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

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

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

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

# COMMONWEALTH IMMIGRATION ACT

## *Meaning of Offence Punishable by Imprisonment for One Year*

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

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

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

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

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

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

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

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

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

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

---

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

# BUSINESS AGENTS ACT

## *Rights of Purchaser under S. 39.*

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

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

(a) the contract is in writing; and

(b) the contract contains the following particulars namely

(i) the name, address and description of the vendor; and

(ii) the name, address and description of some person to whom all moneys falling due under the contract may be paid; and

(c) the contract if the consideration mentioned is £200 or more, or if it is one of a number of contracts forming substantially one transaction in which the total consideration is £200 or more is executed by the purchaser in the presence of two witnesses neither of whom shall be the vendor, the vendor's agent, or any person employed by the vendor's agent.

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

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

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

---

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