Evidence Act 1938'.[42] The importance of the case lies in its failure, as it is submitted, to give full effect to this attitude.

S. W. BEGG

O'SULLIVAN v. TRUTH AND SPORTSMAN LTD.[1]

Criminal Law—S.A. Police Offences Act s. 35 (1) (b)—Prosecution of Interstate Newspaper—'Cause to be offered for sale'

The respondent company was convicted before a magistrate of an offence under section 35 (1) (b) of the Police Offences Act 1953 (S.A.), in that it had caused to be offered for sale in Adelaide a newspaper containing matter allegedly prohibited by the Act. The magistrate's finding that the impugned issue contained matter which fell within the prohibition of section 35 was not thereafter disputed, but on appeal to the Supreme Court of South Australia the respondent's conviction was quashed by Reed J. on a proper interpretation of the words 'cause to be offered for sale'. This decision was upheld by a majority of the Full Court.[2] The High Court held, on appeal, that the respondent company had not caused copies of the offending issue to be offered for sale, or to be sold.

The respondent had printed the offending newspaper in Melbourne, and despatched several parcels of copies of it to carriers in Adelaide. Two of these parcels were marked with the names of Adelaide newsagents, to whom they were delivered by the carriers. A copy from each of these parcels was sold to a policeman, who in each case asked for a copy before the parcel was opened. No direct proof of an offering for sale was produced, but the court proceeded upon the assumption that such an offering could be inferred from common knowledge, and upon the probabilities. There was no proof of any '*de facto* influence or control that the respondent company did, or might, exercise to secure the sale of its paper,'[3] and their Honours dealt with the sales of the newspaper as sales of 'an article of commerce, made by independent retailers, all parties alike being animated by every business motive to promote the sales of the article'.[4]

Two judgments were delivered, the first by Dixon C.J., Williams, Webb and Fullagar JJ., and the other by Kitto J. In the joint judgment, their Honours observed that, before something can be said to have been 'caused' within the meaning of section 35, it must have been contemplated or desired. However, they continued, it is not

[42] Cmd. 8878, para. 253.

[1] [1957] Argus L.R. 180. High Court of Australia; Dixon C.J., Williams, Webb, Fullagar and Kitto, JJ.

[2] Napier C.J. and Ligertwood J., Mayo J. dissenting.

[3] [1957] Argus L.R. 180, 182.

[4] *Ibid.*, 183.

sufficient to show evidence of mere preliminary or antecedent acts done in such contemplation or out of such a desire. Their Honours analyzed a line of English authorities[5] which has led to the adoption by English courts of a more restricted interpretation of the meaning of the word 'cause' in contexts similar to that of section 35. This interpretation, their Honours pointed out, is summarized in *Halsbury's Laws of England*.[6] After quoting this summary, their Honours proceeded to restate the law there laid down: where a statute makes it an offence for one person to cause the doing of a prohibited act by another, it must be shown that 'the prohibited act is done on the actual authority, express or implied, of the party said to have caused it, or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. He must, moreover, contemplate or desire that the prohibited act will ensue.'[7] Their Honours approved this as 'a sensible and workable test, which, at the same time, is hardly open to objection as inelastic,'[8] and they were even more willing to adopt it because of the need, in their view, for a settled interpretation of statutory provisions which make it an offence for one person to cause another to do some act, provisions which might otherwise be used to impose criminal sanctions in a capricious manner.

Applying the above interpretation of the word 'cause' to the instant case, their Honours observed that the newsagents 'sold or offered the paper in the uncontrolled exercise of their own free will', that they 'did not deal with the papers under the authority of the respondent company or in response to its control or influence', and that they 'dealt simply as retail traders might with goods they had acquired to re-sell'.[9] Thus, they concluded, notwithstanding that the production and delivery of the newspaper was a *sine qua non* to its sale by the newsagents, it was nevertheless not a 'causing' of the offering for sale or of the sale of copies of the newspaper by the newsagents.

Kitto J. preferred to arrive at his own interpretation of the meaning of the word 'cause' in section 35 without placing any reliance upon decided cases. He began by observing that it was not sufficient that the respondent's acts 'formed a coherent sequence designed . . . to culminate in'[10] an offering for sale. He pointed out that this is not merely a problem of the physical cause of a physical event, since the immediate cause of the offering for sale was the decision of the newsagents who made the offer, so that the respondent, if guilty, must be shown to have brought about this *decision* before it can be said to

[5] *Watkins v. O'Shaughnessy* [1939] 1 All E.R. 385, 386-387, *per* Judge Longson; *McLeod v. Buchanan* [1940] 2 All E.R. 179, 187, *per* Lord Wright; *Shave v. Rosner* [1954] 2 All E.R. 280; *Lovelace v. D.P.P.* [1954] 3 All E.R. 481, 483.

[6] *Halsbury's Laws of England* (3rd ed., 1955), x, 279.

[7] [1957] Argus L.R. 180, 184. [8] *Ibid.* [9] *Ibid.* [10] *Ibid.*, 185.

have caused the offering for sale. Moreover, he continues, it is 'not . . . every form and degree of inducement or persuasion'[11] that will satisfy this requirement; merely to encourage, for instance, is not the same as to cause a person to form a specific intent.

In His Honour's opinion, therefore, 'one person cannot be said to cause another's act unless not only does the former express it as his will that the act shall be done by the latter, but the latter's decision to do it is a submission to the former's will, that is to say a decision to make himself the instrument of the former for the effectuation of his will'.[12] The form taken by such expression of will may vary, continued Kitto J., from command to suggestion, but this is irrelevant so long as it is calculated to, and does, produce the desired submission. As a corollary to this line of reasoning, His Honour did not agree with the summary of the law on this point in *Halsbury*[13] that it is a pre-requisite to a person's causing an act to be done by someone else that such person should be in a 'position of dominance or control so as to be able to decide whether the act should be done or not '. He put the hypothetical case of a man who asks a perfect stranger, over whom he clearly has no dominance or control, to post a letter for him. If the stranger does so from an obliging nature, it cannot be doubted that the man who asked him to post it had caused the letter to be posted.

His Honour concluded that, in the instant case, the offering for sale by the newsagents could not possibly be said to be a submission to the will of the respondent, for clearly the newsagents were not moved by a consideration of anyone's will but their own. Hence 'the language of causation is inappropriate to describe the relation between their acts and the antecedent conduct of the respondents'.[14]

It would seem correct to say that Kitto J. thus arrived at virtually the same interpretation of the word 'cause' in this context as the other Justices. In neither judgment is it doubted that the party alleged to have 'caused' the prohibited act must have evidenced his desire to bring about such act. In addition, it was laid down in the joint judgment that before A can be shown to have caused B to do some act, B must have acted either on the 'actual authority' of A, or in response to A's exerting powers of control or influence over B, while in the opinion of Kitto J., B's decision to do the act must be 'a submission to [A's] will'. Thus in both judgments it was stressed that, before there can be a causing, it must be proved that B's decision to act was made solely with a view to carrying out A's will. Obviously this will usually be the case where A is in a position, either in fact or law, to exercise control or influence over B's acts. Yet it may be that B makes himself 'the instrument of [A] for the effectuation of

[11] *Ibid.* [12] *Ibid.*, 186. [13] *Loc. cit.* (*supra*, n. 6). [14] [1957] Argus L.R. 180, 186.

his will'[15] by reason merely of his obliging nature, as in the example given by Kitto J. Such a case is deliberately allowed for in His Honour's judgment and, it seems, in the joint judgment also, for in such a case it could reasonably be said that the man who posted the letter was acting not in fulfilment of his own ends but solely upon the 'actual authority' of the man who asked him to post it.

Is this definition by the High Court of what amounts to a causing properly described as 'a sensible and workable test, which, at the same time, is hardly open to objection as inelastic'?[16] Certainly it is in accordance with the view of the English courts[17] that, for A to cause B to do anything, there must be 'some express or positive mandate from [A] to [B], or some authority from the former to the latter',[18] so that, in the circumstances of the case, A has 'some control of B's movements'.[19] It is as workable a test, it is submitted, as any test could hope to be which involves a subjective enquiry into the reasons for which a person has decided to do a particular act, and cannot but be elastic when based upon such a subjective approach.

Is the test a sensible one? The immediate reaction may be to doubt the sense of a test which exonerates the respondent in the instant case from having caused its newspapers to be offered for sale by the newsagents in Adelaide. No doubt the respondent must have known that, once the newspapers were sold to the retailers, it was practically inevitable that they would be offered for sale. From this it might readily be argued that, in selling to the newsagents, the respondent was guilty of causing the papers to be offered for sale. Yet the fact remains that the newsagents did not act in submission to the will of the respondent, but simply for their own ends. Indeed, if they had not chosen to offer the papers for sale, they could in fact have returned their copies to the respondent's Adelaide office, and received a refund. There seems, therefore, nothing in the result of the instant decision to weaken the logical proposition that, before one person can be said to have caused the decision of another to do some act, it must be shown that the latter's decision was made purely in response to some expression of will by the former, and that where the act is done for any of the actor's own ends, there can be no such causing.

In the absence of any Privy Council or House or Lords decision directly in point, this decision of the High Court lays down for Australian courts the interpretation to be given to all statutory provisions that make it an offence for one person to 'cause' the doing of a certain

[15] *Ibid., per* Kitto J.
[16] *Ibid.*, 184.
[17] *Supra*, n. 4. See also *Goodbarne v. Buck* [1940] 1 K.B. 771. For two earlier cases, in which the courts adopted a wider interpretation of the word 'cause' in a criminal statutory provision, see *R. v. Wilson* (1856) 26 L.J.M.C. 18, and *R. v. Farrow* (1857) Dears. & B. 164.
[18] *McLeod v. Buchanan* [1940] 2 All E.R. 179, 187, *per* Lord Wright.
[19] *Watkins v. O'Shaughnessy* [1939] 1 All E.R. 385, 386, *per* Judge Longson.

prohibited act by another. Such provisions are by no means uncommon, particularly (it should be noted) in the Victorian Crimes Act 1928,[20] and it is submitted that the opinion expressed in the joint judgment, that certainty of interpretation is especially desirable when dealing with enactments which provide, *inter alia,* for heavy criminal sanctions, is a sound one.

A. G. HISCOCK

COLEMAN v. GOLDER[1]

Landlord and Tenant – Contract – Part Performance

Pursuant to a verbal agreement between C and G, G entered into possession of a flat and remained in possession for eight years. C sought possession of the flat, which he alleged he had sub-let to G. G claimed that C had assigned his tenancy to him. The magistrate accepted G's account of the transaction, and refused the application. C sought to review the order, in particular on the ground that in the absence of written evidence of the transaction required by the Property Law Act 1928, s. 53, there were not acts of part performance sufficient to allow parol evidence of the transaction to be given. Martin J. discharged the order to review.

The taking of possession of the flat was accepted by both parties as an act of part performance sufficient to show the existence of some contract relating to the flat. The question was whether the acts of part performance must be referable unequivocally to a contract of assignment rather than a sub-lease before parol evidence could be admitted. Clearly an act which is referable to a contract, but not a contract concerning land, is not enough. It is for this reason that the payment of purchase money is not in itself sufficient. '[The] best explanation of it seems to be that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land.'[2] At the other extreme, the view of Lord O'Hagan in *Maddison v. Alderson*[3] was that the act 'must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words, "as could be done with no other view or design than to perform that agreement." '[4] But Martin J. took as the starting

[20] *E.g.* ss. 8, 18, 19, 20, 28, 30, 62.

[1] [1957] V.R. 196. Supreme Court of Victoria; Martin J.

[2] *Maddison v. Alderson* (1883) 8 App. Cas. 467, 479, *per* Lord Selborne L.C. Other grounds have been suggested. See *Fry on Specific Performance* (6th ed., 1921), 290.

[3] (1883) 8 App. Cas. 467, 485.

[4] *Gunter v. Halsey* Amb. 586; 27 E.R. 381. It appears from a note of this case given by Mr West in his report of this case. West *temp.* Hard. 681, 'That the bill was dismissed because it was uncertain from whence the agreement was to commence and because the acts, done by the defendants were not shown to be in pursuance of