must answer according to English law". The question of succession was one thing, but the suability of the successor under an English contract was another. EDWARD I. SYKES.*

TORTS

Master and Servant—Duty to Provide Proper Appliances.

Among the cluster of particular duties which make up the general duty of an employer to take precautions for the safety of his workmen, is the duty to provide proper tools and appliances for working. The limits of this duty were in issue in *Davie v. New Merton Board Mills*[1] where a workman suffered injury when working on metal with a steel "drift" and hammer. The "drift" had been manufactured with excessively hard steel and, when struck with the hammer, splintered with the result that a piece lodged in the workman's eye. The employer had purchased the tool ready made from a firm of middlemen who, in turn, had purchased from the manufacturer. The manufacturer had been negligent in manufacturing the tool, but the other parties were free from negligence in the sense that the defect was not discoverable by the exercise of care on their part. The Court of Appeal, with Jenkins L.J. dissenting, held the employer not responsible.

In the case of the closely allied duty to provide a safe system of working, it had been held in *Wilsons & Clyde Coal Co. v. English*[2] that it was no defence to the employer that he had delegated the duty of providing a safe method to a competent employee or agent, and the tenor of judicial reasoning both in that decision and afterwards had been to the effect that it would make no difference that the delegate was an independent contractor and not an employee.[3]

The decision of the majority has been interpreted as resting on some distinction between the giving of instructions for the making of a tool to order and the buying of one already made.[4] It does not seem, however, that this is so. It is true that the majority would have held that the employer would have been liable if it had directly entrusted the manufacturer with the making of a tool to order, but it seems that they would have reached the same conclusion if it had purchased a ready-made tool directly

1. [1958] 1 Q.B. 210. 2. [1938] A.C. 57.
3. See the Scottish authorities listed in the dissenting judgment of Jenkins L.J. [1958] 1 Q.B. at 221-228, many of which were quoted with approval in *Wilsons & Clyde Coal Co. v. English*. The majority judges in *Davie* did not dispute this proposition.
4. See 21 Mod. Law Rev. 309.

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the trustees executed deeds by which they declared that they held the shares on the trusts of such settlements. It was common ground that if the prior oral direction was ineffectual to vest the beneficial interest, then the written declarations constituted the operative assignment of the equitable interest and as such would be liable to *ad valorem* duty as being voluntary dispositions within the Finance Act. The Inland Revenue Commissioners claimed that the settlor's oral declaration was ineffectual because it was a "disposition of an equitable interest or trust" within the meaning of Section 53 (1) (c) of the Law of Property Act 1925, which required such dispositions to be in writing.

Upjohn J. took the view that section 53 had not materially changed the meaning of the prior provision of section 9 of the Statute of Frauds which it replaced and which provided that all "grants and assignments" of any trust must be in writing. He took the view that the voluntary transfer of an equitable interest in pure personalty could be effected in one of three ways, viz. (a) the donor might make a direct assignment to the donee, (b) the donor might declare himself a trustee of the equitable interest for the donee, or (c) the donor might direct the trustees to hold the equitable interest upon trust for the donee. Now a direct assignment of the equitable interest in personalty would be caught by the Statute of Frauds. It would be clear that a declaration of trust by a legal owner of personalty would not be affected by the Statute of Frauds, though if relating to land it would fall within section 7 of that Statute relating to the creation of trusts of land.

1. [1958] Ch. 375 (Upjohn J.), [1958] 3 W.L.R. 45 (Court of Appeal).

from a manufacturer which was defective because of the fault of the manufacturer.

It seems that the decision is based rather on the lack of contractual privity between the defendants and the manufacturer.[5] It rests on the notion that the duty of the master is to take reasonable care to provide safe equipment and that duty is performed either *per se* or *per alios;* but it is only where the provision of plant is done by employees of or persons who contract directly with the employer that the situation exists where the employer can be said to have acted *per alios*. The negligent person must be in some way the agent of the employer. If the employer dealt with a middleman who has not been negligent and the operative negligence is that of another person with whom the employer had no contractual relations, then one cannot say that the negligence is that of the employer. Thus, Pearce L.J. says[6] that in such a case the employer can hardly be said "to have made the tool *per se* or *per alios*".

It is obvious that the majority proceed on the assumption that the liability, where the employer has not attempted to perform the duty himself, must be a true vicarious one.

Jenkins L.J., on the other hand, would deny that the principle of liability is confined to situations of vicarious liability. It is indeed difficult to see why the fact that the employer had not dealt directly with the negligent party should make a difference. The view of Jenkins L.J. that the duty to take reasonable care is not discharged either by showing that the employer entrusted to somebody else the duty of taking reasonable care or assumed that somebody else had taken reasonable care is very convincing

Upjohn J. further concluded that a declaration of trust of an *equitable interest* would not fall within the Statute, though he said that it "operated to transfer the equitable interest from donor to donee". The donor here had followed method (c) instead of method (b), but in the view of the learned judge there was no real distinction between the two cases. Substantially then, Upjohn J. held that a direction by way of trust was not an assignment, but was akin to a declaration of trust and hence did not require writing.

The decision of Upjohn J. was reversed by the Court of Appeal, with Lord Evershed M.R. dissenting. The majority, however, rested their decision on the language of the Law of Property Act, which referred to a "disposition of an equitable interest or trust"; they considered that "disposition" was a wider word than "grants and assignments", and would embrace the transaction here involved. Though Morris L.J. did not clearly express himself on the point, both Lord Evershed M.R. and Ormerod L.J. considered that the decision of Upjohn J. was a correct decision under section 9 of the Statute of Frauds.

This latter point is of considerable significance in Queensland where the operative statutory provision is still that of the Statute of Frauds. The view of Upjohn J., however, bristles with difficulties. It is difficult to see why a direction to trustees to hold an equitable interest in trust is identical with a declaration of trust of such an interest. In the former case, the beneficiary deprives himself of all interest in the property; in the latter case it may well be that he retains something. But if both cases do, as Upjohn J. thinks they do, involve the effect that the donor deprives himself of all equitable interest in the property or as he says: "disappears from the picture", it is somewhat difficult to see why an "assignment" is not involved. The view that there is not an assignment in such a situation would appear to place too much reliance on the the absence of formal words of transfer and the fact that in *Timpson's Executors v. Yerbury*[2] Romer L.J. placed "direct assignments" in a separate class from other "dispositions". The dissenting judgment of Lord Evershed M.R. in the instant case goes to the length of saying that a transaction by which an equitable owner strips himself of all beneficial ownership is neither a grant or assignment within the meaning of the Statute of Frauds nor a disposition of the equitable interest within the meaning of the Law of Property Act.

Leave to appeal to the House of Lords was granted.

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2. [1936] 1 K.B. 645 at 664.

and a direct independent contractor with him. The opinion of Pearce L.J. seems to amount to saying that the employer is only responsible if by himself or his delegates (servants or contractors) he can be said to be the *maker* of the tool. It is submitted that such a narrowing of the field of responsibility is unjustifiable.

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TRUSTS

Assignment of Trust.

The case of *Grey v. Inland Revenue Commissioners*[1] raises a little-litigated point on the distinction between declaration of trust and assignment where the subject matter of the dealing is itself an equitable interest. Here A, the legal owner of shares transferred them to trustees so that at that point he remained the full equitable owner of the shares. He then orally directed the trustees to hold the shares in trust upon the trusts of certain existing settlements of which they were already trustees Later, the trustees executed deeds by which they declared that they held the shares on the trusts of such settlements. It was common ground that if the prior oral direction was ineffectual to vest the beneficial interest, then the written declarations constituted the operative assignment of the equitable interest and as such would be liable to *ad valorem* duty as being voluntary dispositions within the Finance Act. The Inland Revenue Commissioners claimed that the settlor's oral declaration was ineffectual because it was a "disposition of an equitable interest or trust" within the meaning of Section 53 (1) (c) of the Law of Property Act 1925, which required such dispositions to be in writing.

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1. [1958] Ch. 375 (Upjohn J.), [1958] 3 W.L.R. 45 (Court of Appeal).