CASE NOTES

CASE OF CERTAIN NORWEGIAN LOANS

FRANCE v. NORWAY[1]

International Law — Jurisdiction of the International Court of Justice — Effect of reservation of matters essentially within the national jurisdiction as understood by the government of a state.

The Norwegian Government and two state-guaranteed banks floated loans between 1885 and 1909 on, *inter alia*, the French Market. French nationals became holders of bonds which, the French Government contended, contained a "Gold Clause." At various times from 1914 to 1931, the obligation of the Bank of Norway to convert notes into gold was suspended by Norwegian legislation. The 1931 enactment remained in force at the time of the initiation of proceedings before the Court. Meanwhile, legislation had also been enacted on December 15, 1923, the apparent effect of which was to free debtors from the obligation of specifically abiding by "Gold Clauses" so long as the Bank of Norway notes remained unconvertible. The potential combined effect of these enactments in Norwegian law was claimed by France to be that French bondholders had been deprived of the benefit of the "Gold Clause." France therefore took the stand that French bondholders were not affected by the legislation in question and sought Norway's assurance that the "Gold Clauses" would be honoured. Protracted diplomatic correspondence, including various requests for submission to arbitration, achieved nothing, and on July 6, 1955, the French Government referred the matter to the Court by way of Application based upon the Acceptance of the Governments of France and Norway of the compulsory jurisdiction of the Court in conformity with Article 36 (2) of its Statute.

The Norwegian Declaration of November 16, 1946, accepting the compulsory jurisdiction of the Court, is subject to a condition of reciprocity. The French Declaration of March 1, 1949, is subject, *inter alia*, to the following reservation:

"This Declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."

The main question before the Court was therefore whether, taking into consideration the reservation in the French Declaration, the benefit of which accrued to Norway by virtue of her condition of reciprocity, the Court had jurisdiction.

[1] Judgment of July 6, 1957; I.C.J. Reports, 1957, p. 9.

The Court held that it had no jurisdiction, Norway being entitled to rely upon the French reservation and understanding the matter to be essentially within the national jurisdiction.

It would seem to go almost without saying that the Court, if it was to base its decision as to jurisdiction upon the Acceptances of the Parties, had to determine the question of validity of those Acceptances.[2] It is therefore perplexing in the extreme to find the majority holding that since "The validity of the reservation has not been questioned by the parties . . . in consequence, the Court has before it a provision which both parties to the dispute regard as constituting and expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings."[3] Jurisdiction is then held to be withheld by the reservation on which the Norwegian Government is fully entitled to rely. It was this finding which caused Judges Lauterpacht and Guerrero to deliver separate and dissenting judgments respectively, both holding, on this point, that the Court not only could, but must determine the question of validity *proprio motu*. Judge Lauterpacht felt, and there is force in his argument, that it was impossible to decide on the basis of the Reservation, since "to do so would be to admit that the Court (was) confronted with a valid instrument of acceptance of its jurisdiction,"[4] an admission which he was not prepared to make. It would seem that this is the correct approach. By Article 92 of the Charter of UNO, the Court is obliged to function in accord with its Statute,[5] which lays down that the jurisdiction of the Court comprises all cases which the parties refer to it[6] and all cases in which the compulsory jurisdiction of the Court has been recognised by the parties.[7] As Judge Lauterpacht pointed out, the Court could not be regarded as having jurisdiction by way of *forum prorogatum* since Norway, far from submitting to the Court's jurisdiction had challenged it throughout. Jurisdiction, if any, had therefore to be based upon the Acceptance of the Parties, and for legal consequences to flow from the Acceptances (as the Court implied they did by virtue of its acknowledgment of the efficacy of the Reservation) they had to be valid. Reference of the question of validity of the Reservation by the parties is irrelevant. If the Reservation was invalid, the Court, in basing its decision upon it, was acting in contravention of its own Statute and the Charter of UNO, instruments which are the beginning and end of its existence. There is force in the peroration of Judge

[2] It might have been possible for the Court to base its decision upon alternative grounds, that jurisdiction was lacking either because the Acceptance was invalid, or because it was effective to withdraw jurisdiction from the Court, without actually deciding the question of validity. The Court, however, did not take this course, preferring to decide, on the basis of the Acceptance, that it did not have jurisdiction.

[3] I.C.J. Reports, 1957, p. 27.

[4] Ibid., p. 43.

[5] Article 36.

[6] Ibid., para. 1.

[7] Ibid., para. 2.

Guerrero that "what will be found difficult to understand is what reason the Court could have for not dealing with the question (of validity) when it was seised of the France-Norwegian dispute, in the course of which the parties invoked the terms of their respective declarations of accession to the optional clause."[8]

The decision of the majority that it was not concerned with the question of validity means, of course, that it remains incompletely answered. Judges Lauterpacht and Guerrero were, however, committed by their answers to the previous question to a consideration of the validity of the Reservation. Both held it to be invalid and both, in substance though not in form, held it to be so on the same grounds, which, it was said by Judge Lauterpacht, are two-fold. The Reservation was invalid (a) because it was in contravention of the Statute; and (b) because it was a legal nullity in so far as it purported to create the obligation of submitting to the jurisdiction of the Court. This second ground is regarded by Judge Lauterpacht as being distinct from the first.[9] It is believed, however, for reasons about to be stated, that this is not so. The Reservation is in contravention of the Statute only because it is a nullity, and not apart from that fact. This can be seen from an analysis of the basis of the contravention alleged by Judge Lauterpacht.

The Reservation is regarded as being in contravention of the Statute by virtue of the fact that "the Court is not in the position to exercise the . . . duty imposed upon it, under paragraph 6 of Article 36 of its Statute. That paragraph provides that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court.' "[10] This cannot mean that this particular type of reservation is in contravention with the Statute because it limits the scope of the Court in determining jurisdiction. All Reservations do that. It must mean, as indeed it appears Judge Lauterpacht intended it to mean,[11] that a total withdrawal of the function of determining jurisdiction from the Court does not comply with the Statute. This proposition seems to underlie the dissenting opinion of Judge Guerrero and is acceded to by Judge Read,[12] who points out that the question of contravention turns on the question of nullity. To this extent, then, Judges Lauterpacht and Guerrero put the cart before the horse.

The important, indeed, the vital, question is therefore whether the French Reservation is a nullity. If it is to be interpreted as reserving a discretion to the French Government to declare any matter whatsoever as being within the domestic jurisdiction, then no obligation to submit is created (rendering the Acceptance a nullity) and there is no sphere

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8 I.C.J. Reports, 1957, p. 70.

9 Ibid., p. 48.

10 Ibid., p. 44.

11 Ibid., p. 44. (The assumption that the Reservation is necessarily exclusive of the Court's jurisdiction can be seen throughout Judge Lauterpacht's Opinion. See pp. 43, 46, 47, 48, 51-53).

12 Ibid., pp. 94-95.

within which the Court can discharge the function of determining jurisdiction (rendering the Acceptance in contravention of the Statute).

But is it a nullity? It is possible to answer this question in the affirmative only if the statement of the government concerned that it "understands" a matter to be within the domestic jurisdiction is regarded as conclusive. Some of the Judges would have it so. Judge Badawi, for example, regarded the Reservation as being "conclusive" and having "a formal and direct character which precludes any argument,"[13] but he did not support this finding in any way. There is no reason, either on principle or authority, for adopting this course in preference to any other.[14] It may be argued that where a provision is ambiguous, it is to be interpreted in the manner least onerous to the state assuming the burden;[15] but it can equally well be argued that a party acceding to an instrument must be presumed to have had some purpose in so doing. The Rule of Effectiveness is well-established in international law. There are several grounds upon which it might be possible to give effect to the purport of such a Reservation to allow the Court to hold that it has jurisdiction in certain circumstances.

It was suggested by the Norwegian Government, in invoking the Reservation, that "Should a government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a 'matter which is essentially within the national jurisdiction' it would be committing a *abus de droit* which would not prevent the Court from acting."[16] The requisite of Good Faith was, however, abandoned by Judges Read and Lauterpacht both on the ground that it would be "impossible for an international tribunal to examine a dispute between two sovereign states on the basis of either good or bad faith or of abuse of law."[17] Judge Lauterpacht was not content to rely solely on this ground. He admitted that the requirement of "good faith" was unquestionably a general principle of law,[18] but went on to state that states "have denied the Court the power to determine the legality of" their own decisions that they have acted in good faith.[19] This may mean two things. It may mean firstly, that states have, in the past, been content to assert their own good faith and not allow it to be questioned (Does a rule of law cease to be a rule of law because it is not observed?) or secondly,

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[13] Ibid., p. 29.

[14] The analogy of executive declarations in certain matters in municipal law is a misleading one. Municipally, Executive and Courts are organs of the same authority. This is certainly not the case so far as the declaration of a state before an international tribunal is concerned. For this reason, it would seem unlikely that an argument in support could be based on general principles of law.

[15] As in the **Turkey-Iraq Frontier Case**, P.C.I.J., Ser. B, No. 12, p. 25.

[16] I.C.J. Reports, 1957, pp. 53 and 94.

[17] Ibid., pp. 53 and 94. (Judge Lauterpacht describes as necessary, "An enquiry so exacting that it (the Court) could claim to determine, with full assurance that the judicial view advanced by a government is so demonstrably and palpably wrong and so arbitrary as to amount to an assertion made in bad faith," at p. 54).

[18] Ibid., p. 53.

[19] Ibid., pp. 53-54.

that the Court cannot enquire into the question because of the Reservation (which is the very point in issue). Whatever the reason, Judge Lauterpacht's view is that "the Court has no such power. It cannot arrogate to itself the competence which has been expressly denied to it."[20] The Court surely does not have to arrogate competence to itself. Far from it, the function of the Court is to decide in accordance with international law such disputes as are submitted to it.[21] It may finally be pointed out that the assertion that the requirement of Good Faith is a rule of international law is inconsistent with a finding that its determination is within the exclusive competence of the state.

If the application of the principle of "Good Faith" is to be abandoned at all, therefore, it must be on the basis of the practical difficulties involved in conducting such an enquiry. Judge Read deals briefly with this point, since he avoids the conclusiveness of the Reservation on other, less stringent, grounds. Judge Lauterpacht, however, conducts a fairly searching enquiry into it. It should be borne in mind that to render the requirement of good faith inapplicable it must be shown that in *no* case can the attitude of the state into whose actions an enquiry is being conducted be questioned. This Judge Lauterpacht does not do. He states that "the attitude of a government in *most* disputes is as a rule adopted in pursuance of its internal legislation and other forms of authorization determined by its national law. To that extent it is arguable—perhaps inaccurately but not necessarily extravagantly so—that any dispute *arising in this connection* is essentially a matter of domestic jurisdiction. Also, *practically all* disputes involving an allegation of a breach of an international duty . . . arise out of events occurring within the territory of that state. In that sense it may be claimed, with or without good reason, that they are matters essentially within the national jurisdiction of the state."[22] One may well query whether "that sense" is the generally accepted sense, for if not, a claim relying upon "that sense" may *ipso facto* be evidence of bad faith. One may also perhaps be forgiven for wondering if a claim made "without good reason" must necessarily be made in good faith. And one may finally be not entirely unwarranted in concluding that if a class of disputes, no matter how small, can not, without bad faith, be argued to be within the domestic jurisdiction, then the principle of good faith may have some practical application. Judge Lauterpacht admits that territorial disputes may well fall within that class but suggests that even this is not certain in view of the Argentinian claims in connection with the Falkland Islands Dependencies.[23]. The question of whether the Argentinian claims were made in good faith is, of course, in no way resolved by the fact that the claims were made.

So far, then, as the principle of good faith is concerned, the arguments for its rejection are not convincing. It may, indeed, be possible to go

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20 Ibid., p. 53.

21 Statute of the I.C.J., Art. 38 (1).

22 I.C.J. Reports, 1957, pp. 53-54 (italics supplied).

23 Ibid., p. 54.

further. The notion of good faith is, ostensibly at any rate, subjective. But an objective approach yields better results. As Judge Read points out: "It is necessary, for Norway to succeed, to establish that the Norwegian Government *understands*. . . . It is not sufficient to establish that the Norwegian Government *pretends to understand*, or *declares that it understands*. . . ."[24] Once this is realised and accepted, the sphere of matters which can legitimately be effectively "understood" can be severely limited. It can be argued that certain matters are settled as exclusively within the province of international law among which one might cite territorial disputes (Judge Lauterpacht)[25] and discrimination and extraterritoriality (Judge Read).[26] The latter two subjects are particularly illustrative since they do not, and in their nature cannot, have any existence in municipal law. They are creatures of international law only and become meaningless when considered in any other context. A further and more extensive application of this principle might, however, be validly made. It is surely sound principle that a state cannot "understand" a matter to be within the domestic jurisdiction when it has itself by its conduct on a prior occasion "understood" the matter otherwise. Thus, had France and Norway by a treaty agreed to "understand" certain matters and no others as within the domestic jurisdiction, Norway could hardly be allowed the convenient change of mind necessary to support her present contention (quite apart from the breach of treaty involved in the change of mind). This is not only sound in principle but also well established by authority.[27]

This may have been the import of the French observation that: "Between France and Norway, there exists a treaty which makes the payment of any contractual debt a question of international law. In this connection the two states cannot therefore speak of domestic jurisdiction." But if this be so, it was for this purpose ignored by the Court which adopted the view that in so arguing, France was seeking to establish jurisdiction on an alternative basis, and thus left the question unanswered.[28] Of the separate and dissenting opinions which one might have thought would concern themselves with it, that of Judge Lauterpracht does not expressly contemplate the point, whilst that of Judge Read is based four-square upon it. "The dispute, in the form which it has now taken, and in which it is expressed in the French Final Submissions, involves a threefold claim based on: discrimination, extraterritoriality and the "gold clause." The first two are based solely on international law while the third is based primarily on national law. . . . In these circumstances, I find it impossible to reach the conclusion that

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[24] Ibid., p. 94.

[25] Ibid., p. 54.

[26] Ibid., p. 94.

[27] For example, **The Lisman,** Reports of International Arbitral Awards, p. 1767; **The Diversion of Water from the River Meuse,** P.C.I.J., Ser. A/B, No. 70, p. 25; **The Mechanic,** Moore, International Arbitrations, III, p. 3221.

[28] I.C.J. Reports, 1957, pp. 24-25.

Norway could have reasonably understood that the case was essentially within the Norwegian national jurisdiction."[29]

The objective approach also yields a second possible limitation of the Reservation, which applies only to matters "*essentially* within" the domestic jurisdiction as opposed to matters simply "within." The modification introduced by "essentially" may plausibly be regarded as having the effect of further confining the matters which fall within the scope of the Reservation. Some matters, as above suggested, fall exclusively within the sphere of international law. Some, on the other hand, may be regarded as falling exclusively within the domestic jurisdiction. But there are two types of matter which cannot be said fall exclusively within either. These are:

(1) Matters operative in both spheres.

(2) Matters *de lege ferenda*, and of doubtful classification.

Did the Reservation extend to matters "within," there could be no objection to a state's "understanding" either of the above two classes of dispute to be within its scope. The effect of the modification may well be to rule out the first group of cases. Matters which fall jointly in the two spheres, it might be argued, cannot be understood to be "essentially within" either. Matters *de lege ferenda*, or even doubtful matters, might justifiably be so understood.

There is force in the argument of Judge Lauterpacht that "A party to proceedings before the Court is entitled to expect that its Judgment shall give as accurate a picture as possible of the basic aspects of the legal position adopted by that party" and that, although "there may be force and attraction in the view that among a number of possible solutions a Court of law ought to select that which is most simple, most concise and most expeditious . . . such considerations are not . . . the only legitimate factor in the situation."[30] Such an attitude is to be welcomed, but mere adoption of a narrow ground of decision does not provide a valid basis on which to criticise that decision itself. The decision of the Court in the Norwegian Loans Case, however, is subject to and demands criticism.

The Court acted upon the basis of the Reservation. There are no half-measures about validity, and from this two conclusions only are possible: either the Court was not the International Court of Justice since it was acting in contravention of its Statute, or the Reservation was, quite without any consideration of the matter, regarded as valid. The International Court is, thankfully, free from the shackles of *stare decisis*. But even with this saving grace, the fact still remains that the Court, in neglecting to face up to the issue before it, has failed to make use of an opportunity and to discharge a duty,[31] to make a significant contribution to the development of international law.

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[29] Ibid., p. 95.
[30] Ibid., p. 36.
[31] Statute of the I.C.J., Art. 38 (1).

H. G. Calvert.

HOBSON v. IMPETT[1]

Criminal Law — Receiving Stolen Goods — Mere handling of stolen property not sufficient — Control required — Larceny Act 1916 (6 and 7 Geo. 5, c. 52), s. 33.

The appellant appealed to Quarter Sessions against his conviction by justices on a charge of receiving a number of ingots knowing them to be stolen contrary to section 33 of the Larceny Act, 1916. There had been a breaking and entering of a store and, on the following day, the appellant assisted one George Porritt, with whom he lodged, to unload from a cart a sack containing some of the stolen ingots and to take them into Porritt's house. At the conclusion of the unloading the appellant knew that the sack contained stolen ingots and that Porritt also knew this. On the next day, assisting Porritt and one Ackleton to load 15 of the ingots into a motor car, he picked up some of the ingots and carried them from the house to the car, knowing that they were being carried to the car to be offered for sale. He travelled in the car as passenger, but it was not proved that he touched the ingots again or took any part in offering them for sale. The Appeal Committee of Quarter Sessions in dismissing the Appeal held that by taking up and carrying the ingots to the car the defendant was in manual possession of them and so received them within the meaning of section 33. On Appeal to the Divisional Court the conviction was quashed.

Lord Goddard, C.J., in delivering judgment, held the direction to be too wide in law, that Quarter Sessions as judges of fact were in the same position as a jury and that if a jury had been given such a direction the conviction would have to be quashed. The Court therefore had no alternative but to quash the conviction. The Lord Chief Justice went on to lay down the following statement of the law:[2]

> "It is not the law that if a man knows goods are stolen and puts his hand on them that in itself makes him guilty of receiving because it does not follow he is taking them into his control. The control may still be in the thief or man whom he is assisting and the alleged receiver may be only picking them up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is assisting."

The Lord Chief Justice then said, however, that what the Appeal Committee might have found on these facts, and could obviously have found, was that there was a joint possession and that both Porritt and the appellant were guilty of receiving the goods.

The case involves a consideration of two points. Firstly, on a charge of this kind the prisoner must have received stolen property. It has been established at common law that the test of receipt is control.[3] The offence

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[1] (1957) 41 Cr. App. R., 138.

[2] At p. 141.

[3] **R. v. Thomas Smith** (1855); 6 Cox C.C. 554; **R. v. Gleed** (1916) 12 Cr. App. R. 32.

involves a change of control which may be from exclusive control to joint control or from exclusive control to exclusive control, but so long as exclusive control remains in the thief or person with whom the alleged receiver is dealing there is no receipt.[4]

The term "control" has a somewhat indefinite meaning. But there must be proof of *mens rea* in the sense that the receiver intends to appropriate the goods to his own use or to the use of some person other than the true owner[5] and it would seem that the essence of control is the power to implement this intention. In *R. v. Smith*[6] the jury were directed that if they believed that the stolen property was, with the prisoner's cognizance, in the custody of a person over whom he had absolute control so that it would be forthcoming if he ordered it there was evidence to justify a conviction. It seems implicit in this decision that the amount of control necessary must be such that the goods can be dealt with at the will of the alleged receiver, so that a temporary custody of goods, for example in storage, would suffice as there would be evidence of control in that the goods could be produced or dealt with by the accused.

If this be the test of "control," then plainly, the appellant did not have exclusive control. Was it obvious, as the Lord Chief Justice seemed to think, that he had such joint possession as would render him guilty of receiving?

Merely assisting one person to dispose of goods to another is not receiving unless the receiver has had possession or control of the goods,[7] though in certain circumstances, conviction as an accessory after the fact may be possible. In *R. v. Watson*[8] the prisoner met two others who had stolen jewellery which they wished to dispose of. The prisoner went alone to a jeweller to make enquiries. He was later arrested and charged with receiving. At no time did he have manual possession. The Recorder directed the jury that if the appellant aided and abetted the others to dispose of stolen property he could be convicted of receiving. The jury returned a verdict that the accused was a negotiator for disposing of the jewellery in full knowledge of the fact that it was stolen. This was entered as a plea of guilty. On appeal, the Court of Criminal Appeal held the direction to be incorrect and quashed the conviction. The finding of the jury was not a finding that the appellant received or was in possession of the goods and the question to be left to the jury was whether he had sole or joint possession or had control of them. In delivering judgment Lord Reading C.J. laid down that a person who merely assisted in negotiations for the sale of property which he knew to be stolen or directed others to a place where they might conveniently dispose of it, but who never had control of it, cannot be convicted of receiving.

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[4] **R. v. Wiley** (1850) 2 Den. 37; 169 E.R. 408.

[5] **R. v. Mathews** [1950] 1 All E. R. 137.

[6] (1855) 6 Cox C.C. 554.

[7] **R. v. Watson** [1916] 12 Cr. App. R. 62.

[8] (1916) 12 Cr. App. R. 62.

In so far as the remarks of the Lord Chief Justice in *Hobson v. Impett* indicate that a person may be convicted of receiving if he assists a thief to dispose of property but without intent to assume possession on his own behalf or that of any other person, they seem to be inconsistent with the views of Lord Reading C.J., in *R. v. Watson.*

It is at least arguable that the mere handling by the appellant in *Hobson v. Impett* did not amount to possession and control which always remained with Porritt. He took no further active part in proceedings apart from travelling as a passenger. It seems unlikely the Courts would hold that a person who travels as a passenger in a car, which he knows carries stolen property, could be said to have control of the stolen property. However, in the case of a driver undertaking to deliver them a conviction might be sustained.

The second point of interest which was not taken at the trial is that the prisoner must have guilty knowledge at the time of receipt of the goods that they are stolen. The innocent receipt of a chattel and its subsequent retention after guilty knowledge is not a crime within s. 33 of the Larceny Act,[9] provided that no act has taken place after the guilty knowledge which can be regarded as a fresh act of receiving or as completing the original receiving if it were incomplete at the time.[10]

If the circumstances at the time of the loading in *Hobson v. Impett* were such that joint possession (and, therefore, *a fortiori* joint control) could obviously have been inferred it is equally arguable that the prisoner obtained possession when he assisted Porritt to unload them, at which time it was not established that he knew them to be stolen and that since he lodged in the same premises as Porritt, he retained possession so that there was no fresh act of receipt after guilty knowledge.

L. McDermott.

RUSSELL v. SMITH[1]

Criminal Law — Larceny — Taking — Mistake — Excess goods placed on lorry Mistake not discovered by driver till goods unloaded — Intention then formed by driver to appropriate goods — Larceny act 1918 (6 and 7 Geo. 5, c. 50), s. 1.

Smith, a lorry driver employed by a firm of haulage contractors, was instructed to collect from C. & B. Ltd. 20 sacks of feeding stuff and deliver it to J. By error, and unknown to either party, 8 sacks too many were loaded. The driver did not discover the mistake until he came to unload the goods, when he decided to keep the extra 8 sacks of feed for himself. On an information against the driver charging him with stealing the 8 sacks, the justices decided that there was no taking within section 1 of the Larceny Act, 1916, sufficient to amount to larceny, and dismissed the information. On appeal by the prosecutor, it was held, applying

[9] **R. v. Matthews,** supra n. 3.

[10] **R. v. Johnson** (1911) 6 Cr. App. R. 218.

[1] [1958] 1 Q.B. 27.

R. v. Hudson[2] and distinguishing *Moynes v. Coopper*,[3] that the lorry driver was guilty of larceny because:

(i) a man cannot take into his possession a thing of which he has no knowledge, and the extra 8 sacks were therefore "taken" by the driver only when he discovered that he had them, and

(ii) the "taking" was therefore not an innocent one.

"Taking," however defined, must be without the consent of the owner. Mistake can vitiate consent but must be such as to negative the intent of the owner to part with possession. Where the owner consciously intends to pass possession of a thing there is no "taking" without the owner's consent. In *Moynes v. Coopper*, Moynes, the employee of a firm of contractors, had received an advance of £6/19/6½ on his weekly wages but the wages clerk, who was employed to calculate and pay wages, being unaware of this, had paid the full wages of £7/3/4. It was true the clerk was mistaken as to the circumstances in which he paid the money, but he nevertheless fully intended to pay it. He paid it because he thought it was due and owing to Moynes. *R. v. Hudson* was distinguished on the grounds that in that case "neither the cheque nor the envelope was intended by the sender for the accused. Here, there is no doubt the pay packet was intended for the defendant and was so delivered to him."[4] In *R. v. Hudson* there was a mistake as to the identity of the person and the owner could not consent; in *Moynes v. Coopper* there was no taking without the consent of the owner.

This distinction between what may be called fundamental and non-fundamental mistake, appears to have become well established in the law of larceny. The mistakes in *R. v. Ashwell*,[5] *R. v. Flowers*,[6] *R. v. Hehir*[7] and *R. v. Hudson* are all fundamental mistakes — in the first three as to subject matter and in *R. v. Hudson* as to identity. In *Moynes v. Coopper* the mistake was non-fundamental.

The leading cases can be made to fit into one of these two categories, but *Russell v. Smith* serves to emphasise the artificiality of the dichotomy. "Nobody knew the excess had been put onto the lorry; nobody intended that they should be put onto the lorry."[8] *Moynes v. Coopper* was distinguished on the ground that there the taking was innocent because "he only took what the clerk meant him to have."[9] The Court in *Russell v. Smith* appears to have been of the opinion that there was so obviously a taking *invito domini* that that question did not warrant discussion. If one takes the view that the employee of C. & B. Ltd. only intended to give 20 sacks, he could not have consented to being deprived of the

2 [1943] 1 K.B. 458.
3 [1956] 1 Q.B. 439.
4 Per Lord Goddard, C.J. [1956] 1 Q.B. 439 at 446.
5 (1886) 16 Q.B.D. 643.
6 (1886) 16 Q.B.D. 250.
7 [1895] 2 I.R. 709.
8 Per Lord Goddard, C.J. [1958] 1 Q.B. 27 at 31.
9 Per Lord Goddard, C.J. [1958] 1 Q.B. at p. 33.

whole 28. However, both parties were ignorant as to how the mistake occurred, such evidence as there was indicating that it was probably due to an error in counting. It is at least arguable that on 28 separate and distinct occasions the employee intended to part with possession of the particular sack he was loading. Considered in this light, it is difficult to understand which 8 sacks were handed over without consent, assuming that any were. The remarks of Bramwell B., in *R. v. Middleton*,[10] seem singularly appropriate: "In truth he intended to give him what he gave, because he made the mistake."

The distinction may appear more clearly by taking the analogy of a bank teller who changes a £10 note but by some error of calculation gives the customer a pound too much. If he handles each of the notes individually he intends to part with the possession of them. However, if in counting the notes he were to pass over the counter two that were stuck together his intention to pass possession could apply only to one of those notes.

Thus *Russell v. Smith* rests on a somewhat unreal distinction which, nevertheless, appears to have "black letter" support in the law of larceny, a fact which can only serve to strengthen Lord Goddard's endorsement[11] of the criticisms of the learned editor of the Law Quarterly Review[12] as to the present state of the law.

Having briefly dismissed the possibility of there being consent, the Court in *Russell v. Smith* went on to consider the question of *animus furandi*. Applying the well-known dicta of Lord Coleridge C.J. in *R. v. Ashwell*[13] to the effect that "in good sense it seems to me he did not take it until he knew what he had got and when he knew what he had got that same instant he stole it," the judges came to the conclusion that since a person does not have possession of that of which he is ignorant, there was no taking at the time of loading. Therefore, the defendant took when he discovered the excess, and since he formed the requisite intent there and then the taking was *animus furandi*. This affirms the requirement of knowledge in taking as laid down in *R. v. Ashwell* and affirmed in *R. v. Hudson*.

L. McDermott.

VICTORIA v. THE COMMONWEALTH; N.S.W. v. THE COMMONWEALTH[1]

Constitutional Law — Financial relations between Commonwealth and States — Taxing power of the Commonwealth — Implications from the federal nature of the Constitution — Interpretation of "Grants."

Since the decision of the High Court in the *First Uniform Tax Case* in 1942[2] the Commonwealth has reigned supreme in the domain of income

10 [1873] L.R. 2 C.C.R. 38, at 56.
11 [1958] 1 Q.B. 27 at 31.
12 (1956) 72 L.Q.R. 183.
13 (1885) 16 Q.B.D. 190, at 225.
1 [1957] Argus L.R. 761.
2 **South Australia v. The Commonwealth** (1942) 65 C.L.R. 373.

tax, appropriating to itself as much of the money raised as it requires and returning some of the surplus to the States by way of "grant." To ensure that the Commonwealth's superiority remained unimpaired, legisiation was enacted which from a politico-economic point of view made it practically impossible for the States to raise revenue by way of income tax. By virtue of sections 5 and 11 of the States Grant (Income Tax Reimbursement) Act 1946-48, the Commonwealth made provision for the payment to the States of amounts by way of assistance (calculated in the manner set forth in the Act) so long as the States in the period applicable had not imposed their own income tax.[3] The short title to the Act gave the *raison-d'etre* for the statute. It was an Act to reimburse the States to the extent of the loss suffered as a result of refraining from imposing income tax.

To render it more difficult for the States to recover the "power of the purse," section 221 of the Income Tax Assessment Act 1936-56 had been enacted. Section 221, although in terms directed to individuals, was, and is, aimed at preventing the States from collecting their own income tax until the Federal tax for the period had been paid. The Act was expressly stated to be "for the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth."

The legislation challenged in 1957[3] was, by and large, the same as that which received the approbation of the High Court in 1942, but it was sections 5 and 11 of the Grants Act that were the main object of attack by Victoria and New South Wales in the present case. They alleged that the two sections were coercive in effect and that section 96 of the Constitution[4] was never intended to have such a result. It was clear that litigation upon the extent of section 96 since the inauguration of Federation in 1901 had done little to determine the limits of its operation. But it was now argued that in origin section 96 was directed only to the return to the States of surplus moneys derived from the exercise of powers that were then transferred to the Commonwealth, such as customs and excise and *concurrent* income tax, and it was not contemplated that it had reference to moneys raised by the exercise of what has been since 1942 (for all practical purposes) an *exclusive* power to legislate with respect to income tax. It was also strenuously contended that it was never intended to include among the terms and conditions permissibly attached to grants the *non-exercise* by States of powers retained by the States; the intention was that any conditions attached to grants should have reference only to the purposes to which the sums so granted should be put.

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[3] S.5. "In respect of any year during which this Act is in operation and in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes there shall be payable by way of financial assistance to that State an amount calculated in accordance with provisions of this Act."

[4] "During a period of 10 years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

Dixon C.J. felt that "the course of judicial decision has put any such limited interpretation out of the question."[5] The *Federal Aid Roads Case*[6] and *Moran's Case*[7] were, together with the *First Uniform Tax Case*,[1] the decisions here referred to. But in the first case the Court confined itself to a bald statement that "the Federal Aid Roads Act (No. 46 of 1926) is a valid enactment. It is plainly warranted by the provisions of section 96 . . . exposition is unnecessary."[8] In the second case the Court had the choice of three *rationes decidendi*, none of which had direct reference to limitations on the extent of the terms and conditions permissible under section 96. In both cases conditions attached to the grants were germane to the *reasons for the grants*, but in neither case was the Court called upon to discuss conditions which referred to the non-exercise of State powers. The third case was, of course, one which the Court was expressly asked to over-rule.

Further to the attack on the Grants Act another proposition was advanced by the plaintiff States which received scant attention in the judgments of the Court. The argument was that once terms and conditions (duly observed by the States) were attached to a "grant" by the Commonwealth then the Act by which the financial assistance was bestowed has the effect of creating a binding *contract* enforceable by either party thereto. The generally accepted definition of consideration ("an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable"[9]) would appear to be satisfied by the Grants Act and by the "forbearance" of the States from imposing income tax.

That such a result could eventuate was apparent to Webb J., for he said: ". . . the terms and conditions must be consistent with the nature of a grant, that is to say, they must not be such as would make the grant the subject of a binding agreement, and not leave it the voluntary arrangement that section 96 contemplates. Then the Grants Act must not be read as providing for a *contract* to make a payment if its language permits, *as I think it does*,[10] because section 5 can properly be regarded as addressed to the Treasurer of the Commonwealth and not as being a communication to the States of an offer subject to a condition."[11]

True, the Grants Act is not in terms an offer; it is more an exhortation to the Federal Treasurer to "treat" with the States on certain conditions. The States are free to make the offer necessary to constitute a contract, an offer manifested by their non-imposition of income tax, an offer which

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[5] 1957 A.L.R. at 771.

[6] **Victoria v. The Commonwealth** (1926) 38 C.L.R. 399.

[7] **Commissioner of Taxation v. Moran** (1939) 61 C.L.R. 735.

[8] (1926) 38 C.L.R. at 406.

[9] See Pollock on **Contracts**, 13th ed., at p. 133, and **Dunlop v. Selfridge** [1915] A.C. at p. 855.

[10] My italics.

[11] [1957] Argus L.R. at 796.

is then "accepted" by the Commonwealth by the payments by the Treasurer. The monthly advances (to which, incidentally, the States are said to be *entitled*) are then in the nature of "part payments," thus completing the "contractual picture." Webb J. went on to say: "But the Treasurer need not apply section 11. He can wait until the end of the relevant year, in which event the transaction would be voluntary throughout."[12] This appears to be circular reasoning in that he assumes what he sets out to prove.

McTiernan J. was the only other member of the Court who alluded to this particular argument. He dismissed it on the ground that he thought Parliament "has done no more than to authorise payments of money to a State, if the Treasurer of the Commonwealth is satisfied that the fact is that the State has not imposed any tax on incomes. This is not making a contract."[13]

In view of the upholding by the High Court of the validity of the Grants Act as being properly based on section 96, what would be the position in relation to legislation of the Commonwealth that provided for the payment by the Commonwealth to the States of moneys raised by way of income tax on condition that the States referred certain specified matters to the Parliament under the provisions of section 51 placitum 37[14]? Would the High Court then draw upon the spirit and intendment of the Federal nature of the Constitution to preserve the duality of Government in Australia, or would it place "no limitations upon the terms or conditions it was competent to the Commonwealth to impose under section 96"?[15]

The attack on both sections 5 and 11 of the Grants Act and upon section 221 of the Assessment Act rested heavily upon doctrines of federal implications re-emphasized in the *Melbourne Corporation Case*.[16] Once the Court had concluded that the Grants Act was not coercive in effect the authority of this case was of no assistance to the present plaintiff States in relation to the Grants Act, for the attention of the Court in the *Melbourne Corporation Case* had been directed to a different kind of legislative provision, section 48 of the Banking Act 1945, which had been held to be a *directive* to the States on an essential governmental function. But it was of invaluable help in relation to section 221 of the Assessment Act. Section 221 being in the nature of a mandatory injunction directed to the taxpayer not to pay his State income tax until he had paid the Commonwealth exaction was held to be invalid for the same kind of reason.

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12 [1957] Argus L.R. at 796.

13 Ibid., at 781.

14 Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States but so that the law shall extend only to States by whose Parliament the matter is referred or which afterwards adopt the law.

15 Dixon C.J. [1957] Argus L.R. at 770.

16 (1947) 74 C.L.R. 31.

Both Dixon C.J. and McTiernan J. alluded to the possibility of the Commonwealth abusing its powers and postponing all manner of creditors of the taxpayer until he had discharged his obligation to the Commonwealth. Taylor J. pointed out the fallacy in that line of reasoning when he referred to that part of the judgment of the Court in 1942 where it was stated that the legislation in question was referable only "to claims of the several States for like imposts."[17] A law postponing other creditors would fail to be characterized as one with respect to taxation.[18]

When the question of priority is raised as between State and Commonwealth legislation it is inevitable to turn to section 109 of the Constitution.[19] Certain members of the Court anathematized the suggestion that section 109 might apply in the realm of income tax legislation. It could not, from a purely legalistic approach, be argued on the sections before the Court that the Commonwealth manifested an intention to cover the whole field of income taxation, for, as Webb J. pointed out, the States could impose "income tax not merely on the same persons but also in respect of the same income and to the same extent."[20]

However, if there be introduced into the argument concepts of economic reality it would then be possible to aver that the Commonwealth legislation did cover the whole field. Williams J. may have been thinking along these lines when he said: "There must be a limit to the capacity of taxpayers to pay income tax . . . and the Commonwealth Parliament *may well consider that it is already exploring this taxable capacity to the full.*"[21] Why else did he make reference to the fact that the British North America Act "does not contain a section similar to section 109 of our Constitution so that the Commonwealth Parliament would appear to be in a stronger position than the Dominion Parliament where it is possible for the personal obligations of a taxpayer under Tax Acts of the Commonwealth and a State or States to clash"?[22]

As a result of the Court's decision it would seem that the possibility of the States re-entering the sphere of income taxation is very slight. That the States can, to an extent, impose income taxation on a basis of equality with the Commonwealth is no longer doubted. Whether any State will deem it expedient to do so is problematical in the face of the Commonwealth's power to impose income tax at a rate limited only by its own desires.

J. Munnings.

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17 1957 Argus L.R. 761 at 808.

18 In this context see remarks of Evatt J. in E. O. Farley's Case (1940) 63 C.L.R. at 326.

19 When the law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall to the extent of the inconsistency be invalid.

20 [1957] Argus L.R. at p. 798.

21 Ibid., at 791-792. My italics.

22 Ibid., at 790.

JARVIS v. ATTORNEY-GENERAL AND OTHERS

Negligence — Duty of care — Police constable — Prisoner locked up — Fire in cell — Action by prisoner's widow against Attorney-General

A police trooper, having arrested the plaintiff's husband on a charge of assault, locked him up in the wooden cell that was attached to the police station at Hamilton, a small country town. Through some cause that remains unascertained, a fire started in the cell and its inmate was burnt to death.

The prisoner's widow sued the Attorney-General, in his capacity as owner of the cell and as employer of the two policemen, and also the policemen themselves.

A jury finding for the plaintiff was followed by a ruling from the Judge that there was no evidence to support the verdict. An appeal to the Full Court (comprising Burbury C.J. and Crisp J.) followed.

Crisp J., although of the opinion that the Attorney-General was neither personally nor vicariously responsible, held that the police trooper owed Jarvis a duty of care.

Before the case came on for hearing several pre-trial questions of law were argued and Green J. held, *inter alia*, that the police officers did owe the deceased a duty of care and that, assuming the allegations in the Statement of Claim to be well founded, the Attorney-General was vicariously liable for the failure of the police in their duties.

When the matter came on for hearing, counsel for the defendants submitted at the conclusion of the plaintiff's evidence that there was no case to answer. Gibson J., the trial judge, acting in accordance with recent authority, thereupon put him to his election either to withdraw the submission or abide by the Judge's ruling and be permitted to call no evidence. Naturally, counsel was not prepared to put himself in this position and elected to proceed. However, at the conclusion of his evidence, he once more argued "no case," but once again without avail, as the Judge refused to take the matter away from the jury, though he did reserve leave to counsel to move for judgment after the jury gave its verdict.

Previous authority on the point was conflicting. In *Gibson v. Young*[1] the Supreme Court of New South Wales held that as a matter of public policy no civil action could be brought by a prisoner in connection with his treatment while in gaol. The High Court of Australia in *Flynn v. R.*,[2] following its earlier decision in *Horwitz v. Connor*,[3] held that statutes and regulations dealing with prisons were not to be construed as creating legal rights in prisoners, but were to be regarded as directed solely towards discipline and administration.

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[1] (1900) 21 N.S.W. L.R. 7.
[2] (1949) 79 C.L.R. 1.
[3] (1908) 6 C.L.R. 35.

However, the English decisions of *Ellis v. Home Office*,[4] *Jacoby v. Prison Commissioners*[5] and *D'Arcy v. Prison Commissioners*,[6] while not turning on the particular point in question in *Jarvis'* case, have assumed that a civil action can be brought by a prisoner against the prison authorities. In any case, the position in England is now governed by section 70 of the Criminal Justice Act 1948.[7]

The most recent pronouncement before the *Jarvis* case was in the Victorian case of *Quinn v. Hill*[8] in which the Supreme Court of Victoria (Herring C.J. and Gavan Duffy J.; Smith J. dissenting) dismissed an action of negligence brought by a female prisoner against a wardress. The majority held that on an examination of the facts no duty was owed to the plaintiff, but they expressly declined to comment on *Gibson v. Young* (*supra*). Smith J., however, cited many earlier authorities and voiced emphatic disapproval of *Gibson's* case.

In the present case Crisp J. laid considerable stress on the fact of custody in determining the duty owed. "The paramount circumstance in the relationship between these parties was the fact of imprisonment, by virtue of which the accused was substantially deprived of the ability possessed by citizens at liberty either to provide for himself or to protect himself from danger. In that situation, the deceased was, par excellence, in relation to Trooper Howard, 'his neighbour' in the legal sense as the term is explained by Lord Atkin in *Donoghue v. Stevenson*."[9]

His Honour referred to section 144 of the Tasmanian Criminal Code which provides: "It is the duty of every person having charge of another, who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, to provide such necessaries for that person."

Adopting the reasoning of Smith J. in *Quinn v. Hill* (*supra*) with regard to *Gibson v. Young* (*supra*) and pointing out that the majority in the former case limited their decision strictly to the facts before them, Crisp J. took the view that the circumstances in *Quinn's* case were materially different from those before him and pointed out that in *Gibson's* case there was no reference "to a general duty of care such as is imposed by section 144 of the Criminal Code." Burbury C.J. also found no difficulty in holding that a duty of care was owed to Jarvis.

In our view Crisp J. was correct in asserting the distinction between this case and *Quinn v. Hill* (*supra*). Moreover, surely that case is inconsistent with the modern approach to the penal system to regard a prisoner

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[4] [1953] 2 All E.R. 149.

[5] [1940] 3 All E.R. 506.

[6] The Times, Nov. 17, 1955.

[7] See Salmond on Torts, 11th Ed., p. 81.

[8] [1957] Argus L.R. 1127.

[9] [1932] A.C. 562.

as a person without legal rights to whom the courts are closed. But even if this were not so, it can be argued that there is a considerable difference between a man who is locked up awaiting a charge and a convicted prisoner who is working in a gaol under the supervision of a warder. Assuming *Gibson v. Young* (*supra*) to be good law, the fact that Jarvis was an accused man awaiting trial, and not a convicted one serving a sentence, would, it seems, bring this case outside its ambit. Policy reasons regarding the treatment of prisoners cannot affect the duty of care owed to a man who is, of course, innocent until convicted.

It is interesting to note that although *Flynn's* case (*supra*) was referred to as support for the proposition that gaol regulations and statutes do not give any legal rights to prisoners, both Burbury C.J. and Crisp J. referred to regulation 604 of the Police Regulations: "Where practicable, a watch-house keeper shall visit his prisoners at least every hour, and, if necessary more frequently, to prevent risk of escape and anything untoward happening to the prisoner." This was regarded, in the words of the learned Chief Justice, as "a useful test of the reasonableness of the standard of care prescribed by the jury."

In the recent appeal from this decision to the High Court of Australia, the Solicitor-General (Mr. D. M. Chambers, Q.C.) indicated that the Crown did not wish to raise the question of the existence of a duty of care. Nevertheless the High Court commented: "We feel no doubt that the learned Judges of the Supreme Court of Tasmania were right in holding that Howard was subject at common law to a duty to exercise reasonable care for the safety of Jarvis during his detention in custody." ([1958] 32 A.L.J.R. 40, 42).

P. C. Heerey.