impossible for the judge to expound in a nutshell what won't fit into a nutshell, nor is it possible for a jury to understand the intricacies of a law which can only be solved by reference to comparative fault. The problems of judges and the difficulties of case-note writers have largely been solved in Victoria with the passing of an apportionment Act,[10] and it would appear that the analysis of the High Court is, for the purposes of the law in Victoria, merely a matter of historical interest.

J. J. HEDIGAN

[10]Wrongs (Contributory Negligence) Act, 1951. (No. 5594).

CONTRACT — SALE OF GOODS — SALE OF GOODS TO BE AFFIXED — *QUANTUM MERUIT*

IN *Brooks Robinson Pty. Ltd. v. Rothfield* (1951) V.L.R. 405, H proposed to fill a doorway between the hall and a room of his house by installing a revolving cocktail-cabinet, built so that it could be made to face into the hall or the room as required. He entered into a contract with B.R. Ltd. for it to make the cabinet to his specifications, on a cost-plus basis. The company undertook to provide all the materials, except wrought-iron doors and the pivot about which the cabinet was to revolve, which H was to secure from other sources. The company undertook to assemble the cabinet and (the court found as a fact) to install it in the doorway by attaching the pivot to the ceiling and the floor. The company began work, and, when the pivot was delivered to them, assembled the cabinet. Then H chose to abandon the project. The cabinet was useless for any other purpose, and the company sued H in the County Court for £91, the value of work done and materials supplied, plus a reasonable margin of profit. H's defence was that the contract was for sale of goods over the value of £10, and in the absence of a written memorandum the company was debarred by s. 9 of the Goods Act 1928.[1] The trial judge upheld this defence: the company appealed to the Full Court of the Supreme Court, which unanimously allowed the appeal.

Dean J., in a judgment in which Martin and Sholl JJ. concurred, held firstly that the contract was one for work and labour rather than for goods; and secondly that in any case H had repudiated the contract, the company had accepted the repudiation, and the plaintiff could recover on a *quantum meruit*, independently of the contract, to the amount claimed.

[1]The Victorian equivalent of the Sale of Goods Act 1893, s. 4.

Dealing with the first point, His Honour stated and applied the clear test laid down in the case of *Robinson v. Graves,*[2] in which the Court of Appeal held that a contract for painting a portrait was not a contract for the sale of goods. He concluded that if this contract were to *supply* a cabinet it would be a contract for the sale of goods. But the contract was to supply and *install* a cabinet. Property in the cabinet was not intended to pass until the installation was complete, and at that stage the cabinet was clearly a fixture.[3] Therefore the contract fell outside the provisions of the Goods Act.

The authorities cited by the court, and by Benjamin on *Sale,*[4] to which the Court referred, were all much clearer than the instant case.[5] In all those cases, the work of assembling the fixtures in question must have been carried out at the place of affixation (as in fact it was): a substantial part of the task of creating a ship's engine or a furnace must take place where it is to remain fixed.[6]. In *Chanter v. Dickinson,*[7] Tindal C.J. said: "It (i.e. the work of affixing the furnaces) was not work to be done *instanter* and with little labour; . . . it was not merely an agreement for the sale of goods, but for work to be done by the plaintiff upon the premises of the defendant, whereby furnaces were to be put up . . . " It seems that this was a factor which bulked large in the various courts' assessments of the facts.

The question then is, is there here any material difference? It might be argued that a contract for the making and delivery of a movable cocktail-cabinet, or a lounge-suite, is a contract for the sale of goods: why should it make any difference if the purchaser chooses to employ the vendor to carry out the comparatively minor task of

[2][1935] 1 K.B. 579, especially 587, per Greer L.J.

[3]It was to be affixed to the house at top and bottom, it was built specifically to occupy that doorway, and it was intended for the better enjoyment of the house.

[4]8th edn. (1950) p. 167.

[5]They were as follows: *Cotterell v. Apsey* (1815) 6 Taunt. 322 and *Tripp v. Armitage* (1839) 4 M.&W. 687 (both concerning the building of houses); *Anglo-Egyptian Navigation Co. v. Rennie* (1875) L.R. 10 C.P. 271 and *Seath v. Moore* (1886) 11 App. Cas. 350 (both concerning parts of the engines of ships); *Clark v. Bulmer* (1843) 11 M.&W. 243 (a steam-engine); *Chanter v. Dickinson* (1843) 5 Man. & G. 253 (two furnaces); and *Sydney Hydraulic & General Engineering Co. v. Blackwood & Son* (1908) 8 S.R. (N.S.W.) 10 (a goods lift). The first four were cited only in Benjamin on *Sale,* but the last three were specifically mention by Dean J.

[6]In *Clark v. Bulmer* (1843) 11 M.&W. 243, 250–1, Parke B., delivering the leading judgment, said: "If it were part of the contract that the chattel purchased should be afterwards annexed to the freehold by the vendor and for an entire sum, it might perhaps admit of a question whether that form of action [for goods sold and delivered] alone would be proper. This is unnecessary to decide . . . "

[7](1843) 5 Man. & G. 253, 261.

affixing the chattel to the freehold? It is suggested that such an argument cannot be sustained. It gives insufficient force to the facts that this was a single contract to supply and install, and that the plaintiff had no rights under it until it was fully carried out on his side. More generally, the contract was to add to, or improve, the freehold; the chattel nature of the cabinet was transitory, and it was only a reason of convenience which led to its being made in the company's workshop. Benjamin on *Sale* puts it thus: "In such contracts the intention is plainly not to make a sale of movables as such, but to improve the land or other chattel, as the case may be."[8] This principle applies to the present contract.[9] It is, therefore, submitted that even if the decision involves extension of the rule to facts not previously adjudicated upon, it is more than justified.

Turning to the second part of Dean J.'s judgment, we can say that it is clear law that if an express contract, even one which falls within the provisions of the Goods Act 1928, has ceased because of repudiation by one party and acceptance of that repudiation by the other, the latter may sue on a *quantum meruit* for payment for goods or services included in the express contract.[10] This case is a useful affirmation of that rule.[11]

J. H. BROOK

[8]8th edn. (1950) p. 167.

[9]It also has the advantage of simplicity. The other revolves around a distinction of fact; the line would clearly be most difficult to draw.

[10]*Lodder v. Slowey* [1904] A.C. 442; *De Bernardy v. Harding* (1853) 8 Exch. 822.

[11]Counsel for the defendant cited the early Victorian case of *Lyons v. Hughes* (1875) 1 V.L.R. (L.) 1, which, it would seem (though the report is short and does not make clear the exact form of action), is contrary to this principle at least in dicta, and is overruled to that extent.

CONSTITUTIONAL LAW—DELEGATED LEGISLATION EFFECT OF CLAUSE "AS IF ENACTED IN THIS ACT"

THE judgment of the Full Court in *Foster v. Aloni*[1] contains authoritative opinions on the often-discussed questions of the effect of "as if enacted in this Act" clauses and uncertainty on delegated legislation, and of the element of *mens rea* in statutory offences.

The defendant was charged before a Court of Petty Sessions with an offence against the Protection of Electrical Operations Regulations,[2] made under the State Electricity Commission Acts, which empowered the Governor in Council on the recommendation of the Commission to make regulations for or with respect to a number

[1][1951] V.L.R. 481. [2]Victoria, *Government Gazette*, 7 July 1949.