CASE AND COMMENT.

CONTRACTS—FRUSTRATION OF ADVENTURE—IMPOSSIBILITY OF PERFORMANCE.—The development of the principles concerning frustration of adventure or impossibility of performance in the law of contract is an outstanding example of judicial legislation. It is now well-settled that the basis of these principles is not to be found in the law relating to mistake. The courts are able to relieve the parties by implying a condition to that effect. The use of the word "implied" in law is frequently very sloppy, and the term is often a cloak for premises inconsistent with established principles and it betrays an illogical pursuit after what an individual judge believes to be a just result. Maine in his *Ancient Law* characterized the trio, equity, fictions and legislation, as the great meliorating devices of law. With respect, it might be suggested that the "theory of impliedness" (to coin a phrase) would round out a quartet. There may be some who, meticulous about classification, will quarrel with the promotion. They will observe that "implied conditions," "implied terms," "implied agency," etc., are in many instances nothing more than fictions, and, in a vein of cynicism, they will be bold to state that they are not in those cases reforming agencies in the law. Doubtless, there is a danger which many courts have warned against in the eagerness of a judge to listen to the last contention, and perhaps the sole argument, of a hard-pressed counsel to the effect that there was implied in the transaction in question a term to the effect that, etc.

Ziger et al. v. *Shiffer and Hillman Co. Ltd.*[1] is noteworthy in this respect. The Company, engaged in manufacturing clothing, contracted to withdraw from a manufacturers' association and to employ certain of its workmen for a year in consideration of an undertaking by those workmen to resign from a labour union. The attempt to establish an independent shop was violently opposed by members of the union who resorted to forcible intimidation of the workmen. The police failed to give adequate protection. In face of this difficulty, the Company, being unable to carry on the business, finally capitulated to the union. It employed members of the union and discharged those of the workmen with whom it had contracted and who were not re-instated in the union. An action by some of these workmen, who had been discharged, against the Company for breach of contract was dismissed by the Ontario Court of Appeal, reversing the judgment of Logie, J., at the trial.

[1] [1933] O.R. 407; [1933] 2 D.L.R. 691.

Middleton, J.A., speaking for the Court of Appeal stated: "I think the parties here must be held to have made their bargain on the footing that it would be possible to operate and maintain an independent shop, that the police force would be able to protect both parties from mob violence and permit them to enjoy the freedom of contract which is rightly deemed to be an essential privilege in civilized countries, and that, therefore, a term is to be implied, although not expressed, in the contract that it is founded on the continued existence of an independent shop, the destruction of which by *vis major* would free either party from liability if the terms of the contract should be frustrated by acts of violence and misconduct over which neither contracting party had control and which the police force of the community did not keep in hand." As authority for the decision of the Court in this respect the learned judge quoted at some length a passage from the judgment of Hanworth, M.R., in *Walton Harvey, Ltd.* v. *Walker and Homfrays, Ltd.*[2] where the Master of the Rolls was summarizing the effect of the principle enunciated in *Bailey* v. *Crespigny*[3] to the effect that where some higher authority has supervened and has prevented the performance of the terms of an agreement, such failure to perform the agreement is not to be imputed to one of the parties, but is due to what has subsequently made performance impossible, with the result that the defaulting party is not to be responsible in damages to the other party. Hanworth, M.R., said nothing to detract from the statement of Hannen, J., in *Baily* v. *De Crespigny* that "where the event is of such a character that it cannot reasonably have been supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, where not used with reference to the possibility of the particular contingency which afterwards happens." In fact in the *Walton* case, Hanworth, M.R., refused to relieve the defendant in an action for breach of contract on the ground of frustration of adventure because he found that the defendants were aware, at the time they entered into the contract, that there was some risk that the contingency, which subsequently did occur and rendered performance impossible, might come to pass. He said: "They could have provided against that risk but they did not." Romer, L.J., in the *Walton* case, quoted with approval the statement of Hannen, J., quoted above, and he gave judgment for the plaintiffs because he was "unable to come to the conclusion that (the contingency rendering impossible literal performance of the contract in question) cannot

[2] [1931] 1 Ch. 274.
[3] (1869), L.R. 4 Q.B. 180.

reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made . . . the (contingency) was an event which might have been anticipated and guarded against in the contract."

In the leading case of *Krell* v. *Henry*[4] Vaughan Williams, L.J., set out the constituents of the defence of frustration of adventure to an action for breach of contract. He said: "In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?" The third question propounded by Vaughan Williams, L.J., is so fundamental in this branch of the law of contracts that there is no necessity, in this note, to cite further authorities to support it. It is founded in common sense. Why should relief be given to a party to a contract who has given a general undertaking with the knowledge of the possibility of the occurrence of events which would render it impossible for him to perform? Exceptions to the rule in *Paradine* v. *Jane*[5] were not evolved to rescue that man from his own foolhardiness or chicanery. The Ontario Court with the facts before it dismissed the action of the plaintiffs. It is to be regretted that Middleton, J.A., did not address himself to the question, whether the defendants at the time they entered into a contract without express qualification to employ the plaintiffs for one year had not contemplated that the members of the union would offer serious and forcible opposition to the operation of an independent shop. The statement of the learned judge that, *"as might have been foreseen* this (the independent shop) provoked keen antagonism on the part of the Amalgamated Clothing Workers of America," may induce misgivings with respect to the soundness of the result.

S.E.S.

* * *

TRUSTS—DECLARATION OF TRUST.—Early in the history of equity, the Chancellors could decide many of the suits which came before them by an appeal to some familiar maxim containing in an epigrammatical form the law applicable. In time the growth of law has added so many distinctions and exceptions to these maxims that they now more often express some exception to the rule than the rule itself. This can be illustrated by an attempt to apply the maxim "Equity will not assist a volunteer" to those situations where a

[4] [1903] 2 K.B. 740.
[5] (1674), Al. 26.

beneficiary who has given no consideration seeks to enforce a trust in his favour. The maxim does provide a defence to an action on a voluntary covenant to create a trust.[1] But if the trust is completely executed either by the transfer of the property to trustees,[2] or by the settlor declaring himself a trustee,[3] then the trust will be enforced at the instance of a volunteer.

A person may by *inter vivos* transaction benefit the object of his bounty in any one of three ways. Firstly, he may transfer the property directly to the donee; secondly, he may transfer it to trustees in trust for the donee; or, thirdly, he may constitute himself a trustee of the property for the benefit of the donee. The validity of the gift will be determined by the strict application of the law governing the particular mode selected. If the donor intends to make a gift directly to the donee, he must complete the transfer by doing all that he can at the time to give perfection to the gift according to the nature of the property. If he chooses to benefit the donee by transferring the property to trustees, the transfer to them must be as complete as in the case of a direct gift.[4]

But if for some reason the transfer to the donee or to trustees is not perfected, the courts will refuse to uphold the imperfect transfer as a valid declaration of trust. This is best expressed in the words of Turner, L.J., in *Milroy* v. *Lord*.[5]

"I take the law of this Court to be well settled, that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared

[1] This is fully discussed in a note in (1932), 10 C.B. Rev. 132.

[2] In *Ellison* v. *Ellison* (1802), 6 Ves. 656 at p. 661, Lord Eldon said: "I take the distinction to be that if you want the assistance of the Court to constitute you *cestui que trust* and the instrument is voluntary, you shall not have the assistance for the purpose of constituting you *cestui que trust*, as upon a covenant to transfer stock, etc., if it rests in covenant and is purely voluntary, this Court will not execute that voluntary covenant: but if the party has completely transferred stock, etc., though it is voluntary, yet the legal conveyance being effectually made the equitable interest will be enforced by this Court."

[3] *Ex p. Pye* (1811), 18 Ves. 140; *Tiffany* v. *Clarke* (1858), 6 Gr. 474; *Re B.*, [1929] 1 D.L.R. 501.

[4] *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264.

[5] *Ibid.*, at p. 274.

either in writing or by parol; *but, in order to render the settlement binding one or other of these modes must, as I understand the law of this Court, be resorted to for there is no equity in this Court to perfect an imperfect gift.* The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred the Court will not give effect to it by applying another of these modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

Although an imperfect gift will not be upheld as a valid trust,[6] there are two situations in which a gift imperfect in the first instance may operate by the force of subsequent acts as a perfect gift. The first is where the donor, after the attempted gift, by inadvertance conveys the property to the donee under circumstances which apart from the incompleteness of the gift, would raise a resulting trust in favour of the donor.[7] The second situation in which the imperfect gift is perfected occurs where the donor appoints his intended donee his executor or one of his executors. The vesting of the property in the donee as executor after the death of the donor completes the gift.[8]

In view of the foregoing statements of law, which, it is submitted are well settled by authority, the reasons for judgment of Kingstone, J., in *Re Mellen*[9] justify some comment.

The facts may be briefly stated. The testatrix by her will appointed the Toronto General Trusts Corporation her executor and directed them, after paying certain bequests, to pay the income from the remainder to her son, Edward, for life and after his death to use the corpus to found a mission in the northern part of Canada.

At her death, there were found in her safety deposit box at the office of Toronto General Trusts Corporation four envelopes marked A, B, C and D. These envelopes contained in all fifteen $1,000 bonds

[6] At common law, a husband could not give property directly to his wife. Where such a gift was attempted it was upheld as a valid declaration of trust by the husband for benefit of his wife in some American jurisdictions. Scott, Cases on Trusts, 2nd ed., 149. This doctrine was rejected in England by *In re Breton's Estate* (1881), 17 Ch. D. 416. Cf. *Kent* v. *Kent* (1890), 20 O.R. 158, 445. Since the enactment of legislation enabling a married woman to acquire property "in the same manner as if she were a feme sole," the point is no longer of importance. *Married Women's Property Act*, R.S.O. 1927, c. 182, s. 2(1).

[7] *Carter* v. *Hungerford*, [1917] 1 Ch. 260.

[8] *Strong* v. *Bird* (1874), L.R. 18 Eq. 315; *In re Stewart*, [1908] 2 Ch. 251: *Re Pink, Pink* v. *Pink*, [1912] 2 Ch. 528; *Re Goff* (1914), 111 L.T. 34; *In re Barnes* (1918), 42 O.L.R. 352.

[9] [1933] O.W.N. 118. An appeal was taken from the order of Kingstone, J., but settled before the hearing. The approval of the minutes of settlement by the Court of Appeal is noted at [1933] O.W.N. 246.

fully registered in the name of the testatrix. On each of the envelopes was found in the endorsement in the handwriting of the testatrix—"The contents of this envelope are to be used solely for the benefit of my dearly beloved son, Edward Mellen, Jr., by the Toronto General Trusts Corporation, No. 58 Bay Street, corner Melinda Street, Toronto." Upon an originating motion the Court was asked whether or not the son Edward Mellen should be paid any part or the whole of the principal sums of the bonds contained in the four envelopes. Kingstone, J., decided that the son was entitled to be paid the whole of the principal sum of the bonds on the ground that the testatrix had constituted herself trustee of the bonds for her son by the language used in the endorsements on the envelopes, and that the bonds therefor having been set aside in trust during the lifetime of the testatrix did not form part of her estate.

It is now submitted that the endorsements on the envelopes cannot from their very wording be construed as a declaration of trust on the part of the testatrix. To constitute herself a trustee, the testatrix must use language showing that she holds the property as trustee and not otherwise.[10] The language she employed demonstrates that she intended the trust company to act as trustee and this is clearly inconsistent with any presumed intent on her part to be a trustee.

There is no possibility of supporting the decision by arguing that there was either a direct gift to the son or a transfer of the bonds to the trust company as trustee for the son. Before either of these results could be obtained the testatrix would have been obliged to have the bonds transferred to the son or to the trust company according to the regulations of the company which had issued the bonds or placed her son or the trust company in such a position that he or they could have had the bonds so transferred without any further act on her part.[11] The evidence is, however, that the bonds remained in the possession and control of the testatrix and that they were fully registered in her name at the date of her death.

[10] In *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11, Jessel, M.R., speaking of the language from which it may be inferred that a person has constituted himself trustee, said at pp. 14, 15: "It is true he need not use the words 'I declare myself a trustee' but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning . . . The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise." See also *Jones* v. *Lock* (1865), L.R. 1 Ch. 25. The facts of *Re Mellen* bear a striking resemblance to those of *Re Garden* (1931), 25 Alta. L.R. 580; [1931] 4 D.L.R. 791, which is noted (1932), 10 C.B. Rev. 132.

[11] *Milroy* v. *Lord, supra.*

It might have been urged that there was an intention to give the bonds to the trust company. The appointment of the trust company as executor did not complete this gift. In order to come within the principle of *Strong* v. *Bird*,[12] the executor must be the intended beneficiary and the gift must be intended as a present gift.[13]

The most natural construction to place on the words of the endorsements is that the deceased intended the trust company, her executor, to use the bonds after her death for the benefit of her son. This is not a trust created in the lifetime of the deceased by which she reserved a life interest to herself and gave the corpus after her death to her son.[14] As shown above there was no trust in existence during the lifetime of the deceased. It was an attempted testamentary gift which should have failed because there is no evidence that the endorsement was signed by the deceased and her signature witnessed in accordance with the provisions of the *Wills Act*.[15] The bonds, forming part of her estate, should have been retained by her executor in the manner directed by her will.

It is submitted that the endorsements in the case under consideration do not amount to a declaration of trust and that as the result reached by the reasoning of Kingstone, J., cannot be supported upon any alternative basis, it must, with respect, be considered erroneous.

K. G. MORDEN.

Toronto.

* * *

COPYRIGHT — BROADCAST MUSICAL WORKS — REPRODUCTION BY LOUD SPEAKER—"A PERFORMANCE."—A decision of considerable interest was given recently by Maugham, J., in the Chancery Division in the case of *Performing Right Society, Limited* v. *Hammond's Bradford Brewery Co. Limited*.[1] The plaintiffs owned the copyright of three musical works and licensed their being broadcast by the British Broadcasting Corporation on the 1st of October, 1932. The defendants owned the George Hotel at Huddersfield and on the date mentioned, made these works audible to certain of their customers through a radio receiving set and loud speaker. The plaintiffs

[12] *Supra.*

[13] *In re Innes*, [1910] 1 Ch. 188 at p. 193; *Morton* v. *Brighthouse*, [1927] S.C.R. 118.

[14] There is an interesting article by A. W. Scott on Trusts and the Statute of Wills, (1931), 43 Harv. L. Rev. 521.

[15] R.S.O. 1927, c. 149, s. 11. The present case, like many recent decisions, illustrates the need for thorough re-examination of the principles underlying the *Wills Act*.

[1] (1933) 49 T.L.R. 410.

sought an injunction and damages for infringement of copyright. The defendants denied that the audition constituted a further performance entitling the plaintiffs to royalties in addition to the fees paid to them by the British Broadcasting Corporation. The question was thus squarely raised for the first time in England as to whether a reproduction by loud speaker is a separate performance of the work, not covered by the permission given to the original broadcaster.

In giving judgment, Maugham, J., said that the plaintiffs' license to the British Broadcasting Corporation to broadcast the works in question did not purport to permit their broadcast otherwise than for domestic and private use, and by the terms of the agreement, the Corporation was not authorized itself to authorize people with receiving sets to employ their sets for the purpose of performing entertainments for the public generally. He then referred to the relevant sections of the *Copyright Act, 1911.* Section 1(2) provided that "copyright" means the sole right to produce or reproduce the work in public, and section 35 provided that "performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work including such representation by means of any mechanical instrument. The plaintiffs relied upon *Buck et al.* v. *Jewell-LaSalle Realty Co.*,[2] in which the Supreme Court of the United States had, upon similar facts, given a decision in favour of the plaintiff.

He said the defendants had two points: (1) their act was not a performance; and (2) even if it were a performance, the plaintiffs, by having licensed the British Broadcasting Corporation, had put it out of their power to prevent people with receiving sets and loud speakers from using them for making audible sounds to anybody they pleased.

There was no English authority directly in point, but reference was made to a dictum of McCardie, J., in *Messager* v. *British Broadcasting Co., Limited*,[3] where he said: "It is, I think, reasonably clear that a person who gives to a public audience a performance made audible and effective to them by means of a receiving instrument in the place where that public is assembled together may be liable for infringement of copyright."

Maugham, J., dealt with the first question in the following manner:

> Was the act of the defendants or their servants in tuning in their receiving sets and rendering the inaudible Hertzian waves, which had been transmitted through the ether, available for the purpose of producing vibrations of audible frequencies a performance? As I have said, it is admitted that if it is a

[2] 283 U.S. 191.
[3] [1927] 2 K.B. 543; 43 T.L.R. 818.

"performance" it is a performance in public. In answering that question I do not think that it is necessary to go in great detail into the scientific explanation of what takes place when the radio frequencies which arrive at the place where the defendants' loud-speaker is situated are selected by means of the well-known tuning apparatus and led into the detector, and thence are utilized for the purpose of generating from the radio frequency currents audible frequency currents which conform exactly to the modulations of the originally transmitted waves. I am quoting to some extent from Mr. Willan's report. These currents, he says, are introduced into the low-frequency amplifier, the current from which operates the loud-speaker and causes it to emit sound waves which are relative to those inpinging on the microphone, which is, of course, used at the transmitting station. The loud-speaker is thus, he observes, the translating device in that it converts the electrical current into sound vibrations.

That process, in my opinion, and I have given the best attention that I have been able to give to the arguments on both sides, is essentially a reproduction and is not similar to the step of making distant sounds audible by some magnifying device. The sounds are produced by an instrument under the direct control of the hotel proprietor, and to my mind they are as much under his control as if his employee was turning the handle of a barrel-organ, one of those distressing musical instruments which we sometimes hear. The fact that there is no power of selection is, I think, irrelevant to the question whether the sounds amount to a "performance." The reproduction is, in my opinion, as much a "performance" as is the reproduction of a musical piece by a gramophone apparatus. And if, as has to be admitted, that is a "performance" within the meaning of section 1(2) of the *Copyright Act, 1911*, I can see no reason, having regard to the general observations that I have made as to the meaning of the Act, why the broadcasting apparatus is not giving forth the musical piece just as much as I have said a gramophone does, and with just the same result from the point of view of the owner of the copyright.

Turning to the second point, the learned judge said that the broadcast by the British Broadcasting Corporation no doubt entitled the defendants,

> . . . to listen to the works, either by the use of their head-phones or by the use of loud-speakers, and anybody who was living in the house or happened to be there and who was not a member of the public—I am not here dealing, of course, with the guests of a hotel—I mean members of the household, people of that sort, are entitled to have the advantage of the broadcasting, not perhaps because that is directly authorized by the plaintiffs, but because it is not an infringement of copyright in any way for the sounds to be transmitted to them. But the defendants are in a different position, and, in my opinion, the use of the tuning apparatus and the loud-speaker for the purposes of reproducing the work for the benefit of their guests is an act which is not justified or authorized by the licence given to the British Broadcasting Corporation, and accordingly the act, having regard to the view that I have expressed as to "performance," is an infringement of copyright.

The judgment is in accordance with the decisions in Australia, France and the United States referred to in an article by the present

writer.[4] But in Germany, Danzig and Denmark the contrary view has been held.[5] On his attention being called to one of the German cases (which one is not mentioned in the report but it was presumably that first mentioned in the footnote appended hereto) Maugham, J., said that he was unable to reach the conclusion that that case really dealt with the point with which he had to deal, and in any event, the German system of law differed so widely from the English and their notion of broadcasting licenses and so forth might be so different that he could not follow the German holding.

The case under review gives additional support to the view, expressed in the article above referred to, that in most circumstances a reproduction in public by loud speaker of a copyrighted work received from a broadcasting station would constitute a separate performance in Canada and an infringement of copyright.

BROOKE CLAXTON.

Montreal.

[4] See (1932), 10 C.B. Rev., pp. 435-6.

[5] Reichsgericht (Supreme Court) 11th June, 1932, 2 Journal of Radio Law 758; The Amtsgericht at Sinsheim, 29th September, 1927, 1 Journal of Radio Law 156; Landgericht at Danzig, 10th April, 1929, 1 Journal of Radio Law 146; Court of Appeals at Copenhagen, 20th January, 1930, 1 Journal of Radio Law 144. In a judgment at Amsterdam on 24th October, 1929, 1 Journal of Radio Law 158, a reproduction of a broadcast distributed over a telephone wire was held illegal. See also a judgment of the Civil Chamber in Buenos Aires, 28th October, 1930, 1 Journal of Radio Law 409, where it was held that the purchase of a phonograph record does not give the purchaser the right to broadcast the musical work transcribed on the record.

REVIEWS AND NOTICES.

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THE LAW AND CUSTOM OF THE CONSTITUTION OF NORTHERN IRELAND.*

Northern Ireland has been singularly fortunate from the beginning in possessing a thoroughly competent and learned lawyer to interpret its origins as a jurisdiction under the Crown and the law and custom of its constitution. In 1928, Sir Arthur S. Quekett, the distinguished Parliamentary Draftsman to the Government of Northern Ireland, published an admirable volume in which, with dignity and insight, he dealt with the origin and development of the constitution. The judicial qualities and accurate objectivity of that volume made it inevitable that his readers would look forward to a treatise from his pen in which he would bring his learning and administrative experience to the exposition of the law and custom of the constitution itself. Within

**The Constitution of Northern Ireland.* By Sir Arthur S. Quekett, LL.D., Parliamentary Draftsman to the Government of Northern Ireland. 1933. Belfast: H. M. Stationery Office, 15 Donegall Square West. £1. 2. 6. Pp. xliii, 660.