MERCANTILE LAW: SALE OF GOODS—BUYER'S RIGHT TO RECOVER DEPOSIT UPON RE-SALE BY UNPAID SELLER.

Gallagher v. Shilcock.[1]

In this case the plaintiff sought from the defendant (*inter alia*) the return of £200 paid by way of deposit and part payment on the purchase of a boat.

The plaintiff had agreed to buy the boat from the defendant for £665 and had paid £200 by way of deposit. The agreement was subject to certain conditions, but, after those conditions had been satisfied, the plaintiff did in fact " accept " the boat. The defendant agreed, at the time of acceptance by the plaintiff, to a postponement of payment of the balance of purchase money to allow the plaintiff an opportunity to finance his purchase.

After a reasonable time for payment of the balance had elapsed (i.e. after a notice to pay within 14 days, from defendant to plaintiff, had expired) the plaintiff offered the balance to the defendant, but was told that the boat had already been re-sold elsewhere for more than the contract price—for £700.

The plaintiff sued for specific performance of the contract to sell the boat, damages for breach and for return of the £200 deposit.

Finnemore J. held (*a*) that the £200 was in fact a deposit and part payment (following *Howe v. Smith*[2]); (*b*) that more than a reasonable time had elapsed for the plaintiff to pay the balance of purchase money before the defendant re-sold; (*c*) that the property in the boat had passed to the plaintiff at the time the plaintiff accepted; (*d*) accordingly, the defendant was entitled to re-sell the boat under the English equivalent of the Victorian *Goods Act* 1928, sections 44 and 52.

It was held therefore that the claims for specific performance and for damages failed. Finnemore J. then went on to say,[3] " The point left is one of considerable difficulty, and I am not sure that it has ever yet been decided in terms. It is whether or not in the circumstances of this case the deposit is forfeited."

The decision of that point turned on the question whether the defendant in re-selling had rescinded his contract with the plaintiff and re-sold as absolute owner or had merely exercised a right of re-sale given him to ensure recovery of the contract price, i.e. had re-sold in a position similar to that of a pledgee only.

To answer that question, it was necessary to construe section 48 of the *Sale of Goods Act* 1893 (section 52 of the Victorian *Goods Act*). As read by Finnemore J., that section did not involve the rescission of the contract on re-sale by the seller.

At common law mere failure to pay on the appointed day had not involved rescission[4] and " It would be a curious thing if, nevertheless, the exercise of the " (statutory) " remedy of the seller because of delay

1. [1949] 1 All E.R. 921.
2. (1884) 27 Ch. D. 89.
3. [1949] 1 All E.R. at p. 922.
4. *Martindale v. Smith*, (1841) 1 Q.B. 389.

should rescind the contract."[5] Finnemore J. therefore came to the conclusion that the re-selling vendor was in a position analogous to a pledgee and could not retain more than his contract price, i.e., the £200 deposit was recoverable by the plaintiff.

Halsbury[6] comments as follows: "Whether the unpaid seller under the foregoing provisions re-sells the goods in the capacity of an owner, so as to be entitled to any profit which may be realized by way of re-sale, or whether he re-sells the goods in a capacity analogous to that of a pledgee . . . is doubtful but *semble*, the former is the correct view."

This case does not involve a dispute as to profits received on re-sale but the reasoning on which the decision as to the deposit is based is equally applicable to the question of profits. Finnemore J. quoted the above passage from Halsbury and dissented from it. Perhaps on a strictly technical view, that dissent is *obiter*, but there can be no doubt that any claim by a seller to retain profits received on a re-sale made under section 48 of the English Act (section 52 of the Victorian Act) would be in conflict with the reasoning of Finnemore J. in this case and, with respect, it is submitted that such a claim should fail.

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5. *per* Finnemore J., [1949] 1 All E.R. at p. 924.
6. *Laws of England*, Hailsham (2nd) edition, Vol. 29, p. 186.

PRIVATE INTERNATIONAL LAW: LEGITIMACY.

In re Bischoffsheim; *Cassel v. Grant.*[1]

A priori, it would seem that legitimacy is a matter to be decided by the personal law of the individual. If a child is legitimate by the law of the country where his parents are domiciled at the time of his birth, then it seems reasonable that his legitimacy should be recognised everywhere. A logical difficulty may arise where the domiciles of the parents differ and it becomes necessary to beg the question of the child's legitimacy in order to decide whether to refer to the *lex domicilii* of the father or of the mother. But logical perfection is not the chief aim of law, and either one of two sound working rules could be adopted. The child could in each case be assumed to be legitimate, and the question referred for final decision to the law of the father's domicile; or, in cases where it is the relationship between the child and the mother which is in doubt, the child's legitimacy could be determined by the law of the mother's domicile. This qualification is accepted by the American *Restatement*.

There can be little doubt, from a reading of reported decisions, that this is what most English judges feel, and have felt, should be the law. There is, however, an eighty years old decision of the House of Lords which, it is submitted, defies all principles of reason and logical consistency. This is the case of *Shaw v. Gould.*[2]

1. [1948] 1 Ch. 79.
2. (1868) L.R. 3 H.L. 55; (1865) L.R. 1 Eq. 247.