however, were concerned with the question whether the remedy of rescission existed: return of purchase money in exchange for return of business. If the section is to be construed in accordance with the analogies drawn by Abbott J. the plaintiff still should not have succeeded in recovering his money because the consideration had not failed. His only right would be to avoid performance of any outstanding contractual duty. It is respectfully submitted that the analogy to the rights of a contracting party to avoid a contract for misrepresentation, which Abbott J. rejected, gives a more complete answer to the problems which arise in considering the extent of the remedy generating from the word "avoid". The rules relating to infants' contracts have been evolved to protect the infant insofar as he has not carried out his contract, and as such they provide no analogy in the case where a party claims to be able to go back on what has already been done.

In *Drozd* v. *Vaskas* Reed J. did not approach the problem as a question of applying the equitable principle of rescission. He found that an election to affirm the contract would be constituted in some occurrence which rendered *restitutio in integrum* impossible. Thus in effect the equitable rule is put into effect. But is this approach always good? Inability to restore may result from causes which have nothing to do with the purchaser. Can this then be construed as an affirmance? It is submitted that construction of the word "avoid" in s. 39 can only be completely achieved by analogy from the general law. If the section arises again for consideration the question to be asked should be: does this section give remedies akin to those given at common law and in equity for contracts induced by misrepresentation or undue influence, or does it give some greater or lesser right? The existence of the question illustrates the lack of definition which in general exists with respect to the exact rights arising when a contract is labelled "voidable".

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# HEALTH ACT

## *Suffer to Inhabit or Occupy—Relation to Landlord and Tenant Act*

The extent of operation and relation of the *Health Act* 1935-1955 and orders made under it to general enactments like the *Landlord and Tennant (Control of Rents) Act* 1942-1957 arose for consideration on appeal before the Supreme Court in the case of *Piro* v. *Boorman*.[1] Premises of the appellants let to a weekly tenant were declared unfit for habitation and an eviction order made under s. 116 of the *Health Act* 1935-1955. The appellants' son continued to call at the tenement to collect the weekly rent and no action was taken by the appellants to put out the tenants. They were convicted under s. 117 which states that "any person who, after the expiration of the specified time . . . suffers to be inhabited or occupied any such building" shall be guilty of an offence.

Counsel contended that there was a conflict between this order and s. 42 of the *Landlord and Tenant (Control of Rents) Act* which pre-

1. [1958] S.A.S.R. 226.

vented landlords from exercising their common law right to evict tenants except in certain circumstances, none of which were reasonably applicable to the appellants. At it was thus impossible for them to issue a valid notice to quit, they had not suffered unlawful occupation. The Court (Napier C.J., Reed and Ross JJ.), following observations of Ligertwood J.[2], regarded the purposes of the respective Acts as mutually exclusive in this field. The *Health Act* deals with the premises unfit for human habitation while the *Landlord and Tenant (Control of Rents) Act* deals with the occupation of premises by tenants. Both the intention and natural meaning of the words would deny the construction that a building, which no one could lawfully inhabit or occupy, or suffer to be inhabited or occupied by virtue of an order under the *Health Act*, could be a "dwelling house" or "premises leased for the purpose of residence" for the purposes of the *Landlord and Tenant (Control of Rents) Act*. Thus the contention that because of the *Landlord and Tenant (Control of Rents) Act* the appellants were not in a position to prevent the building from being occupied, failed.

This was undoubtedly sufficient to dispose of the appellants' case. The offence was suffering the building to be occupied and counsel based his whole argument on the inability of the appellants to terminate occupation. "A man cannot be said to suffer another to do a thing which he has no right to prevent": per Field J. in *Reg.* v. *Staines Local Board*.[3] Once the court had established that (a) there was a right to eject the tenants; (b) a failure to do so, and (c) indeed a positive act of collecting rent, then by applying its own ruling that "suffer" suggests inaction—not doing what one could do — it could have decided against the appellants.

The Court, however, was apparently not content to dismiss the appeal on these grounds, and went on to consider the position if they had refrained from collecting the rent. It would be an open question whether they had "abstained from action which under the circumstances then existing it would have been reasonable to take or, in other words, exhibited a degree of indifference from which permission ought to be inferred." This was the test propounded in the dissenting judgment of Knox C.J. in *The Adelaide Corporation* v. *Australasian Performing Right Association*[4] where it was held that the Corporation had not permitted a breach of copyright although they had received notice that an infringement may occur at a performance in the Town Hall, and which they could have prevented. The majority applied substantially the same test[5] but on the facts the appellants were held not liable.

In distinguishing the *Performing Rights Case* the Court drew a difference between "suffer" and "permit" and their respective use in Statutes. "We think that 'permit' suggests the idea of action—leave or licence given—whereas 'suffer' suggests inaction — not doing what one could do — and a person who has remained quiescent might, perhaps, be said to have 'suffered' something to be done, when it

2. *Shiell* v. *Symons* [1951] S.A.S.R. 82 at p. 87.
3. (1889) 60 L.T. 261 at p. 262. See also *Rochford Rural Council* v. *P.L.A.* [1914] 2 K.B. 916 per Darling J. at p. 922.
4. (1928) 40 C.L.R. 481 at p. 488.
5. (1928) 40 C.L.R. 481 at p. 490 per Isaacs J.

might be more difficult to say that he had permitted it."[6] Oddly enough, this seems to be in conflict with the definition quoted from the *Performing Rights Case* that abstinence from action may exhibit a degree of indifference from which permission could be inferred. The suggested definition recognises that abstinence from acts within the individual's power which could have averted the evil is necessary both to "suffer"[7] and to "permit".[8] In the case of "permit", there is a further step of active consent. The High Court decision in *Broad* v. *Parish*,[9] however, confuses the situation. There it was sought to make a hire-purchase company liable for "permitting" a client to drive an uninsured vehicle. Starke J. averted to the statement of Mackinnon L.J. that to be liable for permitting another to use a motor vehicle "it is obvious that he must be in a position to forbid the other person to use the motor vehicle".[10] The company, while remaining the owner, had alienated the right to control the use of the vehicle and it was not within its power to forbid a person to drive it. It was nevertheless held that they had "permitted" the use of the vehicle.

The clear-cut definition given may thus in the light of other decisions prove to be an over-simplification, and the fact that the analysis was not strictly relevant to the case in hand perhaps prevents it receiving the attention that it may deserve. The nett result of the distinction between the present case and the *Performing Rights Case* was the dismissal of the appellants' case on the ground that "the indifference exhibited by these acts of omission and commission, reaches a degree from which an authorization or permission to occupy the building can and should be inferred".[11] The Court thus went one step further than necessary and satisfied itself that not only "by taking the rent, they were suffering, and, indeed, authorizing the tenant to go on living in the building" but also that "authorization or permission" could be inferred. These two conclusions create their own difficulties for in addition to the superfluity of the latter, "authorizing" is treated as synonymous first with "permitting" and then with "suffering", which would logically seem to deny any distinction between the two.

It may be that the only safe conclusion to be drawn from the distinction here propounded is that "suffer" and "permit" indicate different degrees of authorization and wherever "permission" may be inferred "suffering" has also taken place, although the converse does not apply.

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6. [1958] S.A.S.R. 226 at p. 230.
7. See note (2) supra.
8. *Barton* v. *Reed* [1932] 1 Ch. 362 at p. 377; *Performing Rights Case* (1928) 40 C.L.R. 481 at pp. 487, 491.
9. (1941) 64 C.L.R. 558.
10. *Goodbarne* v. *Buck* [1940] 1 K.B. 771 at p. 774.
11. [1958] S.A.S.R. 226 at pp. 230-231.

# JUSTICES ACT PROCEDURE

## *Change of Plea Not Permitted by Section 106a.*

*R.* v. *Mills, ex parte Edwards*[1] is a decision concerning the procedural powers of justices when trying minor indictable offences summarily by virtue of s. 106a of the Justices Act 1935-1956. The defendant was charged with four counts of simple larceny contrary to the provisions of s. 131 of the *Criminal Law Consolidation Act* 1935-1956. In the court of summary jurisdiction for the conducting of preliminary examinations pursuant to the provisions of s. 106 of the *Justices Act* 1921-1956 the Special Magistrate was required by s. 106a of that Act to inform the defendant of his right to plead guilty to the informations. The defendant did in fact plead guilty to the informations, whereupon, without taking any evidence, the Special Magistrate heard the prosecution on the defendant's previous convictions. The question of penalty was then discussed with the defendant's counsel seeking and obtaining a remand to enable the defendant to set his affairs in order. One month later the case came on for hearing, with the defendant's counsel applying for leave for the defandant to change his plea to not guilty. The prosecution objected that the defendant had already been convicted, but the Special Magistrate made the order giving the defendant leave to change his plea. The prosecuting officer then brought a motion before the Full Supreme Court (Mayo A.C.J., Reed and Abbott JJ.), claiming that the Special Magistrate having convicted Mills had no power to permit the pleas to be changed.

S. 106a of the *Justices Act* 1921-1956, provides a means whereby a person charged with a minor indictable offence found in s. 120 may at his preliminary examination before committal plead guilty and have his case tried summarily. The section is in the following terms:—

(1) Where the defendant appears before a special magistrate or two or more justices and the information charges the defendant with an offence cognizable by a special magistrate or justices under section 120, the defendant at any stage of the proceedings, and whether any statement has been taken from any witness or not, may plead guilty to the offence or any of the offences charged against him, and the magistrate or justices shall at the commencement of the proceedings inform the defendant of his right so to plead.

(2) If the defendant pleads guilty to any such offence —

(a) the magistrate of justice shall, in relation to that offence, be a court of summary jurisdiction within the meaning of this Act; . . .

(d) the plea of guilty may be withdrawn as provided in subsection (3) of this section.

(3) If after the defendant has so pleaded guilty to an offence, the magistrate or justices, upon consideration of any facts stated by the prosecution or given in evidence, is or are of opinion that the time for taking the plea should be postponed—

(a) he or they may order that the plea of guilty be withdrawn; . . .

The Full Court found that the Special Magistrate in allowing the defendant to change his plea after conviction upon his counsel's appli-

1. (1958) S.A.S.R. 54.