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## BOOK REVIEW

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### ON VILLAINY

*By the Right Honourable Lord Millett of Marylebone*  
*(University of Queensland Press, 2007 pp 128)*

This short book by the Rt Hon Lord Millett is the first in an annual lecture series inaugurated by the TC Beirne School of Law at the University of Queensland. The book comprises three essays on different aspects of villainy. The first focuses on the classic Shakespearean play, the Merchant of Venice. The second essay examines circular financial transactions while the third examines identity theft.

#### **The Merchant of Venice**

The first essay examines the trial scene in the Merchant of Venice to determine whether Shylock is a villain or a victim or both. The relevant parties in the trial include Count Bassanio who is a scoundrel who tells his friend, the merchant Antonio, that he has a scheme that will enable him to repay his debts to Antonio. Bassanio's scheme involves marrying his friend Portia so as to gain access to her financial fortune. To advance the scheme Bassanio wants to impress Portia and to do so he wants Antonio to lend him further funds so that he can put on a show of wealth to Portia. But Antonio does not have sufficient funds so he approaches Shylock for a loan on the security of Antonio's bond. Shylock agrees to the loan but insists on the unusual condition of a pound of Antonio's flesh as security. As Lord Millett explains, this is to be precisely one pound of flesh to be cut off and taken from whatever part of Antonio's body that pleases Shylock.<sup>1</sup>

Bassanio's scheme is successful and he marries Portia but Bassanio fails to repay the loan and Shylock calls on Antonio to honour his bond. Shylock demands his pound of flesh. Lord Millett proceeds to examine the trial scene in which Portia, by forging documents, is able to become the judge.<sup>2</sup> Lord Millett explains how Portia has a scheme of her own in the trial. She does not want Shylock's suit dismissed;

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1. At p 10.

2. At p 12.

instead she plots to defraud Shylock.<sup>3</sup> She eventually gives judgment to Shylock and awards him a pound of Antonio's flesh but she pretends that the bond refers to a pound of flesh nearest Antonio's heart.<sup>4</sup> She then rules that Shylock shall have nothing but the penalty and so cannot recover the debt due from her husband, Bassanio.<sup>5</sup> As Lord Millett explains, this is a travesty of justice because Shylock has no idea that Portia is Bassanio's husband and that she has an interest in ensuring that Bassanio does not have to repay the debt.<sup>6</sup> She accuses Shylock of having made an unsuccessful attempt on Antonio's life which Lord Millett describes as ludicrous because Shylock has done no more than institute legal proceedings.<sup>7</sup> Finally, Portia rules that Shylock's life is at the mercy of the Duke and that all his goods are forfeited. As Lord Millett explains, Portia has turned civil proceedings into a criminal trial.<sup>8</sup> Lord Millett concludes that Shylock is not the villain, rather it is Portia who is the villain because she is 'cruel, relentless, cunning, deceitful and (despite her eloquence on the subject) merciless'.<sup>9</sup>

## Circular transactions

The second essay explores a number of cases that have involved circular transactions some of which Lord Millett was involved in as an advocate or judge. Lord Millett explains that the cases involving circular transactions fall into two categories: schemes concerned with a company's share capital and tax avoidance schemes.<sup>10</sup> The earliest case that Lord Millett examines is *Gray v Lewis*.<sup>11</sup> The case involved a circular transaction whereby the company's promoters wished to demonstrate that the company had £200,000 when in fact it had no funds at all.<sup>12</sup> This was achieved through a circular transaction whereby at a point in the process the company did have £200,000 but immediately paid it out as part of the circular transaction. Mellish LJ held that the transaction was a sham because the company never had full control over the money in the sense that it was never available to them to spend as they saw fit.<sup>13</sup> Lord Millett then examines a case from the 1960s in which he acted as junior counsel. The case involved a similar circular transaction to that in *Gray v Lewis* but in contrast to *Gray v Lewis* real money was not used.<sup>14</sup> The result was the same and Lord Millett concludes therefore that the result does not depend on whether the parties used real money.<sup>15</sup>

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3. At p 18.

4. At p 20.

5. At p 22.

6. At p 23.

7. Ibid.

8. At p 24.

9. At p 29.

10. At p 37.

11. (1873) 8 Ch App 1035.

12. At p 40.

13. *Gray v Lewis*, above n 11, 1055.

14. At pp 43–44.

15. At p 45.

In *China Everbright-IHD Pacific Ltd v Ch'ng Poh*,<sup>16</sup> the Court of Final Appeal of Hong Kong examined a transaction whereby a controlling shareholder agreed to sell his shares in a company for HK\$232 million. He and his associates owed the company HK\$127 million. But the purchaser did not have the HK\$232 million for the purchase. So the parties agreed to a circular transaction whereby the HK\$127 would be used to meet part of the purchase price. As Lord Millett explains, the effect of the circular transaction was that the purchaser used the company's funds to finance the purchase of the shares, which was contrary to the provisions of the Companies Ordinance.<sup>17</sup> As Lord Millett states, the vice of the scheme 'does not lie in the absence of underlying funds but in the company's inability to make use of the money except for the purpose for which it is to be misapplied'.<sup>18</sup>

Lord Millett concludes that the cases on circular transactions do not depend on whether real money is used.<sup>19</sup> Instead it is necessary 'in every case to identify the critical payment, and ask whether it achieved its purpose'.<sup>20</sup> This is consistent with the position adopted recently by the High Court of Australia. In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*,<sup>21</sup> the respondent argued that a loan had not been advanced pursuant to a loan contract because no 'real money' was advanced. The loan was made by way of book entries in the accounting records of the relevant entities. The court held that each of the transactions was legally effective and there was no sham involved.<sup>22</sup> Real money had therefore been advanced by the lender to the borrower.

## Theft of identity

The final essay examines the theft of identity. Lord Millett highlights the extent of the growing problem of identity theft when he notes that it has been estimated to cost the British economy some £1.7 billion a year.<sup>23</sup> The main issue in relation to identity theft is the fundamental problem that it creates in the law of contract.<sup>24</sup> This occurs where a contract is purportedly formed with a person with a fake identity.

Lord Millett argues that the law should favour a solution that protects innocent third parties 'by treating the contract as voidable rather than void, whether for fraud

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16. [2002] 5 HKCFAR 630.

17. At p 55.

18. At p 56.

19. At p 74.

20. Ibid.

21. (2004) 218 CLR 471. For a recent example of a complex circular transaction, see *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 224 ALR 79; J Tarrant 'Unit Trusts in the 21st Century' (2006) 20 CLQ 12.

22. Ibid 486 (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

23. At p 81.

24. At p 82.

or mistake'.<sup>25</sup> But as Lord Millett points out, in *Shogun Finance Ltd v Hudson*,<sup>26</sup> the House of Lords, by a majority of three to two, rejected that position and instead 'affirmed the traditional view that there was no contract and the innocent purchaser obtained no title'.<sup>27</sup> As Lord Millett notes, both he and Lord Nicholls dissented.<sup>28</sup> The majority in the House of Lords declined to depart from the well known decision of *Cundy v Lindsay*,<sup>29</sup> where it was held that no contract is formed, and thus no title passes, where there is a fraudulent attempt to mislead the other party as to the person's identity. Lord Millett concludes that as 'an authority on the formation of contract, *Cundy v Lindsay* is, with respect unconvincing'.<sup>30</sup> Lord Millett prefers an approach whereby the contract is voidable for fraud.<sup>31</sup>

However, there is an alternative solution to the problem. Swadling argues that 'a contract of sale is separate from the actual conveyance of the subject-matter of the sale, and that a defect in the former does not infect the latter'.<sup>32</sup> This is the principle of abstraction. He argues that a contract of sale represents an additional method by which property might pass and that the error in *Cundy v Lindsay* is the assumption that the contract is the only method by which property can pass.<sup>33</sup>

## Conclusion

This book of three short essays is enjoyable and informative. Lord Millett writes in an engaging style and provides insights into cases based on his experience as a judge at the highest level.

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25. At p 85.

26. [2004] 1 AC 919.

27. At p 85.

28. Ibid.

29. (1878) 3 App Cas 459.

30. At p 92.

31. At p 94.

32. W Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123, 139.

33. Ibid, 141.

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## **INDEX**

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## INDEX

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## INDEX

### CONTRIBUTORS OF ARTICLES

BARTIE S	Ambition Versus Judicial Reality: Causation and Remoteness Under Civil Liability Legislation	415
CORBETT A & O'FAIRCHEALLAIGH C	Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions	153
CROFTS T & SUMMERFIELD T	The Licensing of Sex Work: Regulating an Industry or Enforcing Public Morality?	289
CROSBY N, MURDOCH S, & WEBB E	Landlords and Tenants Behaving Badly? The Application of Unconscionable and Unfair Conduct to Commercial Leases in Australia and the United Kingdom	207
EDGELY M	Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia	351
ESPOSITO A	A New Look at Anthony Forster's Contribution to the Development of the Torrens System	251
FREILICH AYM	A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions Are Consumer Transactions	108
HANDFORD P	A New Limitation Act for the 21st Century	387
HASLUCK N	The Liaison Between Law and Literature	1
KIRBY M	Ten Parables for Freshly-minted Lawyers	23
KUEHNE G	Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?	63
O'CONNOR P	The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake	31
PARKINSON P	The Future of Child Support	179

## INDEX

SYROTA G	The Definition of 'Terrorist Act' in Part 5.3 of the Commonwealth Criminal Code	307
TARRANT J	Total Failure of Consideration	132

## BOOKS REVIEWED (by author)

MILLETT P	<i>On Villainy</i> Reviewer: J Tarrant .....	437
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