more obviously exemplified in the earlier case of *Webster v. Cecil* (1861) (56):—

Cecil offered to sell a number of plots of land to Webster, naming the total price as £1,250. Webster knew very well that Cecil had made a slip in addition, and that the price should have been £2,250. Nevertheless, he accepted the offer.

The Court refused to enforce the contract.

If there is no misdescription on the part of the seller, but the buyer does not do what any prudent man would do and take steps to ascertain exactly what he is buying, he cannot afterwards allege that he made a mistake. Nor can he do so if he has actually deceived himself about his purchase. Thus, if Black shows a picture to White, and White, believing it to be a genuine old master, offers Black a fabulous sum which is accepted, White has only himself to blame if the picture turns out to be a modern fake worth a pound or two at the most. But, should Black have said anything, or given any indication, which might lead White to believe that his surmise was correct, it is probable that White could avoid the contract, on account of misrepresentation.

As to the Nature of the Contract.—A mistake as to the nature of a contract occurs where a person signs a contract in the mistaken belief that he is signing a document of a kind totally different from that which in fact it is. It was held in *Thoroughgood's Case* in 1584 (57) that, where a blind or illiterate person signs a document, after it has been read over to him in such a manner as to make it appear to be something different, he is not bound by it. He can plead *non est factum* ("It is not his deed").

It is important to note that the mistake must be as to the kind of document which has been signed; if it is as to the contents of the document, the plea *non est factum* does not avail the signer (58). Thus, in *Bray v. Pollard and Morris* (1930) (59), Pollard had signed an agreement for dissolution of partnership with Morris, but claimed that he had signed it in mistake, for he had not fully appreciated its effect. It was held that *non est factum* did not apply, because he knew the kind of document he was signing.

Contracts Voidable for Mistake

At common law mistake, if it affects the contract at all, will render it void. Equity intervenes, however, in circumstances where, though there is no sufficient mistake at common law, it

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would cause hardship for one or other party to be bound by the contract; in other words, it will be voidable in equity, although not void at common law.

In setting a contract aside by virtue of its equitable jurisdiction, the Court may impose terms by way of condition. *Cooper v. Phibbs* (1867) (60), an example of common mistake occurring where the subject-matter of a sale actually belongs to the buyer, illustrates this point.

Cooper leased a fishery from the daughters of an uncle of his, both parties being of the belief that the uncle, lately deceased and who had willed the fishery to his daughters, had been the rightful owner. The true facts were that the uncle had no rights at all, and the fishery was really Cooper's property, through his father.

The House of Lords set the lease aside, making it a condition that, although the rent was to be repaid to Cooper, he was to recompense his cousins for expenditure they had incurred in maintaining and improving the property.

The Rectification of Mistakes

As a contract in writing may not truly represent the intentions of the parties, the Courts have, in certain circumstances, equitable jurisdiction to correct mistakes.

It must be shown, first of all, that there was a complete oral agreement; then, that this agreement was reduced into writing; and, finally, that the mistake was made when it was so put into writing. Oral evidence as to the mistake is admissible, even where the contract is under seal.

IV. MISREPRESENTATION

A misrepresentation is a false statement of fact, and it may be either innocent or fraudulent. It is an inducement by one party to persuade the other to enter into a contract; it must not be confused with a term of a contract, although it may become a term at a later stage.

The result of misrepresentation is that the contract may be avoided by the other party; and, if it be fraudulent, an action for damages in the tort of deceit may be brought. A misrepresentation on one side may be the cause of unilateral mistake on the other; the case of *Phillips v. Brooks* (see p. 88) is an example of this.

Innocent Misrepresentation

The misrepresentation must be material to the basis of the contract, and it makes no difference that a person who has innocently misrepresented a material fact has afforded the other party an opportunity of confirming his statement. In *Redgrave v. Hurd* (1881) (61):—

The plaintiff stated, when selling his business, that it was bringing in about £300 a year, whereas summaries of accounts which he produced showed only £200. The defendant enquired as to the difference, and was shown a number of papers which, he was told, accounted for over £100, but he did not examine them. In fact, the papers showed receipts of a few pounds only.

It was held that the defendant was entitled to avoid the contract, even though he had not taken advantage of the opportunity offered him to discover the true position.

Effect of Non-Disclosure.—Concealment, or mere non-disclosure, of facts does not amount to misrepresentation, unless such concealment or non-disclosure “has the effect of making the disclosed facts absolutely false” (62). The seller of an article who refuses to give any warranty and says at the time of sale that he will not entertain claims for compensation, will be able to escape liability for defects provided he has done nothing to conceal them (63). A true representation made at the stage of negotiation is deemed to continue until the contract is signed, and it is the duty of the person who makes the representation to inform the other party of any change of circumstances which will render that representation untrue (64).

Duty of Full Disclosure.—In certain kinds of contract there is a duty to make full disclosure, and, where this is not done, the other party has the right to repudiate. These are known as contracts *uberimæ fidei* (“of the fullest confidence”), and they include all contracts of insurance, fidelity guarantees, and contracts between persons who are in a fiduciary relationship, such as solicitor and client. Partnership agreements also fall into this category.

Remedies.—Provided the misrepresentation is material, that is, provided it actually misleads the other party, rescission of the contract will be allowed provided it is still possible to restore the position as it existed before the contract was made. Damages cannot usually be claimed, and to restore the *status quo* completely

would probably be equivalent to awarding damages; but compensation to the extent of an indemnity for any actual expenditure under the terms of the contract will be allowed (65).

Fraudulent Misrepresentation

A representation which is fraudulent as well as false will, provided certain conditions are satisfied, afford the aggrieved party a remedy in damages, in addition to rescission of the contract, where that is possible.

Fraud.—The remedy in damages is a remedy for the fraud, and is obtained by **action in tort for deceit**. FRAUD, as signifying a form of moral turpitude, implies dishonesty, but, as the principal constituent of DECEIT, its meaning has been rigidly narrowed by the Courts. In the leading case of *Derry v. Peek* (1889) (66) Lord Herschell defined it as:—

“A false representation . . . made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false.”

Deceit.—The ingredients of an action of deceit are:—

It is a REPRESENTATION OF FACT, given with KNOWLEDGE of its falsity, with the INTENTION that it SHALL BE ACTED UPON, and IS, in the result, ACTED UPON, by the OTHER party to his DETRIMENT.

In *Bradford Building Society v. Borders* (1941) (67) Lord Maugham set out the essentials so clearly that it is of benefit to quote his words in full, and they are arranged below in the four sections into which they naturally fall.

(1) *Representation of Fact*

“First, there must be a representation of fact made by words or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit.”

A “representation of fact” includes a promise in so far as that shows a present intention in regard to the future. An opinion is not usually a statement of fact, but it may be if the word “know” is used in such a way that the statement has a factual appearance.

A statement as to the law may be a statement of fact, although there cannot be a false representation as to the law itself. For example, in *West London Bank v. Kitson* (1884) (68)

The defendants, who were directors of a tramway company, represented to the plaintiff that they had power to accept bills of exchange, whereas the two private Acts under which the company had been formed gave no such powers.

It was held that the false representation was one of fact and not of law.

(2) *Knowledge of Falsity*

"Secondly, the representation must be made with the knowledge that it is false, or at least made in the absence of any genuine belief that it is true."

(3) *Intended to be Acted Upon*

"Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made."

(4) *Acted Upon with Detriment*

"Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing."

It should be noted that a false statement does not, of itself, constitute fraud, though it may be evidence of fraud. It must fall within the definition given in *Derry v. Peek*, must have been made with the intention that it should be acted upon, and must have been acted upon, thereby causing damage.

Rescission of Contracts Induced by Fraud.—Rescission of a contract induced by fraud will not be granted in cases where the plaintiff has taken a benefit from it with knowledge of the fraud; nor will it be possible when once the rights of third parties have intervened. To take the example of *Phillips v. Brooks* (already considered, see p. 88). The pawnbroker, who did not know that the ring, which North had pledged with him in the name of Firth, had been obtained from Phillips by false pretences, took good title to it; Phillips therefore had no claim upon him, for it was too late to obtain rescission.

FACTORS WHICH NULLIFY CONTRACTS

REFERENCES

- (28) *Mulcahy v. Reg.* (1868) 3 H.L. 306, 317.
- (29) *Carlill v. Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484, 490.
- (30) *Rourke v. Short.* (1856) El. & Bl. 904; 119 E.R. 717. **Q.B.**
- (31) *Victorian Daylesford Syndicate, Ltd. v. Dott.* (1905) 2 Ch. 624, 629.
- (32) *Anderson, Ltd. v. Daniel.* (1924) 1 K.B. 138, 147. **C.A.**
- (33) *London & North Eastern Railway Co. v. Berriman.* (1946) A.C. 278, 313. **H.L.**
- (34) *Wilson v. Carnley.* (1908) 1 K.B. 729, 739. **C.A.**
- (35) *Fender v. St. John-Mildmay.* (1938) A.C. 1, 40. **H.L.**
- (36) *Montefiore v. Munday Motor Components Co., Ltd.* (1918) 2 K.B. 241.
- (37) *Hindley & Co., Ltd. v. General Fibre Co., Ltd.* (1940) 2 K.B. 517.
- (38) *Napier v. National Business Agency, Ltd.* (1951) 2 All E.R. 264. **C.A.**
- (39) *Berg v. Sadler & Moore.* (1937) 2 K.B. 158. **C.A.**
- (40) *Taylor v. Bowers.* (1876) 1 Q.B.D. 291. **C.A.**
- (41) *Parker v. Mason.* (1940) 2 K.B. 590. **C.A.**
- (42) *Hughes v. Liverpool Victoria Legal Friendly Society.* (1916) 2 K.B. 482. **C.A.**
- (43) *Kaufman v. Gerson.* (1904) 1 K.B. 591. **C.A.**
- (44) *Eric Gnapp, Ltd. v. Petroleum Board.* (1949) 1 All E.R. 980. **C.A.**
- (45) *Scott v. Coulson.* (1903) 2 Ch. 249. **C.A.**
- (46) *Raffles v. Wichelhaus.* (1864) 2 Hurl. & Colt. 906; 159 E.R. 375. **Ex.**
- (47) *Bell v. Lever Bros., Ltd.* (1932) A.C. 161, 218. **H.L.**
- (48) *Nicholson & Venn v. Smith Marriott.* (1947) 177 L.T. 189. **K.B.**
- (49) *Norwich Union Fire Insurance Society v. Price.* (1934) A.C. 455, 463. **H.L.**
- (50) *James Cundy & T. Bevington v. Thomas Lindsay.* (1873) 3 App. Cas. 459. **H.L.**
- (51) *King's Norton Metal Co., Ltd. v. Edridge, Merrett & Co., Ltd.* (1897) 14 T.L.R. 98. **C.A.**
- (52) *Solle v. Butcher.* (1950) 66 T.L.R. 448, 459. **C.A.**
- (53) *Phillips v. Brooks, Ltd.* (1919) 2 K.B. 243.
- (54) *Scriven Bros. & Co. v. Hindley & Co.* (1913) 3 K.B. 597.
- (55) *Hartog v. Colin & Shields.* (1939) 3 All E.R. 566. **K.B.**
- (56) *Webster v. Cecil.* (1861) 30 Beav. 62; 54 E.R. 812. **R.C.**
- (57) *Thoroughgood v. Cole.* (1584) 2 Co. Rep. 9a; 76 E.R. 408. **Q.B.**
- (58) *Howatson v. Webb.* (1908) 1 Ch. 1. **C.A.**
- (59) *Bray v. Pollard & Morris.* (1930) 1 K.B. 628. **C.A.**
- (60) *Cooper v. Phibbs.* (1867) 2 H.L. 149.
- (61) *Redgrave v. Hurd.* (1881) 20 Ch. D. 1. **C.A.**
- (62) *Peek v. Gurney.* (1873) 6 H.L. 377.
- (63) *Ward v. Hobbs.* (1878) 4 App. Cas. 13. **H.L.**
- (64) *With v. O'Flanagan.* (1936) 1 Ch. 575. **C.A.**
- (65) *Newbiggin v. Adam.* (1887) 34 Ch. D. 582. **C.A.**
- (66) *Derry v. Peek.* (1889) 14 App. Cas. 337, 374. **H.L.**
- (67) *Bradford Third Equitable Benefit Building Society v. Borders.* (1941) 2 All E.R. 205, 211. **H.L.**
- (68) *The West London Commercial Bank, Ltd. v. Kitson.* (1884) 13 Q.B.D. 360. **C.A.**

CHAPTER 7

Contract Terms

EVERY contract is a bilateral agreement, entered into voluntarily by the parties subscribing to it, who bind themselves to the due performance of certain obligations. Breach of an obligation by one side entitles the other to take certain steps, the nature and extent of which are determined by the scope and limits of that obligation.

In order that the exact contractual commitments may be known, they are reduced to definite terms which form an integral part of the agreement. Those generally included in engineering contracts are basically the same as are employed when the subject-matter is of a purely commercial character, and it makes little difference whether it is a simple contract, expressed orally or in writing, or a formal one under seal. The rules which apply are the same, however complex the matter, and difference in form is not to be confused with difference in content.

Classification of Engineering Contracts

It is convenient to classify engineering contracts under three main heads:—

- (1) Those for the supply of materials and/or equipment only.
- (2) Those for the supply of equipment "with erection."
- (3) Those for work (*e.g.* repairs), with or without the supply of materials incidental thereto.

In order to determine the correct legal consequences of any of these, it is important to decide whether they fall into the category of "sale of goods," or that of "work and materials." The former is governed by the SALE OF GOODS ACT, 1893, whilst the latter depends almost entirely upon the common law; in some respects the rules are not the same.

The sale of almost anything "over the counter" is a sale of goods, even that of an electric iron or fire which has to be fitted

with a flexible lead and plug to suit the customer. On the other hand, a rewind or repair to an electric motor is work with the incidental supply of materials (*e.g.* wire, tape, etc.). The building of a special body on a motor-car chassis supplied by the buyer has been held to be a sale of goods, but as this was a decision of a judge at first instance, upon which doubt was thrown by the Court of Appeal (69), it might equally amount to a contract for work and materials.

It is obvious, then, that (1) above is a sale of goods, whereas (3) is not. But what about (2), the supply of equipment with erection? Here the law is not particularly helpful, and little direct assistance is to be got from the decided cases, which deal principally with the painting of portraits and the making of dentures! At one time it was considered that the test to apply was whether or not there was a transfer of property from the seller to the buyer. Later judicial opinion has it that it is the essential basis of the contract which matters; is the customer paying for the exercise of skill or for a finished product?

Fortunately, it is not necessary to apply this rather difficult test where anything in the nature of machinery (which, for this purpose, may be given a wide interpretation) is to be supplied "with erection." The old case of *Clark v. Bulmer* (1843) (70), though dealing with a point of legal procedure with which we are not concerned nowadays, is sufficient authority for saying that a contract for the supply and installation of a stationary engine is a contract for work and materials. An earlier case, that of *Cotterall v. Apsey* (1815) (71), is also helpful in this matter. A contractor had built a wall of brick, and he sued for payment, firstly, for the supply of the bricks, and, secondly, for the work of building the wall. It was decided (again, for reasons which do not apply now) that he could not sue in that manner, but must bring his action on the basis of work and materials. On the strength of that decision it can be said with some confidence, therefore, that a contract for an electrical wiring installation (or anything analogous, such as a hot-water system) is one for work and materials and not for the sale of goods.

In doubtful cases the difficulty may be surmounted with little trouble, for any of the provisions of the SALE OF GOODS ACT may be expressly excluded (s. 55 of that ACT). Whether this would be desirable or not is another matter, and, in any event, such exclusion is not a solution but a way round the problem. The line of

demarcation is vague, but it seems to fall somewhere between the case where a machine has to be erected on site in the fullest sense, and that where it is required merely to be fixed to some prepared bed and to have various services, such as electricity, water, air, gas, etc., connected.

Conditions and Warranties

Conditions Precedent and Subsequent.—The word “condition” has, unfortunately, two distinct meanings in the law of contract. The orthodox meaning includes events or facts external to the contract itself but upon which the existence of the contract depends. Such conditions are classified as being either “precedent” or “subsequent.” Put shortly, a CONDITION PRECEDENT prevents a contract becoming operative until the happening of some specified event (*e.g.* “subject to contract,” *see* p. 59); a CONDITION SUBSEQUENT allows a party to a contract which may have been partially performed to rescind, provided he does so before the condition is satisfied.

Suppose Smith wishes to purchase a machine from Brown. Smith knows nothing about engineering matters, so he tells Brown he will have the machine “subject to the certificate of an expert.” The certificate is a condition precedent to the sale of the machine. On the other hand, goods supplied “on approval” or “on sale or return” are supplied subject to a condition subsequent; before the end of the period allowed for approval the goods may be returned to the seller.

“Conditions” of contract.—The second, and more usual, meaning of the word “condition” is as applied to a term in a contract; and here confusion arises. Firstly, it is common parlance to refer to all the terms of a contract as being conditions; witness “Conditions of Contract” and “Conditions of Sale.” Secondly, it is quite usual to use “condition” and “warranty” as being synonymous; even lawyers are prone to do so. This is because of some judicial “loose thinking” in the second half of the nineteenth century, which has, unfortunately, been perpetuated in the case of insurance contracts by the MARINE INSURANCE ACT, 1906, which provides that “a warranty is a condition which must be exactly complied with.”

Condition and Warranty Distinguished.—There is a distinct and important difference between a condition and a warranty.

CONTRACT TERMS

A **CONDITION** is a term so directly affecting the purpose of the contract that its non-performance amounts to a substantial failure to perform the contract at all.

A **WARRANTY**, on the other hand, is an auxiliary stipulation in the nature of a guarantee, which does not go to the root of the contract.

Breach of a condition by one party entitles the other to repudiate the contract, but breach of a warranty entitles to a claim in damages only. Although the other party is entitled to repudiate for breach of a condition, he may, if he so wishes, and must in certain cases, treat the breach as one of warranty only, and sue for damages (*SALE OF GOODS ACT*, 1893, s. 11 (1) (c); *see* p. 143). It is possible, of course, for a contract to contain an express clause excluding the right to claim damages for breach of warranty or breach of condition. Should such a clause exclude action for breach of warranty only, it will not bar a claim for breach of condition, nor will it exclude the right to treat the breach as one of warranty by claiming damages instead of repudiation.

Whether a particular term is to be treated as a condition or a warranty depends almost entirely upon the purpose of the contract and the true intentions of the parties. It is therefore difficult to set out any rules, although the *SALE OF GOODS ACT*, in specifying a number of terms to be implied in every contract falling within its provisions, specifically designates certain of them as being conditions and others as being warranties (*see* p. 108 *et seq.*).

An example may help to make the matter clearer. Statements as to quality of goods are usually treated as warranties, unless the absence of that quality is sufficient to make the goods substantially different in kind, when they will be conditions. A specification for ironwork to be "hot-dip galvanised" does not contemplate any other form of galvanising, though for the purpose in view "hot-dip" may or may not be considered essential. If the goods are supplied galvanised by some other process, there is a difference in quality but not in substance; so, unless "hot-dip" is really essential, there is merely a breach of warranty which can be cured by damages. On the other hand, to supply hard-drawn copper wire in place of annealed when the latter is asked for, would be a breach of condition, for the two are different in kind.

Guarantees.—The so-called **GUARANTEE** made by the manufacturer of goods is really a **WARRANTY**, usually very closely

qualified. It is to be distinguished from a CONTRACT OF GUARANTEE, which is a promise by one party to be answerable for the default of another. Guarantee in this sense is a secondary liability, which arises only should the other party fail to meet his obligations. It is not the same as an INDEMNITY, which is a primary liability, a promise to be answerable for a default of, or to make good a loss occasioned by, another party in any event.

Express Terms

Every contract, oral or written, simple or formal, is made up of a number of terms which purport to express the true agreement between the parties. These terms must have been agreed at the time the contract was made, and they cannot be inserted subsequently unless they form part of a supplementary agreement.

Printed Contracts.—Printed forms are now used almost universally for estimates and orders. These frequently embody standard conditions of sale or of contract which, for reasons of layout and economy, are usually printed on the reverse side, or may even be contained on a separate sheet.

For an understanding of the effect of such printed forms, it is necessary to refer to what are known as the "Ticket Cases." This is a series of cases dealing mainly with claims by railway passengers to compensation for injuries or for loss of articles deposited in cloakrooms. The decisions turn on whether the buying of a ticket, with such words as "This ticket is issued subject to the Company's Bye-Laws and Conditions," printed thereon, constitutes a contract in which the bye-laws and conditions can be deemed to be embodied. As it is the effect, and not the details, of these cases which is relevant here, it will be sufficient to refer only to the law as it stands at the present time.

Lord Justice Mellish, in *Parker v. South Eastern Railway* (1877) (72) (which was specifically approved by the House of Lords in *Richardson v. Rowntree* (1894) (73)), laid down three questions of fact, the answers to which will determine whether or not such bye-laws and conditions are, or are not, deemed to be embodied in the contract.

- (1) Did the recipient of the ticket KNOW there was writing or printing on the ticket?
- (2) Did he KNOW that such writing or printing contained conditions relating to the terms of the contract?

- (3) Did the issuers of the ticket do all that was REASONABLY SUFFICIENT to bring these conditions to the notice of the recipient?

Should the answers to all three questions be in the affirmative, the conditions will be deemed to be embodied. There are, however, two qualifications:—

- (a) Illiteracy, or ignorance of the language used on the ticket, is immaterial, provided the issuer had no means of knowing, or could not reasonably be expected to know, that the recipient suffered from either disability.
- (b) The ticket must, in itself, be an essential part of the contract; should it appear on its face to be no more than a mere receipt for the payment of money, it would be unreasonable to assume that there are conditions.

The “Ticket Cases” deal with documents which, though evidence of a contract, are not signed by the parties. They must be distinguished from the normal form of written contract, which is proved by proving the signature of the parties. A good example is afforded by *L'Estrange v. Graucob* (1934) (74).

The defendants sold an automatic vending machine to the plaintiff, who signed an order form provided by the defendants, and containing a number of special clauses in very small print. One of the clauses read:—

“Any express or implied conditions, statement or warranty or otherwise not stated herein is hereby excluded.”

The buyer sued for a breach of warranty which was not included in the express terms in the printed form.

The Court held that the buyer, having signed the form voluntarily and without any misrepresentation on the part of the sellers, was bound by the contract, whether or not he had read and understood the terms printed (in “legible, but regrettably small print”) on the form.

As regards misrepresentation, Lord Justice Denning, dealing with an exemption clause, said in *Curtis v. Chemical Cleaning* (1951) (75):—

“When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or at any rate not so wide an exemption as that which is in fact contained in the document.”

The effect of this is that the condition (or exemption clause), but not the whole contract, is avoided. It is, perhaps, fair to suggest that this would apply whether or not the printed form was signed.

Estimate and Order Forms.—Applying the above principles to the printed estimate and order forms so commonly used in the commercial world, it is to be presumed that, where any such form contains conditions and has been signed as a contract, or part of one, those conditions are embodied in the contract, whether or not they have been read by the person signing.

Suppose the conditions are printed on the reverse side of the form, and the whole of the remainder of the estimate or order, including the signature, is on its face; will the presumption still stand? This would depend largely upon the individual facts, but, as the conditions are contained within the same piece of paper, they are, *prima facie*, contained in the signed document.

It could be otherwise, however, where the conditions are separately printed, for it is essential that, if they are to be effective, they are expressly embodied in the contract. Inclusion in the signed document of such words as:—

“This estimate (order) is given subject to our standard conditions of sale (contract)”

would probably be sufficient. If some such reference is not made, it will be a question of fact whether the party who signed the agreement could be deemed to be aware of the conditions; a problem which could be resolved only by applying the *Parker v. South Eastern Railway Co.* questions to the facts of the case.

Difficulties may arise when an estimate on a printed form is accepted by an order on a similar form, both having conditions embodied. Doubtless the two sets of conditions will be at variance. What, then, is the position? There are two possibilities. If the order states expressly in the writing that the estimate is accepted subject to certain of its conditions being replaced by those of the buyer, it amounts to a counter-offer and is a rejection of the estimate (see p. 49). But an order which makes no reference to the buyer's conditions will be an acceptance upon the terms of the estimate. Whether the inclusion of a clause, on the face of the order and drawing attention to separate conditions, would be sufficient to make the acceptance a counter-offer, is a matter which would depend upon the wording of the clause and the other circumstances of the order. Were the writing simply in the form of, “Please supply . . . in accordance with your estimate of . . .,” it is probable that the buyer's conditions would be a nullity.

Incorporation of Terms.—It is not necessary actually to reproduce in a written contract everything which is required to be a term of that contract. This applies particularly, of course, to those terms which are implied at law. But where the terms to be incorporated are contained in some other document, it is sufficient that specific

and unambiguous reference is made in the writing to that document. For example, it is necessary, where applicable, to specify compliance with the "Regulations for the Electrical Equipment of Buildings" of the Institution of Electrical Engineers, or with any Codes of Practice or British Standard Specifications. As none of these have statutory force, they cannot be effective unless they are deemed to be embodied in the contract and are expressed as being conditions.

Acts of Parliament and statutory regulations do not require mention. Compliance with their provisions is to be implied in every case where they would be applicable. Thus, it goes without saying that a contractor will be expected to observe the provisions of, say, the FACTORIES ACTS, 1937 and 1948, or the BUILDING REGULATIONS, 1948. But it is to be observed that, as such statutes and regulations are prohibitory in nature (*see* p. 80), they may not be expressly excluded, for to do so would introduce a taint of illegality sufficient to render the contract void from the start.

Standard Conditions of Contract.—Conditions of contract (sometimes referred to as "conditions of sale") have for many years been standardised within the engineering and allied industries. There is, of course, a great variety of them, drawn up to meet particular needs, but in nearly all fundamental matters there is a surprising uniformity. It could be said that these standard conditions now form a code to which all engineering contracts must conform, and to some extent that is entirely true. Whether this is a good or a bad thing may be a matter of opinion, but it would seem to depend upon the motives behind the standardisation, for there are two types of conditions which must be sharply differentiated.

It is common practice among commercial firms to lay down conditions of sale which are aimed, apparently, at avoiding as much liability as possible. This may, of course, be perfectly fair and a buyer of goods who has his eyes open realises the position. But, on occasion, some dishonesty creeps in and, under the guise of "guarantees" and other apparent concessions, the buyer is persuaded to enter into a contract which, though perfectly good in itself, gives him no protection at all. This is particularly true of contracts of sale for goods and equipment intended for use by members of the public.

In strict contrast to those types of conditions are the model forms issued by the Engineering Institutions. These are drawn

up with the twofold object of providing uniformity and giving a fair deal to both parties. The Institution of Electrical Engineers were pioneers in this respect, for, as long ago as 1903, a "Form of Model Conditions recommended for use in connection with Contracts for Plant, Mains and Apparatus for Electricity Works" was published as a result of the work of an Institution Committee representing the interests of purchasers, contractors and consulting engineers. The principles then established have been followed ever since, and there are now standard conditions suitable for all the normal needs of the civil, mechanical and electrical branches of the engineering industry. Some of these are specifically referred to in Appendix II (*see* p. 395).

Implied Terms

Because it is the intention of the parties which is the governing factor in determining the true tenor and purpose of a contract, the Courts will do all that is possible to preserve it, on the principle that the parties would never have entered into it had they not intended it to be effective. In order to achieve this, custom and commercial usage will, in appropriate cases, imply terms which have not been expressed, but which, it may be presumed, were intended. It may be that the express language of the contract precludes an implication being made, either because of specific exclusion, or on the grounds of inconsistency. Further, if one of the parties does not know, or could not reasonably be expected to know, of the custom or usage, such a term will not be implied.

Sale of Goods.—So far as contracts for the sale of goods are concerned, the terms which are to be implied are enacted in the SALE OF GOODS ACT, 1893. That Act codified the then existing case-law on sale and incorporated those tacit undertakings which had, by usage over the years, come to be read into commercial contracts by implication of the common law. S. 55 of that Act provides, however, that any such term may be expressly negatived or varied; and s. 14 (4) states that "an express warranty or condition" in the contract "does not negative a warranty or condition implied by this Act unless inconsistent therewith."

Implication of Terms by the Courts.—Apart from terms implied by custom and usage, there is an inherent jurisdiction in the Courts which enables them to supply a term or terms which will implement the presumed intention of the parties, and give "business efficacy" to a transaction which would otherwise fail. But such

a term must not contradict, or even vary, an express term; it must be sufficient, and no more, to save the contract from failing completely. Although the authority for this proposition is *The Moorcock* (1889) (76), Lord Justice MacKinnon put it in a nutshell in *Shirlaw v. Southern Foundries* (1939) (77).

“*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, ‘Oh, of course!’”

Despite this apparently simple definition of the limits of implied terms, the Courts do not find the principle easy to apply, because, in practice, that which may appear eminently reasonable or desirable in all the circumstances cannot always be strictly reconciled with the parties’ intentions as gathered from within the confines of the agreement.

Terms Implied at Common Law

A few of the terms which may be implied in engineering contracts will now be mentioned. It will be appreciated that a complete list of possible terms would be very lengthy; in any event, such a list could not by any means be a closed one, owing to the Courts’ power to imply terms giving business efficacy to a contract.

Exercise of Skill and Care.—One of the most important terms, and one which is implied in every contract in which it could be relevant, is that every person who holds himself out as an engineer, in whatever capacity and whether qualified or not, is expected to exercise skill and care to the degree normally accepted in the branch of engineering in which, and at the level at which, he professes to practise. What is more, he must exercise that skill and care without negligence (*see* p. 286). A “Plumber and Hot-Water Fitter,” for example, would probably not be considered competent to design a complete hot-water installation, though it would be otherwise if he described himself as a “Hot-Water Engineer.” The standard is set by the recognised custom of the particular branch of engineering concerned, and it is entirely a question of fact as to what that standard is. The liability extends to acts of employees in the course of their employment, for an employer is vicariously liable.

Fitness for Purpose.—In a contract for work and materials (which, of course, includes repairs) there is an implied warranty that the work will be carried out with skill and care, and that the materials will be of good quality and reasonably fit for the purpose for which they are being used. Fitness for the purpose will only be implied, however, where the person for whom the work is being done has made it known to the contractor, not only that the work and materials are required for a particular purpose, but that he is relying on his skill and judgement in the matter (*see also* p. 109). As Lord Wright put it in *Cammell Laird v. Manganese Bronze* (1934) (78):—

“Such reliance must be affirmatively shown; the buyer must bring home to the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation.”

But such reliance may be plainly excluded in such circumstances as were envisaged by Mr. Justice du Parq in *Myers v. Brent Cross* (1934) (79) (a case dealing with the repair of a motor car):—

“A man goes to a repairer and says: ‘Repair my car; get the parts from the makers of the car and fit them.’ In such a case it is made plain that the person ordering the repairs is not relying upon any warranty except that the parts used will be parts ordered and obtained from the makers. On the other hand, if he says: ‘Do this work, fit any necessary parts,’ then he is in no way limiting the person doing the repair work, and the person doing the repair work is, in my view, liable if there is any defect in the materials supplied, even if it were one which reasonable care could not have discovered.”

Any injustice to the repairer in these circumstances is more apparent than real, for he will invariably have a remedy over against the maker or supplier of the parts under the contract of sale to himself.

Sub-Contractors.—When work is put out to a sub-contractor, the rule stated in *Stewart v. Reavell's Garage* (1952) (80) will apply:—

“The repairer is liable for defective work on the part of his sub-contractor, even if the customer consents to the work being done by that sub-contractor, unless the customer, without placing reliance on the skill and judgement of the repairer, selects a particular sub-contractor by whom the work is to be done.”

“Sub-contractor” includes, not only a person or firm who does the whole or part of the work for the main contractor, but also one who supplies the materials and parts to the latter.

Compliance with Regulations.—It is an implied term that, where

the contractor knows the situation or purpose of the work he is to do, he complies with any relevant statutory regulations, such as those made under the FACTORIES ACTS. The question of reliance upon the contractor's skill and judgement does not arise, and is irrelevant; this is particularly so where the work involves installation or erection on site.

Furtherance of Purpose.—It is an obvious and fundamental principle that the parties to a contract should each do their best to perform it. For example, in *Mackay v. Dick* (1881) (81) which concerned the sale of a mechanical excavator:—

There was a written contract, which contained a condition that the machine should first be tried out at a place to be nominated by the buyer. If it were found capable of moving 350 cubic yards of clay from a properly opened-up face in a working day of ten hours, the buyer would complete the purchase. As it turned out, the buyer did not provide reasonable facilities for the trial; nor was the trial face which was offered properly opened-up. In consequence, the machine broke down.

The House of Lords decided that, as the sellers had been thwarted in their attempt to fulfil the condition through the buyer's own conduct, they could be said to have fulfilled the condition, which had virtually been waived by the buyer. The sellers were therefore entitled to recover the price of the machine.

Continuing Contracts.—A point of interest arises where, in course of business, a continuing (or "running") contract is entered into for a fixed period and, before the period expires, one party goes out of business. An example of a contract of this nature would be one for the maintenance of machinery, such as lifts in a building. Assuming that no express provision has been made in the contract for such an eventuality, can a term be implied that, should the building change hands, the contract is automatically at an end? The answer is that such an implication cannot be made, unless, within the principles already discussed, the Court sees fit to implement the intentions of the parties in order to save the contract from failing completely.

A recent example is afforded by *General Publicity v. Best* (1951) (82):—

Hotel proprietors entered into a contract with the plaintiffs for the supply of tariff booklets which would pay for themselves out of advertisements inserted by other firms. The relevant clause in the contract was:

"In consideration of your supplying us with 5,000 tariff booklets free of charge by advertising revenue, we agree to circulate or display

[them] to their best advantage in the course of our business over a period of three years."

After two years the hotel was sold, and the plaintiffs sued for breach of the contract.

The Court of Appeal held that "in the course of our business" did not mean "if and so long as our business continues." The sale of the hotel during the contract period did not release the proprietors from their obligations, which they could have carried out by assigning the contract to the purchasers.

Terms Implied in Sale of Goods

The old rule at common law was *Caveat Emptor* ("Let the buyer beware!") and, because of it, a buyer of goods who took no express warranty from the seller had no remedy against him, unless there had been a fraudulent representation. This was gradually modified, however, by custom and usage among merchants, and there are now a number of implied undertakings in contracts for the sale of goods, designed to protect the buyer.

These undertakings are embodied in the SALE OF GOODS ACT, 1893, and, unless they are excluded expressly in any particular case, they apply to every contract for sale of goods. There are four sections of the ACT which are relevant, in which, it must be noted, "condition" and "warranty" are used only in their strict meanings (see p. 99).

Undertaking as to Title.—S. 12 deals with title, and under its provisions:—

- (1) There is an implied condition on the part of the seller that he has a right to sell the goods.

This means that the seller either owns the goods or is acting as an agent with authority to sell them. Consequently, he is able to pass "good title" (*i.e.* the property) in the goods (see p. 129).

- (2) There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

Niblett v. Confectioners' Materials (1921) (83) provides an illustration.

The plaintiffs purchased 3000 cases of tinned condensed milk from an American firm. In 1000 of these cases the tins were labelled "Nissly Brand," and the Customs Authorities in London detained them on the ground that the labels constituted an infringement of the "Nestlé" trade mark. The plaintiff was compelled to remove the labels before the Customs would release the cases to him.

It was held that there was a breach of warranty in that the buyer's possession of the goods was disturbed by a third party who had a right to do so.

- (3) There is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer at the time the contract was made.

The point of this is that, if a third party has an interest in the goods, the seller should have informed the buyer prior to the sale. This would apply, say, where the bank has a charge on the goods to sustain an overdraft, or the seller is bankrupt (if an individual) or in liquidation (if a firm); in the latter cases, the seller could also have committed a criminal offence.

Sale by Description.—S. 13 provides that in a sale of goods by description, there is an implied condition that the goods correspond with the description.

"Description" usually refers to the particular kind of goods, although it will include any statement necessary to establish identity. It is really a question of whether the description is such that the goods turn out to be essentially different from what the buyer contracted to buy. In this connection, it should be noted that a false trade description will, under the MERCHANDISE MARKS ACTS, 1887 to 1953, render the seller liable to penalties, unless he can show that he has acted innocently, inadvertently, or under a mistake of fact.

Description must not be confused with quality or condition. "Safety Glass" is a recognised trade description, and, provided the glass supplied corresponds with that description, it is immaterial that it is of the "sandwich" type when the "stressed" type was expected but not actually specified; and it matters not that its safety properties are below standard, for that is a question of quality.

Fitness for a Particular Purpose.—S. 14 states that, unless there is some statutory provision to the contrary, no warranty or condition is to be implied as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

There are a number of exceptions, such as are provided by the FOOD AND DRUGS ACT, 1938, the MERCHANDISE MARKS ACTS, 1887 to 1953, and the ANCHORS AND CHAIN CABLES ACT, 1899. S. 14 itself provides three.

Sub-s. (1) "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's

skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose.

"Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to fitness for any particular purpose."

The matter of reliance upon the seller's skill and judgement has already been considered (*see* p. 106), and a simple example should make it quite clear.

Suppose that White is asked by Black to supply an electric motor to drive a certain machine, details of which he has given. It is reasonable to suppose that, as Black has specified the purpose for which the motor is required, he is relying upon White's skill and judgement, and expects him to supply the most suitable type. White will be at fault if he provides a motor which will not "do the job" because of, say, incorrect rating or speed, and Black will be under no obligation to accept it.

Reliance on the seller need not, however, cover the whole subject matter. For instance in *Cammell Laird v. Manganese Bronze* (1934) (78) (*see* p. 106) the contract was for the supply of ship's propellers. The materials and leading dimensions were specified by the buyer, but the details were left to the makers. It was held sufficient that the seller's skill and judgement were relied upon to a substantial extent, and that any unfitness for the purpose arose from the matters relied upon.

"Fitness for purpose" covers defects which could not be detected by the exercise of ordinary skill and judgement; and a seller will be liable for such defects if his skill has in fact been relied upon. The fitness extends to packaging which the nature of the goods renders essential. Thus, mineral waters sold in bottles (84), or oxygen sold in cylinders, include the bottles or cylinders, even though they may be returnable to the sellers.

The proviso that there is no implied condition where "a specified article is sold under its patent or other trade name" is, in practice, a limited one. The name must be, in itself, a sufficient description of the goods. For example, a specification that conduit or pipe fittings are to be of "Blank's manufacture" will restrict choice to Blank's products, though still leaving room for the exercise of skill and judgement.

Sub-s. (2) "Where goods are brought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality."

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“Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.”

“Merchantable Quality” has been defined by Lord Justice Farwell in *Bristol Tramways v. Fiat* (1910) (85) as meaning that:—

“The article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys it for his own use or to sell again.”

This condition is not excluded in the case of goods sold under a “patent or other trade name.” Although “merchantable quality” imports “saleability” (which covers packaging and labelling, as well as the goods themselves), it makes no difference whether the buyer is buying for his own use or for resale.

Wilson v. Rickett Cockerell (1954) (86) provides an illustration of non-compliance with this sub-section.

The plaintiff ordered a ton of “Coalite” from her coal merchant. Some of it, when burning in the grate, exploded, and did considerable material, but not personal, damage. It was found that the consignment of “Coalite” contained a piece of coal in which was embedded a detonator. It was not disputed that the coal had got mixed with the “Coalite” in course of transit.

Lord Justice Denning said (86a):—

“This consignment ought to have been of merchantable quality, and quite clearly it was not. The presence of the offending piece made it unfit for burning. No-one would buy the consignment if he knew that it contained somewhere in it an explosive piece.”

It is probable that the coal merchants were also in breach of s. 13 (*see above*). To quote the learned Lord Justice again (86b):—

“Mrs. Wilson ordered Coalite from the coal merchants but they did not supply what she ordered; they delivered, not Coalite alone, but Coalite mixed with a dangerous piece of explosive.”

(S. 14 (1) was, of course, excluded because of the use of the trade name.)

The proviso as to examination of the goods is dealt with in detail when considering s. 15 (*see below*), but it may be noted here that a buyer who is given the opportunity to examine the goods, but does not do so, is considered to have waived his right (87).

Sub-s. (3) ' An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of the trade."

This is self-explanatory.

Sale by Sample.—**S. 15** deals with sale by sample. A contract of sale will be one for sale by sample either where there is an express term to that effect, or it is to be implied by the custom of a particular trade.

The mere exhibition of a sample at the negotiation stage does not, of itself, make the subsequent contract one for sale by sample; it must be a clear term of the contract that a sale by sample is intended. The production of the wrong sample, where there is sale by sample, could be a ground for avoiding the contract on the basis of mutual mistake.

There are THREE IMPLIED CONDITIONS attached to sale by sample.

- (1) The bulk must correspond with the sample in quality.

A sale may be one by description as well as by sample, in which case **s. 13** provides that:—

"It is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

- (2) The buyer must have a reasonable opportunity of comparing the bulk with the sample.

Failure to provide such an opportunity will, of course, enable the buyer to repudiate the contract.

- (3) The goods must be free from any defect rendering them unmerchantable, and which would not be apparent on a reasonable examination of the sample.

The standard of examination is that generally accepted in the trade concerned, and is the same whether the goods are being examined in bulk (in accordance with the proviso to **s. 14 (2)**) or a sample is being inspected.

"The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself." So said Lord Macnaghten in *Drummond v. Van Ingen*

(1887) (88). His Lordship pointed out that "reasonable examination" means merely such an examination as is customary in the particular trade concerned, and does not contemplate unusual or detailed tests.

Should there be a defect in the sample itself, apparent upon reasonable examination, and the buyer does not find it or does not object to it, the seller fulfils his contract by delivering the bulk in accordance with the sample. But that relieves him of responsibility for lack of merchantable quality only in respect of such matters as could reasonably be judged from the sample (89). It does not exonerate him from the liability of delivering goods which themselves correspond with the sample (90).

Liability in Negligence.—The SALE OF GOODS ACT deals with contractual rights and obligations only. False descriptions may, of course, lead to criminal proceedings under the MERCHANDISE MARKS ACTS, 1887 to 1953; but, apart from that, there is also the possibility that civil proceedings may be brought in negligence. This may occur either because goods are dangerous in themselves, or because they contain some hidden defect. Liability in such cases is not confined to the seller but, where he has not made the goods, may extend to the manufacturer; and it is to the user, whether or not he is also the buyer (*see* Chapter 20).

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- (83) *Niblett Ltd. v. Confectioners' Materials Co., Ltd.* (1921) 3 K.B. 387. **C.A.**
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 - (a) at pp. 607; 632.
 - (b) at pp. 608; 633.
- (87) *Thornett & Fehr v. Beers & Son.* (1919) 1 K.B. 486.
- (88) *James Drummond & Sons v. E. H. Van Ingen & Co.* (1887) 12 App. Cas. 284, 297. **H.L.**
- (89) *Nusserwanjee Bomanjee Mody v. Gregson.* (1868) 4 Ex. 49. **App.**
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CHAPTER 8

The Performance of Contracts

I. COMPLETION AND THE PASSING OF PROPERTY

THE performance, or carrying through, of a contract involves a number of elements which must be considered in some detail. This and the following chapter are, therefore, devoted to a study of such matters as the completion of contracts for work and labour, or for work and materials, the passing of the property in goods or materials from seller to buyer, and the delivery and acceptance of goods supplied under contracts of sale. The fixing of the price in a sale of goods, and questions affecting payment under any contract, are also dealt with.

The law relating to the sale of goods is neither more nor less than a specialised branch of the general law of contract, and the provisions of the SALE OF GOODS ACT, 1893, constitute a codification of that general law as applied to contracts of sale. Consequently, much of the law applying to the sale of goods is equally applicable to contracts for work and labour, or for work and materials. No excuses need be offered for dealing with the general and specialised law "in one breath," as it were; far from producing confusion, it is felt that such treatment will aid clearer appreciation of what is, perhaps, one of the less easy aspects of the law of contract.

The SALE OF GOODS ACT, 1893, is constantly quoted in this and the following chapter. It is, therefore, referred to as "the ACT" to avoid needless repetition, and reference to sections is reference to sections of this ACT.

Completion of the Contract

The Time Element

One of the more important stipulations in any contract is the time clause, and its observance or non-observance may be a

considerable factor in determining whether or not the performance of a contract has been "completed" in law.

At common law, time is said to be "of the essence of the contract." This means that, unless a contrary intention is shown, the time of performance of a contract is an essential element which amounts to a condition; and this is so even where no time for completion has been expressed by the parties. Equity, however, takes the less rigid view, and a decree of specific performance may be granted (*see* p. 185), where it is possible to do so without injustice, despite failure to complete to time. The equitable rule now prevails to the extent that, in all cases where a contract is capable of specific performance, and wherever equity, in order to avoid hardship, would regard time as being not of the essence, the common law rule is superceded, even when damages are claimed.

Express Terms.—Where a contract contains an express stipulation as to time for delivery or completion, that stipulation amounts to a condition, which must be strictly adhered to. For instance, if delivery or performance is to be "in March," that means any day from 1st to 31st March inclusive; delivery or performance outside that period, whether made earlier or later, would be a breach of the condition (91).

Stipulations as to time are not always so specific. To take one example, the phrase, "as soon as possible," does not mean, "as soon as I possibly can" (*see* p. 40). As Lord Justice Bramwell said in *Hydraulic Engineering v. McHaffie* (1878) (92a):—

"To do a thing 'as soon as possible' means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time."

In that case the plaintiffs, who were making what they called a "gunpowder pile driver," ordered the "gun," which supplied the motive power, from the defendants, who contracted to supply it "as soon as possible." It seemed that the order had been accepted by the defendants without their having any real idea of how they were to fulfil it, but trusting that they would be given sufficient time to work out a solution. The learned Lord Justice put it thus (92b):—

"I think it would be utterly unreasonable to hold that the defendants were not bound to deliver the 'gun' until the state of affairs in their workshop should allow them to do so: the defendants ought not to have undertaken to make it, unless they were certain that they could carry out their contract: it is not likely that the plaintiffs

would have consented to wait, if they had known that the defendants had not then the necessary appliances to enable them to carry out the contract."

Although, in general, stipulations as to time of performance or delivery are of the essence of commercial contracts, s. 10 (1) of the ACT provides that whether such a stipulation is of the essence of a contract for the sale of goods depends upon the terms of the contract.

Implied Terms.—In cases where no time for performance or delivery is specified, there is an implied term that the contract will be performed within a reasonable time; and as to what is a reasonable time is a question of fact (93) (s. 56).

Waiver of Condition.—In *Hartley v. Hymans* (1920) (94), a case concerning the sale of goods, it was held:—

"Where, after the expiration of the period of delivery fixed by a contract for the sale of goods, the buyer by his letters and conduct leads the seller to entertain the belief that the contract still subsists and to act upon that belief at serious expense to himself, a new agreement may be implied that the period for delivery is extended and that delivery may take place within a reasonable time of which notice is to be given by the buyer to the seller."

In other words, the buyer may, by his conduct, waive the stipulation as to time.

That decision was followed, and was extended to contracts for work and materials, by the Court of Appeal in *Charles Rickards v. Oppenheim* (1950) (95). The facts in that case were:—

The plaintiffs were motor car dealers, and in 1947 Mr. Oppenheim purchased a Rolls Royce chassis, upon which he asked the plaintiffs to fit a body. He was quoted a delivery of "within six or at most seven months," and upon that basis he gave verbal instructions to proceed. The delivery date was to be 20th March 1948, but this was not kept to. Mr. Oppenheim continued to press for delivery, and asked for the car to be ready in time for Ascot, 1948; he did not get it, but was told he could have it in two weeks from 28th June. He then wrote to the plaintiffs, stating that 25th July was the last day he would accept delivery. The car was actually completed on 18th October, but Mr. Oppenheim refused to take it, and the plaintiffs sued him for the price of the work and materials.

The Court followed the decision in *Hartley v. Hymans*, and held that where a buyer continues to press for delivery after the completion date is passed, he has the right thereafter to give notice to the seller fixing a reasonable time for delivery, thus making time once more of the essence. As to what is a reasonable time is to be decided upon the circumstances existing at the date of the

notice; what remains to be done is important, but other relevant factors are that the buyer has previously given (and waived) notices to the seller, and that time was originally of the essence. The notice will remain valid despite a later change in those circumstances which may be inconvenient to the seller. On this basis it was held that Mr. Oppenheim was entitled to cancel the contract as he had done.

What Constitutes Completion

A contract is completed when it has been entirely performed. This entails the doing of work or the delivery of goods exactly in accordance with the terms of the contract, for otherwise there is no obligation on the other party to accept the work or the goods. In other words, completion by one party is a condition precedent to the performance by the other party of his obligations; partial completion does not fulfil the condition, and it amounts to a failure of the consideration essential to the contract.

"Entire" Contracts.—Every contract is presumed to be "entire;" that is, complete performance by the promisor is, *prima facie*, a condition precedent to the right to receive payment. A familiar instance is the so-called "lump-sum" contract, used largely in building work. It is well known that this type of contract frequently causes considerable injustice by enriching one party at the expense of the other. An example of such an injustice is afforded by the old case of *Cutter v. Powell* (1795) (96):—

Cutter, a sailor, was hired as second mate by one Powell, master of a ship sailing from Jamaica to Liverpool. Powell gave him a promissory note worded thus:—

"Ten days after the ship 'Governor Parry,' myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool.
(Dated) Kingston, July 31st 1793."

The ship sailed on 2nd August, and arrived at Liverpool on 9th October. Cutter went on board on 31st July and sailed in her, but died at sea on 20th September. His wife, as his administratrix, claimed payment on the promissory note.

The claim failed, for the Court held that there was an entire contract which, being in writing, spoke for itself, Mr. Justice Ashhurst saying (96a):—

THE PERFORMANCE OF CONTRACTS

“And as it is entire, and as the defendant’s promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it.”

Fortunately, there are FOUR EXCEPTIONS which alleviate the severity of the common law rule, though they do not by any means remove every possibility of an injustice occurring. These exceptions are:—

- (1) Where complete performance is rendered impossible because of the fault of the other party, or
- (2) Where there is evidence of a fresh agreement to pay for the work actually done,

the contract will fall within the DOCTRINE OF *quantum meruit*.

- (3) Where, due to the happening of an unprecedented event not contemplated by the parties, performance of the contract becomes impossible,

the LAW REFORM (FRUSTRATED CONTRACTS) ACT, 1943, will provide relief (see p. 163).

- (4) Where the contract has been substantially, but not precisely completed,

the Courts will apply the DOCTRINE OF SUBSTANTIAL PERFORMANCE, whereby the contract is deemed to be complete, subject to compensation for unfinished or defective work.

The Doctrine of *Quantum Meruit*

A claim in *quantum meruit* (“as much as he has earned”) is a claim for reasonable remuneration in return for services rendered. In the case of goods supplied, the proper term is *quantum valebant* (“as much as they were worth”), but, as the doctrine covers both, it is common practice to refer to them comprehensively as *quantum meruit*. One party to an entire contract may make such a claim where:—

- (a) The contract has not been completed because of the fault of the other party, or
- (b) “There is something to justify the conclusion that the parties have entered into a fresh contract” (97).

Where it is the fault of one party that the other cannot complete his share of the contract, the inference is that there has been a breach due to the default, and the contract is at an end. That being so, the law looks to the defaulting party, whether or not he

has actually benefited, to recompense the other, for "under these circumstances, the plaintiff ought not to lose the fruit of his labour" (98). This principle will apply equally where something has been done under a contract which, for one reason or another, is found to have no validity; except that it will not be applicable in the case of an illegal contract, unless there is a *locus pœnitentiæ*, or the parties are not *in pari delicto* (see p. 83).

Evidence of a fresh agreement may be afforded either by an implied promise to pay for what has actually been done, or from the circumstances. But it must be clear that the party who will benefit from the work has the option of acceptance or rejection. S. 30 of the ACT provides a statutory example, for, where a wrong quantity is delivered to the buyer, he may reject a short delivery or, in the case of excess, may accept what he contracted to buy and reject the rest; but, if he accepts either the short delivery or the excess, he must pay at the contract rate (see p. 140). But there must be an option. In a building contract, for example, an owner may be left with a half-completed structure because his contractor has insufficient funds to finish the job. No question of acceptance or rejection can arise, and the owner has no option but to complete it or pull it down.

Different or Better Performance

Completion means completion in accordance with the precise terms of the contract. To complete an entire contract by doing different, or even better, work is not completion, and the contractor cannot claim payment, even in *quantum meruit*. Thus, in *Forman v. The Liddesdale* (1900) (99) the plaintiff contracted to do certain repairs to the ship *Liddesdale*, but did not do the work as stipulated, though he effected an equal or better repair. It was held that he could recover no payment, as there was an entire contract; and the owner, though he took the ship as repaired and sold it, was under no liability to the plaintiff.

To do additional work to that stipulated is rather different. Provided the work which was actually contracted for is complete, payment can be claimed for that work; but nothing can be obtained for work done outside the contract. For example, Black contracts with White to fit new bearings to an engine in return for a lump sum. Upon taking the engine down, Black discovers that the crankshaft requires truing if the fitting of new bearings is to be satisfactory. He says nothing to White, but

true the shaft and fits the bearings. Unless it can be shown that it was an implied term of the contract that additional work, essential for a satisfactory job, would be paid for, Black can recover no more than the agreed price.

Where time is of the essence, breach of the term in an entire contract is fatal. Smith contracts to deliver 25 tons of copper strip to Jones by 31st March. On 25th March he delivers 20 tons, but does not supply the balance until 5th April. Smith can claim nothing in payment, and Jones is not bound to accept even the 20 tons (100); if he does accept, he must, by s. 30, pay at the contract rate (*see* p. 140).

The Doctrine of Substantial Performance

What may be termed a relaxation of, rather than a true exception to, the common law rule is provided by the doctrine of substantial performance, first enunciated by the great Lord Mansfield in 1779 in *Boone v. Eyre* (101). The effect of this doctrine is that, where a contract is virtually completed, the contractor may claim for payment, despite minor variations from the exact terms.

The two leading cases are *Dakin v. Lee* (1916) (102), which concerned a lump sum building contract, and *Hoenig v. Isaacs* (1952) (103), where the supply of fitted furniture for a living room was the matter in dispute. The principal proposition of *Hoenig v. Isaacs*, which followed the decision in *Dakin v. Lee*, may be stated as follows:—

“In a contract for work and labour done for a lump sum payable on completion the employer cannot repudiate liability under the contract on the ground that the work though ‘finished’ or ‘done’ is in some respects not in accordance with the contract. Where the work is finished in the ordinary sense and there has been a substantial compliance with the contract, the price must be paid subject to . . . counterclaim in respect of any defect.”

In other words, if the work is “finished” in the ordinary sense, though some details may be lacking, the contract is regarded as complete, and defects which are not of such magnitude as to go to the very root of the contract will make no difference, for the purchaser’s remedy is a claim in damages. This doctrine is, of course, applicable in deciding whether the contract has been completed to time, and is recognised by the use of the phrase “practical completion.”

Hoenig v. Isaacs also decided a subsidiary proposition, to the effect that a purchaser who receives and uses goods “made to

order" under an entire contract, thereby taking the benefit of the contractor's work, cannot treat entire performance as condition precedent to payment. In taking the benefit he is deemed to have waived the condition, and his remedy for faulty work is a claim in damages only. This is in line with the provisions of the Act, for once a buyer has accepted goods under a contract of sale he cannot rescind (s. 11 (1) (c)); and to do any act in relation to the goods which is inconsistent with the ownership of the seller is tantamount to accepting them (s. 35) (*see* p. 143). Obviously, the receipt and use of goods, be they made to order or not, amounts to such an inconsistency.

Divisible Contracts

In a divisible contract the consideration is apportionable; each promise by the one party is in consideration of a distinct counter-promise by the other. Such a contract may be viewed as a series of entire contracts, but this is not to be presumed, even though it is intended that payment shall keep in step with performance. *Prima facie*, instalment contracts and so-called "running" contracts amount in fact to a series of entire contracts, for in the latter the giving and acceptance of each order constitutes a contract in itself (*see Rose and Frank v. Crompton*, p. 54). But whether a contract is, in any individual case, to be regarded as divisible is really a matter of the interpretation of its terms coupled with a consideration of the circumstances of the case, the overriding factor being the true intentions of the parties. (Further reference is made to this question when dealing with instalment deliveries of goods (*see* p. 141).)

Tender of Performance

The rule is that tender of performance which is not accepted is equivalent to complete performance. To tender is to make an offer, and to tender performance is to show willingness and ability to perform the contractual obligations. Thus, a contractor who cannot complete his part of the contract without the concurrence of the purchaser, and his attempts to do so are frustrated by the latter's attitude, is under no further liability. This applies equally to contracts for work and materials (or for work and labour), and for sale of goods.

The law as to tender of goods was stated by Baron Rolfe in the old Court of Exchequer Chamber in 1843, in the case of *Startup*

v. *Macdonald* (1843) (104). His judgement is too long to quote in full, but the essential part is contained in one sentence:—

“The law considers a party who has entered into a contract to deliver goods . . . to another, as having substantially performed it, if he has tendered the goods . . . to the party to whom the delivery . . . was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the goods . . . in order to ascertain that the thing tendered really was what it purported to be.”

The principle is equally applicable to tender of performance under a contract for work and materials.

The Passing of Property

In a contract of sale, whether it be for goods within the meaning of the ACT, or for goods in the sense of machinery with erection, it is important to know who has the property at any given moment, as this may be material in deciding upon which party the risk of loss or damage will fall.

Property and Possession

Property is a right of ownership, vested in the holder by virtue of title (*see* p. 129). It signifies complete control over an object, and has been defined as “the sum of all the ways in which a thing can be lawfully used and enjoyed, together with the right to possession.” Possession, on the other hand, connotes the physical control of something, coupled with the intention of retaining it, whether or not there is a right so to do.

A seller may at any given moment of time have both possession and property, but one may pass to the buyer without the other. He who has the right to possession without the property is a bailee; that is, he holds the goods of the owner (the bailor) upon an undertaking, express or implied, to return them at a time or upon an event which has either been agreed between them or is to be inferred from the circumstances. Where one party to a contract of sale is a bailee for the other, he is responsible to that other party under an implied contract of bailment, which is quite separate from the main contract. (As to bailments generally, *see* Chapter 13.)

Property in Goods

The passing of property in goods is governed by **ss. 16 to 20** of the ACT, which are set out below.

Generic and Specific Goods.—For the purposes of the ACT, goods may be either “generic” or “specific.” “Specific goods” are “goods identified and agreed upon at the time a contract of sale is made” (**s. 62 (1)**); “generic goods” are goods which are, as yet, unascertained, being defined in the contract by description only.

S. 16 provides that:—

“Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.”

“‘Ascertained’ means identified in accordance with the agreement after the time a contract of sale is made” (*105*). The passing of property in specific or ascertained goods is governed by **ss. 17, 18 and 19**; it will be appreciated that once goods are ascertained they are then, to all intents and purposes, specific.

Unascertained goods either do not exist (not yet having been manufactured) or, though physically available, have not been separated or specifically identified from a larger bulk. The point at which a portion of a bulk becomes ascertained is largely a question of fact. To know that in a certain place there is exactly 100 tons of copper wire of a specified quality and gauge is to know that there is there an ascertained quantity of specific goods, and a contract to buy or sell the whole is a contract for the sale of those specific goods. But a contract for a smaller tonnage is a contract for the sale of generic goods, which do not become ascertained until that tonnage is earmarked or separated from the bulk and appropriated to the contract.

Suppose Brown has such a stock of wire, and sells the whole of it to Green, who, in his turn, disposes of 20 tons to Black. For convenience, Brown holds the wire at Green’s disposal, and Green gives Black a delivery order (*see p. 138*) on Brown for the 20 tons, Black then lodging the order with Brown. Before Brown can take any action, Green puts a stop on delivery to Black owing to non-payment.

Black cannot compel Brown to hand over the 20 tons to him (on the ground that the goods are his under the contract), for no property has passed, Brown not yet having separated the 20 tons from the bulk. Neither is the giving of the delivery order to Black, and the handing of it to Brown, sufficient to pass the

property to Black, without some act by Brown in relation to the goods (106).

Intention that Property shall Pass.—S. 17 provides that the property in specific or ascertained goods is transferred to the buyer at such a time as the parties intend. The intention is to be ascertained from the contract terms, the conduct of the parties and the circumstances.

The agreed terms may be sufficiently clear as to indicate precisely when the property passes, or the circumstances and conduct of the parties may show that it is to pass upon the making of the contract. The latter usually occurs in "sales over the counter," where goods actually on display are purchased (but not, of course, where a sale is made from a demonstration or showroom model of, say, a refrigerator).

Ascertainment of Intention.—Where the intention of the parties cannot be gathered otherwise, s. 18 provides FIVE RULES for its ascertainment. The first four refer to specific, and the fifth to generic, goods.

Rule 1. "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

An unconditional, or absolute, contract is one which contains neither conditions precedent nor conditions subsequent (see p. 98). For example, a contract for goods "on sale or return" is a conditional contract; so is one involving something being done to the goods by the seller before delivery.

Goods are in a "deliverable state" when "the buyer would under the contract be bound to take delivery of them" (s. 62 (4)). This means that the buyer is bound to accept goods under the contract when they are complete and in the form which the parties contemplated when entering into the contract. This is illustrated by *Underwood v. Burgh Castle Syndicate* (1922) (107).

The plaintiffs agreed to sell a horizontal tandem condensing steam engine to the defendants, delivery being "free on rail, London." The engine was installed in premises in Millwall, London, and, before it could be despatched, it had to be separated from its foundation and dismantled. During loading on to rail the bedplate was accidentally broken, and the defendants refused to accept the engine.

The Court held that the property in the engine, intended to pass

when the loading was completed, had not so passed, because the plaintiffs were bound to do something to put the engine in a deliverable state, which "depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract" (107a).

Rule 2. "Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof."

Underwood v. Burgh Castle Syndicate also illustrates this Rule, which is a negative one, designed to cover the case of an article which is to be specially made for the buyer, or one which, though largely complete, requires finishing off to the buyer's requirements. "And the buyer has notice thereof" is important because, by putting this additional restriction on the passing of the property, the buyer is saved from having the risk in the goods transferred to him without his knowledge, for, as will be seen, risk usually passes with property.

Rule 3. "Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof."

It will be noted that the acts to be done are confined to those of the seller, and, for this reason, the buyer is again safeguarded, as in Rule 2, from having the risk passed on to him without his knowledge. Although the buyer may, by agreement with the seller, perform "such act or thing," his performance will not be a condition precedent to the passing of the property, and he will not be the seller's agent for this purpose.

Rule 4. "When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms, the property therein passes to the buyer:—

- "(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.
- "(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

The only part of this Rule which requires expansion is the phrase "adopting the transaction" in (a); (b) is self-explanatory.

A person who obtains goods on sale or return and then sells or pledges them, has adopted the transaction. The property in the goods has passed to him, and the original seller cannot recover them (108). It is not necessary, however, to sell or pledge the goods.

Green, a manufacturer, supplies lighting fittings on approval to Brown, a wholesaler, who in turn passes them to White, a retailer, on a sale or return basis. White installs them on trial in Black's house which is then totally destroyed by fire and the fittings are lost.

Brown has, by his act, caused the property to pass to him; in like manner, it has passed from him to White. White is therefore liable for the price to Brown, who in turn is liable to Green. The property has never passed to Black, so that, at the time of the fire, he held no risk on that account (though it is probable that, as a bailee, he will be liable to compensate White).

Rule 5 (1). "Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.

"Such assent may be express or implied, and may be given either before or after the appropriation is made."

Sale by description is covered by s. 13 (*see* p. 109). "Future Goods" are "goods to be manufactured or acquired by the seller after the making of the contract of sale" (s. 62 (1)).

This rule is applicable where there is a power of selection of a specified quantity of goods from a larger bulk. Where an order for, say, a hundred 60 watt pearl lamps is placed with a trader, the selection or appropriation of that quantity is normally done by the trader with the implied assent of his customer. On the other hand, Jones may go to Smith, a dealer, and say, "I want one of the $\frac{1}{2}$ h.p. motors you are selling at £9," to which request Smith will possibly reply, "Give me the £9, and you may select which one you like." Upon Jones picking out a motor, the property in it immediately passes to him.

Rule 5 (2). "Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Reservation of "the right of disposal" is a reference to s. 19 (*see below*). Delivery to "carrier or other bailee" includes delivery to the Post Office, and the property passes to the buyer at the moment of posting (109).

If it is remembered that this Rule deals with generic goods, it will be clear that what it provides is that the act of delivery to the buyer or his agent of a definite quantity of goods from an unascertained bulk, is sufficient to appropriate the goods to the contract and to pass the property, at one and the same time.

Seller's Reservation.—S. 19 deals with the seller's power to reserve the right of disposal of the goods until the fulfilment of conditions. Where such a right has been reserved, the property in the goods does not pass to the buyer, despite delivery to carrier, until the conditions are satisfied. As these provisions are principally applicable to export contracts, they are referred to in detail under that head (*see p. 255*).

When the Risk Passes.—S. 20 is based upon the old legal maxim, *res perit domino* ("Depreciation is the affair of the owner"). Risk *prima facie* passes with property, and the risk may therefore be with the buyer of the goods even though they are still in the possession of the seller. This does not, however, affect the seller's lien (or right of retention) over the goods for unpaid purchase money; nor does it oust the seller's liability as bailee to the buyer.

After stating that the risk passes when the property passes, irrespective of delivery, s. 20 then makes two provisos.

- (a) Where delivery has been delayed, risk in the goods, "as regards any loss which might not have occurred" otherwise, is with the party at fault.
- (b) The liability of either party as bailee for the other is not affected.

The first proviso, in referring to "any loss which might not have occurred," appears, by the use of the word "might," to put upon the defaulting party the onus of showing that the loss would have occurred in any event, if he is not to be liable. Thus, if the buyer has failed to take delivery by a specified date and the goods are destroyed by an accidental fire on the seller's premises, he, and not the seller, must bear the loss, unless he can show, as a question of fact, that, in all the circumstances, the loss should not fall upon him. Such circumstances might be as envisaged by Mr.

Justice Sellers in *Demby Hamilton v. Barden* (1949) (110), where he said:—

“It may be that the seller was in a position to sell the goods elsewhere and acquire other goods for the postponed time of delivery, and, if he does not do that and there is some loss in the meantime, the responsibility for the loss would be held to fall upon him. Again, there may be cases . . . where the seller has his goods ready for delivery as and when the buyer proposes to take them. . . . There is, of course, an obligation on the seller to act reasonably, and, if possible, to avoid any loss.”

The section is prefaced by the words “unless otherwise agreed,” which allows its provisions to be varied by express agreement. They may also be varied by trade usage. For example, in the fur trade, goods sent on approval are at the risk of the potential buyer, who is responsible for loss while they are in his hands, although the property has not passed to him (111). But, where there is no such trade usage, he will still be responsible as a bailee. The difference is that, under rule 5 (2) (*see above*), the property, and hence the risk, will pass upon delivery to carrier; but a bailee is on risk only when actually in possession, unless there are circumstances pointing to the contrary.

Something of an exception to s. 20 is provided by s. 7, which deals with the case of specific goods under an agreement to sell, as where goods are held by the buyer “on sale or return.” If goods on approval are stolen or destroyed before the risk passes to the buyer (that is, before the property has passed to him under rule 4 of s. 18), and there has been no fault by either party, the contract is avoided. But it follows that, if the risk has already passed (as by trade usage), s. 7 will be excluded.

Title to Goods

It does not follow that, because a person has acquired the property in a thing, he will be able to keep it. He must be able to prove “good title” to it, and anyone able to show a better title can claim it from him. Title is antecedent to the right of property, and in this context the term “good title” is used to signify the absolute right of the true owner.

Acquiring Title.—The rule is that no-one can give a better title than he himself possesses, and this is set out in s. 21 (1):—

“Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had,

"unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

"The provisions of this Act" refers to ss. 22 to 25, which provide exceptions to the general rule.

The proviso as to conduct is really an enactment of the rule of estoppel (*see* p. 26), enunciated by Lord Chief Justice Denman in *Gregg v. Wells* (1839) (112):—

"A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

This means that the owner of goods who allows another to sell them in good faith, cannot afterwards deny that the buyer has acquired good title.

Agency of Necessity.—S. 21 (2) excludes certain matters from being affected by the ACT:—

- "(a) The Provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.
- "(b) The validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction."

(a) is considered at a later stage (*see* p. 208). As regards (b), sales under statutory powers or by order of the Court do not concern us here; but common law powers include sale as an "agent of necessity," about which something must be said.

An agent of necessity is a person who acts for the benefit of another in circumstances of such urgency that it is not possible to communicate with that other. It has always been the rule that the master of a ship, finding himself in a foreign port and needing to obtain money for emergency repairs or the like, may hypothecate (*i.e.* pledge) the ship by entering into a bottomry bond (a form or mortgage of the keel) to secure a loan; in the same way, by means of a *respondentia* (a similar type of bond), he may hypothecate the cargo. He has power, also, to sell the ship or the cargo, and in so doing he will pass good title to the purchaser. In both events he is acting as the agent of the owner in circumstances of such real emergency as preclude his obtaining the owner's authority; he is an agent of necessity.

The scope of this doctrine is limited to cases of real emergency where, under an existing contractual relationship, one party is the bailee of the other's goods. The Courts have further confined it

to the carriage of goods by sea or by land, and are loathe to extend it to cases where goods are stored in premises. Lord Goddard said in *Sachs v. Miklos* (1948) (113):—

“There is no reason why, if it becomes commercially impossible, or extraordinarily difficult, for example, in the case of a strike or other breakdown of communications, for a carrier to communicate with the owner of goods, he should not be entitled to sell or dispose of them in the same way as the master of a ship. I know, however, of no case in which the doctrine of agency of necessity has been applied to carriers by land except where the goods are perishable.”

Market Overt.—S. 22 deals with sales in “Market Overt” or open market. Such sales are limited to retail transactions in England which occur in markets declared to be “Market Overt” by statute, charter or prescription (*see* p. 69, footnote). In the City of London, however, all shops are market overt for the purposes of their own trade.

The point about a sale of goods in market overt is that the purchaser obtains good title even though the goods may have been stolen. The SECTION provides:—

“Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.”

“The usage of the market” involves the conditions that the whole of the goods, and not mere samples, must be exposed for sale in the market, and must be sold between sunrise and sunset, during ordinary hours of business, on the days when the market is open. To buy something “in good faith” is to buy it honestly, whether or not the buyer has been negligent in, say, failing to enquire as to the *bona fides* of the seller (s. 62 (2)). But, if the buyer has reason to suspect that the goods are stolen, or that the seller has no right to sell them, he may be deemed to have notice of “defect or want of title” and will not, in that event, acquire any better title than the seller had.

Stolen Goods.—S. 24 provides that, where goods have been stolen and the thief has been convicted, the property in the goods reverts to the original owner. This means that the purchaser of stolen goods in market overt who still has the goods when the thief is convicted will have to part with them. But if he, before the conviction, has already sold them to someone else, he will not be liable to repay the purchase money to that person, although the latter will not be able to keep the goods.

If the goods have not been stolen, but have been obtained by fraud, then the conviction of the the offender for, say, false pretences, will not cause the property to revert in the original owner, and the purchaser in market overt will be unaffected. But similar facts may amount either to "obtaining goods by false pretences," or to "larceny by a trick;" the former is fraud, the latter stealing. The difference is in the intention of the party who is defrauded. Did he intend to part with both the possession of, and the property in, the goods? If he did, the offence is one of false pretences. But, if he had no intention of parting with the property, and was merely induced to give possession, the offence is stealing.

Voidable Title.—S. 23, which has a direct connection with the cases already considered when dealing with the voidability of contracts induced by mistake and misrepresentation (*see* pp. 87, 91 and 94), provides that:—

"When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

A seller of goods who "has a voidable title thereto" is one who has obtained goods under a contract which may be avoided by the other party because of mistake or fraud. Such a contract is valid until it is avoided, and title acquired before avoidance will remain good. Thus, in *King's Norton Metal v. Edridge* (*see* p. 88), the plaintiffs clearly intended to contract with "Hallam & Co.," and therefore intended to part with both their possession of, and the property in, the rivet wire. The defendants obviously bought from "Hallam & Co." in good faith, and they obtained good title in the wire before the plaintiffs avoided the contract. On the other hand, in *Cundy v. Lindsay* (*see* p. 88) there was held to be no contract, for Lindsay's did not intend to deal with Blenkarn, and they did not, therefore, part with the property in the handkerchiefs. Cundy's never obtained a title to the goods and, because of that, had to return them to Lindsay's.

Property Passing on Installation or Erection

Where goods, whether within the ACT or not, are supplied "with erection," or are installed on premises, the property in them will normally pass when, as shown by the express terms of the contract, it is intended to pass. But, if the contract is silent as to

this, there is authority for saying that the property does not pass until the contract is complete.

Implied Provision.—*Laing v. Barclay Curle* (1908) (114) concerned a contract for the building of a ship. It was a condition that the vessel would not be delivered or finally accepted until after official trials, and then only if the result of those trials was satisfactory. There were provisions in the contract for inspection of component parts, and for progress payments. The Lord Chancellor (Lord Loreburn) said in the House of Lords (114a):—

“The facts . . . that the ship was to be paid for by instalments, and that there was a power of inspection on the part of the purchasers, may be marks pointing to the property passing, but it is not conclusive. . . .

“I think the contract was for a complete ship, and the risk lay upon the builders until delivery, and there was no intention to make delivery or to part with the property until the vessel was completed.”

It follows, then, that where there is an entire contract for the installation or erection of equipment, with provision for acceptance trials, the property does not, *prima facie*, pass to the purchaser until he is satisfied with the performance figures. The fact that component parts of the equipment may themselves be subject to inspection or to acceptance tests by the purchaser, or that there is provision for payment as the work proceeds, does not affect the matter.

Express Provision.—An example of a case where express provision has been made for the passing of property is afforded by *Reid v. Macbeth and Gray* (1904) (115)

This was again a contract to build a ship, but, before it could be completed, the builders went bankrupt. At that date there were a number of plates, marked both by the makers and by Lloyd's surveyor at the former's works, lying at the railway station adjacent to the shipyard. The question arose whether the property in these plates was with the builders, or whether it had passed to the purchasers under Clause 4 of the contract, which read as follows:—

“The vessel, as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river or elsewhere, shall immediately as the same proceeds become the property of the purchasers.”

The House of Lords decided that this was an entire contract and that, despite the wording of the clause, the plates could not be regarded as appropriated to the contract. It was clear from the use of the words “as the same proceeds” that the property in the

goods in question would pass only when they became part of the structure of the ship.

Fixtures

This is a convenient place to refer to the vexed question of fixtures, which may, in some circumstances, have an effect upon the passing of property.

A fixture is anything which is attached to land or buildings in such a manner as to become part of the freehold (or "realty," as it is usually called). The property in a fixture vests in the owner of the freehold so soon as it is attached. So-called "tenant's fixtures" are not fixtures in that sense at all, but are chattels annexed to the realty. "When is a fixture not a fixture?" depends upon both the object of, and the degree of, annexation, and the question may usually be decided by ascertaining whether the chattel has been fixed to the realty for its more convenient use as a chattel, or to improve the land or building. Trade fixtures are tenant's fixtures which have been installed for the purpose of carrying on some business or manufacture; but a chattel which may be a trade fixture when installed in business premises, will not necessarily be a tenant's fixture when fitted in a private house. Both tenant's and trade fixtures must be removed, without damaging the fabric, before, or within a reasonable time after, the end of the tenancy, for otherwise they will revert to the owner of the freehold.

Property in Fixtures.—The effect of this doctrine upon the passing of property under a contract is best shown by example.

Brown contracts with Green, a garage proprietor, to instal some electrically-driven petrol pumps, with ancillary tanks buried in the ground, on premises rented by Green from White, the owner of the freehold. Under the terms of the contract the property does not pass to Green until the pumps are in full working order. Though the installation is virtually finished, there is delay in connecting the electricity supply, and Green will not accept the pumps until they have been tested under working conditions. In the meantime, White takes possession of the premises under a clause in the tenancy agreement (which is thereby at an end), because Green has consistently failed to pay the rent. What is Brown's position?

Supposing that Brown cannot claim payment on a *quantum meruit*, he will be able, as the owner of the property in the pumps, to reclaim possession of them. It has been held (116) that petrol pumps attached by pipes to tanks which are buried in the ground are tenant's fixtures, removable within a reasonable time after the

determination of the tenancy. But the tanks are fixtures and the property in them passes to the owner of the freehold the moment they are installed. So, unless Brown can come to some amicable arrangement with White that he may remove the tanks provided he makes good, White will have every right to retain them.

Concrete foundations are usually considered to be fixtures, though machinery bolted down to, or embedded in, such a foundation is a trade fixture (117). A printing machine, resting on the floor by its own weight, is a tenant's fixture, even if it is driven by an electric motor which is a landlord's fixture (118). On the other hand, a generating set, installed in a country house and bolted down to a concrete bed, has been held to be a landlord's fixture, though the batteries and switchboard were not, the explanation being that the set was not used in connection with a trade or business so as to make it a trade fixture (119).

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- (112) *Gregg v. Wells.* (1839) 10 Ad. & E. 90, 98; 113 E.R. 35, 38. **K.B.**
- (113) *Sachs v. Miklos.* (1948) 2 K.B. 23, 35. **C.A.**
- (114) *Sir James Laing & Sons, Ltd. v. Barclay, Curle & Co., Ltd.* (1908) A.C. 35. **H.L.**
(a) at p. 43.
- (115) *Reid v. Macbeth & Gray.* (1904) A.C. 223. **H.L.**
- (116) *Smith v. City Petroleum Co., Ltd.* (1940) 1 All E.R. 260. **Assize.**
- (117) *Webb v. Frank Bevis, Ltd.* (1940) 1 All E.R. 247. **C.A.**
- (118) *Hulme v. Brigham.* (1943) K.B. 152.
- (119) *Jordan v. May.* (1947) K.B. 427.

CHAPTER 9

The Performance of Contracts

II. DELIVERY, ACCEPTANCE AND PAYMENT

A CONTRACT for the sale of goods is completed when the seller has delivered the goods and the buyer has accepted and paid for them.

S. 27 of the ACT lays it down that:—

“It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.”

The parties to a contract are, of course, free to make what bargain they please, and stipulations as to delivery, acceptance and payment may be included as considered desirable or expedient.

Delivery

Delivery is defined by s. 62 (1) as the “voluntary transfer of possession from one person to another.” There may be actual delivery, as where the seller hands over the goods to the buyer; or it may be “constructive.” There are three possible forms of constructive delivery, the most common of which is by the transfer of a document of title, such as a bill of lading. It may be symbolical, as where goods stored in a warehouse are “delivered” by handing over the key. But, if the goods are already in possession of the buyer in some other capacity (*e.g.* as a borrower or hirer), the mere agreement by the owner to sell constitutes delivery “by attornment;” this applies also where the seller continues to hold goods after sale to the buyer.

Rules as to Delivery.—S. 29 provides five general rules:—

- (1) The place of delivery is the seller's place of business or, in the case of specific goods known to be elsewhere, the place where they are situate. Whether it is for the buyer to take possession, or for the seller to send them to him, depends upon the terms of the contract.

Where the seller is required under a contract to deliver goods to the buyer's premises, and he delivers them there to someone who is apparently authorised to receive them, he has fulfilled his obligation. Should that person turn out to have no such authority, and to have misappropriated the goods, the loss will fall on the buyer (120).

- (2) Where, under the contract, the seller must send the goods to the buyer, he must do so within a reasonable time if no time is fixed.

If a contract is for goods "to be delivered as required by the buyer," it is implied that the goods will be called for within a reasonable time. An inordinate delay on the part of the buyer may be grounds for the seller to rescind the contract, though he cannot do so, as a general rule, unless he has given notice to the buyer that unless delivery instructions are forthcoming by a specified date he will cancel the contract. But there may be evidence that the contract has been abandoned (121).

- (3) Where the goods are in the possession of a third person, there is no delivery unless that person acknowledges to the buyer that he holds the goods on his behalf.

Goods "in the possession of a third person" are goods held by that person as the bailee of the seller. It would obviously be unfair to such person for delivery to be deemed to have occurred without his knowledge, for he might have a lien against the seller for, say, unpaid storage dues (*see* p. 218). Such lien would cease the moment he parted with the goods. Hence the necessity for him to acknowledge to the buyer that he is ready to hand them over; in so doing he "attorns" to the buyer.

There is a PROVISIO that "nothing in this section shall affect the operation of the issue or transfer of any document of title to goods." A "document of title to goods" is defined by s. 1 (4) of the FACTORS ACT, 1899, as including bills of lading (*see* p. 253), delivery orders, and

"any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise . . . the possessor of the document to transfer or receive goods thereby represented."

Receipts for money paid are not documents of title (nor, incidentally, are motor-car registration books), but they may, nevertheless, be very good evidence of ownership. The transfer of a bill of lading (which shows title to goods in the course of transit by sea) operates always as delivery of the goods. On the other hand, a delivery order or "other document" is, as between the immediate parties, merely a token of authority to take possession; but it is always a document of title to the extent that it may be transferred or assigned to a third party in return for a consideration.

- (4) "Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact" (*see* p. 122).

- (5) "Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller."

It is never an implied term that the buyer shall pay extra to the seller for anything done in relation to goods before delivery. (As to "Deliverable State," see p. 125).

Delivery to Carrier.—S. 32 (which consists of two sub-sections) deals with the question of delivery of goods to a carrier.

- Sub-s. (1)** "Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer."

The purport of this is that the carrier is ordinarily the agent of the buyer to receive the goods, and thereby the property and the risk are passed to the buyer (if they have not already passed), provided the goods are in conformity with the contract. This is an inference which may, of course, be rebutted by express terms, though it may be corroborated if goods are to be sent "carriage forward." In "carriage paid" or "carriage free" contracts there is no such inference, and, unless there is an express stipulation otherwise, the risk remains with the seller until the goods are actually handed over to the buyer or his agent.

- Sub-s. (2)** "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case."

"If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat delivery to carrier as a delivery to himself, or may hold the seller responsible in damages."

This is applicable to cases where the seller is acting as the buyer's agent. It does not apply if the buyer has specifically named the carrier to be employed.

The arrangements to be made by the seller are usually governed by the normal usage of the trade or industry concerned. For example, it might well be customary to despatch certain classes of goods at carrier's risk. This is illustrated by *Young v. Hobson* (1949) (122):—

The plaintiffs, carrying on business as shipbreakers, sold to the defendants certain electrical machines which were on a ship in process of being broken up. It was a term of the contract that the

machines should be despatched by rail, but whether at owner's or railway company's risk was not stated. In fact, the machines were sent, in accordance with what the plaintiffs averred was normal practice, at owner's risk. The machines were found, on arrival, to have been seriously damaged in transit, and the defendants refused to accept them. The plaintiffs sued for the price of the machines.

At the trial of the action it was held that the property in the machines, and therefore the risk, had passed under s. 18 (*see* p. 125), it having been found as a fact that they were in a deliverable state at the time of putting on rail. On appeal, the Court of Appeal decided that, whether or not the property in the machines had passed to the defendants, the plaintiffs had not, in all the circumstances, made a reasonable contract with the railway on behalf of the defendants, and the latter were justified in refusing to accept the machines, as provided by s. 32 (2).

Seller's Risk.—Delivery by, and at the risk of, the seller, as in a "carriage free" or "carriage paid" contract, is dealt with by s. 33:—

"Where the seller of goods agrees to deliver them, at his own risk, at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit."

This refers to the sort of deterioration which a particular type of goods would be expected to suffer if sent by the means of transit usually employed. Thus, steel sections, normally despatched by rail in open wagons, would be expected to rust, and that amount of deterioration cannot be laid at the seller's door. This is to be distinguished from damage to goods resulting from the seller's neglect to take ordinary precautions, as envisaged by s. 32 (2).

Incorrect Delivery.—S. 30 deals with the rights of the buyer to accept or reject incorrect delivery. Sub-ss. 1 and 2 are concerned with delivery of the wrong quantity of contract goods, whereas sub-s. 3 envisages deliveries where some of the goods conform with the contract and some do not.

Sub-s. (1) "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate."

Sub-s. (2) "Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate."

This is a statutory example of the application of the doctrine of *quantum meruit* (see p. 119). Delivery of a larger quantity is virtually a proposal by the seller that the buyer should enter into a fresh contract for the excess, acceptance of the contract being made by the acceptance of that excess. It follows from this that a buyer who does accept a larger quantity cannot afterwards sue for delivery of the wrong quantity. It also follows that a buyer who has contracted to buy a certain quantity cannot ask for delivery of a lesser quantity unless he is prepared to take the whole. Incidentally, no Court will have regard to comparatively minute variations, because of the maxim *de minimis non curat lex* ("The law is not concerned with trifles").

Sub-s. (3) "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

"Mixed with" means "accompanied by," and does not refer to physical confusion (123). (As to "description," see p. 109). The sub-section does not apply where goods answer the description but a portion is of inferior quality; in that event, the only option is to accept or reject the whole (although damages may be claimed in compensation for inferior quality). But the whole may not be accepted where the sub-section does apply.

Sub-s. (4) "The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties."

Instalment Deliveries.—S. 31 deals with instalment deliveries.

Sub-s. (1) "Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments."

Part delivery of goods under an entire contract may be rejected by the buyer under s. 30 (1), and it need not be accepted as an instalment unless there is such an agreement between the parties. Whether the acceptance of a part delivery can raise an implication of agreement to deliver by instalments is another matter, depending upon the surrounding circumstances. In certain cases, such as in "running" contracts, there will be an implied term that instalment deliveries are to be made.

Sub-s. (2) "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect

of one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated."

This has been explained by Lord Hewart in *Maple Flock v. Universal Furniture Products* (1934) (124):—

"A contract for the sale of goods by instalments is a single contract, not a complex of as many contracts as there are instalments under it.

"The main tests to be considered in applying the sub-section . . . are, first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated."

An instalment contract must, therefore, be distinguished from a divisible contract, where each promise is in consideration of a separate counter-promise (*see* p. 122). It may be difficult in any particular case to decide whether there is, in fact, a divisible or an instalment contract. The difference is that breach of one part of the former does not imply breach of the whole; but a defective delivery under the latter may enable the buyer to repudiate.

Neglect to Take Delivery.—By s. 37, a buyer is liable to the seller if he neglects or refuses to take delivery of goods which have been properly tendered to him. He will be liable for any loss occasioned by such neglect or refusal, and for a reasonable charge in respect of care and custody of the goods.

To take an example. Brown contracts to supply Green with an engine to drive a special machine which the latter is making for a customer. Delivery of the engine is tendered by Brown on the due date, but Green is not ready to receive it. Green is liable to Brown for his care and custody of the engine between the due date and the date when he actually takes delivery; he is also liable for any loss, directly attributable to the delay, which is sustained by Brown. But, should Brown not be ready by the contract date, and the time clause is waived by Green not pressing for delivery because he is not himself ready (*see* p. 117), neither will have a claim against the other, so long as Brown is ready to deliver the engine by the time Green is ready to receive it. On the other hand, if Green is ready to take delivery on the due date, and he accepts the engine notwithstanding delay by Brown, he may recover damages from Brown for any loss he has sustained as a result of the delay.

Acceptance

The word "acceptance" has two distinct applications in the law of contract, one being the acceptance of the offer in the formation of the contract (*see* p. 49), and the other the acceptance

of the acts done in its performance. Acceptance of the performance of a contract for the sale of goods is governed by s. 35 which defines "acceptance in performance" thus:—

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Acceptance in Performance.—An act "inconsistent with the ownership of the seller" is an acceptance within the meaning of the section. To resell, or attempt to resell, goods which have been delivered to the buyer (and this includes delivery to carrier as agent of the buyer), will be such an act (125). To select, mark or appropriate goods with the concurrence of the seller, or to retain a delivery note or to sign a carman's delivery sheet, could be an intimation to the seller by the buyer that he has accepted the goods (although this will depend largely upon the facts of the particular case). But where goods are sold by the buyer to a sub-purchaser, and it is agreed that the seller shall deliver direct to the sub-purchaser, there is acceptance by the buyer under s. 35 (126). A buyer who is already in possession of goods as a bailee, and who does something in relation to those goods which is inconsistent with the seller's ownership, may find that he has accepted the goods within s. 35, provided there has been constructive delivery to him (*see* p. 137).

Retention of goods "after the lapse of a reasonable time," without giving notice of rejection to the seller, is acceptance within s. 35. As to what is a reasonable time is, of course, a question of fact; five years has been held to be unreasonable (127).

It may be a term of the contract that acceptance in performance is subject to a condition precedent. In such circumstances acceptance may be withdrawn should the condition fail, but an attempted resale of the goods prior to failure of the condition may be evidence, though not necessarily conclusive evidence, of acceptance in any event. Once the goods have been unconditionally accepted, the contract cannot be rescinded, and breach of the condition precedent (or, for that matter, of any condition in the contract) can be treated as a breach of warranty only (*see* p. 99). In this connection, s. 11 (1) (c) provides:—

"Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for

specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

(As to "severable," see p. 280.)

Examination Before Acceptance.—S. 34, which deals with the right of the buyer to examine goods before acceptance within s. 35, provides that:—

Sub-s. (1) There can be no acceptance unless the buyer, not having previously examined the goods, has been given a reasonable opportunity of ascertaining whether they conform with the contract.

Sub-s. (2) "Unless otherwise agreed," upon tender of delivery, reasonable opportunity of examination must be afforded.

A buyer who has been given a reasonable opportunity of examining the goods, but does not take advantage of it, is deemed to have waived his right so to do (128) (see p. 111). But, whether or not such an opportunity has been given to the buyer, any act amounting to acceptance within s. 35 will automatically waive his rights under s. 34 (125). In a sale by sample, the buyer must, by virtue of s. 15 (2) (see p. 112), be given a reasonable opportunity of comparing the bulk with the sample. Here again, the opportunity may be waived by acceptance within s. 35, or by his failure to avail himself of it.

As to what is a "reasonable opportunity" is a question of fact, to be determined in the light of the circumstances. *Prima facie*, the place of examination is the place of delivery, but this presumption may be displaced by express or implied terms. Where these terms include stipulations as to the kind of examination, the result may be that other terms are affected (e.g. there may be an implication that the contract time should be extended to allow a stipulated examination to be properly carried out (129)).

Refusal to Accept.—S. 36 provides that:—

"Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

The buyer's duty is to notify the seller that he has rejected the goods, and to be ready to give him immediate possession; but he need not either return, or offer to return, them. But it would be

inconsistent with his right of rejection to do any act amounting to acceptance within s. 35.

The converse case, where the seller refuses to take back goods which have been properly rejected by the buyer, is not dealt with by the ACT. The old case of *Chesterman v. Lamb* (1834) (130) is, however, authority for the following proposition.

It is the duty of a buyer who, having notified the seller of his rejection of goods and of the fact that they are at the seller's disposal, is informed that they will not be taken back, to tender the goods to him. Refusal of tender entitles the buyer to sell the goods to the best advantage. He is liable to the seller for whatever price he receives, to the extent of the contract price only. Should the goods have been paid for already, the sum received may be set off against that payment, as the seller is liable for such purchase money so soon as the goods are tendered to, or taken back by, him. Any loss sustained by the buyer as a result of refusal of tender, and expenses incurred by the sale and for care and custody of the goods between the date of tender and the date of sale, are chargeable to the seller. The only other condition is that the period between tender and sale must be a reasonable one; this is a question of fact, taking into account that the buyer is obliged to get the best price he can in the circumstances.

Price and Payment

Price and terms of payment are usually fixed by the contract. The former is, of course, the consideration for performance by the party who is to receive payment. It follows, therefore, that, unless the price is actually fixed when the agreement is made, or unless there are express terms, or it is to be implied, that the price is to be fixed subsequently on an already agreed basis, or unless there are grounds for an implication that a reasonable price is to be paid, the contract is a *nudum pactum* for want of consideration (see p. 50).

The Price of Goods

In regard to the sale of goods, s. 8 provides that:—

- Sub-s. (1)** The price may be fixed, or left to be fixed as agreed, by the contract, or may be “determined by the course of dealing between the parties.”
- Sub-s. (2)** If not determined in accordance with sub-s. (1), a reasonable price must be paid.

The “price” of anything, whether goods or services, is the agreed or estimated value, expressed in terms of money; it need not be adequate, although it must be of some value. There is

nothing to prevent underselling or sale at a loss, but goods may be sold on condition that they may not be resold at less than a fixed price. Such a condition is binding only upon the immediate buyer, and does not affect a subsequent purchaser (131) (*see* p. 50), unless the goods are sold under a restrictive licence granted by virtue of a patent right, and the price is fixed by the terms of the licence.

"Price to be Fixed."—Should it be agreed that the price is to be arranged subsequently to the making of the contract, and there is nothing to show that it is to be fixed upon any predetermined basis, the contract will not, in fact, come into existence until the price is fixed. This is because the parties, by virtually reserving to themselves an option as to the price, have impliedly excluded sub-s. (2) (132).

In some circumstances, however, a reasonable price may be implied. For example:—

Smith sells some land to Jones, who wants it to expand his motor-coach hiring business. The sale is subject to an agreement by Jones that he will purchase all his petrol requirements from Smith "at a price to be agreed," and will not purchase elsewhere so long as Smith can keep him supplied.

These were the facts of *Foley v. Classique Coaches* (1934) (133), in which case the Court of Appeal held that a term was to be implied that the petrol supplied would be of reasonable quality at a reasonable price. It is an example of an implication being made by the Court in order to give business efficacy to the transaction (*see* p. 104).

Alternative Price.—The fixing of an alternative price may bring the contract within the orbit of wagering contracts, which are, of course, illegal and therefore void (*see* p. 79).

Sale at Valuation.—In connection with the provision in s. 8 (1) that the price may be fixed subsequently in a manner agreed in the contract, s. 9 deals specifically with agreement to sell at valuation.

Sub-s. (1) If it is agreed that the price is to be fixed by the valuation of a third party who cannot or does not so act, the agreement is avoided. But, if some or all of the goods have been delivered to or appropriated by the buyer, he must pay a reasonable price.

Sub-s. (2) If the third party is prevented by one of the parties from making the valuation, the party not at fault may claim damages from the other.

There is nothing that can be done under the contract itself to compel a third party to make the valuation. He is not privy to the contract (*see* p. 74), and therefore a decree of specific performance will not be granted by the Court. On the other hand, it would be possible, by means of an injunction (*see* p. 186), to restrain the party who is at fault from acting in such a way as to prevent the valuer making his valuation. The provision as to payment of a reasonable price is yet another application of the rule of *quantum meruit* (*see* p. 119).

Valuation under s. 9 is not the same as submission to arbitration (*see* p. 16), even though the latter may involve reference to valuers. Arbitration pre-supposes that there is a dispute, whereas valuation will probably avoid one.

Payment

Terms of payment are normally incorporated into written contracts, but, where no time of payment is mentioned, as is usually the case in oral transactions, payment within a reasonable time is to be implied.

Payment for Goods.—As regards sale of goods, s. 10 (1) provides:—

“Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale.”

This means that, unless the contract terms make it absolutely clear that non-payment by a certain date rescinds the contract, time of payment is not of the essence (*see* p. 116). This rule is not confined to sale of goods, but applies equally to contracts for work and materials.

S. 28, which must be read in conjunction with s. 10 (1), relates payment to delivery:—

“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

“Unless otherwise agreed” means, of course, unless the seller is giving the purchaser credit. The phrase “concurrent conditions” denotes that delivery of the goods and payment of the price are reciprocal obligations, neither being a condition precedent to the other (*see* p. 98). “Ready and willing” implies

not only the disposition, but also the capacity to deliver the goods or to pay for them (134). All that is necessary, therefore, is that the parties concur in the joint act, the one being ready and willing to perform his obligations as a condition of the other being ready and willing also. This is particularly applicable to sales "over the counter," there being no concluded contract until the customer's offer to buy has been accepted by the trader receiving the money, when he is obliged to hand over the goods (*see* p. 47).

Credit.—The giving of credit takes a transaction out of s. 28 and brings it within s. 10 (1). Payment is no longer a condition of performance, and the buyer has an immediate right to possession of the goods, once the property has passed to him.

In regard to instalment contracts, though s. 31 (2) allows for the possibility of defective deliveries constituting a repudiation of the whole contract (*see* p. 141), there is no such assumption affecting payments, and failure to make punctual payment for each instalment, as provided in the contract, does not necessarily raise an inference of repudiation (135).

There is no need for credit to have been expressly granted under the terms of the contract, for it may be implied from the course of dealings between the parties, or by virtue of trade usage or custom. The granting of discounts to encourage prompt payment is an indirect method of giving credit, as was instanced in *Amos and Wood v. Kaprow* (1948) (136):—

"Where a contract contains a provision which, without saying more, gives the buyer a discount off the price of the goods bought if he pays for them within a stated period from delivery, it has the effect of giving him credit during the stated period, but for no longer, and accordingly, if the price, less discount, is not paid within the stated period the full purchase price becomes payable at the end of that period."

Such a contract is clearly outside s. 28, for it gives a limited credit. Incidentally, "Prompt payment within 7 days less 2½ per cent discount" carries the same meaning even with the omission of the word "prompt;" in either case payment would be obligatory after the seventh day (136).

Recovery of the Price.—In contracts other than those for the sale of goods within s. 28, the time of payment may be related to the date of delivery or completion, or may be specified as due on a day certain irrespective of completion. Commonly used terms are "Payment by the 10th of the month following delivery,"

and "Payment as to 90 per cent upon practical completion, balance within one month after taking over." Whether or not payment is made to time, it is "nevertheless a payment in discharge of the debtor's obligation under the contract unless it contains special and exceptional terms" (137).

Neglect or refusal to make payment when due does not affect the contract itself, but gives rise to a right of action to recover the money (specifically provided in a sale of goods by s. 49). Once judgement has been obtained in such an action, the ordinary processes of law applicable to its enforcement may be set in motion, with the possible ultimate result of making an individual defaulter bankrupt, or of putting a defaulting company into compulsory liquidation.

Tender of Payment.—By a rule of English Law it is a debtor's duty to go to his creditor and tender payment of his debt so soon as it is due. That rule is, of course, subject to any stipulation as to payment which is either expressed in the contract or is to be implied by usage or custom.

Tender of payment, unlike tender of performance (*see* p. 122), does not extinguish the obligation, and a debtor may still be sued by his creditor even though tender has been made and refused. But a debtor who is so sued may offer a good defence to the action by paying the money into Court.

For tender of payment to be valid, "there must be an actual production of the money, or a dispensation of such production" (138). It must be made in the coin of the realm, and the precise amount due must be tendered. Change must not be asked for, and any amount in excess must be left with the payee (139). "Legal tender" consists of gold up to any amount, silver up to forty shillings and bronze up to one shilling (COINAGE ACT, 1870, s. 4). Bank of England notes, payable to bearer on demand, are also legal tender up to any amount (CURRENCY AND BANK NOTES ACT, 1954, s. 1 (6)).

Tender may be refused by the creditor on the grounds that legal tender was not made, that the money was not actually produced, or that a lesser amount than that due was offered. But, if his refusal is given for different reasons, he waives any objections there may be as to the quality or mode of tender (140).

Mode of Payment.—Although a particular method of making payment may be stipulated in the contract, it is usually inferred that normal commercial practice will be followed. In this

connection, *International Sponge v. Andrew Watt* (1911) (141) is of some interest.

Statements of account sent out by the plaintiffs to their customers contained three printed notices . . . "Cheques to be crossed," "All cheques to be made payable to International Sponge Importers," and "No receipt valid unless on the firm's printed form to be attached hereto."

The House of Lords decided that such statements did not contain sufficient intimation that the plaintiffs' travellers were not authorised to receive payment in cash or by cheque in their favour. But in *Mitchell-Henry v. Norwich Union* (1918) (142) it was held that the sending of nearly £50 in Treasury notes by registered post was not "payment," even though the payee stated that the sum due should be "remitted" to him.

Money Paid by Mistake.—Should payment have been made by mistake, the question arises whether the money so paid is recoverable from the payee. The general rule is that money paid owing to a mistake as to the law is irrecoverable, but if paid under a mistake of fact it may be recovered in certain circumstances.

There is usually little difficulty in deciding whether a particular mistake is one of law or one of fact. Money paid to the wrong person is obviously money paid under a mistake of fact; but, if paid as the result of a mistaken interpretation of a statute or regulation, it is equally obvious that the mistake is one of law. Occasionally, however, the difference is not so clear, as is illustrated by *Sebel Products v. Customs and Excise* (1949) (143), a case dealing with the imposition of Purchase Tax.

The parties differed as to whether Purchase Tax was leviable upon a certain product sold by the plaintiffs, and the latter brought an action against the defendants in order to have the question determined by the Court. Before the action was heard, but after it was brought, the plaintiffs paid to the Commissioners the amount of tax which would be due were the product held to be taxable.

Mr. Justice Vaisey having decided that Purchase Tax did not apply, the Commissioners then contended that the money already paid was irrecoverable as having been paid under a mistake of law. But the learned Judge held that, although there was no express agreement to refund the sum so paid, such an agreement could be inferred from the facts, and His Lordship added (143a):—

"An alternative short answer to the problem might be that the plaintiffs cannot possibly be said to have been under a mistake as to the law, at a time when they were in the very act of asking the Court to tell them what the law was."

Where the mistake is one of fact and is connected with the contract itself, it must be such as would render the contract void *ab initio* (see p. 86). Payment by mistake due to a misapprehension of facts is recoverable, even though the mistake was induced by carelessness, for carelessness not amounting to recklessness or indifference is usually regarded as irrelevant. But money paid without regard to whether it is due or not is irrecoverable in any event.

Deposits and Part Payments

Occasionally a buyer will give something to the seller in token of his *bona fides* in concluding a bargain. It may consist of some valuable thing or a nominal sum of money, to be returned upon the completion of the contract, but to be forfeit should he default. This goes by the name of "earnest," and it is of very great antiquity, being certainly known to the Roman law. The word itself is reputed to come from a Phoenician source.

Another name for earnest is "deposit," although the latter may also be treated as a part payment of the contract price, which earnest cannot be. However, they both have this in common, that if the contract is not performed by the giver, they are forfeit to the recipient, for the primary purpose in either case is a guarantee that the giver means business (144). On the other hand, money given solely in part payment, without any intention that it shall be treated as a deposit, cannot be forfeit, and it is returnable if the contract is not fulfilled. But that does not mean that it cannot be set off against a claim in *quantum meruit* (see p. 119).

The giving of a deposit, or the making of a part payment, may well serve to evidence the existence of an oral contract. But if this is to be of any value it is essential that actual acknowledgement has been made by the other party.

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CHAPTER 10

The Discharge of Contracts

A CONTRACT is said to be discharged when the parties to it have been freed of their obligations. In the normal course this occurs when the contract has been completely performed in accordance with its terms, be they express or implied. But there are four other ways in which discharge may occur, and these will now be considered.

In the first place, it is always open to the parties to discharge a contract by subsequent agreement, though this may not free them completely of obligation. Secondly, some event may occur which renders further performance impossible; the contract is then said to be "frustrated." Thirdly, a breach by one party of some condition which goes so far to the root of the agreement that further performance is either pointless or manifestly impossible, will relieve the other party of his obligations, and the contract will be discharged; as it will be if he renounces the contract by refusing to proceed further with it (often referred to as "anticipatory breach"). Finally, discharge may occur by operation of law, as where a simple contract is converted into one under seal, the former being automatically discharged by the latter (*see* p. 59).

I. DISCHARGE BY AGREEMENT

The obligations created by an existing contract may be extinguished by a new contract, provided it is made between the same parties and is supported by consideration (though consideration is not required if it is made under seal—*see* p. 56). In order to understand how this operates, it must be appreciated that a contract may be either executory or executed. It is EXECUTORY when agreement has been reached, but nothing has yet been done under its terms (*see* p. 49); but it is EXECUTED, wholly or partially, so soon as one party either has begun to

perform his obligations, or has made no attempt to carry them out within the time limited for performance.

Executory Contracts

An executory contract may be expressly extinguished by an agreement which does no more than that. Consideration for such an agreement is not required, because each party agrees to the release of the other from his obligations; the releases are mutual, each being in consideration of the other. It matters not whether the contract to be extinguished is simple or under seal, and the agreement may itself be a simple contract, and may be oral. Rescission will be implied if the parties have entered into an entirely new contract which is basically inconsistent with the first.

Partial Discharge or Variation.—Any oral or written contract, not under seal and not a contract of guarantee (*see* p. 55), may be varied as to its terms by subsequent oral agreement. At first sight this may seem to be at variance with the rule that oral evidence may not be adduced to show variation of a written contract (*see* p. 38). But that rule is applicable only to the admissibility of evidence for the purpose of proving that the writing does not truly represent the original contract; it does not exclude oral evidence of a variation made by subsequent agreement, for that will confirm rather than deny the contract which it purports to vary.

A contract under seal may be varied only by agreement under seal; a contract of guarantee cannot be varied otherwise than in writing. The reason for this is that "after the agreed variation the contract of the parties is not the original contract which has been reduced to writing, but that contract as varied," and, unless that variation is also reduced into writing, the varied contract "cannot in its entirety be enforced" (145*a*).

Discharge by Implication.—A subsequent oral agreement, intended to be in substitution of an existing written contract, will not effect a discharge unless it is "entirely inconsistent with the written one, or, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it" (146). The inconsistency must be sufficiently fundamental to make manifest beyond doubt that the original contract is to be extinguished in any event; a mere alteration of terms, however sweeping, will not necessarily amount to a rescission. If the written contract is

under seal, or is one of guarantee, the oral agreement will, of course, be a nullity so far as variation of the original is concerned. But, if its effect is to destroy the substance of the original by substituting an entirely new contract, the former will be discharged and the enforceability of the latter will depend upon whether it should, itself, be under seal or in writing.

Variation and Waiver.—A distinction must be drawn between variation and waiver of a contract condition. For example, a buyer continues to press for delivery of goods after the contract date has passed, and by so doing has waived a condition of the contract (see *Charles Rickards v. Oppenheim*, p. 117). Waiver of the condition might, in some circumstances, effectively discharge the contract, particularly if made orally; it would be effective to vary the contract only if writing or sealing were not essential. But it must be remembered that, firstly, a modification of the terms of a contract will not discharge it unless that modification goes to the root of it. Secondly, waiver is a voluntary forbearance by which one party refrains from enforcing his strict legal rights against the other. It falls within the *Hightrees* principle (see p. 52) and amounts to a subsidiary promise which is within the framework of an existing contract. But it does not vary the contract, and it need not, therefore, be in writing or under seal.

Executed Contracts

Where one party has performed his obligations under a contract, but the other has not, the latter may be released from liability by the former. This can easily be accomplished by agreement under seal, and consideration is not required. But discharge may also be obtained by simple agreement, which must, however, include consideration. Such an agreement is called "accord and satisfaction."

Accord and Satisfaction.—The basis of accord and satisfaction is:—

"The purchase of a release from an obligation . . . by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative" (147).

This form of discharge usually occurs where goods have been delivered, or work has been done, by one party, and the other is

unwilling or unable to make payment. To release a debt in consideration of the payment of a larger sum after the due date is good accord and satisfaction; but payment of a lesser sum is not good, unless it is paid either before the debt is due, or in a manner different to that originally stipulated. This is the Rule in *Pinnel's Case* (1602) (148), which, after a somewhat chequered history, was confirmed by the House of Lords in *Foakes v. Beer* (1884) (149).

The Rule may be illustrated by a simple example.

Suppose that the contract terms are payment on 1st December of the sum of £100, and on 15th November £50 is offered in full settlement. If the £50 is accepted, the debt is discharged, and the debtor cannot later be sued for the full amount. But, were the offer made on, say, 5th December, acceptance would not discharge the contract, and the balance would still be owing. If, however, payment were made after 1st December in a manner different to that stipulated (as by a bill of exchange, if cash payment was a term of the contract), the debt would be discharged.

It is submitted that if the £50 is offered, accepted and, in fact, paid, in full settlement, after the £100 is due, the debt is discharged to the extent that, on the *Hightrees* principle, the creditor cannot, in equity, bring any action for the payment of the balance (see p. 52). As the law stands at present, *Foakes v. Beer*, being a decision of the House of Lords, cannot be overruled save by Parliament; but that does not prevent the *Hightrees* principle being applied in cases which are not entirely consistent with it.

The Rule applies only where the sum is a liquidated one; that is, it is a definite or easily ascertainable sum fixed by the contract. An unliquidated sum, such as one based on a claim in *quantum meruit* (see p. 119), does not become "due" in the ordinary sense, and payment of a lesser sum than that claimed will be a sufficient consideration at any time.

Accord and satisfaction is just as much a contract as any other agreement supported by consideration, and produces the same result as where an executory contract is discharged expressly by a fresh agreement.

The Consideration.—Consideration will, of course, amount to good satisfaction if it is executed (*i.e.* performed). But a promise to perform (or "executory" consideration, as it is called), will also be accepted in satisfaction, provided it is clear that it is the promise as opposed to the performance that has been agreed to by the promisee or creditor (145*b*). Although the original contract

is discharged as from the date of the promise (and, therefore, no action may be brought under it), there is a fresh right of action in the promisee to enforce performance of the promise.

II. DISCHARGE BY FRUSTRATION

It is a basic principle of law that a contract to perform something which is not, from the start, absolutely impossible of performance, will not be discharged merely because of some supervening impossibility. To enter into a contract is to undertake certain voluntary obligations, and, as every man is presumed to know the consequences of his own acts, it is open to him to provide for those consequences by express terms in the contract. This principle has, however, been considerably modified by the application of the doctrine of frustration.

The Doctrine of Frustration

The original principle underlying the doctrine of frustration was stated by Mr. Justice Blackburn in 1863 in the case of *Taylor v. Caldwell* (1863) (150a):—

“The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.”

The facts concerned the letting of the old Surrey Gardens and Music Hall (situated near Newington Causeway in South London) for a series of entertainments.

Taylor and Lewis entered into an agreement with Caldwell and Bishop that the latter should have the use of the Hall and Gardens “for the purpose of giving a series of four grand concerts and day and night fêtes” in the summer of 1861, “Mr. Sims Reeves and other artistes” performing. On 11th June, before the date of the first concert, the Hall was accidentally destroyed by fire, and the concerts could not be given.

It was held that the agreement was discharged. In the course of his judgement the learned Judge said (150b):—

“There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.”

What Mr. Justice Blackburn called "impossibility of performance" is now, of course, generally referred to as "frustration of the contract." But, in *Joseph Constantine v. Imperial Smelting* (1942) (151a), Lord Wright pointed out that "frustration of the contract" is really an elliptical expression: "The fuller and more accurate phrase is 'frustration of the adventure or of the commercial or practical purpose of the contract'." In the *Fibrosa Case* (1943) (152a) Lord Wright explained that when a contract is frustrated, it is automatically terminated as to the future because

"Its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failure on either party. When the Court holds a contract to be thus terminated, it is simply giving appropriate effect to the circumstances of the case, including the actual contract and its meaning applied to the event."

In other words, it is a question of construing the contract in the light of the circumstances, in order (as Mr. Justice Blackburn put it in *Taylor v. Caldwell*—see above) "to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract."

The present view was summed up by the late Lord Simon in *British Movietonews v. London and District Cinemas* (1951) (153):—

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain which they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

Specific Applications of the Doctrine.—Until the *British Movietonews* case it was customary to categorise the types of cases in which the doctrine of frustration would be applied. Although this classification is now quite artificial, it is convenient to follow it in order to illustrate the doctrine.

- (1) Where performance depends upon the existence of some specified thing.

This is illustrated by *Taylor v. Caldwell* (see above). In

regard to sale of goods, it is provided by the SALE OF GOODS ACT, 1893, s. 7 (*see* p. 129) that:—

“Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.”

This section is concerned only with specific goods, the risk in which is still with the seller. Frustration of other contracts of sale is covered by the general law, but there can be no discharge once the risk has passed to the buyer. But, if the goods have perished without the seller's knowledge at the time when the contract was made, the contract is void *ab initio* (SALE OF GOODS ACT, 1893, s. 6), and no question of discharge can arise.

- (2) Where performance is rendered impossible by a change in, or an un contemplated operation of, the law.

This will not apply where the change or operation could have been in the contemplation of the parties at the time of the making of the contract.

- (3) Where, in a contract for personal services, the contractor cannot perform his part owing to personal incapacity.

Supervening ill-health or death will discharge such a contract as one of apprenticeship (154), or one made by a consulting engineer who has contracted on his own behalf and not on that of his firm (*see* p. 76). Internment as an enemy alien similarly effects discharge (155).

- (4) Where the basis of the contract depends upon the continuance of a state of affairs, or the happening of a certain event, so that, if there is a vital change of circumstances, the performance of the contract becomes commercially impossible.

Many contracts were discharged upon the outbreak of war, both in 1914 and in 1939, for the reason that their performance depended upon the continuance of peace. Not all such contracts were discharged, however, for it had to be shown that they were made on the assumption that war would not be declared.

Commercial Frustration.—**Category (4)** covers situations where the contract is frustrated because of some “commercial prevention.” The cases dealing with this aspect are liable to be confusing, as they are principally concerned with charterparties

and marine insurance. To avoid having to delve into the technicalities of those branches of the law, this type of frustration will be explained by means of a simplified example.

A ship, carrying cargo under a contract of freight, runs aground during a bad storm and damages her hull. The ship owners are insured against loss of freight charges, the policy providing, in effect, that the underwriters will pay as for a total loss if the assured are prevented by perils of the sea from completing the voyage.

The question at issue is, what constitutes sufficient "prevention by perils of the sea" as to discharge the contract of freight, thus rendering the underwriters liable?

It is an elementary principle that the ship owner has a contractual duty to repair the ship and complete the voyage, if that be physically possible. But what if the cost of the repairs is so great as to exceed the repaired value of the ship? Must the owner ruin himself in order to complete the contract? On the authority of the House of Lords in *Rankin v. Potter* (1873) (156) such a situation is sufficient to discharge the contract of freight. This decision was followed by the Court of Appeal in *The Bessie Morris* (1892) (157), when Lord Justice Bowen said:—

"The ship went aground; but, in order to show that she was prevented from performing the voyage agreed upon by the perils of the sea, she must have become unnavigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to incur it."

In *Kulukundis v. Norwich Union* (1937) (158), Lord Justice Scott expressed the view that the owner's duty to repair the ship and complete the voyage ruled out any contention that excessive cost of repairs could, by itself, cause the contract to be discharged.

"The rule expressed in cases like *The Bessie Morris* that in commercial contracts commercial prevention is equivalent to physical prevention has therefore to be harmonised with this rule of holding a man to his contract though it be financially to his own let or hindrance. Both rules are fundamental and the solution must transgress neither. The way of escape from the antimony in my view lies in a third principle of the law of contract—that a contract may be intended by both parties to be dependent for their mutual benefit upon some basic condition, such as the continued existence or availability of a particular thing, or state of affairs, so that if the condition fails the contract is discharged, or at any rate becomes unenforceable."

The result is, then, that if the ship is prevented by the perils of the sea from completing the voyage so as to earn her freight, the

contract is discharged, whether her incapability is due to physical or commercial causes or both, because the basic condition of the contract, that the ship in question would be able to complete the voyage, has been frustrated.

Elements Excluding Frustration

The doctrine will not apply where the supervening impossibility is something which could have been provided for in the contract. In other words, if one party knows that a certain event is likely to happen and does not provide for that eventuality in the contract, he cannot plead that that event caused frustration. Thus, in *Walton Harvey v. Walker & Homfrays* (1931) (159):—

The defendants, who were lessees of an hotel, contracted with the plaintiffs, a firm of advertising agents, allowing them to erect and maintain an electric sign on the roof of the hotel for a term of years. Before the end of the term the hotel was acquired by the local authority under statutory powers, and demolished. The possibility of acquisition was known to the defendants at the time when the contract was made, though they did not know precisely when the authority would exercise its powers.

The Court of Appeal held that the contract was not discharged.

The cause of the frustration must be one which affects both parties. "If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation" (160).

A claim by one party that a contract has been frustrated may be defeated by an averment by the other party that the frustrating event occurred through his negligence or default. It is not for him to prove that he was not negligent; the other party must show affirmatively that he was. Thus, in *Joseph Constantine v. Imperial Smelting* (1942) (151):—

A chartered ship, the "Kingswood," about to be handed over by her owners to the charterers for loading, was badly damaged by an explosion in the neighbourhood of her auxiliary boiler. The time needed for repairs was sufficient to frustrate the commercial object of the voyage. The subsequent Board of Trade enquiry failed to establish the cause of the explosion, although three possible explanations were put forward, nor could it say definitely that the owners or any of their employees were negligent.

The House of Lords decided that, as it had been established that the explosion had frustrated the commercial object of the charter,

and as negligence on the part of the owners had not been proved, the contract was discharged.

Express Provision for Frustration

It is common practice to include in a contract a clause providing for the suspension of certain obligations should performance be impeded by such events as strikes, inclement weather, shortage of labour and materials, and the like. Lord Haldane said in *Tamplin v. Anglo-Mexican* (1916) (161):—

“The question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.”

This was illustrated in the *Fibrosa Case* (1943) (152), where it was held by the House of Lords that a clause in the contract which provided for “a reasonable extension of time” in the event of delay due to various causes, did not prevent frustration by reason of war, even though express provision had been made for that contingency, because the war involved prolonged and indefinite interruption of prompt contractual performance. But, where a contract for the installation and hire of an internal telephone system in an office building contained a clause providing for the transfer of the installation to other premises during the life of the contract, it was held that a fire, which destroyed the premises and compelled the hirers to take other accommodation, did not frustrate the contract, for it was open to them under the contract to continue to hire an installation at the new address (162).

The Consequences of Frustration

At Common Law.—The important thing to bear in mind is that a frustrated contract is NOT void *ab initio*, but is valid and subsisting until the onset of the frustrating event. At common law the consequences were:—

- (1) Both parties were released from further performance of their obligations under the contract at the moment of frustration, and

- (2) Each party was bound to fulfil those of his obligations which had arisen previously to the occurrence of the frustrating event.

The result of this was that any loss occasioned by the discharge of the contract had to "lie where it fell," and neither party could claim against the other except under one of the contract terms. Money already paid could not be recovered, and any sum which had fallen due before the date of discharge was still payable. Further, payment due after discharge, for performance before discharge, could not be claimed.

This unsatisfactory state of affairs, which resulted in considerable injustice in many cases, was modified by the House of Lords' decision in the *Fibrosa Case* (1943) (152) in June 1942, to the extent that, where there had been a total failure to perform any part of the contract before discharge, money already paid could be recovered, and money due need not be paid. But this did not affect the case where there had been only a partial failure to perform; even a slight benefit received in return for money paid in advance would bar its recovery.

The Law Reform (Frustrated Contracts) Act, 1943.—Partly as a result of the decision in the *Fibrosa Case*, the LAW REFORM (FRUSTRATED CONTRACTS) ACT, 1943, was passed. It is concerned solely with the rights of the parties after discharge by frustration, and has no effect upon the principles or application of the doctrine; nor has it any application to contracts discharged for any other reason.

S. 1 of the ACT provides in effect that:—

- (1) Money paid before discharge can be recovered, AND
- (2) Money payable before discharge ceases to be payable.

But this is subject to the following:—

- (a) Where the party to whom the money was paid or payable before discharge has incurred expenses in the performance of the contract, he may recover these in whole or in part out of the money so paid or payable, where the Court, in all the circumstances, considers it just to allow him to do so.
- (b) Where any one party has received a valuable benefit (other than the payment of money as in (a)) under the contract from any other party, that other party may be awarded such sum as seems just in the circumstances, having regard to expenses incurred by the party who has benefited, and to the effect on such benefit of the circumstances giving rise to the frustration.
- (c) In estimating the amount of expenses to be allowed, account must be taken of charges for overheads, and for personal services, incurred by the person claiming them.

- (d) Sums payable under a contract of insurance by reason of the frustration are not to be taken into account, unless there was an obligation to insure under an express term of the contract or because of some statutory requirement.

S. 2 deals with the scope of the ACT, which does NOT APPLY AT ALL to:—

- (1) Any charterparty, except a time charterparty, or one by way of demise.
(Ships are normally chartered for specific voyages, but they may be chartered for a limited time, in which case the Act does apply. A charterparty by way of demise is rare, as it involves the charterer obtaining temporary ownership of the vessel.)
- (2) Contracts for the carriage of goods by sea.
- (3) Contracts of insurance.
- (4) Contracts discharged under the provisions of s. 7 of the SALE OF GOODS ACT, 1893 (*see pp. 129 and 159*).

In these cases, therefore, the common law rules continue to apply.

In applying the provisions of **s. 1**, the Court must have regard to any term in the contract which regulates the rights of the parties in the event of discharge. If part of the contract has been wholly performed before the time of discharge, and that part is severable from the whole, the Court must apply the ACT only to the remainder of the contract; this will usually apply to instalment contracts (*see p. 141*).

III. DISCHARGE BY BREACH

Breach of contract will occur where one party fails to perform some obligation as provided, or to be implied, in the terms of the contract. It may also take the form of "anticipatory breach," as when one party explicitly or impliedly renounces the contract before performance is due. In both cases the other party is entitled to claim damages, although the contract may or may not be discharged.

Anticipatory Breach

An intention to renounce a contract may be express or implied. Whilst it is obvious that an express renouncement will free the other party from the necessity for further performance on his part, it is not always so easy to establish that a particular breach bears the implication of an intention to abandon the contract. It is

entirely a question of fact whether such an intention is to be implied, and that depends upon the nature of the breach and the actual circumstances of the case. The question of renunciation commonly arises in the case of instalment contracts for the sale of goods, and it is then a matter of applying s. 31 (2) of the SALE OF GOODS ACT, 1893, as explained by Lord Hewart in *Maple Flock v. Universal Furniture Products* (see p. 141).

Conduct Not Amounting to Breach.—*William Cory v. City of London Corporation* (1951) (163) is illustrative of conduct which does not amount to anticipatory breach.

The Corporation, as a sanitary authority, entered into a contract in 1936 with the Company for the removal of refuse by the latter in barges. In 1948, on the advice of the Medical Officer of Health, the Corporation, in their capacity of public health authority for the Port of London, and by virtue of the PUBLIC HEALTH (LONDON) ACT, 1936, made a bye-law in respect of the coaming and covering of hatches on barges carrying refuse, imposing terms more onerous than those contained in the contract. The bye-law came into operation in 1950.

It was agreed by both parties that the bye-law was so onerous that it rendered performance of the contract commercially impossible after the date it became effective. The Company contended that the Corporation, in making the bye-law, had acted in anticipatory breach of an implied term of the contract that they would not impose more onerous terms in regard to its performance. The Court of Appeal held that such an implied term would be *ultra vires* the Corporation; there was therefore no anticipatory breach in 1948, and no repudiation in 1950. Though the Court was not called upon to decide the point, it was of the opinion that the contract might well have been frustrated.

Acceptance of Repudiation.—Unequivocal renouncement of a contract before performance is due allows the other party to elect which of two steps he will take. He may accept the repudiation by treating it as an anticipatory breach, and sue for damages; or he may ignore it and treat the contract as still subsisting. The reason for this choice between two alternatives is that renouncement or repudiation (as it is generally called) is not a one-sided affair. Unfortunately, the word "repudiation" is somewhat ambiguous, for, as Lord Justice Scott put it in *Toller v. Law Accident* (1936) (164), it may mean one of three things:—

"It may mean: repudiate the original existence of the contract.
It may mean: disclose an intention to disregard it *in toto* and refuse

to be bound by its terms altogether. Or it may mean: a mere contention that under the terms of the contract the defendant is completely free from liability by reason of some fact."

In the first case, repudiation will be immediately effective where the contract is void *ab initio*, as for illegality or mistake, or is voidable, as in the event of fraud or misrepresentation. Once the facts are proved, the innocent party has a right to repudiate or rescind, and his repudiation does not have to be accepted by the other party. This applies also to the third case, where one party claims that the contract is no longer binding because of the failure of a condition precedent.

In the second case there is no question of it being denied that there ever was a contract, or that it has automatically ceased to be binding. If the repudiation is not accepted, the party repudiating may change his mind, but, in any event, both parties take the risk of subsequent frustration. It is the acceptance of the repudiation which causes the contract to be discharged; until that happens, the contract persists.

"Anticipatory Breach" is thus a misnomer in cases where one party makes an express renouncement of the contract. But it is submitted that the expression is the correct one where that party deliberately places himself in such a position that he will be incapable, when the time comes, of tendering due performance. Whether he has done so or not is a question of fact, which will undoubtedly have a bearing upon the action the innocent party elects to take.

Breach in Performance

For a breach to discharge a contract, it must go to the root of it to the extent that further performance is rendered useless; the very foundation must be destroyed. Not every breach will accomplish this, for it is not the form but the extent which is the decisive factor.

Breach of Condition.—In general, it may be said that breach of a condition, as distinct from a warranty, will be sufficient to cause the contract to be discharged. As to whether a particular breach is of a condition is a question of fact as to its importance when looking at the contract as a whole (*see p. 99*).

Election by Innocent Party.—As in the case of anticipatory breach, the innocent party may elect either to treat the breach of condition as such and accept the repudiation, in which case the

contract is discharged; or to look upon it as a breach of warranty only, when the contract will not be discharged (*see* p. 99). But breach of condition will not be allowed to rescind the contract where the innocent party has received a substantial benefit under it, or, in a sale of goods, where the property has passed to him, or he has accepted the goods (SALE OF GOODS ACT, 1893, s. 11 (1) (c)). In such cases the breach must be treated as one of warranty only (the contract not being discharged).

Effect of Discharge

Where the breach discharges the contract, the innocent party is relieved from further liability under it, and may claim damages as well. But he is bound to return money or property received in part performance. If the circumstances are such that the *status quo* cannot be restored, then there can be no discharge and damages only can be claimed.

Sale of Goods.—In a sale of goods, where the buyer has not accepted them and the property in them has not passed to him, the goods must be returned to the seller and any part payment restored to the buyer. This is irrespective of any damages which may be claimed by either party (165). But the seller may not retain the money as a security for damages which he anticipates may be awarded (166).

Deposits.—Money held as a deposit by the innocent party, in earnest of due performance by the other, is, of course, forfeit to him in the case of discharge of the contract by breach, and does not, therefore, have to be returned. But, if such a deposit is, in fact, a part payment, it must be repaid. (As to whether, in any case, the money is a deposit or a part payment, *see* p. 151).

It sometimes happens, particularly in building contracts, that there is an express term which vests the property in materials, brought on to the site by the contractor, in the purchaser. The purpose of such a term is to give the purchaser security for due performance by the contractor. Should the contract be discharged owing to the contractor's default, he cannot recover the materials (167).

Claims for Damages.—The party who elects to rescind, or to accept the other party's repudiation of, a contract because of breach of a condition, retains the right to sue for damages in respect of that breach (168). If, however, it is the purchaser who has repudiated and the innocent party has partly performed under

the contract, a claim for the value of the work done may be made in *quantum meruit* as an alternative to a claim for damages (*see* p. 119).

IV. DISCHARGE BY OPERATION OF LAW

Discharge by operation of law, which is to be distinguished from the cases where a change in the law frustrates the contract (*see* p. 159), may take place

- (1) By merger,
- (2) By material alteration in a written contract, or
- (3) By lapse of time between the breach and the bringing of an action in connection with it.

Merger

A simple contract may be converted into one under seal. An example of this has already been discussed (*see* p. 59), where the simple contract formed by the offer of a tender and its acceptance is converted, by agreement, into one under seal. In a sense, this comes under the heading of discharge by agreement of an executory contract (*see* p. 154), for the simple contract is discharged by the one under seal; but it differs in that for merger to occur there must be no alteration or variation save as to form.

A truer example of merger is where the obligations and rights under a contract vest in the same person. For instance, Brown supplies Green, under a running contract, with parts for a type of machine which the latter manufactures. By a later agreement, Green purchases Brown's business *in toto*, and the former contract with Brown is automatically discharged.

Material Alteration

Alterations to documents have already been mentioned (*see* p. 38). At common law a material alteration (*i.e.* one made to some essential part) made in a contract under seal, after execution, rendered it void. The effect to-day of a material alteration to any written contract, whether under seal or under hand (*see* p. 56), is as follows:—

- (a) If the alteration is made by one party only, without the consent of the other, the one who made the alteration is barred from taking action on the contract, which is thus discharged.

- (b) An alteration made with the consent of both parties will not affect the validity of the contract, if its purpose is to clarify or confirm the true intentions of the parties at the time of execution. But, if its purpose is to introduce something new, the contract is discharged.

Lapse of Time

Up to the reign of James I, when the LIMITATION ACT, 1623, was passed, there was no fixed period within which an action might be brought on a breach of contract. That Act, the first of several collectively referred to as the STATUTES OF LIMITATION, provided that any action upon a simple contract had to be brought within six years, and one on a contract under seal within twenty years, of the occurrence of the breach. The effect of this was that, after the periods named had expired, the contract was to all intents and purposes discharged, because no action could be taken.

The Limitation Act, 1939. The old STATUTES OF LIMITATION were superseded, for all practical purposes, by the LIMITATION ACT, 1939. In general, actions founded on simple contracts may not now be brought "after the expiration of six years from the date on which the cause of action accrued" (s. 2 (1)); in the case of actions on contracts under seal the period is now twelve years (s. 2 (3)).

The Running of Time.—The moment when the cause of action may be said to accrue under a contract is the moment when the breach is committed, and time begins to run then, irrespective of when any damage consequent upon the breach is actually suffered. Once time has expired, right of action is extinguished, and the contract is to that extent discharged. Time will cease to run, provided it has not already expired, at the moment the first step in the action is taken, which is, in most cases, the date of the issue of the writ.

The practical effect of time running out at the end of the statutory period is, generally, that the contract is fully discharged. But it must be emphasised that the ACT is procedural only; the agreement is not destroyed, and the contractual obligations remain, though neither party can sue on them. For example, a seller may have a lien on goods for the price (*see* p. 190); despite the ACT, he may continue to hold those goods until he is paid, but he cannot sue for the money after six years from the date when payment became due.

The Effect of Acknowledgement.—By ss. 23, 24 and 25 of the ACT, any acknowledgement of a debt or liquidated claim under a contract will start time running afresh, as from the date of the acknowledgement. The statutory period will then run in full from that date, irrespective of when the cause of action actually accrued. An acknowledgement must, however, be in writing, and must be signed by the party making it, or his agent. Part payment of the debt or liquidated claim, made by the debtor or his agent to the creditor or his agent, will have the same result as a written acknowledgement.

The Effect of Personal Disability.—"Disability" is here used in the sense of "contractual incapacity," and does not mean physical disablement. Provision is made by s. 22 of the ACT for cases where a party is an infant (*see* p. 63), or is of unsound mind (*see* p. 64). The person concerned must be under the disability at the time the cause of action accrued. Time will not then begin to run until the disability ceases, or he dies before that happens. In the case of a person of unsound mind, once time has started to run, no subsequent recurrence of the disability will cause it to cease.

The Effect of Fraud.—S. 26 of the ACT provides for cases involving fraud or mistake. Where the basis of an action is fraud on the part of the defendant, or the right of action has been concealed by fraud on his part, or where relief from the consequences of mistake is sought, time does not begin to run until the fraud or mistake has been discovered. But the discovery must be made before the normal limitation period has expired, otherwise the section does not apply, unless the fraud or mistake was of such a character that it could not, with reasonable diligence, have been discovered before time had ceased to run. However, if there is a cause of action for some actual breach, which has been concealed by a fraudulent act on the part of the person who committed the breach, time will not begin to run at all until the concealment has, or could have, been discovered.

Public Authorities and Nationalised Industries.—Until recently, actions in contract against public authorities had to be brought within one year from the date when the cause of action accrued (s. 21). Further, those against Electricity and Gas Boards had to be brought within three years (ELECTRICITY ACT, 1947, s. 12; GAS ACT, 1948, s. 14). These provisions have been repealed, and the special periods of limitation abolished, by the LAW REFORM

(LIMITATION OF ACTIONS, ETC.) ACT, 1954, s. 1, which came into effect on 4th June, 1954. Henceforth, all such actions, whether accruing before or after that date, are subject to the provisions of s. 2 of the 1939 ACT, provided the shorter period has not already expired by the effective date.

Actions for Equitable Remedies.—An action brought to obtain some equitable remedy, such as a decree of specific performance (see p. 184), does NOT come within s. 2 of the ACT. This is because the STATUTES OF LIMITATION dealt only with actions for common law remedies. Originally there were no fixed periods within which equitable claims had to be brought, although a plaintiff would fail in equity if he were guilty of unreasonable delay. Thus, if his tardiness had resulted in the destruction of evidence by which the defendant could have rebutted the claim, or if he had acquiesced to the extent that it might appear that he had abandoned his rights, the Court of Chancery would refuse to hear the action, holding him guilty of *laches* (i.e. laxity in making his claim). But, apart from such circumstances, delay would be considered immaterial.

Actions for equitable remedies are still governed by the doctrine of *laches*. Although there is no rigid rule about its application (for the remedy sought will not be granted if it would be unjust or inequitable so to do), the Courts will usually apply the normal statutory periods of limitation to actions in which damages could also be claimed.

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- (168) *Mayson v. Clouet.* (1924) A.C. 980. **P.C.**

CHAPTER 11

Remedies for Breach of Contract

THE normal remedy for breach of contract is an award in damages, which is a sum of money fixed by the Court as compensation payable by the defendant to the successful plaintiff. But it may be that damages do not meet the case, and in that event the Court may, in its discretion, decree, either conditionally or unconditionally, that the contract is to be specifically performed; or, it may order an injunction to issue to restrain one party from committing a breach.

The award of damages is governed by the common law, supplemented in the case of a sale of goods by statutory provision. Decrees of specific performance and injunctions are equitable remedies, the ordering of which is a matter for the discretion of the Court; in practice, there are very few cases in engineering contracts where they are applicable.

A seller of goods who has not been paid for them has, of course, a right to sue for his money (*see* p. 149). In certain circumstances, however, he may also have rights over the goods themselves before they get into the hands of the buyer. These rights, which fall into the special category of "rights of the unpaid seller," are governed by the SALE OF GOODS ACT, 1893.

I. DAMAGES

It is advisable to be clear from the outset about the use of the word "**damage.**" In the SINGULAR it refers to the loss sustained, as a result of breach of contract; in the PLURAL it signifies the monetary award made by the Court to the party who has suffered that loss.

Damages awarded for breach of contract are given as compensation for loss suffered, and not as a punishment of the party responsible for such loss. The basic principle is *restitutio in integrum*, that is, the party who has suffered damage is to be put

as nearly as possible into such a position as though no wrong had been done to him. The only way in which this can be accomplished is by money. But a sum of money, however large, may not provide adequate compensation; or, looked at in another way, the damage may be so catastrophic that any award, to be sufficient, must be out of all proportion to the value of the subject matter of the contract. On purely practical grounds the law has taken the view that there must be some limit to damages, not only as to the amount, but also as to the kind of harm for which they may be awarded. In other words, whatever the damage actually suffered, that which will qualify for compensation must be due to causes which are not too remote from the breach itself.

There are three principles upon which the award of damages is based. Firstly, the damage must not be too remote; secondly, the measure of damages must be such as to amount to a full indemnity within the limits determined by the rule against remoteness; thirdly, it is the duty of the person claiming damages to mitigate as far as possible the loss caused to him by the breach.

Remoteness of Damage

The rule as to remoteness of damage in contract was first enunciated by Baron Alderson in 1854, in the well-known case of *Hadley v. Baxendale* (1854) (169), when the learned Baron said:—

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered

“either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself,

“or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

The two alternatives are commonly referred to as the “first rule” and the “second rule” respectively. Their application was considered at some length by the Court of Appeal in *Victoria Laundry v. Newman Industries* (1949) (170), and, in the course of his judgement, Lord Justice Asquith summarised the law in a series of propositions which, he said, emerged from the authorities as a whole. Put shortly, they are as follows.

REMEDIES FOR BREACH OF CONTRACT

- (1) Though the purpose of damages is *restitutio in integrum*, it is recognised that this is too harsh a rule, for it would provide a complete indemnity for all loss, however improbable or unpredictable, resulting from breach.
- (2) Everyone is presumed to know that breach will result in certain consequences, because, as a reasonable person, he is credited with imputed knowledge of "the usual course of things," and the loss that is liable to result from breach in that "usual course." This is the "first rule" in *Hadley v. Baxendale*.
- (3) But in addition to such imputed knowledge (which he may or may not have in fact), he may have actual knowledge of special circumstances outside "the usual course of things," of such a kind that breach would cause special loss. This is the "second rule" in *Hadley v. Baxendale*.
- (4) The test of knowledge under either rule is to be made as at the time of the making of the contract. But the "contract-breaker" need not have asked himself what loss was liable to result from breach, for parties contemplate performance and not breach when they enter into a contract.
- (5) "Actual knowledge" is knowledge of circumstances which might cause special loss. It is not necessary that the "contract-breaker" should, as a reasonable man, foresee that breach must result in that loss; it is sufficient that he realises that such loss is "on the cards."

Application of the Rules.—The practical application of these rules may be illustrated from the facts of the two cases cited above. In *Hadley v. Baxendale*:—

The plaintiffs were millers at Gloucester. Their mill had been put out of action by breakage of the crankshaft of their only steam engine. A new shaft was required, and this entailed the broken one being sent as a pattern to the makers, Joyce & Co., at Greenwich. A clerk was sent down to the office of the defendants, who were common carriers trading under the name of "Pickford & Co.," to arrange for the despatch of the shaft. It seems that all the defendants were told was that there was a broken shaft to be sent to Greenwich, and how soon could it go? They replied that if it were handed over to them by noon on any day, it would be delivered at Greenwich on the next day.

The shaft was duly handed to the carriers, but it did not reach Greenwich for several days, and in the result the mill was idle for longer than it need have been. The plaintiffs thereupon claimed for loss of profits.

The Court held that the loss of profits could not "reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both parties when they made the contract." The plaintiffs might have had a spare shaft, and merely wished to return the broken one to the makers; or they might have had a stand-by engine. The defendants were not to know, unless they were told (which they were

not), that the mill was shut down. Loss of profits was not something which arose naturally from the breach, nor could it, in the circumstances, have been in the contemplation of the defendants when they received the shaft for despatch.

The facts of the *Victoria Laundry* case were these:—

The plaintiffs, who carried on a laundry and dyeing business at Windsor, saw an advertisement by the defendants of two vertical Cochran boilers of "8,000 lbs./hr. capacity heavy steaming." Wishing to expand their business, they considered buying one of these to replace their existing one. In April 1946, they concluded a contract for the purchase of one boiler, as advertised, for a price which included loading on to transport at Harpenden. The defendants knew the plaintiff's business, and that the boiler was wanted for use in that business. They had also been told in the course of negotiations that the plaintiffs intended to "put it into use in the shortest possible space of time."

It was arranged that delivery was to be taken at Harpenden on 5th June, and a lorry was sent from Windsor to collect it. On arrival, it was found that, in the course of dismantling four days earlier, the boiler had been allowed to fall on its side and had thereby become damaged. The plaintiffs refused to take delivery unless the damage was made good. This was eventually done, and the boiler was delivered at Windsor on 8th November, twenty weeks after the due date. The plaintiffs claimed damages for loss of business profits during that period.

The Court of Appeal held that loss of profits was a true head of damage. Commercial concerns do not purchase large and expensive plant with any other motive than that of business advantage, and no supplier who knows that such plant is to be put into immediate use after delivery on the contract date can reasonably contend that it could not be foreseen that delay in delivery would result in business loss.

A further illustration is provided by *Hydraulic Engineering v. McHaffie* (1878) (171), already referred to when considering the time element in contracts (see p. 116). The "gunpowder pile driver" was a special machine, being made by the plaintiffs to the order of one Justice. The main contract specified delivery by a certain date, and the defendants, who were supplying the "gun", were aware that if delivery were late, the machine might be rejected, and would be unsaleable elsewhere. In fact, the machine was rejected, and the Court of Appeal held that the plaintiffs were entitled to recover from the defendants both their loss of profit and the expenditure they had incurred in making a machine which had become, to all intents and purposes, a piece of scrap. As Lord Justice Bramwell said (171a):—

"Where the contractee states that he wants the article agreed to be made in order to help him carry out another contract, the contractor if he commits a breach in the delivery of the article is liable for the loss sustained by the contractee if he becomes unable to carry out that other contract."

This is a decision which sub-contractors would do well to note!

Mitigation of Damage

It is the duty of a party claiming damages to minimise them as much as he is able. He is expected to take such reasonable steps as he can to reduce his loss, though he is not expected to risk money in order to achieve such a result. Neglect to mitigate his damage may prevent his claiming that part of his loss which is attributable to such neglect. On the other hand, a reasonable endeavour to mitigate which turns out to be unsuccessful or even mistaken, or one which in fact aggravates the damage, will not bar him from recovering. As to what is reasonable is, as always, a question of fact in the circumstances of any particular case.

The British Westinghouse Case.

British Westinghouse v. Underground Railways (1912) (172) is of considerable interest both on account of its facts and because it is a leading case on mitigation. The facts were these.

In March, 1902, the Metropolitan District Electric Traction Co. entered into a contract with the British Westinghouse Co. for the supply of eight turbo-alternator sets, each of 5,500 kW output. They were to be supplied during the years 1904 to 1906, and payment was to be made by instalments over a considerable period. The Underground Railways, who had taken over the Metropolitan Co. in April, 1902, found that the machines were defective both in design and efficiency, and failed to satisfy the contract provisions as to steam consumption, which greatly exceeded the guaranteed figure. Despite this, however, the machines were accepted and put into use.

In 1907 the makers, with the users' consent, endeavoured to improve matters with regard to one machine, the intention being that the other machines would be similarly improved in due course. After many months of experiment, however, the makers failed to reach the contract figures, and the users then decided to replace all the machines with 6,000 kW turbo-alternator sets of Parsons manufacture. The British Westinghouse Co. then claimed the balance of the purchase price of their machines, and the Underground Railways counter-claimed for the cost of installing the Parsons machines, and the loss sustained on account of excessive coal consumption.

The matter was referred to arbitration, and the arbitrator found as facts:—

- (1) That the purchase of the Parsons machines was a reasonable and prudent course.
- (2) That that step mitigated or prevented the loss or damage which would have been recoverable from the British Westinghouse Co. if the old machines had been kept in use.
- (3) That the superiority of the Parsons machines was such that, even if the British Westinghouse Co. had delivered machines to contract in the first place, it would still have been to the pecuniary advantage of the users to replace those machines by Parsons machines at their own cost.

The House of Lords held that the pecuniary advantage which the users derived from the superiority of the Parsons machine was a relevant matter for consideration in assessing damages. Lord Haldane, the Lord Chancellor, said that, whereas the fundamental basis for awarding damages is compensation for pecuniary loss naturally flowing from the breach,

“This first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. . . .

“This second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But, when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act” (172a).

Measure of Damages

The measure of damages is always monetary compensation in full for all loss sustained, subject to the rules as to remoteness and mitigation.

It is not in every case, of course, that the plaintiff succeeds in getting what he claims. For instance, in the *Victoria Laundry* case (see p. 176), a claim was made for loss under two heads, one being the wages of extra staff taken on in anticipation of the boiler being delivered to time. For the twenty weeks involved a total of £320, was asked, but only £110 was awarded, presumably because these workpeople were either stood off for some of the time, or were employed on other work. The other head of loss was the estimated profit over the period of some lucrative Ministry of Supply contracts, said to amount to over £5,000. The sum

actually awarded is not reported, but even were half allowed, the total damages would have exceeded the price of the boiler, which was £2,150. The defendants certainly stood to lose on the contract, for they had also to repair the damage occasioned when the boiler was allowed to fall on its side during dismantling.

Nominal Damages.—When no loss is proved, although there is no doubt that legal rights have been infringed, purely nominal damages are awarded, the sum granted being usually forty shillings. But, if the Court considers that the claim should never have been made, as where the plaintiff has nothing more than a bare legal right (established, possibly, with the assistance of some technicality of law), “contemptuous” damages of one farthing will be given.

Damages in Sale of Goods

The SALE OF GOODS ACT, 1893, deals specifically with damages in ss. 37, 50, 51 and 53; other instances of the award of damages under contracts of sale are covered by common law rules. There are, in all, five situations where loss arising “in the usual course” may be a head of damage.

Buyer Failing to Accept Goods.—By s. 50 (1), wrongful neglect or refusal to accept and pay for goods renders the buyer liable in damages, within the “first rule” in *Hadley v. Baxendale*. If there is “an available market” for the goods, then, by s. 50 (3), the measure of damages is, *prima facie*, “the difference between the contract price and the market or current price,” to be ascertained as at the time fixed for acceptance or, if no such time were fixed, at the time of refusal. The section applies whether or not the property in the goods has passed to the buyer (*see* p. 124 *et seq.*).

These provisions must not be confused with those of s. 37 (*see* p. 142), which cover the case where the buyer refuses delivery because he is not ready to receive the goods at that time, although he is not absolutely refusing to take them. It must also be appreciated that, alternatively to claiming damages under s. 50, a seller may bring an action for the price within s. 49 (*see* p. 149).

The rule as to market value or current price applies to goods in fairly common supply which can command a more or less ready sale. If such price cannot be ascertained, then the value at the time of delivery must be found by taking the cost to the seller and adding a reasonable margin of profit. If the seller has resold the

goods, the price he has obtained will probably be taken as the current value. But it might be that there is no market value at all, as in the case of the "gunpowder pile driver" in *Hydraulic Engineering v. McHaffie* (see p. 176), where the entire expenditure on the project was a total loss. In such an event, supposing the buyer were held responsible, the whole contract price would be recoverable, either as damages within s. 50, or directly under s. 49.

The seller is expected to mitigate the damage by acting in a reasonable manner. Thus, if the buyer repudiates before the time fixed for delivery, and there is a falling market for the goods, the seller should elect to accept the repudiation (see p. 165), rather than wait for the due date before he claims damages, which will then be considerably enhanced (although the net benefit to himself will be negligible).

Seller Failing to Deliver Goods.—S. 51 contains similar provisions to those of s. 50, and a seller who wrongfully neglects or refuses to deliver goods will be equally liable in damages.

A buyer who fails to get delivery of goods under the contract may obtain similar goods elsewhere, and, if it be reasonable for him to do so, the measure of damages will be the difference in price, provided, of course, that the substituted goods are comparable in quality with those bargained for under the contract. If a seller who fails to deliver knows at the time of sale that they are required by the buyer for resale, the measure of damages is the difference between the contract price and the resale price at the date fixed for delivery. It makes no difference that the seller did not know of an actual sub-contract (173).

Breach of Warranty by Seller.—S. 53 allows a buyer who has suffered a breach of warranty either to set off his loss against the price of the goods, or to claim damages within the "first rule" in *Hadley v. Baxendale*.

By s. 53 (3), the loss recoverable in the case of a breach of warranty of quality (such as is implied by s. 14 (1) of the ACT; see p. 109), is "*prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty."

If there has been a breach of condition by the seller in such circumstances that the buyer is not barred from rescinding the contract by s. 11 (1) (c) of the ACT (see p. 166), the buyer does not have to elect to treat the breach as one of warranty in order to obtain damages. He may both rescind and claim damages,

because rejection of the goods is, in proper circumstances, equivalent to failure by the seller to deliver them (*and see* p. 167). There is, therefore, no reason why the buyer, having rejected the goods, should not claim damages under s. 51 (*see above*).

Delay in Delivery by Seller or Carrier.—Where there is a delay in delivery, whether due to the seller or to the carrier, it is necessary to find what damage the buyer suffers “according to the usual course of things.” The measure of damage is the difference between the market value at the date when they should have been delivered and the actual value they had when delivery was made. Depreciation in market value between these dates is not the criterion, and must be ignored (174).

Failure by Carrier to Deliver.—In the case of non-delivery of goods by a carrier, the measure of damages to the consignee is the loss of the value of the goods, less any freight he might have been liable to pay upon their receipt. The value of such goods is their market value at the date they should have been delivered. But if there is no market for such goods in the ordinary way, so that there is no easily determinable market value, then an estimate must be made, based upon the cost of the goods to the consignee and the reasonable profit a person in his line of business would ordinarily make.

Where there is a recognised market value for the goods, no circumstances peculiar to the consignee are taken into consideration. For instance, the fact that the goods have already been resold at a price either more or less than the market price is irrelevant, as is the fact that the margin of profit which the consignee normally allows himself differs from that usual in his particular trade (175).

“Special” Damages.—Damages coming within the “second rule” in *Hadley v. Baxendale* are sometimes referred to as being “special.” The ACT is not concerned with damages other than those arising “in the usual course of things,” but s. 54 leaves the door open to “special” damages by providing that

“Nothing in this Act shall affect the right of the buyer or the seller to recover . . . special damages in any case where by law . . . special damages may be recoverable. . . .”

Thus, there is nothing in the ACT which runs counter to the general law in regard to damages, and particularly to the rules as to remoteness.

Liquidated Damages

Damages assessed and awarded by the Courts after consideration of claims brought before them are generally referred to as "unliquidated," in contrast to cases where the parties have, by an express term in the contract, fixed a sum to be payable in the event of breach. Where such a sum is a genuine pre-estimate of the damage likely to arise, it is said to be "liquidated."

"Penalty" *Clauses*.—Provision for payment of liquidated damages is frequently made in contracts where time is of the essence, certain sums being payable for each day or week by which the period for delivery or completion exceeds that stipulated. The term implementing this is commonly called the "penalty clause," though this is a misnomer. The law refuses to recognise attempts to exact any sum in the nature of a penalty, however much it may be disguised as damages. This is because of the equitable view that damages are sufficient compensation for actual loss; whereas a penalty, designed as a form of security for performance, may be out of all proportion to that loss.

Penalty or Liquidated Damages?—The principles upon which the Courts decide into which class a particular penalty clause shall fall were set out by Lord Dunedin in *Dunlop v. New Garage* (1915) (176). They may be summarised as follows:—

- (1) Though the words "penalty" or "liquidated damages" may mean what they say, the use of either expression is not conclusive.
- (2) "The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine pre-estimate of damage."
- (3) It is a question of the interpretation of the contract, in the light of its terms and the inherent circumstances, to be judged as at the time of its making, not of its breach.
- (4) If the sum stipulated is extravagant in comparison with the greatest loss which could be caused by the breach, it is a penalty.
- (5) If the breach consists of the non-payment of a sum of money, and the sum stipulated is greater than that sum, it is a penalty.
- (6) If a single lump sum is payable in the event of breach of any one of a number of terms, some of which may occasion serious, and others trifling, damage, it is a presumption (but no more) that it is a penalty.
- (7) If the consequences of breach are such as to make a precise pre-estimate almost an impossibility, a sum expressed as being liquidated damages for that breach probably represents the true bargain between the parties.

The facts of that case were that the plaintiffs supplied goods to the defendants under an agreement covering trade discounts, resale terms, and other conditions. The penalty clause stipulated that the defendants were to pay the "sum of £5 for each and every tyre, cover or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty." The House of Lords held that the stipulated sum represented liquidated damages (but they did not do so merely because it was expressed to be such).

In *Ford Motor v. Armstrong* (1915) (177), Ford's entered into an agreement with the defendants that the latter should not sell any Ford cars or parts below certain fixed prices; for any breach of that undertaking the defendants were to pay £250, "such sum being the agreed damages which the manufacturer will sustain." It was shown that the same sum was also payable for breaches of a different kind. The Court of Appeal held that the sum expressed as being "agreed damages" was, in fact, a penalty. But in *Law v. Local Board of Redditch* (1892) (178), where there was a contract to construct sewerage works and time was of the essence, the sum of £100, plus £5 per week, was payable in default of completion to time. The amount payable, expressed in the contract as being liquidated damages, was held to be such, as it became due upon the happening of a single event only.

Effect of a Valid Penalty Clause.—The fact that the actual loss sustained exceeds the amount agreed as liquidated damages does not allow the plaintiff to claim the greater sum. For example, in *Cellulose Acetate Silk v. Widnes Foundry* (1933) (179), the contract contained a penalty clause which stipulated that £20 would be payable for each week the contractors were in default of delivery of an acetone recovery plant. They were thirty weeks late in completing, and the purchasers claimed £5,850 as the actual loss sustained due to the delay. The House of Lords held that, as £20 per week was the full amount that the contractors agreed to pay in compensation for delay, they were liable for £600 and no more. As Lord Atkin said (179a):—

"Except that it is called a penalty . . . , it appears to be an amount of compensation measured by the period of delay. I agree that it is not a pre-estimate of actual damage. I think it must have been obvious to both parties that the actual damage would be much more than £20 a week; but it was intended to go towards the damage, and it was all that the sellers were prepared to pay."

On the other hand, the contractor cannot elect to pay the penalty rather than to perform his primary obligations, for he may be

compelled by injunction to carry out his agreed performance (180) (see p. 187).

Retention Moneys.—It is common practice to retain a percentage of progress or instalment payments for work done under a contract as retention moneys to cover defective work. In *Commissioner of Public Works v. Hills* (1906) (181) the plaintiffs, who were a department of the Government of the Cape of Good Hope, had provided in a contract for railway construction that, in the event of failure to complete within the specified period, retention moneys were to be forfeit "as and for liquidated damages." The Judicial Committee held that the Government were not entitled to treat the retention moneys as liquidated damages, because the total amount of such moneys was indefinite and depended upon the progress of construction and the quantity of defective work. It was not, therefore, a genuine pre-estimate of loss. But any damages awarded for such loss as was actually suffered could be so deducted.

II. EQUITABLE REMEDIES

In cases where an award of damages would provide inadequate compensation, the Courts may, entirely at their discretion, either decree specific performance of obligations arising out of a contract, or grant an injunction to forbid a threatened future act or to force the undoing of a past wrongful act.

The Basis of Relief

These remedies are purely equitable in origin, and they cannot, therefore, be demanded as of right. They are discretionary, but the discretion is exercised in no arbitrary manner, for the rules of equity are now as fixed as are those of the common law, and the granting of these remedies is dependent upon basic equitable principles. The Courts will not decree them in cases where it considers that it would be unjust, or would cause hardship, so to do.

He who seeks relief from equity must come to the Court with "clean hands;" that is, he must not have been guilty of such conduct in the transaction that it would be unfair to the other party that the remedy asked for should be granted. For example, he may have done something savouring of "sharp practice," which equity would look upon as being fraudulent, but which does not, perhaps, amount to fraud within its common law definition (see p. 93). Again, if he is guilty of *laches*, that will bar his remedy (see p. 171). In any event, if damages would be adequate, no equitable remedy will be granted, unless an award of damages

would have the effect of enabling the party in default to purchase the right to do that which he had contracted not to do.

The granting of a decree of specific performance, or an injunction, to the plaintiff in the action amounts to an order of the Court directed to the defendant. Deliberate disobedience of such an order may involve the defendant in proceedings for contempt of Court, with the consequent penalty of a fine or, possibly in an extreme case, of imprisonment until he "purges" his contempt by showing willingness to obey the order.

Specific Performance

A decree of specific performance of a contract is a decree by the Court, awarded to the successful plaintiff, that the defendant shall actually perform his obligations. It will not be awarded where there is no consideration, even when the contract is under seal and does not require it (*see* p. 56). In practice, its application is almost wholly confined to contracts which concern the sale or leasing of real property, but, even then, there are many cases where a decree will be refused.

Decrees in Sales of Goods.—By the SALE OF GOODS ACT, 1893, s. 52, a contract for the sale of specific or ascertained goods (*see* p. 124) may be ordered to be performed specifically, "without giving the defendant the option of retaining the goods on payment of damages." The decree "may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise" as may seem just.

Provided that the breach amounts to failure to deliver specific or ascertained goods, a decree may be granted although the property in them may or may not have passed to the buyer. But it will be refused where damages would be adequate, which means that, in practice, it will not be granted if the goods, being ordinary articles of commerce, are readily obtainable in the market. For example, a contract to deliver 100 tons of mild steel bars would not be specifically enforced, because such bars are freely obtainable (licences and allocations apart). But it is probable that the delivery of a special type of machine, made to order, would be enforced; no doubt the "gunpowder pile driver" in *Hydraulic Engineering v. McHaffie* (*see* pp. 116, 176 and 180), would have been held to fall into that category had the point arisen. Strangely enough, a contract for the sale of a ship is specifically enforceable under this section, for a ship is "goods" within the meaning of the ACT (182).

When a Decree Will Not Be Granted.—Specific performance will not be decreed where the contract is one for personal services, because a forced performance is unlikely to produce results; nor will it be ordered where the contract is not mutually enforceable by both parties, as where one of them is an infant (against whom it cannot be decreed).

If the performance of a contract would require the constant supervision of an officer of the Court were a decree granted, it will be refused. This applies particularly to contracts for building or for civil engineering construction, which will never be enforced unless there is a "building lease;" that is, unless the land has been leased to the contractor on condition that he erects a specified building, or carries out specified works, upon it. For this reason, a contract for the supply of machinery with erection cannot be the subject of a decree.

Agreement to submit to arbitration is not specifically enforceable. But where proceedings have been commenced in regard to a matter referable to arbitration under a term in a contract, an order to stay those proceedings pending arbitration may be obtained. This is allowed by s. 4 (1) of the ARBITRATION ACT, 1950, and, though the granting of such an order is discretionary, it would probably achieve the required result.

Injunction

An injunction is an order of the Court, granted to the successful plaintiff, which imposes on the defendant an obligation either not to do a threatened future act, or to undo a past wrongful act. It may be granted while proceedings are still pending, in which case it is an "interlocutory" injunction (*i.e.* one incidental to the main object of the proceedings); but if it is granted as a result of judgement in the action, it is "perpetual" or "final," and may be in addition to damages. Apart from that classification, there are two kinds of injunction. One which forbids a threatened future act is termed "prohibitory;" one which orders that the continuance of an existing wrongful state of affairs must cease, or that a past wrongful act must be undone, is called "mandatory."

Interlocutory Injunctions.—The object of an interlocutory injunction is to maintain the *status quo* until the action has been tried, and a final order has been made or refused, as the case may be. It can be granted upon the application of one party only, without the other even being present; such application is called

"*ex parte*." But for an *ex parte* application to be successful there must be some grave urgency, and, in order to safeguard the other party, the one applying is usually required to give an "undertaking in damages" that he will pay the other compensation for any damage caused to him by the injunction, should it turn out that it ought not to have been granted. Such an injunction will generally be prohibitory; a mandatory injunction is seldom granted upon an interlocutory application.

Restraint of Breach.—If it is desired to restrain a breach of contract by injunction, the term in the contract which is threatened to be broken must be a negative one. In a contract other than one for personal services (as to which *see below*), the term must be one which is negative in substance, though it may be expressed in affirmative terms. Thus, in *Metropolitan Electric Supply v. Ginder* (1901) (183):—

The defendant signed a form of request for a supply of electrical energy, subject, *inter alia*, to the term that he should take the whole of his supply from the plaintiffs for a period of not less than five years. Upon his attempting to take a supply from a rival undertaking (the identity of which is not recorded), the plaintiffs applied for an injunction.

It was held that the form of request was in substance a contract not to take electrical energy from anyone but the plaintiffs. Though the term was positively worded, it was negative in substance, and could therefore be enforced by injunction. Similarly, the plaintiff in *Foley v. Classique Coaches* (*see p. 146*) could have obtained an injunction against the defendants, had they endeavoured to obtain their supplies of petrol from any other source.

Even though damages may be an adequate remedy, it is possible that in some circumstances an injunction to restrain a breach of a negative term will be granted instead. This is because an award of damages might have the effect of allowing the party in default to purchase the right to do the very thing he had contracted not to do (184).

Sale of Goods.—The SALE OF GOODS ACT, 1893, s. 9, provides that where the price in a contract for the sale of goods is to be "fixed by the valuation of a third party," and such valuation is not made, the agreement is avoided, unless the "third party is prevented from making the valuation by the fault of the seller or buyer." The party at fault could be restrained by injunction from preventing the valuer from acting, for a term which provides

that there shall be a valuation imports an implication that neither party will do anything to interfere with it (*see* p. 146).

Contracts for Personal Services.—In a contract for personal services an injunction will be granted only where there has been a breach of an express negative undertaking; it is not sufficient that the term is in substance negative, though affirmative in form. Thus, in *Whitewood Chemical v. Hardman* (1891) (185), the manager of the plaintiff company agreed to give "the whole of his time to the company's business." It was held that this did not amount to an express negative stipulation, and therefore an injunction could not be granted to restrain him from working for others. But it would have been otherwise if the manager had also agreed expressly not to work for any other company. In that event, an injunction would be more likely to have a similar result to that of a decree of specific performance, by coercing him to fulfil his contract (186).

An injunction will not be granted if the result of its enforcement would be to deprive an individual of all means of livelihood apart from service under the contract. There is no humanitarian reason underlying this; it is simply that the effect of such an injunction would be precisely as though specific performance had been ordered (*see* p. 186).

III. THE RIGHTS OF AN "UNPAID SELLER" OVER GOODS

The seller or repairer of goods has a common law right, called "lien," to retain possession of them until the price or his charges have been paid. Innkeepers have a similar right over the belongings of a guest who does not pay his bill. But the SALE OF GOODS ACT, 1893, gives an unpaid seller certain additional rights against the goods.

Definition of "Unpaid Seller"

The term "unpaid seller" has a special meaning in the ACT, for the mere fact that the buyer has not paid the price of goods when due is not sufficient, by itself, to give the seller any other right than that of suing for his money under s. 49 (*see* p. 149). But, if the seller still has what might, somewhat loosely, be termed "control" over the goods, even though they have left his physical possession, and the buyer has not paid for them, or has become

insolvent, then the seller is deemed to be "unpaid" and may exercise certain rights over the goods.

S. 38 (1) defines an "unpaid seller" by saying that a seller of goods is deemed to be such:—

- "(a) When the whole of the price has not been paid or tendered;
- "(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise."

Payment or tender of price has already been dealt with (*see* p. 147 *et seq.*). Negotiable instruments include bills of exchange, cheques and promissory notes, and they are governed by the **BILLS OF EXCHANGE ACT, 1882**. It is unnecessary, for present purposes, to go into the technicalities of these documents, except to say that a bill of exchange is an order in writing, addressed by the drawer to the drawee, requiring the latter to pay on demand or at a fixed date a sum of money to a specified person, called the payee. The bill is presented for acceptance to the drawee, who is then called the acceptor; the drawer becomes the holder, and he can negotiate the bill for value to a third party, when he is said to have "discounted" it (because he will have had to take less than its face value).

A bill of exchange may be dishonoured by the drawee refusing to accept it, or by the acceptor refusing to pay when it has matured (*i.e.* the date for payment has arrived). The effect of dishonour is that the seller, as the drawer, will be deemed to be "unpaid," even though he may have discounted it. He will also be unpaid if the buyer (the acceptor) has become insolvent before the bill has matured (187), and the same will apply in the case of a post-dated cheque (188). By s. 62 (3), a person is deemed to be **INSOLVENT** who "either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due;" this applies whether or not he is liable to be made bankrupt.

When a bill of exchange is "received as conditional payment," the condition is the due delivery of the goods. Whether a bill has been given in absolute or conditional payment is a question of fact, but the latter is generally to be assumed (189).

The Rights of the "Unpaid Seller"

By s. 39 (1), an unpaid seller has certain rights over goods, the property in which has already passed to the buyer. These are:—

- (a) A right of **LIEN** for the price so long as he is in possession of the goods.
- (b) A right of **STOPPING THE GOODS** while they are in transit from him to the buyer.
- (c) A right of **RE-SALE**.

Where the property has NOT passed to the buyer, s. 39 (2) declares that the unpaid seller shall have "a right of withholding delivery similar to and co-extensive with" the rights of lien and stoppage conferred by s. 39 (1). This overcomes the difficulty that it is a contradiction in terms to refer to anyone having a lien over his own goods.

The Right of Lien

The lien is a right against the goods for the price only. A seller may not, after the price has been paid or tendered, retain possession of the goods for any other purpose, such as to enforce the payment of storage charges incurred during the period of lien (190).

S. 41 provides that an unpaid seller's lien subsists until payment or tender of the price, where the goods have been sold either without credit having been given, or upon credit terms which have expired. But the right of lien will arise immediately should the buyer become insolvent, irrespective of any unexpired period of credit. If the buyer becomes bankrupt, his trustee in bankruptcy steps into his shoes, as it were, and may either affirm or disclaim the contract, as is provided by the BANKRUPTCY ACT, 1914. Disclaimer will rescind the contract; but if the trustee affirms it, the lien revives (despite a breach by the seller), and the trustee must then pay or tender the price within a reasonable time in order to obtain the goods (191).

In the case of *INSTALLMENT CONTRACTS*, s. 42 provides that where part delivery of goods has been made, the right of lien may be exercised on the remainder, unless the circumstances of the part delivery show an agreement to waive the lien (*see below*). The seller need not make a further delivery until the goods already delivered have been paid for; what is more, he may refuse the further delivery until payment has been received for that too.

Loss of Lien.—Lien is founded on possession, and once that is gone the lien is gone. By s. 43 (1), an unpaid seller will lose his right of lien:

- (a) Where he delivers the goods to a carrier or other bailee for transmission to the buyer, and has not reserved a right of disposal in accordance with s. 19 (*see p. 128*).
- (b) "Where the buyer or his agent lawfully obtains possession of the goods."
- (c) "By waiver thereof" (*see below*).

Waiver of Lien.—The right of lien may be expressly or impliedly waived by the seller. Thus, an express term may be of such a

kind that lien implied at common law or by the ACT is excluded. A bill of exchange may have been drawn on the buyer for the price; lien will then be excluded until the bill matures, though it will be immediately revived by the buyer's insolvency (192). The seller may have assented to a sub-sale by the buyer; such assent will amount to an implied repudiation of his lien for, by assenting, he will be estopped from denying that the property in the goods has passed to the sub-buyer (193).

Repairing Contracts.—Where goods are held for repair, the provisions of the ACT do not, of course, apply. But the repairer has, at common law, a right of lien for his charges so long as the goods remain in his possession. In some circumstances the right may be extensive. For instance, in *Keene v. Thomas* (1905) (194):—

The plaintiff sold a dogcart on hire-purchase terms to one Robertson, who took it, during the hire period, to the defendant for repair. It was a term of the agreement that the hirer should "keep and preserve the dogcart from injury." Some instalments being unpaid, the plaintiff sought to recover the dogcart, then in the possession of the defendant, who was himself unpaid for his work. The defendant claimed a right of lien for his repair charges. The Court held that the hirer had the owner's permission, by virtue of the agreement, to send the dogcart for repair, and that the repairer's lien was good against both the hirer and the owner.

The Right of Stoppage in Transit

S. 44 provides that where the buyer has become insolvent within s. 62 (3) (*see* p. 189), the unpaid seller has the right of resuming possession of goods which are in course of transit to the buyer, and of retaining them until he is paid. The effect of this is that exercise of the right of stoppage revives the right of lien in the seller. The right of stoppage is against the goods themselves, which must be taken in the condition in which they are found. The seller has no claim to any insurance moneys which may be due to the buyers on account of damage to, or loss of, the goods in transit (195).

"Transit" Defined.—For s. 44 to apply, the goods must be "in transit;" that is, they must be in the possession of a carrier or forwarding agent, who holds the goods in his capacity as such, and not solely as the agent of the buyer. If he is the seller's agent the question of stoppage does not arise, for the goods are still in the possession of the seller, who has his right of lien.

“Transit” is very fully defined by s. 45, the provisions of which may be summarised as follows.

- (1) “Goods are deemed to be in course of transit” from the moment of delivery to the carrier or forwarding agent until they are further delivered to the buyer or his agent authorised to take delivery (not necessarily at the appointed destination).
- (2) Delivery to a carrier or forwarding agent always puts the goods in transit, unless the intentions of the parties are clearly to the contrary. This is so whether the carrier is, or is not, employed by the buyer.
- (3) Where the goods have arrived at their destination, and the carrier acknowledges to the buyer that he holds the goods on his behalf, transit is at an end, even though he may continue to hold them in storage, or may be instructed by the buyer to forward them to another destination.

But, if the buyer rejects the goods, and the carrier continues in possession of them, transit continues, despite the fact that the seller may have refused to take them back. On the other hand, if the carrier wrongfully refuses to deliver the goods to the buyer, transit is at an end. “Wrongfully” here does not mean “wrongfully;” the carrier may have received notice from the seller to stop the goods (*see* s. 46 *below*), and if the notice turns out to be invalid, the stoppage will be “wrongful.”

- (4) Where part delivery of goods has already been made to the buyer, the remainder may be stopped unless the part delivery was made in circumstances which showed an agreement to give up possession of the whole.

This provision is similar to that of s. 42 in regard to seller’s lien (*see* p. 190).

Effecting Stoppage.—S. 46 (1) deals with the method of effecting stoppage in transit. The unpaid seller may take actual possession of the goods (or of a document of title to them—*see* p. 138); or he may give notice to the carrier or forwarding agent in whose possession the goods are.

S. 46 (2) provides that the carrier must, upon receiving valid notice of stoppage from the seller, re-deliver the goods as directed. If he does not do so, he may be liable in conversion of the goods (*see* p. 219). The seller, on the other hand, must pay the cost of re-delivery and any expenses incidental to the stoppage. Further, a carrier has a common law lien for the cost of carriage, and a seller’s right of stoppage is subject to that lien; he is bound, therefore, to pay the carrier’s charges before he can claim possession.

The Right of Resale

An unpaid seller has, *prima facie*, no right to resell goods which are in his possession and in which the property has passed to the buyer, except (possibly) as an agent of necessity (*see* p. 130). But by s. 48, an unpaid seller may resell goods in three cases.

- (1) Where a right of resale is expressly reserved in case the buyer should default in payment.

Resale of the goods upon the buyer defaulting automatically rescinds the contract, and the subsequent buyer gets good title. But this is without prejudice to the seller's right to claim damages from the original buyer.

- (2) Where the goods are of a perishable nature.
- (3) Where notice has been given to the buyer of the seller's intention to resell.

Cases (2) and (3) may be considered together. In each case the seller must have exercised his right of lien or of stoppage in transit. This does not, of itself, rescind the contract, although the subsequent buyer will get good title. The right of resale arises if the buyer does not pay or tender the price within a reasonable time; and the seller may recover damages for loss occasioned by the buyer's breach of contract.

In case (1), the buyer loses all rights under the contract; but in cases (2) and (3), because the contract is not rescinded, the buyer may claim the return of a deposit. If the goods have been wrongfully resold, the buyer may have a claim against the seller, though he will have none against the subsequent buyer, who is protected both by s. 48 and s. 25 (1) (*see* p. 208).

Effect of Resale by the Buyer

Subject to s. 25 (2) (*see* p. 208), it is provided by s. 47 that a sale or other disposition of the goods by the buyer does not affect the seller's right of lien or stoppage. This covers any forward sale by the buyer. But if such a sale is accompanied by the transfer of a document of title, such a bill of lading, from the buyer to the sub-buyer (*see* p. 138), and such transfer is by way of sale to someone who gives value and takes the document in good faith, the right of lien or stoppage is defeated. For example:—

Smith sells Brown 100 tons of steel bars, and gives him a delivery order for that quantity in return for his cheque in payment. Brown in turn sells the steel to Jones, and indorses the delivery order over to him. Later, Brown's cheque to Smith is dishonoured.

Smith has no lien on the steel, for the delivery order has, by its indorsement over to Jones by Brown, become a document of title (*see* p. 138); he must, therefore, deliver the steel to Jones (196).

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- (183) *Metropolitan Electric Supply Co., Ltd. v. Ginder*. (1901) 2 Ch. 799.
- (184) *Doherty v. Allman & Dowden*. (1878) 3 App. Cas. 709. **H.L.**
- (185) *Whitewood Chemical Co. v. Hardman*. (1891) 2 Ch. 416. **C.A.**
- (186) *Lumley v. Wagner*. (1852) 1 De G. M. & G. 604; 42 E.R. 687. **Ch.**
- (187) *Gunn v. Bolckow, Vaughan & Co.* (1875) 10 Ch. App. 491.
- (188) *Dixon v. Yates*. (1833) 5 B. & Ad. 313; 110 E.R. 806. **K.B.**
- (189) *Goldshede v. Cottrell*. (1836) 2 M. & W. 20; 150 E.R. 651. **Ex.**
- (190) *The British Empire Shipping Co., Ltd. v. Somes*. (1857) 3 K. & J. 433; 69 E.R. 1179. **V.C.**
- (191) *Ex p. Stapleton. In re Nathan*. (1879) 10 Ch. D. 586. **C.A.**
- (192) *Valpy v. Oakeley*. (1851) 16 Q.B. 941; 117 E.R. 1142.
- (193) *Knights v. Wiffen*. (1870) 5 Q.B. 660. **App.**
- (194) *Keene v. Thomas*. (1905) 1 K.B. 136. **Div.**
- (195) *Berndtson v. Strang*. (1868) 3 Ch. App. 588.
- (196) *Ant. Jurgens Margarinefabrieken v. Louis Dreyfus & Co.* (1914) 3 K.B. 40.

CHAPTER 12

Agents and Agency

I. AGENCY IN GENERAL

AN agent is a person employed to act on behalf of another, called a principal, and their relationship is governed by contract, which may be express or implied. Agency is of great importance in the world of business. Obvious examples are estate agents and shipping agents; factors, brokers, auctioneers and commercial travellers are also agents, though not so styled. A carrier to whom goods are delivered by the seller is the agent of the buyer to receive the goods (*see* p. 139), but not to accept them.

Classification

The usual function of an agent is to negotiate and conclude contracts between his principal and third parties, and he may make such contracts for his principal with the same consequences as though he had made them on his own behalf. Any act of an agent which is within the scope of his authority will bind his principal. According to the extent of that authority his agency may be universal, general or special.

Universal Agency.—A universal agent acts for all purposes under a power of attorney, which will define his authority.

Special Agency.—A special agent is one appointed for a particular purpose, and his authority will be that which has actually been given; it will not be presumed or implied.

General Agency.—In the normal case an agent appointed to act in transactions of a certain class (as, say, a factor or broker) will be a general agent. The scope of his authority will be that usual for agents of that class, and no limitation of the usual authority will be effective unless notice of it has been given by the principal to the parties with whom the agent will deal.

Formation of Agency

Express Agency.—In the ordinary way an agency is formed by the express appointment of the agent by the principal. No special formality is required, and the contract need not be in writing. A universal agency cannot, however, be granted except under a power of attorney, which is a contract under seal; and only a universal agent may enter into contracts under seal on behalf of his principal.

A mere declaration that a person is an agent does not necessarily make him one. Thus, in *Customs & Excise v. Pools Finance* (1952) (197), coupons issued by a betting pools firm contained a rule that their collectors acted solely for, and were alone responsible to, the investors; in other words, they were to be regarded as agents of the investors and not of the firm. Lord Justice Denning said (197a):—

“The true relationship of the parties is to be discovered from the facts, not from this rule. . . . This is no new doctrine. In life actions speak louder than words. So they do in law. . . . Conditions cannot, under the cloak of contract, be allowed to speak that which is false. They cannot assert that black is white and expect the Courts to believe it.”

Implied Agency.—Agency may, of course, be implied, as where the principal stands by and allows another to contract with a third party in such circumstances that the latter believes that other to be acting as an agent and not on his own behalf.

For example, Brown is accustomed to buy goods from Green through his agent White, and Green is aware that all purchases made from him by White are for his principal Brown. Should White make a purchase which has not been authorised by Brown, and Green has not been so informed, Brown will not be allowed to deny that White had the usual authority.

In other words, a general agent may pledge his principal's credit even though he does so for his own benefit, unless the third party has been previously and specifically informed that his authority has been withdrawn.

An implied agency may arise in two cases which have already been considered. These are agency of necessity (*see* p. 130) and the implied authority of a wife to pledge her husband's credit (*see* p. 66). There is no need to consider these further, but it may be mentioned in passing that a minor has no implied

authority, as a minor, to pledge his parents' credit, though, in practice, such an implication will readily be made (*see* p. 64).

Ratification.—A principal cannot be bound by a contract made without his authority. But he may, under certain conditions, adopt a contract professedly made on his behalf.

Suppose that White, unknown to Brown, contracts with Green on the basis that he is Brown's agent. Green has had no previous dealings with White and does not know of Brown, except through White's representation in this transaction. If White fails to pay, Green cannot hold Brown liable for the price unless Brown has ratified the contract.

For ratification to take place, three conditions must be fulfilled, and, if they are, the agency will date back to the making of the contract. These conditions are:—

- (a) The agent must have professed to make the contract on behalf of a principal, whose existence must have been indicated, though he need not have been named.
- (b) The principal must have existed at the time the contract was made.
- (c) The contract must be one which is capable of ratification.

It follows, therefore, that if the agent appears to the third party to be acting on his own behalf, or the principal is a limited company which had not been registered when the contract was entered into (*see* p. 71), or the contract is void for, say, illegality, there can be no ratification.

The Relationship of Principal and Agent

As has been shown, the relations between principal and agent are contractual and, with one exception, no special formalities are required. If either party is in breach of the contract, the remedy is in damages. Specific performance will not, however, be decreed in any event (*see* p. 186), but it is possible to obtain an injunction to restrain a breach of an express negative stipulation (*see* p. 188).

Duties of an Agent.—The primary duties of an agent are to obey his principal's instructions, to perform his undertaking with exercise of due skill and care, and to act diligently for his principal's benefit. He is also under a duty to keep his principal's property separate from his own, to pay over money received on behalf of his principal, and to keep proper accounts of all transactions.

An agent may not, without express authority, delegate his responsibilities to a sub-agent, unless such authority is to be implied in particular circumstances. For example, it may be customary in a certain type of business to employ sub-agents, or the nature of the agency may be such that whole or part of the authorised duties cannot be executed without sub-agents. But no implication will be made if such employment would be unreasonable, or inconsistent with the express authority.

If there is a fiduciary or confidential relationship between the parties, the agent must disclose any personal interest which may conflict with his duty to his principal. He may not reveal confidential information acquired in the course of his duties, even after the agency has terminated, without the specific permission of his principal.

Liabilities of an Agent.—An agent is liable for any damage suffered by his principal as a result of breach of duty or negligence. He is similarly liable for the acts of a sub-agent, whether authorised or not, for there is no privity of contract between a principal and a sub-agent.

NEGLIGENCE is the neglect or omission to exercise due skill and care in the performance of his duties. The measure of damage is that arising "according to the usual course of things" from the breach of the contract of agency, within the "first rule" in *Hadley v. Baxendale* (see p. 174).

Remuneration of an Agent.—The right of an agent to receive remuneration for his services is based upon the contract of agency. Where payment is by way of commission, there is no *prima facie* right to it until it has been earned, and then only in connection with transactions which result directly from the efforts of the agent. The commission is payable even though the principal may not, in fact, have derived any benefit from the transaction, unless, of course, this is due to the fault of the agent.

Where a principal wrongfully prevents his authorised agent from earning his commission, the latter may claim in damages. Any loss or liability incurred by an agent in the lawful exercise of his authorised duties is the responsibility of his principal, who impliedly indemnifies him against any such occurrence. But neither remuneration nor indemnity can be claimed if the agent is guilty of misconduct or breach of duty.

Every agent has a particular lien over the goods of his principal in respect of all lawful claims he may have in his capacity of agent

in connection with those goods. But he may have a general lien, either by agreement or by custom.

Relations of Principal and Agent with Third Parties

Assuming that an agent has authority to act, the relationship between him or his principal and third parties differs as to whether he reveals the agency and names his principal, reveals the agency without naming his principal, or does not disclose the agency at all.

Agency Disclosed and Principal Named.—The *prima facie* presumption is that the contract is between the principal and the third party, and the agent has neither rights nor liabilities. But this presumption may be displaced by the agent signing the contract on his own behalf, as where a seller refuses to deliver goods unless the agent himself assumes responsibility for payment. In this event, although the principal will remain both liable and entitled, the seller, having elected to make the agent responsible, cannot afterwards change his mind and demand payment from the principal.

Agency Disclosed; Principal Not Named.—There is here the same *prima facie* presumption that the contract is between the principal and the third party, but it may be the more easily displaced because the principal is unnamed. However, in cases where it is customary not to reveal the name of the principal, but it is obvious that there must be a principal, the agent will not, in the absence of recognised business usage to the contrary, be personally liable (198).

Agency Not Disclosed.—By the doctrine of the undisclosed principal, the agent may both sue and be sued on the contract, and his primary liability is not destroyed by the principal being revealed and brought in. The principal, when disclosed, may sue on the contract instead of the agent, provided he existed and was competent to contract at the time when the transaction was first entered into, and provided the personality of the agent is not a matter of vital importance to the third party. The third party cannot sue both the agent and the principal, but must make his election. If he is so unfortunate as to be unsuccessful against one, he cannot then proceed against the other.

Where the principal remains undisclosed, the agent will assume the character of the principal, and he can both sue and be sued as such. This will be so even when the contract has been signed

“by authority of and as agents for” unnamed principals (199). But liability as a principal party would be excluded where the name of the supposed principal has been given.

Authority of Agent

The authority of an agent may be apparent or express. A general agent possesses apparent authority to do any act which is normally incidental to the type of business transaction which he has been authorised to carry through, and any restriction placed upon such ostensible authority will be ineffective unless the third party has been informed of it by the principal. Thus, anything done within the scope of apparent authority is deemed to be authorised; and a principal is liable for all the authorised acts of his agent.

If an agent acts without authority, either real or apparent, his principal is not liable. If he acts merely in excess of authority, the principal will be liable save as to the excess. But if, without authority, he enters into a transaction with a third party, who deals with him for value in the belief that he has authority, the principal will be estopped from denying that authority as against the third party.

An agent who acts fraudulently, but within the scope of his authority, renders his principal liable to the defrauded party, whether the fraud is committed for his own benefit or for that of his principal (200). But an innocent misrepresentation made by him without the knowledge or authority of his principal, who knows of certain facts which will make the representation false, will not render his principal liable for fraudulent misrepresentation (although it will be otherwise if fraud is proved) (201).

Agent Acting Without Authority.—The position of an agent who represents to a third party that he has authority when in fact he has not, varies in accordance with whether his representation is made fraudulently, knowingly or innocently.

If he has been fraudulent, he will be liable in deceit (*see* p. 93). If he has knowingly and untruly, but without fraud, represented that he has authority, or has done so innocently, in the belief that he has authority, he will be held liable as principal, under the doctrine of implied warranty of authority. “By professing to act as an agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not.” That is the *ratio decidendi* of the leading case of *Yonge v. Toynbee*

(1910) (202), and the sentence just quoted is taken from the judgement of Lord Justice Buckley, who pointed out that an innocent representation might be made by an agent either because he believed that he had authority which in fact he never had, or because the original authority had ended by reason of facts of which he had no knowledge or means of knowledge. Referring to the implied warranty of authority, the learned Lord Justice continued:—

“This implied contract may, of course, be excluded by the facts of the particular case. If, for instance, the agent proved that at the relevant time he told the party with whom he was contracting that he did not know whether the warrant of attorney under which he was acting was genuine or not, and would not warrant its validity, or that his principal was abroad and he did not know whether he was still living, there will have been no representation upon which the implied contract will arise.”

Position of Agent in Particular Cases

Signing Contracts.—An agent who has been given authority to sell has implied authority to sign a written contract which is not under seal. Where authorised, he may sign for both parties. In the case of contracts under seal, an agent may sign only when his authority is derived from a power of attorney (*see* p. 196). Any deed executed by a duly authorised agent is as effective as though executed by the principal himself, for whom the agent is in the position of a trustee.

A contract which has been signed by an agent with no qualification will be his personal liability, unless it is clear from the body of the document that he is not signing on his own behalf. But, if he signs in such a manner as clearly to indicate that his signature is that of an agent, he will not be liable (*see* p. 71). Such qualification must, however, be unambiguous, for, as Lord Justice Scrutton said in *Elliott v. Bax-Ironside* (1925) (203):—

“Where a man signs ‘for and on behalf of Jones as agent’ he is clearly not undertaking any personal liability, but is purporting to make Jones liable. It is otherwise where the man puts after his signature a description for the purpose merely of showing who he is and how he came to sign.”

It is probable that the use of such words as “for account of our principals” would be sufficient to free an agent of liability, despite an unqualified signature (204).

Trade Usage and Custom.—A custom or usage which makes an

agent personally liable on behalf of his principal will, if it is sufficiently notorious as to command general acceptance in a particular trade, be recognised by the Courts, provided it is not inconsistent with the express terms of the contract. For example, it is the custom in certain trades that a broker who does not give the name of his principal will be treated as though he were the principal in regard to liabilities under the contract. Such a custom will not be admissible, however, if it runs counter to an arbitration clause, for to do so would make brokers judges in their own cause (205).

Payments to Agent.—Where an agent is authorised to receive payment for goods, the payment must be in cash, unless he has been specially authorised to receive it in some other form, such as by bill of exchange. Such special authority will be presumed, however, if it is customarily given in a particular trade or business, and such custom is known to the principal. It may be noted that a cheque, made out to a named agent “or order” and duly honoured, is equivalent to cash.

An agent who receives money on behalf of his principal is, of course, in duty bound to pay it over. Similarly, if he is given money by his principal to pay to a third party, he must give it to the person entitled to receive it. If, in either case, he fails to do so, he will probably be guilty of the criminal offence of fraudulent conversion, and the debt between the principal and third party may still remain.

The position as between a principal and third party when an agent defaults may conveniently be summarised as follows.

- (1) Agent purchasing on behalf of principal; money given to him to pay the seller not paid over.
 - (a) If the agent is known by the seller to be an agent, the principal will normally remain liable, and will have to make payment afresh.
But if the principal has been led by the seller to believe that he has already been paid by the agent, or that he expects to be paid by him, the seller cannot afterwards claim payment from the principal, as he will, by his conduct, have induced the latter to pay the agent (206).
 - (b) If the principal is undisclosed, he will be liable whether or not he has already paid the agent.
- (2) Agent selling on behalf of principal, to whom he does not pay over purchase money received from the buyer.

Unless there has been express authorisation that the agent is to receive payment, or the buyer can show that the agent had

ostensible authority (e.g. by virtue of custom in the trade), the buyer will be liable to pay a second time (207).

The reason for this is that authority to an agent to sell does not necessarily imply authority to receive payment.

In regard to (2), suppose the agent owes a personal debt to the buyer, and the latter wishes to set this off against the price of the goods he has bought. If he does this and pays the agent the balance, knowing him to be an agent, he will be liable to the principal for the amount set off if the agent refuses to pay over the whole amount. But if the agent sells in his own name, so that the buyer believes him to be a principal, there will be no liability (208).

Termination of Agency

A contract of agency may, like any other, be terminated by agreement of the parties, discharge by one being in consideration of discharge by the other (*see* p. 153). On the other hand, the principal may revoke his authority, or the agent may renounce; in either event, such revocation or renouncement may found a claim in damages. Destruction of the subject matter may frustrate the agency; the death, lunacy or bankruptcy of the principal, or the death of the agent, may end it; or some supervening event may render it illegal. Discharge may thus occur by the acts of the parties or by operation of law.

Termination by Operation of Law.—Any event which renders an agency illegal will terminate the contract automatically. For example, the principal may become an enemy alien, as was the case in *Nordisk Insulin v. Gorgate* (1953) (209).

Before the outbreak of war in 1939 the plaintiffs, a Danish firm, had deposited a valuable stock of insulin with an English bank in England. In 1940, by reason of the invasion of Denmark by Germany, the plaintiffs became enemy aliens and the stock of insulin vested in the Custodian of Enemy Property. The defendants, who were the pre-war selling agents of the plaintiffs, purchased the insulin from the Custodian and resold it at a profit. After the war the plaintiffs claimed that they were entitled to that profit.

The Court of Appeal held that the agency had been terminated by the war, and therefore the plaintiffs had no claim.

Upon the death of his principal, the agent's authority will lapse immediately. But if he continues to act, he may be liable under the rule in *Yonge v. Toynbee* (*see* p. 200). Lunacy has a similar effect, except that the agency is presumed to continue

until the third party has received notice that the agency is terminated; until then the principal will probably remain liable to the third party, although this will not prevent the agent being liable under the rule in *Yonge v. Toynbee*.

Termination by Act of the Parties.—Whether the destruction of the subject matter of the agency will frustrate the contract depends upon principles already enunciated (*see p. 157 et seq.*) and, particularly, whether there is an implied term to that effect. The question usually arises where there is a continuing contract of general agency, and the principal goes out of business; does the fact of the principal ceasing to trade automatically terminate the agency? *General Publicity v. Best*, discussed in an earlier chapter (*see p. 107*), is relevant to this issue. Although the Courts will not necessarily infer a term that the principal will continue his business merely for the benefit of the agent, they may do so where the agency is for a fixed period, or where the terms of remuneration are clearly independent of the continuance of the business. Thus, in *Reigate v. Union Manufacturing* (1918) (210):—

The defendant company agreed to appoint the plaintiff as their agent in consideration of his subscribing for shares and introducing certain business. The agreement was for seven years, and thereafter at six months' notice of termination by either side. Within the currency of the agreement the company went into voluntary liquidation.

The Court of Appeal held that the agreement was to employ the plaintiff for seven years, and it could not be implied that the company could terminate the agency at any time by ceasing to carry on business; the voluntary winding up clearly showed repudiation, and the company were liable in damages.

A contract of agency may be revoked by the principal so long as the agent's authority has not yet been exercised, and provided:—

- (a) There is no express agreement that he will not revoke, or
- (b) The authority is not "coupled with an interest."

To take the second proviso first. It is common practice for a factor, to whom goods have been entrusted for sale, to make a monetary advance to his principal on the credit of the goods. If the making of such an advance is a condition precedent to the authority to sell, the authority is said to be "coupled with an interest." But if the making of the advance is subsequent to the giving of the authority, the interest is not "coupled," unless there is some express agreements to that effect. In *Reigate v. Union*

Manufacturing (see above) the authority of the agent was coupled with his interest in the capital of the company, and this provided an additional reason for holding that his principal had repudiated the contract.

Any agreement by a principal not to revoke must be most clearly expressed, for the Court will not imply such a term in order to give business efficacy to the contract (211) (see p. 104). To employ a "sole" agent is equivalent to an express promise not to employ another, but this will not make the principal liable to that sole agent if he carries through a transaction without the intervention of any agent. Almost all the cases dealing with this question are concerned with the employment of estate agents to sell property; as such agents are special agents, the decisions depend largely on particular facts. However, it is possible to elicit certain general principles which are applicable to any special agent employed to sell on commission.

Where the agent has exercised his authority, and there is an executory contract with a third party, the position is as follows: —

- (1) If the principal defaults, he is in breach of both the contract with the third party and the contract of agency.
- (2) If the third party defaults, the agent is entitled to nothing, for the presumption is that commission is payable out of the purchase money. Payment to the agent for anything he has actually done is a matter for express agreement, which must be in "clear and unequivocal language" (211). The principal may sue the third party if he so chooses, and he may retain any deposit. But he is under no duty to the agent to take any such steps (212).

A principal's liability for repudiation is in damages, and is not by way of the commission which would have been payable had the deal materialised.

II. SPECIAL CLASSES OF AGENCY

There are certain types of agent, familiar to the commercial world, whose relations with their principals and with third parties are marked by some rather special characteristics. They include "DEL CREDERE" AGENTS, BROKERS, FACTORS and AUCTIONEERS.

Del Credere Agents

A "del credere" agent is an agent who acts with the authority of a seller, but who takes on the additional liability of indemnifying

his principal in regard to the payment of the price by the buyer, in return for which he is paid an extra commission. He does not guarantee that the buyer will pay in any event; he is liable only if there is an ascertained debt owing from the buyer to the seller, which cannot be recovered due, say, to the insolvency of the former (213).

A contract of guarantee, or a promise to answer for the "debt, default or miscarriage" of another, comes within s. 4 of the STATUTE OF FRAUDS as requiring to be evidenced by a note or memorandum (*see* p. 55). A *del credere* agreement is not such a contract or promise, being regarded as an indemnity (*see* p. 100); it need not, therefore, be in writing.

Brokers

A broker is an agent who, in the ordinary course of his business, negotiates and makes contracts for the sale and purchase of goods or other property, but is not entrusted with the possession or control of such goods (214). The scope of his authority is that of a general agent, regulated usually by the custom of the particular trade in which he does business. The fact that his principal may be ignorant of trade usages does not affect their applicability, provided they are reasonable and not inconsistent with the contract.

Although a broker will normally act for one party, he has the authority of both buyer and seller to sign a note or memorandum of sale. The usual procedure is that he reduces the contract into writing and delivers one signed copy, called the "sold note" to the seller, another called the "bought note" to the buyer, and retains a third copy, also signed, in the "broker's book." Provided the three copies do not differ in their terms, any one of them will constitute sufficient evidence of the contract.

If the party who has originally employed the broker has given him special instructions as to price, the broker cannot act as the agent of the other party in fixing the price. But, under his implied authority, he may sign a note on behalf of the other party which incorporates the agreed price (215).

Factors and Mercantile Agents

Mercantile Agents.—A mercantile agent is, in common parlance, anyone who, in the course of his business, acts as an agent in a commercial or mercantile transaction. But in law "mercantile

agent" has a special meaning, being defined by s. 1 (1) of the FACTORS ACT, 1889, as an agent who, "in the customary course of his business," has "authority to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." The best known example is the factor, who actually deals in goods on behalf of a principal, with the right to possession and authority to sell in his own name.

Factors.—Since the ordinary business of a factor is to dispose of goods entrusted to him by the seller, a person dealing with him in that capacity is entitled to assume that he has the requisite authority to sell the goods and to pass good title to them (*see* p. 129). This has always been recognised by the common law. But there is an old established custom (*see* p. 204) that a factor, perhaps called upon to make an advance to his principal, is authorised to raise money on the security of the goods, although at common law there was nothing to stop the principal denying the factor's authority so to do. This was apt to place the person who had made the loan in a most unfortunate position, and so, in order to regulate this and other matters, four FACTORS ACTS were passed between 1823 and 1877. These Acts were replaced by the FACTORS ACT, 1889, and this ACT now represents the law.

The Factors Act, 1889.—The ACT provides that, where a mercantile agent (or his bailee) is, with the consent of the owner, in possession of goods or of documents of title to goods, any sale, pledge or other disposition by him in the ordinary course of his business is as valid as though he were expressly authorised to make it. This is so, notwithstanding that such consent may have been withdrawn, provided that the person taking the goods has acted in good faith, without knowledge at the time of any lack of consent (s. 2).

"Document of title" has already been defined and explained (*see* p. 138); "pledge or other disposition" means any disposal of the goods as security for a pecuniary liability (s. 1 (5)); and the "consent of the owner" is to be presumed in the absence of evidence to the contrary (s. 2 (4)).

The designation "factor" does not appear in the ACT, despite its title. Instead, "mercantile agent" is used, and the ACT therefore covers the case of any agent who comes within the definition given in s. 1 (1). For example, forwarding agents are included, and so are dealers who buy and sell goods on commission. But brokers, who never obtain possession of the goods in which they deal, nor of the documents of title to them, are not mercantile agents. Any commercial agent who acts as such "in the ordinary course of his business" may be a mercantile agent, even though he does so for one

transaction only. But he must act as such. Thus, a warehouseman who is also a factor cannot tender goods, received for storage only, as security for a loan, because he is acting for the owner, not in his capacity of factor, but as a warehouseman (who is not a mercantile agent).

Passing Title to Goods.—**Ss. 8 and 9** of the ACT, which are substantially reproduced by sub-ss. (1) and (2) of **s. 25** of the SALE OF GOODS ACT, 1893, contain similar provisions to those of s. 2 in respect of cases where:—

- (1) A seller of goods remains in possession of goods after sale, the property having passed to the buyer, and
 - (2) A buyer is, with the consent of the seller, in possession of goods which he has bought or agreed to buy, the property not having yet passed to him.
- ("Possession of goods" includes possession of documents of title to them.)

In both these cases, any person who, "in good faith and without notice" of (1) the previous sale or (2) the rights of the seller, receives the goods (or documents of title) by way of "sale, pledge or other disposition," will obtain good title, just as though he had obtained the transfer from a mercantile agent. This provides another exception to the rule that no-one can pass a better title than he himself possesses (*see* p. 129), and, by introducing the analogy of agency, the position of the honest transferee or purchaser is, to a large extent, safeguarded. These provisions must, of course, be read in conjunction with ss. 47 and 48 of the SALE OF GOODS ACT (*see* p. 193), and they are also of importance in connection with hire-purchase transactions (*see* p. 240).

Auctioneers and Auction Sales

An auctioneer is one who sells or offers for sale by auction the property of the seller, being employed by the latter as his agent to sell. He requires a licence, and he must conform with other requirements of the AUCTIONEERS ACT, 1845. Sales by auction come within the provisions of **s. 58** of the SALE OF GOODS ACT, 1893, and, as to one aspect, of the AUCTIONS (BIDDING AGREEMENTS) ACT, 1927. As it is practically impossible to separate the law affecting auctioneers from that which governs auction sales, the whole subject is considered as one.

Sales by Auction.—In an auction sale the bid is the offer, which is accepted by the fall of the hammer; until such acceptance, any bid may be withdrawn (SALE OF GOODS ACT, s. 58 (2)), and the seller may withdraw the goods. The contract so made is an

unconditional contract for the sale of specific goods within s. 18 (1) of the SALE OF GOODS ACT (*see* p. 125), and the property passes on the fall of the hammer (216). The bid being the offer, it follows that the auctioneer's request for bids may be withdrawn at any stage before a bid is accepted. Similarly, an advertisement that specified goods will be sold on a certain day is a mere declaration of intention and is not a binding promise that the goods will be sold on that day or at all.

The Authority of the Auctioneer.—The auctioneer, as the agent of the seller, has implied authority to sign the contract of sale on his behalf; and the highest bidder, by his act of bidding, constitutes the auctioneer his agent for the same purpose. The signature must, however, be at the time of the sale, and it must be that of the auctioneer himself; his clerk or assistant has no implied authority to sign for either party. This dual authority is effective only when the goods are actually sold by auction, for if they are disposed of by private treaty, the auctioneer is not acting as such, and is therefore the agent merely of the seller. Each lot put up at an auction is, by s. 58 (1) of the SALE OF GOODS ACT, "*prima facie* deemed to be the subject of a separate contract of sale."

Goods for sale are held in the possession of the auctioneer as a bailee. He is authorised to receive payment, but only in cash, and he has a lien on the goods for the purchase money. For the purpose of enforcing his right to payment, he may sue for the price in his own name (217), even though he has sold the goods for a disclosed principal. But if he has lost his lien by parting with the possession of the goods, he cannot recover them, for the property will have passed on the fall of the hammer, unless there was an effective condition that it should not pass. In this connection, *Dennant v. Skinner and Collom* (1948) (216) is of some interest.

A number of motor vehicles were sold at auction to the highest bidder, who had made certain misrepresentations as to his identity. The auctioneer, believing him, allowed the purchaser to take delivery of one vehicle, and accepted a cheque for all of them. He also accepted a certificate to the effect that the property in the vehicles should not pass until the cheque had been paid. It was a condition of the sale that all lots should, on the fall of the hammer, be at the risk and cost of the buyer. The cheque was dishonoured and the auctioneer sued the purchaser for the return of the vehicle or its value. The purchaser had already been convicted of obtaining the vehicle by false pretences.

It was held that the property had passed on the fall of the hammer,

and was not prevented from passing by the nature of the offence, which was not larceny by a trick but false pretences (*see* p. 132). There was no effective condition that the property should not pass until the cheque had been honoured, and it was not possible, after it had passed, for it to revert in the seller merely by the purchaser signing a certificate which purported to retransfer his interest. (The auctioneer had, of course, brought his claim under the wrong head. He should have sued on the cheque, but, as the purchaser was obviously a man of straw, that would doubtless have availed him not at all).

Bidding.—Unless the seller expressly reserves the right to bid, and the sale is notified as being subject to that right, it is unlawful for him, or any person on his behalf, to bid at the sale, and for the auctioneer knowingly to take such a bid. If this rule is contravened, the buyer may treat the sale as fraudulent (SALE OF GOODS ACT, s. 58 (3)). But where the seller has reserved the right, only he, or one person nominated by him, may bid. (This is an extension of the provisions of the SALE OF LAND BY AUCTION ACT, 1867, passed to prevent the employment of “puffers” to boost the bidding).

The AUCTIONS (BIDDING AGREEMENTS) ACT, 1927, provides that it is a criminal offence for any dealer to offer a gift or reward to any person as an inducement to abstain from bidding. The penalty is a fine of £100, 6 months' imprisonment, or both. Any sale so effected may be treated by the seller as having been induced by fraud. A *bona fide* agreement to buy on joint account, provided it is in writing and provided a copy is deposited with the auctioneer before the sale, is not within the ACT. A “dealer” is, for the purposes of the ACT, any person who attends auction sales in the ordinary course of his business, and purchases with a view to resale. A copy of the 1927 ACT must be conspicuously displayed, together with other particulars required by the AUCTIONEERS ACT, 1845, at the place where the auction is held.

Sales With or Without Reserve.—There is no rule of law that a lot must be knocked down to the highest bidder, even where the sale has been advertised as being “without reserve.” On the other hand, a sale may be notified as subject to a reserve price (SALE OF GOODS ACT, s. 58 (4)), in which case every bid, and the acceptance, is conditional upon the reserve being reached. If the reserve price has been expressly announced, a buyer to whom the goods have been knocked down in error at a lower price does not acquire the property in them; nor has he any remedy against the auctioneer (218).

Express Conditions.—Auction sales are usually made subject to conditions, which are brought to the notice of intending bidders by being printed in the catalogue. As in any other case, exclusion of common law liability must be very clearly stipulated, and anything said by the auctioneer which is inconsistent with the printed conditions will probably nullify them to that extent (*see Curtis v. Chemical Cleaning*, p. 101). If he gives an express oral warranty, he cannot escape responsibility by relying on an exempting clause in the catalogue. It matters not that he has done so without the seller's authority (which will not be implied).

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CHAPTER 13

Contracts of Bailment

I. BAILMENTS IN GENERAL

When dealing with the passing of property under a contract for the sale of goods, the difference between property and possession was explained, and it was pointed out that he who has possession of something without the property in it is a bailee under a contract of bailment (*see* p. 123). It is now necessary to consider this form of contract in some detail, for it has important applications in connection with the storage, repair, carriage and hire of goods and equipment, as well as being the basis of all true hire-purchase agreements.

Definition

“**Bailment**” is:—

The delivery of goods by a bailor to a bailee for some specific purpose and upon the condition that, after the fulfilment of that purpose, they shall be redelivered to the bailor, or otherwise as the bailor may direct.

The bailee is the one who has the possession of the goods, whilst the bailor retains the property in them. From the point of view of the bailee, the bailor is the owner of the goods; and, even though the bailor's title to them may, in fact, be defective, it is a rule of law that “the bailee cannot dispute the bailor's title.” Both the bailment itself and the condition of redelivery may be express or implied; the delivery and redelivery may be actual or constructive (*see* p. 137).

Classification

A BAILMENT may be **gratuitous**, in **pledge**, or for **reward**. It may be in **custody** or for **work**, in which cases it will be for the benefit of the bailor; or it may be for **hire**, for the benefit of the bailee. If a bailment is for reward it will be in custody, or for

work or hire; if gratuitous, the corresponding terms are custody, mandatory, and loan for use. A bailment in pledge is a special form of bailment in custody. A gratuitous bailment may be either voluntary or involuntary.

That is the basic classification, which is followed when considering the principles applicable to bailments in general. But a more practical classification is adopted when dealing with the particular application of these principles to bailments for reward, which are divided into contracts for STORAGE, REPAIR, CARRIAGE and HIRE.

Gratuitous Bailments

Let us suppose that Brown, who is going overseas, persuades Smith to look after some property until his return. That will be a gratuitous bailment for the benefit of the bailor. But if Brown agrees to allow Smith the use of his motor-car, it will be one for the benefit of the bailee. On the other hand, Smith might have the use of the car in return for his doing some work on it in his spare time. This is not, as might be thought, a bailment for reward, but is a double gratuitous bailment, the loan of the car being for Smith's benefit, and the work on it for Brown's.

In the first example there is a bailment in custody of Brown's property; in the second there is a loan for use; and in the third there is both a loan for use and a mandatory bailment. In all these cases the bailment is voluntary. But bailment in custody may be involuntary, as where goods are delivered to the wrong person; that creates a special situation, considered below.

Bailment in Custody

1. *Involuntary Bailment.*—The ubiquitous Smith receives through the post a parcel addressed to himself and containing an electric razor, accompanied by a note from the sender suggesting that Smith might care to try it out and, if satisfied, to forward a cheque. Smith, an involuntary bailee of the razor, wonders, rather naturally, what he should do. He has two alternatives. He may follow the sender's suggestion, keep the razor and forward a cheque. Or he may reply to the sender, telling him to collect the razor within, say, a week, and adding that otherwise he will accept no responsibility (and if he chooses not to stamp the letter, who is to blame him?). If, as is probable, the sender or his representative calls upon him to enquire whether he wishes to buy

the razor, he may, without qualms, hand it over and tell him to take it away. But what he may not do is to keep it without paying for it, refuse to hand it over, pass it on to a friend, destroy it or otherwise dispose of it. Fortunately, the problem does not often arise, though it is not unknown for those with the uncommon name of Smith (or Jones or Brown) to have goods delivered to them in error (when the same principles apply).

The question of the liability of an involuntary bailee was dealt with in *Elvin and Powell v. Plummer Roddis* (1934) (219):—

A person, who represented that he was a buyer, ordered goods from the plaintiffs, with instructions that they were to be sent to the Brighton branch of the defendant company. The goods were duly despatched and delivered to the defendants, who shortly afterwards received a telegram which read:

"Goods despatched to your branch in error. Sending van to collect. Elvin and Powell."

Subsequently, a man called upon the defendants and, presenting the plaintiffs' trade card, prevailed upon them to hand over the goods to him. Upon discovering that the goods had been handed to a swindler who had decamped without trace, the plaintiffs sued for the value of the goods.

It was held that the defendants had done what was right and reasonable in the circumstances. An involuntary bailee must use the ordinary care of a reasonable man in safeguarding the property of another, and he will be liable to the owner for loss only where he neglects or omits to exercise that standard of care. In this case there had been no negligence, and the defendants were not liable for the loss of the goods.

2. *Voluntary Bailment*.—Here again the bailee must use the ordinary care of a reasonable man, and failure to do so amounts to negligence. But if, without negligence, the goods are destroyed or damaged, he will not be responsible, though the onus will be on him to show that there was no negligence on his part. Such a bailment is not transferable without the consent of the bailor, so that if the goods bailed pass into the possession of someone else the bailee is still responsible.

Mandatory Bailment.—A mandatory bailment is one whereby a bailee undertakes to do something to or with the article bailed, usually for the benefit of the bailor. The fact that the bailee may have undertaken to repair an article in return for the use of it does not necessarily make the bailment one for reward; in fact, the presumption is against that conclusion.

The bailee must use ordinary diligence, such as he would if the article were his own. But if he possess some special skill, as by virtue of his profession or calling, omission to use that skill will constitute negligence, even though he may be using it in his spare time and "for the fun of the thing" (which is something not unknown among engineers!).

Loan for Use.—A loan for use is a type of gratuitous bailment which is usually for the benefit of the bailee, and Smith's use of Brown's car falls into that category (*see above*). But should Brown have said, "If you will mow my lawn whilst I am away, you may use my motor mower for your's as well," there would then have been a loan for use of the mower for the benefit of the bailor. In neither of these examples is the bailee responsible for reasonable wear and tear, but the bailor is under a duty to acquaint the bailee of any defects of which he is aware, and if he does not do so (whether negligently or deliberately) he will be liable for any injury the bailee may sustain as a result.

If the bailment is for the bailee's benefit, he may not lend the article bailed, nor may he allow it to be used by anyone other than himself, except where such use would be in the ordinary course of things (*e.g.* where a bailee of a motor-car, unable to drive himself, employs a chauffeur). Even if an article is borrowed without the permission of the owner, the borrower is still a voluntary bailee. True, he may be held liable to the owner in detinue, conversion or trespass to goods (*see p. 219*), and, if it is a motor-car he has borrowed, he will probably be guilty of an offence under the ROAD TRAFFIC ACTS. But, in relation to the owner, he will be a bailee, unless he has taken the article "with intent permanently to deprive the owner thereof," when he will be guilty of stealing.

A loan for use, though gratuitous, may not, in some circumstances, be a true bailment without reward. Thus, in *Chapman v. Saddler* (1929) (220):—

A firm of stevedores, employed by the shipowner, and a portorage company, employed by the owners of the cargo, were engaged together in unloading a ship. The stevedores gratuitously allowed the porters to use their slings in order to expedite the work. Due to a defect in one of the slings, a porter was injured.

It was held by Lord Atkin (220*a*) that:—

"The porters were possibly entrusted with the sling, but merely to be used in a particular way, to be returned forthwith to the bailors,

in an operation, the speedy completion of which was of vital importance to the bailor's business, where bailor and bailee, to the knowledge of both, relied for their safety on the care of the bailor. In these conditions the rule as to gratuitous bailors appears to me to have no application."

Bailment in Pledge

To most people "pledge" signifies the deposit of some article with a pawnbroker in return for temporary financial accommodation. In that case the rights of the pledgor and pledgee (the pawnbroker) are governed by the PAWNBROKER'S ACT, 1872, which needs no mention here, for pawning is merely a special form of bailment in pledge.

Where an article is deposited with another by way of security, that other is not only a bailee but is also a pledgee, in which latter capacity he obtains a special property in the article enabling him to sell it should his right to do so arise. As with any other bailment, he must have either actual or constructive possession; that is, he may either have the article itself, or a document of title to it. While the article is in his possession, and until his right to sell arises, his responsibility is that of a bailee for reward (*see below*).

If White entrusts his goods to Black in such circumstances that Black is a pledgee, White will be guilty of larceny (*i.e.* stealing) if, by some fraud, he takes them out of Black's keeping. This was the decision in *Rose v. Matt* (1951) (221):—

The defendant deposited a clock with the plaintiff, a shopkeeper, from whom he wished to buy a model aircraft engine. He took the engine, promising to pay for it within a month, and agreed that, should he not do so, the shopkeeper would be at liberty to sell the clock. Before the expiry of the month the defendant, by a ruse, obtained possession of the clock, but he did not pay for the engine.

The Divisional Court held that the defendant, by taking the clock, was depriving the shopkeeper of his special property in it, and was thus preventing him from exercising the right of sale he would have had at the end of the month. The defendant was guilty of larceny and it was immaterial that he had no intention either of charging the shopkeeper with its loss, or of refusing to pay, eventually, for the engine.

Bailment for Reward

A bailee for reward who undertakes to do anything in connection with an article belonging to the bailor "is bound . . . to bring

reasonable care to the execution of every part of the duty accepted" (222). The degree of care or skill normally expected may, of course, be varied by express agreement. But failure to exercise the requisite amount of skill or care, which results in loss or damage to the article bailed, will amount to negligence; and the onus is on the bailee to show that such loss or damage was not due to his default (223).

Negligence.—Negligence, as here meant, is the neglect or omission to exercise due skill and care in the performance of an obligation under a contract (*see* p. 286).

Except in the one special case of a common carrier (*see* p. 286), a bailee is not responsible for loss or damage caused otherwise than by his negligence. But he is liable for the negligent acts of his employees within the scope of their employment (*see* p. 264), and for those of his agent within his actual or ostensible authority (*see* p. 200). However, should the delegation of his duties under the contract be expressly or impliedly excluded, he will be responsible for all the acts of his agent, whether or not they are authorised by him. If the article bailed is destroyed, and the bailee can show that he was not negligent, he will be excused from further performance of the contract, unless there is a term, express or implied, that that article shall continue to exist (*see* pp. 158 and 161). Unless there is an express term to that effect in the contract, a bailee is not compelled to insure. But if he does so, anything paid by the insurers over and above the interest of the bailee must be paid over to the bailor.

A bailee in possession is at liberty to sue a stranger for the recovery of goods wrongfully removed from his custody, or for their value. He may also claim for damage to those goods. This is so whether or not the bailee has been negligent, and irrespective of any claim made against him by the bailor. But if, in an action against a stranger, he recovers something more than his own interest, he is accountable to the bailor for the excess; and the stranger who has paid full damages to the bailee is under no liability to the bailor (224).

Goods held by a bailee in the course of his trade or business are exempt from distress for rent or rates. But if they are stolen whilst in his custody he is not necessarily free of responsibility for their loss. Not only must he prove that they were stolen without default on his part, but he must show that even by the exercise of reasonable diligence he could not have recovered them (225).

Contracting Out of Liability.—It is possible to insert a condition in the contract of bailment which excludes liability for negligence on the part of a bailee, his servants or agents. But a bailee who sub-contracts will not be able to rely on such an exemption clause, unless he has allowed for sub-contracting in very clear terms (226). Further, if loss is sustained due to factors other than negligence, such as by breach of contract, an exemption clause will be quite ineffective.

For example, if a motor-car is deposited with a garage for sale on commission, and there is a documentary agreement containing the clause, "Customers' cars are driven by the firm's staff at customers' sole risk," that will be sufficient to excuse the garage from responsibility for damage done to the car owing to the negligent driving of their employee when demonstrating the car to a potential buyer (227). But the inclusion of such a term, or of the words "at owner's risk," though it may exempt a bailee from the consequences of negligence, will not excuse him from the performance of the contract (228). Any fundamental breach of contract by the bailee, sufficient to bring it to an end, will prevent him from being able to rely on conditions inserted for his benefit. Thus, in *Alexander v. Railway Executive* (1951) (229):—

The plaintiff, accompanied by an acquaintance, deposited some baggage in a railway cloakroom, and was given a receipt in the usual form. At a later date, the acquaintance went alone to the cloakroom, and, making certain misrepresentations implying that he had the plaintiff's authority, but without producing the receipt, was permitted to have access to the baggage and to take some of the contents away with him. The plaintiff sued for breach of contract, and the defendants relied on a printed condition excluding liability for misdelivery.

Mr. Justice Devlin held that to permit an unauthorised person to have access to goods, to break open cases, and to take articles away, was a fundamental breach of the contract of bailment by the defendants, which prevented the "misdelivery" clause from having any effect. He held further that, in any event, words used in an exception must, in a contract of bailment, be construed narrowly, so that "misdelivery" would mean no more than accidental misdelivery by mistake or error.

Lien.—Where the bailment is for the benefit of the bailor, as under a contract for storage or repair, the bailee has a lien on the goods for his legitimate charges in connection with those goods, and he is entitled to retain possession of those goods until his

charges are paid. Redelivery of the goods to the bailor for some special purpose does not necessarily terminate the bailment or destroy the lien. Thus, in *Albemarle Supply v. Hind* (1928) (230):—

The defendants, taxicab owners, garaged their cabs on the plaintiff's premises. The plaintiffs maintained the cabs, which were held by the defendants on hire-purchase from a third party, and they claimed a lien for their repair charges as against the third parties, who demanded the return of the cabs because of non-payment of the hire-rentals.

The Court of Appeal held that the plaintiffs had a lien on the cabs, and that such lien was not destroyed by their allowing the cabs to be taken out daily for the purpose of plying for hire.

In a bailment for hire, which is for the benefit of the bailee, no question of lien arises. There is, however, an implied term that the bailee shall have the right to quiet and undisturbed use and enjoyment of the article bailed. But if the bailee fails to pay the hire-charges when due, the bailor has a right to repossess. Unjustifiable repossession by a bailor, whether against the bailee's right to quiet possession or against his right of lien, will render him liable in damages and, in some circumstances, lay him open to a charge of stealing.

Detinue and Conversion.—A bailee who, having no lien, fails to return goods to his bailor when they are lawfully demanded, may be sued by him in either DETINUE or CONVERSION. These actions may also be taken by a bailee against a stranger (*see* p. 217).

The tort of **Detinue** is the wrongful detention of the possession of goods against a claim by someone who is better entitled to them. The tort of **Conversion** is a dealing in goods in a manner inconsistent with the rights of the true owner, so as to constitute an unjustifiable denial of his title to them. The difference is that detinue is a wrong against possession, whereas conversion is a wrong against ownership. Thus, a bailee who merely refuses to hand over goods may be guilty of detinue; but if he has dealt with the goods, as by selling or pledging them, he will be guilty of conversion. The right to bring either of these actions is in the person who is entitled to immediate possession; hence, the bailor may sue the bailee, and the bailee may sue the stranger (as may the bailor if the bailment has come to an end).

It has already been shown that a bailor may claim against a

bailee in negligence; similarly, a bailee may claim against a stranger whose interference with the goods does not amount to either detainment or conversion. Although it is usually simpler for a bailee to base his claim on negligence, he may alternatively bring an action in the tort of **Trespass to Goods**. The essence of this tort is wrongful interference with goods which, though not amounting to a denial of either the right to possession or of ownership, constitutes the infliction of some damage or loss. For instance, the scratching of the paintwork of a motor-car is a trespass. It matters not whether the act is intentional or negligent; mere interference is sufficient, though there may be no ascertainable loss. Such an act might, of course, amount to a criminal offence, particularly if the damage were malicious, or contravened some statutory provision (*e.g.* "joy-riding" in a motor-car without permission).

Where an action is brought in DETAINMENT and the claim is successful, the Court will order the restoration of the goods or payment of their value, which will be that at the date of the judgement, and not at the date when the defendant first refused to return them. If the claim is in CONVERSION, the same principle applies (231). In the case of a bailment for hire, the Court may also order payment of the full hire rental for the period of detention. An example is afforded by *Strand Electric v. Brisford Entertainments* (1952) (232), which illustrates the fact that the bailor may bring an action directly against the assignees of the original bailees, although the latter may themselves be able to claim.

The plaintiffs loaned some portable stage-lighting switchboards to the then owners of the Bedford Theatre, London, pending the manufacture of permanent boards. Before delivery of the latter, the theatre owners decided to retain the portable boards and agreed to pay rent for them. At a later date the theatre was sold to the defendants, who refused to hand over the boards either to the former owners or to the plaintiffs, on the ground that they were intending to re-sell the theatre and could not conclude a sale unless the stage-lighting could be demonstrated.

The Court of Appeal held that it made no difference whether or not the boards were actually in use, and ordered that they be restored to the plaintiffs, or their value paid. The Court further ordered that, as the plaintiffs hired out such switchboards as part of their regular business, they were entitled to damages to the extent of the full rent for the entire period of detention.

II. PARTICULAR BAILMENTS

Contracts for Storage

Those, such as warehousemen, who undertake the storage and safe custody of goods for reward must exercise ordinary care, want of which may render them liable in negligence. The standard of care required is that of taking such precautions as would satisfy a reasonable and prudent man.

Care of Goods.—Where the character or locality of the warehouse is such that there may be some risk of goods stored therein being damaged, as by flooding, the degree of care required includes “not only the duty of taking all reasonable precautions to obviate those risks, but the duty of taking all proper measures for the protection of the goods,” when such risks are imminent or have actually occurred. So said Lord Watson in *Brabant v. King* (1895) (233). The learned Law Lord pointed out that there was no authority for the proposition that a bailor, having observed certain defects in a warehouse, “must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee.”

In regard to THEFT, Lord Wright held in *Brook's Wharf v. Goodman Brothers* (1937) (234) that warehousemen will “discharge the burden of proof upon them if they can show that the theft took place notwithstanding that they had taken all reasonable precautions to guard against the danger.”

Extent of Bailee's Responsibility.—A warehouseman may, in the course of one transaction, act not only in that capacity, but also as a carrier or agent. For example, wharfingers may undertake to transport goods by lighter from ship to their warehouse, though they do not hold themselves out as ready to carry goods for any other purpose. It has been held that they will be liable only as warehousemen, and not as carriers (235).

It is part of the ordinary business of a warehouseman to deliver goods in exchange for documents of title, such as bills of lading or delivery orders, and in so doing he is acting as the agent of the bailor. If he hands over the goods to the wrong person, he may be liable to the bailor, though the fact that he has accepted the delivery order without objection will not prevent him denying, at some future time, that the person who presented the order is

the owner of the goods (236). On the other hand, if he delivers the wrong goods, he may later be estopped from denying that he still has the goods when they are rightly demanded.

Sub-Contracting.—A contract for storage cannot be sublet without the specific concurrence of the bailor. This is because, under such a contract, the bailee undertakes to take possession of the goods and to exercise reasonable care in looking after them, in accordance with common law principles. Anyone who undertakes to store goods, but allows another to have possession of them, is therefore in breach of his contract (237).

Contracts for Repair

A contract for the repair of, or for work on, anything of which the possession has been entrusted to the contractor, involves not only the specific agreement for work and materials, but also an implied bailment. The contract of bailment continues, even though the work may be finished, until the parties have shown, either by express words or by conduct, that they intend to alter that relationship. This type of bailment is classed as being for reward; the fact that the work is finished does not make it gratuitous (238), even though the only reward the bailee can claim is his profit from the price of the work.

Repairer's Lien.—A bailee for repair has a lien on the goods for his charges under the contract for repair, but the lien is for those charges only, and he cannot include anything by way of rent for storage; nor does the lien give him the right to sell them in satisfaction. Under the LIMITATION ACT, 1939 (*see* p. 169), he cannot sue for his charges after time has ceased to run at the end of the statutory period, although his lien remains. Likewise, the bailor loses his right to bring an action to claim the goods, and the effect of that is that he loses his title to them. Thus, a bailee is in a position to sell the goods only after time has run under the Act. In the present state of the law, therefore, there is no absolute right to sell them before time has ceased to run, even though due notice may have been given to the bailor by advertisement or otherwise.

The Disposal of Uncollected Goods Act, 1952.—Some relief has now been afforded to repairers by the DISPOSAL OF UNCOLLECTED GOODS ACT, 1952, which became law on 1st August of that year. This ACT makes provision for the "disposal of goods accepted in the course of business for repair or other treatment but not re-

delivered;" goods held merely for storage or safe custody are not included. For the ACT to apply, a notice to the effect that repairs are accepted subject to the provisions of the ACT must be "conspicuously displayed" on the premises (s. 1 (3) (a)). Where this has been done and the owner of the goods has both failed to pay the repairer's charges and to take delivery (or give delivery instructions), the goods may be sold, subject to the provisions of the ACT and the terms of any agreement between the parties. Special provision is made for cases where goods were accepted for repair before August 1952 (s. 5).

The steps to be taken by the repairer are as follows:—

- (1) When the goods are ready, notice in writing to this effect must be given to the bailor personally, or delivered by hand or through the post to his last known address (s. 1 (3) (b); s. 1 (7); s. 2 (4)).
- (2) If, after the expiry of 12 months from the giving of the above notice, the bailor has failed both
 - (a) To pay or tender the bailee's charges, and
 - (b) To take delivery of, or give delivery instructions for, the goods,
 the bailee may then give notice of his intention to sell the goods. The notice must be in writing, must be given not less than 14 days before the sale, and must be sent to the bailor's last known address by registered post (s. 1 (3) (c); s. 1 (7); s. 2 (3)).
- (3) The sale must be by public auction, unless the bailee has included in his notice of intention to sell, a statement of the lowest price he is prepared to accept, when he may sell the goods otherwise than by auction at not less than the declared price (s. 1 (3) (ii)).
- (4) When the goods have been sold, the repairer is entitled to deduct his charges from the proceeds, such charges to include a reasonable amount for storing the goods from the date of the first notice, costs in connection with the sale, and the cost of insuring the goods. A proper record of the transaction must be made within 7 days of the sale, and must be kept for, and shown on demand to, the bailor at any time within 6 years (s. 3; s. 4 (2)).

The balance of the proceeds of the sale is recoverable by the bailor within the usual period of limitation (*see* p. 169). Failure to keep a proper record of the sale renders the bailee liable to a fine of up to £100, or to three months' imprisonment, or both (s. 3 (3)).

Contracts of Hiring

A contract of hiring is a bailment for reward, under which the bailee obtains undisputed possession of the article hired, and has

the right to prevent interference with it by anyone, including the owner. Apart from any special terms in the agreement for hire, there are certain implied terms which apply to this class of contract and impose obligations upon both the owner and the hirer. It is convenient to consider these firstly as pertaining to the owner, and secondly as to the hirer.

Duties of the Owner

Implied Warranty of Fitness.—The owner of equipment which he lets out on hire impliedly warrants that it is as fit and suitable for the purpose for which it is hired as reasonable skill and care can make it. The purpose may be expressly communicated to the owner at the time of hiring, or it may be obvious from the kind of equipment hired. Thus, if a civil engineering contractor hires a road-roller, it may be assumed that he will use it for the purpose of consolidating a road, and not for breaking up old castings. It is, of course, open to the owner to specify conditions of use, and to make it a term of the contract that the equipment shall not be employed on work for which it is not designed.

An illustration of the scope of this warranty is afforded by *Reed v. Dean* (1949) (239).

The plaintiff, wishing to hire a motor launch for a cruise, made enquiries of the defendant, who sent him a leaflet and an order form. The form, which was headed, "Order Form for Charter of Craft," contained the statement, "For terms of hire see general catalogue," and a blank order for completion by the hirer. No catalogue was enclosed. The form was duly completed and signed by the plaintiff, and its receipt was acknowledged by a telegram, "Booking O.K." Although there had been some preliminary correspondence, there was nothing which revealed any relevant contract terms.

Soon after the start of the cruise the launch caught fire and was destroyed. The cause of the fire could not be satisfactorily explained, but the loss was principally due to there being no proper fire-fighting equipment on board.

It was held that there was an implied undertaking by the owner that the launch was as fit for the purpose for which it was hired as reasonable care and skill could make it. The fact that there was an unexplained fire raised the presumption that the launch was not fit for its purpose, and failure to provide fire-fighting equipment was a definite breach of the implied warranty of fitness.

Warranty of No Defects.—There is a further implied warranty that at the time of delivery there are no defects, discoverable by reasonably careful examination, of which the owner is or ought

to be aware. In a sense, this is a part of the general warranty of fitness. Failure to declare such defects may have consequences outside the scope of the contract itself, for the owner's liability extends to all consequential damage which would normally be in the contemplation of a reasonably prudent man, aware of the use to which the equipment is to be put (*see* p. 320).

Statutory Obligations.—Apart from any implied warranty, there may be statutory obligations with which the owner must comply. For example, s. 17 of the FACTORIES ACT, 1937, requires "machines intended to be driven by mechanical power," for use in a factory, to be properly guarded, and default by the owner may render him liable to a fine not exceeding £100. These provisions have been extended to the BUILDING REGULATIONS, 1948 (*see* p. 356). Again, if it is a mobile machine, likely to be driven upon the public highway, it must, apart from any question of licensing, be in conformity with the MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, 1951.

Duties of the Hirer

Payment of Charges.—The hirer must pay all charges when due. If the agreed charge is a fixed sum for a stated period, the whole sum is payable, whether or not the equipment is returned before the expiration of the period. Where payment is to be by instalments at specified intervals, each instalment is treated as a fixed sum for the period it covers. Non-payment on the due-date ends the contract, and the owner is entitled to recover the equipment and claim the moneys owing up to the end of the period.

Care of Goods Bailed.—It is implied by the contract that the hirer is possessed of sufficient skill and experience to operate and maintain the equipment he has hired. It is his duty to take reasonable care of it, but he is not responsible for fair wear and tear; he is liable only for loss caused by negligence.

Apart from special terms in the contract, he is under no obligation to effect repairs, except as incidental to his duty to take reasonable care. But, again apart from any special terms, he is entitled to have the equipment repaired so as to enable him to use it, without any express authority of the owner. In fact, such authority may be inferred if it is part of the agreement that the equipment shall be kept in repair (240). It makes no difference that the equipment is delivered to a third party for this purpose,

even though, by so doing, that party obtains a lien for his charges (see p. 218).

Unauthorised Use.—Unless specifically authorised by the owner, the hirer may not lend or sub-let the equipment; nor may he put it to any use for which it is not intended. Should he sell it, the purchaser will not obtain good title, even though he has acted in a *bona fide* manner and without knowledge of the hiring. In all these cases the hiring will be determined and, in the case of a sale, the hirer will be liable in conversion.

A hirer who wrongfully refuses to hand over equipment upon determination of a hiring will be liable in detinue. If it has got into other hands, the owner may sue the third party in detinue or conversion, as the case may be. In this connection, *Strand Electric v. Brisford Entertainments* is instructive (see p. 220).

Contracts of Carriage

Carriers are, in law, divided into the two classes of "common carriers" and "private carriers." A **common carrier** is one who undertakes, for hire and by way of public business, to carry from place to place, without discrimination, the goods of all persons as may choose to employ him. A **private carrier** is a person who, not being a common carrier, undertakes upon occasion to carry the goods of another, and receives a reward for so doing (241). A carrier must be distinguished from a contractor, who places a vehicle with driver at the disposal of his customer. Such a contract is one for hire and not for carriage, even though the purpose is to carry goods to a specific destination, provided that payment is to be made whether or not the vehicle is used (though it would be otherwise if the charges were on a tonnage basis) (242).

Common Carriers

It is a question of fact whether or not a particular carrier is a common carrier. That he carries within a defined district or between fixed termini is irrelevant (243). A carrier who accepts goods on terms which limit his liability may still be a common carrier in so far as those limiting terms do not apply (244). But if he reserves the right to accept or reject offers as he thinks fit, he is a private carrier (243).

Obligations.—A common carrier is bound to accept for carriage and to convey the goods of anyone who:—

- (i) Offers to pay the hire, pays it in advance, and pays it in ready money, and
- (ii) Tenders the goods to the carrier, or his authorised representative, in the usual course of business and at a reasonable time before the start of the journey.

Non-compliance with either of these conditions affords the carrier a reasonable excuse for refusing the goods. Refusal is also justified where, for example, the proposed destination is outside the route or area usually covered, or the goods are insufficiently or improperly packed, or are inherently dangerous. Wrongful refusal to accept goods properly tendered will render the carrier liable in damages at the suit of the person offering them. The imposition of unreasonable charges or conditions amounts to such a refusal.

Payment and Lien.—Although the charges must be reasonable, there is nothing to prevent the carrier giving preference to one customer over another, unless he has publicly declared his charges, or they are fixed by some statutory regulation. He may claim payment in advance, but if he accepts the goods without doing so, he cannot then demand payment until the contract has been performed, or the goods have been stopped in transit (*see* p. 191).

In the event of non-payment of his charges, a common carrier has a particular lien in respect of them. *Prima facie*, it is the consignor who is liable, but if, to the knowledge of the carrier, he has contracted as the agent of the consignee, then it is to the latter that the carrier must look. The lien is also good against the true owner of the goods. For the lien to operate, the goods must have been received by him in his capacity as a carrier, and it will not arise until the journey has been completed. Whilst the goods are held under lien he must take good care of them, although he cannot make any charge for warehousing.

A carrier may have a general lien by agreement, but this is not viewed favourably by the Courts. In any event, such a lien does not hold against stoppage in transit, or the claims of a trustee in bankruptcy, a liquidator or a receiver, who has replaced the consignor, consignee or true owner.

Liability for Loss.—It is the common carrier's duty to carry and deliver the goods entrusted to him safely and securely,

and whether he is negligent or not is beside the point. His contract is to deliver the goods to the consignee. If tender of the goods is refused, and they cannot for some reason be returned to the consignor, he will become an involuntary bailee, and may sell as an agent of necessity (*see* p. 130). Delivery to someone other than the consignee, even though made innocently, will found a claim in conversion by the owner. If the goods are stopped in transit, he must obey a valid notice of stoppage; if he disobeys it, or acts on an invalid one, he may again be liable in conversion (*see* p. 192).

The carrier's liability may appear onerous, but he can protect himself by taking out a policy of insurance, which may cover losses for which he is not himself liable. There are, also, certain events which will excuse him from liability. They are:—

- (1) An act of the Queen's enemies,
- (2) An act of God,
- (3) Inherent vice in the goods, and
- (4) Certain acts or omissions by the owner of the goods.

An "enemy" is a national of a country with which Great Britain is in a state of war, and "act of God" is explained elsewhere (*see* p. 312). "Inherent vice" includes defects in the goods themselves, in their packaging, or in the method of packing; it is immaterial whether the carrier is or is not aware of this. "Acts or omissions by the owner" means this. A consignor is under a duty to give warning where goods, apparently harmless, are inherently dangerous (*see* p. 321). Should he not do so, he impliedly warrants that they are safe and fit to be carried. Further, the carrier is entitled to information as to the contents of the packages he is asked to carry. If he is given wrong or misleading information, he will be excused from blame for any consequences, and may have a claim against the owner.

The Carriers Act, 1830.—Common carriers by land are given statutory protection in respect of certain articles "of great value in small compass" by the CARRIERS ACT, 1830 (as amended by the CARRIERS ACT AMENDMENT ACT, 1865). The articles include, *inter alia*, timepieces of every description (including chronometers), glass of any kind (but not optical apparatus), and silk. An increased charge may be asked for carrying these articles. It is for the carrier to demand the charge, and there is no duty upon the consignor to tender it, even though he may have made a proper declaration.

A notice giving particulars of increased charges under the ACT must be displayed at the place where the goods are normally received

by the carrier. Such notice will be binding upon the consignor, even though he has not seen it. But the carrier may not, by such notice, limit his liability otherwise than as allowed by the ACT.

Private Carriers

A private carrier is a bailee for reward, liable at common law only in negligence. He operates under special contract, and reserves the right to accept or reject goods offered to him as he thinks fit.

Although there is an implied warranty that he will exercise skill and competence, he may contract out of liability for negligence, and a condition that he will not be responsible for loss or damage by fire has been held to protect him from all claims, even though he has been negligent (245).

In the event of non-delivery under a contract of carriage, the damage to the consignor will be that within the "first rule" in *Hadley v. Baxendale* (see p. 174). In other words, the carrier is taken to know that in such an event the consignor will lose the value of the goods.

Carriage by Rail

The railways' obligation to carry is contained in the RAILWAY AND CANAL TRAFFIC ACTS of 1854, 1873 and 1888, and in the RAILWAYS ACT, 1921; these provisions have not been materially affected by the TRANSPORT ACT, 1947 (the "nationalisation" measure).

It is provided by s. 2 of the 1854 ACT that "all reasonable facilities for the receiving and forwarding and delivering of traffic" shall be afforded. Since the RAILWAYS ACT, 1921, the railways are no longer common carriers, but, even so, a declaration that they are not common carriers of certain classes of goods does not afford them an excuse for not providing "all reasonable facilities" for the conveyance of such goods. By ss. 42 to 55 of the 1921 ACT, as modified and amended by ss. 72 to 85 of the 1947 ACT, all goods are now carried under standard terms and conditions settled by the Transport Tribunal (previously known as the Railway Rates Tribunal), unless there is a special contract.

Carriage by Sea

The owner or master of a general ship is deemed to be a common carrier, but his liability is limited by s. 502 of the MERCHANT

SHIPPING ACT, 1894, to loss or damage due to fire, and that occurring by reason of the owner's "actual fault or privity."

Damage occurring otherwise is limited (by s. 503 of the 1894 ACT, as extended by s. 1 of the MERCHANT SHIPPING ACT, 1900) to an aggregate amount not exceeding £8 per ton of the ship's registered tonnage. Liability for valuables is limited by s. 502 of the 1894 ACT.

The CARRIAGE OF GOODS BY SEA ACT, 1924, has for its purpose the regulation of bills of lading on goods shipped from any port in the United Kingdom, whether the destination is "home" or overseas.

By that ACT the shipowner is responsible that the ship is seaworthy, but his obligation does not extend to his having to give an absolute undertaking in that respect; it is sufficient that seaworthiness is assured so far as due diligence can make it. He must see that the holds and other cargo-carrying parts of the ship are fit for the reception of the goods to be carried, and must "properly and carefully, load, handle, stow, carry, keep, care for and discharge the goods carried."

Liability of shipowners for loss or damage to cargo is excluded where the cause of such loss or damage falls within any one of a number of specified exceptions, which include the management of the ship, acts of God or of the Queen's enemies (*see* p. 228), the perils of the sea, fire (not due to the fault of the shipowner), strikes, and bad packing or marking of, or latent defects in, the goods. The shipowner may not contract out of the ACT, save to a limited extent only, and not at all in connection with "ordinary commercial shipments made in the ordinary course of trade."

Carriage by Air

International carriage by air between countries which have ratified the Warsaw Convention of 1929 is governed in the United Kingdom by the CARRIAGE BY AIR ACT, 1932. Carriage within the United Kingdom, or to countries which have not ratified the Convention (a minority only), is not covered by the ACT, and is therefore controlled by whatever contractual conditions the carrier may choose to impose.

The ACT, which is based upon the terms of the Convention, provides that the carrier cannot contract out of liability for loss of, or damage to, goods. But his liability is limited, unless there has been a special declaration of value and an additional charge has been

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paid. Even so, that liability may be further limited, or avoided altogether, where the carrier is able to show that all necessary measures were taken to avoid damage, or that it was caused, or contributed to, by the consignor.

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CHAPTER 14

Hire-Purchase Agreements

THE practice of selling goods by instalments is now firmly rooted in our commercial and economic systems, and it is therefore important to understand the legal implications of this form of credit. Whether the transaction is large or small, and whether the credit is given to an industrial firm or to a housewife, the principles are the same; it is only a question of degree.

The term "hire-purchase" includes any transaction where there is a hiring of goods with an element of sale. The potential purchaser gains possession of the goods in return for his promise to pay hire-rentals at regular intervals, and when the total of these rentals has reached the agreed purchase price, the property then passes to the hirer, who becomes the owner. That is putting it at its simplest, and it will not be true in every case, for there are two basic forms of agreement with marked differences.

A true hire-purchase agreement must be in what is called "*Helby v. Matthews* form" (265). Its essentials, enunciated by the House of Lords in the case of that name in 1895, are that the hirer must be under no legal obligation to buy the goods, but must have the option either of returning them and terminating the agreement, or of paying the price in full and becoming the owner. If there is no option, and no provision for the hirer to terminate the agreement, the transaction is not one of hire-purchase, though it may be a "credit sale." A credit sales agreement is usually in "*Lee v. Butler* form" (263), being one for the "hire and purchase" of goods. It will probably provide that the property in the goods is not to pass until the payment of the last instalment, that non-payment will entitle the owner to repossession, and that moneys paid before such default are to be on account of hire and are not to be regarded as part-payment. In fact, its effect will be that of an agreement to purchase the goods and not to hire them in the ordinary sense. Of course, if the property passes right away, there will be no condition of repossession, and the sale will not be

a credit sale as it is normally understood; there will be merely an extended credit, recoverable as for an ordinary debt.

Putting it shortly, the difference between a *Helby v. Matthews* and a *Lee v. Butler* agreement is that in the former the hirer has the option of keeping or returning the goods, whereas in the latter there is no such option. Apart from that, the two forms of agreement are generally similar, and provide for the regular payment of instalments, with a right in the owner to terminate and repossess upon default by the hirer.

Both types of agreement are governed by the ordinary law of contract, but if the total price payable does not exceed £300, the HIRE-PURCHASE ACT, 1938, applies. The Act, which was passed to remedy abuses perpetrated by unscrupulous traders and to protect purchasers with modest means, has been amended and modified as from 30th August, 1954, by the HIRE-PURCHASE ACT, 1954. As its provisions are rather special, it is dealt with after the general law affecting hire-purchase has been considered.

I. THE GENERAL LAW

A hire-purchase agreement being primarily one of hire, the hirer is subject, during the currency of the agreement, to all the usual obligations of a bailee for hire (*see* p. 225). Although there is also an element of sale, the provisions of the SALE OF GOODS ACT, 1893, do not apply to true hire-purchase transactions, but they do to credit sales. It is usual for the contract to be in writing, and to be sufficiently comprehensive as to exclude implied terms. However, apart from such terms as are normally implied in all contracts, there are some peculiar to hire-purchase or credit sales agreements.

If it is desired to sell or buy goods on the basis of instalment payments, the form of credit desired should be settled in the initial stages. It is useless to incorporate a condition in an agreement for sale that the goods are to be purchased on "hire-purchase terms," for it has been held (246) that such a clause is too vague for any precise meaning to be attributed to it, and, consequently, there will be no enforceable contract.

Even if a proper hire-purchase agreement has been entered into, it is doubtful whether it can be enforced from the point of view of obtaining performance. Suppose the hirer refuses to take delivery. The owner will not be able to obtain specific

performance, except in a very special case (*see* p. 185), and he will have no claim for rent accrued, for no debt will have been incurred. His only remedy will be in damages for breach of agreement (247). In the same way, if the owner refuses to deliver, the hirer's remedy will be in damages.

Ownership of Goods Hired

It is a condition precedent that the person expressed in the agreement as being the "owner" of the goods shall be the true owner, able to pass good title. As Mr. Justice Goddard (now the Lord Chief Justice) put it in *Karflex v. Poole* (1933) (248a):—

"In my judgement where a person is letting out chattels of any description on hire-purchase, he does thereby impliedly contract, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time when he lets it out."

The material date when this implied condition arises is the date of delivery of the goods to the hirer, not the date of the signing of the agreement. This is particularly important where the seller of the goods is not the "owner" under the agreement, the transaction being financed by a so-called hire-purchase firm or finance company.

Effect of Breach of the Condition.—The facts of *Karflex v. Poole* (248) were as follows:—

The defendant asked the plaintiffs, who were "hire-purchase dealers," to finance the purchase of a motor-car from one King. This they did on the usual terms, and were described as the "owners" in the agreement. The first instalment was not paid, and the plaintiffs took possession of the car and started proceedings to recover the sum due under the agreement. They then found that King had no title to the car, but had obtained it dishonestly from a man who had had it on a hire-purchase agreement from the true owners. Two months later the plaintiffs perfected their title by buying in the rights of the owners.

As there had been a breach of the implied condition as to ownership, which could not be put right by the acquisition of ownership at a later date, the agreement was avoided, and the plaintiffs had no claim against the defendant in respect of anything due under it.

The implied condition may, however, be treated as a warranty by the hirer (*see* p. 99). Thus, in *Warman v. Southern Counties Car Finance* (1949) (249):—

The plaintiff entered into a hire-purchase agreement for a motor-car with the defendants, who were described as the "owners."

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During the currency of the agreement he became aware that another company claimed to own the car, but he continued payments and finally exercised his option to purchase. He was then served with a writ by the other company, to whom he later returned the car.

It was held that there was a condition that the defendants were the owners of the car, which the plaintiff had treated as a warranty by continuing the instalments after he knew of the breach. He was therefore entitled to the return of all payments he had made, by way of damages. It was held further that the defendants could not recover rent for the hire of the car for the period, for the real object of a hire-purchase agreement is to enable the hirer to buy, and there had been a total failure of consideration.

The rule that a bailee cannot dispute his bailor's title (*see* p. 212) has no application to a hire-purchase transaction, because of the element of sale (248).

Repossession by the Owner

Time is of the essence of a hire-purchase contract, and the owner is thereby entitled to retake possession if the hirer is in arrear with payment of hire-rentals. By so doing the owner does not abandon his right to sue for the arrears (250). Nor does subsequent tender of the amount owing displace the owner's right to recover the goods. Further, the hirer who has defaulted has no claim to the goods or to the repayment of any instalments. The right to repossession may, of course, be varied by express agreement, but, *prima facie*, it arises at the moment of default (251). It is usually provided, however, that notice must be given to the hirer of an intention to terminate the agreement by repossession.

The Effect of Distress.—The right to repossession of the goods may be hampered where the hirer is a tenant upon whom the landlord has levied a distress for non-payment of rent. The LAW OF DISTRESS AMENDMENT ACT, 1908, by **ss. 1 and 2**, protects from distress the goods of under-tenants, lodgers, and "any other person whatsoever not being a tenant . . . and not having any beneficial interest in any tenancy of the premises or of any part thereof." The term "any other person" could include the husband or wife of the tenant, or the true owner of the goods. But **s. 4** provides that the ACT is not to apply to goods comprised in any hire-purchase agreement, nor to goods in the possession of the tenant by permission of the true owner in such circumstances

that the tenant is the reputed owner thereof. The result of this is that goods held by a tenant under a hire-purchase agreement to which he is a party are liable to distress (252).

A clause providing that the agreement, and the owner's consent to the hirer's possession, shall automatically terminate upon the landlord levying distress on the goods, will not protect the owner completely. It was held in *Times Furnishing v. Hutchings* (1938) (253) that the effect of such a clause was that the landlord's action to distrain terminated the agreement, and the goods were then no longer comprised in a hire-purchase agreement within s. 4. But if, at the time of the distress, they were in the possession of the tenant, he was the "reputed owner" within that section, and the clause did not operate automatically to terminate the owner's consent. It was for the owners to indicate the withdrawal of their consent by taking some active step. In such a case, therefore, the owner will protect himself only by attempting actual repossession.

Fixtures.—Where goods comprised in an agreement have been so installed on premises as to have become fixtures (*see* p. 134), it has been held that the owners have a sufficient interest to give them authority to enter and remove the installation (254). But if the hirer is a limited company which has gone into liquidation, others, such as the debenture holders, may have an equal interest. In such cases the rule is that "the first in time prevails," and the first to give notice of his claim to the liquidator will therefore be the one allowed to exercise his right.

Bankruptcy of Hirer.—In the event of the bankruptcy of the hirer of goods, whether under a hire or hire-purchase agreement, the goods are likely to vest in the trustee in bankruptcy, unless active steps are taken by the owners to repossess them. This is because the hirer is the "reputed owner" of the goods by s. 38 of the BANKRUPTCY ACT, 1914. But reputed ownership may be excluded by notorious custom. Thus, it is a custom for hotel proprietors to hire all the articles necessary for the furnishing of an hotel in the widest sense, and that custom is sufficiently notorious as to exclude the ACT (255). But it does not extend to traders generally (256).

Agricultural Premises.—Machinery on agricultural premises is exempt from landlord's distress. This is provided by s. 20 (1) of the AGRICULTURAL HOLDINGS ACT, 1948:—

"Agricultural or other machinery that is the property of a person other than the tenant of an agricultural holding and is on

the holding under an agreement with the tenant for the hire or use thereof in the conduct of his business, . . . shall not be distrained for rent."

An "agricultural holding" is the aggregate of agricultural land comprised in a tenancy (s. 1 (1)). "Agricultural land" is land so used by way of trade or business, including land designated as such by the Minister of Agriculture and Fisheries under s. 109 (1) of the AGRICULTURE ACT, 1947 (s. 1 (2)). "Agriculture" includes horticulture, fruit growing, dairy farming and livestock breeding and keeping, and the use of land as market gardens and nursery grounds (1947 Act, s. 109 (3)).

Repairs

It was held in *Green v. All Motors* (1917) (257) (see p. 225), that the hirer of equipment is entitled to have it repaired in order that he may use it, and this applies equally where the equipment is under hire-purchase. But the repairer will have a lien for his charges, and that lien will be good against both the hirer and the owner (see *Keene v. Thomas*, p. 191). This is because, by putting the hirer in possession of the equipment, the owner impliedly authorises him to deal with it in any way necessary to enable it to be used. But such authorisation is terminated whenever the agreement comes to an end. If, therefore, the repairer's lien subsisted at the time the agreement was terminated, it would continue; it would be otherwise if the charges were incurred after termination (258).

Depreciation Payments

It is sometimes provided that, in the event of an agreement being terminated either by the hirer or the owner, a sum in addition to the hire-rentals becomes payable, by way of compensation for depreciation of the goods. The question arises whether such a sum is in the nature of a penalty (see p. 182); the answer depends largely on the facts. Thus, in *Associated Distributors v. Hall* (1938) (259), a clause in an agreement for the hire-purchase of a bicycle provided that, upon termination before all instalments were paid, the hirer would be liable for rental up to the time of that event, plus a sum which, when added to the rental, would equal half the total amount payable under the agreement. The Court of Appeal held that such a sum was neither a penalty nor liquidated damages.

In *Cooden Engineering v. Stanford* (1952) (260), termination

of the agreement because of non-payment of hire-rental immediately entitled the owner to claim the full balance of the hire-purchase price. A majority of the Court of Appeal (Lords Justices Somervell and Hodson) held that such a provision was penal, and the balance was accordingly not recoverable. But Lord Justice Jenkins, who dissented, held that no question of a penalty could arise, since the balance became payable, not on a breach of contract, but because the hiring had been determined. It is submitted, with respect, that the majority were influenced to some extent by the fact that, not only was the whole balance payable, but the owner got the goods back as well. It would seem, therefore, that the majority decision in this case stands alone upon its facts, and that *Associated Distributors v. Hall* still represents the law as applicable to the majority of cases of this kind.

Finance Companies

Traders who sell goods on hire-purchase terms are not usually in a sufficiently strong position to finance these transactions themselves, and it is the almost invariable practice to sell the goods to a finance company, who then becomes the "owner" under the agreement. Arrangements between trader and finance company vary, but, in general, the trader acts as the agent of the company, and the contract between them sometimes incorporates a "recourse agreement" whereby the trader is called upon to purchase the goods back from the company in the event of the hiring agreement coming to a premature end. This kind of arrangement is less troublesome than calling for guarantors.

"Colourable" Transactions

The essence of a hire-purchase agreement is that it represents a genuine transaction whereby a purchaser is enabled to obtain goods on credit. What happens in practice is that Smith, the owner of goods, sells them to Jones & Co., a finance company, in order that the latter shall let them out to Brown on hire-purchase terms. But if it is Brown who owns the goods, and he sells them to Jones & Co., who in turn hires them back to him, there is no true hire-purchase transaction; it is a loan of money by Jones & Co. on the security of Brown's goods. Assuming that the agreement is in writing, it may, in the latter case, be a bill of sale and not a hire-purchase agreement.

Bills of Sale.—A BILL OF SALE is a document whereby “personal chattels” are assigned by the owner to another as security for a loan of money made by the latter to the former.

“Personal chattels” comprise goods, furniture and other articles capable of transfer by delivery, tenants’ fixtures, and trade fixtures other than fixed prime-movers, transmission machinery and pipe-work.

Bills of sale are governed by the BILLS OF SALE ACTS, 1878 and 1882, which do not affect the transactions themselves, but are aimed at the documents; oral agreements are, therefore, outside the ACTS.

The term “bill of sale” as used in the ACTS does NOT include bills of lading, delivery orders, or other documents of title used in the ordinary course of business as proof of the possession or control of goods. NOR does it include hire-purchase agreements. But it DOES include, for example, an inventory of goods with receipt attached, where the person to whom the money has been paid remains in possession of the goods.

In order to be valid, a bill of sale must be drawn up and executed as a deed, must be in the standard form prescribed by the 1882 ACT, and must be registered at the Central Office of the Supreme Court in London (or at a local Registry). If these conditions are not fulfilled, it will be absolutely void.

Whether an Agreement is a Bill of Sale.—The question of deciding whether what appears to be a hire-purchase agreement is in fact a bill of sale is not free from difficulty. If (to revert to the example) Brown sells goods to Jones & Co., and Jones & Co. hires them back to Brown, and there are two independent transactions, one of sale and the other of hire, there may be a true hiring agreement, even though Brown has a right of purchase. It is a matter of determining whether the real transaction is a loan of money secured by the agreement; if it is, the document or documents will comprise a bill of sale. But, as it is more than likely that the BILLS OF SALE ACTS will not have been complied with either as to form or registration, these documents will be absolutely void, with the result that there will be neither a hire-purchase agreement nor an enforceable bill of sale. In other words, the security will have gone completely, because the property in the goods will never have passed from Brown to Jones & Co.

Polsky v. S. & A. Services (1951) (261) provides a good example.

The plaintiff purchased a motor-car from a dealer, to whom he gave a cheque for £895. On the next day, wishing to obtain £400 to meet the cheque, he sold the car to the defendants, a finance company, and entered into a hire-purchase agreement with them on the usual forms used by them in such transactions. In the proposal form the plaintiff stated, "I desire you to purchase and let to me (such and such a car) on your hire-purchase plan." The value of the car was given as £895, and it was stated that an initial payment of £495 had been made, leaving £400, plus £50 for charges, as "balance of hire." The plaintiff gave a receipt, "Received cheque £400 payment for car," and he signed a statement that it was clearly understood that he was selling the car to the defendants.

Later, when the defendants claimed to repossess because of non-payment of instalments, the plaintiff averred that the agreement was a bill of sale, and the transaction was therefore void.

Lord Goddard held that there was no genuine sale and hiring, but that the transaction amounted merely to the giving of a loan of £400 on the security of the car. The agreement was thus a bill of sale, void for lack of registration.

Such an agreement may, on occasion, have unexpected results. For instance, in *Reg. v. Deller* (1952) (262):—

A finance company purported to purchase Deller's motor-car and hire it to him on hire-purchase terms. Before all the instalments had been paid, Deller exchanged the car for another belonging to a third party, to whom he represented that there was no more to be paid on it, and that the car was, therefore, his property. Deller was charged with obtaining the third party's car by false pretences.

The Court of Criminal Appeal held that it was a question of fact whether the transaction with the finance company was genuine. If it were, Deller would be guilty of the offence. But if it were not, there would be an unregistered bill of sale, the car would be his property, and there could have been no false pretences.

Unauthorised Disposal of Goods

A question which frequently has to be answered is: what is the position when a hirer disposes of goods on hire to him under a hire-purchase agreement? Apart from the fact that the hirer may be liable in conversion (*see* p. 219), can the goods be recovered from the third party who is in possession? Shortly, the answer is that everything may depend upon whether the agreement is in *Helby v. Matthews* or in *Lee v. Butler* form (*see* p. 232).

Goods Not Recoverable.—In *Lee v. Butler* (1893) (263) there was a valid agreement for the "hire and purchase" of goods, in which it was provided that, after all instalments had been paid,

the goods were to become the absolute property of the hirer. There was no option to buy the goods, or for the hirer to terminate the agreement. The hirer sold the goods to a third party before the conclusion of the agreement, and the Court of Appeal had to decide whether the sale was a valid one. It was held that the hirer was a person in possession of goods which he had agreed to buy, and the sale was therefore within s. 9 of the FACTORS ACT, 1889, and the purchaser obtained good title (*see p. 208*).

There may be a similar result where there is an invalid agreement. Thus, in *Union Transport Finance v. Ballardie* (1937) (264):—

The plaintiff company bought a motor-car from one Clark, and let it on hire-purchase to an employee of Clark by name Felton. All three were aware that it was not a genuine transaction, in the sense that Felton was not in a position to buy a car and could not, in any case, take delivery. In fact, the car remained in Clark's possession, and he paid the instalments. At a later date Clark let the car out under a further hire-purchase agreement to the defendant, who knew nothing of the transaction with the plaintiffs.

It was held that the plaintiffs could not recover the car from the defendant, because Clark was in the position of a seller who had remained in the possession of goods after sale within s. 8 of the FACTORS ACT, 1889 (*see p. 208*). Clark was therefore a mercantile agent, in the same position as if he had been expressly authorised by the plaintiffs to make the sale to the defendant.

When Goods May Be Recovered.—In *Helby v. Matthews* (1895) (265) it was provided by the agreement that the hirer of a piano had the option to return it to the owners during the hiring, or to acquire the absolute property in it by payment in full. After he had paid a few instalments, the hirer pledged the piano with a pawnbroker. The House of Lords held that, by putting it out of his power to return the piano to the owners, he had not, in effect, exercised his option and become bound to buy it. He had not, therefore, agreed to buy goods within s. 9 of the FACTORS ACT, 1889, and he was thus a mere bailee and not a mercantile agent. Consequently, the owners could recover the piano from the pawnbroker.

The Effect of Fraud.—A more complicated example on rather different lines serves to illustrate a variety of fraud which is sometimes perpetrated in connection with motor-cars.

Smith agreed to buy a Morris car from Brown on hire-purchase terms. He then purported to sell the car to Jones in exchange for

cash and an Austin car. He sold the Austin to Green, who in turn sold it to White. Meanwhile Brown claimed back the Morris car from Smith because he had defaulted in his payments; but, on learning that Jones now had the car, Brown bought it back from him for an agreed sum. Jones then claimed the Austin car back from Smith, and eventually sued Green in conversion.

These were the basic facts of *Robin and Rambler Coaches v. Turner* (1947) (266), the decision in which depended upon a question of fraudulent misrepresentation (see p. 93). Following that decision, the position as to the Austin car was this. Smith's contract with Jones was induced by the former's implied representation that he could pass good title to the Morris car. But Smith could not pass title, because he was a mere bailee under a *Helby v. Matthews* agreement. His representation was fraudulent, and the contract was voidable by Jones. However, the contract had not been avoided before the transaction between Smith and Green took place. Green had bought in good faith, and the property in the Austin car had passed to him and thence to White. Jones, therefore, had no claim.

II. THE HIRE-PURCHASE ACT, 1938

As already explained, the HIRE-PURCHASE ACT, 1938 (as modified by the HIRE-PURCHASE ACT, 1954, with effect from 30th August of that year), is not exclusive, and the general law still applies where it is not affected by the ACT. It covers both hire-purchase and credit sales agreements, which are defined by s. 21 (1) as follows:—

A HIRE-PURCHASE agreement is an "agreement for the bailment of goods under which the bailee may buy the goods, or under which the property in the goods will or may pass to the bailee."

A CREDIT SALES agreement is an "agreement for the sale of goods under which the purchase price is payable by five or more instalments."

The first definition covers all *Helby v. Matthews* agreements. The second covers all credit sale agreements which allow for five or more instalments, whether or not they are in *Lee v. Butler* form.

Previously the ACT applied where the hire-purchase price (or "total purchase price" in a credit sale) did not exceed £100, except

HIRE-PURCHASE AGREEMENTS

in the case of motor-vehicles (as defined by the ROAD TRAFFIC ACT, 1930) or railway rolling stock, where the figure was £50. The 1954 ACT has now abolished these distinctions and in all cases the 1938 ACT applies where the figure does not exceed £300. The "hire-purchase price" is the total sum payable in order to complete the purchase of the goods; since the 1954 ACT this must include any deposit or other initial payment, or any allowance for part-exchange of goods. The "total purchase price" is the total sum payable under a credit sales agreement. In both cases any penalty for breach of agreement, or payment for depreciation, is excluded.

Hire-Purchase Agreements

Notification of Price.—By s. 2 (1) the cash price of the goods must be notified in writing to the prospective purchaser, either by clear labels on the goods, or by a clear statement in a price-list or advertisement (or any other quotation).

Note or Memorandum.—S. 2 (2) stipulates that there must be a note or memorandum in writing, signed by the hirer in person, and by or on behalf of all other parties. It must contain:—

- (a) A statement of the hire-purchase price and the cash price.
- (b) A statement of the amount of each instalment, and when payable.
- (c) A list of the goods, sufficiently described as to identify them.
- (d) A notice in the terms of the Schedule to the ACT.

The NOTICE is divided into two parts, the first dealing with the right of the hirer to terminate the agreement, and the second with the restrictions on the owner's right to repossess the goods. As its terms differ somewhat from the provisions of the ACT, it would seem that it has little legal value in itself, except that it acts as a reminder to the hirer and a warning to the owner, to which end it must be shown as prominently as the rest of the memorandum.

A copy of the memorandum must be delivered to the hirer within seven days of execution. Failure by the owner to comply with this, or with any of the other requirements of s. 2, will be sufficient to prevent him from either enforcing the agreement or recovering the goods.

Void Provisions.—S. 5 sets out certain provisions which, if included in the agreement, will be treated as void, though they may or may not invalidate the remainder. These are:—

- (1) Authority for the owner or his agent to enter upon the hirer's premises in order to take possession of the goods.
- (2) Any restriction upon the right of the hirer to terminate the agreement.

- (3) Any additional liability imposed upon the hirer when it is he, and not the owner, who terminates the agreement.
- (4) The owner's representative to be considered as being the agent of the hirer.
- (5) The owner not to be liable for the acts or defaults of his employees or agents in connection with the formation or conclusion of the agreement.

Implied Terms.—S. 8 provides that there are certain implied terms applicable to every agreement to which the ACT applies. They are to apply notwithstanding any agreement to the contrary, unless such modification has been brought to the notice of the hirer and its effect made clear to him. These terms are similar to those in the SALE OF GOODS ACT, 1893 (*see* p. 108), and they consist of three conditions and two warranties.

Implied Conditions

- (i) The owner shall have the right to sell the goods at the time the property is to pass.

(This would seem to oust the usual implication that the "owner" must be the true owner at the time of delivery; *see* p. 234).

- (ii) The goods shall be reasonably fit for the purpose for which required, such purpose having been made known, expressly or impliedly, by the hirer.
- (iii) The goods shall be of merchantable quality, UNLESS:
 - (a) They are second-hand, and are specified as such in the agreement, or
 - (b) Lack of merchantable quality is due to a defect of which the owner could not reasonably have been aware at the time of hiring, or
 - (c) The hirer has examined the goods or a sample, and such examination should have revealed the defect.

Implied Warranties.

- (iv) The hirer shall have quiet possession.
- (v) The goods are free from any charge or encumbrance at the time the property is to pass.

It will be noted that these requirements differ from those implied in a sale of goods in that there is no mention of reliance upon the owner's "skill and judgement," and no exclusion where goods are supplied under a trade name. Apart from the provisions of this section, and those of s. 5, there is nothing to exclude the operation of any rule of law which would be applicable to any hire-purchase agreement.

Information.—S. 6 provides that the hirer may, at any time before the final payment is due, demand from the owner in return for the tender of one shilling, a copy of the agreement together with a signed statement setting out:—

- (1) The amount already paid,
- (2) The amount of arrears, if any, with dates and amounts of instalments due, and
- (3) The amount not yet payable.

Until the owner complies with this demand, he has no right of enforcement, and if he is in default for one month or more he is liable to a fine of £10.

S. 7 gives the owner the right to request information from the hirer as to the whereabouts of the goods, provided that the agreement specifies that they shall be kept in the hirer's possession or control. Failure to give this information within 14 days may render the hirer liable to a fine of £10.

Termination.—The owner may terminate the agreement at any time authorised by its terms. The hirer has an absolute right to terminate at any time before the final payment becomes due.

S. 4 provides that, if the hirer wishes to terminate, he must give notice to the owner, or to any person authorised to receive payments, in writing. He must pay an amount which, when added to the total sum already paid, equals one-half of the hire purchase price. Any sum fixed by the agreement as depreciation is payable in addition. The hirer is not bound to return the goods, but he must permit the owner to recover possession.

Repossession.—By s. 11 an owner may not repossess the goods without an order of the Court where one-third or more of the hire-purchase has already been paid. If the agreement provides for a depreciation payment upon termination, the owner may claim this when suing for possession. The Court has a discretion both as regards ordering the return of the goods and in fixing the amount to be paid by the hirer.

In Menzies v. United Motor Finance (1940) (267):—

The plaintiff purported to sell a motor-car to dealers, who in turn sold it to the defendants, a finance company. The defendants then entered into a hire-purchase agreement with the plaintiff, it being stated that an initial payment of £25 had been made, and that the balance of £37 was to be repaid in twelve monthly instalments. In fact, the defendants had paid £33 to the dealer, who had given £30 to the plaintiff; but the latter had never paid £25 to the defendants. The instalments fell into arrear, and the defendants repossessed the car.

The Court of Appeal, not concerned with whether the transaction was sham or genuine, held that, as the £25 had never been paid, the hire-purchase price was under £50, and the ACT of 1938 applied. More than one-third of the instalments having been paid, repossession otherwise than by order of the Court was in breach of s. 11 of the ACT, and the agreement was therefore determined. The plaintiff was entitled to the return of all instalments paid. But in a case where the ACT had been complied with save to the extent that the owner had repossessed goods without making application to the Court, it was held that the hirer had suffered damage only to the extent that he had been deprived of the goods sooner than he might have been had the provisions of s. 11 been observed (268).

Separate Agreements.—In cases where a hirer has entered into two or more separate agreements with the same owner, and makes a payment to the owner which is insufficient to cover the total amount owing, he has the right to appropriate it to each agreement as he thinks fit. But if he does not so appropriate it, the owner must, notwithstanding any agreement to the contrary, distribute the sum paid between the agreements in proportion to the amounts due under each of them (s. 9). But there is nothing to prevent a later agreement incorporating an earlier one, so as to avoid that difficulty. In that event, the only condition is that, by s. 15, if one-third of the hire-purchase price has already been paid under the earlier agreement, one-third will be deemed, for the purposes of s. 11, to have been paid under the subsequent agreement.

Installation Charges.—Where installation charges are made, they may be included in the hire-purchase price, though they must be shown separately.

For this purpose, "INSTALLATION" is defined by s. 19 (2) as:—

- "(a) The installation of any electric line, as defined by the ELECTRIC LIGHTING ACT, 1882, or any gas or water pipe,
- "(b) The fixing of goods to which the agreement relates to the premises where they are to be used, and the alteration of premises to enable such goods to be used thereon, and
- "(c) Where it is reasonably necessary that any such goods shall be constructed or erected on the premises where they are to be used, any work carried out for the purpose of such construction or erection."

The determination of the one-half or one-third of a hire-purchase price which includes installation charges, as required by ss. 4 and

11, is governed by s. 19 (1). Its effect may be explained by example.

If the hire-purchase price is £70, made up of £60 for the goods and £10 for installation charges, the statutory "one-third" is £30 (£20 + £10), and the statutory "one-half" is £40 (£30 + £10).

Effect of the 1954 Act.—In addition to enlarging the scope of the 1938 ACT (see p. 242), the amending ACT has made certain procedural alterations affecting Court Orders made in actions brought under it. These do not concern us here, except to note that they apply to all actions brought after the commencement of the new ACT, irrespective of whether the agreements were entered into before or after 30th August, 1954. Certain transitory provisions are included, to the effect that all existing agreements which fall within the new limit, and which were entered into before the commencement of the new ACT, are governed by the provisions of s. 9 (see p. 246), s. 11 (see p. 245) and s. 15 (see p. 246) of the 1938 ACT.

Credit Sales Agreements

The requirements as to the making of credit sales agreements are set out in s. 3, and are similar to those for hire-purchase agreements contained in s. 2 (see p. 243). The only difference is that a notice in the terms of the Schedule to the ACT is not required, and there need be no written agreement where the total purchase price is less than £5.

In general, most of the ACT will not apply, but, as a credit sales agreement is an agreement to buy goods, the provisions of the SALE OF GOODS ACT, 1893, must be observed. However, s. 5 is applicable to the extent of the two provisions numbered (4) and (5) above (see p. 243). S. 6 applies also (see p. 245), and the buyer may demand an account from the seller whether or not the agreement is in writing. Further, he is entitled to a copy of the agreement whenever there is one, even though the total purchase price is under £5.

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- (267) *Menzies v. United Motor Finance Corporation.* (1940) 1 K.B. 559.
C.A.
- (268) *Carr v. James Broderick & Co., Ltd.* (1942) 2 K.B. 275.

CHAPTER 15

Export Contracts

CONTRACTS for the sale of goods to buyers outside the United Kingdom involve considerations which do not arise in connection with home contracts. Firstly, there is the shipping of the goods, for which the seller may be responsible to a greater or lesser degree. Then there is the matter of invoicing and payment, usually arranged through a banking house. Finally, and not least important, there is the question of dealing with disputes, which is complicated by the fact that the laws of no two countries are the same.

The export trade is now so specialised that the majority of manufacturers employ shipping and forwarding agents to see to everything in connection with the actual consignment of goods, though they themselves deal with the actual contract. It is only the largest firms who attend to everything themselves, through their shipping departments. Many smaller firms export their products with the aid of merchant shippers, who trade at their own risk and sell to their own customers overseas. Manufacturers with overseas branches are in a somewhat different position, but, if those branches are, in fact, agencies (who may be commission houses acting for more than one principal), the procedure will not differ materially from that adopted when dealing with any other overseas buyer.

I. TYPES OF EXPORT CONTRACT

General Classification

The simplest method of delivering goods, applicable to both home and export sales, is for the buyer to take them "ex works" or "ex warehouse." But where the seller is responsible for delivery away from his own premises, the extent of his responsibility will vary in accordance with the terms of the contract.

There are six types of contract which may be used for export sales, the employment of any one depending upon the stage at which it is intended the seller's liability shall cease. They are:—

Free Delivered.

Delivery by parcel post to named address of overseas consignee.

F.o.r. "Free on rail."

Delivery into the railway's hands.

F.a.s. "Free alongside ship."

Delivery to port of embarkation (placed alongside the ship or in a steamer shed, according to the custom of the port).

F.o.b. "Free on board."

Delivery loaded over the ship's rail.

Ex Ship.

Delivery over the ship's rail at port of destination.

C.i.f. "Cost, insurance and freight."

Arranging for the delivery of the goods to, and landing them at, the port of destination, and insuring them for the benefit of the buyer. Delivering to the buyer, not the goods themselves, but a document of title to them, together with an invoice and a marine insurance policy, so soon as they are shipped.

Of the contracts listed, the first three, being also applicable to home sales, need no further mention. Contracts which include for the erection of machinery on selected sites overseas are rather outside the scope of the normal export contract, for it is usual in such cases to make special arrangements. It is probable, however, that such contracts will embody some of the features dealt with below.

"F.O.B." Contracts

It is the responsibility of the seller to deliver and load the goods over the ship's rail, and to pay all charges thereby incurred. Delivery is complete when this has been done. The buyer must name an effective ship, and he cannot claim delivery of the goods prior to shipment. He is responsible for all charges after the goods are loaded, but whether he or the seller is liable for port or lighterage dues is a matter of the custom of the port.

The buyer normally arranges the contract of carriage by sea and the insurance during sea transit. But the seller may be required to provide a bill of lading; and, by s. 32 (3) of the SALE OF GOODS ACT, 1893, he must give the buyer sufficient notice to enable him to insure the goods (*see* p. 256). When the seller has

fulfilled all contract requirements, he will be entitled to payment against his invoice.

The risk in the goods passes to the buyer at the moment of delivery on board. The property will be presumed to pass also, unless the seller has reserved a right of disposal under s. 19 of the SALE OF GOODS ACT, 1893 (*see* pp. 128 and 255). Where the goods are not up to contract quality, the buyer will be able to reject them after they have reached their destination, if he has had no reasonable opportunity of examining them previously.

“Ex Ship” Contracts

It is the responsibility of the seller to ship the goods at his own expense by a named vessel to a named port of destination. He must furnish the buyer with an effective direction to the shipowner or master to hand over the goods, and must ensure that any lien for freight which the shipowner may have is released. The direction will usually take the form of a ship's delivery order (*see* p. 255).

Delivery is from the ship, and, until the goods are over the ship's rail, neither the risk nor the property will pass to the buyer. Consequently, the buyer has no insurable interest in the goods whilst in transit and, although he may have one in his anticipated profits, he cannot compel the seller to insure on his behalf (269). Payment cannot be demanded until delivery has been made, and the buyer has a right of rejection which subsists until he has had a reasonable opportunity of examining the goods.

“C.I.F.” Contracts

It is the responsibility of the seller to ship the goods at the port of shipment under a suitable contract of carriage by sea, and to insure them for the benefit of the buyer during sea transit. He must, therefore, obtain a BILL OF LADING and a MARINE INSURANCE POLICY, and must, in addition, make out an INVOICE. These constitute the “**shipping documents**,” which he must tender to the buyer within a reasonable time of the agreed date of shipment, so that the latter may obtain delivery of the goods when they arrive, or recover for their loss during the voyage (270). It makes no difference that the seller knows that at the time of tender the goods have already been lost (271).

A c.i.f. contract is a contract for the sale of insured goods, whether lost or not lost, and it is performed by the transfer of the

"shipping documents" from the seller to the buyer. The delivery of those documents measures the extent of the buyer's rights and the seller's duties, and constitutes complete performance. The buyer cannot ask for the actual goods; nor can the seller tender them in place of the documents. It follows, therefore, that the transaction consists essentially of a transfer of documents as a condition precedent to payment; in other words, payment is due "against shipping documents" (272).

The buyer is not entitled, without reasonable excuse, to refuse tender of the documents; if he does so refuse, or fails to make payment against their presentation, he will be in breach of contract. But there may be circumstances which justify refusal. For example, in *Arnhold Karberg v. Blythe, Green* (1916) (273):—

There was a c.i.f. contract for the sale of goods which were to be shipped from China in German vessels to certain European, non-German, ports. Whilst the contract was still executory, war was declared between England and Germany. Shipping documents were tendered after the outbreak of hostilities, but were refused by the buyer.

The Court of Appeal held that the buyer was entitled to refuse the tender, because acceptance would have resulted in a contractual relationship with enemy aliens, which would be illegal.

The property in the goods will probably pass when the shipping documents are tendered to, and accepted by, the buyer (274). But this presumption may be rebutted by the clear intention of the parties, as shown by the terms of the contract or by the circumstances. Thus, the property may be expressed to pass upon shipment, or the seller may reserve a right of disposal under s. 19 of the SALE OF GOODS ACT, 1893 (see pp. 128 and 255). The incidence of risk is entirely divorced from the passing of property, and risk in the goods passes either upon shipment or upon tender of documents. It is on this basis that the goods are insured for sea transit for the benefit of the buyer. If there is no effective insurance, the risk will remain with the seller until delivery to the buyer at the port of destination. As with other forms of export contract, the buyer does not lose his right of rejection of the goods until after he has had a reasonable opportunity of examining them.

The result and effect of a c.i.f. contract is that, upon receipt of the shipping documents in exchange for the price, the buyer obtains constructive possession of the goods and the risk in them;

it is likely he obtains the property also. The bill of lading, being a document of title, is freely transferable, and buyers are thereby enabled to deal with cargoes whilst they are still at sea.

II. PARTICULAR FEATURES

Bills of Lading

A bill of lading is a document of title (*see* p. 138), which is signed by the shipowners and delivered by them to the shippers, acknowledging receipt of goods for shipment. It specifies the ship, its destination, the goods, the consignee, and the rate of freight. It contains an undertaking to deliver the goods at the port of destination, subject to whatever conditions may be expressed in the bill.

General Characteristics.—A bill of lading is not, in itself, a contract of affreightment between the shipper and the shipowner, though it may be evidence of its terms. Such evidence will be admissible to prove an oral contract entered into before the issue of the bill (275). But a bill issued in the absence of any contract at all is a nullity, even though issued by an agent in apparent breach of warranty of authority (276) (*see* p. 200). The duration of a bill is that of the voyage, which is deemed to continue so long as the goods are held under the shipowner's lien for freight, even though they may have been landed (277).

Bills of lading are made out in three parts, one of which goes to the shipper, one to the buyer, and the third is retained by the shipowner. Although one part only of a bill may have been delivered, the others being unaccounted for, such delivery is sufficient (278). But if two or more parts of a bill are each transferred to two or more *bona fide* transferees for value, the property will pass to the transferee who was first in point of time (277). However, a shipowner who acts in good faith and has no notice of any prior claim may safely hand over the goods to the person who first presents one part of the bill to him (279). But he cannot be compelled to part with the goods unless and until he is presented with a bill (280).

The **BILLS OF LADING ACT, 1855**, ss. 1 and 2, provides that the rights under a bill of lading, and the liabilities as to the goods, are transferred automatically from the shipper to the consignee named in the bill, and thence to any subsequent indorsee. But

the issue of a bill does not affect the seller's right to stop the goods in transit, the shipowner's right to claim his freight charges from the shipper, or any liability of the consignee or indorsee to pay such charges.

"Shipped" and "Received for Shipment" Bills.—"Shipment" means "shipment on board," and this is evidenced by what is known as a "shipped" bill of lading. It is this type of bill which is normally obtained from the shipowner, and is, in fact, essential to a c.i.f. contract. A bill of lading which merely acknowledges that goods have been "received for shipment" is not a "shipped" bill, and is, therefore, insufficient for a c.i.f. contract (282). A "received for shipment" bill is one which states, for example, that goods have been received "to be transported by the s.s. 'Clyde,' or, failing shipment by the said steamer, in and upon a following steamer" (282).

A shipowner is not bound by a bill of lading which has been signed by the ship's master for goods which have not been loaded; nor is he estopped by the master's signature from asserting that the goods are not on board (281).

"Clean" and "Claused" Bills.—Under the CARRIAGE OF GOODS BY SEA ACT, 1924 (see p. 230), a shipper is entitled to a clear statement on a bill of lading as to the "apparent order and condition of the goods" when received by the shipowner. If the statement is that the goods have been received "in apparent good order and condition," there is a "clean" bill; if that statement is qualified in any way, the bill is "claused." To say that "the apparent order and condition of the goods is as declared by the shipper but unknown to the carrier" is entirely ineffective, for the shipowner is required to state the condition as found by him, and is under an obligation to deliver the goods in a like condition. He can excuse himself only by proving facts which either bring him within an exemption clause excluding his liability, or show that damage was occasioned by something not apparent upon reasonable examination of the goods when shipped (283).

Ship's Delivery Orders.—It is sometimes the practice to ship goods in bulk under a bill of lading made out in favour of the seller himself. This enables him to sell portions of the bulk to different buyers whilst the goods are at sea. The seller enters into a form of c.i.f. contract with each buyer, stipulating that in place of a bill of lading the buyer is to be given a ship's delivery order.

A "ship's delivery order," normally used in "ex ship" contracts, is an order by the consignee directed to the shipowners, authorising them to deliver the contract goods to the buyer or to his order. Such an order is addressed to the master of the ship, or to someone holding the goods who is able to acknowledge to the buyer that he holds them on his behalf (*i.e.* he is able to "attorn" to the buyer—*see* p. 138). But there must be a valid bill of lading in existence, for otherwise the delivery order will be void (284).

Such an order is not so good a protection to the buyer as a bill of lading, because it will not give him any cause of action against the shipowners unless they have attorned to him. In any event, it will be a question of construction whether there is a true c.i.f. contract, for there will not be one unless the buyer has an immediate and enforceable right to obtain the goods against presentation of the delivery order (272).

Rights of Stoppage and Disposal of the Goods.—The issue of a bill of lading does not affect the seller's right of stoppage in transit as against the buyer (*see* p. 191). If the holder of a bill disposes of the goods to a third person for value, and does not transfer the bill, that person will acquire his interest subject to the seller's right of stoppage (285). But an indorsee of the bill, to whom it has been assigned absolutely for value (and not by way of security), will, if he has paid the money, be in a position to defeat the seller's rights (*see* p. 193).

A shipper may expressly reserve a right of disposal of goods shipped under a bill of lading (*see* p. 193). In the first place, if a bill is made out to his own order (or that of his agent), he is *prima facie* deemed, by s. 19 (2) of the SALE OF GOODS ACT, 1893, to have reserved his right of disposal. Secondly, such a right is implied (by s. 19 (3)) where a seller draws a bill of exchange on the buyer for the price (*see* p. 189), and transmits both the bill of exchange and the bill of lading to the buyer in order to obtain payment or acceptance of the former. The buyer must, if he does not honour the bill of exchange, return the bill of lading; if he wrongfully retains the bill of lading the property in the goods will not pass to him. But supposing that he not only retains the bill of lading, having dishonoured the bill of exchange, but transfers it for value to an innocent third party. This occurred in *Cahn & Mayer v. Pockett's Steam Packet* (1899) (286), where it was held by the Court of Appeal that, although the effect of s. 19 (3) was to prevent the property passing to the buyer, it did not exclude the

operation of s. 25 (2) (*see* p. 208). The buyer was thus in the position of a mercantile agent, so that the bill of lading conferred good title upon the innocent third party; the goods could not, in consequence, be stopped in transit.

Insurance

F.o.b. Contracts.—It is provided by the SALE OF GOODS ACT, 1893, s. 32 (3), that, “unless otherwise agreed,” a seller who sends goods to a buyer by a route involving sea transit must, where it is usual to insure, “give such notice to the buyer as may enable him to insure them during their sea transit.” If he fails to do this, the goods are deemed to be at his risk. *Wimble v. Rosenberg* (1913) (287) decided that this provision applies to f.o.b. contracts. But, where a buyer has all the information he needs to enable him to insure, the seller is under no obligation to give this notice.

C.i.f. Contracts.—The shipper is bound to provide, as one of the shipping documents, a marine insurance policy for the benefit of the consignee. It must cover all customary risks in respect of the type of cargo and the particular voyage. An undertaking by the shipper “to hold the consignee covered” is not sufficient, for the latter is entitled to demand a policy of insurance which covers exclusively the goods specified in the bill of lading and the invoice (271).

Although the consignee is entitled to demand an actual policy, he may agree to accept a certificate of insurance in its place. As in the case of the substitution of a delivery order for a bill of lading (*see* p. 254), it will be a question of construction whether there will still be a true c.i.f. contract where a certificate is tendered in place of a policy. It is essential that the consignee shall be able to make an effective claim against the insurers in the event of loss (272), for, should he have to bring an action to enforce his claim, he will require to be in the possession of a stamped and valid policy. The certificate must therefore provide that a policy will be furnished on demand.

Certificates are usually “backed” by floating or “open” policies, taken out by shippers either to cover unspecified quantities of goods to be shipped within a stipulated time, or to deal with bulk consignments against which delivery orders are to be issued to individual buyers. This practice is adopted because it does result in a considerable saving of time. But difficulties may arise if the conditions set out in a certificate do not correspond with

those in the open cover. It has been held, however, that in such a case a certificate may, of itself, be a separate contract of insurance (288).

The Invoice

The third shipping document which must be tendered by the shipper to the consignee under a c.i.f. contract is the invoice. This must be in strict agreement with the relevant terms of the contract and bill of lading; if it is not, there may be difficulty in obtaining payment. Apart from custom or special agreement, details must be given of the price, commission charges, insurance premium, and shipping and freight charges. Against this must be shown, and credited, any freight charges payable by the consignee at the port of destination.

Payment

Payment may be made by bill of exchange, drawn on the buyer by the seller and forwarded for acceptance with the bill of lading. This is not a very satisfactory method for either party. If the bill of exchange is dishonoured by the buyer, who, notwithstanding, transfers the bill of lading to a third party for value, the seller may lose both the goods and his money (*see the Cahn and Mayer case, above*). On the other hand, the presentation of a bill of exchange for acceptance, accompanied by the bill of lading, is no guarantee to the buyer that the bill of lading is genuine, even though the bill of exchange may have been presented in entire good faith (289).

Commercial Credits.—The most satisfactory method of obtaining payment from an overseas buyer is that afforded by the system of commercial or documentary credits, applicable to c.i.f. contracts, and operated through bankers. The working of this system is briefly as follows.

- (a) It is agreed by the contract of sale that payment shall be made by means of a commercial credit.
- (b) The overseas buyer arranges with his banker to provide payment for the seller upon presentation of the shipping documents.
- (c) The overseas bank (called the "issuing" or "instructing" bank) then arranges with a bank in the United Kingdom (referred to as the "correspondent" or "confirming" bank) that the latter will pay the seller upon delivery of the shipping documents.

It is usual to stipulate in the contract for an irrevocable or confirmed credit. This means that the instructing bank gives firm instructions to the confirming bank to pay against documents. If the credit is not irrevocable, there may be delay in obtaining payment, or it may be found that the buyer has withdrawn his instructions.

It is essential to ensure that all the shipping documents are in order before they are presented to the confirming bank, who will probably insist on the production of all three copies of the bill of lading as a precaution against fraud (*see* p. 253). If the invoice does not agree strictly with the terms of the contract, or the bill of lading is "claused", payment will probably be refused.

A stipulation in the contract of sale that a confirmed credit shall be provided in favour of the seller may, in accordance with the circumstances, be either a condition precedent to the formation of the contract, or an essential term. This is because a confirmed credit is not so much a payment as an assurance that payment will be made. Failure to provide the credit will enable the seller to recover damages from the buyer to the extent of his loss of profit, provided, of course, that it can be shown that such loss was reasonably foreseeable by the buyer at the time the contract became executory (290).

Exchange Control.—It is to be remembered that, whichever method of payment is arranged, the provisions of the EXCHANGE CONTROL ACT, 1947, must be strictly observed. The contract itself should provide that performance is subject to the requisite exchange permission being granted.

Export Licences

The responsibility for obtaining export licences is usually dealt with in the contract of sale, but, *prima facie*, it is with the seller in the case of c.i.f. and "ex ship" contracts, and with the buyer in all other cases.

The inclusion of a clause, "subject to grant of export licences," will excuse the responsible party who has failed to obtain a licence despite his having taken all proper steps (291). The phrase "subject to . . ." means that the contract is to be considered as cancelled if a licence cannot be obtained. But if the reason for not obtaining a licence is that the party concerned does not wish to comply with certain formalities (although he could do so), it cannot be said that it was unobtainable.

Thus, in *Brauer v. James Clark* (1952) (292), it was a condition of the granting of a Brazilian export licence that there should be a certain minimum selling price f.o.b. Although this would have been higher than the contract price, the Court of Appeal held that the requirement of increased price did not provide an excuse for non-performance.

Carriage by Air

Bills of Lading are not employed for carriage by air. Instead, there is an air consignment note, which is not a document of title; nor is it negotiable. It follows, therefore, that the normal methods of payment by the use of commercial credits are inapplicable. There are three copies of the consignment note. One is signed by the consignor and retained by the carrier; one is signed by the carrier and given to the consignor; and one is signed by both the consignor and the carrier and accompanies the goods. Any copy is *prima facie* evidence of the contract of carriage and of the receipt of the goods by the carrier.

III. THE INCIDENCE OF PRIVATE INTERNATIONAL LAW

It is common practice to incorporate into export sales contracts some such clause as, "This contract is deemed to be governed by English law." The effect of this is that questions of interpretation will be answered, and matters in dispute will be resolved, by the Courts in England in accordance with the principles and practice of English law. But if there is no clear indication that the parties have chosen any particular system of law, it will have to be found by applying the rules of private international law (usually referred to as "P.I.L.").

What is "P.I.L."?

Private international law (sometimes called "The Conflict of Laws") is that part of English law which deals with cases having a foreign element. Every law except English law is a foreign law, and every law has, to a greater or lesser extent, its own system of P.I.L. But English law is concerned only with English P.I.L., and its rules are employed to determine whether English or a foreign internal law is applicable in any particular case. If it is found by these rules that a foreign law must be applied, then that law is ascertained as a question of fact, to be proved by evidence;

but its application will be in accordance with the ordinary principles of English law.

P.I.L. must not be confused with public international law, which is concerned only with disputes between nations. Attempts have been made to unify the various systems of P.I.L., but they have not been very successful. There have also been attempts to co-ordinate internal laws having an international application. Two examples are the International Conferences on Maritime Law held at Brussels in 1922 and 1923, and the Warsaw Convention of 1929 on Air Law. In both these cases the resulting codes of rules have been adopted by many countries, and were enacted in England by the CARRIAGE OF GOODS BY SEA ACT of 1924, and the CARRIAGE BY AIR ACT of 1932, respectively.

Systems of Law.—One point must be made clear, and that is that many nations have more than one system of law. For example, there are three systems in Great Britain, those of England and Wales, of Scotland, and of Northern Ireland (and that leaves the Channel Islands and the Isle of Man out of account). Although there are statutes which apply to both England and Scotland (and some to Northern Ireland as well), the system of law in each country is different. In the U.S.A. there are as many systems of law as there are states; in Australia each State has its own system; and each of the Canadian Provinces is in a similar position. It follows, then, that there is no law of Great Britain, or of Canada, or of Australia, except such law as happens to be applicable to the whole (*e.g.* the Federal Law of the U.S.A.).

Which Law Governs the Contract

When determining the system of law applicable to a particular contract, it is the intention of the parties which is of first importance. The law to be applied is called the "proper law of the contract," and it is the legal system by which the parties intend to bind themselves, or with which the contract has the most real connection. Frequently the point is not considered at all when the contract is made, and it will then be necessary to discover the proper law by gathering the parties' intentions from the contract itself or the surrounding circumstances.

The "Proper Law."—There are many features which may be relevant in determining the proper law, including the place where the contract is made, or where it is to be performed; the form in which it is drawn up, or the language in which it is written; and the nature of the subject-matter and where it is situated. But in

any event, if the parties expressly stipulate that their contract shall be governed by a particular system of law, their choice is conclusive (293).

When the Proper Law Applies.—The proper law governs the validity and construction of the contract, including the meaning of terms, the general nature and effect of the obligations, and their discharge. The formalities (*i.e.* as to execution or stamping) must comply with the law of the place where the contract is made (which may also happen to be the proper law), and this also decides questions of capacity to contract. But matters of procedure, such as whether an oral contract is enforceable without a note or memorandum, depend entirely upon the law of the country where an action is brought.

Contracts of sale and of related matters are normally governed by the proper law. But this may not be so where a third party is interested, unless the original contract is relied upon. For example, Brown sells goods to Green, who resells them to White. White claims that Brown has wrongfully stopped the goods in transit. In making that claim White is relying on the original sale, and therefore the proper law applies. In any other case it will be the law of the place where the goods are, and where the transfer to the third party takes place, which will be applicable. Thus:

Brown, in Sweden, sells goods to Green, in England. They are shipped in a French vessel which is wrecked off the Danish coast, and the master sells the goods by auction in Denmark to White. If Danish law gives White good title, this will prevail and the sale to White will be good.

But if Brown, in England, obtains goods on hire-purchase terms from Green, also in England, by an agreement which stipulates that the property is not to pass until all instalments have been paid, and Brown wrongfully takes the goods to France and there sells them to White, White will be able to retain the goods as against Green provided that French law gives him good title.

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CHAPTER 16

Contracts of Employment

Contracts "Of Service" and "For Services"

Contracts of employment are divided into the two classes of contracts "of service" and contracts "for services." It is commonly said that the relationship of "master and servant" (as it is known to the law) occurs when, by agreement between them, one person is employed by another in such circumstances that he is bound to obey the orders of that other, both as to the work he has to do and as to the manner in which he must perform it. Such an agreement would be a contract of service and not one for services. As was said by Mr. Justice Hilbery in *Collins v. Herts C.C.* (1947) (294):—

"The distinction between a contract for services and a contract of service can be summarised in this way: In the one case the master can order or require what is to be done, while in the other case he can not only order what is to be done but how it shall be done."

But in *Cassidy v. Ministry of Health* (1951) (295), Lord Justice Somervell, commenting upon that statement, said, firstly, that the word "master" seemed inappropriate in connection with a contract for services, and, secondly, that the test of a contract of service would, "if applied in the ordinary meaning of the words exclude many cases where the relationship of master and servant clearly exists." In illustration, his Lordship cited the example of a certified master of a ship, who is invariably employed under a contract of service—"the owner can, of course, tell him where to go, but not how to navigate."

The Real Distinction.—The difference between the two types of contract is not always readily apparent. There is no decisive test, and perhaps the nearest one can get to determining into which category a particular contract falls is to ask the question posed by Lord Justice Buckley in *Simmons v. Heath Laundry* (1910) (296)—"Was his contract a contract of service within the meaning which an ordinary person would give to the words?"

An example may help to make this clear. Suppose that an engineer is employed in a whole-time capacity by a firm of switchgear manufacturers to design their products. He will be expected to use his skill and judgement in carrying out set tasks, probably dictated to him by the chief engineer in accordance with the policy of the firm and the orders received. Would not Lord Justice MacKinnon's "officious bystander" (see p. 105) conclude that the engineer was employed under a contract of service? But should the firm decide to employ an independent engineer to design a range of switchgear within limits set by them, that engagement would clearly be under a contract for services. Other instances could be given, but, as Lord Justice Denning put it in *Stevenson Jordan v. Macdonald* (1952) (297):—

"One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of that business; whereas, under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it."

The word "servant" does not, therefore, necessarily signify one who undertakes menial tasks. Skilled craftsmen and technicians will be servants if employed under a contract of service; so may professionally qualified persons such as medical practitioners, lawyers and chartered engineers. But if employed under a contract for services, they will be "independent contractors."

The Importance of the Distinction.—To be able to distinguish between these two forms of contract is important for a number of reasons, one being that a master is vicariously liable for the acts and omissions of his servant done in the course of his employment. This vicarious liability arises generally in connection with acts of negligence, which are fully discussed under that heading (see p. 326). But it is appropriate to consider here and now under what circumstances an act of a servant is deemed to be done "in the course of his employment."

"Scope of Employment" under a Contract of Service.—Anything done by a servant which has been specifically authorised by the master is, of course, within the scope of his employment; other acts, for which the master's authority is to be implied by custom or usage, will also be within that scope. But, "it is well settled law," said Mr. Justice Lynskey in *Marsh v. Moores* (1949) (298) that:—

"A master is liable even for acts which he has not authorised provided that they are so connected with the acts which he has

authorised that they may rightly be regarded as modes, although improper modes, of doing them. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it but is an independent act, . . . the servant is not acting in the course of his employment but has gone outside it."

In *Conway v. George Wimpey* (1951) (299) lorry drivers employed by the defendants were authorised to give lifts to fellow employees, but to no-one else. It was held that a driver who gave the plaintiff a lift, not knowing that he was not a fellow employee, was, despite that lack of knowledge, acting outside the scope of his employment by doing an act which he was not employed to perform. On the other hand, a garage employee, who was forbidden to drive customers' cars and was specifically instructed to move them by hand, was held, in *L.C.C. v. Cattermole* (1953) (300), to be doing an authorised act in an unauthorised manner when, not holding a licence to drive, he drove a car on to the highway.

General and Particular Employment.—It is common practice, where machines, such as mobile cranes, are let out on hire, to provide the services of an operator. Circumstances may arise which render it important to know, not only whether a particular act is within the scope of the operator's employment, but also by whom he is deemed to be employed. This is necessary in order to fix the vicarious liability, should it arise. Does this liability fall on the man's general (or permanent) employer, or is it transferred to his particular (or temporary) employer?

"The presumption is all against there being such a transfer" (301). This is because, where a machine and operator are being lent, "it is easy to infer that the general employer does not intend to permit the hirer to have control over his valuable piece of machinery, control in the sense of being able to tell the workman how to work it" (302). But in the case of labour only (and particularly unskilled labour), it is "much more easy to infer that the hirer should not merely control in the sense of being able to tell the workman what he wants doing, but control the manner of doing it as well" (302).

In *Mersey Docks and Harbour Board v. Coggins and Griffith* (1947) (303):—

A harbour authority hired a mobile crane with driver to a firm of stevedores under general hiring conditions which specified, *inter alia*, that the driver should be deemed to be the servant of the hirer. Although the stevedores were entitled to tell the driver where to go,

made for fines, unless the employee has previously signed a written contract agreeing to such deductions, or a notice has been posted permanently in a place where it may easily be seen. The section applies to shop assistants, as well as to workmen as defined in the 1887 Act. There are similar provisions in s. 2 as to payment for damaged materials and in s. 3 in regard to payments by employees for the use of tools, etc.

Payments to Benefit Societies.—Although the TRUCK ACTS allow payments to a benefit club to be deducted from wages, these deductions must actually be paid to the treasurer or other officer of the club authorised to receive them, and the right to make them must have been stipulated in the contract of service. But such stipulations are subject to the SHOP CLUBS ACT, 1902, which applies to shops, factories, workshops, docks and warehouses. That Act provides that employers may not compel their employees to join a "shop club" or "thrift fund" unless it has been registered and certified by the Registrar of Friendly Societies; moreover, the joining of any registered friendly society may not be forbidden.

Conditions of Employment

Rates of wages and conditions of employment are, *prima facie*, matters for agreement between the employer and his employee. Where a trade union agreement between a worker's organisation and a group of employers is in force, it will be valid only so far as its terms have been adopted by the contract of service. But, where an award has been made by the Industrial Disputes Tribunal, under the provisions of the INDUSTRIAL DISPUTES ORDER, 1951, it may enforce recognised terms and conditions settled by negotiation or arbitration between trades unions and employers, or terms not less favourable.

The Wages Councils Acts.—The WAGES COUNCILS ACTS, 1945 and 1948, deal with the regulation of terms and conditions of employment of workers in certain circumstances, by the establishment of Wages Councils with power to make orders. Orders so far made do not affect the engineering industry as such, though a high proportion of retail trades and various basic textile industries have been dealt with. In this connection, "workers" includes those engaged in manual labour and clerical work.

The Factories and Shops Acts.—Apart from wages, the FACTORIES ACTS, 1937 and 1948, regulate conditions of employment in factories (*see* p. 342). The SHOPS ACT, 1950, does the same for retail shops and, in the case of "young persons" under the age of

18, for retail and wholesale establishments and other places which do not come within the purview of the FACTORIES ACTS.

The Duties of the Employer

To Provide Work and Other Services.—An employer is bound to provide work and to pay remuneration in accordance with the express terms of the contract, though this may also be implied from the circumstances and the nature of the employment. If he does not provide work he will be in breach of contract.

Thus, White employs Black to design certain engineering works, and makes it known that Black is so acting; but he provides him with no work to do. White will be in breach, whether the contract is one of service or for services.

There is no duty to provide accommodation or board and lodging, unless this is expressly provided for in the contract of service, or it is to be implied from the type of employment.

Indemnities.—There is an implied obligation to indemnify an employee against all expenses, losses and liabilities incurred by him in the proper execution of his authorised duties. This obligation arises, not so much under the contract of service, as under the relationship of principal and agent, for the indemnity is that to which an agent is entitled (*see* p. 198). Although an employer is vicariously liable for the acts of his employee which are done within the scope of his employment (*see* p. 264), he has no right to claim indemnity from his employee against liability to third persons who have suffered damage through those acts (305).

Safety of Employment.—There is a common law duty upon an employer to ensure safety of employment by providing safe and suitable plant and equipment, a safe place in which to work, and a safe system of working (*see* p. 326). There may also be a statutory duty to do this, as under the FACTORIES ACTS, 1937 and 1948 (*see* p. 335).

Testimonials.—The giving of testimonials, or “characters,” to employees or former employees is entirely at the discretion of the employer; they cannot be demanded, either by the employees or by their subsequent employers. But if they are given, they must not contain untrue statements, for, if a subsequent employer suffers damage thereby, he will have a claim against the person who made them. Libelous statements in a testimonial are privileged as between employers, provided there is no publication to anyone

who is not strictly entitled to have knowledge of the contents, or, because of the nature of his duties, cannot avoid that knowledge (e.g. the person who types the letter, or whose duties include the opening of the recipient's correspondence).

The Duties of an Employee

Competence and Good Faith.—Anyone who enters the employment of another impliedly warrants that he is competent to perform the work which he undertakes. But he is under no duty to disclose information about himself for which he has not been asked, even though he may know of facts which might materially influence the employer when deciding whether or not to engage him. On the other hand, non-disclosure of the fact that he suffered from, say, epilepsy, might prejudice him in any subsequent claim against his employer for injury caused by the neglect of some safety precaution (306) (see p. 339).

It is an employee's duty to exercise reasonable care and skill in his employment, to consult his employer's interests, and to render faithful service. It is also his duty to obey lawful orders, provided that the acts ordered are within the scope of his employment, and that he is not required to undertake risks which he did not contract to run. There is an implied term in every contract of service that an employee will not be required to do an unlawful act (307). But if, by doing something within the scope of his employment, he commits a criminal offence, his employer will be vicariously liable, whether or not he knew of its commission (308).

Confidence.—It is part of the duty of rendering faithful service that an employee shall not disclose confidential information acquired during his employment, whether such disclosure is prohibited by the contract of service in express terms, or whether, having regard to the relationship of the parties and other circumstances, there is to be implied a trusteeship in the employed person (309). Further, he must not incapacitate himself by doing anything calculated to affect his employer's interests or likely to conflict with his duty towards him. To occupy his spare time by doing the very kind of work which he is wholly employed to do may conflict with his duty towards his employer, particularly if it is work of a highly skilled nature, and more particularly if the result of his doing it is to assist in the building up of a rival business (310). It is irrelevant that no confidential information will have been divulged in the course of that spare time activity. But,

confidential information apart, an employee is entitled, after the termination of his employment, to use such skill as he may have gained in his employer's service.

The Duty to Account.—Another aspect of the duty of faithful service is that an employee impliedly promises that "he will account to his master for any moneys he may receive in the course of his master's business or by the use of his master's property or by the use of his position as his master's servant" (311a). The same applies to goods or other property entrusted to, or received by, him on his employer's behalf. Should it happen that he makes a profit by the use of his master's property in some transaction which is, in fact, corrupt, he will still be accountable for that profit (311).

Service Agreements

Contracts of service or for services are usually treated as simple contracts, and they need not be in writing or under seal. Normally, provision will be made in the contract to provide for notice of termination by either party, and the duration of the agreement may be expressed. But these matters are not always dealt with explicitly, and in that event certain implications will have to be made.

Duration.—If the duration of the employment is not expressed in the contract, there will be a presumption that it shall last for one year, or for the duration of a particular task. Where the presumption of one year is made, there will be what is called a "GENERAL HIRING." But if the only reference to time is in a provision for hourly, daily, weekly or monthly remuneration, it will be presumed that the employment is intended to be for that period.

Notice and Termination.—Length of notice to terminate employment may be expressed in the contract, or may be implied by custom. Failing that, then reasonable notice must be given; what is reasonable is a question of fact in all the circumstances of the case.

It is a popular misconception that length of notice is regulated by the periods of payment, and that if a man is paid weekly he must give, and is entitled to, one week's notice. This is by no means the sole criterion. The notice must be reasonable, and this may depend upon a number of factors, such as the nature of the employment and the responsibility and remuneration attaching

to it; the period of the engagement and the length of time already served; and whether payment is made at weekly, monthly or longer intervals. No one factor is decisive, and all relevant matters must be considered. As an indication, it has been held that clerks, commercial travellers and engineering salesmen are entitled to give, and to receive, three months' notice, and shop managers, one month. But these are periods based upon the particular facts of particular cases, and they are not necessarily applicable generally.

Employment may be terminated summarily by either party where there is agreement to that effect, or if there has been a breach of an express or implied condition precedent. An employee under a contract of service may be summarily dismissed for failing to carry out his duties, or if he has been guilty of misconduct, disobedience, breach of faith or incompetence.

Recent Cases.—The following two cases illustrate points discussed above.

In Aris-Bainbridge v. Turner (1951) (312):—

A sales manager was appointed to a manufacturing company under a service agreement which expressed the duration of the engagement as two years unless terminated by mutual consent. He stayed on after the end of the two years without any further discussion as to terms, but, six months later, he was dismissed at one month's notice.

It was held that there was nothing in the circumstances to rebut the presumption of a yearly hiring; there could, therefore, be no dismissal before the end of the third year. The company could not, in this case, rely upon its staff rules, whereby they were entitled to give one month's notice of dismissal.

In James v. Thomas Kent (1951) (313):—

The plaintiff was appointed a director of the defendant company at a meeting of shareholders, and it was recorded in the minutes that the appointment was approved, at a stated salary, "subject to a three year contract with the company." At a board meeting on the same day the company's solicitor was instructed to prepare an agreement. This was never done, and the plaintiff was dismissed two and a half years later.

The Court of Appeal held that, as the employment was subject to a three year contract which had not been executed, there was employment for an indefinite time. This was a general hiring, with an implied term of reasonable notice, which in this case, was three months.

Service Tenancies

The Rent Acts.—It may happen that the nature and circumstances of a particular employment are such that there is a house or other living accommodation "to go with the job." Whilst, in the majority of cases, a prospective employee will welcome such an amenity with open arms, the employer may have difficulty in ejecting him after the employment has ceased. This is because the type of accommodation usually offered falls within the provisions of the RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACTS, 1920 to 1939 and subsequent Acts (including the HOUSING REPAIRS AND RENTS ACT, 1954), which together are commonly called "THE RENT ACTS."

These ACTS apply in the main to every dwelling house (or flat) whose rateable value does not exceed £100 in the City of London and the Metropolitan Police Area, or £75 elsewhere in England or Wales.

They do not apply if the rent is less than two-thirds of the rateable value, nor do they apply, *inter alia*, to furnished houses, houses on agricultural land exceeding two acres in extent, business premises or council houses.

A tenant in possession under a tenancy agreement who, either at the normal end of the tenancy or upon receipt of a notice to quit, remains in occupation (or has "held over," as it is termed), becomes a "statutory tenant." Recovery of possession by the landlord can only be obtained by his making application to the County Court, and this will not be granted unless the case falls within one of several specific categories, or suitable alternative accommodation can be offered.

Where a dwelling house is reasonably required by the landlord for the occupation of someone who is in his whole-time employment (or in the whole-time employment of one of his tenants), the Courts will make an order for the statutory tenant to vacate the premises where he was in the full-time employment of the landlord under a letting which was in consequence of that employment, and is no longer employed.

Tenancies and Licences.—For the RENT ACTS to apply there must be a tenancy. Certain types of occupation are not tenancies, but amount to licences to occupy (*i.e.* occupation is by "leave and licence" or permission of the landlord). Thus, a chauffeur or gardener occupying a room over a garage is there by licence, as is a caretaker of a block of flats or offices. But a licence may be

presumed in other circumstances, such as occurred in *Torbett v. Faulkner* (1952) (314):—

The plaintiff bought a house for a prospective employee of a company, which he was forming, to live in. The employee moved in and the company was formed. He was paid a salary by the company, who deducted a weekly amount by way of rent.

The Court of Appeal held that, although the employee was in occupation by agreement with the company, the house was the property of the plaintiff. The company had, therefore, no interest in the house, and could only grant a licence and not a tenancy.

In *Facchini v. Bryson* (1952) (315):—

An employee went into occupation of a house in consequence of his employment and under an agreement which, although it had all the features of a tenancy agreement, incorporated a clause reading "nothing in this agreement shall be construed to create a tenancy." His employer applied for an order for possession on the ground that there was merely a licence to occupy.

The Court of Appeal held that the employer was not entitled to recover possession except in accordance with the provisions of the RENT ACTS. Lord Justice Denning said (315a):—

"The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put upon it. . . . It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven—I will not in these days say a coach and four—but an articulated vehicle."

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- (304) *Byrne v. Statist Company.* (1914) 1 K.B. 622.
- (305) *Jones v. Manchester Corporation.* (1952) 2 Q.B. 852. **C.A.**
- (306) *Cork v. Kirby Maclean, Ltd.* (1952) 2 T.L.R. 217. **C.A.**
- (307) *Gregory v. Ford.* (1951) 1 All E.R. 121. **Assize.**
- (308) *Barker v. Levinson.* (1951) 1 K.B. 342. **Div.**
- (309) *British Celanese, Ltd. v. Moncrieff.* (1948) Ch. 564. **C.A.**
- (310) *Hivac, Ltd. v. Park Royal Scientific Instruments, Ltd.* (1946) Ch. 169. **C.A.**
- (311) *Reading v. Attorney-General.* (1951) A.C. 507. **H.L.**
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CHAPTER 17

Monopoly, and Agreements in Restraint of Trade

General Considerations

Any contract which unreasonably restricts the basic right of a person to carry on business is said to be in restraint of trade. Such restraint is usually the result of some kind of monopoly, either individual or collective. It is not generally realised that all monopolies are illegal at common law, and that, with certain exceptions, they are prohibited by the STATUTE OF MONOPOLIES, 1624. Contracts in restraint of trade are, therefore, *prima facie* invalid, because they tend to create a monopoly and are against the public interest. Originally they were held to be absolutely void. But it gradually came to be realised that there are two different kinds of restraint, those creating individual, and those creating collective monopolies. In the eighteenth century, contracts which imposed merely a partial restraint, and created an individual monopoly, were considered valid, provided the restraint went no further than was reasonably required for the protection of the covenantant.

Categories of Restraint.—A contract in restraint of trade may fall into any one of the following categories:—

- (1) Those between employer and employee, whereby the latter agrees that, should he leave his employment, he will not compete with his former employer, either by entering into the service of a competitor, or by going into a similar business on his own account.
- (2) Those between the vendor and purchaser of a business, whereby the former agrees not to compete with the latter by starting up a similar business.
- (3) Those by which traders or manufacturers enter into an alliance for the purpose of maintaining prices, regulating output, or stifling competition.

MONOPOLY, AND AGREEMENTS IN RESTRAINT OF TRADE

Categories (1) and (2) represent cases of individual monopoly, which are, to some extent, allowed by the common law. Such monopoly is, of course, specifically permitted by such statutes as the PATENTS ACT, 1949, the TRADE MARKS ACT, 1938, the REGISTERED DESIGNS ACT, 1949 and the COPYRIGHT ACT, 1911; but these are not within the scope of this discussion. Category (3) represents cases of collective monopoly.

The Principles Involved.—Consideration of these contracts involves the application of the two fundamental principles that freedom of contract is to be encouraged, and restraints upon trade are contrary to public policy. The attitude of the common law may be stated as follows:—

- (a) Every restraint, even if partial, is *prima facie* void as contrary to public policy.
- (b) The fundamental presumption will be rebutted if it is reasonable in the public interest and in that of both the contracting parties. But, in any event, a restraint must be no wider than is required to give the covenantee some reasonable protection.

The test is, therefore, whether the restraint is reasonable. As to what is reasonable depends upon the facts of the particular case, and into which category the contract falls, for the Courts are more ready to allow a restraint in a contract for the purchase of a business than they are in a contract of service.

Contracts of Service

A restraint in a contract of service will be allowed only where “the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary” (316a).

Trade Secrets.—In *Herbert Morris v. Saxelby* (1916) (316):—

The plaintiffs, a well-known firm of engineers specialising in the manufacture of pulley blocks and travelling cranes, had employed the defendant for a number of years, first as a draughtsman, and then as an engineer under a service agreement. That agreement contained a covenant by the defendant that he would not, for seven years after ceasing to be employed by the plaintiffs, be concerned with or work for any manufacturer of similar products in the United Kingdom.

In due course the defendant left the plaintiffs' employment and, having failed to find work with other engineering firms who did not

compete with the plaintiffs, joined some manufacturers of lifting machinery in France. Within a few months, however, he returned to England, and obtained employment with some direct competitors of the plaintiffs in Manchester.

The reason for the restraint was that the plaintiffs objected to the skill and knowledge acquired in their service being put at the disposal of rival concerns. They also averred that the defendant had knowledge of certain data and formulæ which were treated by them as being confidential.

The House of Lords held that the defendant had not been entrusted with anything which could properly be called a trade secret. Lord Parker referred to the many detailed charts, drawings and other documents which were considered by the plaintiffs to be confidential, and held that they were far too detailed for their contents to be memorised.

"All that he could carry away was the general method and character of the scheme of organisation practised by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret" (316b).

Trade Connections.—Whilst an employer is entitled to be protected from having his customers enticed away by a former employee, such protection will be allowed only where the employee has, because of his position in the firm, had special opportunities of obtaining personal knowledge of, and influence over, those customers. In other words, the employee must have been so placed that his employer's customers dealt directly with him and came to rely upon his individual skill and judgement. It would be likely, therefore, that in such a case those customers would continue to deal with him if and when he set up in business on his own.

The above is a fair statement of the law as set out by the House of Lords in *Herbert Morris v. Saxelby* (1916) (316) and *Fitch v. Dewes* (1921) (317), and which has been applied in cases concerning such employees as solicitors' managing clerks, tailors' fitters and milk roundsmen. It is submitted that it would also apply in the case of a specialist and technically trained salesman working for an engineering firm; but it is doubtful if it would have any application to that of an ordinary commercial traveller or a shop assistant.

The Area of Restraint.—The area to which the restraint applies is one of the factors to be taken into account when considering whether it is reasonable. Here again, the nature of the employment and the matter of trade connections will be relevant. In

Fitch v. Dewes (1921) (317), the House of Lords held that a covenant by a solicitor's managing clerk not to engage in the "office, profession or business of a solicitor" within a radius of seven miles of Tamworth Town Hall (near where the employer's business was situate) was not unreasonable.

In *Nordenfelt v. Maxim Nordenfelt* (1894) (318):—

The plaintiff was a patentee of guns and ammunition, and he had transferred his patents and business to the defendant company, on the basis of a covenant by him that he would not, for a period of twenty-five years, engage either directly or indirectly in the business of a manufacturer of guns or ammunition, except on behalf of the company.

It was held that, although the covenant was unrestricted as to area, it was reasonable, having regard to the fact that the business of the company was world-wide, and the number of potential customers (mostly Governments) was restricted.

It is almost entirely a question of the circumstances whether a particular restraint is too wide. For example, in *Mason v. Provident Clothing* (1913) (319) it was held that a canvasser who was employed to sell articles of clothing within a small district in London could not be restrained from taking other similar employment "within twenty-five miles of London." In any event, the area designated was too vague to enable the restraint to be enforced. On the other hand, a restraint upon an employee carrying on business "in Canada," has been held to be valid, notwithstanding that his employer's business was restricted to certain parts of that Dominion (320).

The Duration of Restraint.—The length of time for which a restraint operates may, on some ground, be considered excessive. Here again, the question of reasonableness crops up, so that a restraint for life is not necessarily unreasonable. In *Fitch v. Dewes* (1921) (317) (see above) the solicitor's clerk covenanted that he would never practise within seven miles of Tamworth Town Hall, and the restraint was upheld by the House of Lords.

It is arguable that the longer the employee is away from his former employment, the less harm he is likely to do by setting up in competition. The employee may plead, therefore, that on the particular facts of the case, it would be reasonable to hold that a period of, say, ten years was excessive, on the ground that "the sting would have gone out of his tail" in a considerably shorter time.

Contracts for the Sale of a Business

A restraint upon the vendor of a business will be invalid unless the purchaser has acquired some proprietary right or interest. What this means is that it is only the business itself which is entitled to protection, and the restraint must do no more than protect the proprietary interest which has been transferred.

In *British Reinforced Concrete v. Schelff* (1921) (321):—

The plaintiffs carried on an extensive business in the manufacture and sale of "B.R.C." concrete reinforcements. The defendant, a selling agent for "Loop" reinforcements, sold his business to the plaintiffs and covenanted not to be concerned "in the business of manufacture or sale" of reinforcements in any part of the United Kingdom.

It was held that the restraint was too wide, for all that had been transferred was the selling agency for "Loop" reinforcements.

Severance of Covenants

Where part of a covenant appears to the Court to be unreasonable, and that part is separate, so that it may be removed without damaging the remainder, it will be struck out. This is the doctrine of severance, which has application to all contracts and is not restricted to those in restraint of trade. It was explained by Mr. Justice Salter in *Putman v. Taylor* (1927) (322):—

"If the promise sought to be enforced is invalid, as being in restraint of trade or for any other reason, the Court will not invent a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made, but did not make. The promise to be enforceable must be on the face of the documents a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the Court will enforce it. Whether it is separate or not depends on the language of the document. Severance, as it seems to me, is the act of the parties, not of the Court."

British Reinforced Concrete v. Schelff (1921) (321) (see above) provides a good illustration, for the Court considered that it could delete the words "manufacture or" from the covenant. As it happened, the covenant was still too wide, even after the severance.

Trade Alliances and Monopoly

The principles already considered are equally applicable to the activities of associations of traders, and any such alliance, which

has as its object the maintenance of prices or the regulation of output, may well be void as being in restraint of trade. But, although the principles to be applied are the same as in any other case, the Courts take into account the fact that such restraints may not only be beneficial to the parties concerned, but also to the public at large, in that the standards of manufacture and the quality of the goods may be improved whilst, at the same time, prices may be stabilised and cut-throat competition eliminated. Another point which will be taken is that traders who enter into restrictive agreements do so voluntarily and with a view to some advantage. But they must be prepared to take the rough with the smooth, and attempts to escape from their voluntarily assumed obligations are looked upon with some disfavour.

The Common Law Position.—The position of trade associations was put in this way by Lord Parker of Waddington in *A.-G. of Australia v. Adelaide Steamship Co.* (1913) (323):—

“The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. . . . A contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce . . . a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent. . . .

“No contract was ever an offence at common law merely because it was in restraint of trade. . . . The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others.”

A monopoly will, therefore, be “pernicious” if its intention is to injure others, including the public, by taking such steps as unduly enhancing prices. But if such a combination sets out wilfully to injure a man in his trade, either by doing an act unlawful in itself, or by doing something, which would otherwise be lawful, by unlawful means, it may, provided that some damage has been done, be guilty of the tort of conspiracy.

The Statutory Position.—Trade alliances have now received the attention of Parliament, who, seeking to control “pernicious monopolies,” have put upon the statute book the MONOPOLIES AND RESTRICTIVE PRACTICES (INQUIRY AND CONTROL) ACT, 1948,

“to make provision for inquiry into the existence and effects of, and for dealing with mischiefs resulting from, or arising in connection with, any conditions of monopoly or restrictions or other

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analogous conditions prevailing as respects the supply of, or the application of any process to, goods, buildings or structures, or as respects exports."

The provisions of the ACT are too involved to be dealt with in any detail. What it amounts to is that, if the Board of Trade considers that the ACT is applicable to any case in respect of the supply, processing or export of goods, it may refer the matter to the Monopolies Commission which has been set up under the ACT. The Commission then investigates the position and submits its report to Parliament. The "mischiefs," if any, are dealt with by orders issued in the form of Statutory Instruments, approved by resolution of each House, by a "competent authority," who may be the Board of Trade, one of the principal departmental Ministers, the Admiralty or the Home Secretary. The ACT does not apply to the nationalised industries.

So far several reports have been issued by the Commission, including those on electric lamps (324) and insulated electric wires and cables (325). Other branches of the engineering industry are being investigated, in particular that concerned with electrical and allied machinery and plant. The necessity for issuing orders has not yet arisen, and it seems that, to date, any restrictive practices which the Commission has considered to be undesirable in the public interest have been dealt with by negotiation between the appropriate Ministry and the trade association concerned.

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PART THREE

THE LAW OF NEGLIGENCE

Introduction

NEGLIGENCE in the sense of omission to perform contractual obligations in a proper manner has already been mentioned (*e.g.* *see* p. 198 as to the negligence of an agent, and p. 217 as to that of a bailee for reward). But the law of negligence as here considered is that of negligence as a tort (*see* p. 13), which imports a duty of care laid down either by common law or by statute and which is independent of any contractual obligation.

The duty of care which the law imposes varies in accordance with the circumstances. Its basis is explained in Chapter 18, which should be read with care in order that the practical aspects dealt with in succeeding chapters may be fully understood. Those persons whom the law considers to have particular responsibilities are the occupiers of premises, employers, and the possessors of dangerous, or potentially dangerous, things, such as motor cars or explosives. Chapters 19, 20 and 21 set out the law in that regard, and opportunity has been taken to deal with the related tort of nuisance as it affects the occupiers of premises.

Few engineers are fortunate enough to be unconcerned with the FACTORIES ACTS and the many regulations made thereunder. The duties imposed are analogous to those embraced by the tort of negligence, and Chapter 22 is therefore devoted to a consideration of those parts of the factory legislation which are of more immediate interest to engineers. For the same reason, and because they are rarely given extensive treatment, regulations primarily concerned with electrical safety are dealt with at some length in Chapter 23. Finally, in order to carry all these matters to their inevitable conclusion, the question of compensation for personal injuries resulting from breach of duty in negligence is considered in Chapter 24.

Professional negligence is usually contractual; if it is not, then the ordinary rules as explained in Chapter 18 apply. The liabilities of professional engineers for negligence under contract may be ascertained from Appendix I (*see* p. 391).

CHAPTER 18

The Basis of Liability in Negligence

IN its ordinary meaning "negligence" signifies an attitude of carelessness towards, and an indifference to the consequences of, some act or omission by the person who does that act or makes that omission. Whilst this may be a constituent element in some torts (*see* p. 13), negligence does not, in that sense, amount to an actionable tort in itself. But negligence as a tort, which is here to be considered, has a more positive meaning, in that it consists of the breach by one person of a legal duty to take care which results in damage being caused to another to whom that duty is owed.

The tort of negligence contains THREE ELEMENTS:—

- (1) A LEGAL DUTY TO TAKE CARE, imposed by common law or statute.

If the duty is contractual, then its breach is "negligence" within the ordinary meaning; *i.e.* it is the neglect or omission to exercise due skill and care in the performance of the contract.

- (2) A BREACH OF THAT DUTY which amounts to negligence in law.
- (3) SOME DAMAGE, which is not too remote, resulting from the breach.

Negligence is concerned with conduct and not with intention. For that reason, the act which constitutes it may be caused by carelessness or indifference, or it may be wilfully intended. But its basis is breach of duty, and what is behind the breach is irrelevant. The degree of negligence is reflected in the *quantum* of damages which may be awarded in consequence of the breach. But, in itself, negligence has no degrees. The expression "gross negligence" is used in the criminal law, but it has no application otherwise. As Lord Goddard said in *Pentecost v. London District Auditor* (1951) (326):—

"Negligence is a breach of duty. If there is a duty and there has been a breach of it which causes loss, it matters not whether it is a

venial breach or a serious one; a breach of a legal duty in any degree which causes loss is actionable."

The Duty to take Care

In an action in negligence, there must be shown to be a duty of care owed to the plaintiff by the defendant; if no duty is owed, there will be no negligence. The rule for deciding whether there is a duty was enunciated by Lord Atkin in the well-known case of *Donoghue v. Stevenson* (1932) (327):—

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

What must be foreseen is not the event which may reasonably be contemplated as following the act or omission, but the possibility that injury is likely to occur. The injury must be physical injury to person or property, and the possibility must be so within the range of probability that a reasonable man will be led to anticipate it (328). Whether or not the likelihood of injury is within the range of probability or is too remote is a matter of enquiry in each case. As to "who is my neighbour?" this, though a question of law, is ultimately decided by the same test.

Breach of the Duty

The standard of care to be observed is a question of law. It is often said to be that of a reasonable man, but it is rather more than that. To say that it depends upon the circumstances is, perhaps, begging the question. But different sets of circumstances tend to form themselves into patterns, and for each of those patterns or situations the law prescribes a standard. Thus, there are different standards of care owed by an occupier of premises to those who enter, depending upon whether they are employees, independent contractors, trespassers, casual callers or business visitors.

Whatever the standard of care may be, the burden of proving that it has not been maintained—that is, that there has been negligence—is upon him who alleges it. It is for the judge to decide the standard applicable and whether negligence is

reasonably to be inferred from the facts which have been established before him. If the judge is sitting alone, he will then rule whether or not negligence has been proved; if he is sitting with a jury, the decision will be left to them.

Res Ipsa Loquitur.—It may be that damage or injury occurs in such circumstances that it would seem to any reasonable person to be highly improbable that it could have happened without negligence. In such a case the rule of *res ipsa loquitur* ("The thing speaks for itself") will apply. The rule is not applicable to cases where all the facts are known (328), for it is really a device for substituting a reasonable explanation of an accident about which insufficient evidence is available to establish the cause. It is, in fact, a rule of evidence affecting the onus of proof, and depends upon the absence of explanation (329).

The kind of circumstances in which the rule will be applied are such as where a parked motor-car runs away downhill, a stone is found in a bath bun, a man goes into hospital with two stiff fingers and comes out with four, or a passer-by in the highway is struck by a brick or a tool dropped from an adjacent building. But, whatever the circumstances, there will be no place for its application where the plaintiff knows the cause of the accident, or the facts afford sufficient indication.

Contributory Negligence.—Where the plaintiff himself has been shown by the defendant to have contributed to his injury by his own negligence, that will not necessarily defeat his claim, although it would probably have done so before 1945. But the LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945 s. 1 (1), provides that:—

"Where any person suffers damage as the result partly of his own fault and partly of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

In assessing the damages, the Court must, firstly, find what total damages would have been recoverable had there been no contributory negligence. It may then reduce that total as it deems "just and equitable," in accordance with the proportion of the total liability for which it considers the plaintiff is responsible. The finding is usually expressed as a percentage of the whole liability. Thus, if it were found that both parties were equally

to blame, the damages would be reduced by fifty per cent. It is, of course, open to the Court to find that the contributory negligence is so great a factor that there is a one hundred per cent reduction; that is, no damages at all will be recoverable. (For a fuller explanation of this, see p. 339.)

Remoteness of Damage

The damage or injury must be that caused in consequence of the breach of duty to take care and, if it is too remote, damages will not be recoverable. The question of remoteness of damage in contract has already been discussed (see p. 174), and it was seen that, if damages are to be recovered, the damage must have been within the reasonable contemplation of the parties. A similar test applies in tort, to the extent that damage such as might reasonably be expected to be in the contemplation of the parties as likely to result from the breach will not be too remote (330).

The Theory of "Causation."—Strictly speaking, this "reasonable contemplation" test is not the accepted one, for, although it has considerable judicial support (particularly in the House of Lords), it has developed mainly from *dicta*. The older leading decisions have been based upon what is called the "causation" test, which is founded on the maxim *causa proxima non remota spectatur* ("The immediate, not the remote, cause is to be considered"). If two events are so connected, albeit casually, that one cannot happen without the other, there is then a "chain of causation," and anything in that chain is *proxima* within the maxim. As Lord Wright put it in the *Monarch Steamship* case (1949) (330a):—

"If a man is too late to catch a train because his car broke down on the way to the station, we should all naturally say, that he lost the train because of the car breaking down. We recognise that the two things or events are casually connected. Causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a casual connection between them."

The "Causation" Test.—A direct physical consequence of a negligent act is never too remote. That the damage caused is not what might be expected is immaterial, "so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act" (331).

Intended consequences are never too remote, even though they

would not have occurred but for intervening causes. This rule is based upon the old case of *Scott v. Shepherd* (1773) (332), known as "The Squib Case."

Shepherd, a mischievous boy, threw a lighted squib into the market house at Milborne Port in Somerset. It first alighted on the gingerbread stall of one Yates, whose assistant Willis picked it up and threw it at random so that it fell on another stall, owned by Ryal. Ryal then threw it away towards another part of the market, and it hit Scott, exploding in his face and injuring his eye.

Shepherd, when he threw the squib, must have known that it would cause some damage. Willis and Ryal were not free agents, but acted under the necessity of self-preservation, the necessity having been imposed upon them by Shepherd's act. It was as though Shepherd had actually thrown the squib at Scott.

The intervention of some new act of negligence may serve to break the chain of causation. This is termed *novus actus interveniens* ("A new act intervening,") and may be exemplified thus.

Suppose Brown, driving his motor-car at a furious rate, knocks down Black and injures him. Black is taken to hospital in an ambulance, but, during the journey, the ambulance skids into a bus and overturns, thereby aggravating Black's injuries. Brown will not be responsible for the further injuries, for the chain of causation has been broken by Black being taken into the ambulance.

But an independent act will not invariably constitute a *novus actus*; *Scott v. Shepherd* shows this. Thus, in *Philco Radio v. Spurling* (1949) (333):—

The defendants delivered by mistake to the plaintiff's premises some packing cases containing film scrap. The plaintiffs, having discovered that the goods were not for them, were repacking them when one of their typists touched a piece of the scrap with the lighted end of a cigarette, remarking that it would "make a good bonfire." In the result there was an explosion, and fire broke out causing damage.

It was held that the defendants were liable. Although the typist's act was not accidental, for she knew that the scrap would burn, it was not sufficiently intentional as to amount to a *novus actus*, because she did not appreciate that the material was highly explosive.

The "Reasonable Contemplation" Test.—It is submitted that the cases cited above can be explained on the basis of "reasonable contemplation." The *Philco Radio* decision depends upon this principle, for those who deal in dangerous goods must be taken to realise the consequences of negligent handling, and if they fail

to take proper precautions they will be responsible for all the damage which results (*see* p. 318). A *novus actus interveniens* may break the chain of causation, but only because a fresh and independent act is not usually within the reasonable contemplation of the parties.

That this test is obviously the right one is shown by the fact that it does appear to spring naturally from the definition of negligence given in *Donoghue v. Stevenson* (*see* p. 287). It is, of course, possible to criticise the test as being too vague, by saying that the causation principle is more positive. But, to quote Lord Wright in *Bourhill v. Young* (1943) (334a):—

“Negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. It is a concrete, not an abstract, idea. It has to be fitted to the facts of a particular case.”

The “reasonable contemplation” test is both fluid and universally applicable. Rigid application of the “causation” test could result in injustice, and this is recognised in the application of the *novus actus* principle, for the exceptions to that principle’s operation all depend upon the fresh and independent act being reasonably foreseeable.

Nervous Shock.—In recent years it has become recognised that physical injury to the person may include “nervous shock” (a term used to cover a number of specific psychiatric disorders). The shock must arise from a reasonable fear of immediate personal injury to oneself or a near relative. The cases dealing with this concern road accidents, and the decisions show two sets of circumstances in which damages may be recoverable. It would not be difficult to apply these decisions to other spheres of activity.

A mother who sustains shock as a result of seeing her child run over by a furiously driven lorry will have a claim against the driver. A bystander who suffers similarly when witnessing a collision between two negligently driven vehicles will also have a claim provided he was in the area of potential danger and had a reasonable apprehension that he might be struck by one of them. In both cases the facts must, of course, be established satisfactorily; nervous shock is a fact, to be proved by proper medical evidence (not always an easy matter). That a given person is particularly susceptible to shock is irrelevant, unless it is known to the wrongdoer (so that it may be said that he should have had it in contemplation).

Apart from those two cases, shock is usually too remote. As Lord Porter put it in *Bourhill v. Young* (1943) (334b):—

“The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.”

Volenti non fit Injuria

It is a defence in an action for negligence to plead that the plaintiff voluntarily undertook the risk of injury; this is in accordance with the maxim *volenti non fit injuria* (“That to which a man assents is not an injury”). The key to this defence is assent on the part of the plaintiff. The assent must amount to an agreement, express or implied, to run the risk of injury. There is express agreement, for example, when a railway passenger travels under conditions which exclude the railway from liability for injury (see p. 100). More usually the agreement is to be implied, probably from conduct. But in making the implication, it must be clear that the risk was taken by the plaintiff on the terms that he would accept the consequences.

A person who incurs a risk with full knowledge of the danger is not necessarily within the maxim. Mere knowledge (*sciens*), however complete, is not the same as assent (*volens*), in the sense of implied agreement. The maxim is NOT *scienti non fit injuria*. For example, in *Smith v. Baker* (1891) (335):—

Smith was employed by the defendants as a rock driller, and was engaged on work in a cutting where there was a crane for lifting spoil. While he was working the crane would frequently jib loads of stone over his head, and on one occasion a stone fell and injured him. Both he and the defendants knew of the risk.

The House of Lords held that the mere fact that Smith undertook to work in the cutting, with full knowledge of a danger arising from an operation over which he had no control, did not prevent him from recovering damages for his injury. The danger had been created by the negligence of the defendant, and it could not be said that, by continuing his work, Smith had volunteered to suffer the consequences.

The maxim is rarely applied in cases where a risk is taken in the course of employment. This is probably because there can be no true and voluntary assent where the only choice is between

running a risk and giving up an employment which is not normally dangerous. But it could be otherwise where an unreasonable risk was assumed, except that it would probably amount to contributory negligence.

The "Rescue Cases."—In what are known as the "rescue cases" the maxim *volenti non fit injuria* affords NO defence. An example is afforded by *Haynes v. Harwood* (1935) (336), which is the leading case on this aspect of negligence.

A policeman, on duty in a police station, saw through the window some runaway horses bolting with a van down a crowded street. He rushed out, seized the reins and eventually stopped the horses, sustaining injuries in so doing. The defendant, who had left the horses unattended, pleaded *volenti*, but it was held that this did not apply.

That someone will intervene to prevent injury resulting from another's negligence is, in a case of this kind, to be anticipated as a natural and probable consequence. Lord Justice Maugham considered that the fact that it was a policeman who was the rescuer made no difference to the result.

"My present view is that a rescuer, who acts on such a moral compulsion that having regard to his powers and his opportunities he would feel disgraced if he merely stood by, would be entitled to succeed in such an action as this" (336a).

In *Hyett v. G. W. Rly* (1948) (337) the Court of Appeal extended this principle to cases where the threat of injury is to property rather than to persons, by holding that, where someone is on premises by right (*e.g.* is employed by the occupier), and fire breaks out because of the negligence of the occupier, the injuries he sustains in attempting to put out the fire will be part of the damage within reasonable contemplation.

Contracting out of Responsibility

That it is possible to contract out of liability for negligence has already been demonstrated when considering the law of contract. The limitations of contracting out in general were considered in connection with the "Ticket Cases" (*see* p. 100), and the application of exemption clauses to contracts of bailment have also been discussed (*see* p. 218). The principles there outlined are generally applicable, and need not be discussed further.

Prohibitions Against Contracting Out.—Certain statutes prohibit or restrict contracting out. The CARRIAGE OF GOODS BY SEA ACT, 1924, allows a shipowner to contract out of the ACT to a very limited extent only (*see* p. 230); the CARRIAGE BY AIR ACT, 1932, has a similar provision (*see* p. 230).

The LAW REFORM (PERSONAL INJURIES) ACT, 1948, s. 1 (3), provides that any provision in a contract of service or apprenticeship intended to have the effect of avoiding or limiting the liability of the employer for injuries caused to employees by the acts of fellow-employees is a nullity. The reason for this is that any attempt to contract out of a statutory duty imposed upon an employer for the benefit of his employees is contrary to public policy (*see* p. 81). Thus, it is not possible to contract out of the FACTORIES ACTS.

Effect on Third Parties.—It is, of course, a basic principle that the terms of a contract are binding only upon the parties to that contract. But a contract made with an agent will also bind his principal; consequently, a principal who suffers injury under the contract will be unable to recover damages for negligence excluded by an effective exemption clause. Such a clause will not, however, exclude liability for injury to third parties, who will be covered by the rule in *Donoghue v. Stevenson* (*see* p. 322).

Subsequent Contracting Out.—It is possible to contract out of liability for an injury which has already been inflicted. In other words, an injured person can make what contract he likes with the person who is liable. This usually takes the form of the giving of a receipt against the payment of monetary compensation.

A receipt does not, by itself, amount to a contract; it is merely evidence of the payment of money. The fact that it expresses the sum received to be in full settlement of the claim does not affect the position. But such a receipt may be very good evidence of the existence of an agreement, which can be proved by oral evidence. Provided it can be shown that the injured person knew that the payment was made in full satisfaction of his claim, and fraud is not alleged, the agreement will be binding. Thus, although the receipt itself will not amount to an estoppel, the injured person will be estopped from making a further claim.

Liability under Contract and in Tort

It may so happen that a negligent act is both tortious and contractual. In the former case, the liability is usually more

onerous because the duty is generally wider. The question arises, has the plaintiff any choice as to which remedy he will take? Apart from the fact that it is not possible to pursue both remedies, the answer is, in general, in the affirmative; but "where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort" (338).

In this connection, an unenforceable contract with an infant (see p. 63) cannot be indirectly enforced by suing in tort, even though there has been misrepresentation by him amounting to deceit (339) (see p. 93).

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(a) at p. 228.
- (331) *Re Polemis and Furness Withy & Co., Ltd.* (1921) 3 K.B. 560, 577. C.A.
- (332) *Scott v. Shepherd*. (1773) 2 Wm. Bl. 892; 96 E.R. 525. K.B.
- (333) *Philco Radio and Television Corporation of Great Britain v. J. Spurling*. (1949) 65 T.L.R. 757. C.A.
- (334) *Hay or Bourhill v. Young*. (1943) A.C. 92. H.L. (Sc.)
(a) at p. 107.
(b) at p. 117.
- (335) *Joseph Smith v. Charles Baker & Sons*. (1891) A.C. 325. H.L.
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- (338) *Hall v. Brooklands Auto Racing Club*. (1933) 1 K.B. 205, 213. C.A.
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CHAPTER 19

Responsibilities of Occupiers of Premises

I. IN NEGLIGENCE

To Whom the Duty is Owed

The occupier of land or buildings, collectively referred to as "premises," owes a duty of care to all who enter therein. "Premises" is widely interpreted, and the expression is not confined to permanent structures, but covers railway carriages, road vehicles, ships and temporary erections such as stagings and scaffolds. The standard of care varies with the circumstances and purpose of entry. One who goes on the land of another without right or permission is a TRESPASSER; if he is there with permission, given as a matter of grace, he is a LICENSEE; and if he has entered by invitation, as on business, he is an INVITEE. The lowest standard of care is that owed to a trespasser, and the highest is to an invitee. These categories "correspond to real differences in the nature of the user of property and in the reasonable claims to protection of those who are permitted such use" (340).

There are two special classes of persons who do not come within these categories. Firstly, there are those who enter by virtue of contract and pay for admission, such as travellers on the railway, theatre-goers and hotel guests. The duty of care owed to them is regulated by the express or implied terms of the contract. Secondly, there are the employees of the occupier. Here the standard is prescribed both by common law and by statute (*e.g.* the FACTORIES ACTS), and is higher than that owed to an invitee (*see* p. 326).

The duty of care owed to trespassers, licensees and invitees is not confined to the occupier. Anybody who creates a danger will be equally responsible if it causes injury to others whom he has reason to expect will be on the premises. The wrongdoer may

himself be a licensee, an invitee, or even a trespasser, but his liability to others in those categories will be that of the occupier, unless he has grounds for believing that the danger will be guarded against by the occupier himself or by someone else.

Trespassers

Trespass to land is the unjustifiable interference with the possession of it. Despite the familiar legend, "Trespassers will be prosecuted" (aptly described as a "wooden falsehood"), trespass is not a criminal offence but a tort. It is actionable whether or not notice has been given, and irrespective of the fact that no perceptible damage has been done.

A trespasser is one who enters on land without right or permission, and "whose presence is either unknown to the proprietor or, if known, is practically objected to" (341*a*). He who enters wrongfully enters at his own risk and, therefore, no duty is owed to him by the occupier; nor is any owed to the owners of animals which trespass and suffer injury. This must, however, be qualified to the extent that the occupier is under a duty not to do anything with the intention of injuring a trespasser. He will be liable for injury resulting from "some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser" (341*b*).

The Duty to Trespassers.—It is necessary to distinguish acts which are done "with the deliberate intention of doing harm," from those whose purpose is to prevent trespassing. To affix broken glass, barbed wire or spikes along the top of a wall may cause injury to a trespasser, but the occupier will not be liable, because the intention in so doing is not to inflict injury but to impede entry. Even if something has been put on the land for the purpose of injuring intruders, due warning by notice or otherwise of the presence of the danger will be sufficient to avoid liability. However, it should be noted that the use of "any spring gun, man trap or other engine calculated to destroy human life or inflict grievous bodily harm" is absolutely prohibited by s. 31 of the OFFENCES AGAINST THE PERSON ACT, 1861, except "in a dwelling house for the protection thereof" between sunset and sunrise, or to destroy vermin.

The duty not to do an act "with reckless disregard of the presence of the trespasser" does not arise unless he is known to be present. There is no duty to anticipate or look for trespassers.

But if it is reasonable to suppose that they are present, the occupier must, before he does anything likely to harm them, either make sure that they are not there, or, if they are, give them due warning. For example, in *Robert Addie v. Dumbreck* (1929) (341):—

A colliery company operated a conveyer system, the whole of which was not visible from the pithead where it was controlled. A boy, who had been playing with one of the pulleys of the conveyer while the system was at rest, was killed when it was set in motion.

The House of Lords held that, as the boy was a trespasser who could not have been seen from the pithead, the colliery company were not liable. But in *Excelsior Wire Rope v. Callan* (1930) (342), the House held, in somewhat similar circumstances, that there was a liability.

A wire rope was used to move waggons in a works siding, adjacent to a field used as a children's playground. The rope passed over a pulley, around which children, who habitually trespassed on the siding owing to lack of proper fencing, were in the habit of playing. On an occasion when the haulage device was in use, a child, who had been swinging on the rope, was caught between it and the pulley, and was injured.

The owners were held liable, for they should have seen that any children were well clear before starting up the haulage device.

If there is a continuing danger, the occupier is under no liability to trespassers. In *Hardy v. Central London Railway* (1920) (343), children were continually being warned by the station staff against trespassing on a moving staircase. A child was injured when playing on the staircase while the staff were temporarily elsewhere. It was held that the railway was not liable.

Licensees

A licensee is one who comes on to premises with the permission (i.e. "leave and licence") of the occupier. He is lawfully there, and that distinguishes him from a trespasser. The line of demarcation is, however, sometimes difficult to define, for the law is apt to infer a tacit licence. Where, for example, someone is in the habit of crossing land and the occupier knows of this but takes no steps to prevent it, there will be a licence by implication. But if the occupier makes some practical objection, such as by giving warning or erecting a fence, there will be no licence.

Lord Wrenbury said in *Fairman v. Perpetual Investment* (1923) (344a):—

“The licensee must take the premises as he finds them; but this is apart from and subject to that which follows as to concealed dangers. The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, . . . and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it.”

A visitor to a tenant in a block of flats who uses the common staircase is a licensee of the landlord of the flats. If he trips and falls because of a damaged step, he will have no claim against the landlord if he could, by using ordinary diligence, have seen the defect. A customer to a shop who must cross a private forecourt in order to reach it, will be the licensee of the owner of the premises if the shopkeeper is merely a tenant; if, however, the shopkeeper is the owner, the customer will be his invitee. But if he uses the forecourt merely as part of the pavement belonging to the highway, and has no intention of entering the shop, he may or may not be a licensee (*see* p. 310). Where there is “entry as of right,” such as into public recreation grounds, parks and public conveniences, it is as a licensee of the authority controlling those places.

Liability of the Licensor.—While it is the duty of the licensee to take reasonable care for his own safety, that of the licensor or occupier is restricted to warning him of hidden dangers. The occupier must have “actual knowledge of the danger,” and it is sufficient that he knows of the presence of some physical object which could be put into a dangerous condition by the action of some independent person (345). “Actual knowledge” may mean one of two things. The occupier may have knowledge of the physical facts which constitute the danger, but he may not appreciate the risk involved, although a reasonable man would do so; on the other hand, he may have both knowledge and appreciation. In either event he will be liable for injury to a licensee. But it will be otherwise if he does not know of the physical facts, even though his ignorance is caused by lack of adequate inspection (346).

Invitees

An invitee is a person “invited to the premises by the owner or occupier for purposes of business or of material interest” (344b), and “he must be on the land for some purpose in which he and

the proprietor have a joint interest" (341a). The commonest example of an invitee is the customer in a shop, who goes there upon the express or implied invitation of the shopkeeper and in their common interest. It is not necessary that business should actually be transacted; the fact that the customer is merely "looking round" will be sufficient.

Persons visiting railway stations for the purpose of meeting travellers are invitees of the railway; a stevedore loading a ship is an invitee of the shipowner; a tenant in a block of flats or offices is an invitee of his landlord as regards the common staircase, lifts, passages, etc.; and firemen attending a fire are the invitees of the occupier, whether or not they were called out by him. But a canvasser who calls on the occupier of premises for the purpose of doing business, in which it turns out the latter is not interested, will not be an invitee, because there will be no common interest (347).

The Duty of the Occupier.—The duty of the occupier to an invitee was settled long ago in *Indermaur v. Dames* (1866) (348a), where Mr. Justice Willes, giving the judgement of the full Court of Common Pleas, said that the invitee

"using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

The occupier's duty is therefore higher than where he is a licensor, for knowledge of danger is attributed to him where it is considered he ought to possess it. Mr. Justice Willes' words were considered in some detail by the House of Lords in *London Graving Dock v. Horton* (1951) (349). It was pointed out that the duty is to use reasonable care to prevent danger, but not to prevent it absolutely, because Mr. Justice Willes followed his statement by words which were explained by Lord Porter (349a) as seeming to mean:—

"Even if there is unusual danger, the duty to use reasonable care to prevent damage may be performed by notice, lighting or guarding, and the recognition that the invitor may fulfil the obligation imposed upon him by notice or lighting indicates that adequate warning to the invitee may be a compliance with the duty which is owed by the invitor."

As to "unusual danger," it must be remembered that what is unusual for one person may be usual for another. Thus, a

gangway used by stevedores on a ship may be reasonably safe for them because it is the kind of gangway usually provided for them. But it may constitute an unusual danger for another class of worker or a member of the public, for whom it will not become a usual danger merely because he knows of it and risks it. Further, a gangway which is safe for use by stevedores in daylight may become, for them, an unusual danger at night, if it is not properly illuminated.

The duty being to give the invitee fair warning, it is a question of fact as to when that warning need be given. If the invitee has actual knowledge and full appreciation of the danger, it will no longer be "unusual." Lord Porter considered that, although the maxim *volenti non fit injuria* does not apply in such a case, in his opinion (349b):—

"A full appreciation of the danger on the part of the invitee and a continuance of his work with that knowledge is sufficient to free the invitor from liability for damage occasioned by the insecurity of the premises to which resort is made."

The effect of lapse of time between an invitee acquiring "actual knowledge" of an unusual danger, and an occasion when he re-encounters it, was considered by Mr. Justice Hilbery in *Wingrove v. Prestige* (1953) (350). His Lordship held that it was entirely a question of fact, depending upon the circumstances of the case, whether fresh warning should be given to the invitee. Where the danger was open and apparent, and the invitee had been well acquainted with it a mere five or six weeks before, it would be impossible to say that an ordinary careful invitor would regard it as reasonably necessary to give fresh warning.

The Extent of the Duty.—The occupier's duty is not confined to giving warning of unusual danger which may be due to the structural condition of the premises. He must also have regard to the use which he makes of the premises and to the manner in which he permits a third party to use them (351). But, if he is carrying on a dangerous, but lawful, business, he is under no absolute duty to protect an invitee. He must, of course, be careful to give proper warning of the danger, but he is not called upon to give a guarantee against harm (352). The standard of care depends upon the nature of the business; it would be particularly high in, say, the manufacture of explosives.

A journeyman gas-fitter, employed by a contractor to do work on some gas burners in a sugar refinery, accidentally fell through an

unfenced hole in the floor and was injured. It was held that he was an invitee, and that the hole was an unusual danger to anyone not regularly employed upon the premises (348). Although an independent contractor, employed to do work on premises, may have the status of an invitee, the invitor's duty does not extend to that part of the premises where the work is actually being done, although it would be otherwise in some other part to which the contractor had access (353), or where scaffolding, necessary to gain access to the work, had been supplied and erected by the occupier and had proved defective (354).

The Invitee's Responsibility.—An invitee must take reasonable care for his own safety. Lord Atkin said in *Hillen v. I.C.I.* (1936) (355) that the occupier's duty towards an invitee

“only extends so long and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use.”

As Lord Justice Scrutton put it in *The Carlgarth* (1927) (356), “When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters.”

In *Vaughan v. Building Estates* (1952) (357):—

The plaintiff, a sub-contractor on a building site, sued the main contractor for damages for injuries received when he fell over a scaffold board and broke his ankle. It was the plaintiff's habit, as it was also of the main contractor's men, to take short cuts over rough ground instead of going round by established roads or paths. While taking such a short cut the plaintiff was injured, and he alleged that it was impossible to see the board because of long grass.

It was held that the plaintiff was an invitee but, although the duty owed to him was to give fair warning of unusual danger, he must himself show a reasonable regard for his own safety. Bricks and boards were normally found lying around on building sites, and they were not unusual dangers. In this case, the scaffold board was something the plaintiff might expect to find, and because of that he had no claim.

The duty to the invitee is owed only so long as he is acting in compliance with his invitation. It is limited “to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so” (358). An invitee who exceeds this limit will be a trespasser, or, at best, a licensee. The invitation may be limited, not only as to area,

but also in point of time. A customer will not be an invitee if he enters a shop after it has closed, even though the door may be unlocked; and workmen remaining on premises after ceasing work may well become trespassers.

Liability to Children

It can be stated as a general rule that no higher duty of care is owed to children than to adults. ("Child" in this context is not the same as "infant" (*see* p. 63), but is confined to those of "tender years"). This must be qualified, however, in the case of children who are licensees or invitees. But, where they are trespassers, there is no such qualification, for, as Lord Dunedin said in *Robert Addie v. Dumbreck* (1929) (341c):—

"The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser."

The decisions in that case and in *Excelsior Wire Rope v. Callan* (*see* p. 298) did not depend, therefore, upon the fact that children were involved.

Child Licensees and Invitees.—Where children are allowed on premises by licence or invitation, it may be that they are attracted by some object of fatal fascination which constitutes a trap or allurement. Thus, in *Cooke v. M. G. W. Rly.* (1909) (359):—

The defendant railway company kept an unlocked turntable on their land close to a public road. The company's employees knew that children were in the habit of going on the land. A five-year-old child was seriously injured when playing with other children on the turntable.

The company was held to be liable, for the children were tacit licensees, and the turntable was in the nature of a trap.

Child Trespassers.—If a child is a trespasser, the existence of a trap or allurement makes no difference to the occupier's liability. But a licence may fairly easily be presumed. For instance, in *Williams v. Cardiff Corporation* (1950) (360):—

A child of four and a half was playing on a piece of unfenced waste ground belonging to the local authority, and was injured when he rolled down a bank on to a heap of tins and broken glass. Children played on this waste land every day, and there was nothing to prevent them going on it.

The Court of Appeal held that the child was a licensee and that the place was a concealed danger; the authority were accordingly

liable. A licence will not be inferred, however, where it is shown that the occupier has taken steps to keep children off his property, as by providing adequate fencing which he keeps in repair. Thus, in *Edwards v. Railway Executive* (1952) (361), a child who climbed through a fence in order to fetch his ball which had gone on to an electrified railway track, and who caught his foot in a live rail, was held to be a trespasser.

The Standard of Care.—It must be realised that warnings and notices, which may be adequate to free an occupier from liability to adult licensees and invitees, may not be sufficient in the case of children. Again, things which do not constitute unusual dangers to adults may easily be traps for children, and conduct amounting to contributory negligence on the part of an adult may not be negligent in a child. Accordingly, where children are likely to come on to land, the occupier must take special precaution in regard to objects likely to have a fascination for them.

Where proper precautions have been taken, there will, of course, be no liability. This is exemplified by *Cuttress v. S. G. B. Ltd.* (1953) (362):—

A tubular steel scaffolding, thirty-five feet high and weighing over four tons, which was not tied or strutted, was erected against the wall of a house on a bombed site on which children habitually played. At night and at weekends the lower scaffold boards and ladders were removed, and a long rope, used in conjunction with a pulley at the top of the scaffolding to raise materials, was left coiled near the pulley.

One Sunday a number of boys, aged from twelve to sixteen, approached the scaffolding, and one of them swarmed to the top and let down the rope, which was secured at one end. About a dozen boys then pulled on the rope, and the scaffolding eventually tipped over and came down in one piece, severely injuring three younger boys.

The Court of Appeal held that, on the evidence, it was impossible to say that the contractors responsible for the scaffolding ought to have foreseen the probability of it being pulled over, or of an adventurous boy climbing to the top after they had removed ladders and boards.

Liability of the Occupier for Acts of Others

An occupier is free from liability to licensees and invitees if he has taken reasonable care to make the premises safe, and has taken steps, by warning or otherwise, to mitigate the effect of unusual dangers of which he knows or ought to know. The

safety of premises depends, in a large measure, upon the standard of cleaning and upkeep, and in that the occupier is usually compelled to employ others to do the work for him. If it is done by his employees, then he will be vicariously liable for any injury caused as a consequence of their negligence (*see* p. 264). But if he employs independent contractors, he may or may not be responsible for dangers which they have created.

Independent Contractors.—It is well settled that the occupier is not responsible for the negligent acts of an independent contractor which are done in the execution of the contract. Thus, if, say, a builder is employed to make some structural alterations which entail the employment of an electrical contractor to move lighting circuits, and the latter, in order to do his work, makes use of the builder's scaffolding, the occupier will not be liable for the injury of one of the latter's employees because of the collapse of the scaffolding (363). But if the work given to the independent contractor is something which the occupier is bound to do if he is to be free of liability for injury to others, he will, *prima facie*, be responsible if the contractor does that work negligently.

Delegation to an independent contractor will not free the occupier of his liability to licensees and invitees unless he satisfies himself that the contractor possesses the necessary skill to do the work. He must also exercise reasonably intelligent supervision, and take care to detect any danger which may exist after the completion of the work. If he does this, he will be free of liability (364).

Where the work to be done involves the application of technical skill and knowledge, the occupier may be liable if he does not entrust it to a competent contractor. On the other hand, if he does so entrust it and, so far as he is able to ascertain, the contractor he employs is skilled and competent, he will not be responsible for the creation of any unusual danger, provided it is not one about which it could be said he ought to know. Thus, in *Haseldine v. Daw* (1941) (365):—

The landlord of a block of flats made a contract with a firm of lift engineers to carry out regular maintenance of an hydraulic lift, and to report to him any repairs that might be required. He was told by them that the rams were badly worn and ought to be replaced, but that they did not consider the lift was dangerous to use. Owing to wartime difficulties in obtaining replacement parts, they suggested that they should pay extra visits in order to grease the rams, and the landlord agreed.

On one of these visits the engineers' employee, in repacking one

of the glands, failed to replace it properly, with the consequence that it fractured when the lift was used. A visitor to one of the flats, a licensee of the landlord, was using the lift when it fell to the bottom of the well, and he was injured.

The Court of Appeal held that the landlord's duty was to take reasonable care that the lift was safe to use. He had fulfilled that duty by employing a competent firm of engineers to maintain it.

Others Lawfully on the Premises.—Any person, including an independent contractor, but excluding an employee of the occupier acting within the scope of his employment, who creates a danger on another's premises, will be responsible for injury to all others who are lawfully there. But he will be relieved of liability if he has reasonable grounds for believing that the danger will be removed or guarded against, either by the occupier himself, or by someone else, such as the occupier's independent contractor. Apart from this exception, however, his liability will be the same as that of the occupier, and if he is a contractor doing work on the premises, he must give warning of, or guard, any unusual or hidden dangers for which he alone is responsible. Further, he will be liable for any negligent act which causes injury, such as by fixing an electric light fitting so insecurely that it falls and does damage, or repairing a lift so badly (as in *Haseldine v. Daw*) that it is left in a dangerous state.

The liability of the person who actually creates the danger is well illustrated by *Buckland v. Guildford Gas Co.* (1949) (366).

The defendants, an electricity undertaking, were the owners of an 11 kV overhead line which passed across a field at Ewhurst in Surrey. Two poles of this line were in the field, about 80 yards apart, and midway between them there was a tree which was directly under the line and about two feet from the lowest conductor. The tree was in foliage and the line could not be seen by anyone standing at the foot of the tree.

A girl, aged 13, who was in the field with the tacit permission of the owner, climbed the tree and, coming into contact with one of the line conductors, was electrocuted and killed. It was established that the defendants had complied with Reg. 19 of the OVERHEAD LINE REGULATIONS, 1947, in that they had affixed the statutory notice to the two poles in the field. There was no danger notice on or near the tree.

It was held that the girl came within the class of persons whom Lord Atkin, in *Donoghue v. Stevenson* (see p. 287), had called "neighbours;" that is, she was one of those persons whom the defendants ought to have had in contemplation as being likely to be affected by the fact that their overhead line was in close proximity

to an easily climable tree. The defendants had failed in their duty towards the girl in neglecting to safeguard her from a hidden deadly trap, and they were therefore liable for her death. In referring to that liability, Mr. Justice Morris said (366a):—

“The regulations imposing obligations upon the defendants to fix anti-climbing devices and warning notices to any poles or structures . . . served as an additional reminder of the need to take steps to avert any possible perils attendant upon the transmission of high voltage along wires carried overhead across the countryside.”

Liability where Entry is by Contract

Where entry into premises is the main purpose of a contract, the occupier's duty of care is regulated by the terms of the contract. Entry under contract must not be confused with entry which is ancillary to the performance of it, for, in the latter case, the contractor will be an invitee, except in so far as his entry may be regulated by some specific stipulation.

Most cases of entry by virtue of contract come within the “Ticket Cases” (see p. 100), particularly as the majority concern travellers by all forms of public transport, and those who go to theatres, cinemas and other forms of entertainment, including exhibitions. If it is found that the conditions in the contract do not apply, or if there are no conditions, then a term will be implied that the premises will be reasonably fit for the purpose for which they are to be used (367). Mr. Justice McCardie, in *Maclean v. Segar* (1917) (368), considered that, though the premises must be as safe “as reasonable care and skill on the part of anyone can make them,” this was subject to the limitation that the occupier should not be responsible for defects “which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises.” He added that, subject to that limitation, it did not matter who was responsible for the lack of care, whether it was the occupier or his independent contractor, or whether it took place before or after the occupier took possession of the premises.

Mr. Justice McCardie's words were expressly approved by Lord Justice Greer in *Hall v. Brooklands Auto Racing Club* (1933) (369), in which case it was held that the occupier's duty to the contractee is not an absolute one, in that he is not an insurer against all accidents, for he will not be liable if there is no negligence. In

the case of an exhibition, where an accident occurs on one of the exhibitors' stands, the occupier will be liable only if he was responsible for the stand itself; otherwise, the contractee will be the invitee of the exhibitor. If admission is free, the person who enters will probably be the occupier's invitee as well.

II. IN NUISANCE

Private Nuisance

Nuisance is a tort which is closely allied to that of negligence, for the same facts may constitute either of them. It may be defined as:—

“Unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it” (370*a*).

That definition covers what is usually referred to as “private” nuisance, and must be distinguished from “public” nuisance, which is the obstruction of the rights of the public at large. There is little which is common to the two, for public nuisance is *prima facie* a crime, and a private individual cannot sue in respect of it, unless he can prove damage suffered by himself over and above that inflicted upon the Queen's subjects generally.

“*Unlawful Interference.*”—The essential element in private nuisance is “unlawful interference.” Interference takes many forms, and they are classified for convenience into those, such as vibration, which inflict injury to property, and those, such as noises and smells, which cause personal discomfort. Even so, the division is not hard and fast. For example, excessive vibration may interfere with both personal comfort and structural safety.

As to whether interference is “unlawful” cannot be decided just by applying some simple test. The maxim, “Live and let live” affords the right approach, for the key to nuisance is whether the interference complained of is reasonable or unreasonable in the circumstances. “Reasonableness” is the basis of quite a number of legal principles, but it has rather a different meaning in connection with nuisance. To “take reasonable care” is a test in negligence; but that is not sufficient in nuisance, for a person may still be liable even though he has taken the care of a reasonable man.

Thus, Brown may install a diesel engine in his works, and take care to see that it is fixed upon efficient anti-vibration mountings.

There will probably be no question but that he has taken reasonable care to stop vibration, but, if, despite his care, Smith's drawing office next door cannot be used because the floor shakes every time the engine is run, he cannot plead that he is not liable. That is not to say that what he has done will not be to his credit, for, had he not taken care, it would have gone against him.

"*Reasonableness.*"—All the circumstances must be taken into account in deciding whether an unreasonable amount of damage has been done to the other person. The locality may be important, for, as Lord Justice Thesiger said in *Sturges v. Bridgman* (1879) (371a), "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey." (That may not be true of those localities to-day, but it should not be difficult to substitute others.) Malice or ill-will may, in some cases, be material, particularly where it turns something which would otherwise be reasonable into something unreasonable.

It has been held that noise creates an actionable nuisance only if it interferes materially with the ordinary comfort of life. It is a question of degree, and must be judged by ordinary plain and simple notions, having regard to the locality (372). For example, it was held in *De Keyser's Royal Hotel v. Spicer* (1914) (373) that, although the noise from building operations must usually be tolerated, it is not reasonable and proper to do pile-driving by night so that residents in adjoining buildings cannot sleep. But, in deciding what is reasonable or unreasonable, no account will be taken of the extreme sensitiveness of the other party.

Thus, a tenant of the upper floor of a building, who is manufacturing delicate instruments, cannot complain if the tenant on the floor below, engaged in the ordinary and reasonable conduct of his business, maintains his premises at such a temperature that heat is conducted through the ceiling and upsets the settings of instruments stored on the floor above.

The Basis of Liability.—Liability for nuisance is based upon occupancy, but the occupier must have some title to the land. It is not sufficient, therefore, that the occupation is by "leave and licence" (see p. 273); the occupier must be either the owner of the premises, or a tenant.

In the case of leasehold premises, the landlord is not usually liable. But a tenant may be deemed to continue a nuisance if he fails to take reasonable steps to bring it to an end, and he will have adopted it if he makes use of whatever constitutes or causes the nuisance. A nuisance created by a trespasser or an act of God

(see p. 312) will not render him liable, unless he continues or adopts it (374). Upon ceasing to occupy the premises, a tenant will no longer be liable for any nuisance which was not positively created by him.

It is no defence to a claim to say that the plaintiff "came to the nuisance." In *Sturges v. Bridgman* (1879) (371):—

A confectioner had for more than twenty years used a pestle and mortar in the rear of his premises, which abutted on to the garden of a physician, who did not complain of the noise and vibration. Some years later, the physician built a consulting room at the end of his garden, and from then onwards the noise and vibration became a nuisance to him. The physician asked for an injunction, but the confectioner claimed that he had acquired a prescriptive right to use the pestle and mortar, because he had used them in the same way for more than twenty years.

The Court of Appeal held that the physician was entitled to an injunction, for there was clearly a nuisance. Although twenty years continuance of a private nuisance will legalise it by prescription (see p. 69), the prescriptive period will not commence until the matter complained of has become a nuisance to the complainant. The physician may have "come to the nuisance," but it did not become actionable until after he had come to it.

Comparison with Negligence.—It may be useful to compare the tort of nuisance with that of negligence, for the same facts may constitute either of them.

The comparison may aptly be made by considering the example of the forecourt to a shop (see p. 299). A person who uses the forecourt to enter the shop will, as has been seen, be entitled to recover in negligence if he suffers injury because of its defective condition. But suppose the forecourt is, to all appearances, part of the pavement of the highway. Someone walking on the pavement who has no intention of approaching the shop, but who steps on to the forecourt in order to avoid some obstruction and trips over a hole in its surface will, if he can recover at all, have a claim in nuisance against the owner or occupier. But he will not, being neither a licensee nor an invitee, have a claim in negligence.

On the other hand, the Court of Appeal have held, in *Mumford v. Naylor* (1951) (375), that a person who deliberately crosses the forecourt of a shop with the intention, not of entering the shop but of taking a short cut, is to be regarded as the licensee of the owner or occupier. Perhaps the distinction is to be found by ascertaining whether the forecourt is being used as a right of way or as a mere diversion.

Obviously, this is not a very satisfactory state of affairs, but, for better or worse, that is the law.

Strict Liability

The Rule in Rylands v. Fletcher.—There is a rule of strict liability which applies in the case of what may be called an “escape” from premises. (The liability is, in many respects, similar to that which results from nuisance, and may, in some cases, be indistinguishable.) It is known as “The Rule in *Rylands v. Fletcher*” (376), and depends upon a principle which, at the time it was formulated, served to fill a gap in the general law. This rule, slightly paraphrased in order to bring it into line with later decisions, may be stated as follows:—

The person who, for his own purposes, brings on to land which he occupies, and collects and keeps there, anything likely to do damage if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

It must be emphasised that liability under the rule is strict, but it is not absolute. Absence of negligence affords no excuse, but, on the other hand, there are exceptional situations where the rule does not apply.

Application of the Rule.—The facts of *Rylands v. Fletcher* (1868) (376) were these:—

Rylands and Horrocks, the owners of a mill, employed a firm of contractors to construct a reservoir on their land. In the course of the work some old mine shafts were uncovered, but the contractors did not consider it necessary to block them up for they were already filled with marle and earth from the surrounding land. In fact, these shafts were directly connected with a mine which was being worked by *Fletcher*. When the reservoir was filled, the water burst through and flooded *Fletcher*’s workings.

Although *Rylands* and *Horrocks* had not themselves been negligent, it was held that they were liable to *Fletcher* for the damage he had sustained.

That case has been followed by many others, and the rule has been applied to the escape of a variety of things, including gas, oil, electricity, colliery slag, noxious fumes and vibration. The essential point is that there must be an actual escape from the land of the occupier. The phrase “land which he occupies” covers cases where land is said to be occupied by such things as electricity, gas and water mains, and telephone cables.

Thus, in *Charing Cross Electricity Supply v. London Hydraulic* (1913) (377), the bursting of the defendants' mains under the street was deemed to be an "escape" under the rule, for the plaintiff's cables, laid under the same street, were damaged in consequence. It was held that the rule would apply even though the occupation was by "leave and licence" and neither party had any right of property in the land, provided that the nuisance was not one authorised under powers conferred by the statute which allowed the laying of the mains.

In *Collingwood v. Home and Colonial* (1936) (378), a fire started in the defendants' premises due to a defect in the electrical installation, and spread to the plaintiff's premises adjoining. It was held that, in the absence of proof of negligence, there was no liability, for the rule in *Rylands v. Fletcher* did not apply to the use of electricity, gas or water for ordinary domestic purposes, as opposed to the handling of them in bulk in mains or reservoirs. But in *Western Engraving v. Film Laboratories* (1936) (379), the rule was held to apply to the escape of excess water from factory premises.

The defendants occupied the second floor of a factory, in which they processed cinematograph films. They used large quantities of water, and on several occasions allowed it to escape on to the floor below, thereby causing damage to the plaintiff's property.

The defendants were liable under the rule, and it was held that negligence need not be proved.

Exclusion of the Rule.—The rule does not apply to damage done by act of God or "natural user." An "**Act of God**" is:—

"An operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it" (370b).

An unprecedented fall of rain, an exceptionally severe gale, or "the heaviest snowfall within living memory," would each be an act of God. "**Natural user**" applies to things which are naturally on the land, in contradistinction to things which are put there artificially. The first may be converted by some positive act into the second. For example, floodwater may collect on land because of the existence of an embankment, and it may, on occasion, overflow that embankment on to the land of the adjoining occupier. The overflow will be due to natural user and the adjoining occupier will have no remedy. But if the embankment is deliberately breached to let water through, or water is pumped into that area from elsewhere, such a positive act will allow the rule to apply.

If the escape is caused by the act of a third party, over whom the occupier has no control, the rule is excluded. Thus, if White's reservoir is caused to overflow on to Brown's land because Green has sent an excessive amount of water down a drain which supplies it, White will not be liable. But if Green's act could have been foreseen, and it was reasonably practicable to take steps to guard against it, White would be liable, not under the rule, but in negligence.

Where the danger is known, and the adjacent occupier has expressly or impliedly accepted the risk, or the escape is due to something which he himself has done, there will be no liability under the rule. In *Peters v. Prince of Wales Theatre* (1943) (380):—

The plaintiff was the occupant of a shop which formed part of the defendant's building. It was known to the plaintiff, when he went into occupation, that the room above his shop was fitted with an anti-fire sprinkler system, because that system extended into the shop. Owing to a severe frost, the system in the upper room burst, flooding the shop.

It was held that the rule did not apply, for the plaintiff had impliedly assented to any risk attendant upon the presence of the sprinkler system.

The Escape of Fire

At common law it is possible to sue for the escape of fire from another's premises, for it has long been the rule that a man must "keep in his fire at his peril." If damage is caused by an unintentional escape of fire, the injured person has a choice of the action he will take to obtain a remedy. Firstly, he may resort to an old form of action known as "negligent keeping," which alleges a trespass. Secondly, he may sue under the rule in *Rylands v. Fletcher*, into which, it is considered by many lawyers, the action of "negligent keeping" has now been merged. Thirdly, he may bring an action in either negligence or nuisance.

However, it is provided by s. 86 of the FIRES PREVENTION (METROPOLIS) ACT, 1774, that no action may be brought against anyone upon whose land a fire shall accidentally begin. Despite its title, the ACT is not confined to London but is universally applicable. "Accidentally" means that the fire must have been caused "by mere chance," or that it was "incapable of being traced to any cause" (381). It must, therefore, have started

without negligence, which includes the taking of reasonable steps to prevent the fire spreading.

In addition to affording no protection where there has been negligence, the ACT does not apply where a fire is caused by nuisance. In *Spicer v. Smeë* (1946) (382):—

The plaintiff's bungalow was completely destroyed by a fire which originated in the adjacent bungalow belonging to the defendant. The fire was caused by a defect in the electrical installation, due to the negligence of the contractor who had done the work.

It was held that the defective installation constituted a nuisance for which the defendant was liable, because the principle that an occupier is not liable for the default of his independent contractor does not apply to nuisance. The difference between this decision and that in *Collingwood v. Home and Colonial* (see above) is that, in the latter case, the question of nuisance did not arise.

Public Nuisance

Any obstruction to the highway is likely to constitute a public nuisance, which is primarily a crime. A private person who, not being negligent, sustains injuries as the result of a public nuisance cannot sue unless he is able to prove special damage over and above that suffered by the public generally (383). It has been seen already that negligence is not necessarily an element in private nuisance, and this is equally so in public nuisance. The negligence referred to is, of course, the negligence of the person responsible for the nuisance, for negligence on the part of the injured person will always tend to reduce the liability (see p. 288).

A public nuisance may be caused by something on the highway, something adjacent to the highway, or something which has got on to the highway from adjacent premises. For example, a heap of stones, a "hole in the road," imperfect paving and poor re-instatement, are all dangers on the highway, whilst a dangerous wall or an excavation may adjoin the highway. A cloud of smoke or a loose tile will be a danger on the highway which has emanated from premises adjoining the highway. As it is the occupier of premises with whom we are concerned, the liability of local authorities, public utility undertakings and others who create nuisances on the highway is not considered.

Dangers Adjoining the Highway.—Danger may be due either to the construction, or to the state of repair, of the premises. In the first case, a row of spikes on the top of a low wall would probably be

held to be a nuisance because of the likelihood of passers-by being injured. But a wall is not dangerous merely because it is easily climbable and there might be a risk of someone falling from the top. Most of these cases are covered by local bye-laws or some statutory provision, such as the BARBED WIRE ACT, 1893; but, because they deal with powers to compel abatement of the nuisance, they are of no direct assistance to an injured person.

Where the danger is due to bad state of repair, the position is not quite so simple. When premises become dangerous for want of repair and are, therefore, a nuisance, and a member of the public suffers injury due, say, to their collapse, the responsibility will lie either with the landlord or with the occupier (384). The landlord will be liable if he has covenanted by the lease, or otherwise contracted, to do repairs. But it will be sufficient if he has reserved the right, in the lease, to enter and inspect the premises and do all necessary repairs (385). Otherwise it is the occupier who will be responsible. Liability will be there, whether or not the responsible party knew, or ought to have known, of the danger. If the nuisance has been created, not by lack of repair, but by the act of a trespasser, or by "a secret and unobservable process of nature," there will be no liability, unless, with knowledge or means of knowledge, the nuisance is allowed to continue (384). It may be noted that this liability is not confined to public nuisance, for if the danger abuts on to adjoining premises, it will be equally a private nuisance.

Dangers Over and Under the Highway.—Things suspended over the highway may also amount to a public nuisance. The liability is similar to that discussed above. The principle applies also to things in the pavement, such as coal holes, cellar flaps, pavement lights, and the defective pavement of a private forecourt (see p. 310).

Dangerous Things in the Highway.—A person who puts something dangerous on to the highway may be liable in public nuisance. In *Dollman v. Hillman* (1941) (386):—

The plaintiff slipped on a piece of fat outside a butchers' shop. It was found as a fact that the fat came from the shop, having either flown out of the shop when meat was being cut up on a stand near the door, or been carried out on a customer's shoe.

The Court of Appeal held that the presence of the fat on the pavement constituted a nuisance, for which the defendants, who had also been negligent, were responsible. If a carboy of acid falls

in the roadway and breaks whilst being unloaded, the person responsible for the breakage will be liable in negligence if he does not take immediate steps to warn others on the highway of the danger (387). The occupier of a works who allows steam to be emitted in such density that vision on the highway is obscured, will be guilty of perpetrating a public nuisance if he takes no steps to mitigate it, or to warn traffic of the danger (388).

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CHAPTER 20

Dangerous Things

ARTICLES may be dangerous in themselves, as is the case with explosives. Alternatively, they may be inherently safe, but made potentially dangerous by some defect which is not apparent; for example, a steel bolt of declared tensile strength will be potentially dangerous if, in fact, there is a hidden flaw in the metal. The duty of care imposed on those who have control of the first is higher than that required of the possessor or transferor of the second.

Things Inherently Dangerous

The possessor of something inherently dangerous is under a duty to those who use it, or are likely to come into contact with it, to ensure that it is reasonably safe. Lord Justice Atkin (later Lord Atkin) defined that duty in *Hodge v. Anglo-American* (1922) (389):—

“If a person for his own purposes manufactures a dangerous article, or puts any chattel into a dangerous condition such that it is likely to cause injury to third persons who in the ordinary course of affairs come into its vicinity, it is his duty to such third persons before so disposing of it as that they may be affected by it, to take reasonable precautions to make it as little dangerous as possible.”

The duty is to take reasonable care to see that the thing is safe; it is not enough to leave it unsafe and to give warning of its condition. A man who sells things of a class dangerous in themselves “cannot be heard to say he did not know of or appreciate the danger” (390).

Conversion into a Dangerous Thing.—Something not inherently dangerous may, by some act, be converted into a thing dangerous in itself. In *Howard v. Furness Houlder* (1936) (391):—

A welder was working in the boiler of a steamship when an explosion occurred and steam came in through the furnace door, scalding him badly. It appeared that the escape of steam was due to the fact that a bridge in a valve chest had been negligently fitted upside down by an independent firm of contractors.

It was held that, by a negligent repair, the contractors had converted something which was not dangerous in itself into a dangerous article, and that this imposed upon them a liability to the welder for his injuries.

Exceptional Cases.—A domestic hot-water boiler has been held not to be a “noxious and dangerous thing,” even though fitted into a hot-water system without a safety valve. In *Ball v. L.C.C.* (1949) (392):—

The landlord of a private house installed a new domestic hot-water boiler for his tenant. No safety valve was fitted. In February 1947, six or seven years after installation, the whole water system became frozen up. The tenant's daughter lit the boiler, which, shortly afterwards, exploded and wrecked the kitchen, seriously injuring the daughter.

The Court of Appeal decided that the landlord owed no duty of care to the daughter of their tenant.

With respect, it is submitted that this decision was wrong, for the landlord not only supplied the boiler, but installed it. He was therefore under a duty to see that it was properly installed, having regard to the system as a whole. The report of the case does not record whether there was an expansion pipe, but, if there was, it was doubtless frozen up with the rest of the piping. Even admitting that the winter of 1946–7 was exceptionally cold, it would appear that the expansion pipe (if there was one) must have been fairly exposed, and the inclusion of a safety valve would have been an obvious precaution.

An inflammable gas is rightly considered as being a thing which is dangerous in itself. But, in *Beckett v. Newalls Insulation* (1953) (393), the Court of Appeal held that, where such a gas is in a proper container which is fitted with an efficient valve and regulator, the law applicable when damage is caused by an escape of gas is that of negligence, which is “a failure to take that care which a reasonable man would take in the circumstances” (393a).

Liability to Children.—The standard of care owed to children in respect of dangerous things is similar to that due to them as invitees (see p. 303). The liability of a person who puts something inherently dangerous into the hands of a child is in negligence. Unless it can be shown as a fact that the child had a greater knowledge of its dangerous properties than would normally be attributable to one of his age, he cannot be held to have contributed to his injuries if, by meddling with it, an accident happens (see p. 304).

Danger Arising from Defects

In the case of goods which are dangerous due to some defect, the possessor of them who does not know, and is not negligent in not knowing, their true condition, will be under no liability, provided they appear to be safe upon reasonable examination. "It would seem hard to impute negligence to a seller of goods apparently safe, but dangerous only because of some defect of which he could not reasonably be aware" (390).

The Transfer of Dangerous Things

The liability of the possessor of goods who keeps them in his possession, but allows others to use them, is assimilated to that of the occupier of premises (*see* Chapter 19). This is, of course, apart from the liability for things dangerous in themselves. But where he allows the goods to go out of his possession, the liability will vary as to whether the duty of care is owed to an immediate transferee or to a third party.

(A) THE DUTY OWED TO AN IMMEDIATE TRANSFeree

Under Contract.—Liability under contract will depend upon the express or implied terms of the contract. If it falls within the SALE OF GOODS ACT, 1893, there will be an implied condition that the goods will be reasonably fit for the purpose for which they are required (s. 14 (1); *see* p. 109) and of merchantable quality (s. 14 (2); *see* p. 110). In the case of contracts for hire, there is an implied warranty of fitness for purpose (*see* p. 224). In other cases, and in the absence of express terms, the duty is to take reasonable care.

If the goods are dangerous in themselves, then, irrespective of contract, a transferor who has knowledge of the danger will be liable in negligence should he fail to give warning. This requirement will, in the case of a manufacturer, be satisfied if, firstly, he labels the goods sufficiently for them to be properly identified and their potentially dangerous character made known. Secondly, he must provide adequate instructions for use, at any rate in those cases where it is necessary or advisable to do so in the interests of safety. Thirdly, the goods must be properly packed, and his duty as regards the container is the same as for the goods themselves, except that, if it was made by someone else, he must be reasonably

careful to see that it is fit for use and suitable for the purpose. This last requirement has been held to apply to railway waggons used for the delivery of coal (394).

Otherwise than under Contract.—There is no liability in the case of a GRATUITOUS BAILMENT or a GIFT, except that warning must be given where the transferor knows of defects or dangers. If he is aware that the goods are dangerous in themselves, he must take steps to ensure that the recipient knows of their potentially dangerous character.

When goods are delivered to a CARRIER under contract, there is an implied warranty that they are fit to be carried and are not dangerous. The transferor will be liable whether or not he knows of any potential danger. But, apart from contract, the person who delivers goods to a carrier must take reasonable care to see that they will not cause damage during transit. If they are potentially dangerous, then he must give the carrier warning to that effect. The carrier will himself be liable if he delivers some highly inflammable goods to the wrong address and without giving warning of the danger (*see Philco Radio v. Spurling*, p. 290).

(B) THE DUTY OWED TO A THIRD PARTY

Manufacturers rarely sell to the ultimate purchaser, who usually buys from a retailer; and the retailer may himself buy from a wholesaler, who in turn will obtain the goods from the manufacturer. It is probable, therefore, that between the manufacturer and the user there will be a chain of contracts, and, if there is cause for complaint, the retailer will be liable to the final buyer. But the retailer will have a claim against the wholesaler, who in turn will be able to claim against the manufacturer, for any damages he may have had to pay. In other words, the manufacturer is ultimately liable through the chain of contracts.

It may be, however, that the user or consumer of the goods is someone other than the ultimate purchaser. In that event, there can be no claim in contract, for the user is a third party with whom there is no privity (*see* p. 74). Of course, if the goods are dangerous in themselves, the user will be able to claim apart from contract, for he will be one of those whom the manufacturer or deliveror should have had in mind as likely, in the ordinary course of things, to be affected by it.

Where the goods are not potentially dangerous, but are defective

in some way, so that the ultimate user or consumer suffers damage, it is probable that the manufacturer can be held liable, even though there is no contractual relationship between him and the consumer. Liability in such a case is covered by the rule in *Donoghue v. Stevenson* (1932) (395), as explained in *Grant v. Australian Knitting Mills* (1936) (396).

The Rule in Donoghue v. Stevenson.—In *Donoghue v. Stevenson*, Lord Atkin stated the rule as follows (395a).

“A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.”

The facts of that case were:—

A young woman, accompanied by a friend, went into a café at Paisley, where the friend bought her a bottle of ginger beer. The friend poured the contents into a glass from which she drank, and then discovered that there was a decomposed snail in the bottle. She alleged that, as a result, she had severe gastro-enteritis, and sued the maker of the ginger beer in damages. The bottle was an opaque one, properly stoppered, sealed and labelled.

History does not record whether the young woman succeeded in her action (it has been rumoured that the snail was but a figment of her imagination). But the case decided the principle, which has since been applied to many other cases where the facts were widely different. The principle was slightly modified, and at the same time explained, by Lord Wright in two passages in *Grant v. Australian Knitting Mills*. The learned Law Lord indicated, firstly, that it was not essential that there should be “no reasonable possibility of intermediate examination.”

“The decision in *Donoghue's* case did not depend on the bottle being stoppered and sealed; the essential point in this regard was that the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer” (396a).

Secondly, he pointed out that the defect must not be apparent to the user.

“The principle of *Donoghue's* case can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent; the man who consumes or uses a thing which he knows to be noxious cannot complain in respect

DANGEROUS THINGS

of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or uncertainty of mischance" (396b).

It may thus be said that, apart from contract, the duty of a manufacturer to the consumer or user of his products is to take reasonable care to avoid defects in their manufacture. Should he fail so to do, he will be liable, provided:—

- (1) He contemplates that, because of their nature, his products will be used by the ultimate consumer or user in the condition in which they left him.
- (2) Defects are not apparent to the ultimate consumer or user upon reasonable examination.
- (3) Injury has been caused to the person or property of the ultimate consumer or user as a result of a defect which existed in the product when it went out of his possession or control.

Application of the Rule.—The wide application of the principle in *Donoghue v. Stevenson* will now be illustrated. In *Malfrout v. Noxall* (1935) (397):—

The defendants had fitted a sidecar to the plaintiff's motor cycle. A few days later, when driving along a public road with a passenger, the sidecar parted from the cycle and the passenger was injured.

It was held that the defendants had been negligent in fitting the sidecar, so that the plaintiff was entitled to damages in contract, and the passenger could recover within *Donoghue v. Stevenson*. But in a case of this kind, the liability is not necessarily confined to that owed by a manufacturer to a user, for, in *Stennett v. Hancock* (1939) (398) a repairer was held liable to a quite independent third party.

A firm of repairers refitted a wheel flange to the road-wheel of a lorry. Shortly afterwards, when the lorry was being driven along a road, the flange came off, mounted the pavement and hit a pedestrian, who was injured. No-one had examined the flange after the lorry left the repairers' premises, and nothing had happened which could have caused the flange to become dislodged.

It was held that the lorry-owner was not liable, as he had entrusted the repair to a competent firm. But the repairers were liable to the pedestrian, because their relationship was that of manufacturer and user.

In *Herschthal v. Stewart and Ardern* (1940) (399):—

The plaintiff's employers purchased a reconditioned motor-car for his use from the defendants, who delivered it to him for his

immediate use. Early the next day the plaintiff drove the car out on business and, in turning a corner, the near-side rear wheel came off, causing an accident and injury to the plaintiff.

It was held that, as the car was known to the defendants to be required for immediate use, no intermediate examination of it by the purchaser could be contemplated. The plaintiff would, therefore, be ignorant of the defect, and the defendants were liable. But where there is opportunity for inspection, the principle in *Donoghue v. Stevenson* will not apply. Thus, in *Farr v. Butters* (1932) (400):—

The defendants supplied a crane to a firm of building contractors. They delivered it in parts, and a skilled crane erector, employed by the builders, assembled it. In the course of erection he discovered that certain parts were defective, but, nevertheless, he completed the erection and thought fit to use the crane. By reason of the defects it collapsed, and he was killed.

The plaintiff, the erector's widow, was unable to recover, because her late husband knew of the defects before the accident. But in *Denny v. Supplies and Transport* (1950) (401), it was pointed out that knowledge and opportunity for inspection may lack the essential significance they had in *Farr v. Butters*.

The plaintiff was a dock labourer who suffered injuries when unloading timber from a barge. The timber had been so badly stowed that, during the unloading, it collapsed on to the plaintiff. The work was being done by a firm of stevedores, who were not in any contractual relationship with those who loaded the barge.

As it was obvious from the facts that, despite opportunity for inspection, it was intended by the plaintiff's employers to carry on with the unloading in any event, for there was no practical alternative. The plaintiff was therefore entitled to succeed in his claim against the loaders.

Negating Liability.—Apart from opportunity for inspection, liability may be negated by considerable lapse of time between the acquisition of the goods and the occurrence of damage due to a latent defect. This was brought out in *Evans v. Triplex* (1936) (402), where a toughened glass windscreen fitted to a motor-car, which had been purchased about a year before, shattered without apparent cause and injured the car's occupants. It was held that there was no liability, because of lapse of time, opportunity for inspection, and the possibility that either the glass was strained when first fitted by the makers of the car, or that it had been shattered due to some cause other than a manufacturing defect.

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CHAPTER 21

Responsibilities of Employers

AN employer is under a duty at common law to take care for the safety of his employees, and breach of that duty will found a claim in negligence. As likely as not he is also under a statutory duty to observe certain codes of safety, such as are provided by the FACTORIES ACTS and similar enactments, breach of which may lead, not only to a prosecution brought by or on behalf of the appropriate Government Department, but also to a claim in damages by an employee who has suffered injury as a result of such breach.

A claim made on the grounds of breach of statutory duty is analogous to one founded on common law negligence. As will appear later, claims on both grounds are frequently made in the alternative in the one action. But it must be appreciated that the two duties are essentially different, for that at common law is to exercise care, whilst that laid down by statute is, as likely as not, virtually absolute, breach bringing penalties in its train.

I. EMPLOYERS' DUTIES AT COMMON LAW

Every employer is bound to provide his employees with safe and suitable plant and equipment and a safe place in which to work. He must also institute a proper system for, and exercise proper control of, the carrying out of the work, and he must select fit and competent workpeople. These duties are not absolute, but are discharged by the exercise of due skill and care.

Selection of Workpeople

It has already been mentioned that an employer is vicariously liable for the negligent acts of his employees done in the course of their employment (*see* p. 264). Prior to 1948 he could, where one employee was injured as a result of the negligence of a fellow employee, plead the doctrine of common employment in his

defence and escape liability for, under that doctrine, the negligent employee was himself responsible to the injured one. But the employer could not hide behind common employment unless he had exercised due care and skill in the selection of the offending employee and in seeing that that employee was competent to do the work with which he was entrusted. The doctrine was, rather naturally, unpopular, despite its partial modification by the EMPLOYERS' LIABILITY ACT, 1880. It was finally abolished, and the ACT repealed, by the LAW REFORM (PERSONAL INJURIES) ACT, 1948.

The present position is that, if one employee is injured by the negligent act of another, the employer is vicariously liable. The selection of fit and competent employees has, therefore, lost some of its importance since common employment was done away with, but, because of his vicarious liability, an employer is still well advised to take due care in their selection.

Provision of Suitable Equipment

It is well established that an employer who knows or ought to know that a machine is in a dangerous condition and unsafe to use, and with that knowledge sanctions its use, is responsible for any injurious consequences (403). This is not confined to machines as such, for "equipment" includes practically anything which is provided by the employer to enable his employee to carry out his duties. For example, articles of clothing made of material which is likely to catch fire in the conditions under which they are required to be used are included (404). "Duties" is widely interpreted, and the obligation to provide safe appliances extends to everything normally and reasonably incidental to employment. Thus, in *Davidson v. Handley Page* (1945) (405), the employer was held liable for injuries sustained by an employee who slipped on a wet duck-board when going to a water tap to wash a tea-cup, because it should have been realised that, in the wet conditions which existed near the tap, a metal grating would have been more suitable.

Safe Place to Work

An employer must provide his employee with a safe place in which to work, and this includes a safe means of access to that

place. The application of the first part of this duty may be illustrated by *Paine v. Colne Valley Electricity Supply* (1938) (406), which concerned an outdoor transformer kiosk.

The kiosk was arranged in three cubicles, containing respectively a transformer, switches and busbars, and an oil-switch. The cubicles were separated by insulated partitions, but these did not extend for the whole depth and there were gaps of about six inches at the back. An employee of the undertaking, working in one cubicle, accidentally came into contact with a live busbar in the adjacent cubicle, it being within two inches of the six-inch gap.

It was held that the undertaking had not fulfilled its duty of providing the employee with a safe place in which to work. Although the fault was originally that of the manufacturer, the undertaking had had ample opportunity to examine the kiosk, and therefore the manufacturer could not be held liable under the rule in *Donoghue v. Stevenson* (see p. 322).

Means of Access.—"Means of access" includes not only the permanent parts of a building, but also ladders, scaffolding, temporary gangways and the like. The obligation is to provide a safe means of access and to maintain it. This is particularly important in the case of ladders and scaffolding, which must be properly constructed and suitable for the purposes intended.

Temporary Access.—The provision of a temporary means of access was considered, in regard to ladders, in *Farquhar v. Chance* (1951) (407).

An employee was required to work on a platform, sixteen feet from the ground. Ladders were available in a store some short distance away, but he chose to gain access to the platform by climbing from a girder; he slipped, fell and was killed.

It was held that the employers were not at fault, for they had provided an adequate supply of suitable ladders. Mr. Justice Hilbery said (407a):—

"An article which can be made into a safe means of access is not the same thing as a safe means of access. . . . In my view, it does not become a means of access to a particular place of work until it is placed in such a position as is appropriate for its use as a way of getting to that place of work; and that is a question of degree."

Whether a ladder is a safe means of access when it has already been placed in position depends upon a number of factors. It may, for example, be placed at an unsafe angle, or the floor may be of such a kind that precautions should be taken, such as by wedging or

tying, to prevent slipping. Again, it is a question of degree, for, as Lord Justice Denning said in *McCarthy v. Coldair* (1951) (408):—

“I certainly would not wish it to be thought that the common law puts on every employer a duty to post a man at the foot of a ten-foot ladder on an ordinary wooden floor.”

Maintenance.—The question of the maintenance of floors, gangways and similar places has been dealt with quite recently by both the House of Lords and the Court of Appeal. As to whether means of access have been maintained in a reasonably efficient manner is really a matter of deciding what a reasonably prudent employer would have done in the circumstances of a particular case. In *Latimer v. A. E. C.* (1953) (409), it was contended that, for a floor to be “efficient,” it must be fit for any of the purposes for which it is intended to be used. Lord Porter said (409a):—

“The difficulty of such a view is that it puts an excessive obligation upon the employer. Indeed, it was conceded that it could not be carried to the length of saying that a temporary obstruction, such as a piece of orange peel or the like, would make it inefficient. Once this concession is made it becomes a question of the degree of temporary inefficiency which constitutes a breach of the employer’s obligation.”

In *Levesley v. Thomas Firth* (1953) (410), the Court of Appeal, following *Latimer v. A. E. C.*, held that, in the absence of actual negligence on the part of the employer, a means of access is not necessarily rendered unsafe by the presence of a transient and exceptional obstruction, such as a patch of oil or a piece of wood or iron, provided the employer has some efficient system whereby the access is normally kept clean and free from obstruction.

Safe System of Work

The obligation to provide and maintain a safe system of working is the most important of the four requirements. In some cases, it may even appear to embrace the others, for, in its most comprehensive, though not usual, meaning, a “safe system” does very nearly cover the whole common law duty.

Definition.—The exact meaning of “safe system of work” has never been precisely defined. It consists of a number of elements, which may include the layout of the job, the sequence of operations, the display of warning notices and the issue of special instructions. On an electrical job, for example, it might consist

of the issue of permit-to-work cards, the employment of a keyed interlock system, the provision of rubber gloves and earthing bars, or a set sequence of switching. The test is whether the system renders an operation reasonably safe, and whether the exercise of due skill and care eliminates possible or probable dangers. The obligation is not absolute, though the standard demanded is high. As to what that standard is can, perhaps, be ascertained from *dicta* contained in the judgement of Lord Greene in the case of *Proctor v. Johnson and Phillips* (1943) (411). That case concerned an accident to some high voltage testing equipment, which came within the scope of Exemption 4 of the ELECTRICITY (FACTORIES ACT) SPECIAL REGULATIONS, 1908 and 1944 (see p. 367). The exemption covers apparatus used, *inter alia*, for testing or research purposes,

“provided such process be so worked and such apparatus so constructed and protected and such special precautions taken as may be necessary to prevent danger.”

That proviso enforces what amounts to a safe system. Lord Greene said (411a):—

“If the proviso is read literally it imposes an obligation to take such precautions as may be necessary to prevent danger. In operations of the kind contemplated, the complete elimination of danger must, on the face of things, be an impossibility. . . . The precautions required to prevent danger can only be those which comply with the highest standard of safety which can reasonably be provided.”

It is submitted that that is a fair statement of the standard of care required of an employer in providing a safe system.

The Employer's Duty.—The employer's duty, which is both personal and positive, is to decide what the system shall embrace, and then to ensure that it is carried out. The obligation is a continuing one; so soon as it becomes apparent that the system is inadequate, it is incumbent upon the employer to take proper steps to revise it (412). But he is not expected to guard against isolated acts of an employee outside the system, those day to day occurrences, inadvertencies and omissions which happen in the course of a familiar routine, and of which he cannot be expected to know (413). If, however, he does in fact know of such departures from the system, he is bound to take notice and correct them.

The system must be designed to protect both those persons actually engaged in the operation in question and others in the vicinity. Protection of those others may consist of no more,

perhaps, than putting up warning notices. But the fact that such persons, themselves engaged in a safe operation, have full knowledge and understanding of their exposure to danger, does not permit the employer to dispense with the notices on the ground that the situation has been accepted by them (414). In other words, *sciens* does not imply *volens*, particularly in cases where the employer-employee relationship exists (see p. 292).

Delegation of Duty.—Although an employer may be a company and not an individual, the personal responsibility remains, despite the fact that a company must, by its very nature, appoint an individual as its officer to perform the duty. But if an employer chooses to delegate his duty, he remains responsible for any inadequacy in the system, and cannot excuse himself by showing that he had good grounds for relying on the competence of the person to whom he delegated it (415). Nevertheless, an employer may perform his duty of maintaining a safe system by pointing out to competent and experienced employees that the means of safety rests largely in their own hands; if he does so delegate his duty, he must do so in express terms and must lay down a proper system to start with. But he may not rely on the fact that a particular category of workmen usually take certain precautions; it is his duty to make certain that adequate precautions are actually taken (416). This may be illustrated by *Barcock v. Brighton Corporation* (1949) (417):—

The defendants, in their capacity of electricity undertakers, appointed an unskilled fitter as an "authorised person" for the purpose of testing and operating e.h.v. switchgear. For some years previously this fitter had assisted skilled persons in the work, and had observed that, before testing, certain protective panels were removed, thus exposing live metal. To his query as to possible danger he received the reply, "If you did not take the risks, you would never get anything done."

The only instruction the fitter was given, upon his appointment as an "authorised person," was that he must make himself conversant with the *Memorandum* by the Senior Electrical Inspector of Factories on the ELECTRICITY (FACTORIES ACT) SPECIAL REGULATIONS, 1908 to 1944 (see p. 443). In carrying out a test in the manner with which he had become familiar through observation of skilled men, he was seriously injured.

It was held that the defendants had not discharged their duty of providing a safe system merely by instructing the fitter to read and comply with certain regulations as explained in a memorandum. Further, if they had at one time provided a safe system, it had been disregarded by long usage.

When Failure to Provide a System is Alleged.—Whenever it is alleged that a proper system of work was not provided or maintained, it is essential to state precisely what system would have been proper in the particular circumstances, and in what respects that system was not observed or fell short of requirements (413). The onus of establishing what is the proper system is upon him who alleges the breach of duty, and the employer has a good defence if he can show that the system suggested is unreasonably onerous in the prevailing conditions, and that the existing one is adequate. Failure to adopt a particular type of protection, however well tried it may be, does not in itself constitute failure to provide a safe system, so long as the type of protection in use is sound and no defect has so far become apparent (411). But to say that a system is safe merely because it has existed for a long time and has produced no accidents, is not sufficient. If a system is defective from the beginning and, as a consequence of that defect, an employee is injured, the employer will be liable, even though the system, as it stood, was worked without negligence (418).

The Duty Owed to Individuals.—The employer's duty of care arises from the contract of service, and is owed, not only to his employees in general, but to each individual. He must, therefore, make provision for the shortcomings and disabilities of individual employees. This was the effect of the decision in *Paris v. Stepney B. C.* (1951) (419):—

The plaintiff, employed by the defendants as a garage hand, and known by them to be blind in one eye, was engaged in dismantling the chassis of a vehicle. To release a rusted bolt he hit it with a hammer, with the result that a chip of metal flew off and entered his good eye, and in consequence he lost the sight of it and became totally blind. He claimed that the system of work should have included the provision and use of goggles, despite the fact that the work was not of itself dangerous and did not call for special protection.

Lord MacDermott said (419a):—

"The employer's duty to take reasonable care for the safety of his workmen is directed . . . to their welfare and for that reason, if for no other, must be related to both the risk and the degree of the injury. If that is so and if . . . the duty is that owed to the individual and not to a class, it seems to me to follow that the known circumstance that a particular workman is likely to suffer graver injury than his fellows from the happening of a given event is one which must be taken into consideration in assessing the nature of the employer's obligation to that workman."

As Lord Morton of Henryton put it (419b), "the more serious the damage which will happen if an accident occurs, the more thorough are the precautions which an employer must take."

It follows, therefore, that what is safe for one employee may not be safe for another, and the measures taken to ensure safety must be devised with a view to all the circumstances, including the experience and habits of the individual. But the duty is to take reasonable care, and it would be unduly hard on employers to expect them to provide for every contingency. Thus, in *Bristol Aeroplane v. Franklin* (1948) (420):—

An aero-engine fitter was engaged in dismantling a propeller fitted to a "Centaur" engine, and for that purpose he was provided with a special tool. The tool had been damaged and the fitter, without reference to his superiors, repaired it himself, although there was a section of the factory specially charged with doing such repairs. He had carried out the repair with silver steel, which was unsuitable for the purpose, and when he attempted to use the tool, the silver steel snapped and he was flung to the ground from the ramp on which he was standing, receiving fatal injuries.

The House of Lords held that there was no unsafe system of working.

The Extent of the Duty.—Responsibility for evolving a safe system is not confined to cases where employees are working in the employer's own premises. Where work is done on the premises of another in circumstances which are accompanied by an element of danger, it is not enough for the employer to leave the taking of precautions to the initiative of individual workmen. He must himself evolve a system, making it as safe as it can be in the prevailing conditions (421). In initiating such a system he is expected to have regard for the kind of dangers normally to be found on particular premises. Although there are certain recognised risks in every trade, if, in any case, the risks appear too great, it is for him, in consultation with the occupier, to find a way of surmounting them. To expect an employee to take a greater risk than he would normally be prepared to take is not justified, even where the employee apparently accepts it, for the presumption is that no employee is capable of giving a true assent to a risk which might result in injury to himself (*see* p. 292). If the premises are unoccupied, the employer will not be held responsible for dangers which, from the point of view of an occupier, would be "unusual" to an invitee (*see* p. 300).

It is not only a man's general or permanent employer who must

provide a safe system, for where vicarious liability has shifted to a particular or temporary one, it is he who is responsible (*see* p. 265). But even where it is established that the liability has not shifted, it is possible for the relationship of employer and employee to arise as the result of a dangerous situation being created by the temporary employer. *Holt v. Rhodes* (1949) (422) provides a good example.

The plaintiff was in the general employment of the owners of an electrically-driven mobile crane, which was on hire to a firm of stevedores. The crane driver, who was the plaintiff, was loaned with the crane, and took orders from the stevedores merely as to the work he had to perform. On the occasion in question the electrical lead from the crane was plugged into a socket fixed on a pillar at about twelve feet from the ground. The driver was asked to move the crane, which he could not do until he had disconnected the lead. The stevedores had piled cargo around the pillar, and the driver was compelled to climb over the cargo in order to reach the socket. While doing so he fell and was injured.

The Court of Appeal held that the stevedores were liable, for, although the driver was, in general, their invitee, they were under a duty to provide a safe system for any particular operation of which the control had passed temporarily to them.

Enforcement of a Safe System.—Where the system in use involves the provision of special equipment, such as goggles or barrier cream, that equipment must be made available at the place where it is needed; it is not sufficient that it is somewhere on the premises. In *Finch v. Telegraph Construction* (1949) (423), goggles for use with grinding machines were hung on a nail some thirty feet away, but the operatives were not informed that they were there. It was held that drawing the attention of the operatives to the need to use goggles, but leaving them to ask for them and not telling them where they were kept, did not amount to a safe system of work.

The duty of an employer in such a case was considered by Lord Justice Denning in *Clifford v. Challen* (1951) (424):—

“The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must, therefore,

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by his foremen, do his best to keep them up to the mark and not tolerate any slackness."

His Lordship's last sentence was qualified and explained by Lord Justice Singleton in *Woods v. Durable Suites* (1953) (425):—

"I do not believe it to be part of the common law of England that an employer is bound, through his foreman, to stand over workmen of age and experience every moment they are working and every time they cease work, in order to see that they do what they are supposed to do. That is not the measure of duty at common law. The duty is to take reasonable care and so to carry on their operations as not to subject those employed by them to unnecessary risk."

Both the *Clifford* and *Woods* cases concerned the use of barrier cream as a preventive against the contraction of dermatitis from synthetic glue. In the *Woods* case the cream was provided and the employees received specific instructions as to its use; but the plaintiff did not avail himself of this protection.

II. EMPLOYERS' DUTIES UNDER STATUTE

Breach of Statutory Duty

An employer who is in breach of a duty imposed by Act of Parliament or by regulation made thereunder, will certainly be liable to whatever penalty may have been provided for that breach. But he may, additionally, be liable in damages to any person who has suffered injury in consequence. There are two principal considerations affecting this additional liability. Firstly, do the enacted provisions permit a civil action to be brought for the recovery of damages, or is the injured person's only compensation the satisfaction of knowing that the person responsible has had to pay a fine? Secondly, if civil action is permissible, upon whom is the burden of proving that the injury is attributable to the breach?

Exclusion of the Right to Bring an Action.—As regards the right to bring a civil action in damages, it can be said that, in general, a statute which has been passed in the public interest, and which imposes duties upon public authorities with penalties for breach, excludes that right.

Thus, a statutory water company failing to maintain pressure in its mains cannot be held liable in damages because premises are burned down owing to there being no water to fight the fire, for the duty is imposed for the benefit of the public in general, and the penalty is considered to give sufficient redress.

The right may be specifically excluded, or it may be barred because a particular remedy has been prescribed by way of compensation. But some statutes give a right to claim general damages by implication. A good example is s. 35 of the ROAD TRAFFIC ACT, 1930, which imposes heavy penalties on those who use motor vehicles on the public road whilst uninsured against third party risks. The implication is that, as this section was enacted for the benefit of third parties, such persons should have the right to sue the offender and recover damages. Some statutes and regulations specifically allow for civil action in respect of breach (*e.g.* the ELECTRICITY SUPPLY REGULATIONS, 1937, by Reg. 39—*see* p. 365).

When Action may be Brought.—Damages are usually recoverable when the statute has been enacted for the benefit of a particular class or category of persons; a familiar example is the FACTORIES ACT, 1937, which provides for the safety, health and welfare of persons employed on factory premises. Provided that the person seeking to recover is within the contemplated category, and provided that the injury sustained is of the kind envisaged by the statute, there will be a right of action. For example, in *Kininmonth v. William France* (1949) (426) a claim for personal injury, alleged to have been due to a breach of the DOCKS REGULATIONS, 1934, was defeated because the claimant did not come within the class of persons employed “in respect of the processes of loading, unloading, moving and handling goods in, on or at any dock, wharf or quay.” On the other hand, Reg. 11 (b) of the SHIP-BUILDING REGULATIONS, 1931, provides:—

“All staging shall be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed.”

It was held in *Hodgson v. British Arc Welding* (1946) (427) that “all persons employed” included the employees of sub-contractors of the occupier, who was the main contractor.

As to whether an injury is of the kind envisaged by the statute, *see Nicholls v. Austin* (p. 352).

The Onus of Proof.—For a claim in damages to be successful, there must have been a breach of duty owed to the injured person, and the injury must have been actually due to the breach. The Courts have given a good deal of consideration to the question of proof that an injury is due to a breach of statutory duty; that is, how far the accident may be said to speak for itself, and upon whom

lies the burden of proof. In an action for common law negligence the onus of proof is upon the injured person to show that his injury was caused by the breach of a duty of care owed to him, unless the rule of *res ipsa loquitur* applies, when it will be for the defendant to show no negligence (*see* p. 288). But where there is a breach of a statutory duty under the FACTORIES ACT, 1937, the position as stated by the Court of Appeal in *Watts v. Enfield Rolling Mills* (1952) (428), is as follows.

The injured person must prove at the outset that the injury was caused by the very danger against which Parliament, in framing the ACT, intended to guard him. Provided that is proved (or it may be admitted), then he must show that there was a definite breach of the statutory duty which was imposed to guard against that very danger. So soon as both these conditions are fulfilled, the inference is that the breach of duty was the cause of the injury, and it is then for the employer to show that it was not the cause. One of the defences open to the employer is to show that the injured person was guilty of contributory negligence.

The fact that an employer has been prosecuted and fined for breach of a statutory regulation is not accepted as absolute proof, in a civil action, that there has been a sufficient breach to found a claim in damages. It does, however, go to the weight of evidence by showing that there has been a breach. But if, in a case brought under the FACTORIES ACTS, it is shown, for instance, that the fencing of certain machinery has satisfied the factory inspector, the Courts do not regard that as having any bearing upon the question of whether the fencing really complies with the statutory requirements (429).

Delegation of Statutory Duty

A word must be said about the delegation of a statutory duty. There can, of course, be no delegation unless it is expressly or impliedly allowed by the statute or regulation imposing the duty. For instance, under the ELECTRICITY (FACTORIES ACT) SPECIAL REGULATIONS, 1908 and 1944, power is given to appoint "authorised persons" who, because they, and they alone, may perform certain operations, have the duties of the occupier compulsorily delegated to them (*see* p. 366).

So far as it applies to the FACTORIES ACTS, the doctrine of delegation has been described as imposing a "hard duty" (430), because it transfers to the person intended to be protected by

statute the duty of protection which the statute imposes upon the employer. But an employer will not necessarily escape liability in cases where he is entitled to delegate his duty, for he must prove very clearly that the person to whom he has delegated that duty has been fully instructed as to its nature and extent, and is competent to discharge it (431). If he has appointed as an "authorised person" one who, by definition, must be "competent," but is actually unskilled and incompetent, there will, in fact, have been no delegation.

To plead that a statutory duty has been delegated will be a defence to an employer only where it is the delegate himself who has been injured, for if such a person has been responsible for the breach, he is estopped from averring that because of it he has suffered injury (432). It is not necessary to prove disobedience to orders, or misconduct, on the part of the delegate employee (433). But if anyone else is injured, the employer will be vicariously liable.

Alternative Claims

It is possible that, on the same facts, there may be a right of action both in negligence at common law and for breach of statutory duty. Actions are frequently brought on both grounds, for the common law liability is normally far wider in scope than the statutory duty, which is generally aimed at curing some particular evil. It follows, therefore, that compliance with statutory requirements will not necessarily absolve an employer from liability for negligence (434).

III. THE DUTY OF THE EMPLOYED PERSON TO TAKE CARE

Contributory Negligence

The duty of care is not all upon the shoulders of the employer. The employee is himself under a duty to take reasonable care, and if he does not do so he may be guilty of contributory negligence. An employer who is sued in damages for an injury sustained by his employee may, in his defence, plead that the employee contributed to his own hurt; and he may do so whether the claim is in negligence or for breach of statutory duty (435).

"Fault."—To say that an employee is under a duty to take care of himself is, perhaps, misleading, for contributory negligence does not depend upon any duty owed by the injured party to the party sued (436). It is really a question of "fault" within the LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945 (*see* p. 288). Lord Oaksey described it as "fault in failing to observe the ordinary care which an ordinary prudent person would have taken for his own safety" (437). But "fault" does not mean a mere error of judgement; nor is it that degree of inattention which commonly results from familiarity with a daily routine (438). It is really a question of reasonable care on the part of the injured person, and if he has unreasonably, or even improperly, exposed himself to risk, and the taking of that risk has resulted in an accident, he cannot say that he was not at fault in the matter.

Infirmity of an Employed Person.—The employer's duty of care being what it is (*see*, for example, *Paris v. Stepney Borough Council*, p. 332), it follows that if an employee suffers from some infirmity, about which he knows but his employer does not know, and that infirmity is a contributory cause of an accident, he will be at fault.

Thus, in *Cork v. Kirby MacLean* (1952) (439), a painter, who was subject to epileptic fits, fell from a platform some twenty feet above the ground and was killed. His employers knew nothing of his disability. It was held that the cause of the fall was a fit and, although his employers were in breach of the BUILDING REGULATIONS, 1948, in that they had failed to provide a guard rail and toe boards on the platform (which, had they been provided, might have prevented the fall), the deceased man had contributed to the accident to the extent of one-half.

Employed Persons' Duties under Statute

Where in a statute, such as the FACTORIES ACT, 1937, there is laid down a duty of care owed by an occupier of premises or an employer to his employees or other employed persons, it is usually provided that the employed person has himself a duty of care for his own safety, as well as an obligation to observe any safety code which may be prescribed (*see* p. 359). It may be noted, however, that such provisions do not exclude the possibility of the employer alleging contributory negligence by his employee.

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CHAPTER 22

The Factories Acts and Regulations

Historical

Legislation affecting the safety, health and welfare of factory workers goes back just over one hundred and fifty years. It all started with an Act passed in 1802, directed to the regulation of cleanliness and ventilation in cotton mills. This was followed at intervals by a number of other enactments, passed *ad hoc* as the need arose and totally unrelated to each other. By 1875 the position had become chaotic and a Royal Commission was appointed to investigate. As the result of their deliberations, the FACTORY AND WORKSHOP ACT, 1878, which was principally a consolidating measure, was passed. But within the next twenty years a further five Acts were put on the statute book, and the position once more became acute. A further consolidation then took place with the passing of the FACTORY AND WORKSHOP ACT of 1901.

The 1901 ACT survived for thirty-six years until, in 1937, it was replaced by the present FACTORIES ACT. That ACT did very much more than did its predecessors, for it not only consolidated the law as it stood, but added thirty-eight new provisions and amended a large number of existing ones. The 1937 ACT was itself amended by the 1948 ACT, and the two ACTS are together known as the FACTORIES ACTS, 1937 and 1948 (referred to in this chapter as "the ACT").

The Factories Act, 1937 (as Amended)

The ACT contains one hundred and sixty sections and, in pursuance of powers contained therein, nearly two hundred orders and regulations, concerned with matters of safety, health and welfare in particular trades and industries, have been made. It will be appreciated, therefore, that it is a practical impossibility to deal with the ACT and its Regulations in any real detail.

No attempt is made to cover the whole ACT. Instead, its scope is explained, the duties of occupiers and employees are outlined,

and the "fencing" provisions, probably the most important part, are considered fairly fully. The reason for this particular choice is, firstly, that knowledge of the scope of, and the extent of duties under, the ACT is essential if its purpose and application is to be properly understood; secondly, the fencing and guarding of machinery is of great practical importance to engineers. Other provisions are outlined in Appendix III.

The general provisions as to safety are contained in PART II of the ACT, which consists of twenty-nine sections, numbered 12 to 40. Of these, ss. 12 to 17, which deal with the fencing of machinery, and ss. 25 and 26, concerned with safe place of employment and safe access thereto, are, perhaps, the most important; it can certainly be said without hesitation that no part of the ACT has received so much judicial consideration as have these sections. The "fencing" sections are affected by a number of Regulations, and it is about these that some of the more important judicial decisions have been made.

The Scope of the Act

The ACT applies to all premises which may be regarded as factories, and the person responsible for the observance of its provisions is, generally, the occupier. In order to determine its scope, it is necessary, therefore, that both "factory" and "occupier" should be defined.

"Factory" Defined.—The expression "factory" is interpreted by s. 151, which is long and comprehensive. The basic definition (considerably paraphrased) is:—

Any premises in which, or within the curtilage or precincts of which, persons are employed in manual labour in any process or activity for or incidental to the making, adapting for sale, altering, repairing, ornamenting, finishing, cleaning, washing, breaking up or demolition of any article, or the making of part of any article, by way of trade or gain, and where the employer of persons employed therein has the right of access or control.

It should be noted that "premises" includes open air premises, and that those in the occupation of the Crown or public authorities are not excluded from the ACT merely because the activities are carried on for purposes other than trade or gain.

A technical institute, occupied by a public authority, has been held not to be a factory (440). A retail chemist's shop is not a factory, even though a person on the premises may be employed there in manual labour (441). A kitchen attached to a hospital is not a factory (442), although a works canteen may be part of one (443).

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But a restaurant within the curtilage of a factory, used exclusively by the administrative and executive staff, is not a part of it (444).

Premises Deemed to be "Factories."—S. 151 specifies certain types of premises which are deemed to be "factories" whether or not they fall within the definition. These include:—

- (1) SHIPYARDS and DRY DOCKS, where the construction, repair, refitting, finishing or breaking up of ships is carried on. The SHIPBUILDING REGULATIONS, 1931, deal with the special conditions to be met with in such cases.
- (2) WORKSHOPS incidental to building operations or works of engineering construction.
- (3) FILM STUDIOS (except as regards the performers), and workshops which are attached to, or form part of, theatres and film studios.
- (4) LAUNDRIES which are ancillary to another business, or incidental to a public institution.
- (5) PRIVATE RAILWAY LINES and SIDINGS, used in connection with a factory, are a part of the factory. But if they serve two or more factories having different occupiers, they will constitute a separate "factory."
- (6) Premises where the construction and repair of LOCOMOTIVES and TRANSPORT VEHICLES is carried on. Places where vehicles are merely housed are excluded, even though minor repairs and adjustments are done there.
- (7) Premises used for PRINTING and BOOKBINDING, or for purposes incidental to those trades.
- (8) Any premises where:—
 - (a) Articles are SORTED as a preliminary to work in any factory.
 - (b) Articles are PACKED, or bottles or containers are WASHED or FILLED, incidentally to the purposes of any factory.
 - (c) MECHANICAL POWER is used for the making or repair of metal or wooden articles.
 - (d) GAS is stored in gasholders having a capacity of not less than 5,000 cu. ft.
- (9) Any workplace where two or more persons, with the permission of the occupier, carry on work which would constitute that place a "factory" were they in the employment of the occupier. The occupier in such a case is deemed also to be the occupier of the "factory."
- (10) Premises within the curtilage which are used solely for some other purpose are not a part of the main factory, though they may be a separate factory.

A separate building within the precincts of a factory, which was used for the repair and testing of equipment used in the factory, has been held to be part of the factory (445). Where a generating station was partly in commission, but contractors were still installing plant in another portion of the building, it was held that the place where the contractors were working, being separated by a tarpaulin from the operative part of the station was not a part of that station (446).

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Premises which are ancillary to quarries or mines are not within the ACT (s. 151 (5)); nor are agricultural premises (447).

Special Classification as "Factories."—Certain other premises are brought within the ACT by virtue of sections specially devoted to them. These include:—

(A) *Electrical Stations.* (S. 103.)

Generating, transformer and switching stations and control rooms, where persons are regularly employed. Other places, such as unattended sub-stations, switch and transformer kiosks and the like, are also included, although PART II of the ACT does NOT apply to them.

(B) *Institutions.* (S. 104.)

Premises forming part of an institution carried on for charitable or reformatory purposes, where any manual labour is used in the processes, detailed in the basic definition in s. 151, in connection with articles not intended for the use of the institution.

(C) *Docks.* (S. 105.)

Docks, wharves and quays, including private railway lines and sidings. The processes covered include the loading, unloading and coaling of ships. The DOCKS REGULATIONS, 1934, provide specifically for matters covered by PART II of the ACT, and s. 105 (3) applies PART II itself to any warehouse within the curtilage of docks.

(D) *Ships in Harbour or Wet Dock.* (S. 106.)

The processes covered are construction, reconstruction, repairs, refitting, painting and cleaning of boilers. S. 106 does not cover ships in a shipyard or dry dock, for these are already within s. 151 (*see above*). A ship in wet dock is not itself a "factory" within s. 151 (448), and, therefore, PART II of the ACT does NOT apply.

(E) *Building Operations.* (S. 107.)

By s. 152 (1), "Building Operation" means:—

"The construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure), the demolition of a building, and the preparation for, and laying the foundation of, an intended building, but does not include any operation which is a work of engineering construction within the meaning of this Act."

PART II of the ACT applies ONLY as regards steam boilers and air receivers (ss. 29, 31 and 32). But the BUILDING REGULATIONS, 1948, contain similar provisions to those contained in PART II, and fencing is dealt with by Regs. 85 and 86.

(F) *Works of Engineering Construction.* (S. 108.)

By s. 152 (1), "Work of Engineering Construction" means:—

"The construction of any railway line or siding otherwise than upon an existing railway, and the construction, structural

alteration or repair (including re-pointing and re-painting) or the demolition of any dock, harbour, inland navigation, tunnel, bridge, viaduct, waterworks, reservoir, pipe-line, aqueduct, sewer, sewerage works or gasholder, except where carried on upon a railway or tramway, and shall include such other works as may be specified by regulations of the Secretary of State." (No regulations have so far been made.)

PART II of the ACT applies as for Building Operations, within the orbit of s. 107, but NOT as to the BUILDING REGULATIONS, 1948.

"*Occupier*" Defined.—"Occupier" is defined neither in the ACT nor in any of the Regulations. It is necessary, therefore, to go to the case of *Cox v. Cutler* (1948) (449), where Lord Justice Scott adopted the following definition given by Lord MacLaren in the Scottish case of *Ramsay v. Mackie* (1904) (450):—

"'Occupier' plainly means the person who runs the factory . . . , who regulates and controls the work that is done there, and who is responsible for the fulfilment of the provisions of the Factory Act within it."

Although that definition might be regarded as "circular," its meaning is obvious.

Under normal conditions, contractors who have had a site or building handed over to them are the occupiers; but this will not necessarily apply to a portion of a factory, unless it can be shut off in some way. Thus, in *Turner v. Courtaulds* (1937) (451), a firm of contractors were engaged in erecting a switchboard in a factory, when an accident occurred. It was held that the factory owners, and not the contractors, were the occupiers, although, at the time, the switchboard had not been taken over by them.

"*Occupiers*" in *Special Circumstances*.—The actual occupier may not be the "occupier" within the ACT. In *Meigh v. Wicken-den* (1942) (452):—

A debenture holder of a limited company, acting under the terms of the debenture, appointed a receiver and manager to "carry on the business of the company." The company was the occupier of factory premises, and after the appointment of the receiver, continued in fact, by its works manager, to deal with the day to day affairs of the factory. An accident happened, and a prosecution was brought against the receiver.

The Divisional Court held that the prosecution was properly brought, for the receiver had, in that capacity, complete control over the affairs of the company.

By s. 139 the owner or hirer of a machine "moved by mechanical power" may be deemed to be the "occupier" in regard to that machine, even though he is not the occupier of the factory in which

the machine is used. This provision would seem to cover machinery introduced by a contractor in connection with repairs or other work to be done on the premises.

Extent of the Occupier's Duty.—The ACT is a penal one; that is, non-compliance can be dealt with by prosecution in a Court of Summary Jurisdiction (*i.e.* before magistrates), and a fine can be imposed. The Court's powers are wide enough to allow the person or persons actually committing an offence to be dealt with in addition to the occupier or owner (who is in all cases primarily responsible). The Court also has power to cause a contravention to be remedied (s. 132). Proceedings are usually initiated by a factory inspector, who can act whether or not an accident has occurred. Civil proceedings can be brought in the County Court or the High Court, by, or on behalf of, the injured person. In that event the claim is for damages for breach of statutory duty, and it can be made whether or not there has been a prosecution.

The provisions are, for the most part, absolute. This is exemplified by the constant use of the phrase "shall be;" for instance, machinery within ss. 12, 13 and 14, "shall be securely fenced." Because the ACT is penal, its provisions are construed strictly by the Courts, and the construction does not (or, at least, should not) differ as between criminal and civil cases; "to hold otherwise would be to make a serious inroad on the rule of *stare decisis* on which so much of English jurisprudence depends" (453a) (*see p. 17*).

In general, the duty is owed "to every person employed or working on the premises" (ss. 12 (3), 13 (1), 14 (1), and 15). But it may be owed to "any person" (ss. 22, 24 and 26), who is, presumably, anyone lawfully on the premises, although the inference would seem to be that he must be employed or working there, not necessarily for the occupier.

Machinery Not Covered by the Act.—It was decided by the House of Lords in *Parvin v. Morton Machine* (1952) (454) that ss. 14 (1), 16 and 20 do not apply to machines within a factory which are the products of the manufacturing processes carried on in that factory. It was suggested, in fact, that none of the provisions of PART II of the ACT would apply.

The case concerned a dough-brake, which had been manufactured, assembled and tested in a factory. While the machine was running on test, the guard had been removed to allow a slight adjustment to be made. An apprentice, who had been set to clean the machine, had his hand caught in the rollers. The Scottish Court of Session

held that there was no breach of statutory duty, and the House of Lords affirmed that decision.

There was a similar decision by the Court of Appeal in *Thurogood v. Van den Berghs* (1951) (445), where it was held that the same principle applied to machinery under repair in a workshop attached to the factory where it was used.

A ventilating fan which had been repaired was being tested by running it without the blades being guarded, and the tester was injured. As in the *Parvin* case, there was no breach of statutory duty, but the occupiers were liable in negligence at common law.

The "Fencing" Provisions

The general obligation to fence dangerous machinery is contained in ss. 12, 13 and 14, which deal, respectively, with PRIME MOVERS, TRANSMISSION MACHINERY and "OTHER MACHINERY." In each section the words "shall be securely fenced" are used, and these words make the primary obligation an absolute one; there is no room for discretion. But there are exceptions, so that electric generators, motors and rotary convertors (and their fly-wheels) (s. 12 (3)), all transmission machinery (s. 13 (1)), and dangerous parts of other machines (s. 14 (1)), need not be fenced provided they are "in such a position or of such construction as to be safe to every person employed or working on the premises," as though they were securely fenced.

As the wording and purpose of these sections are similar, it may be assumed that their interpretation will be largely upon the same lines. Decisions on one section may, therefore, apply to the others.

The Obligation to Fence.—S. 14 (1) reads as follows:—

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

"Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

The duty is to make dangerous parts safe, and whether a part is a "dangerous part" is a question of fact. There is no real definition of "dangerous" in the ACT and, although its meaning has been argued on many occasions, the best test is still that enunciated by

Mr. Justice Wills in *Hindle v. Birtwistle* (1897) (455a):—

“It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree.”

In considering that statement, it must be remembered that THE DUTY TO FENCE IS ABSOLUTE. It is not sufficient excuse to say that to fence a particular part of a machine is impracticable because it would thereby become virtually unusable. If it cannot be securely fenced, or made safe by position or construction, its use is, for all practical purposes, prohibited. Moreover, the fencing must be secure; “somewhat secure” will not do at all. But a properly fenced machine does not cease to be properly fenced merely because a guard can be forced or circumvented by some deliberate and ingenious act (453). On the other hand, if the fence is so constructed that there is a small gap through which an operator can put his hand, the machine is not “securely fenced” within the meaning of s. 14 (456). This applies particularly to a guard which lifts to permit material to pass if, when the material is through, the guard does not close the aperture completely.

The provisions as to secure fencing are likely to render the use of certain types of machines illegal. Two recent cases concerned with the guarding of grinding machines illustrate this. In both cases a standard type of power driven machine was used, the wheel being fenced with the usual three-quarter guard or shield and provided with a tool rest, there being a gap of some eight inches between them. In *Pugh v. Manchester Dry Docks* (1954) (457) the operator was not using the rest, but was taking the rag end off a box spanner by holding it directly against the wheel; the spanner slipped and his finger was injured by the wheel. In *Frost v. John Summers* (1954) (458) the operator used the rest and, when grinding a key about four inches long, caught his finger between the rest and the wheel.

In the *Pugh* case Mr. Justice Donovan decided that the wheel was a dangerous part of the machine and should have been securely fenced. That decision was expressly approved by Lord Justice Birkett in the Court of Appeal in the *Frost* case. But the Court was not unanimous in deciding that such a grinding machine was dangerous, for Lord Justice Somervell, who dissented, was of the opinion that “Parliament cannot have intended to prohibit the use of rotating grindstones” (458a). Mr. Justice Donovan had said in

the course of his judgement, "As the authorities stand, the deadlock can be resolved, in my opinion, only by the House of Lords or by Parliament" (457a), and Lord Justice Birkett considered that that was the right conclusion. There are, in fact, two ways out of the *impasse*. Either Parliament must legislate upon the matter, or some ingenious engineer must produce a form of guard which will satisfy the present strict interpretation of s. 14, resorting, perhaps, to some device which will fall within the proviso to that section. It is not, of course, beyond possibility that an appeal to the House of Lords might produce a practical solution.

Mr. Justice Wills' "contingency of carelessness" must be approached from the point of view that the behaviour of human beings is to be regarded in the light of what is reasonably foreseeable and not what might be considered reasonable in the circumstances. This part of the test is not applicable to determining whether a machine is or is not securely fenced; but it may be important in deciding whether a dangerous part is safe by position or construction. It must not be assumed that everybody will always be careful. But part of a machine will be dangerous if it is a possible cause of injury to anyone acting in circumstances which may reasonably be expected to occur (459). Such circumstances include negligent, indolent, ill-advised and even frivolous acts of operators (456).

The Application of Regulations.—The proviso to s. 14 (1), that an automatic device may be used in place of a fixed guard, does not create an exception to the obligation to fence, but provides a method whereby, in a difficult case, secure fencing may be achieved. By s. 14 (2), the Secretary of State (now the Minister of Labour and National Service) may make regulations as to the use of safety devices designed to overcome the difficulty of complying with the section. So far, no such regulations have been made. Instead, SPECIAL REGULATIONS have been made under powers given by s. 60, and these are directly related to s. 14, and must be read in conjunction with it (460). They are the BUILDING, JUTE, HORIZONTAL MILLING MACHINES, and WOODWORKING MACHINERY REGULATIONS, and they affect the section in varying degrees.

Reg. 85 of the BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, extends the absolute obligations of ss. 12, 13, and 14 to building works, with certain additional and particular requirements provided by Reg. 86. The JUTE (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, specify with great particularity in the First Schedule how a round dozen of machines used in the

processing of jute are to be safeguarded, and Reg. 27 states specifically that these provisions are to be "without prejudice" to s. 14 (1).

On the other hand, the HORIZONTAL MILLING MACHINES REGULATIONS, 1928, in naming a number of exemptions, provide that they "shall not prejudice the application of section 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery" (that section being now s. 14 of the 1937 ACT), but do not do so in regard to the regulations themselves. The Court of Appeal considered this in *Benn v. Kamm* (1952) (461), and decided that Reg. 3, which deals exhaustively with the fencing of cutters, applies only to cutters as such, and does not oust the provisions of s. 14 as to the protection of other parts of milling machines.

Resulting from *Benn v. Kamm*, it can now be stated as a general rule that none of the SPECIAL REGULATIONS made by virtue of s. 60 supercedes the requirements of the ACT, except when dealing with the same danger or aspect of danger; but it is clear that they may modify the absolute obligations of s. 14, where applicable. Although the WOODWORKING MACHINERY REGULATIONS, 1922 (as modified by the WOODWORKING (AMENDMENT OF SCOPE) SPECIAL REGULATIONS, 1945), make no mention of being without prejudice to the provisions of s. 14, the Court of Appeal held in *Miller v. William Boothman* (1944) (460) that Reg. 10 modified the section; Mr. Justice Hilbery followed that decision in respect of Reg. 17 in *Harrison v. Metropolitan Plywood* (1946) (462). This means that these REGULATIONS do not replace s. 14, unless, in any particular case, their requirements are comprehensive enough to embrace the whole purpose of the section.

The Extent of the Obligation to Fence.—Having considered the obligation to fence, as laid down by the ACT, it is necessary to deal with the extent of that obligation. Purely from the point of view of safety, it is suggested that fencing may be required:—

- (1) To keep individuals away from the dangerous parts of a machine. In this event one may have to bear in mind:
 - (a) One person only, such as the operator of a machine tool, or
 - (b) All persons who, in the course of their duties, may accidentally come into contact with some moving part, such as a belt or gearing.
- (2) To protect individuals from the consequences of the escape of a broken part or the throwing out of spoil. Here all persons likely to be in the vicinity must be considered.

Although this may be a fair summary of the practical position, it does not entirely accord with the requirements of the ACT, as interpreted in the cases. The legal position must, therefore, be examined, in order to see to what extent the practical requirements summarised above are supported.

It is clear from the wording of ss. 12, 13 and 14 that it is "every person employed or working on the premises" who must be protected from coming into contact with dangerous parts of machines; this clearly supports para. (1) (b) above. But there is not the same support for para. (2), for it is quite definite that there is no duty to protect anyone from being hit by spoil from a machine (see *Nicholls v. Austin* below). As to the escape of broken parts, there is considerable doubt about the liability in this connection. On the other hand, para. 1 (a) would seem to fall within the implication raised by the final words of the proviso to s. 14 (1) (see p. 348), in that, in guarding the "business" part of a machine tool, it is sufficient to have only the operator in mind. That this is not entirely true will be appreciated when *Dickson v. Flack* is considered (see below).

In *Nicholls v. Austin* (1946) (463) the claim was for damages for injury caused by a piece of wood spoil which flew out from a type of circular saw known as a straight-line edger. The House of Lords decided that there could be no claim under s. 14, for the object of that section is to protect employees and others from coming into contact with any dangerous part of a machine. By s. 14 (3) powers are given to make regulations "requiring the fencing of materials or articles which are dangerous whilst in motion in the machine," but, so far, no such regulations have been made; any duty to fence materials in motion was therefore excluded. Further, the machine in question was provided with the type of protection detailed in Reg. 10 of the WOODWORKING REGULATIONS, which do not specify guarding to prevent spoil flying out from a woodworking machine. On these grounds the claim failed. This decision having been arrived at by the House of Lords, it cannot be overruled except by legislation. It is possible that the point might be covered by regulations made under s. 14 (3), although the wording of that sub-section does not appear to contemplate protection against the throwing out of materials or articles.

Where it is part of the machine itself which flies out and causes injury, there is no liability under s. 13, although there may be

under s. 14. In order that the position may be properly understood, the findings in four cases must be considered. In *Hindle v. Birtwistle* (1897) (455), a Divisional Court of Queen's Bench had to consider the case of injury to a weaver caused by a shuttle flying out of the shuttle-race of a loom, and held that provisions of the FACTORY AND WORKSHOP ACTS of 1878 and 1891 (analogous to those of s. 14 of the 1937 ACT) applied in such an event. The Court ruled that the obligation to fence "all dangerous parts" was not confined to those parts which were dangerous in the ordinary course of careful working, but included parts which were likely to fly out with any degree of frequency. In *Harrison v. Metropolitan Plywood* (1946) (462), Mr. Justice Hilbery arrived at a similar result by a different process of reasoning. There, part of a cutter of a spindle moulding machine broke off and injured a worker at an adjacent machine. In holding that Reg. 17 of the WOODWORKING REGULATIONS applied, the learned Judge pointed out that the Regulation required "the most efficient guard" to be fitted. The evidence showed that a ring guard, of a type to protect the operator only, had been used. But in "Safety Pamphlet No. 8" (464), issued by the Home Office in 1928, there was illustrated a type of guard which consisted of a wire-mesh screen fitted round the vertical spindle. The use of such a guard would have complied with the Regulation, which the ring guard certainly did not do. The injured person therefore succeeded in his claim, for

"The modification effected by the regulations is a modification in the standard of fencing; it is not an elimination of certain classes of workers in a factory from a right to such protection as the modified fencing will afford" (462a).

In 1948 the House of Lords decided in *Carroll v. Andrew Barclay* (465) that the requirements of s. 13 were confined to protecting employees from coming into contact with transmission machinery, and did not oblige occupiers to erect an enclosure to prevent broken machinery flying out. In that case an employee was injured by a broken balata belt which flew out from above the guarding and struck him; the guard provided was adequate to protect employees under normal conditions, and it was established in evidence that balata belts of the type used were not prone to breakages. The conditions in this case were not the same as in *Hindle v. Birtwistle*, where shuttles had a propensity to fly off the race, and where, in any event, it was the forerunner to s. 14 with

which the Court was concerned. Nor were they the same as in the *Harrison* case, in which the decision was based on a breach of the WOODWORKING REGULATIONS and not of s. 14. The House expressly reserved consideration of the question whether s. 14 really requires a machine to be so fenced as to protect employees from the ejection of loose or broken parts.

The Court of Appeal, in 1953, expressly approved the decision in the *Harrison* case. This was in *Dickson v. Flack* (1953) (466), where an employee, who was testing a vertical spindle moulding machine, was injured by a bolt which flew off the headpiece when it was revolving at high speed (4 500 r.p.m.). It was held that the Shaw guard fitted to the machine, while effective to protect the operator from coming into contact with the cutters, was not the most efficient guard within Reg. 17 of the WOODWORKING REGULATIONS, for it did not guard against the known danger of pieces flying out of the machine. But, because the Regulation did not specify the type of guard required, it did not deal exhaustively with the occupier's duty; hence, the general duty under s. 14 still applied. The Court emphasised that, in the *Carroll* case, the House of Lords had left open the question of a machine which might have a propensity to throw off loose or broken parts. The danger of vertical spindle moulding machines throwing off cutters was a very real one, as was emphasised in a pamphlet issued by the Factory Department of the Ministry of Labour and National Service in 1947 (467). This was, therefore, a case where the duty to fence extended to protecting employees from the danger of parts flying out from a machine.

In this connection, it should be remembered that compliance with the relevant section or regulation is all that is required, and that, although it may be very advisable to follow the recommendations of the Factory Department, such action is by no means compulsory.

Exceptions to the Absolute Duty.—**Ss. 15 and 16**, which must be read together, are subsidiary to ss. 12, 13 and 14, in that they provide what are, in effect, certain exceptions to the obligation to fence. **S. 16** states that all fencing is to be "of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use," except when "necessarily exposed" for examination, lubrication or adjustment. **S. 15** deals with exceptions to the matters to be considered when determining whether machinery is safe by position or construction; these exceptions also concern

examination, adjustment and lubrication while in motion. The carrying out of work covered by the exceptions must be in accordance with the OPERATIONS AT UNFENCED MACHINERY REGULATIONS, 1938 and 1946, which apply to both sections.

Nash v. High Duty Alloys (1947) (468) provides a good example of the application of s. 16. The facts were as follows:—

The plaintiff was employed as an inspector of output of certain machines in a factory. If he found that the output of any machine was defective, he was responsible for seeing that adjustments were made by a tool-setter (being forbidden to interfere with machines himself).

The operation of a certain power-press was defective, and the plaintiff called a tool-setter to adjust the dies, but, as difficulty was experienced, the charge hand and a tool-maker were also sent for. A master pressing was inserted in the press, and the plaintiff was asked whether he could "see daylight" between the pressing and the lower die. He replied that he could, and was in the act of indicating the bad fit with his hand, when the tool-maker pressed the operating pedal and the plaintiff's hand was caught in the press.

The machine was provided with a guard comprising a gate which was so interlocked with the operating pedal that when it was opened the pedal could not be depressed. The whole guard could, however, be lifted clear for the purpose of adjusting the dies, and in that position the interlock was inoperative.

When the accident occurred the guard had been lifted clear, and the tool-maker had depressed the pedal in order to remove the master pressing, which could not be moved by hand.

It was held that s. 16 does not apply when a machine is not running. But when, for the purposes of testing, the machine is set in motion with the guard removed, it is not "necessarily exposed" within the meaning of the section, if the operation could just as easily be performed with the guard in position. As regards setting "in motion," it was recently decided by the same Court in *Cummings v. Richard Thomas* (1953) (469) that these words, as used in s. 16, are not limited to motion imparted by a source of power, but include movement by hand with the power cut off, as where a machine is turned over during the course of some adjustment.

Duties as to Women and Young Persons.—Touching the exceptions provided by ss. 15 and 16, it is enacted by s. 20 that no woman or young person (*i.e.* under 18 years of age) shall clean any part of a prime mover or transmission machinery whilst in motion.

This is absolute, and the only exception is provided by the ELECTRICITY SUPPLY (HOURS, SAFETY AND WELFARE) ORDER, 1943, Art. 6, which permits a woman to clean a part of a prime mover in a generating station so long as she is not exposed to risk of injury

from any moving part, either of the prime mover itself, or of any other machine in the vicinity.

But women and young persons may clean other machines in motion, unless to do so would expose them "to risk of injury from a moving part either of that machine or of any adjacent machinery."

A young person may not work at a dangerous machine unless he has been fully instructed as to its dangers and has been either sufficiently trained in its working, or is under the supervision of a competent person who has a thorough knowledge of the machine. This is provided by s. 21.

What constitutes a "dangerous machine" for this purpose is specified in the Schedule to the DANGEROUS MACHINES (TRAINING OF YOUNG PERSONS) ORDER, 1954 (which came into operation on 1st August 1954, and replaces the Order of 1938). Eighteen types of machine are listed in the Schedule, and they include power presses, milling machines, guillotines, and certain other machines used in particular industries.

The Responsibility of a Seller of Machinery.—S. 17 (2) provides that any person who sells or lets on hire, "for use in a factory in the United Kingdom, any machine intended to be driven by mechanical power" which does not comply with the requirements of s. 17 (1), shall be liable to a fine not exceeding £100. S. 17 (1) specifies that, in the case of such machinery:—

- "(a) every set-screw, bolt or key on any revolving shaft, spindle, wheel or pinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger; and
- "(b) all spur and other toothed or friction gearing, which does not require frequent adjustment while in motion, shall be completely encased unless it is so situated as to be as safe as it would be if completely encased."

It was held in *Biddle v. Truvox* (1951) (470) (which concerned an accident caused by the exposed lifting chains and cogwheels of a fork-lift truck) that the liability under s. 17 (2) of the supplier of machinery which fails to comply with s. 17 (1) is limited to the penalty. He is under no liability in civil damages to an employee injured by the machine in the factory of the person to whom the machine was sold or hired. It was also held that the manufacturer's liability under that section is no bar to the occupier being himself liable (both to the penalty and in civil damages) under s. 14.

The provisions of s. 17 (2) have been extended to Reg. 86 of the BUILDING REGULATIONS, 1948, by virtue of Reg. 100; and to Reg. 27 of the JUTE REGULATIONS, 1948, by virtue of Reg. 28 (see p. 225).

It has been suggested (471) that s. 17 (1) has created a definite obligation upon the occupier of a factory, the inference being that s. 17 (2) merely extends that obligation to the suppliers of the machinery. The arrangement of the section certainly leads to that conclusion. Unfortunately, the only decision on the section (*Biddle v. Truvox*) did not deal with that point, and, in fact, Mr. Justice Finnemore found that the occupier's liability in that case was under s. 14. The suggestion, though obviously a right one, must, therefore, remain a suggestion until it has been confirmed, or otherwise, by judicial decision.

Other Safety Provisions

There are a number of other safety provisions contained in PARTS II and IV of the ACT. Unfortunately, space does not permit of detailed treatment, but the scope of the relevant sections (and of the other PARTS of the ACT) is indicated in Appendix III. However, in view of the similarity of the duties prescribed by ss. 25 and 26 to those implied by the common law in regard to safe place of employment and safe means of access thereto, these sections are dealt with briefly below.

Floors, Passages and Stairs.—S. 25 (1) provides:—

“All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained.”

“Gangway” includes a plank, placed across a three feet wide trench by the contractors who had dug it, and used by both the contractors’ and the occupier’s employees (472). “Maintained” is defined by s. 152 (1) as meaning “maintained in an efficient state, in efficient working order, and in good repair.” This definition was referred to by Lord Porter in *Latimer v. A. E. C.* (1953) (473) (which concerned the maintenance of a gangway). The learned Law Lord, in considering the effect of s. 152 (1) on s. 25 (1), said:—

“Primarily, in my opinion, the section is aimed at some general condition of the gangway, *e.g.* a dangerously polished surface or the like or possibly some permanent fitment which makes it unsafe. But I cannot think the provision was meant to or does apply to a transient and exceptional condition. If it had been directed to such a state of affairs it would have been easy to say so.”

(NOTE ALSO the dictum of Lord Porter quoted on p. 329). S. 25 (2) requires staircases to have “substantial handrails . . . provided and maintained;” s. 25 (4) requires all ladders to be

"soundly constructed and properly maintained." It is submitted that "maintained" has the same meaning as was attributed to it in connection with s. 25 (1).

S. 25 (3) requires all openings in floors to be "securely fenced, except in so far as the nature of the work renders such fencing impracticable." Lord Justice Singleton in *Street v. B. E. A.* (1952) (446), expressed some doubt as to whether an open hole in the floor of a generating station under construction, waiting to receive a boiler, was an "opening" within the section; it was not, however, something he had to decide. He pointed out that "impracticable" does not mean "not very convenient." If an opening is being used to hoist materials from the floor below, it may be *inconvenient* to have to remove a portion of fencing every time a load comes up, and to replace it afterwards, but it cannot be considered *impracticable* to have to do so.

In *Harrison v. Metropolitan-Vickers* (1954) (474) it was held by the Court of Appeal that the sand bed of a foundry was a "floor" within the meaning of s. 25 (3), despite the fact that access was obtained by means of steel-flagged gangways. Consequently, any excavation made in the sand bed for the purpose of casting was an "opening" which had to be fenced (and no evidence was adduced to show that such fencing was impracticable).

Safe Means of Access.—S. 26 (1) provides that, "so far as is reasonably practicable," a safe means of access "to every place at which any person has at any time to work" shall be "provided and maintained." Lord Justice Denning remarked, in *Levesley v. Thomas Firth* (1953) (475), that this section "adds very little to the common law obligations between employers and workmen, and it has been so said on several occasions in this Court" (*see* p. 328). It was held in *Lavender v. Diamints* (1949) (476) that the wording of the sub-section was such that its application was not confined to the employees of the occupier, but included an independent contractor working on the premises; and, in *Hosking v. De Havilland* (1949) (472), that a plank, laid across a trench by independent contractors and used as a gangway by the employees of both the contractors and the occupier, was a means of access for which the occupier was responsible.

Safe Place of Employment.—The requirements of s. 26 (2) are more restricted than are those of the common law, for it provides:—

"Where any person is to work at a place from which he will be liable to fall a distance of more than ten feet, then, unless the place

is one which affords secure foothold and, where necessary, secure hand-hold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise, for ensuring his safety."

It is to be noted that the protection is to be afforded to "any person," and it follows, therefore, that the scope of this sub-section is the same as that of s. 26 (1).

Similar provisions are to be found in PART II of the BUILDING REGULATIONS, 1948, in Regs. 9 to 11 of the DOCKS REGULATIONS, 1934 and in Regs. 11 to 17 of the SHIPBUILDING REGULATIONS, 1931. The requirements of these REGULATIONS are, of course, considerably more elaborate and detailed, dealing as they do with temporary scaffoldings, stagings and the like. It is of interest to note that, in these REGULATIONS, the distance through which a person "will be liable to fall" is put at six feet six inches instead of ten feet.

The Duties of Employed Persons

Whilst in any action brought for breach of a duty under the Act, contributory negligence on the part of the plaintiff may be pleaded by way of defence, it may also be a defence that he did not comply with the provisions of s. 119. Apart from that, breach by an employee of any of the duties imposed upon him by that section may render him liable to a fine.

S. 119 (1) provides that an employee must not "wilfully interfere with or misuse any means, appliance, convenience or other thing provided in pursuance of this Act" for his safety, health or welfare. Further, he must make use of any means or appliance provided for the purpose of securing his health or safety. By s. 119 (2) he must not, "wilfully and without reasonable cause," do anything which is "likely to endanger himself or others."

The Duty to Use Safety Appliances.—The meaning of the second limb of s. 119 (1) is this. If safety appliances are provided they must be used, and if an employer has supplied such an appliance, in good condition, in its proper place and ready to hand, then he has "provided" it. He is under no obligation to tell the employee to use it, and even if he has gone so far as to acquiesce in its not being used, the employee is himself still liable (477). However, if the employer has actually instructed an employee not to use a particular appliance, such as a guard on a machine, he has not "provided" the appliance within the meaning of the section (478).

The Duty to Take Care.—The duty under s. 119 (2) is not co-extensive with contributory negligence; this is partly because of the word "wilfully." An employee who wilfully endangers himself will not, however, have committed an offence if the cause

of his so doing was failure by the occupier to fence securely. In *Wraith v. Flexile Metal* (1943) (479):—

Ovens for drying tubes were so mounted that there was a clear space of about two feet between the base and the floor. Below the ovens, and in that space, was a revolving shaft. Tubes frequently fell under the ovens, and the employees, who were forbidden to go near or under the ovens when the shaft was running, were provided with brooms with which to retrieve the fallen tubes. An employee who crept under an oven to pick up a tube was injured by the shaft.

It was held that the shaft should have been securely fenced in accordance with s. 14 (1); if it had been, the accident would not have happened. The employee was injured in consequence of the occupier's breach of duty, and any question of an offence under s. 119 (2) was irrelevant.

Duties under Special Regulations.—A number of the SPECIAL REGULATIONS deal specifically with the duties of employed persons. For instance, Reg. 23 of the WOODWORKING MACHINERY REGULATIONS, 1922, provides that persons employed on woodworking machines "shall" use and keep adjusted the guards, and use the push-sticks, provided under the REGULATIONS. All these provisions can be regarded as being supplementary to s. 119.

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- (445) *Thurogood v. Van den Berghs & Jurgens, Ltd.* (1951) 2 K.B. 537. C.A.
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- (449) *Cox v. S. Cutler & Sons, Ltd. and Hampton Court Gas Co.* (1948) 2 All E.R. 665, 668. C.A.
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- (452) *Meigh v. Wickenden*. (1942) 2 K.B. 160. Div.
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- (454) *Parvin v. Morton Machine Co., Ltd.* (1952) A.C. 515. H.L. (Sc.)

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- (473) *Latimer v. A. E. C., Ltd.* (1953) A.C. 643, 654; 3 W.L.R. 259, 263. **H.L.**
- (474) *Harrison v. Metropolitan-Vickers Electrical Co., Ltd.* (1954) 1 W.L.R. 324. **C.A.**
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- (477) *Norris v. Syndic Manufacturing Co., Ltd.* (1952) 2 Q.B. 135. **C.A.**
- (478) *Murray v. Schwachman, Ltd.* (1938) 1 K.B. 130. **C.A.**
- (479) *Wraith v. Flexile Metal Co., Ltd.* (1943) K.B. 24. **Div.**

CHAPTER 23

Some Regulations Concerning Electrical Safety

THERE are four principal sets of regulations concerning the safety of electrical apparatus which are of particular interest to electrical engineers. They are:—

(1) *The Electricity Supply Regulations, 1937.*

These were made by the Electricity Commissioners by virtue of powers conferred upon them by the ELECTRICITY (SUPPLY) ACTS, 1882 to 1936, and are continued in force by s. 60 of the ELECTRICITY ACT, 1947.

[The functions of the Electricity Commissioners were transferred to the Minister of Fuel and Power by the ELECTRICITY COMMISSIONERS (DISSOLUTION) ORDER, 1948, made under powers conferred by s. 58 of the 1947 ACT.]

(2) *The Overhead Line Regulations, 1947.*

These were first made in 1931, and revised in 1947, by the Electricity Commissioners under the same powers as authorised the ELECTRICITY SUPPLY REGULATIONS, and they are continued in the same manner.

(3) *The Electricity (Factories Act) Special Regulations, 1908 and 1944.*

The principal "REGULATIONS . . . FOR THE GENERATION, DISTRIBUTION, TRANSFORMATION AND USE OF ELECTRICAL ENERGY IN PREMISES UNDER THE FACTORY AND WORKSHOP ACTS, 1901 AND 1907," were made in 1908 under the general heading of "Dangerous and Unhealthy Industries." They are continued in effect by s. 159 of the FACTORIES ACT, 1937. Their scope was extended, and certain amendments were introduced, by the ELECTRICITY (FACTORIES ACT) SPECIAL REGULATIONS, 1944, made by virtue of s. 60 of the 1937 ACT. The two are together known by the short title given above.

(4) *The Heating Appliances (Fireguards) Regulations, 1953.*

These Regulations came into force on 1st October 1953, and were made by the Home Secretary in pursuance of powers given by the HEATING APPLIANCES (FIREGUARDS) ACT, 1952. [Although they are a little out of line with the other three, it is convenient to note them here.]

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The Government Departments responsible for enforcement are: (1) and (2), the Ministry of Fuel and Power; (3), the Factory Department of the Ministry of Labour and National Service; and (4), the Home Office.

The Electricity Supply Regulations

The purpose of the ELECTRICITY SUPPLY REGULATIONS, 1937, is (apart from "insuring a proper and sufficient supply of electrical energy") to secure "the safety of the public." Those responsible for compliance are the electricity undertakings; that is, the British Electricity Authority, the Area Electricity Boards, and the North of Scotland Board (ELECTRICITY ACT, 1947, ss. 1 (3) and 60). The majority of the Regulations are inevitably concerned with technical matters touching continuity of supply and so forth, but there are some, including those relating to the supply of energy to consumers' premises, which are relevant to be noted here.

The Duty to Avoid Danger.—**Reg. 21 (b)** provides that undertakings "shall take all reasonable precautions . . . to avoid danger to the public or to any employee or authorised person" engaged in any operation in connection with "the installation, extension, replacement, repair and maintenance" of any of the undertakings' works which do not come within the scope of the ELECTRICITY (Factories Act) Regulations. It imposes a general, not an absolute, obligation "to avoid danger." The requirement that "reasonable precautions" shall be taken means that there must be no negligence on the part of the undertaking, and in the event of an accident the onus would be upon the undertaking to show that reasonable precautions were taken.

Specific provisions as to the avoidance of danger are contained in **Regs. 9 to 11**, which are concerned with transformers, switchgear and related apparatus intended for pressures exceeding 650 volts. They are also to be found in **Reg. 25 (b)**, in regard to the standard of construction and installation of the undertaking's own apparatus which is on consumers' premises; by inference, **Reg. 24** is also concerned with the avoidance of danger.

Connections to Consumers' Installations.—**Regs. 26 to 31** are concerned with the connection of supplies of energy to consumers' premises. The wording used in these Regulations imports that the standard of duty required from an undertaking is not the same in every case. Thus, undertakings "shall not permanently connect" installations if there is a likelihood of leakage above a specified figure (**Reg. 26**); they "shall not commence" a supply of 250 volts or below from more than one pair of

conductors of a three-wire or multi-phase system, unless the connected load exceeds 8 kW or it is necessary to avoid a voltage variation exceeding the limits allowed by Reg. 34 (**Reg. 28 (a)**); and they "shall not commence" a supply at a pressure exceeding 650 volts, unless a number of specified conditions are fulfilled by the consumer in regard to safety and other matters. The wording used shows that the obligation is absolute; there is no room for discretion.

But undertakings are given a discretion in two cases. **Regs. 28 (b) and 29**, which deal with three- and four-wire and multi-phase supplies, and with supplies at between 250 and 650 volts respectively, use the phrase "shall not be compelled to commence." This implies that if they are "reasonably satisfied" about certain matters, then they cannot refuse to commence the supply. But discretion does not extend to **Reg. 31**, because "shall not knowingly commence" implies that if there is knowledge of certain matters, however obtained, a supply must not be commenced. On the other hand, **Reg. 32** affords undertakings a complete discretion as to disconnecting supplies for technical reasons.

It should be noted that **Regs. 27, 28 (b), 29, 30 and 31** are NOT applicable to premises to which the ELECTRICITY (FACTORIES ACT) REGULATIONS apply; BUT **Reg. 25** does not relieve the consumer of any obligation imposed upon him by those REGULATIONS. Further, the installation requirements to be satisfied before a supply is commenced under **Regs. 27, 28 (b), 29 and 30** can be met by compliance with the provisions of the current edition of the Institution of Electrical Engineers' "Regulations for the Electrical Equipment of Buildings" (480), which are thus given statutory force to that extent.

Judicial Decisions.—There are three judicial decisions affecting these REGULATIONS. Two of them, *Hartley v. Mayoh* (487) and *Sellers v. Best* (488), are dealt with later when considering cases of mixed liability (see p. 371). The third is *Heard v. Brymbo Steel* (1947) (481).

The occupiers of a factory were afforded an e.h.v. supply directly from the supply authority's sub-station some miles away. The incoming feeder was taken to a switch controlling the intake to two transformers, which fed the factory busbars through individual switches. All this equipment was the property of, and was under the exclusive control of, the authority, except that the occupier could operate the l.v. transformer switches as required.

One of the occupier's main switches, which controlled part of the l.v. output from the busbars, tripped because of a fault in the factory

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installation. Almost immediately an explosion occurred on the intake side of that switch, with the result that the sub-station switch tripped out; the authority's other switches at the factory were not affected. In accordance with standing orders, the authority's sub-station attendant restored the factory supply after an interval. A second explosion then occurred in the occupier's main switch, causing injury to an employee. The sub-station switch tripped again, but the other switches were still unaffected.

The Court of Appeal held that, although the occupiers were themselves in breach of the **ELECTRICITY (FACTORIES ACT) REGULATIONS** (*see* p. 369), the supply authority were at fault under Regs. 24 and 25 (a) of the 1937 REGULATIONS. It is not clear from the report of the case, but it would seem that the breach of Reg. 24 consisted of employing an incoming feeder switch of insufficient rupturing capacity. Reg. 25 was not complied with because that switch was not "maintained in a safe condition and suitable" for its purpose, in that the trip setting was incorrectly graded in relation to that of the sub-station switch.

The liability for the injury to the occupier's employee was assessed by the Court as to two-thirds against the supply authority and as to one-third against the occupier. The former's liability in damages was based upon Reg. 39 and Para. 77 of the Schedule to the **ELECTRIC LIGHTING (CLAUSES) ACT, 1899**. **Reg. 39**, after reciting the liability to penalty of a defaulting undertaking, states:—

"The recovery of a penalty under these Regulations shall not affect the liability (if any) of the Undertakers to make compensation in respect of any damage or injury which may have been caused by reason of the default."

Para. 77 of the Schedule (which is, incidentally, continued in force by the 1947 ACT) provides:—

"The Undertakers shall be answerable for all accidents, damages, and injuries happening through the act or default of the Undertakers, or of any persons in their employment, by reason of or in consequence of any of the Undertakers' works. . . ."

It was also found that there was an agreement between the supply authority and the occupiers whereby the former agreed to maintain the incoming feeder switch. This agreement, which was within Reg. 25 (c), did not, therefore, modify the obligation imposed by Reg. 25 (a).

The Overhead Line Regulations

THE OVERHEAD LINE REGULATIONS, 1947, are a revised version of those made in 1931, and their purpose is "for securing the safety of the public." Responsibility for compliance is the same as under the ELECTRICITY SUPPLY REGULATIONS. They deal primarily with matters affecting the actual construction of overhead lines and are, therefore, mainly concerned with technical matters.

Specific "provision to prevent danger" is afforded by **Reg. 14** (lines carrying voltages not exceeding 650 D.C. and 325 A.C.) and **Reg. 17** (lines carrying higher voltages). **Reg. 19** provides for danger notices to be fixed to all supports, and **Reg. 20** for the attachment of anti-climbing devices to supports and stay wires in certain cases.

There are no judicial decisions regarding these REGULATIONS, except that Regs. 19 and 20 were referred to in the case of *Buckland v. Guildford Gas Co.* (see p. 306).

The Electricity (Factories Act) Regulations

THE ELECTRICITY (FACTORIES ACT) SPECIAL REGULATIONS, 1908 and 1944, cover the "generation, transformation, conversion, switching, controlling, regulating, distribution and use of electrical energy" in all factories to which any SPECIAL REGULATIONS made under s. 60 of the FACTORIES ACT, 1937, apply. The "factories" are those within s. 151, and those deemed to be factories by virtue of ss. 103 to 108 (see p. 345), one exception being provided by Exemption 8 (see p. 369).

Those responsible for compliance with the REGULATIONS are the "occupiers" of the factory premises (see p. 346). It is also provided that "it shall be the duty of all agents, workmen, and persons employed to conduct their work in accordance with these Regulations."

Definitions.—Of the definitions given, two are of particular importance.

Authorised Person

"(a) The occupier, or (b) a contractor for the time being under contract with the occupier, or (c) a person employed, appointed, or selected by the occupier, or by a contractor as aforesaid, to carry out certain duties incidental to the generation, transformation, distribution, or use of electrical energy, such occupier, contractor, or

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person being a person who is competent for the purposes of the Regulation in which the term is used."

It is submitted that the duties are now extended to those incidental to conversion, switching, controlling and regulating, in accordance with the extended scope introduced by the 1944 REGULATIONS. This definition should be compared with that given in the ELECTRICITY SUPPLY REGULATIONS, 1937, in that competence "for the purposes of the Regulations in which the term is used" is a necessary condition in both cases.

This definition is relevant in regard to Regs. 15, 24, 28, 30 and 31.

Danger

"Danger to health or danger to life or limb from shock, burn or other injury to persons employed, or from fire attendant upon the generation, distribution, or use of electrical energy."

Here again, it is submitted that the danger is that attendant upon all the operations covered by the REGULATIONS. In *Gatehouse v. John Summers* (1953) (482a), Lord Goddard expressed the view that, on this definition, "the main object of these regulations is to protect the workman from what may be called electrical injury."

The definition is relevant in regard to Exemption 4 and Regs. 1, 2, 3, 5, 7, 8, 12, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28 and 31.

Exemptions.—The REGULATIONS are prefaced by eight Exemptions, of which four need to be noted.

Exemption 2 provides that the REGULATIONS shall not apply to "service lines or apparatus on the supply side of the consumer's terminals." This is necessary in order to avoid a duplication of responsibility, for Reg. 25 of the ELECTRICITY SUPPLY REGULATIONS, 1937, does not relieve the consumer of any obligation imposed upon him by the FACTORY REGULATIONS (see p. 364).

Exemption 4 is as follows:—

"Nothing in these Regulations shall apply to any process or apparatus used exclusively for electro-chemical or electro-thermal or testing or research purposes; provided such process is so worked and such apparatus so constructed and protected and such special precautions taken as may be necessary to prevent danger."

This was considered in *Proctor v. Johnson and Phillips* (1943) (483):—

A cable tester was killed whilst working in the Supertension Test Department of the defendants' works. This was an enclosed danger

area, with access by a gate, and it contained two sets of high voltage test apparatus supplied from independent transformers. Two indicator lights, one red and one green, were fitted outside the danger area, and were so arranged that if one apparatus was alive, both would show; if both were alive, the red alone would show; and if both were dead, the green alone would show. There was also an interlocking device on the gate, which, when the gate was opened, rendered both sets of apparatus dead.

It appeared that the tester met his death by coming into contact with a cable under test which should have been dead, but was, in fact, alive. The gate was open and the green light only was showing. There was an earthing rod, which had not been used, still in its place beside the gate; the tester had disobeyed instructions to use earthing rods "without fail."

The Court of Appeal held that the safety devices had failed, but that the proximate cause of the accident was the tester's omission to use the earthing rod.

An allegation was made that the safety devices should have been tested periodically. Of this, Lord Greene said (483a):—

"That seems to me to be answered conclusively by the fact that the best possible test of the working of an apparatus of this kind is the regular using of it. It was in continuous use. No further daily test or anything of that kind would have helped matters. It does not seem to have been suggested that the whole of this elaborate apparatus should be taken down and stripped and examined, unless there was a defect in its working which suggested that something was going wrong. In the present case there was nothing of the kind; and, in fact, when the apparatus was taken down nothing was found which could suggest the reason of its failure."

A further allegation that the wrong type of automatic device was being used on the door was dismissed by Lord Greene on the ground that all such devices were "liable to the same curious failures as those to which any automatic device is liable."

As well as dealing with the facts in that case, Lord Greene considered the general nature of the obligation imposed by the proviso to the Exemption upon the person in charge of the process or operation (*see also* p. 330). (His Lordship referred inadvertently to "regulation" instead of "exemption.")

"If the proviso is read literally it imposes an obligation to take such precautions as may be necessary to prevent danger. In operations of the kind contemplated, the complete elimination of danger must, on the face of things, be an impossibility. . . . It seems to me that, if the regulation is read in such a way as to impose an absolute obligation to eliminate any possibility of danger, it would result in making any use of the apparatus in question quite impossible. . . . The regulation contemplates that testing and research is going to continue. . . .

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"A sensible construction must be put upon this regulation which will not prevent testing and research . . . from being carried out. The precautions required to prevent danger can only be those which comply with the highest standard of safety which can reasonably be provided" (483b).

Exemption 7, which excludes the application of the REGULATIONS to "domestic factories or domestic workshops" is now redundant, for previous provisions dealing with such places were repealed by the 1937 Act.

By **Exemption 8**, the REGULATIONS do not apply to apparatus, "other than portable apparatus," which forms part of the permanent electrical installation of premises in which work is being done by way of building within s. 107, by way of engineering construction within s. 108, or on a ship in harbour or wet dock within s. 106 (see p. 345). But they may apply if that installation is being used otherwise than to provide lighting or energy for the purposes of such work.

Particular Regulations.—There are thirty-two Regulations, of which four only have received judicial consideration.

Regulation 1 provides:—

"All apparatus and conductors shall be sufficient in size and power for the work they are called upon to do, and so constructed, installed, protected, worked and maintained as to prevent danger so far as is reasonably practicable."

This was relevant in *Heard v. Brymbo Steel* (1947) (481), the facts of which have already been given (see p. 364). The occupiers of the factory were held liable under this Regulation because the original fault had been due to a defective insulator in the factory installation, which had not been "so maintained as to prevent danger." There had been a further fault in that the main switch in which the explosion had occurred had not been properly maintained or set.

Regulation 2 provides:—

"All conductors shall either be covered with insulating material and further efficiently protected where necessary to prevent danger, or they shall be so placed and safeguarded as to prevent danger so far as is reasonably practicable."

In *Long v. Kirk* (1938) (484):—

A firm of contractors, in occupation of premises during course of construction, had erected a portable lamp in a fixed position, the cable for which had been repaired in several places with insulation tape. An employee wrongfully took the lamp off its hook and used

it as a portable lamp, allowing the cable to trail on wet ground. He received a fatal shock.

Although the cable had been passed as safe by the electricity supply authority's inspector, it was held that this Regulation was imperative, and that the occupier was in breach of it despite the employee's unauthorised act.

The mere fact that an employee has been electrocuted, apparently due to breach of this Regulation (or, for that matter, of Regs. 21, 22 or 23) was held by the Court of Appeal in *Youngman v. Pirelli General* (1940) (485) to be insufficient evidence, by itself, to show that the occupier had actually committed a breach, because some positive proof of negligence is essential.

Regulation 6 provides:—

“Every electrical joint and connection shall be of proper construction as regards conductivity, insulation, mechanical strength and protection.”

In *Gatehouse v. John Summers* (1953) (482), an electrician was killed when an overhead crane cable, which had become jammed on its winding drum and which he was endeavouring to release, parted at a joint and knocked him to the ground. The cable was not carrying current at the time. The Court of Appeal decided that there was a breach of the Regulation because the cause of injury was a mechanically defective joint. Although the object of the REGULATIONS is to give protection from “danger” as there defined, the word “danger” does not appear in this particular Regulation. Its scope is not, therefore, limited to cases where the cause of injury is electrical, but extends to those in which injuries occur because of some mechanical defect in a joint or connection, not apparent upon superficial examination. Anyone working on a cable is entitled to assume, in the absence of signs to the contrary, that a joint or connection will be sufficiently strong to withstand normal handling.

Regulation 18 (d) provides (so far as is relevant here):—

“When any work is done on any switchboard for high pressure or extra high pressure the switchboard shall be made dead.”

It was decided in *Barcock v. Brighton Corporation* (1949) (486) that this Regulation is sufficiently complied with by the occupier if he has properly delegated the duty of its observance to an employee, who has been authorised to work without supervision. In that case, the facts of which have already been given (*see* p. 331),

it was held that the Corporation was not liable for an injury caused to an authorised but unskilled fitter in consequence of his own breach of Regulation. It is submitted that, on the facts, the Corporation should have been liable, for the duty had not been properly delegated, the unskilled fitter being hardly "competent" within the definition of "authorised person" (see p. 366). However, it would have made little difference to the result, because the Corporation was held liable in any event for not having provided a proper system of working.

Allied Regulations.—Certain SPECIAL REGULATIONS, made under the authority of s. 60 (or continued by s. 159) of the FACTORIES ACT, 1937, embody provisions concerned with electrical matters. In the three cases of the CELLULOSE SOLUTIONS REGULATIONS, 1934 (Reg. 5), the MANUFACTURE OF CINEMATOGRAPH FILM REGULATIONS, 1928 (Reg. 12), and the CINEMATOGRAPH FILM STRIPPING REGULATIONS, 1939 (Reg. 14), it is specifically stated that those provisions must not be deemed to relieve the occupier of any obligation imposed by the ELECTRICITY (FACTORIES ACT) REGULATIONS.

In various other SPECIAL REGULATIONS there are provisions as to the protection of incandescent electric lamps, etc., but no reference is made to the ELECTRICITY (FACTORIES ACT) REGULATIONS. Nor is such reference made in the FACTORIES (TESTING OF AIRCRAFT ENGINES AND ACCESSORIES) SPECIAL REGULATIONS, 1952, which, by Regs. 14, 17 and 18, make provision as to the installation, use and testing of flameproof and intrinsically safe electrical apparatus employed in the vicinity of the testing equipment covered by the REGULATIONS.

Cases of Mixed Liability

It has been stated already (see p. 338) that there may be a right of action, based on the same facts, for breach of both statutory and common law duties, and it is instructive, therefore, to consider two fairly recent cases of mixed liability which concerned defective electrical installations.

Hartley v. Mayoh.—The first case, entitled *Hartley v. Mayoh & Co. and North-Western Electricity Board* (1953) (487), involved breaches of both the ELECTRICITY SUPPLY and the ELECTRICITY (FACTORIES ACT) REGULATIONS, as well as negligence at common law.

A fire broke out on an upper floor of the defendant company's factory, and the fire brigade was summoned. The fireman responsible for seeing that mains supplies of gas and electricity were cut off was directed by the company's manager to the main switchboard, where he was shown two ironclad switches. He switched these off and went to the fire, but, having received a slight shock from some wiring, he returned to the switchboard to investigate further. He was told by the manager that there were no other main switches, and that both the switch controlling the lighting on the upper floor and that in the room where the fire was, were off. The fireman returned to the fire and, later, was killed through contact with a live wire.

It transpired in evidence that there were two tumbler switches on the main switchboard which served as the main control for all lighting circuits. They had originally been linked by a wooden handle, but the link was missing, and there was no other indication of their purpose, which was unknown to the manager. The two switches on the upper floor were both of the single-pole variety. Some months before the fire the Electricity Board had fitted a new kWh meter for lighting; examination after the fire showed that the connections between the meter, the neutral and the tumbler switches were reversed. It was fairly clear that this reversal must have taken place at some time before the fixing of the meter.

The judgement, given by Mr. Justice Barry at Manchester Assizes, was very comprehensive, and involved consideration of the fireman's duty in regard to cutting off the mains supply, and of the statutory and common law duties owed to him by both the occupier and the Electricity Board. The main points were these:—

Although firemen should understand the normal methods of cutting off the supply of electricity to a building, they are not required to possess detailed knowledge of obsolete mechanisms. Thus, the fireman could not be blamed for not recognising the function of the two tumbler switches.

The status of the fireman was, at common law, equivalent to that of an invitee. He was also a person "employed" within the definition of "danger" in the ELECTRICITY (FACTORIES ACT) REGULATIONS, for "persons employed" need not necessarily be in the employ of the occupier, so long as they are lawfully on the premises and acting there in the course of their employment, whatever that may be (*see p. 264*).

The company should have been aware of the way to switch off the lighting circuits, and should have known that the unlinked tumbler switches constituted an unusual danger. By not warning the fireman it had failed in its duty towards him as an invitee, and it made no difference that the manager was unaware of the danger. It was also in breach of Regs. 1, 7 and 9 of the ELECTRICITY (FACTORIES ACT) REGULATIONS, and would clearly have been liable had an employee been injured. The fireman was, in his Lordship's opinion, a "person employed" on the premises and, therefore, by failing to comply with Regs. 1 and 7 (in which the word "danger"

SOME REGULATIONS CONCERNING ELECTRICAL SAFETY

is used), it was liable to him for breach of a statutory duty owed to him.

So far as the Electricity Board's liability went, it had been negligent within the rule in *Donoghue v. Stevenson* (see p. 287), in that, as its "neighbour," it should have had him in contemplation. When the Board connected the new meter the connections had not been tested, and it should have been aware that omission to make a proper test would be likely to cause damage or injury to persons, lawfully on the premises, who might come into contact with the wiring of the lighting system. It could not reasonably be contemplated that the company would examine the connections, for it would be justifiable to assume that the mains supply was properly connected. The failure to test was a negligent omission, and constituted a breach of the duty owed by the Board to the fireman. The Board was probably in breach of Reg. 25 (a) of the ELECTRICITY SUPPLY REGULATIONS as well, in that the leads from the meter and the neutral to the switches, though originally supplied by the occupier, were under the Board's control. But it was not necessary to decide whether the Board was in breach of any statutory duty owed to the fireman, owing to the obvious liability at common law.

In the result, it was held that the company and the Board were each in breach of duty at common law, and the company was additionally liable for breach of statutory duty. The fault of the company was comparatively slight, and the principal blame was upon the Board. The damages awarded to the plaintiff (the widow of the deceased fireman) were therefore apportioned as to ten per cent against the company and as to ninety per cent against the Board.

Mr. Justice Barry's decision was appealed against by the company, and the Court of Appeal held that the fireman was not a "person employed" on the premises, although it was agreed that he was undoubtedly an invitee. Consequently, the company owed no duty to the fireman for breach of the ELECTRICITY (FACTORIES ACT) REGULATIONS, but it was in breach of its common law duty to him as an invitee. The appeal therefore failed and was dismissed.

Sellers v. Best.—The other case, *Sellers v. Best and North Eastern Electricity Board* (1954) (488), heard by Mr. Justice Pearson at York Assizes, raises some interesting points regarding the relative responsibilities of electrical contractors and Electricity Boards in the testing of consumers' installations. The facts were these:—

The first defendant, an electrical contractor, installed an electric water heater at the plaintiff's house and provided a new circuit by which it could be connected directly to the meter. An earth wire was run from the heater to a short earthing rod (about 18 inches

long) which was buried in the soil outside the front door. Having completed the installation, the contractor applied to the Electricity Board for connection, using the standard form requesting the Board to "please inspect and test." The Board connected the new circuit, after certain tests which did not include one of the earth connection. About three months later the plaintiff's wife received a fatal shock from the heater. It appeared that the insulation of the immersion element had broken down to the sheath, and the "earth" provided was of too high a resistance to allow the circuit fuse to rupture. It was shown in evidence that the earthing arrangement was adequate in wet weather only, and that the contractor had not tested for earth resistance.

In any contract for the supply and installation of electrical apparatus there is an implied term that care will be taken to ensure that the apparatus is installed in a reasonable and proper manner (having regard to normal practice), and that it is not left in a potentially dangerous state (*see* pp. 105 and 320). Mr Justice Pearson decided that the contractor in this case was liable to the plaintiff for breach of that implied term, in view of the Institution of Electrical Engineers' "Regulations for the Electrical Equipment of Buildings," and evidence of common practice in the district.

A contractual obligation does not, of course, extend beyond the immediate parties (*see* p. 74), so the contractor was not liable for breach of the implied term to the plaintiff's wife. But, as she was undoubtedly one of those persons whom he should have had in contemplation under the rule in *Donoghue v. Stevenson* (*see* p. 287), and as failure to provide a proper earth for the heater was a negligent act, the learned Judge held that he was liable to her in negligence, and awarded damages under the FATAL ACCIDENTS ACT, 1846, and the LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934 (*see* p. 383 *et seq.*).

The Electricity Board might have been liable either under the ELECTRICITY SUPPLY REGULATIONS or in negligence at common law. Both possibilities were considered by the learned Judge, but he decided, firstly, that the REGULATIONS afforded no cause of action either to the plaintiff himself or to his wife, and, secondly, that the Board owed no duty of care to the latter in connection with defects on those parts of the installation over which it had no direct control. The reasons for that decision are as follows:—

The obligation to give a supply of electricity is contained in s. 27 of the Schedule to the ELECTRIC LIGHTING (CLAUSES) ACT, 1899. This obligation is subject to conditions contained in the section itself, and also to the provisions of the ELECTRICITY SUPPLY REGULATIONS. Reg. 25 (a) places responsibility upon the undertakers "for all

electric lines and apparatus placed by them on the premises of a consumer and either belonging to the undertakers or under their control." This suggests that the undertakers have not the same responsibility for apparatus not in their ownership or under their control, and is an illustration of the principle that responsibility depends upon ownership and control. Reg. 26 imposes a definite obligation in regard to leakage, and breach is an offence punishable with a penalty (Reg. 39). But Reg. 27 gives the undertakers a discretion, for they "shall not be compelled to commence or . . . continue to give a supply of energy" unless they are "reasonably satisfied" as to certain matters. That means that if the undertakers give a supply without being satisfied, they do not commit an offence, for there is nothing to say that an installation must be inspected or tested; power is given only to refuse a supply. It follows, therefore, that this regulation imposes no responsibility upon undertakers for any defects in consumers' installations. So, unless in a particular case the leakage figure at the time of connection exceeds that allowed by Reg. 26, the REGULATIONS will afford no cause of action to a consumer in a case of this nature.

As to the second point, it was alleged by the plaintiff that the Board should have tested the earthing system of the water heater, and it was argued that, because the standard form contained a request that it should "inspect and test" the new installation, there was a contractual obligation to the consumer to give a comprehensive test, although nowhere in the form was the nature of such a test specified. It was further argued that the Board, in undertaking to make tests, misled consumers into thinking that they would be adequate to ensure against any unsafe feature of the installation tested. His Lordship held there was no ground for this assumption but, even had there been one, the obligation would have been purely contractual and could not have extended to anyone other than the plaintiff himself, whom the Board regarded as its consumer.

The learned Judge, in dealing with the question of common law negligence, concluded his judgement with these words (488a):—

"The Board are responsible for bringing the electricity along their own lines, and for making and continuing to have, it may be, a proper connection at the terminal supply points. Then, if they have installed and they still have control of some electrical equipment on what is called the consumer's side, by virtue of that installation and continuing control they would be responsible for that also. It seems to me too much to say that the Board are responsible for what the occupier by himself and his contractors and agents may have done or omitted to do to his own chattels on his own premises. That is carrying the kind of tortious liability which is envisaged in *Donoghue v. Stevenson* too far, and it cannot be held to apply here."

Testing Consumers' Installations.—The extent of the obligation to test an installation may briefly be stated thus. Unless the supply authority has itself done something wrong in connecting an installation to its mains (as by crossing the phase and neutral leads between the meter and the main switch), it cannot be held

responsible for any fault or defect on those parts over which it has no control, provided it has carried out the statutory leakage test in conformity with Reg. 26 of the ELECTRICITY SUPPLY REGULATIONS. The installation contractor cannot hide behind any apparent undertaking by the authority to test his work, and it is for him to satisfy himself that he has done everything he should have done if he is to avoid liability for negligence.

The matter was also raised in *Homer v. Southern Electricity Board* (1953) (489).

Lord Goddard held that it is no part of the duty of an electricity undertaking, when inspecting and connecting extensions to an existing domestic installation, to carry out a test of the installation as a whole, unless specifically requested to do so by the consumer, who must be prepared to pay for that additional service. It would place an intolerable burden upon an undertaking to hold that it was duty bound, every time an extension was connected, to test the other circuits as well.

The Heating Appliances (Fireguards) Regulations

The HEATING APPLIANCES (FIREGUARDS) REGULATIONS, 1953, which came into force on 1st October 1953, were made by the Home Secretary under powers conferred by s. 5 of the HEATING APPLIANCES (FIREGUARDS) ACT, 1952. The purpose of the ACT is to "prohibit the sale or letting of certain heating appliances without an effective fireguard." The ACT and the REGULATIONS are inter-dependant, and the two together form a limited safety code applicable to domestic heating appliances in the nature of "fires," using electricity, gas or oil.

The Provisions of the Act.—It is an offence under the ACT to sell or let on hire or hire-purchase "in the course of a business," any electric or gas fire, or oil heater, as specified in the REGULATIONS, unless guarded in the manner prescribed in the REGULATIONS. Local authorities (defined in s. 7) are empowered (s. 2) to inspect and test appliances on any premises where they are kept for the purpose of sale or letting. Wilful obstruction of any duly authorised inspector is an offence.

Anyone guilty of an offence is liable to a fine of up to £50 (s. 3). Where an offence is committed by a firm, company or other corporate body, a director, manager, secretary or other officer found to have been responsible will himself be liable. Local authorities in England and Wales may institute proceedings (s. 4).

Power to make Regulations, conferred by s. 5, covers the specification of the appliance to be guarded, the types of guards to be fitted ("appropriate to reduce or prevent the risk of fire or injury resulting from accidental contact with, or proximity to, flames or heating elements"), and the making of provision to deal with appliances manufactured before October 1953. Within this scope, the REGULATIONS apply to heating appliances, whether electric, gas or oil, "suitable for use in a dwelling house or other residential premises" (Reg. 1).

The Regulations.—An electric "heating appliance" is an electric fire "other than one which is so constructed" that, when consuming energy "at the maximum rate for which it is designed," the element "is so enclosed within the body of the appliance that there is no likelihood of injury to the person from burning, or of ignition of clothing or other fabrics by reason of, in either case, contact with or proximity to, the heating element" (Reg. 6 (1)). Gas fires and oil heaters are similarly defined, and gas fires which use gas "in liquid form" or "contained in a portable container" are included with those which burn gas from the mains.

Regs. 2 and 3, and the SCHEDULE to the REGULATIONS, deal with standards of construction, and the fitting and testing, of guards, which must, in the result, comply with British Standard Specification No. 1945 of 1953 (490). The Schedule gives statutory effect to the Specification, which embodies tests for determining whether a particular guard complies with the REGULATIONS. Both the appliance and the guard are to "be so constructed that the guard when in use with the appliance shall be securely attached thereto" (Reg. 2). It should be noted that, in the case of electric fires, there is no provision for *electrical* safety, as that is not within the scope of the ACT.

Exemptions.—The circumstances in which the operation of the ACT is EXCLUDED are set out in s. 1. They are not very clearly defined, but it would seem that the effect of this section is to place outside the ACT appliances sold for export, those already on hire or hire-purchase before October 1953, and those let on hire incidentally to the letting of premises. Hire-purchase finance companies, who are never in possession of an appliance and acquire the property only when entering into an agreement, are not liable. It would also appear that a trader or auctioneer who sells an appliance "as the agent of a person who is not acting in the course of a business," will not be liable either. This last exception is

probably limited in practice to the sale of second-hand appliances on commission only, for, if a trader acquires the property in an appliance he will almost certainly bring himself within the ACT. Additionally to these exclusions, **Reg. 4** provides that an appliance which does not comply with the REGULATIONS may be sold "for the purpose of being broken up as scrap to a person who carries on a business of dealing in scrap of that nature."

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Compensation for Personal Injuries

General Considerations

The award of damages to persons injured as the result of negligence is always something of a mystery to the layman in legal matters, and, even to lawyers, the estimation of the amount likely to be recovered is attended by considerable uncertainty. Although accidents to workpeople are usually covered by insurance, such cover is not invariably all-embracing; if the accident is to an invitee or licensee, there may be no insurance cover at all. Consequently, some or all of the liability may fall directly upon an unfortunate employer or occupier of premises.

Increase in Compensation Claims.—Claims for personal injuries are on the increase, and this applies particularly to those brought by injured workpeople against their employers. For example, in the Trinity Sittings of the Queen's Bench Division of the High Court for 1953, there were nearly six hundred cases of all kinds listed for hearing, and of these over half involved personal injuries claims, mostly against employers. Two events at least are responsible for this situation.

The doctrine of common employment was abolished, and the EMPLOYERS' LIABILITY ACT of 1880 repealed, by the LAW REFORM (PERSONAL INJURIES) ACT, 1948; the employer thereby lost one of his defences (*see* p. 326). The NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946 (which came into force in 1948), repealed and replaced the WORKMEN'S COMPENSATION ACTS, 1897 to 1943, with the result that whereas, under the latter ACTS, an employee had to elect whether to claim compensation or to bring an action in damages, by the 1946 ACT he can both claim compensation and sue his employer. A further incentive was provided by the LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945 (*see* p. 288). Previously to the passing of that Act, any degree of negligence by the plaintiff which was shown to have contributed to his injury was an absolute bar to his recovering anything. Now,

if the claim is proved, damages will be awarded in the usual way, but contributory negligence on the part of the plaintiff will be assessed as a percentage of the whole cause of his injury, reducing the damages actually recoverable by that proportion.

The natural result of these changes is that claims, which would have had little or no chance of success a decade ago, are now being made by injured workpeople. In many respects this is undoubtedly a good thing, although it seems to have produced an attitude of mind which fosters the idea that it is always worth while to "have a go." Perhaps that is because, in these days of the Welfare State and the nationalisation of industry, it is considered that any institution controlled by the Government is fair game. Be that as it may, the judiciary are undoubtedly aware of the position, and there is a tendency, both at first instance and on appeal, for the scales to be weighted slightly in favour of the defendant employer in doubtful cases. As has been said many times in the Courts, the employer is not to be regarded as an insurer.

The Assessment of Damages.—In cases which are tried by Judge and jury, it is the latter's function to assess the *quantum* of damages. But trial by jury is now rare in civil cases, particularly in those concerned with personal injuries. (Less than three per cent of Queen's Bench cases are now tried with a jury.) There are two reasons for this.

The ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT, 1933, s. 6, restricts the types of case in which a jury may be demanded to six (which include actions brought on such grounds as libel and slander), unless fraud is alleged. In other cases, including claims for personal injuries, trial by jury is a matter for the discretion of the Court. In practice, this is exercised by a Master of the Supreme Court, who will not, as a rule, allow a jury if considerable scientific or medical evidence has to be taken. The other reason is that, during the war years, it was practically impossible to assemble a jury except for criminal trials. Since the return of more normal conditions, although juries are again available, the legal profession seems to have got out of the habit of thinking in terms of juries, for there are many counsel now practising who have little or no experience of them, save in criminal matters. Another factor is cost of trial, for trial by jury inevitably takes longer than trial without, and is therefore more expensive.

Trial is now usually by a Judge sitting without a jury, and the

Courts have laid down principles for the Judges to follow when carrying out their unenviable task of so fixing damages as to provide adequate and fair compensation for an injured person.

The assessment of damages differs according to whether the injuries have proved fatal or otherwise. That this should be so is obvious, for the considerations are different in each event.

Claims for Injuries

The Basis of Assessment.—The general rule is that the injured person is to be put, as nearly as possible, into the position in which he would have been had no injury been done to him. This can only be accomplished by money, even though, in many cases, money provides no real compensation. As Lord Justice Birkett said in the Court of Appeal in *Rushton v. N. C. B.* (1953) (491a):—

“If money is no compensation, then £5,000, £10,000, £15,000 or £20,000 become meaningless, but the Courts have been compelled by the logic of circumstances to decree that in cases of personal injury the only thing open to the Court is to make an award of damages in money.”

How, then, is such a payment to be assessed? Many factors have to be taken into consideration, not least of which is the pain and suffering undergone, and that which may occur or recur in the future. Another is that a person with severe injuries may lose many of the amenities of life, and may be dependent upon someone else to help him with such mundane but necessary matters as dressing and moving about. Further, his disablement will almost certainly result in reduced earnings. There are many other matters to be looked at, including loss of expectation of life; but even when that has been done, the fact remains that damages cannot be standardised, and there is no real yardstick by which they can be measured. To quote Lord Justice Birkett again, this time in *Bird v. Cocking* (1951) (492a):—

“The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a Judge has to perform, and certainly the task is no lighter when the appellate Court is asked to reconsider the assessment made by a Judge in the Court below. The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the Courts have been making these assessments over many years, and I think that they do form some guide to the kind of figure which is appropriate to the

facts of any particular case, it being for the judge, or for the appellate Court if they are reviewing the matter, to consider the special facts in each case; for I agree . . . that one case cannot really be compared with another."

There are two qualifications to the general rule, the first being that it is the injured person's duty to take all reasonable steps to mitigate his injury. For example, if his accident has rendered him unfit to do the type of work he was engaged in before, he is nevertheless expected to take what employment he can, though he is not bound, of course, to take work merely because it has been offered to him, however suitable it may be. The second qualification is that he must not have been guilty of contributory negligence.

Examples of Awards.—A few examples of awards made in some fairly recent cases will serve to illustrate the difficulties attendant upon assessment. In *Rushton v. N. C. B.* (1953) (491):—

A colliery worker, aged 36, had his gloved right hand caught in a conveyor belt, and his right arm was literally torn from his body. The injury was such that he could never wear an artificial limb. Some ribs were fractured, also, causing chronic bronchitis. This man had originally intended to become a commercial artist, but had taken work in a mine owing to some domestic trouble.

Mr. Justice Byrne, taking all these circumstances into account, and allowing for the fact that he was in receipt of a small pension, and that he had a certain earning capacity (but not as an artist), awarded him £10,000. The Court of Appeal reduced this to £7,000, because it was considered that on the particular facts, and considering past cases, the original sum was too high. Lord Justice Birkett said (491a):—

"If one were freely to say 'Money can be no compensation,' then awarding £10,000, £15,000 or £20,000 would be one thing; but this Court, while it regards the decisions of the past, must also have regard to the future, and the effect that its decisions might possibly have in that direction."

In *Bird v. Cocking* (1951) (492) a factory worker, aged 61, suffered such severe injuries to his hands that the right hand had to be amputated; the left one was so emaciated that only the thumb was of any use. Damages of £10,000 were awarded, but were reduced on appeal to £7,000. By contrast, in *Heaps v. Perrite* (1937) (493), damages of £10,000, granted to a boy who had lost both hands at work, were confirmed by the Court of Appeal, who took into account the fact that he would not be able, even with artificial hands, to dress or undress himself or do other things

without assistance, and that he would never be able to indulge in the usual forms of recreation which appeal to the healthy man.

Although the Court of Appeal may, and often does, reduce an excessive award, it is not unknown for a very considerable increase to be made. Thus, in *Payne v. Grabham and Shute* (1953) (494), an agricultural worker, who injured his head and neck when, because of a defective rope, he fell from a trailer upon which he was loading hay, was awarded £1,320 by the Judge. On appeal, this sum was increased to £2,800, which happened to be the sum his employers had been originally prepared to pay.

At the lower end of the scale, a painter, aged 52, and earning £7 a week, was awarded £1,500 for the loss of an eye (495). A riveter who fell from scaffolding and broke a leg received £850 (496); a labourer who sustained leg injuries which would reduce his ability to obtain employment, £430 (497). Between these two extremes, an apprentice engineer, aged 23, who received injuries to arm and leg which resulted in the shortening of the latter, got £3,800 on appeal (498); and a charge hand, aged 35, received £3,000 for loss of a leg (499).

Claims where Death Results

In cases of death, the assessment of damages is subject to rather different considerations, governed by statute. In order that these may be properly understood, something must be said about the survival of a right of action for damages when the person injured has died as a result of his injuries. Death does not, of itself and apart from the criminal law, create any liability, and it used to be said that it was cheaper to kill an employee than merely to injure him; but this is no longer true.

Statutory Provisions.—At the time when railways were first developed, and there were many accidents, the relatives of those who were unfortunate enough to be killed could recover nothing, while the injured often obtained heavy damages. This led to the passing of the FATAL ACCIDENTS ACT (known as “Lord Campbell’s Act”) in 1846. Under that ACT, as later amended, certain close relatives, namely, husband, wife, children, parents, grandchildren and grandparents, may claim for pecuniary loss sustained by them as a result of the death. The cause of death must, however, have been such that, had the deceased lived, he could himself have brought a successful claim.

The growth of motor traffic between the wars brought about the LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934, which

supplemented the provisions of the ROAD TRAFFIC ACT, 1930, in regard to "third party" insurance (*see* p. 336). This ACT, which is not restricted to road accidents, provides that where there is a right of action for damages vested in a deceased person at the time of his death, that right survives for the benefit of his estate, except in certain cases not here relevant. Before the ACT was passed, the deceased's executors or administrators had no right to claim damages for personal injuries inflicted upon him, except that they could claim on behalf of relatives under the FATAL ACCIDENTS ACT where such injuries were the cause of death. Now, of course, a claim under the LAW REFORM ACT may be brought within a limited period after death, whether or not the injuries caused the death.

These two ACTS are quite independent of each other and are, in a sense, complementary. Claims can be brought under both on account of the same cause of action, the only limitation being that there must be no duplication of the damages awarded.

The Fatal Accidents Act.—To be able to claim under the FATAL ACCIDENTS ACT, some pecuniary loss must be proved by the relatives. Thus, a wife will be allowed compensation to the extent of loss of benefit from her late husband's earnings; a husband can claim damages in respect of the loss of the domestic services of his late wife (on the basis of having to employ a house-keeper). But a father who employs his son in his own business, and pays him the current rate of wages, can claim nothing if his son is killed in, say, a railway accident, unless he can prove that the son was contributing to his, the father's, support (which would, in those circumstances, be unlikely).

In order to ascertain the damages payable, it is necessary to start with the amount of wages that the deceased was earning at the date of his death. From this must be deducted a sum estimated to cover his personal and living expenses. The balance is the basic sum which will be multiplied by a certain number of years' purchase, in accordance with what would have been the deceased's expectation of life (500). The resultant sum is then subject to certain deductions, which include any award under the LAW REFORM ACT of 1934, and any pecuniary benefits which the relatives may have obtained from the death, such as inheritance under the will, or entitlement under a trust or settlement. Payments under policies of life insurance, or by benefit societies, are not deductible, nor are benefits received under the LAW REFORM (PERSONAL INJURIES) ACT, 1948. But money paid to a widow, or into the deceased's estate, by way of death benefit under a contributory pension scheme, must be taken into account (501).

The Law Reform Act, 1934.—It is provided by the LAW REFORM ACT of 1934 that, where death has been caused by an act or omission giving rise to a claim, the damages are to be assessed without reference to any loss or gain to the deceased's estate consequent upon the death. Thus, life insurances and future earnings do not have to be taken into account; nor does the "death grant" under the NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946, nor any benefit receivable under the LAW REFORM (PERSONAL INJURIES) ACT of 1948. Funeral expenses may be claimed additionally to damages, although the cost of a tombstone will not be included.

Loss of Expectation of Life.—One of the grounds upon which damages may be obtained by the injured person himself is that of loss of expectation of life, and this, like the other grounds already mentioned, survives his death for the benefit of his estate. The estimation of such loss in case of death is, rather obviously, inclined to be difficult; but the factors to be taken into account were set out by Lord Simon (then Lord Chancellor) in the House of Lords in *Benham v. Gambling* (1941) (502). They may be summarised in this way.

Expectation of life for this purpose is not to be found by statistical or actuarial methods, such as by consulting the tables prepared by the Registrar-General. "The thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life," though "the age of the individual may, in some cases, be a relevant factor." The test to be applied is an objective one—what kind of future might the deceased have enjoyed; his ability to appreciate what life might have held for him is irrelevant. The damages are to be assessed "in respect of loss of life, not loss of future pecuniary prospects," and no regard is to be had to wealth or status. In any event, only moderate amounts should be awarded, for it is almost impossible to put a money value on the prospects of future happiness.

It was held by Mr. Justice Slade in *Harris v. Brights Asphalt* (1953) (503) that wages which might have been earned over the period between the date of death and the date to which the deceased would normally have lived, cannot be taken into consideration.

The Application of the Acts.—A case which affords a good illustration of the application of both ACTS is *Roughead v. Railway Executive* (1949) (504):—

The deceased, who was killed in a railway accident, was a chartered accountant, aged 43. At the time of his death he was earning £1,600 a year, with immediate prospects of an increase to £2,250,

and ultimate prospects of earning £4,000 or more. He had a wife and two children, to each of whom he left £5,000; his freehold house, valued at some £3,500 was left to his wife. Under the LAW REFORM ACT of 1934, his widow was awarded £250 for his loss of expectation of life and £250 for his pain and suffering. So far as the FATAL ACCIDENTS ACT was concerned, it was found that he expended about £700 a year on his wife and children, and, as it was estimated he would have lived about another 15 years, the total award would amount to £10,500.

Awards under the LAW REFORM ACT rarely exceed about £300, although in special circumstances they may be higher. This is the result of Lord Simon's *dictum* in *Benham v. Gambling*, that only moderate sums should be paid on account of loss of expectation of life.

Settlement of Claims

The assessment of damages, whether for injury or death, is a difficult matter in all but the simplest and most straight-forward of cases. Where liability is admitted, or there is obviously no defence to an action, efforts are usually made to reach a settlement between the parties. In such an event, the only real difference is as to the amount of damages, and it is often a wise thing to accept a reasonable offer rather than proceed to trial and risk losing everything. *Payne v. Grabham and Shute* (see p. 383) provides an example of how costs may be thrown away unnecessarily. A defendant who makes an offer which is not accepted may save some costs by paying the money into Court. The plaintiff is at liberty to take the money out in settlement at any time, but if he leaves it there and proceeds to trial, and then fails to win his case, or to recover more than has been paid in, he will probably be ordered to pay the defendant's costs from the date of payment in.

If the damage sustained is due to the acts of more than one person, then all those persons may be sued, either together or separately, and damages may be recovered against all of them. This is provided by the LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, which also allows a defendant to recover a contribution to the damages he has had to pay from any other person, who, if sued, would have been liable for the same damage. Where two defendants are sued together, the Court has power to apportion the damage between them, in accordance with their

separate liabilities; *Hartley v. Mayoh* (see p. 371) and *Heard v. Brymbo Steel* (see p. 364) provide good illustrations.

Time for Bringing Actions

The LIMITATION ACT, 1939, s. 2 (1) provides, *inter alia*, that actions founded upon simple contract (see p. 169) or tort shall be brought within six years of the occurrence of the cause of action. This provision has been modified in regard to actions for personal injuries by the LAW REFORM (LIMITATION OF ACTIONS, ETC.) ACT, 1954, which became effective on 4th June of that year.

Actions for damages for negligence, nuisance or breach of duty, where the damages consist of or include damages in respect of personal injuries, must now be brought within three years of the occurrence. This applies also to actions against public authorities or nationalised undertakings (see p. 170). In the case of actions brought under the FATAL ACCIDENTS ACT, 1846 (see p. 384), it was originally provided by that ACT that they should be commenced within twelve months of the death of the deceased person; the period is now three years.

If a cause of action arose before 4th June 1954, and was still effective under the old rules at that date, the period of limitation which will apply will be either the old or the new, whichever is the longer. Thus, an action for damages for personal injuries inflicted on 1st June 1954, may be brought at any time up to 31st May 1960; but if the accident had occurred on, say, 6th June 1954, the limitation period would end on 5th June 1957. If, however, the defendant was a nationalised undertaking, the period in either case would be three years.

REFERENCES

- (491) *Rushton v. National Coal Board*. (1953) 1 Q.B. 495; 1 W.L.R. 292. C.A.
(a) at pp. 501; 296.
- (492) *Bird v. Cocking & Sons, Ltd.* (1951) 2 T.L.R. 1260. C.A.
(a) at p. 1263.
- (493) *Heaps v. Perrite, Ltd.* (1937) 2 All E.R. 60. C.A.
- (494) *Payne v. Grabham and Shute*. (1953) *The Times*, 28 Jan. C.A.
- (495) *Davies v. Harris Bros. (Billericay)*. (1953) 1 C.L. 106. Q.B.
- (496) *Thomas Darby v. Redpath, Brown & Co.* (1953) 1 C.L. 106. Q.B.
- (497) *Charles v. Johnson & Sons Smelting Works*. (1953) 1 C.L. 106. Q.B.
- (498) *Paul v. Weaver*. (1953) 1 C.L. 106. C.A.

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- (499) *Blower v. Speirs*. (1953) 1 C.L. 106. **Q.B.**
(500) *Davies v. Powell Duffryn Associated Collieries, Ltd.* (1942) A.C. 601, 617. **H.L.**
(501) *Smith v. British European Airways Corporation*. (1951) 2 K.B. 893.
(502) *Benham v. Gambling*. (1941) A.C. 157, 166. **H.L.**
(503) *Harris v. Brights Asphalt Contractors, Ltd.* (1953) 1 Q.B. 617; 1 W.L.R. 341.
(504) *Roughead v. Railway Executive*. (1949) 65 T.L.R. 435. **K.B.**

APPENDIXES

APPENDIX I

The Responsibilities of Professional Engineers

WHEN considering implied contractual terms, it was pointed out that any person who holds himself out as capable of exercising a skill, to whatever degree, must exercise that skill without negligence (*see* p. 105). This applies most forcibly to professional engineers who, being members of one or more of the senior Engineering Institutions, are employed in their individual capacities under contracts for services (*see* p. 263). Such employment is usually as a consulting engineer.

The conduct of all professional engineers is regulated by the ethical code prescribed by the Institution to which they belong. If they hold themselves out as consulting engineers, and they are members of the Association of Consulting Engineers, the rules of that Association (which are not in conflict with those laid down by the Engineering Institutions) are also binding upon them. As with lawyers, medical practitioners, accountants and other professional persons, the codes of conduct are designed to ensure the maintenance of strict confidence between the engineer and his employer, and the elimination of interests which might conflict with that confidence.

The rules and bye-laws of the Institutions provide that a member who contravenes these codes of conduct may be expelled or compelled to resign. Provided that he has been given a fair hearing and his case has been dealt with in accordance with the ordinary principles of natural justice, the member will have no cause for complaint. It is entirely a matter between him and the Institution concerned, and the Courts will not interfere unless there has been a grave miscarriage of justice, as where the bye-laws have not been observed, the member has not been permitted to present his case sufficiently or at all, or the matter has not been handled throughout in a *bona fide* manner.

Apart from any such codes, however, the law itself has some-

thing to say about professional persons in their relations with their employers. What this is may best be shown, perhaps, by considering the position of the consulting engineer.

It is to be remembered that, unlike medicine and the law, the profession of engineering is not closed, and anyone, whether qualified or not, is entitled to call himself an engineer and to practise as such. The law treats all alike, although it will take cognizance of any wrongful assumption of professional qualifications. What follows applies, therefore, to all who choose to practise as engineers.

Consulting Engineers

The term "consulting engineer" is here used in its widest sense as including any engineer, qualified or not, who is employed as an independent person under a contract for services. Under that contract he is, to all intents and purposes, the agent of his principal in regard to relations with third parties, and his duty towards them is regulated entirely by the terms of the contract with his principal. His duty towards his principal is also regulated by the contract, into which, however, certain implied terms must be read. These are to the effect that he will be liable for LACK OF SKILL, NEGLIGENCE or IGNORANCE OF THE LAW.

Skill and Care.—In common with other professional persons, a consulting engineer is bound to bring to his task that care, skill and competence which is generally recognised as being in accord with ordinary professional standards. If he does not do so, he will be liable in negligence under the contract. But, "a defendant charged with negligence can clear himself if he shows that he has acted in accord with general and approved practice." So said Lord Justice Maugham in *Marshall v. Lindsey County Council* (1935) (505) (specifically approved by the House of Lords in *Whiteford v. Hunter* (1950) (506)).

Negligence.—The duty of care is that owed under the contract, and the engineer will not, therefore, be *prima facie* liable for negligence to third parties, such as his principal's contractors. The furnishing of estimates will normally raise no liability, for there is no guarantee that an estimate represents finality. But the preparation of a report which, due to carelessness, contains false statements and gives a misleading picture will be a negligent act under the contract. However, in the absence of fraud (*see p. 93*), there will be no liability for consequential damage to third parties. This was the effect of the judgement of the Court of Appeal in *Chandler v. Crane, Christmas & Co.* (1951) (507), although Lord

Justice Denning, in a dissenting judgement, considered that the duty of care would extend in any event to those persons whom the writer of the report knew were interested in his findings. But the doctrine of *Donoghue v. Stevenson* (see p. 287) would have no application to such a case.

A contract for services entered into between a consulting engineer and his principal is a personal one, and the engineer's duties and responsibilities cannot be delegated without express authority. He is responsible for all acts or omissions of his employees which amount to negligence, just as though they were his own acts or omissions; he is vicariously liable. But he is not responsible for anything done by someone not employed by him, unless done because of some direction given by him. Such an act, done with his authority, which causes damage to his principal's interests will raise a presumption of negligence under the contract; if damage is caused to a third party, he may be liable to him in the tort of negligence. The latter liability might arise, for example, where personal injury was caused to one of the contractor's employees; it could not arise under contract, for there is no privity (see p. 74) between a consulting engineer and a contractor employed by his principal.

Knowledge of the Law.—A consulting engineer is expected to have a practical working knowledge of the law so far as it is likely to affect the work for which he is responsible to his principal. Such knowledge should be sufficient to put him upon enquiry so that he may know when to advise his principal to obtain legal advice. But he is not expected "to supply minute and accurate knowledge of the law;" it is sufficient if he knows "the general rules applicable" (508). However, it is his duty to become acquainted with any legal decision or enactment which has a bearing upon the conduct of his practice (509). If he is an electrical engineer, he must know and understand, for example, the provisions of the ELECTRICITY SUPPLY REGULATIONS, 1937 (see p. 363), and the ELECTRICITY (Factories Act) SPECIAL REGULATIONS, 1908 and 1944 (see p. 366); if his interests are mainly mechanical, he may require to have a working knowledge of, say, the FACTORIES ACT, 1937 and 1948, and the many SPECIAL REGULATIONS made thereunder (see Chapter 22).

Judicial Functions.—It is usual to provide in the contract for services that the consulting engineer is to settle points of difference between his principal and a contractor. Although there is no

privity of contract between him and the latter, the main contract will contain a provision that certain disputes are to be determined by the engineer, whose decisions will thus be rendered binding upon the contractor.

In making such decisions, the engineer is called upon to exercise an impartial judgement, and he may feel that he is in a difficulty, being torn between allegiance to his principal and fairness to the contractor; this will be particularly so where the dispute is, in fact, between the contractor and the engineer himself. In reality, there should be no difficulty. The engineer, in his judicial capacity, is not liable to his principal under the contract; nor can he be held to have been negligent in the exercise of his judgement. He is in the position of an arbitrator, in that he is bound to exercise his judgement impartially; it is of no consequence that he is not an arbitrator in the strict meaning of that term (510).

In practice, it may be difficult to decide on occasion whether the engineer was acting as his principal's agent or in his judicial capacity. That is a matter to be resolved by the particular facts of the case. If the contract gives the engineer a discretion as to acceptance or rejection, or allows him to fix or vary prices, such discretion can only be exercised judicially; but the issue of a certificate of payment due to a contractor is not a judicial act.

REFERENCES

- (505) *Marshall v. Lindsey County Council*. (1935) 1 K.B. 516, 540. C.A.
- (506) *Whiteford v. Hunter*. (1950) W.N. 553. H.L.
- (507) *Chandler v. Crane, Christmas & Co.* (1951) 2 K.B. 164. C.A.
- (508) *Jenkins v. Betham*. (1855) 15 C.B. 168, 189; 139 E.R. 384, 393. C.P. App.
- (509) *Lee v. Walker*. (1872) 7 C.P. 121. App.
- (510) *Finnegan v. Allen*. (1943) K.B. 425. C.A.

APPENDIX II

Standard Conditions of Engineering Contracts

It is impossible to attempt a complete survey of the many standard conditions of contract available for engineering works; in any event, it is doubtful whether such a survey would prove to be of any real value. But there are certain provisions, common to all sets of conditions, which are sometimes a cause of difficulty, and it is felt that a consideration of some of these might be helpful.

The following STANDARD CONDITIONS are referred to in the text by the abbreviations given.

Inst.C.E. Conditions

General Conditions of Contract for Use in Connection with Works of Civil Engineering Construction.

3rd. Edn. (March, 1951).

The Institution of Civil Engineers, the Association of Consulting Engineers, and the Federation of Civil Engineering Contractors.

I.Mech.E./I.E.E. Conditions "A"

Model Form of General Conditions of Contract (A) for Use in Connection with Home Contracts—With Erection.

1948 Edn. (Reprinted 1951).

The Institution of Mechanical Engineers, the Institution of Electrical Engineers, and the Association of Consulting Engineers.

I.Mech.E./I.E.E. Conditions "A.I.S.F."

Model Form of General Conditions of Contract (Short Form) (A.I.S.F) for Use in Connection with Home Contracts—With Erection.

1st Edn. (1952).

The Institution of Mechanical Engineers and the Institution of Electrical Engineers.

I.E.E. Conditions "C"

Model Form of General Conditions for the Sale of Goods Other than Cables (Home—Without Erection). (1940)

The Institution of Electrical Engineers.

Inst.Str.E. Conditions

General Conditions of Contract for Structural Engineering Works. (1949)

The Institution of Structural Engineers.

R.I.B.A. Conditions

Schedule of Conditions for Building Contracts. (1939; revised 1952.)

The Royal Institute of British Architects, and the National Federation of Building Trades' Employers.

PENALTY CLAUSES

The difference between a penalty and liquidated damages was demonstrated in Chapter 11 (*see* p. 182). It is submitted that in none of the Conditions cited above is a penalty imposed, although there is some variation as to terms. Assuming that in every case time is of the essence (*see below*), liquidated damages become payable if the work is not completed within the stipulated or extended time.

The Inst.C.E., Inst.Str.E. and R.I.B.A. Conditions provide for the payment of a fixed sum per week. In the first two cases, this sum may be reduced in proportion to the amount of work already accepted, but a fair construction of cl. 17 of the R.I.B.A. Conditions seems to indicate that such a variation is not contemplated in that case.

The I.Mech.E./I.E.E. Conditions "A" and "A.I.S.F", on the other hand, prefer to fix liquidated damages as a percentage of the contract price, with a maximum deduction which is not to be exceeded. (The recommended percentages are one per cent and 25 per cent respectively.) Cl. 25 of Conditions "A" reads:—

"If the Contractor fail to complete the Works in accordance with the Contract (except the maintenance thereof as provided in Clause 29 and such tests as are to be made in accordance with Clause 26) within the time fixed by the Contract for the completion of the Works or any extension of such time, or if no time be fixed, within a reasonable time, *and the Purchaser shall have suffered any loss from such failure*, there shall be deducted from the Contract Price the percentage named in the Appendix of the contract value of such portion or portions only of the Works as cannot in consequence of the said failure be put to the use intended for each week between the time for completion of the Works as aforesaid and the actual date of completion, but the amount so deducted shall not in any case exceed the maximum percentage named in the Appendix of the

contract value of such portion or portions of the Works, and such deduction shall be in full satisfaction of the Contractors liability for the said failure."

(Cl. 14 (ii) of Conditions "A.I.S.F" is shorter, but to the same effect.) The words in italics (which are the writer's) are important as showing that, *prima facie*, liquidated damages cannot be claimed unless loss can be proved. Cl. 7 (ii) of the I.E.E. Conditions "C" also provides that "the purchaser shall have suffered loss." This provision serves to confirm that no question of there being a penalty can arise. Further, it is clear that the percentages are to be calculated on the contract value of uncompleted work; this corresponds to the reduction allowed by the Inst.C.E. and Inst.Str.E. Conditions.

TIME CLAUSES AND EXTENSIONS

The question whether time is or is not of the essence of the contract was considered in Chapter 8 (*see* p. 115). Where time is of the essence and there is a fixed date for completion, it is essential that provision be made to extend that time when unavoidable delays have occurred. This is invariably done, not only in fairness to the contractor (who would otherwise be liable in liquidated damages for any delay, however caused), but is for the purchaser's benefit, in that, without such provision, any delay due to his default would render liquidated damages irrecoverable.

As to when an extension may be granted is entirely a matter of the construction of the relevant clause. For example, cl. 24 of the I.Mech.E./I.E.E. Conditions "A" provides:—

"If after the acceptance of the Tender, by reason of any industrial dispute or any cause beyond the reasonable control of the Contractor, the Contractor shall have been delayed or impeded in the completion of the Works, whether such delay or impediment occur before or after the time (if any) or extended time fixed for completion, provided that the Contractor shall without delay have given to the Purchaser or the Engineer notice in writing of his claim for an extension of time, the Engineer shall on receipt of such notice grant the Contractor from time to time in writing either prospectively or retrospectively such extension of the time fixed by the Contract for the completion of the Works as may be reasonable."

In *Miller v. L.C.C.* (1934) (511) it was held that a clause empowering the consulting engineer to grant "such extension of time for

completion of the work, and that either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable," does not enable him to do so after the work is completed. All that the word "retrospectively" implies is that he may wait until the cause of delay has ceased to operate, and then fix a new completion date to which the contractor can work. In such a case, where the extension is a proper one, but is granted out of time, liquidated damages will not be payable, for the purchaser will have waived his right to benefit from the clause. It is submitted that cl. 24 and that with which *Miller v. L.C.C.* was concerned are indistinguishable.

What may be called the "*Miller v. L.C.C.* Clause" must be distinguished from the "*Sattin v. Poole* Clause," of which cl. 18 of the R.I.B.A. Conditions is an example. Cl. 18 provides that, "If in the opinion of the Architect the Works be delayed" by any one of eight specified causes, "then in any such case the Architect shall make a fair and reasonable extension of time for completion of the Works." In *Sattin v. Poole* (1901) (512) it was held that a similar clause allowed an extension of time to be granted even after the works were completed, and this decision was followed and applied by the Court of Appeal in *Amalgamated Building Contractors v. Waltham Holy Cross U.D.C.* (1952) (513) to the interpretation of cl. 18. Lord Justice Denning pointed out that there may be a continuing cause of delay, such as shortage of labour and materials or inclement weather, which is operative right up to the finishing of the work. It follows that, in such circumstances, the engineer should, as a matter of business, be able to grant an extension whether or not the original, or previously extended, contract time has expired (513a).

Cl. 24 of the I.Mech.E./I.E.E. Conditions "A" is the only one in *Miller v. L.C.C.* form. All the others are in *Sattin v. Poole* form, although cl. 6 of the Inst.Str.E. Conditions leaves the whole matter very much at the engineer's discretion.

It may be observed that, in the cases cited above, the relevant clauses all provide that, so long as certain conditions are fulfilled, the architect or engineer "shall" grant an extension of time (except in cl. 6 of the Inst.Str.E. Conditions). This means that, if the clause is not complied with by the engineer, time is no longer of the essence and liquidated damages cannot be claimed.

Where the penalty clause fixes liquidated damages at a rate of so much per week (e.g. one per cent of the contract price), and

names a maximum, the question of repudiation may arise. Suppose that the contractor is guilty of such extended delay that he becomes liable for maximum damages, but has still to complete the contract. Is the purchaser then in a position to repudiate? Unfortunately, a certain answer cannot be given, for there is no decision on this point. On the face of it, it would seem that a right of repudiation could not arise in such a case, for the mere limitation of liquidated damages to a fixed maximum does not, of itself, create a fresh time for completion. This can be done only by the purchaser and contractor agreeing a new completion date, and thus making time once more of the essence (*see Hartley v. Hymans and Charles Richards v. Oppenheim* at p. 117).

CONTRACTOR'S LIABILITY FOR DAMAGE

It is usual to make the contractor liable for damage to the works, subject to certain exceptions and the necessity for him to insure. But there are conditions of contract in use which grant no exception, and this was forcibly brought out in *Farr v. Admiralty* (1953) (514).

The plaintiffs were under contract with the Admiralty for the construction of a jetty, and the contract incorporated the General Conditions of Government Contracts for Building and Civil Engineering Works (515). Work was proceeding under the contract when an Admiralty vessel, due to admittedly negligent navigation, collided with the jetty and caused damage amounting to over £2,000. The plaintiffs were instructed to make good the damage, but the Admiralty refused to meet their claim for the cost, on the ground that cl. 26 (2) of the General Conditions provided that "the contractor shall be responsible . . . for any loss or damage . . . arising from any cause whatsoever."

It was held that the words "any cause whatsoever" included the negligent navigation of an Admiralty vessel, and they were so wide that there was no room for any implied condition granting an exception.

PROPERTY IN MATERIALS AND PLANT

A clause vesting the property of all materials and plant brought on to the site by a contractor is invariably included in conditions of contract covering the supply of materials or equipment "with erection." The object of this type of clause is to give the purchaser some security against the contractor's insolvency, bankruptcy or failure to carry out the contract.

It is necessary to distinguish between materials for incorporation in the works, and plant for use in the operations of erection or construction. As regards the former, this has already been considered (*see* p. 132), and in this connection the law as to fixtures should not be forgotten (*see* p. 134).

A good example is afforded by cl. 53 (1) of the Inst.C.E. Conditions.

"All Constructional Plant Temporary Works and materials provided by the Contractor shall when brought on to the Site immediately be deemed to become the property of the Employer and the Contractor shall not remove the same or any part thereof without the consent in writing of the Engineer which shall not be unreasonably withheld. But the Employer will permit the Contractor the exclusive use of all such Constructional Plant Temporary Works and materials in and for the completion of the Works until the happening of any event which gives right to the Employer to exclude the Contractor from the Site and proceed with the completion of the Works."

This makes it quite clear that everything brought on to the site vests in the purchaser. But cl. 18 of the Inst.Str.E. Conditions is not so specific.

"All materials brought on to the site by the Contractor for use on the Works shall subject always to the Engineer's right of rejection of any materials not approved become the property of the Employer but the Contractor shall be responsible for and shall protect and preserve entire all such materials until the completion of the Works."

Does "materials" include plant? It could be argued that the answer is to be found in cl. 19, for

"... no materials plant temporary buildings and other equipment shall be removed from the site at any time without the consent in writing of the Engineer which consent shall not be unreasonably withheld."

But it is not safe to assume, just because cl. 18 is followed by cl. 19, that the additional words in the latter are to be considered as being incorporated in the former. The better opinion would appear to be that "plant temporary buildings and other equipment" refers to constructional plant, and that "materials" in both clauses refers only to materials to be incorporated in the works.

Hired Plant

Contractors frequently hire constructional equipment, and it is quite clear that such equipment will not, in any event, vest in the

purchaser, however well phrased the vesting clause. The contractor is a bailee for hire, whether the equipment is on hire, or on hire-purchase under a *Helby v. Matthews* agreement (see p. 232). He is not a mercantile agent within s. 9 of the FACTORS ACT, 1889 (see p. 208), and he cannot, therefore, pass the property in the equipment to the purchaser, who could be sued by the true owner in detinue or conversion (see p. 219) if he attempted to enforce his supposed rights under the vesting clause.

MEANINGLESS AND UNNECESSARY CLAUSES

Conditions of contract are sometimes so drafted as to include rights which one or other party has already at common law. Not only does this tend to make the conditions unnecessarily complicated, but it might even result in the complete exclusion of common law rights. This applies particularly to contracts for the sale of goods, the conditions of which should always be drafted with the provisions of the SALE OF GOODS ACT, 1893, in mind, for it would be a pity for some condition to be so expressed as to exclude a desirable condition contained in the ACT.

Forfeiture clauses, which provide for the purchaser taking over the works in the event of the contractor failing to perform his part of the contract, tend to be unnecessarily specific as to the purchaser's rights in the matter. For instance, where a contractor shows an intention not to be bound by the contract, the purchaser has a common law right to exclude him and to take over the works himself. So, too, where time is of the essence, the purchaser may rescind the contract and take possession of the works if the contractor has failed to complete to time.

The Effect of Bad Drafting

Loosely drawn conditions of contract are likely to have the effect of rendering the contract a nullity; or, at best, they may be so meaningless that they can be ignored. For example, a contract for the sale of steel contained a clause which read:—

“Subject to *force majeure* conditions that the government restricts the export of the material at the time of delivery.”

This fell to be considered in *British Electrical & Associated Industries v. Patley Pressings* (1953) (516). It was held, firstly, that the words of the clause were too obscure to be capable of any

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precise meaning, and there was, therefore, no enforceable contract (see p. 233). Secondly, "conditions" meant "clauses" or "stipulations" and not "contingencies" or "circumstances"; as it was not agreed which conditions applied, there was no *consensus ad idem* (see p. 85) and therefore no contract.

Force majeure means, literally, "circumstances beyond one's control"; but it has not yet been judicially defined (if, indeed, it is capable of precise definition). For this reason, the inclusion of "force majeure" in cl. 18 of the R.I.B.A. Conditions as one of the grounds for granting an extension of time (see p. 398) is of doubtful value.

In *Nicolene v. Simmonds* (1953) (517) a contract for the sale of steel reinforcing bars was expressed to be subject to "the usual conditions of acceptance." As there were no "usual" conditions applicable, the Court of Appeal held that the words were meaningless, and, as they left nothing to be agreed, could be ignored. The remainder of the contract was complete and enforceable.

REFERENCES

- (511) *Miller v. London County Council*. (1934) 50 T.L.R. 479. **K.B.**
- (512) *Sattin v. Poole*. (1901) Hudson 306. **K.B. Div.**
- (513) *Amalgamated Building Contractors, Ltd. v. Waltham Holy Cross Urban District Council*. (1952) 2 T.L.R. 269. **C.A.**
(a) at p. 272.
- (514) *A. E. Farr, Ltd. v. Admiralty*. (1953) 1 W.L.R. 965. **Q.B.**
- (515) *General Conditions of Government Contracts for Building and Civil Engineering Works*. Form CCC/Wks/1. Edn. 6. H.M. Stationery Office. (1950)
- (516) *British Electrical & Associated Industries (Cardiff), Ltd. v. Patley Pressings, Ltd.* (1953) 1 W.L.R. 280. **Q.B.**
- (517) *Nicolene, Ltd. v. Simmonds*. (1953) 1 Q.B. 543; 2 W.L.R. 717. **C.A.**

APPENDIX III

SUMMARY OF

The Factories Act, 1937,

AS AMENDED BY THE FACTORIES ACT, 1948

(See Chapter 22.)

PART I. Sections 1 to 11.

General provisions for health, including cleanliness, overcrowding, temperature, ventilation, lighting, drainage of floors and sanitary arrangements.

PART II. Sections 12 to 40.

General provisions as to safety.

SS. 12 to 17 (the "fencing" provisions), **ss. 20 and 21** (women and young persons) and **ss. 25 and 26** (safe means of access, etc.) are dealt with fully in the text (*see* pp. 348 to 359). The remaining sections of this PART cover the following:—

S. 18.—Containers of any kind holding scalding, corrosive or poisonous liquids must be so fenced or covered as to prevent any person falling into them.

S. 19.—Deals with self-acting machines having traversing parts (*e.g.* rack saws and metal planers).

SS. 22, 23 and 24.—Concerned with hoists, lifts, cranes and other lifting machinery, as well as chains, ropes and lifting tackle.

S. 27.—Precautions to be taken in places where dangerous fumes are likely or liable to be present.

S. 28.—Precautions to be taken in respect of inflammable or explosive materials, dust, gas or vapour.

SS. 29 to 32.—**SS. 29 and 30** lay down safety requirements for steam boilers, receivers and containers; **s. 31** does the same for air receivers. **S. 32** deals with exceptions to these requirements.

S. 33.—Construction, maintenance, etc., of water sealed gasholders.

SS. 34 to 37.—Safety provisions and means of escape in case of fire.

S. 38.—Power given to the Secretary of State (*i.e.* the Home Secretary; power since transferred to the Minister of Labour and National Service) to require special safety arrangements to be made at a particular factory, or a class or type of factories.

SS. 39 and 40.—By s. 39, a Magistrate's Court may, upon a complaint being made by a factory inspector, make an order prohibiting the use of dangerous plant, or requiring the occupier to remedy the danger, by repair, alteration or otherwise. S. 40 contains similar provisions in regard to factory premises.

PART III. Sections 41 to 46.

General welfare provisions, covering washing facilities, first aid, etc. Power is given to make special welfare regulations (of which a number have been made for particular trades and industries).

PART IV. Sections 47 to 63.

Special provisions for safety, health and welfare, including the removal of dust and fumes (s. 47), the protection of the eyes (s. 49), humid factories (s. 52), underground rooms (s. 53), basement bakehouses (s. 54) and laundries (s. 55). Power is given by s. 60 for the Secretary of State (now the Minister of Labour and National Service) to make special regulations for safety and health (*see* p. 350).

PART V. Sections 64 to 69.

Deals with the notification of accidents and the outbreak of industrial diseases.

PART VI. Sections 70 to 100.

Conditions of employment of young persons under 18 years of age, and of women, particularly in regard to hours of work and holidays.

PART VII. Sections 101 to 109.

Deals with special applications of the ACT to certain classes of premises (*see* p. 345).

PART VIII. Sections 110 and 111.

Concerned with home work.

PART IX. Section 112.

Concerned with piece work.

PART X. Sections 113 to 121.

Concerned with a number of miscellaneous matters, including the keeping of registers and records. S. 119 deals with the duties of employed persons (*see* p. 359).

PART XI. Sections 122 to 129.

Duties, appointment and powers of factory inspectors and factory doctors.

PART XII. Sections 130 to 148.

Offences, penalties and legal proceedings. S. 132 gives power to the Court to order contraventions to be remedied (*see* p. 347), and s. 139 extends liability to owners of machines in certain cases (*see* p. 346).

PART XIII. Sections 149 and 150.

The general application of the Act.

PART XIV. Sections 151 to 160.

The usual interpretation and general sections contained in any Act of Parliament. S. 151 defines "factory" (*see* p. 343), s. 152 gives other definitions (*see* pp. 345 and 357), and s. 159, *inter alia*, continues certain regulations made under previous Acts.

APPENDIX IV

TABLES OF

Acts of Parliament, Statutory Regulations and Decided Cases

REFERRED TO IN THE TEXT

ACTS OF PARLIAMENT

ACTS OF PARLIAMENT are commonly referred to as "statutes," although this is strictly speaking incorrect. A Statute consists of all the Acts passed in any one year, known as a "Regnal Year" (calculated from the commencement of the Sovereign's reign). Each Act is a "Chapter," and the correct citation of an Act is by reference to the Regnal Year and the Chapter. However, it is simpler to use the "short title" of each Act, because that is the title by which Acts of Parliament are generally quoted (the year being the calender, and not the regnal year).

Acts which apply to Scotland, whether with or without modification, are indicated with the suffix (Sc.).

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Those Regulations which apply to Scotland, with or without modification, are indicated with the suffix (Sc.).

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DECIDED CASES

*(A re-reading of that part of Chapter 1 headed "Reports of
Judicial Decisions" on p. 18 is recommended.)*

The method of referring to cases which is used in this book is that employed universally. Each reference consists of the year of the report (which will, in some cases, be the year following that of the hearing), the volume number (either that within the year or of the whole series of Reports), the abbreviated title of the Report, and the page number upon which the report of the case begins. If two or more page numbers are cited, the second and following are those of the actual pages from which quotations are taken; in some instances direct reference is made to those pages by the words "at p."

The name of the case precedes the reference, and takes the form of *Smith v. Jones*. *Smith* is the plaintiff or appellant, *Jones* the defendant or respondent. The expression "v." (meaning

“versus”) is read as “and” in all civil cases; but a criminal case entitled *Reg. v. Jones* would be read as “The Queen against Jones” (*Reg.* being short for “Regina,” although *R.* is frequently used as a convenient abbreviation for both “Rex” and “Regina”).

All Reports, except the LAW REPORTS, are cited by an abbreviation of the title of the series. That used for the LAW REPORTS indicates the Division or Court in which the case was heard, and is usually sufficient also to show the level at which it was heard. The other series do not always show this. An indication is therefore appended to every case reference which does not show clearly the Court which made the decision.

The following are examples:—

Smith v. Jones. (1950) 66 T.L.R. 1842, 1863. **K.B.**

“Smith and Jones, vol. 66 of *The Times* LAW REPORTS, 1950, page 1842, at page 1863, King’s Bench Division.”

Brown v. Evans. (1949) 1 K.B. 2024. **C.A.**

“Brown and Evans, vol. 1 of the LAW REPORTS for 1949, King’s Bench Division, p. 2024, Court of Appeal.”

Cases are usually reported in more than one series of Reports, but in this book reference to more than one series is made in two cases only. Firstly, cases reported before the introduction of the LAW REPORTS, and which have been reprinted in the “English Reports,” are given the additional reference to the latter series. Secondly, those cases from 1953 onwards which have been reported both in the WEEKLY LAW REPORTS and in the LAW REPORTS are given both references.

Lists of the abbreviations used are given below.

Abbreviated Titles of the Law Reports

A.C.	{ Appeal Cases to the House of Lords and the Judicial Committee of the Privy Council.	{ 1891 onwards. 1875–1890.
App. Cas.		
C. P.	Court of Common Pleas cases.	1865–1875.
C.P.D.	Common Pleas Division cases.	1875–1880.
Ch.	Chancery Division cases.	1891 onwards.
Ch. App.	Chancery Appeal cases.	1865–1875.
Ch. D.	Chancery Division cases.	1875–1890.
Ex.	Exchequer cases.	1865–1875.
H.L.	English and Irish Appeals to the House of Lords.	1865–1875.
K.B.	King’s Bench Division cases.	1902–1951.
P.	{ Probate, Divorce and Admiralty Division cases.	{ 1891 onwards. 1875–1890.
P.D.		

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Q.B.	{ Queen's Bench cases.	1865-1875.
	{ Queen's Bench Division cases.	{ 1891-1901.
		{ 1952 onwards.
Q.B.D.	Queen's Bench Division cases.	1875-1890.

Abbreviated Titles of Reports other than the Law Reports

Ad. & E.	Adolphus and Ellis.
All E.R.	The "ALL ENGLAND" LAW REPORTS.
B. & Ad.	Barnewall and Adolphus.
B. & S.	Best and Smith.
Beav.	Beavan.
Bing.	Bingham.
Bing. (N.C.)	Bingham, New Cases.
Black. H.	Henry Blackstone.
C.B.	Common Bench.
C.B., N.S.	Common Bench, New Series.
C. & J.	Crompton and Jervis.
C.L.	"Current Law" (Monthly).
C.L.C.	"Current Law" Consolidation.
C.L.Y.	"Current Law" Year Book.
Co. Rep.	Coke.
Com. Cas.	"Commercial Cases."
De G. M. & G.	De Gex, Macnaghten and Gordon.
Doug.	Douglas.
Dunlop	Scottish Court of Session cases, 2nd Series.
E.R.	The "English Reports."
El. & Bl.	Ellis and Blackburn.
Elect. Rev.	The " <i>Electrical Review</i> ."
Exch. Rep.	Exchequer Reports (Welsby, Hurlstone and Gordon).
Fraser	Scottish Court of Session cases, 5th Series.
Hudson	" <i>Hudson on Building Contracts</i> ," 4th Edn., Vol. 2.
Hurl. & Colt.	Hurlstone and Coltman.
K. & J.	Kay and Johnson.
L.J.	" <i>Law Journal</i> " Reports.
L.T.	" <i>Law Times</i> " Reports.
Ll. L. Rep.	"LLOYD'S LIST" LAW REPORTS.
M. & G.	Manning and Granger.
M. & W.	Meeson and Welsby.
Q.B.	Queen's Bench Reports (Adolphus and Ellis, New Series—not to be confused with the later LAW REPORTS).
T.L.R.	" <i>The Times</i> " LAW REPORTS.
Taunt.	Taunton.
Term	Term Reports (Durnford and East).
<i>The Times</i>	" <i>The Times</i> " Newspaper.
W.L.R.	THE WEEKLY LAW REPORTS.
W.N.	" <i>Weekly Notes</i> ."
Wm. Bl.	Sir William Blackstone.

Other Abbreviations

Aff.	Affirmed (on appeal).
Adm.	Admiralty.
App.	Appeal.

ACTS OF PARLIAMENT, REGULATIONS AND CASES

Assize.	Case heard on Circuit.
C.A.	Court of Appeal.
C.C.	County Court.
C.C.A.	Court of Criminal Appeal.
C.P.	Court of Common Pleas.
Ch.	Court of Chancery <i>or</i> Chancery Division.
Div.	Divisional Court.
Ex.	Exchequer Court.
<i>Ex. p.</i>	<i>Ex parte</i> application (<i>see</i> p. 437).
H.L.	House of Lords.
<i>In re</i>	In regard to.
(Ir.)	Irish case.
K.B.	King's Bench (Division).
(N.I.)	Northern Ireland case.
P.C.	Judicial Committee of the Privy Council.
Q.B.	Queen's Bench (Division).
R.C.	Rolls Court (the old Chancery Court of the Master of the Rolls).
<i>Reg.</i>	Regina ("The Queen").
(Sc.)	Scottish case.
Sc. Ct. Sess.	Scottish Court of Session.
V.C.	Vice Chancellor's Court (Chancery—now obsolete).
Var.	Varied (on appeal).

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Glossary of Legal Terms

NOT all the legal terms used in this book are included. Explanations of other terms may be found in the text by reference to the Index.

Ab initio. "From the beginning." A contract which is void *ab initio* is one which has never had any real existence (*see* p. 78).

Action. A civil proceeding at law, brought by the PLAINTIFF (*q.v.*). By contrast, criminal proceedings are prosecutions brought on behalf of the Crown.

Ad hoc. "For a particular purpose."

Affidavit. A statutory declaration in writing, in which a person deposes on oath to certain facts (*see* p. 29).

Appellant. The party who appeals from the decision of the Court.

Attorney. The old name for solicitor (*see* p. 20). A "POWER OF ATTORNEY" is a formal document (a deed) under which one person empowers another to act as his agent (*see* p. 196).

Attornment. Where goods are in the possession of another as a BAILEE (*q.v.*) and he agrees to buy them, the concurrence of the owner, and his agreement to sell, constitutes delivery "by attornment" (*see* p. 137). If goods are held by a third party, who acknowledges that he is ready to hand them over to the buyer, he is said to "attorn" to the buyer (*see* p. 138).

Bailee. He who holds the goods of the owner under a contract of BAILMENT (*q.v.*), express or implied. He has the right to POSSESSION (*q.v.*) without having the PROPERTY (*q.v.*) in them (*see* pp. 123 and 212).

Bailment. The delivery of goods by one person to another for some specific purpose and upon the condition that, when the purpose has been fulfilled, they shall be redelivered (*see* p. 212).

Bailor. One who entrusts goods to another under a contract of BAILMENT (*q.v.*) (*see* pp. 123 and 212).

Bona fides. Good faith; honest intentions.

Chattels. All property which does not consist of freehold land. Leaseholds are "CHATELS REAL"; goods and other movable articles are "CHATELS PERSONAL."

Common law.

(i) Judge-made law as opposed to that enacted by Parliament (*see* p. 4).

(ii) Customary law, as opposed to EQUITY (*q.v.*) (*see* p. 8).

Consensus ad idem. "Agreement as to the same thing." The common consent of the parties to a contract, necessary if it is to be valid (*see* p. 85).

Conversion. A TORT (*q.v.*). Dealing in goods in a manner inconsistent with the rights of the true owner, so as to constitute an unjustifiable denial of his TITLE (*q.v.*) to them (*see* p. 219).

Curtilage. Originally a courtyard adjoining a house. Now any area surrounding a building and which is part of the property.

Damages. Monetary compensation for loss or injury sustained by reason of breach of contract or TORT (*q.v.*) (*see* pp. 173 and 289).

Defendant. The party against whom an ACTION (*q.v.*) is brought.

Detinue. A TORT (*q.v.*). The wrongful detention of the possession of goods against a claim by someone who is better entitled to them (*see* p. 219).

Disability. Legal incapacity (*see* pp. 62-74).

Distress. A landlord's power to seize movable property and to sell it in satisfaction for the non-payment of rent.

Earnest. Any valuable thing given by one party to another in token of his good faith in entering into an agreement with him. It is returnable provided the giver carries out his part of the bargain (*see* p. 151).

Ejusdem generis. "Of the same kind." The rule of interpretation which bears this name is that where particular words are followed by general words, the latter will be confined to the same category of persons or things as those to which the particular words apply (*see* p. 37).

Engross. To engross is to copy out a legal document in "copper-plate" handwriting, although typescript is invariably used at the present time (*see* p. 56).

Equity.

(i) Fairness or natural justice.

- (ii) Rules originally formulated and administered by the Court of Chancery, as a relief against the unfairness of common law rules (*see* p. 8).

Estoppel. A rule of evidence which precludes the denial of the truth of a statement previously made (*see* p. 26).

Ex parte. "On behalf of one side only." An application in any judicial proceeding made either by someone who is interested but not a party, or by one party in the absence of the other (*see* p. 186).

Executed.

- (i) A DOCUMENT is "executed" when it has been signed and, if a deed, also sealed and delivered (*see* p. 56).

- (ii) A CONTRACT is "executed," either wholly or partially, so soon as one party either has performed or has begun to perform his obligations, or has made no attempt to carry them out within the time limited for performance (*see* p. 153).

Executory. A DOCUMENT which remains to be EXECUTED (*q.v.*) is said to be "executory." A CONTRACT is executory when agreement has been reached, but nothing has yet been done under its terms (*see* pp. 49 and 153).

Felony. A serious crime, such as murder, arson, burglary or housebreaking. To be contrasted with MISDEMEANORS, which include false pretences, perjury and offences under the Factories Acts. (*See also* LARCENY.)

Force majeure. "Circumstances beyond one's control." (There is no precise legal definition) (*see* p. 402).

Hypothecate. To PLEDGE (*q.v.*) a ship or its cargo (*see* p. 130).

In pari delicto. "Equally at fault" (*see* p. 83).

Injunction. An order of the Court directing that some threatened future act is not to be done, or some past wrongful act is to be undone. If granted as the result of judgement in an ACTION (*q.v.*), it will be "perpetual" or "final"; otherwise it will be "INTERLOCUTORY" (*q.v.*) (*see* p. 186).

Inter alia. "Among other things." An indication that a category of persons or things is not closed.

Interlocutory. Proceedings taken incidentally to the main trial of an ACTION (*q.v.*) are termed "interlocutory." (*See also* INJUNCTION.)

Invitee. One who is on another's premises for some purpose in which both have an interest (*see* p. 299). (*Contrast* LICENSEE.)

Laches. Delay in bringing an ACTION (*q.v.*) for a remedy in EQUITY (*q.v.*) (*see* p. 171).

Larceny. A generic term used to cover a number of specific criminal offences which have the common element of stealing. Some offences are misdemeanors, others FELONIES (*q.v.*) (*see* p. 132).

Licensee. One who is on another's premises with permission ("by leave and licence") (*see* pp. 273 and 298).

Lien. The right to hold another's property pending the performance by that other of some obligation (usually the payment of money) (*see* pp. 190, 218 and 222).

Locus poenitentiae. "Opportunity of repentance." The interval between the payment of money or the delivery of goods for an illegal purpose and the carrying out of that purpose (*see* p. 83).

Mandatory.

(i) A mandatory BAILMENT (*q.v.*) is a voluntary bailment whereby the BAILEE (*q.v.*) undertakes to do something to or with the article bailed, usually for the benefit of the BAILOR (*q.v.*) (*see* p. 214).

(ii) A mandatory INJUNCTION (*q.v.*) is a direction by the Court that the continuance of an existing wrongful state of affairs must cease, or that a past wrongful act must be undone (*see* p. 186).

Non est factum. "It is not his deed." A plea by a person who has signed a document in the mistaken belief that it is of a kind totally different from that which it is in fact (*see* p. 90).

Novus actus interveniens. "A new act intervening." Some act not in reasonable contemplation (*see* p. 290).

Obiter dictum. A "saying by the way." Any observation by a Judge upon a legal point suggested by the case before him, but not one which affects the decision in that case (*see* p. 17).

Plaintiff. The party who brings an ACTION (*q.v.*).

Pleadings. Formal documents exchanged between the parties to a dispute after the WRIT (*q.v.*) has been served, in order that the issues between them may be narrowed and clarified before trial (*see* p. 23).

Pledge. A form of BAILMENT (*q.v.*) of goods as security for a loan of money, by which the pledgee obtains a special PROPERTY (*q.v.*) in them enabling him to sell them should the right to do so arise (*see* p. 216).

- Possession.** The physical control of something, coupled with the intention of retaining it, whether or not there is a right so to do.
- Prescription.** The acquisition of some right by reason of lapse of time. It is presumed that the right existed from the beginning of legal memory (*i.e.* from the year 1189), although its proved existence may be for only twenty years (*see* p. 69).
- Prima facie.** "On the face of it." In evidence, a *prima facie* presumption is one which may be displaced or rebutted by proven facts (*see* p. 25).
- Privity.** The relationship between persons having a common interest. In the sphere of CONTRACT it exists between the immediate parties (*see* p. 74).
- Property.** A right of ownership, vested in the holder by virtue of TITLE (*q.v.*) (*see* p. 123).
- Quantum meruit.** "As much as he has earned." A claim for reasonable remuneration in return for services rendered (*see* p. 119).
- Quantum valebant.** "As much as they were worth." A claim for reasonable remuneration for goods supplied. Analogous to *quantum meruit* (*q.v.*), with which it is usually confused (*see* p. 119).
- Ratio decidendi.** The ground or grounds of a decision or judgement in a Court of Law (*see* p. 17).
- Res ipsa loquitur.** "The thing speaks for itself." A rule of evidence affecting the onus of proof where damage or injury occurs in such circumstances that it appears highly improbable that it could have occurred without negligence (*see* p. 288).
- Res judicata.** Short for *res judicata pro veritate accipitur*—"a thing adjudicated is received as the truth." Judicial decisions are conclusive until reversed by a higher Court, and they cannot be questioned (*see* p. 26). (*See also stare decisis.*)
- Res perit domino.** "Depreciation is the affair of the owner." As the risk in goods *prima facie* (*q.v.*) passes with the property in them, the depreciation of goods which remain in the possession of the seller will be the responsibility of the buyer who has acquired the property. By equality of reasoning, any appreciation is to the advantage of the owner, so that he who has the property stands to gain as well as to lose (*see* p. 128).

Respondent. The party against whom an appeal is brought.

Restitutio in integrum. Putting a person who has suffered damage as nearly as possible into such a position as though no wrong had been done to him. The basic principle in the award of DAMAGES (*q.v.*) (*see* p. 173).

Stare decisis. The doctrine of judicial precedent, whereby a decision made in one Court is binding upon other Courts (*see* p. 17).

Status quo. The original state of things.

Statute. An Act of Parliament. Strictly, all the Acts passed in any one year of the Sovereign's reign, each Act being a "Chapter" (*see* p. 406).

Subpoena. A form of WRIT (*q.v.*) used to compel the appearance of a witness at the hearing of a case, with a penalty for default. There is the *subpoena ad testificandum* where he is required to give oral evidence only; and the *subpoena duces tecum* where he is required to produce documents (*see* p. 29).

Taxation. The examination and (possible) reduction of a solicitor's bill of costs by a Taxing Master of the Supreme Court, in accordance with a fixed scale (*see* p. 15).

Tender. An offer. It may be:—

- (i) An offer which, by acceptance, constitutes a contract (*see* p. 58).
- (ii) An offer of performance under a contract for work and materials or the sale of goods. Refusal of a valid tender constitutes complete performance (*see* p. 122).
- (iii) An offer to pay a debt. Tender of payment which is refused does not extinguish the debt (*see* p. 149).

Title. The right to ownership of property. "Good title" signifies the absolute right of the true owner (*see* p. 129).

Tort. A civil wrong. The infliction of harm by one person upon another, not giving rise to criminal liability. (From the Latin *tortus*, meaning "twisted, crooked, contorted") (*see* p. 13).

Trespass. A TORT (*q.v.*).

- (i) Trespass to GOODS is the wrongful interference with the goods of another resulting in some damage or loss (*see* p. 220).
- (ii) Trespass to LAND is the unjustifiable interference with the possession of it (*see* p. 297).

Trust. A relationship between two persons, based on con-

fidence, whereby one (the TRUSTEE) holds property on behalf of the other (the BENEFICIARY) (*see* p. 13).

Uberimae fidei. "Of the fullest confidence." Contracts are said to be *uberimae fidei* when there is a duty to make full disclosure, as in contracts of insurance (*see* p. 92).

Ultra vires. "In excess of authority" or "beyond the power." Any act done outside the scope of statutory or other authority and which cannot be validated (*see* pp. 20 and 70). But an act within the powers given will be *intra vires*.

Vicarious. "Acting as a substitute." The liability of an employer for the acts of his employees is a vicarious one (*see* p. 264).

Volenti non fit injuria. "That to which a man assents is not an injury." A defence to an ACTION (*q.v.*) for negligence. *Scienti non fit injuria* ("That of which a man has knowledge is not an injury") is no defence (*see* p. 292).

Writ. A judicial writ is a document issued by the Court in the Queen's name on behalf of the PLAINTIFF (*q.v.*) to an ACTION (*q.v.*) and addressed to the DEFENDANT (*q.v.*), by way of commencing proceedings. (There are other forms of writ with which we are not here concerned) (*see* p. 23). (*See also subpoena.*)

Bibliography

THIS short bibliography has been compiled with the idea of assisting those readers who may wish to gain a working knowledge of branches of the law in which they are interested, but which either have not been dealt with at all in this book, or, for reasons of space, have not been fully treated. It is submitted that there is no reason why any reader of the present book should not derive considerable understanding from a study of any of the books and papers listed below.

The following classification is used:—

- † Intended for readers who have no knowledge whatever of the law.
- †† Intended for law students, but should prove of value to others.
- * Written primarily for lawyers, but can be read to advantage by anyone who has acquired some knowledge of law.
- ** Standard works. Useful principally for reference to particular points.

[Prices have been appended merely as a guide; they were correct at the time of going to press.]

The General Law

- † "THE BOOK OF ENGLISH LAW." Edward Jenks. 5th Edn. by D. J. L. Davies. John Murray (London, 1953). (21s.)

A full and interesting study of the English Legal System.

- †† "A FIRST BOOK OF ENGLISH LAW." O. Hood Phillips. 2nd. Edn. Sweet and Maxwell (London, 1953). (17s. 6d.)

Rather more technical than "The Book of English Law."

Engineering Contracts

- ** "THE LAW OF BUILDING AND ENGINEERING CONTRACTS." Alfred A. Hudson. 7th Edn. by Lawrence Mead. Sweet and Maxwell (London, 1946). (80s.) [Out of print. New edition in preparation.]

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Industrial Relations

- * "THE LAW OF TRADE UNIONS." H. Samuels. 4th Edn. Stevens (London, 1949). (17s. 6d.)
- † "INDUSTRIAL LAW." H. Samuels. 4th Edn. Pitman (London, 1949). (16s.)
- † "INDUSTRIAL INJURIES." H. Samuels and R. S. W. Pollard. 2nd Edn. Stevens ("This is the Law" Series) (London, 1950). (4s.)

Deals principally with the National Insurance (Industrial Injuries) Act, 1946, and the Law Reform (Personal Injuries) Act, 1948.

- † "CONCILIATION AND ARBITRATION IN INDUSTRIAL DISPUTES." J. R. W. Alexander. Heffer (Cambridge, 1952). (2s.)

Deals with the Conciliation Act, 1896, the Industrial Courts Act, 1919, the Industrial Courts (Procedure) Rules, 1920, and the Industrial Disputes Order, 1951.

Factories

- ** "REDGRAVE'S FACTORIES, TRUCK AND SHOPS ACTS." John Thompson and Harold R. Rogers. 18th Edn. Butterworth (London, 1952). (50s.)

Covers in detail the whole of the Factories Acts and all the relevant regulations.

- ** "FACTORY LAW." H. Samuels, 5th Edn., with Supplement. Stevens (London, 1951 and 1953). (63s.)
- † "MEMORANDUM BY THE SENIOR ELECTRICAL INSPECTOR OF FACTORIES ON THE ELECTRICITY REGULATIONS (Factories Acts, 1937 and 1948)." 4th Edn. H.M. Stationery Office (London, 1951). (3s.)

A technical guide to the practical application of the Electricity (Factories Act) Special Regulations, 1908 and 1944.

Patents, Trade Marks, Copyright and Industrial Design

- † "INVENTIONS, PATENTS AND MONOPOLY." Peter Meinhardt. 2nd Edn. Stevens (London, 1950). (30s.)
- † "PATENTS AND REGISTERED DESIGNS." T. A. Blanco White. 2nd Edn. Stevens ("This is the Law" Series) (London, 1950). (4s.)
- † "TRADE MARKS AND THE LAW OF UNFAIR COMPETITION." T. A. Blanco White. 2nd Edn. Stevens ("This is the Law" Series) (London, 1951). (5s.)
- * "COPYRIGHT AND INDUSTRIAL DESIGNS." A. D. Russell-Clarke. Sweet and Maxwell (London, 1951). (37s. 6d.)

Miscellaneous

- †† "THE PRINCIPLES OF MERCANTILE LAW." J. Charlesworth. 7th Edn. Stevens (London, 1951). (15s.)
- † "THE EXPORT TRADE." C. M. Schmitthoff. 2nd Edn. Stevens (London, 1950). (25s.) [*Out of print. New edition in preparation.*]

A manual of inestimable value to all concerned with the business of export.

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NOTE. A number of expressions, commonly found in contracts and elsewhere, are listed under the title "WORDS AND PHRASES." Latin expressions are similarly listed under "LATIN PHRASES AND MAXIMS."

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