by merely establishing that he had actual possession at the time the lorry was seized. No reference to the contract need be made to establish a proprietary right (as in detinue) and the defendant cannot plead the illegality of the contract as a defence. So the plaintiff's remedy would be in damages for the value of the lorry, but no restitution of the lorry could be allowed. Although trespass was not expressly pleaded, the facts of the trespass were pleaded, and the plaintiff was entitled to rely on these facts to establish an alternative claim in trespass, as the court was prepared to allow an amendment of the pleadings.

A. H. GOLDBERG

BEYER v. BEYER[1]

Present agreement for the sale of shares held on death—Present binding obligations—No power of revocation—Non-testamentary document—Wills Act 1928

By an indenture dated 22 January 1948 between G.H.B. and his son, brother, and three nephews, the deceased agreed to dispose of such shares as he held at his death in a proprietary company (in which all parties were shareholders) in the manner set out in that document.

After his death, the plaintiffs C.H.B. and W.J.B., who were to receive shares under the indenture, took out an originating summons to determine whether the defendants, the legal personal representatives of the deceased, were bound by such indenture.

The main point in issue was whether the deed constituted a testamentary disposition of property. If so, it was inoperative as it was not executed in accordance with the requirements of the Wills Act 1928.

The chief ground urged by counsel for the defendants was that there remained in the covenantor a power tantamount to that of revocation, for he was at liberty during his lifetime to dispose of all his shares, thus leaving nothing on which the covenant could operate. It fell, therefore, within the class defined by Starke J. in *Bird v. Perpetual Trustees*[2] as testamentary documents—'a document made to depend on the event of death for its vigour and effect'.[3]

This argument was decisively rejected by Pape J. There was no revocable mandate here: one must distinguish a document such as Starke J. had in mind. Here there was imposed on all parties, present and binding obligations—to buy and sell at a price fixed in accordance with the agreement, such shares as the deceased held on his death, and the fact that these obligations were not to be performed until death was irrelevant.

In this part of his judgment, His Honour relied on two cases, *In the Will of Kininmonth*[4] and *Bird v. Perpetual Trustees.*[5] In the former case, it was held that an assignment under a marriage settlement of all household furniture belonging to the assignor at his death operated as an immediate equitable conveyance to the assignee despite the fact that the assignor may have disposed of it all in his lifetime.

[1] [1960] V.R. 126; Supreme Court of Victoria; Pape J. [2] (1946) 73 C.L.R. 140.
[3] *Ibid.* 144. [4] (1897) 23 V.L.R. 134. [5] (1946) 73 C.L.R. 140.

He quoted, with approval, *dicta* of Dixon J. (as he then was) in *Bird v. Perpetual Trustees*[6] within which, he felt, this agreement fell. 'But it is no objection that the payments are not to be made until the intestate's death. . . . If the instrument containing the covenant is executed so as to take effect as his deed during the covenantor's lifetime, it is no objection that his death is the event upon which the obligation is to be fulfilled. That does not make it a testamentary instrument.'[7]

His Honour then went on to consider revocability as the criterion of the testamentary nature of documents by an examination of the authorities in point. He developed the statement of Griffith C.J. in *Re Shepherd*[8] in which he considered the tests to be twofold: firstly, the intention to convey benefit as if by will, and secondly, that death is the event required to give it force. If these elements are present then it is a testamentary document. He adopted the reasoning of Hood J. in *Re Fenton*[9] that the latter principle was the other side of the coin to revocability, for if the document is not effective until death, then it may be revoked at any time before death. The other authorities which he cites as supporting the importance of revocability are *Fletcher v. Fletcher,*[10] *Jeffries v. Alexander*[11] and *Re Fenton.*[12] Although Cussen J. in *Re Carile*[13] stressed that revocability was not the only test and that surrounding circumstances were equally important, Pape J. states that he considered that Cussen J. held a similar view to his own.

He distinguished the case of *Russell v. Scott*[14] as being a case where the deceased could so deal in her lifetime with the contractual rights conferred by the chose in action as to destroy their value, because here the rights are only to such shares as are held on death. It resembles more closely the situation in *Re Reid*[15] inasmuch as his power to defeat the purpose is the product of a collateral agreement, and is not a power to revoke it entirely.

It is doubtful, in view of the fact that one can have a binding revocable trust, how valid a criterion of revocability is in cases of this type. With respect, it seems that it is more a result of the fact that a document is testamentary than it is a test, and that the view of Cussen J. as stated in *Re Carile*[16] is a more fruitful line of enquiry.

The second problem raised by the judgment is concerned with the obligations arising from the deed. How can their existence and extent be tested? In what way could the parties protect themselves against an anticipatory breach? The covenantor may be able to obtain an order of specific performance, but the covenantees seem to be peculiarly helpless since the whole agreement can be circumvented by the sale of all shares in the lifetime of the covenantor. In another connection, it is interesting to speculate at what stage the Statute of Limitations begins to run against the parties. When can it be said that the covenant had been broken? In fact, can it be broken before the death of the covenantor?

[6] *Ibid.* [7] *Ibid.* 146. [8] (1893) 5 Q.L.J. 116, 117. [9] [1919] V.L.R. 740, 744.
[10] (1844) 4 Hare 67; 67 E.R. 564. [11] (1860) 8 H.L.C. 594; 11 E.R. 562.
[12] [1919] V.L.R. 740. [13] [1920] V.L.R. 427, 436.
[14] (1936) 55 C.L.R. 440. [15] (1893) 5 Q.L.J. 120. [16] [1920] V.L.R. 427.

If not, then it seems to resemble a testamentary, rather than a non-testamentary document. Such considerations were thought to be overstated, for in his judgment, Pape J. said, 'Indeed, too much emphasis has been placed upon what might have occurred, and not enough upon what has in fact occurred'.[17]

It may, however, be possible to offer a short solution to the whole problem. Since according to its terms the Wills Act operates to give power to dispose of property by will, it may have been possible to argue that compliance with the requirements of the Wills Act was unnecessary on the alternative ground that this was not a disposition of property. The obligations which it called into being were contractual and not executorial in nature. This may be seen by applying the tests laid down in *Ashby v. Commissioner of Succession Duties (S.A.)*[18] by Starke J. This case concerned a covenant to pay money as interest on a loan, and the issue was whether it constituted a 'disposition of property' and was thus liable to succession duty. He said, 'The covenant created a liability to pay a sum of money; no property of any description whatsoever passed by force of the covenant; no property accrued to any person by its force, and no charge was created over any property. The covenant did not diminish the property of the covenantor; he was possessed of the same property after the making of the covenant as he was before.'[19] As a result, he held that it was not a disposition of property and, with respect, it is submitted that the same can be said of this indenture.

The effect of this decision may be to give a helpful precedent to persons placed in a similar situation to that of the Beyer family (shareholders in a small family company who wish to continue and consolidate their control over the company and to avoid many of the problems caused by the death of a major shareholder). But there is a very definite gap in the protection afforded by such a covenant, for although no express power of revocation was, or could have been given, it may be effectively avoided by a unilateral act of the covenantor, such as a sale or other disposition of shares in his lifetime.

MARY E. HISCOCK

RICH v. COMMISSIONER FOR RAILWAYS[1]

Occupier's liability—Duty irrespective of status of person injured—Breach of by-law as defence

R was injured whilst crossing a railway line: she did not use a footbridge although one was provided, and although a by-law under section 66 of the Government Railways Act 1912-1952 (N.S.W.) made it an offence to cross a railway line on foot when a footbridge was provided. She crossed the line near a car-crossing where she stumbled, and before she got up, she heard the whistle of a train. Although she saw the train and

[17] [1960] V.R. 126, 129. [18] (1943) 67 C.L.R. 284. [19] *Ibid.* 290.

[1] (1959) 33 A.L.J.R. 176; High Court of Australia; McTiernan, Fullagar, Taylor, Menzies and Windeyer JJ.