CASE NOTES

SALE OF GOODS — REQUIREMENTS CONTRACT — AGREED METHOD OF FIXING PRICE BECOMING IMPOSSIBLE — EFFECT UPON CONTRACT.

Price is one of the most important terms in a contract for the sale of goods but one which may not be fixed at the time when the parties conclude their agreement. Where the contract is silent upon the matter the court itself can fill the gap by the use of a 'reasonable price'.[1] However the contract, whilst not stating a price, may refer to machinery for its determination. In this case the court will still uphold the agreement provided that it contains a sufficiently objective standard[2] for the fixing of the price. The contract may refer to such a standard in different ways. For example, the contractual terms themselves may provide the objective standard because words such as 'reasonable' or 'proper' are used in conjunction with 'price'. Alternatively, there may be a reference to objective standards outside the contract such as the 'market price' or the prices fixed by a trade association or a trade price-list.

It is clear that in all these cases the contracts contain a sufficiently objective standard for the determination of the price and this provides consideration for the seller's promise and a sufficiently definite measure of the buyer's obligations. Although there is no reason on these grounds for a refusal to uphold such contracts, a difficulty may occur where the parties use standards outside the contract, such as a trade list or the prices as declared by a particular trade association, and these cease to be published or declared during the currency of the agreement.

A problem of this character occurred in *Re Nudgee Bakery Pty. Ltd.'s Agreement*[3] where it was agreed that Nudgee Bakery Pty. Ltd., the applicant in the present proceedings, would take its requirements of flour and wheatmeal from the respondent, the Queensland Co-operative Milling Association. The contract, which was to last for five years, provided that the prices to be paid '... shall be the maximum prices fixed and declared for the time being in respect thereof pursuant to the "Profiteering Prevention Acts 1948 to 1959" or any amendment thereof or any other Act passed in substitution therefor'. A year after the conclusion of the contract prices ceased to be declared but the applicant continued to buy flour and wheatmeal from the respondent for a further three years at prices fixed from time to time by the Queensland Flour

---

1 See, for example, *Acebal* v. *Levy* (1834) 10 Bing. 376 and *Hoadly* v. *M'Laine* (1834) 10 Bing. 482.

2 'Standards are objective if the criteria and the methods used to apply them are uninfluenced by the wishes and opinions of the parties.' Schlesinger, *Formation of Contracts*, Vol. I, at p. 87, n. 8.

3 [1971] Qd. R. 24.

Millers Association. The applicant then started to purchase flour and wheatmeal from persons other than the respondent and claimed that the fact that the flour and wheatmeal had ceased to be declared goods, which resulted in no maximum prices being fixed, lead to a discharge or avoidance of the contract.

In the event of a specified standard failing, or proving unworkable, it is submitted that the court should resolve this difficulty by using the standard of the 'reasonable price' unless it can be shown that the use of this standard, as a substitute for the selected one, would defeat the parties' intentions. In the present case the parties themselves had adopted another standard for a period of three years, the price fixed by the Queensland Flour Millers Association. This price was based on the costs of production and was apparently reasonable. The fact that the parties had used this substituted standard for three years shows that it was equally effective to carry out their intentions. It is therefore difficult to agree with the court when it says[4] that '... it seems to me contrary to principle to say that the applicant, after January 1967, was bound to pay a fair and reasonable price or bound to pay the price fixed by the Flour Millers Association. To do so, would be to compel it to abide by terms to which it had not agreed.' The conduct of the applicant in accepting the goods at prices fixed by the new standard would seem to show very clearly an agreement as to the new method of fixing the prices and an intention to be bound by that new standard.

The court however, held that the contract was 'suspended' from the time that the flour and wheatmeal were taken from the class of declared goods and 'remains suspended and not enforceable at the suit of either party while this continues to be so'.[5] The court reached this conclusion after setting out that part of s.12 of the Queensland Sale of Goods Act, 1896 which provides that 'When there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation the agreement is avoided....' It is submitted that the correct application of this section presupposes that the buyer has agreed to pay, not a reasonable or a specified price, but only that price which the third party shall name. In other words, the valuation is a condition precedent to the existence of the contract. However, the circumstances may show that this is not the case and that the choice of the third party is just another way of using the market price. In that case, the refusal or inability of the third party to fix the price would not affect the contract. It has already been suggested that this was the situation in the present case where the parties had adopted a new standard and used it for three years. It therefore seems quite inappropriate to apply that particular provision of the Sale of Goods Act to the present case. It is submitted therefore that a more attractive approach would have been to hold either that the original

4 At p. 28.
5 At p. 29.

contract was still in force with a different standard adopted by the parties or alternatively a new contract, using the new standard, had been created by conduct. On either view there was an existing contract.

Re Nudgee Bakery Pty. Ltd.'s Agreement illustrates the difficulties which can occur where there is a failure of the machinery selected by the parties. It has been suggested that the parties in that case were using the machinery of the 'declared prices' as an alternative to the 'reasonable' or 'market prices'. In view of the difficulties which may occur it may be preferable simply to use the standard of the 'market price'[6] in the first place. Use may be made of this standard in a variety of ways. The price which the parties would normally select would be that at the date fixed for delivery and here they would be adopting the same standard as a court if there was no mention of price. A certain amount of flexibility can be introduced by the parties fixing the prices at the date of entering into the contract and then providing that if the market price is lower at the date for delivery then the buyer shall have the benefit of this; alternatively it could be provided that the seller should have the benefit of an increase in the market price.

However, instead of referring in general terms to 'the market price', the parties may wish to use the price of a particular market at a particular time and further variations will occur depending upon whether the sale is a cash or credit sale or whether it is a wholesale or retail sale. Again the circumstances may show that the parties have used the expression 'market price' in a particular sense and have thereby given it a different meaning from the accepted one. In *Woolworths Ltd.* v. *Stirling Henry Ltd.*,[7] for example, the court held that 'at market prices' meant the prices which other sellers might offer and not the ordinary market price. The parties may not, however, have deliberately selected a market but the circumstances of the case may suggest one as in *Charrington & Co.* v. *Wooder*.[8] It was pointed out in that case that 'market price' had no fixed meaning which attaches to the phrase irrespective of the context in which it is used. It was held, in the context of a contract between a brewery company and the tenant of one of its tied houses, that the phrase 'a fair market price' meant a fair market price for a tied house and not an open market price. Other variations can occur through discounts which are allowed to trade customers or those who buy in bulk. In *Orchard* v. *Simpson*,[9] for example, the court interpreted 'market value' as meaning the price charged to an ordinary customer (even though the purchaser had bought large quantities) and not those charged to a trade customer. In *Charrington* v. *Wooder*[10]

6 A 'market price' has been defined as 'that reasonable sum which the property will bring in a fair sale by a man willing to but not obliged to sell, to a man willing but not obliged to buy'. *Per* Winslow C.J. in *Allen* v. *Chicago & N.W. Ry.* (1911) 145 Wis. 263, 129 N.W. 1094, cited by Prosser, 'Open Price in Contracts for the Sale of Goods', (1932) 16 *Minn. L.R.* 733, at p. 754.
7 (1967) 87 W.N. (N.S.W.) 200. (P.C.).
8 [1914] A.C. 71.
9 (1857) 2 C.B. (N.S.) 299.
10 [1914] A.C. 71.

there were different discounts allowed to tied houses and free houses and also for different brands of beer. These are examples of the difficulties which may occur, even with a 'free market'.

Further problems may arise where there is no 'free market'. There may be no dealing in a particular commodity, and therefore no market price, or there may be no market price because the sellers and buyers in the market cannot agree upon a price. Alternatively, the price may be unreal because it is not the result of a free bargain but has been produced artificially through the 'monopolising' or 'cornering' of the particular market. In these circumstances the American courts apparently use the theoretical 'market value' of the goods to deal with the problem. This 'market value' would be determined by such factors as the cost of the goods and the prices on the nearest free market. The goods, however, may be unique or have been made to the buyer's order which may mean that they have no easily ascertainable market value. No doubt expert evidence could be used to put a price on goods of this nature.

It may be argued that as the phrase 'market price' has no fixed meaning it is an unsuitable standard for the purpose of determining price. It is submitted, however, that the court would have no more difficulty in determining the market price for this purpose than it would in the case of a breach of contract. It will only be in very exceptional circumstances that the standard of the 'market price' will fail because there is no market. For this reason, the use of the 'market price', providing as it does a sufficiently objective standard which is outside the control of either party and is a standard which is related to the value of the goods, is a more reliable method of providing a flexible price term than is either the trade price list or the 'declared price' as in *Re Nudgee Bakery Pty. Ltd.'s Agreement.*

Michael Howard

OFFER AND THE DISPLAY OF GOODS

It will no doubt be surprising to future generations of law students to see the complacency, if not the perverse relish, with which some judges of our time refuse to recognise the reality around them; as surprising as it is to find out how primitive in matters of politics or social awareness were men like Eldon and Ellenborough. And one of the weaknesses of the common law system of judicial lawmaking is that it is much easier for a judge to fill a gap in the law by producing a pat analogy[1] than by looking at the needs of the community as expressed in an Act of Parliament. There are no doubt great dangers in judges, undemocratically chosen and without political responsibility, creating

1 Compare the strange analogy which appealed to the judges in *U.D.T.* v. *Eagle Airways* [1968] 1 W.L.R. 74, that of a recourse agreement and an option to purchase in a lease.

law as they think society needs it, but where it is clear from a statute, read as a whole and applying the 'mischief rule', what parliament wanted to do, analogy seems a poor substitute for the judges doing as they are told.

A recent decision of an English Divisional Court has raised again the question of the meaning of 'offering for sale' in a criminal statute. In *Partridge* v. *Crittenden*[2] the appellant was charged with unlawfully offering for sale a bramblefinch contrary to the Protection of Birds Act 1954. He had advertised in *Cage and Aviary Birds* 'Quality British bramblefinches 25s. each'. He was convicted by Chester Justices and appealed, claiming that the advertisement was an invitation to treat and not an offer. The court (Lord Parker C.J., Ashworth and Blain J.J.) accepted this and allowed the appeal. The leading judgment is that of Ashworth J., with whom Blain J. agreed. The parts relevant to this note are:

> In no place, so far as I can see, is there any direct use of the words 'Offers for Sale'. I ought to say I am not for my part deciding that that would have the result of making this judgment any different, but it at least strengthens the case for the appellant that there is no such expression on the page. Having seen that advertisement, [the purchaser] wrote to the appellant and asked for a hen and enclosed a cheque for 30s. A hen... was sent to him.
>
> The real point of substance in this case arose from the words 'offer for sale', and it is to be noted in s.6 of the Act of 1954 that the operative words are 'any person sells, offers for sale or has in his possession for sale'. For some reason which Mr. Havers for the prosecutor has not been able to explain, those responsible for the prosecution in this case chose, out of the trio of possible offences, the one which could not succeed....
>
> A similar point arose before this court in 1960 dealing, it is true, with a different statute but the same words, in *Fisher* v. *Bell* [1961] 1 Q.B. 394, Lord Parker C.J. in giving judgment said:
>
> > The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think that most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense.[3] In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country.
> >
> > The words are the same here 'offer for sale', and in my judgment the law of the country is equally plain as it was in regard to articles in a shop window, namely that the insertion of an advertisement in the form adopted here under the title 'Classified Advertisements' is simply an invitation to treat.
>
> That is really sufficient to dispose of this case. I should perhaps in passing observe that the editors of the publication *Criminal Law*

2 [1968] 1 W.L.R. 1204; [1968] 2 All E.R. 421.
3 The flaws in the construction of this sentence are in the report itself.

> *Review*[4] had an article dealing with *Fisher* v. *Bell* in which a way round that decision was at least contemplated, suggesting that while there might be one meaning of the phrase 'offer for sale' in the law of contract, a criminal court might take a stricter view, particularly having in mind the purpose of the Act; in *Fisher* v. *Bell* the stocking of flick knives, and in this case the selling of wild birds. But for my part that is met entirely by the quotation which appears in Lord Parker's judgment in *Fisher* v. *Bell*, that 'It appears to me to be a naked usurpation of the legislative function under the thin guise of interpretation'. Lord Parker C.J. said:
>
> > I agree and with less reluctance than in *Fisher* v. *Bell* and *Mella* v. *Monahan* [1961] Crim. L.R. 175, D.C.; I say 'with less reluctance' because I think when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale. [He referred to Lord Herschell's judgment in *Grainger* v. *Gough* [1896] A.C. 325]. It seems to me accordingly that not only is it the law but common sense supports it.

The first point that must be dealt with is the red herring about 'naked usurpation of the legislative function'. There are not many who still cling to the myth that judges do not make the law, but those who heard Lord Parker in Australia know that he is one. The 'legislative function' is being exercised just as much by saying that 'offer' here means 'a manifestation of willingness to be bound by a contract on the proposed terms without further opportunity for negotiation on the part of the advertiser' as by saying that for the purposes of this Act it includes an 'invitation to treat'. And a naked usurpation has over a clandestine or unconscious one the merit of being open to be discussed and even appealed.

The second point is the refutation of Lord Parker's statement 'that common sense supports it'. Common sense is a subjective and non-arguable criterion. In how many cases have judges come to opposite conclusions while still praying in aid this emotive and self-complimentary support?[5] What was the evil which Parliament was concerned to combat by means of the legislation in these cases? In *Fisher* v. *Bell* the trade in flick knives, in *Mella* v. *Monahan* the trade in pornographic photographs, in *Partridge* v. *Crittenden*, the trade in wild birds. So parliament prohibited their sale or their being 'offered for sale'. Common sense would require that 'offer for sale' should have *some* meaning. Generations of law students have understood, thanks primarily to Sir Frederick Pollock, that there is no magic in the terms 'offer' and 'acceptance'. It is often only possible to say whether a communication is an offer or an acceptance by deciding (by some other

---

4 [1961] *Crim. L. Rev.* 181.

5 *E.g.* Barrowclough C.J. in *Reporoa Stores* v. *Treloar* [1958] N.Z.L.R. 177: '... the commonsense view ... is that the appellant ... exercised his option'. F. B. Adams, J.: 'It is impossible ... to say ... that the letter means that the option is not exercised.' The majority of the Court of Appeal (Gresson, McGregor and T. A. Gresson, JJ.), however, disagreed.

method) at what stage a contract came into existence and by working back from that. Then, looking at the negotiations, you can if you like say that the last communication was an acceptance and the one before that an offer. Because an offer is in the law of contract a manifestation of willingness to be bound if the other party signifies in an acceptable way his willingness to be bound, an advertisement or display in a shop or shop window may well fall short of an offer. But surely the judges ought at least to have asked themselves whether *the appellant in this case* was willing to be bound, was making an offer.[6] Moreover, if he was not, and if Bell was not, and if Monahan was not, whoever would be 'offering for sale'? Only a vendor can 'offer for sale', a buyer 'offers to buy'. If common sense tells you that a dealer does not 'offer for sale' the goods in his window or shop or advertisement, common sense tells you that 'offer for sale' in the statutes is virtually otiose and common sense should smell a rat.[7]

The third point is that whereas the contract cases talk about 'offers' or 'offers to sell', the statutes concern 'offers for sale'. The element of willingness to be bound may well be a part of the former phrase now, but it may possibly not be part of the latter. Suppose that a statute contained a provision 'It shall be an offence for a woman to offer her body for indecent acts'. Is it not an offence unless she has an intention to be bound by contract? 'Offer' can clearly mean something different outside the law of contract. What if the Act says it is an offence 'to offer her body for hire for indecent purposes'? Would a street walker not be committing an offence? Clearly she intends to retain to herself the decision as to which customers she will 'accept'. Common sense demands that one distinguish between the different meanings of a word in different contexts.

There are two further difficulties on which it may be interesting to speculate. First, what does Lord Parker mean in the above quotation when he says 'unless they indeed come from manufacturers'? He says, straight-forwardly, that 'offer' may mean something different if it is in an advertisement made by a manufacturer. Can it be that he is suggesting that the interpretation of a word in a statute might depend on the judge's view of public policy, which leads him to put a greater burden on a manufacturer, say, in the interests of consumer protection? How do you

---

6 Judges have often said that this is a question not of law but of intention: *e.g.* Lord Greene M.R. in *Clifton* v. *Palumbo* [1944] 2 All E.R. 497, 499, quoted by Russell L.J. on this point in *Brigg* v. *Boyd Gibbins* [1971] 1 W.L.R. 913, 916.

7 An interesting piece of evidence of the strength of the judicial bent towards this analogy is found in the judgment of the magistrate in *Kirk Motors Ltd.* v. *Industries and Commerce Dept.* [1969] N.Z.L.R. 1057 and [1970] N.Z.L.R. 539. He construed 'every person who... offers to sell any goods... for a price that is not in conformity with the order', in s.29 (1) of the Control of Prices Act 1947 as relating only to an 'offer' as understood in the law of contract and not as including the furnishing of a quotation. On appeal it was pointed out that this construction is hard to justify when s.50 of that Act expressly declares that the furnishing of a quotation shall be deemed an offer to sell for the purposes of the Act.

manufacture cage-birds? What is the difference for the purposes of interpretation between a breeder, a bird-catcher and a middleman?

One last point is that by s.6 of the Trade Descriptions Act 1968, a person exposing goods for supply or having goods in his possession for supply shall be deemed to offer to supply them. It is arguable that this section is concerned only with offences under this Act, or with criminal offences of any kind, or with civil and criminal matters alike. It seems unlikely that it will be interpreted as changing the law of contract, or indeed as having any effect other than in respect of offences against the Act, s.1(2) of which says:

> Sections 2 to 6 of this Act shall have effect for the purposes of this section [which describes the false trade description offence], and for the interpretation of expressions used in this section, wherever they occur in this Act.[8]

In any case, the words of s.6 would not be apt to cover an advertisement of goods in a paper, which will not be 'exhibiting goods for supply' nor necessarily be accompanied by 'possession for supply'.

It looks as if it will be necessary to wait for legislation to clear up the mess to which careless drafting, pedantic judging and an apparently bungled prosecution have all contributed. Such legislation is not likely to be enacted in the foreseeable future. It is hoped that when next a prosecutor finds himself faced with the law as presently expounded by the Divisional Court he will be able to take the case to the House of Lords and will there find judges who realise that:—

(i) 'offer' is a word used in many different ways in the English language,

(ii) a number of these meanings are commonly used by lawyers.

(iii) it does not follow, because the word has acquired a special meaning in relation to the formation of a contract, that that is

---

8 See *Hansard* (Lords) vol. 287, col. 300, 30th Nov. 1967 and cols. 1315-1323, 18th Dec. 1967, referred to by A. Samuels in a note in (1969) S.J. 157.

9 The importance of the problem is not confined to the United Kingdom. I have not made an exhaustive search of the Tasmanian legislation, but the same difficulties could arise here; see *e.g.* Dangerous Drugs Act 1959 s.5:—

> No person shall sell or offer or expose for sale a dangerous drug, etc.

Police Offences (Contraceptives) Act 1941, s.4:—

> No person shall ... (c) sell, or offer for sale, any contraceptive in any public place, etc.

Indeed, a very recently reported case, *Attorney-General for New South Wales* v. *The Mutual Home Loans Fund of Australia Ltd.* [1972] 2 N.S.W.L.R. 162 shows that the Court of Appeal in New South Wales at least is unlikely to make the same mistakes. Sugerman A.C.J., in a judgment with which Asprey and Mason J.J.A. agreed, said that the word 'offer' in s.40 (1) of the Uniform Companies Act must be interpreted as including an invitation to treat. 'It is also in my opinion plain from the context — indeed from the context to be found in s.40 (1) itself — that the "offering" or "offer" therein mentioned does not connote an offer in the contractual sense. It refers, rather, in accordance with common usage in these matters, to an invitation to the public to make offers, in the contractual sense.' None of the cases discussed in this article was mentioned by the judges or even cited in argument. In *British Car Auctions* v. *Wright* (1972) 116 S.J. 583, a Divisional Court of the Queen's Bench followed *Fisher* v. *Bell* and *Partridge* v. *Crittenden*, Lord Widgery C.J. regretfully. No full report is yet available to me.

> the only meaning it can have in any statute, whatever its purpose and its context. In general, it is probably wise to avoid treating questions of intention as questions of law and making them matters of precedent.[9]

Derek Roebuck

FIGHT THE GOOD FIGHT — CRUELTY, CONSTRUCTIVE DESERTION AND THE STATUS OF A HUSBAND

The facts in the South Australian case of *Landau* v. *Landau*[1] were even more bizarre than some of the issues which arose from them. The husband, in answer to a petition by his wife, had cross-petitioned on the grounds of cruelty and constructive desertion. The evidence showed that over a period of years the wife had behaved in an unjustifiably violent manner towards her husband, including attacking him, hurling missiles at him and threatening to kill him. There was no evidence, however, that the husband's health had been adversely affected by her conduct, and it seemed as though he regarded his wife's behaviour as a nuisance rather than a menace. After an argument which culminated in the wife's throwing a tray of food at him and telling him to go, the husband, not altogether surprisingly, took the hint and left.[2] Bray C.J. held first, that the wife's continued petty violence exposed the husband to a reasonable apprehension of injury and he was therefore entitled to a decree of divorce on the ground of cruelty. Secondly, as the wife's conduct afforded the husband just cause for leaving her, she was guilty of constructive desertion and the husband was therefore entitled to a decree on that ground also.

The major factor involved in the husband's petition on the ground of cruelty was that he had suffered no actual physical harm, nor had his mental or psychological state been affected adversely. On the other hand, his contention was that his wife's attacks had exposed him to a reasonable apprehension of danger, even though he had, over the years, become extremely adept at avoiding her attacks. Bray C.J. was uncertain[3] as to whether the standard to be applied was subjective or objective. That is, whether the husband *had* actually been in a state of fear at the relevant time or whether a reasonable man would have considered that there was a risk of injury. In the event, Bray C.J. adopted[4] the words of the Judge Ordinary in the case of *White* v. *White*,[5] where it was said,

> The assaults committed upon him were not proved to have been productive of any serious bodily injury; but where a woman.... is entirely without the power of controlling her passion and in

1 [1970] S.A.S.R. 288.
2 This description of the facts cannot of necessity, do justice to what actually happened.
3 At p. 292.
4 *Ibid.*
5 (1859) 1 Sw. & Tr. 591 at p. 593.

> such a state of mind is in the habit of assaulting her husband, it is impossible to say that he is not in such danger of bodily injury as entitles him to the protection of the court.

This was despite the cases of *Bostock* v. *Bostock*[6] and *Birch* v. *Birch*,[7] which are authority for the view that some kind of subjective fear is necessary. Bray C.J., however, took the view[8] that the expressions used in those cases meant no more than that the absence of fear on the part of the petitioner indicated that there was no real risk of injury.

It was further contended for the wife that the husband could to a large extent have mitigated the situation by tactics of extreme conciliation and submission to the wife's whims. The Chief Justice was of the view[9] that the husband was not obliged to do this. He pointed out that the social position of wives has altered since the nineteenth century and referred to *Meacher* v. *Meacher*[10] and *La Rovere* v. *La Rovere*.[11] In the latter case the Full Court of the Supreme Court of Tasmania discussed the history of wifely submission to her husband's wishes and stated, 'Whatever (if anything) now remains of the duty of submission on the part of the wife must be limited to what is reasonable according to contemporary notions and social behaviour'.[12] Bray C.J. went on to remark, 'But the position of the spouses has not been reversed; it has been equalized. The twentieth century husband is not required to play the role of the nineteenth century wife'.[13]

With regard to the husband's petition based on constructive desertion, Bray C.J. decided that the husband had just cause for leaving and was therefore entitled to a decree. Even had the wife's conduct not amounted to cruelty, the husband would still have been justified in leaving,[14] provided that the conduct had been sufficiently grave.[15] The Chief Justice accepted the propositions laid down in *Simes* v. *Simes*,[16] *Manning* v. *Manning*[17] and *Fronten* v. *Fronten*, which finally disposed of the residual *animus* in constructive desertion left behind by the Privy Council in *Lang's* case.[18] Bray C.J. applied the test which Smith J. of the Supreme Court of Victoria had enunciated in *Simes*,[19] where it was said that the wife had shown,

> ... a disregard for her matrimonial obligations, a callousness in wounding him and a contempt for his character and intelligence, which gave him just cause or excuse to treat the matrimonial relationship as at an end.

---

6 (1858) 1 Sw. & Tr. 22.
7 (1873) L.J. P. & M. 23.
8 At p. 292.
9 *Ibid.*
10 [1946] P. 216.
11 (1962) 4 F.L.R. 1.
12 At p. 10.
13 At p. 292.
14 At p. 293.
15 See *Fronten* v. *Fronten* [1963] S.A.S.R. 179.
16 (1961) 2 F.L.R. 311.
17 (1961) 2 F.L.R. 257.
18 [1955] A.C. 402.
19 At p. 315.

The Chief Justice was of the view that even if, in strict terms, the wife's conduct could not, as a result of her obviously unstable mental condition, be described as 'callous', it had produced the same effects.

Landau v. *Landau* is particularly interesting in its consideration of cruelty as a ground for divorce. It seems to extend the notion of apprehension of injury, by suggesting that the applicable test is an objective one. It is suggested that this is a reasonable solution since, first, it obviates the need for an examination of a petitioner's actual mental state and, secondly, it emphasises the need for 'grave and weighty' conduct for the constitution of cruelty. In addition, it helps clarify the kind of conduct which is expected of a petitioner in such circumstances, particularly that expected of a husband petitioner. The law, it may now be stated with some certainty, will not require the harassed husband to remain a stationary target for objects thrown by his wife: he may now try to avoid them.

Frank Bates

BREACH OF PROMISE AND STANDARD OF PROOF

The suggestion that there exists a standard of proof intermediate between the civil and criminal standards which is applicable in matrimonial causes actions is one which has arisen, both expressly and by implication, in Australia and elsewhere.[1] Most recently, the matter has been considered in relation to the question of breach of promise of marriage by the Full Court of the Supreme Court of Western Australia in the case of *Andrijich* v. *D'Ascanio*.[2] There the plaintiff claimed damages from the defendant for breach of promise to marry. The plaintiff testified to a verbal agreement and called several witnesses. The defendant denied the truth of the plaintiff's allegations at every material point. The judge at first instance held that the plaintiff's action would fail as he was not prepared to find, as a fact, that the defendant had promised to marry the plaintiff as alleged. The plaintiff appealed.

The major ground of appeal was that the trial judge had propounded the wrong rule relating to the standard of proof in such cases. It was contended that the leading case of *Briginshaw* v. *Briginshaw*[3] required a higher standard of proof in matrimonial causes actions than was normally required in civil cases. In that case, Dixon J., after citing a passage from *Wigmore on Evidence* concerning the standard of proof in civil actions, had said,[4]

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a

1 Expressly, see the Canadian cases of *Lichstein* v. *Lichstein* (1922) 62 D.L.R. 581 and *Leboeuf* v. *Leboeuf* [1928] 2 D.L.R. 23 and, by implication, the English case of *Bastable* v. *Bastable & Sanders* [1968] 3 All E.R. 701.
2 [1971] W.A.R. 140.
3 (1938) 60 C.L.R. 336.
4 At p. 361.

> mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the standard required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

Both Lush and Whickham J.J. refuted[5] the suggestion that this passage implied the existence of an intermediate standard. Lush J. commented[6] that there were three points made by Dixon J. First, that there was no intermediate standard; secondly, that the gravity of the issue affects the cogency of the evidence needed to prove it; thirdly, that an issue is not established at all unless by some means the tribunal of fact is led to entertain an actual belief in its truth. Wickham J. was of the opinion[7] that Dixon J., in using the phrase 'actual persuasion', was pointing out that what was required in the court was belief, 'which did not spring from a mere mechanical comparison of probabilities'. Wickham J. went on to adopt the remarks of Kitto J. in *Nesterczuk* v. *Mortimer*[7] that

> An opinion that a state of facts exists may be held according to indefinite gradations of certainty; and in a civil case such as we have here it is enough if the tribunal, on a balance of probability, believes (or thinks, if one prefers that word for the sake of a clearer recognition that no high degree of persuasion is required) that the fact is as alleged. But if the tribunal finds itself unable to form any opinion at all as to whether an allegation of fact is true, a decision which depends upon proof of that allegation obviously cannot properly be given.

The present writer has long felt disquieted by this attitude towards the civil standard of proof. There is, as indeed Dixon J. pointed out in *Briginshaw*, a difference in principle between the standards of proof required in civil and criminal cases.[8] The reason why nominate standards of proof exist is so that a litigant or his representative will be able to know what kind of evidence they will be required to adduce in support of their case. If the nominate standard were to be abandoned or, indeed, a system based upon a subjective assessment of the gravity of the issues to be widely adopted, problems resulting from uncertainty would inevitably result. In fact, if such were universally to be the case an effective third standard of proof could not but result as the issues of status are clearly of considerable gravity. Denials of the existence of such an intermediate status, as in *Andrijich* v. *D'Ascanio*, make no real

---

5 Virtue A.C.J. concurred with the judgment of Lush J.

6 At p. 142.

7 (1965) 115 C.L.R. 140 at p. 149.

8 See also the leading case of *Rejfek* v. *McElroy* (1965) 112 C.L.R. 517 at p. 521.

difference to the actuality of the situation, both in Australia and elsewhere.

The other feature of interest which arises from *Andrijich* v. *D'Ascanio* is the court's consideration of the circumstances when an appellate court will be justified in setting aside a trial judge's finding of fact. Lush J. considered[9] a number of authorities and refused to hold that Burt J. had made an error of law. He emphasised, quoting the remarks of Lord Sumner in *S.S. Hontestroom* v. *S.S. Sagaporack*[10] and Griffith C.J. in *Dearman* v. *Dearman*,[11] that the trial judge operated under the considerable advantage of being able to see the witnesses in person. Therefore, an appellate court should not set aside the finding of a trial judge unless it could be shown that he has failed to use, or palpably misused, his advantage. It is not enough for an appeal court to suspect that they would have arrived at a different conclusion, nor is it sufficient for an appellant to show that other judges might have legitimately arrived at a different conclusion.[12] Furthermore, the whole of the judgment at first instance should be considered and if the judge's estimate of a particular witness forms a substantial part of the reasons for the decision, then the decision must be allowed to stand.[13]

Frank Bates

9 At p. 143.
10 [1927] A.C. 37 at p. 47.
11 (1908) 7 C.L.R. 549 at p. 553. As Lush J. pointed out (at p. 144), a rather more extreme statement.
12 See *Whiteley Muir & Swananberg Ltd.* v. *Kerr* (1966) 39 A.L.J.R. 505.
13 See *S.S. Hontestroom* v. *S.S. Sagaporack ante.* Wickham J. agreed with the view of Lush J., whilst basing his comments on the judgment of Rich J. and Latham C.J. See *Briginshaw ante* at pp. 349, 351.