However, the perpetuation, through the logic of a strictly applied procedural law, of an acknowledged error in substantive law does not produce a happy result; to say that it is reprehensible may be doing an injustice to the law; to say that it is jurisprudentially satisfactory would be to acknowledge that the law was doing an injustice to the community, which is entitled to expect that justice will not be 'falsely true'.

R. C. TADGELL

UNIVERSAL GUARANTEE PTY. LTD. v. CARLYLE[1]

Contract – Hire Purchase – Enforceability of Minimum Hiring Clause

The defendant C had signed one of the plaintiff company's printed forms offering to enter a hire-purchase agreement for a refrigerator. Clause 11 of the document stated that on determination of the hiring the company would be entitled to retain all sums paid by the hirer and to 'recover all damages for breach of agreement and also as compensation for the depreciation of goods, the sum, if any, by which the sums previously paid by [the hirer] . . . hereunder, shall be less than that sum, which, together with the value of the goods at the time of such determination . . . and the moneys paid by [the hirer] . . . hereunder, amount to the purchase price of the goods', the 'purchase price' and the 'value' of the goods to be ascertained in accordance with the 1936 Hire-Purchase Agreements Act.[2] The company signed the acceptance form as provided, but by mistake there was also sent to C an inappropriate document purporting to notify acceptance, which, although it agreed with the original form in most details, purported in clause 11 to entitle the company on determination to recover, in all, up to seventy-five per cent of the purchase price.

When C fell into arrears, the company repossessed the refrigerator and sued for moneys allegedly payable as compensation under clause 11 in the original document. At first instance, the stipendiary magistrate upheld the defendant's contentions that the second document constituted the true agreement and that clause 11 therein was a penalty; therefore he dismissed the company's claim. The plaintiff obtained an order to review and in the subsequent hearing argued that it was the first document that constituted the true agreement, which contention Sholl J. upheld. His Honour further held that clause 11 of that document was fully enforceable since it was not a

[1] [1957] V.R. 68. Supreme Court of Victoria; Sholl J.

[2] Although this clause *prima facie* repeats the formula in the Hire-Purchase Agreements Act 1936, s. 4, and apparently is assumed to do so by court and counsel in this case, the clause in fact permits a double deduction for the amount of hire already paid by the hirer – through the company's inadvertance rather than generosity, it seems. This does not affect the result of the case.

penalty at common law nor was it affected by the Hire-Purchase Agreements Act 1936. He made the order absolute and remitted the case to the magistrates.

As for the document sent in error, Sholl J. easily held that the agreement was constituted by the defendant's offer and the plaintiff's acceptance, and that this was not affected by the subsequent document since the parties did not thereby intend to effect any contractual relationship. The line of cases cited to the court, (including *Bellamy v. Debenham*[3] and *Perry v. Suffields*[4]), was distinguished on the ground that in each of those cases, *some* contractual relationship was intended even though it was not of precisely the same nature as the relationship in fact established. Therefore on the facts and on the law, the second document was irrelevant since the first comprised the true terms of the agreement.

To decide the enforceability of clause 11 in the original document Sholl J. chose first to examine the authorities relevant to the question of the application of the doctrine of penalties to minimum hiring clauses.

In 1926, *Elsey & Co. Ltd. v. Hyde*[5] was decided, and although unreported, it was seized on[6] as authority[7] for the proposition that a sum, payable by virtue of a clause in a hire-purchase agreement on either a breach of the agreement or on an event which did not constitute a breach (*e.g.* voluntary return of the goods by the hirer), could not be a penalty in one case and be not a penalty in the other, and since it could not be a penalty in the second, it was not a penalty in *either* case. In Victoria, the next relevant decision was *Greene v. Shean*[8] in 1934, where the hirer had voluntary determined the hiring and the law as to penalties was held to be therefore inapplicable.[9]

In the same year, in *Green v. Carfarella,*[10] a clause similar to that in *Elsey & Co. Ltd. v. Hyde,* was held by Mann J. to be a penalty since breach of the agreement had brought the case before the court, even though the same sum was described as payable also on events which would not constitute breaches of the agreement. The court was helped to this conclusion by the fact that the agreement

[3] (1890) 45 Ch.D. 481. [4] [1916] 2 Ch. 187.

[5] Unreported, but noted in *Jones and Proudfoot's Notes on Hire-Purchase Law* (2nd ed., 1937), 107, and G. Sawer: 'The Minimum Hiring Clause in Hire-Purchase Agreements', (1936) 10 *Australian Law Journal,* 167, 168.

[6] *E.g.* G. Sawer, *loc. cit.*

[7] The important statement in this case was not strictly necessary to the decision, since the amount payable was held to be reasonable, and therefore it could have been a penalty anyway.

[8] Unreported, but noted by G. Sawer, *loc. cit.*

[9] A similar case was *Associated Distributors Ltd. v. Hall* [1938] 2 K.B. 83, where the Court of Appeal came to the same conclusion as in *Green v. Shean.* A short note on the odd result which such a conclusion produces, appeared in (1938) 54 *Law Quarterly Review,* 171-172.

[10] (1934) unreported, but noted by G. Sawer, *op. cit.* 168-169.

provided for payment of seventy-five per cent of the option price *as well as* damages for any breach of contract: in such a case the seventy-five per cent of the option price could hardly be a genuine pre-estimate of damages if recoverable in addition to damages for any loss suffered by the owner. In this case however the plaintiff was not allowed to recover anything as legitimate damages, since in refuting allegations of misrepresentation, he showed he had suffered no loss at all.

Although in 1938 the Court of Appeal's decision in *Associated Distributors Ltd. v. Hall*[11] apparently settled it that if the alleged penalty clause comes before the court in an event which is not a breach of the agreement by the hirer, then the law as to penalties is inapplicable[12], the *Green v. Carfarella* approach still conflicted with the *Elsey & Co. Ltd. v. Hyde* approach when the agreement comes before the court on a breach by the hirer.[13] Mr Justice Dean in 1936 suggested that 'a minimum hiring clause is not in any event a penalty but is increased rental payable by reason of the shortened period of hire'.[14] However that suggestion may have been received in 1936, subsequent cases have surely rejected it.

In 1937 the problem came before the Supreme Court of Victoria in *Universal Guarantee v. Jarvis*.[15] The Full Court however, threw little light on the subject. There the owner, on determination of the agreement by itself or by the hirer, could recover all moneys payable under the agreement up to fifty per cent of the total purchase price, plus all damages for disrepair, plus damages for breach of the agreement. Mann C.J. allowed the owner's claim (which had been reduced to £50 in the Court of Petty Sessions) as legitimate damages recoverable *anyway*. Macfarlan J. agreed to allow the claim as damages and left the question of penalties alone, while Gavan Duffy J., although abandoning the reasoning of *Elsey's* case, set up a test of whether the amount payable was a collateral arrangement or not. Then in England in 1942, Simonds J. in *In re Apex Supply Co. Ltd.*,[16] followed *Elsey & Co. Ltd. v. Hyde,* thus reviving it.

With the law in so uncertain a state, the problem came squarely before the Court of Appeal in *Cooden Engineering Co. Ltd. v.*

[11] [1938] 2 K.B. 83.

[12] In *Cooden Engineering Co. Ltd. v. Stanford* [1953] 1 Q.B. 86, Somervell L.J. expressly left this question open, but Hodson L.J., *semble,* thought the clause should be held a penalty in either case. It is submitted that the question was no longer open to the Court of Appeal after *Hall's* case, a view which Sholl J. apparently supports.

[13] For criticism of both views: G. Sawer, *op. cit.,* 169, and Gilbert: 'The Minimum Hire Provision in Hire-Purchase Agreements' (1938) 12 *Australian Law Journal,* 198-201.

[14] *Hire-Purchase Law in Australia* (2nd ed. 1938), 76-80.

[15] Unreported, but noted by Dean, *op. cit.,* 310. Criticized by Gilbert, *op. cit.,* 139-144.

[16] [1942] Ch. 108. Briefly discussed in (1942) 16 *Australian Law Journal,* 178-179.

Stanford.[17] The agreement there allowed the owner on determination by either the company itself or by the hirer, to recover the full balance of the purchase price with additional interest. The hirer had fallen into arrears, the company had retaken possession and now sued the hirer for the balance of the instalments. Somervell and Hodson L.JJ. held the *Elsey v. Hyde* argument to be untenable,[18] and that applying the tests laid down in *Dunlop Pneumatic Tyre Co. v. New Garage,*[19] this clause was a penalty and therefore unenforceable. Jenkins L.J., dissenting, followed *Elsey v. Hyde.* Two years later however in *Landom Trust Ltd. v. Hurrell,*[20] Denning L.J., sitting in the Queen's Bench Division, expressly followed the majority in *Cooden's case.*[21]

The majority in *Jarvis's* case seem implicitly to accept this proposition.

Carefully weighing the above authorities, Sholl J. drew the conclusion, quite correctly it is submitted, that the clause before him was subject to the application of the penalty laws and might therefore be unenforceable. However on applying the tests laid down in *Dunlop's* case, His Honour held that clause 11 did not constitute a penalty at common law, distinguishing the wording of clause 11 (which provided for payment of a sum as compensation for depreciation plus all damages for breach of the agreement) from the clause in *Green v. Carfarella*[22] where the amount stated to be recoverable in addition to damages for breach, was a fixed percentage of the purchase price. What is recoverable as *compensation* in clause 11 is clearly intended not to be included in damages for breach of the agreement. The draftsman has attempted to separate loss through depreciation from loss occuring through any other cause, and although this latter may thus be meaningless because depreciation is probably the only loss the owner will suffer, it was put in *ex maiore cautela,* rather than to penalize the hirer.

Holding that clause 11 was fully enforceable at common law, Sholl J. turned to the relevant statutory law, section 4 of the Hire-Purchase Agreements Act 1936, pointing out that this section was intended to restrict an otherwise enforceable right rather than to render enforceable a provision otherwise unenforceable.[23] Also, the

[17] [1953] 1 Q.B. 86. *Supra,* n. 12.

[18] Hodson L.J. also agreed with G. Sawer, *op. cit.,* 169, on how easily the penalty law could be defeated otherwise by a simple addition in drafting.

[19] [1915] A.C. 79, 87-88, *per* Lord Dunedin.

[20] [1955] 1 All E.R. 839.

[21] In these latter cases it was also made clear as Sholl J. points out ([1957] V.R. 68, 78), that a minimum hiring clause operating on determination for a breach by the hirer, operates in relation to matters which might form the basis of a common law claim for damages including depreciation in the value of the goods repossessed.

[22] *Supra,* n. 10.

[23] [1957] V.R. 68, 80; Else-Mitchell, *Hire-Purchase Law* (2nd ed. 1955), 28.

section has been held[24] to restrict the amount recoverable only if sued for under a provision in the agreement of a type set out in limbs (a), (b), or (c) of section 4.[25] Clearly clause 11 did not come within limbs (a) or (c), but Sholl J. also held that clause 11 did not fall within limb (b), which covers a provision to pay 'not less that a stated amount or stated proportion of the total purchase price.' Clause 11 was not a 'stated proportion' nor was it a 'stated amount of the total purchase price', but it might well be considered 'a stated amount'. The mere fact that it is a calculation will probably preclude its being a 'fixed amount',[26] but this is not necessarily the same as a 'stated amount' which, it might be argued, is a very wide description, intended to catch everything not falling within any of the other modes of describing penal sums. Sholl J. however, construed the phrase as requiring a precise figure, thus construing limb (b) very narrowly, and excluding a clause such as the one before him. Therefore the enforceability at common law of clause 11 was held to be unimpaired by the statute and the full amount provided for should be recoverable. The case was accordingly remitted to the magistrate to hear the defence.

But Sholl J. continued his tightly reasoned argument still further. He added that even if clause 11 did fall within section 4—and it is submitted with the greatest respect that it should have been so held—the amount specified in the clause did not exceed that allowed by section 4 and therefore the section could have no application here anyway.

His Honour then pointed out the case of the clause which is held to be not a penalty and also not within section 4, yet allows recovery of more than the maximum allowed by the section. Even on the narrow interpretation of section 4 that Sholl J. accepts, such a clause is hard to posit, yet if such ever were the case, the clause must be fully enforceable—a gap in the section which the legislature would do well to fill if the broader construction of limb (b), suggested above, is rejected.

His Honour pursued the matter still further, however, by then discussing the clause, which although within section 4, is held to be penal. If the clause is penal, but not within the Act, nothing would be recoverable; yet if within section 4 is it enforceable to the extent that the Act allows, since it may be argued either that the Act applies before the common law doctrine and the amount payable is no longer penal, or that the section in its nature assumes that clauses

[24] *Johnstone's Pty. Ltd. v. Nettleton* (1943) 68 C.L.R. 190.

[25] This difficulty was overcome in the New South Wales legislation: Hire-Purchase Agreements Act 1941-55, s. 5.

[26] *King Gee Clothing Co. Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 184, 196 *per* Dixon J.

within its purview are deemed valid? Sholl J. apparently inclines to this view of implied restricted enforceability of penal clauses, since he argues that if this were not so, section 4 would apply to a very limited class of provision, *viz.* a clause that was *not* a penalty but came within section 4 (a), (b) or (c).[27] However, is not His Honour's suggestion here in direct conflict with his previous statement that the Act operates to restrict a right otherwise enforceable, not to render enforceable a provision otherwise unenforceable?[28]

In any event, if a clause held to be penal, yet within section 4, were not enforceable at all due to the common law, presumably the amount still recoverable as ordinary damages for loss through depreciation,[29] would be equal to the amount recoverable under section 4 if the penal clause were to be given that restricted enforceability.[30] Therefore whether the penalty clause is enforceable to the extent section 4 allows, or not, the result will be the same. It will be perceived that once the clause is within section 4, then whether the clause be penal or not, the amount recoverable is that allowed by the formula in section 4, and no more. Thus, if, despite Professor Sawer's hope of forever abandoning the penalty question in this field,[31] the question seems about to be revived due to the judgment in this case, it is submitted that the penalty question should be avoided in many cases by *first* considering whether the clause involved is within section 4. If so, then whether it be penalty or not, the amount recoverable will be limited to the formule set out in that section, whether justified as recoverable under the clause, or as legitimate damages.

If the clause is *not* within the section – and if the broader interpretation be adopted, this will not occur often – then the application of the penalty doctrine will have to be considered; but now that this case has set out the authorities so skilfully and thoroughly, it is hoped that future judgments will regard it as no longer necessary to go behind *Cooden's* case and Sholl J.'s review of the authorities in the present case. If the clause is then held penal, the claim will be limited to ordinary damages (the same as where the clause falls

[27] [1957] V.R. 68, 82.

[28] *Supra*, n. 23. Sholl J.'s argument however has some slight support in Sawer's comment on *Cooden's* case in (1953) 16 *Modern Law Review*, 375, where he says: 'This [penalty law's application to minimum hiring clauses] has ceased to be an active issue in Australia where legislation of the six states has long since made minimum hiring clauses unenforceable'. Legislation has *never* made these clauses unenforceable; Professor Sawer must have meant that legislation had restricted their enforceability, *i.e.* they are enforceable but only to the extent that section 4 allows; the Professor was clearly including clauses that might be held penal, since he says that the penalty question is now an inactive issue here, which would not be so if only non-penal clauses were restricted by s. 4 while penal clauses were still totally unenforceable.

[29] See *Universal Guarantee v. Jarvis*, *supra*, n. 15.

[30] *Supra*, n. 21.

[31] *Supra*, n. 28.

within section 4), but if it is not penal, then and only then will the full amount be recoverable. Only in this last case can more than section 4 allows be recovered, a class of case which it is hard to imagine once a wider interpretation of section 4 is adopted.

Finally, His Honour criticized the method of calculating the value of the goods at the date of repossession in this case, (based as it was on wholesale values)—a method described by counsel as 'usual' in the trade—and pointed out the correct method (based on retail value) to be used in fairness to the hirer, and it is hoped that the finance companies will heed this warning from the bench.

J. D. PHILLIPS

WILSON v. KELLY[1]

Transfer of Land Act 1928—Sale by Mortgagee—Lease Prior to Sale without consent of Mortgagee

S, the registered proprietor of land on which a service station was erected, defaulted in his payment of mortgage moneys, whereupon the unsatisfied mortgagees, in exercise of their right under the Transfer of Land Act 1928, s. 148,[2] sold the land to the plaintiff at public auction. Prior to the sale S had granted to the defendant a ten-year lease of the land, this lease being neither consented to by the mortgagees nor registered. The plaintiff brought an action to recover possession of the land, claiming an injunction to restrain the defendant from occupying it, and damages for his exclusion therefrom. He claimed that upon registration of the transfer to him following the sale he had, by virtue of the Transfer of Land Act 1928, s. 150,[3] acquired a clear title to the land. The defendant claimed that a lessor-lessee relationship within the meaning of these terms in the Landlord and Tenant Act 1948, s. 2, existed between the plaintiff and himself, and that section 37 of the Act applied to the situation. In this case he could not be ejected from the land except by the procedure therein defined, *viz.* the service of a notice to quit on one of the prescribed grounds.[4] Gavan Duffy J. gave judgment for the plaintiff, holding that his title was paramount to that of the defendant lessee.

Two principal lines of argument were advanced in the case. The plaintiff's case relied on the provisions of the Transfer of Land Act 1928 to establish the paramountcy of his claim. The effect of sections 131 and 150 of the Act, it was contended, was that the plaintiff acquired an estate and interest in the land freed from the lease

[1] [1957] V.R. 147. Supreme Court of Victoria; Gavan Duffy J.
[2] The corresponding provision in the Transfer of Land Act 1954 is s. 77 (1).
[3] *Ibid.*, s. 77 (4). [4] Landlord and Tenant Act 1948, s. 37 (5).