the borrower. It is not the unlawfulness of the payment which determines its recoverability but the relation of the parties to the transaction. The unlawful payment cannot be recovered only where the parties are in *pari delicto*. It seems at first sight that *Shearer Transport Co. Pty. Ltd.* v. *McGrath*[35] is one of those cases where the maxim applies, since McGrath was very much involved in the transaction and a party to a scheme involving an unlawful act. However, closer analysis of the transaction reveals that it contravened the section and consequently was not within the ambit of the maxim.

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VICARIOUS LIABILITY

LONG v. *DARLING ISLAND STEVEDORING AND LIGHTERAGE COMPANY LIMITED*

Much has been said in academic writing and judicial pronouncement concerning the functional justification of the doctrine of vicarious liability, one of the matters before the court in the present case;[1] but little has been said concerning the analytical basis of the doctrine.[2] One purpose of this Note is to examine the extent to which the judgments of the High Court in *Long* v. *Darling Island Stevedoring and Lighterage Company Limited*[3] have contributed an analytical basis for the doctrine, and the implication of any such contribution for the functioning of the doctrine.

The facts of the case were as follows. An accident in which the plaintiff was injured occurred on board a ship during some unloading operations. Part of a hatch on the ship had been removed and a hatch beam had been left in position. During the unloading something caught on the hatch beam and dislodged it, with the result that the plaintiff (who apparently was standing on the hatch beam) and part of the hatch, fell into the hold of the ship. Regulation 31(3) of the Navigation (Loading and Unloading) Regulations provides, "Where any hatch beam is left in place, it shall, before loading and unloading work begins, be securely fastened at each end by means of stout bolts, with nuts, attached, or other suitable fastenings provided for the purpose of preventing and in such manner as to prevent its accidental displacement. Penalty on the person-in-charge, One hundred pounds".

Prior to the action which gave rise to the appeal with which this Note is concerned, the plaintiff brought an action against the defendant claiming damages for injuries allegedly caused by the negligence of the defendant. There was no count for breach of statutory duty in the declaration in that action. The jury found a verdict for the defendant. The Full Court of the Supreme Court of New South Wales dismissed the appeal, holding that the jury had been properly directed on the issues of negligence and contributory negligence.[4] Whether the jury found for the defendant on the ground of absence of negligence on his part, or on the ground of the plaintiff's contributory negligence is of course not known. But the possibility that they may have found for the defendant on the ground of contributory negligence left open, as the plaintiff thought, the way to a second action, founded on the breach of a statutory duty. It may be mentioned that in New South Wales by virtue of the Statutory Duties (Contributory Negligence) Act, 1945 contributory negligence is no defence to an action for breach of a statutory duty.[5]

The defendant demurred to the declaration in the second action. The

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[35] *Supra.*

[1] (1957) 64 A.L.R. 505.

[2] That is, until the recent discussion by Professor Glanville Williams, "Vicarious Liability — Tort of Master or Tort of Servant?" (1956) 72 *L.Q.R.* 522.

[3] (1957) 64 A.L.R. 505.

[4] (1956) S.R. (N.S.W.) 137.

[5] Although Williams, J. (1957) 64 A.L.R. 505 describes the second proceedings as "an attempt to re-litigate very much the same facts to prove a separate cause of action", only Fullagar, J. (at 516) adverted to the issue of *res judicata*.

declaration was in fact ill-drawn to raise the issues the parties proposed to argue on the hearing of the demurrer, but the Full Court of the Supreme Court allowed the amendments necessary to raise those issues.[6] The New South Wales Supreme Court overruled the demurrer (Ferguson, J. dissenting) and the defendant appealed to the High Court.

Sir Garfield Barwick, for the appellant, took a constitutional point at the outset of his argument. He submitted that since s. 425 of the Navigation Act 1912-1953 (Cwlth.) prescribed the means whereby the Regulation-making authority might enforce the Regulations made under the Act, by fixing penalties not exceeding three months or one hundred pounds, it was not open to that authority to provide for the enforcement of the Regulations by any other means. So far, therefore, as Regulation 31 purported to create a civil action it was *ultra vires* the Act. As will appear, the High Court did not have to decide the constitutional question, although Fullagar, J.[7] thought that there was merit in Counsel's argument.

The appellant's principal submission — that Regulation 31 did not create a private right of action in the persons for whose protection it was made — raised the question whether the giving of a civil action for breach of a statutory duty is a matter of statutory interpretation pure and simple or whether it is a piece of judicial law-making under cover of the presumed intention of Parliament. It is true that in some cases the legislature expressly directs that a civil action shall be available, but it is rare for the legislature to give its mind to the matter at all.

All members of the High Court found justification for their holding that Regulation 31 created a civil action in the principle formulated by Dixon, J. (as he then was) in *O'Connor* v. *S. P. Bray Ltd.*[8] His Honour there said:

> Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty is laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on.[9]

The High Court appears to have regarded the principle as one of construction directed to discovering the intention of the legislature; but it is respectfully submitted that it smacks much more of a common law principle. Were it a principle of construction *simpliciter* the enquiry would be — what was the intention of the legislature as ascertained from its expressed will, i.e. its will as expressed in the statute or the regulations made thereunder ?

The principle upon which the Court relied, however, involves a very different enquiry: whether the particular situation with which the Statute or Regulation dealt was one in which the common law cast upon the person whom the statutory duty was laid, a duty to take care.

The same obscurity is evident in the approach of some members of the Court to the further question — whether, having held that the Regulation included only the person actually in charge of the loading or unloading (in this case the supervisor or foreman), the employer was nevertheless liable for a breach of the Regulation committed by that servant in the course of his employment.

The view of Fullagar, J. (a view which is supported in the judgments

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[6] The amendments were not formally made in the pleadings, a fact which gave rise to some critical comment in the High Court — see *per* Williams, J. (1957) A.L.R. 505, 506.

[7] (1957) 64 A.L.R. 505 at 513-514.

[8] (1937) 56 C.L.R. 464.

[9] *Supra* at 478.

of Williams, J. and, although less explicitly, in that of Webb, J.) appeared to have been as follows: The vicarious liability of an employer for the acts and omissions of his servant is a liability at common law. The common law supplies the remedy in the case of the breach of a statutory duty or duty imposed by a regulation, but it is the statute or regulation that creates the civil right and not the common law. Therefore, as the statute, as a matter of construction, imposed a duty on the person-in-charge and not on the defendant, that ended the matter. This view is similarly stated by Lord Reid (without expressing an opinion on its merits) thus: "In performing a statutory duty which is purely personal to the servant, the servant is not acting for his master, so as to make his master liable in damages".[10] The same anxiety to preserve the fiction that the courts merely interpret the will of the legislature as a matter of construction and not of common law principle is evident in Fullagar, J's disapproval of the practice of calling a breach of statutory duty a "tort".[11]

It may be respectfully asked, why, if Williams, Webb and Fullagar, JJ. had already taken the step of holding that the regulations imposed a civil liability by the application of what really amounts to a common law principle, they might not have found the intention of the Legislature in the matter of the employer's liability in the common law doctrine of vicarious liability.

Kitto and Taylor, JJ., assumed that in determining liability common law principles were involved, and then proceeded to an analysis of the doctrine of vicarious liability. Both Justices distinguished between the acts of a servant and the torts of a servant and affirmed that it is for the former and not the latter that the master may be vicariously liable.

It is submitted with respect that there are certain difficulties confronting this approach. It is difficult to see how the distinction between the acts of the servant and the torts of the servant can be maintained. It is true (as Kitto, J. said)[12] that the liability of the master is not *substituted* for that of the servant in that the servant can escape all liability by shouldering off the responsibility upon the unfortunate master. But even granting this, liability can only be attributed to the master by first asking: Was the act of the servant a wrongful act ? and then: Was this wrongful act committed in the course of the servant's employment ? If the master is liable only for what the servant has done (a question of fact) without any consideration of wrongfulness, then how can any wrongfulness be attributed to the master so as to make the master liable ? Kitto, J. said:

> The master's liability . . . is a separate and independent liability, resulting from attributing to the master the conduct of the servant, with all its objective qualities, but *not with that quality of wrongfulness* which in an action against the servant, it may be held to have because of considerations personal to the servant.[13]

In the present case, however, was it not an objective quality of the foreman's acts that he was in charge of the loading ? If that be so, why was not this objective quality transferred to the master so as to make the master a person-in-charge, and therefore liable ?

The distinction between 'personal considerations' and 'objective qualities of acts' is more than a little difficult to comprehend. But apparently we are to say that the fact that the servant was in charge of loading was a consideration personal to him and it will only be if we can find the *same* personal considerations in the master's situation that the master will be liable. This, it seems, is what Kitto, J.[13] meant by saying that both master and servant must be under the *same* duty. Yet, in terms of the classic test of duty laid

[10] *Harrison* v. *National Coal Board* (1951) A.C. 639, 688.
[11] (1957) 64 A.L.R. 505, 515.
[12] *Supra* at 518.
[13] *Ibid.* Italics have been supplied

down by Lord Atkin,[14] how can two men ever be under the *same* duty ?

If it be said that the master's duty need only be a *like* duty it may be asked: What likeness is there between the absent master's duty to provide a safe system of work and supervision and the duty of the servant to see that his casual acts are done with due regard to the safety of his fellow servants ? They are only *like* in the sense that they both have in mind the protection of other servants. How then can one explain the vicarious liability of the master in *Staveley Iron & Chemical Co. Ltd.* v. *Jones?*[15]

The same questions emerge in Kitto, J.'s discussion of the case of damage caused to a stranger by the careless driving on a highway of a servant in the course of his employment. His Honour said of the duty of the servant to drive safely and of the duty of the master as regards to the operation of the vehicle that they are "identical in nature and extent".[16] Can it, however, be said that a master, sitting in an armchair at home, is under a duty identical with that of his servant, the driver ? Can he, as a reasonable man, be expected to have contemplated the same things that his servant, at the very centre of operations, should be taken to have contemplated?[17]

Kitto, J. insisted[18] that nothing in the judgments of the members of the House of Lords in *Staveley Iron & Chemical Co. Ltd.* v. *Jones*[19] showed disagreement with his view. It is intriguing that Fullagar, J. could find support in the same judgments for an opposite view. He said: "The liability (i.e. of a master for the acts of his servant) is a true vicarious liability, that is to say, the master is liable not for a breach of a duty resting on him and broken by him, but for a breach of duty resting on another and broken by another."[20] The passages which he quoted from the judgments reveal that their Lordships were at pains to distinguish between cases where there is a personal liability in the master for breach of duty imposed by common law or statute (when he cannot escape by saying that the servant is not liable) and cases of vicarious liability (when the master is liable only if the servant is liable, and even where the master is not himself at fault).

In the result all the Justices were of the opinion that the appeal should be allowed and that there should be judgment for the defendant on the demurrer, Williams, Webb and Fullagar, JJ., on the ground that the Legislature had not intended that the employer should be liable for the breach of duty of his foreman, Kitto and Taylor, JJ., on the ground that the doctrine of vicarious liability, as properly analysed, could not justify imposing liability on the employer for the acts of his foreman.

In the writer's view the case should have been decided on the ground most clearly in the minds of Williams and Fullagar, JJ., that as a matter of construction, the statute conferred a civil right of action against the person-in-charge and not against his employer. In most instances this means of arriving at a conclusion amounts to judicial law-making and it leaves the way open for courts in future cases to reach a different conclusion as to the legislative intent from that taken in the instant case.

Discussions in the judgments of the analytical basis of vicarious liability have brought us no nearer the final analysis. This branch of the law is, it is submitted, not based upon logic but rather upon considerations of "social necessity". What those considerations are, this Note does not seek to discuss, though it may be added that, whatever the considerations may be, they would seem more efficiently served by the analysis offered by Fullagar, J. than (with respect) by the obscure and complex reasons of Kitto and Taylor, JJ.

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[14] *Donoghue* v. *Stevenson* (1932) A.C. 562, 580.
[15] (1956) A.C. 627.
[16] (1957) 64 A.L.R. 505, 518.
[17] See Kitto, J. at 520 and Taylor, J. at 524.
[18] (1957) 64 A.L.R. 505, 518.
[19] (1956) A.C. 627.
[20] (1957) 64 A.L.R. 505, 515.

FRUSTRATION OF CONTRACT

DAVIS CONTRACTORS LTD. v. *FAREHAM URBAN DISTRICT COUNCIL*

The doctrine of frustration of contract has always been a source of joy to the academic lawyer and a corresponding cause of confusion to the practising lawyer owing to the vast number of different opinions as to the basis of the doctrine that have been advanced by the judges. As Lord Radcliffe remarks in the present case:[1] "It has often been pointed out that the descriptions vary from the case of one high authority to another. Even as long ago as 1918 Lord Sumner was able to offer an anthology of different texts directed to the factor of delay alone . . . . A full current anthology would need to be longer yet".[2] The result has been that as the learned Editor of the *Law Quarterly Review* (Professor Goodhart) once observed: "No branch of the law of contract is so difficult to explain or so uncertain in its effects as that dealing with frustration".[3] Hence it can readily be seen why *Davis' Case*,[4] which clearly lays down the general principle to be followed in all future cases of frustration and sweeps away most of the uncertainty which surrounds the doctrine, merits the attention of all members of the legal profession.

The facts before their Lordships were as follows. The appellants, a firm of building contractors, had entered into a contract with the respondent, a local authority, to build for it seventy-eight houses within a period of eight months for a fixed price. The original tender had been accompanied by a letter stating that it was "subject to adequate supplies of labour and materials being available as and when required to carry out the work within the time specified". Owing to an unforeseen delay in demobilisation there was a shortage of skilled labour so that the work took twenty-two months to complete and the contractors' costs as a result were considerably increased. They contended:

1. That the contract price was subject to an express condition contained in the letter which had been attached to the tender that there should be adequate supplies of labour and materials.

2. That the unexpectedly long delay due to neither party's fault frustrated the contract in law, and they were entitled on a *quantum meruit* claim to the excess costs.

Their Lordships unanimously rejected the first ground of claim and held that the letter was not incorporated into the contract; therefore it could not affect the express terms.[5] On the second and more important ground the House again unanimously gave judgment for the respondent and decided that the contract had not been frustrated; but in doing so their Lordships, particularly Lord Reid and Lord Radcliffe, exhaustively considered what was the "true basis of the law of frustration".[6]

Out of the numerous views as to when a contract is frustrated two principal theories have emerged. These were the theory of the "implied term" and the theory of the "just solution". Up to this time the most commonly favoured theory as to the basis of the doctrine had been that of the "implied term". This states that the court will imply a term into the contract that the parties thereto be discharged in the event that has happened if to do so would be in harmony with the presumed intention of the parties. Probably the best-known judicial statement in favour of this view is that of Lord Loreburn in *F. A.*

[1] (1956) A.C. 696; (1956) 3 W.L.R. 37; (1956) 1 All E.R. 145.
[2] (1956) A.C. 696, 727. [3] (1936) 52 *L.Q.R.* 7. [4] (1956) A.C. 696.
[5] "It would . . . be contrary to all practice and precedent to hark back to a single term of preceding negotiations after a formal and final agreement omitting that term has been signed". (*Id.* at 713).
[6] *Per* Lord Reid. *id.* at 719.