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

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

CONTRACT PENALTY CLAUSES

Principles to Apply in Determining Validity

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

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

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

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

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

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

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1. [1915] A.C. 79 at 86-87.
2. [1958] S.A.S.R. 136.

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

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

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

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

EVIDENCE

Admissibility of Confessions—Judges' Rules

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

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

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

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

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

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