WORDS AND PHRASES LEGALLY DEFINED

Volume 4: O-R

Words and Phrases

Legally Defined

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O

O.K.

"Each document was considered, altered by agreement, with each alteration initialled, and then the whole document was initialled as agreed by each side, or . . . O.K.'d, the court being informed by evidence that O.K. means 'Orl Korrect'." *British Russian Gazette and Trade Outlook, Ltd.* v. *Associated Newspapers, Ltd.*, [1933] 2 K. B. 616, C. A., *per* Scrutton, L.J., at p. 641.

"The judgments of the courts below ultimately depend on the meaning of the letters 'O.K.', on the delivery orders. . . . The origin of this commercial barbarism (which, according to the Oxford dictionary, was already in use as far back as 1847) is variously assigned in different works of authority. The general view seems to be that the letters hail from the United States and represent a spelling, humorous or uneducated, of the words 'all correct'. Another view is that they represent the Choctaw word *okeh*, which signifies 'so be it'. . . . The only conclusion at which in our opinion, it is possible to arrive, is that the letters O.K. on . . . delivery notes and bills mean . . . that the details in those documents are correctly given." *Dawsons Bank, Ltd.* v. *Japan Cotton Trading Co., Ltd.* (1935), 79 Sol. Jo. 213, P. C., *per* Lord Russell of Killowen, at p. 214.

Canada. — "The supposed agreement consists of an offer in writing dated 3rd June, 1941, addressed by the respondent to Empire Realty Co., Ltd., who were negotiating on behalf of the appellant, to rent the premises for a term of five years at a rental of $125 per month, with the privilege of renewing same for a further period of five years at an appraised rental. When this offer was presented to the appellant he wrote on it 'O.K. Kenneth Drury'. . . . I cannot agree with the conclusion that the words written by the appellant . . . constitute or were intended to constitute an acceptance of the offer. The learned Judge held that the appellant by writing the letters 'O.K.' and signing them thereby accepted the offer. I would not so hold. These letters have been the subject of judicial interpretation in *British Russian Gazette, etc., Ltd.* v. *Associated Newspapers, Ltd.* [*supra*]. While they may be used as evidence that the terms set out in a contract are satisfactory to the parties, nevertheless they may be explained. In the case mentioned there were, aside from the 'O.K.', definite words of offer and acceptance. Here I feel no doubt upon the evidence that the appellant knew he had no authority to bind his co-owners, that the respondent knew it, and that when the appellant wrote the letters 'O.K.' he intended to say, and respondent knew he intended to say, that the terms, in so far as they were expressed, would be satisfactory to the appellant if they turned out, upon inquiry, to be equally satisfactory to the other owners. In my opinion there was no concluded agreement on 3rd June, 1941." *Saperstein* v. *Drury*, [1943] 3 W. W. R. 193, C. A., *per* McDonald, C.J.B.C., at pp. 195, 196.

OATH

Subject to the exceptions referred to hereafter, no evidence is receivable in any court, except that given upon oath or affirmation. At common law the form of the oath is immaterial, provided that it is binding on the witness's conscience, whether he is of the Christian religion or not.

By statute [Oaths Act 1909] an oath may be administered and taken as follows. The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that . . ." followed by the words of the oath prescribed by law [see note, *infra*]. The officer must, unless the witness objects or is physically incapable of so taking it, administer the oath in that form and manner without question, provided that to a witness who is neither a Christian nor a Jew the oath is to be administered in any manner which was lawful prior to the passing of the statute. The fact that a witness has been sworn in a manner contrary to the custom of his religion is no ground for a new trial; the witness, if he has sworn falsely, may be convicted of perjury.

A witness may object to be sworn on the ground that he has no religious belief, or that the taking of an oath is contrary to his religious belief; and he may then be permitted to make a solemn affirmation in lieu of an oath, which has the same force and effect in law as though the oath had been taken in the ordinary form. It is for the court to decide by questioning the witness whether he is entitled to take advantage of this provision, but where the witness has taken the oath without objection the fact that he had at the time no religious belief does not affect its validity in any way.

A witness may, at his own desire, be sworn in the Scottish manner with uplifted hand, instead of in the ordinary form. A special form of affirmation has long been permitted to members of the religious bodies of Quakers and Moravians, and even to persons who have ceased to belong to these bodies, but retain their views as to the unlawfulness of oaths.

With regard to certain oaths required to be taken out of court and such voluntary declarations as may be required in confirmation of written instruments, proofs of debts, or other matters, any person may make a solemn declaration in place of an oath (15 Halsbury's Laws (3rd. Edn.) 436, 437, 438).

[In courts presided over by judges of the Queen's Bench Division the words prescribed are: "the evidence I shall give shall be the truth, the whole truth, and nothing but the truth". This form is also used in other courts; see further 15 Halsbury's Laws (3rd Edn.) 437, note (*u*).

In relation to any oath administered to and taken by any person before a juvenile court or administered to and taken by any child or young person before any other court the words "I promise before Almighty God" are substituted by s. 28 (1) of the Children and Young Persons Act 1963.]

The expressions "oath" and "affidavit" shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression "swear" shall, in the like case, include affirm and declare (Interpretation Act 1889, s. 3).

The expression "oath" in the case of persons for the time being allowed by law to affirm or declare instead of swearing, includes "affirmation" and "declaration", and the expression "swear" in the like case includes "affirm" and "declare" (Perjury Act 1911, s. 15).

"An oath is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice." *R.* v. *White* (1786), 1 Leach, 430, *per cur.*, at pp. 430, 431.

OBITER DICTUM

"It is of course perfectly familiar doctrine that *obiter dicta*, though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context means what the words literally signify—namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case, and the reasons for the decision." *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K. B. 132, *per* Talbot, J., at p. 154.

OBJECT OF VERTU. *See* VERTU

OBJECTS (Of company). *See also* MOTIVE

[The plaintiff company (limited by guarantee) claimed to be entitled to the benefit of the provisions of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act 1955 (repealed; see now s. 40 (5) of the General Rate Act 1967) because its "main objects" were non-profit making and educational.] "The expression 'main objects' is nowhere defined, as far as I know. There is a fairly simple answer to this problem, because in my view there are two kinds of 'objects' in this kind of document [the memorandum of association of the company], i.e. objects which are properly so called, as distinguished from objects which are not in fact objects so much as powers. That is the point which is dealt with in *Cotman* v. *Brougham* [[1918] A. C. 514], in the speech of Lord Wrenbury—than whom no greater authority on companies and the law of companies can be found—where he says: 'There has grown up a pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation is to have power to do.' I may perhaps mention that the same comment was made by myself some years ago in *Re Cole, Ltd.* [[1945] 1 All E. R. 521 n.]. In that case I called attention to the importance of not inserting a clause which had become so common, making every sub-clause, heading or objects clause, independent of the other objects and therefore to be construed in isolation. Lord Wrenbury's speech gives me the requisite clue to the proper significance to be attached to that phrase, 'main objects'. What is meant by 'main objects' in s. 8 of the Act of 1955 is, those objects which are really objects, excluding those so-called objects which are, in fact, nothing more or less than powers." *North of England Zoological Society* v. *Chester Rural District Council*, [1958] 3 All E. R. 535, *per* Vaisey, J., at p. 537; *affd.*, [1959] 3 All E. R. 116.

OBLIGATION. *See also* BOND

The ordinary form of bond now in use is one accompanied by a condition in the nature of a defeasance, the performance of the condition generally being secured by a penalty. This form of bond is called a double or conditional bond, and consists of two parts: first, the obligation,

and secondly, the condition. The condition, which may be contained in the same or another instrument, or may be endorsed on the back, specifies the real agreement between the parties—that is to say, the money to be paid or acts or duties to be performed or observed, the payment, performance, or observance of which is intended to be secured by the bond—and provides that on due performance of the condition the bond shall be void. The obligation, as in the case of a single bond, simply binds the obligor to the payment of a certain sum of money, such sum of money being usually, though not necessarily, a penalty, and does not in terms refer to the condition. On breach of the condition the bond is said to become forfeited or absolute, though, as will be subsequently seen, it does not follow that the obligee is entitled to recover the sum mentioned in the obligation (3 Halsbury's Laws (3rd Edn.) 330.

"There are two terms by which English lawyers designate bonds, both well known terms. One is bond, and the other is obligation. Oddly enough, we generally use the term bond to distinguish the instrument, and the terms derived from obligation or from oblige, to distinguish the parties to it. We speak of a bond, and of the obligor and the obligee of a bond. But still the word 'obligation' denotes a bond as well as the word 'bond'." *Norton* v. *Florence Land & Public Works Co.* (1877), 7 Ch. D. 332, *per* Jessel, M.R., at p. 337.

Canada. — "The Act [Canadian Broadcasting Act 1936 (Can.), c. 24, s. 4 (now s. 27 (4) of the Broadcasting Act 1958 (Can.) c. 22)] now says that an action, suit or other legal proceeding in respect of any obligation incurred, may be brought or taken against the [Canadian Broadcasting] Corporation. 'Any obligation incurred' may not be very apt language to describe a liability in tort. The very words 'liability in tort' could have been used and then there would have been no question. But I am not going to stop this action at this stage by restricting the meaning of the word 'obligation' in this legislation to a duty arising out of contract. I think it also includes a duty or liability arising from an actionable tort." *Smith* v. *Canadian Broadcasting Corpn.*, [1953] 1 D. L. R. 510, *per* Judson, J., at p. 512.

OBLIGATORY

"I can see no difference at all between enacting that certain words shall be valid and obligatory and saying that the agreement is to be confirmed and made binding on the several parties. . . . I do not understand how an agreement which is not made binding can be made obligatory; the only meaning that I can attach to the word 'obligatory' when so used is that the parties to the agreement are bound by its contents; just as the meaning of a contract being binding is that its various clauses are binding upon the parties to the contract." *R.* v. *Midland Ry. Co.* (1887), 19 Q. B. D. 540, D. C., *per* Stephen, J., at p. 547.

OBLIGEE—OBLIGOR

A bond is an instrument under seal, usually a deed poll, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date. The person who so binds himself is called the obligor, and the person to whom he is bound the obligee; and the instrument itself is sometimes called an obligation (Shep. Touch. 367; 3 Halsbury's Laws (3rd Edn.) 329, 330).

OBLITERATION

[Section 21 of the Wills Act 1837 provides that "obliterations", interlineations or other alterations in a will after execution are void, if not affirmed in the margin, or otherwise, by the signature of the testator, and the attestation of witnesses.] "It is not a mere difference of ink or handwriting, which would constitute any of the acts done according to the true meaning of the statute. The mere circumstance of the amount or name of the legatee, inserted in a different handwriting and in different ink, would not alone constitute an obliteration, interlineation, or other alteration. Blanks may be supplied, and in a different ink, because the will may very probably be brought with blanks to the testator, and then filled up; no presumption could arise in such a case against the will having been executed as it appears. But the case is different when there is an erasure apparent on the face of the will, and when that erasure has been superinduced by other writing. In such a case there is an obliteration and something more, which constitutes an alteration, and then the question arises, whether this was done before the execution of the will or not? We apprehend it to be now settled, that whoever alleges such alteration to have been done before the execution of the will, is bound to take upon himself the *onus probandi*." *Greville* v. *Tylee* (1851), 7 Moo. P. C. C. 320, P. C., *per* Dr. Lushington, at pp. 327, 328.

"For the purposes of this case I must hold that a pasting over a piece of paper is an obliteration within the meaning of the Act [Wills Act 1837, s. 21 (*supra*)]. It is not, perhaps, an exact use of the word according to ordinary parlance in a case where, as on this codicil, and no doubt on this will, the piece of paper could with perfect ease be removed, leaving the document intact. Parts of a document sealed up under an order for discovery can hardly be said to be obliterated. A picture

would rather be said to be concealed than obliterated if a curtain is drawn before it, or a letter if placed in an envelope. If the pasting on of pieces of paper in this case were not an obliteration within the meaning of the Act, then all difficulty would be removed by the very simple process of their removal. But I cannot hold that they did not constitute such an obliteration. In the original sense of the Latin word from which obliteration is derived —in Facciolati's Lexicon '*oblitterare*' is defined as '*aliquid literis superducere*'—a placing of a piece of paper over writing would be an obliteration." *Ffinch* v. *Combe*, [1894] P. 191, *per* Jeune, P., at pp. 201, 202.

See, generally, 39 Halsbury's Laws (3rd Edn.) 885.

OBSCENE

For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it (Obscene Publications Act 1959, s. 1 (1)).

"It is quite clear that the publishing an obscene book is an offence against the law of the land. It is perfectly true . . . that there are a great many publications of high repute in the literary production of this country the tendency of which is immodest, and, if you please, immoral. . . . But it is not to be said, because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *R.* v. *Hicklin* (1868), L. R. 3 Q. B. 360, *per* Cockburn, C.J. at p. 371.

"The classic definition, delivered by Cockburn, C.J., in the Queen's Bench in 1868, in *R.* v. *Hicklin* [*supra*], was: '. . . the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.' We are being asked to upset these convictions because something was not said about the standards of today. The learned recorder said, and this court entirely agrees with him, that the law is the same now as it was in 1868, and, indeed, counsel for the appellants . . . has not sought to say differently. If that is the test, the jury today have to consider whether, today, these books have a tendency to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. When considering whether books have a tendency to deprave and corrupt, everybody's mind goes to the depraving or corrupting of young people into whose hands they may fall. There may be dirty-minded elderly people, no doubt, but it is not to be expected that many elderly people would read this stuff. Younger people would, however, and we are told that these books circulate in the armed forces. The jury have to consider whether or not, looking at these books as a whole, people would be corrupted. I can well understand that, nowadays, novelists and other writers mention things which they would not have mentioned in the reign of Queen Victoria, but it is one thing to discuss a subject and quite another to discuss it and write about it in the way in which these books deal with it. It seems to me idle to contend that these books are not of the tendency which Cockburn, C.J., described in 1868." *R.* v. *Reiter*, [1954] 1 All E. R. 741, C. C. A., *per* Lord Goddard, C.J., at p. 742; see also [1954] 2 Q. B. 16.

"The test today is extracted from a decision of 1868, and the test of obscenity is this [*R.* v. *Hicklin*, *supra*]: '. . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'. Because that is a test laid down in 1868, that does not mean that what you have to consider is, supposing this book had been published in 1868 and the publishers had been prosecuted in 1868, whether the court or a jury, nearly a century ago, would have reached the conclusion that the book was an obscene book. Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall in this year, or last year when it was published in this country, or next year or the year after that." *R.* v. *Martin Secker Warburg*, [1954] 2 All E. R. 683, C. C. A., *per* Stable, J., at p. 685.

"In my judgment, there is no reason whatever to confine obscenity and depravity to sex." *John Calder* (*Publications*), *Ltd.* v. *Powell*, [1965] 1 All E. R. 159, *per* Lord Parker, C.J., at p. 162; also reported [1965] 1 Q. B. 509.

"The test of obscenity is now laid down in s. 1 of the Act of 1959 [Obscene Publications Act 1959 (*supra*)] which, in so far as it is material, reads as follows: '(1) For the purposes of this Act an article shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons

who are likely, having regard to all relevant circumstances, to read . . . it.' The learned judge read out this section to the jury, laying emphasis on the words 'if taken as a whole'. He then went on to say: 'Those other vital words "tend to deprave and corrupt" really mean just what they say. You have heard several efforts to define them. "Tend" obviously means "have a tendency to" or "be inclined to". "Deprave" is defined in some dictionaries, as you heard, as "to make morally bad; to pervert or corrupt morally". . . . The essence of the matter, you may think, is moral corruption.' The appellants contend that this direction as to the meaning of obscenity does not go far enough; the learned judge should have gone on, so they say, to explain that the essence of moral corruption is to make a person behave badly or worse than he otherwise would have done, or to blur his perception of the difference between good and bad. This court cannot accept that contention. Were it sound, it would perhaps be difficult to know where the judge ought to stop. When, as here, a statute lays down the definition of a word or phrase in plain English, it is rarely necessary and often unwise for the judge to attempt to improve on or re-define the definition. Certainly, in the circumstances of the present case he cannot be blamed for saying no more than he did about the words 'deprave and corrupt'." *R.* v. *Calder & Boyars, Ltd.*, [1968] 3 All E. R. 644, *per* Salmon, L.J., at p. 647.

Australia. — "The offence is one against public morality. It is for convenience generally known as 'obscene libel', but the gist of it is publishing matter to deprave or corrupt the public with the intention of depraving and corrupting them. It does not depend on the exact meaning of 'obscene' any more than on the exact meaning of 'lewd' or 'bawdy', epithets which generally kept company with 'obscene' in the common law indictment. The substantial requirement is that the matter published and the manner of its publication establish the guilt of the accused in accordance with the test." *R.* v. *Close*, [1948] V. L. R. 445, *per* Gavan Duffy, J., at p. 455.

"The first thing, I think, that strikes one, in considering a 'tendency to corrupt' as the characteristic of obscenity, is that it does not at all reproduce the ordinary popular meaning of the word 'obscene'. There is probably no exact synonym, but the words 'indecent', 'filthy', 'disgusting', 'offensive', all readily occur to one's mind and express more or less fully and clearly the popular meaning. . . . Perhaps 'filthy' is today a stronger word than 'obscene', but this is not true, I think, of 'indecent', or 'disgusting' or of 'offensive'. The derivation of the word seems obscure. The dictionaries (including Lewis and Short's Latin Dictionary, s.v. '*obscenus*') suggest a connection with the Latin *caenum* which means 'filth' but this makes the 'obs' meaningless, and seems very dubious. It may perhaps come from *ob* and the word *scena*, which means 'a stage', and the fundamental idea may be something which would be offensive to prevailing taste if performed or uttered on the stage, something which should be kept 'off' the stage. This would not, I think, be inconsistent with the notion of something 'impious', which is undoubtedly part of the earlier Latin implications of the word 'obscenus'. It is applied by Virgil to the harpies. These matters, however, are perhaps of merely academic interest. What seems important is that the word 'obscene' in its ordinary sense denotes today something which is indecent or disgusting. The notion is of that which offends good taste or decency; it could be quite properly used of something which has no sexual significance, and of something which is not likely to corrupt or deprave anybody. No doubt most things which are 'obscene' in the ordinary sense could be said to have a tendency to deprave or corrupt, but such a tendency is, I think, no part of the ordinary meaning of the word." *Ibid.*, *per* Fullagar, J., at p. 463.

Canada. — "The word 'obscene' . . . was originally used to describe anything disgusting, repulsive, filthy, or foul. This use of the word is now said to be somewhat archaic or poetic; and it is ordinarily restricted to something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas, or being impure, indecent, or lewd." *R.* v. *Beaver* (1905), 9 O. L. R. 418, *per* Maclaren, J.A., at pp. 424, 425.

OBSERVE

[A landlord failed to "observe" the covenants contained in a lease.] "The word 'observe' is not a purely negative word. It cannot, I think, mean that the covenantor may simply sit by noticing what is happening and doing nothing. What it means, I think, is 'to comply with the obligation' and therefore it has a positive and not merely a negative meaning." *Ayling* v. *Wade*, [1961] 2 All E. R. 399, C. A., *per* Danckwerts, L.J., at p. 402.

OBSOLETE

[The question was whether a covenant was "obsolete" within the meaning of s. 84 (1) (*a*) of the Law of Property Act 1925.] "Counsel for the applicants referred us to the Shorter Oxford English Dictionary, and, out of the many meanings of 'obsolete' which are to be found there, he selected as being appropriate to this case such definitions as 'fallen into disuse', or 'out of date', and submitted that that was the proper interpretation to apply to

'obsolete' in s. 84 (1) (*a*). Counsel submitted that such an interpretation was quite distinct from the interpretation which, he said, the tribunal inferentially put on the word, namely, 'valueless'. The meaning of the term 'obsolete' may well vary according to the subject-matter to which the term is applied. Many things have some value, even though they are out of date in kind or in form—for example, motor cars, or bicycles. Here, however, we are concerned with the application of the term to restrictive covenants as to user, and these covenants are imposed when a building estate is laid out, as was the case with this estate which was laid out in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them. If, as sometimes happens, the character of an estate as a whole, or of a particular part of it, gradually changes, a time will come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time comes, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used in s. 84 (1) (*a*)." *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application*, [1955] 3 All E. R. 559, C. A., *per* Romer, L.J., at pp. 563, 564; see also [1956] 1 Q. B. 261.

New Zealand. — " 'Obsolete' does not mean merely suspended or reserved for special aggravated cases, but means wholly and entirely out of date, unsuited to existing conditions, existing in theory but inapplicable in practice. It is not only obsolescent (growing out of use), but obsolete (disused). The long bow was formerly the weapon of Englishmen. It is still in use in some countries 'consisting principally of coloured populations', but it is obsolete in England." *A.-G.* v. *Blomfield, A.-G.* v. *Geddis* (1913), 33 N. Z. L. R. 545, *per* Denniston, J., at p. 568; also reported 16 G. L. R. 218, at p. 229.

"An obsolete process or jurisdiction is one which is no longer used, not necessarily one that is no longer capable of being used." *Ibid.*, *per* Chapman, J., at p. 581; 235.

OBSTRUCT

In Malicious Damage Act

[Section 35 of the Malicious Damage Act 1861 makes it a felony unlawfully and maliciously to do certain acts with intent to "obstruct" any engine, tender, carriage or truck using a railway, and s. 36 makes it a misdemeanour to "obstruct" any engine or carriage by any unlawful act or wilful omission or neglect.] "The offence, under s. 36, is the unlawfully obstructing a train, not in obstructing it unlawfully with a malicious intent, as required by s. 35. In this case a drunken man unlawfully changed the signals. The natural result of this would be to stop the train, and to cause derangement of the whole machinery of the railway. If this is the natural result of the prisoner's act, is it not a causing a train to be obstructed? There is nothing in s. 36 to show that the obstruction must be a physical one. It is sufficient if a train is in fact obstructed." *R.* v. *Hadfield* (1870), L. R. 1 C. C. R. 253, C. C. R., *per* Blackburn, J., at p. 256.

"There can be no doubt in this case that the prisoner did in fact make a signal, namely, by holding up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations; or that he did thus obstruct the train, for the driver shut off steam and diminished the speed of the train from twenty to four miles an hour; or that the prisoner did what he did with the intention of producing this result. We have to consider whether this is such an obstruction as is contemplated by s. 36 [of the Malicious Damage Act 1861 (see *supra*)]. . . . The first question is whether the section applies to anything except a mere physical obstruction. If it had spoken of obstructing the line of railway, it might have been limited to physical obstructions. But the words are 'obstruct any engine or carriage'. And further the section speaks not only of obstruction 'by any unlawful act', but also of obstruction 'by any wilful omission or default'. These latter words are probably directed to the case of a servant of the company delaying a train by wilfully omitting some act which it is his duty to do; and they must include something beyond mere physical obstruction. But all doubt is removed when we refer to s. 35. That section makes it felony to do certain acts maliciously and with intent to obstruct. It enumerates first a number of acts which would no doubt amount to a physical obstruction of the line itself, such as placing wood or stones across the railway, displacing the rails, or altering the points. Then follow the words 'shall unlawfully and maliciously make or show hide or remove any signal or light upon or near to any railway'; and then the general words 'shall unlawfully and maliciously do or cause to be done any other matter or thing with intent, etc.' Now it is quite clear that the making or altering of a signal need not necessarily create any physical obstruction; and it is therefore clear that the word obstruct in s. 35 is not limited to physical obstruction. I should have said the same of s. 36, even if it had stood alone. But plainly the same word must have the same meaning in both sections; and there-

fore s. 36 applies to other than physical obstructions." *R.* v. *Hardy* (1871), L. R. 1 C. C. R. 278, C. C. R., *per* Bovill, C.J., at pp. 280, 281.

See, generally, 10 Halsbury's Laws (3rd Edn.) 891, 892.

Local government officer

[The Public Health Act 1875, s. 102 (repealed; see now Public Health Act 1936, s. 287), empowered a local authority to enter upon private premises to examine as to the existence of nuisances. Section 306 (repealed) made it an offence for a person wilfully to "obstruct" a member of a local authority, or any person duly employed in the execution of the Act.] "The power given to the local authority is very considerable because apparently it does not matter by whom the refusal has been made if there has been a refusal in fact. If there has been anyone on the premises, whether he has had authority to do so or not, who refuses them admission they would be entitled to make use of the compulsory powers of s. 102 and go before the magistrates. But this is a case where there has been no opportunity of refusal because those who were conducting the inspection got in apparently without seeing anybody or meeting anybody who could refuse or admit. . . . I think that if these gentlemen had a right to go on the premises without asking permission or without giving any opportunity of refusal, I must say the person who exposes them even to a well grounded apprehension of personal detention as a kind of punishment or revenge for their act of entry, most certainly obstructs within the meaning of this section, and I think it would be very unfortunate if any countenance should be given to the notion that conduct of that kind, where there is a right of entry, would not be obstruction within the meaning of the Act." *Consett Urban District Council* v. *Crawford* (1903), 67 J. P. 309, D. C., *per* Wills, J., at p. 311.

See, generally, 31 Halsbury's Laws (3rd Edn.) 40.

Australia. — [Section 635 of the Local Government Act 1919–1966 (N. S. W.), makes it an offence for any person wilfully to "obstruct" a servant of a municipal council in the execution of his duty under the Act.] "The verb 'obstructs' of course can, in various contexts, have different shades of meaning, but a common and natural meaning of the verb 'to obstruct' is to impede or hinder, to retard or to oppose the activities of, or to oppose the course of conduct of a person who is seeking to achieve a particular purpose. Those meanings which I have suggested seem to me to be perfectly natural and straightforward synonyms, as it were, of the verb 'to obstruct' and if they are to be regarded as indicating the meaning of the word 'obstructs' as used in s. 635, then I think the evidence before the magistrate did indeed disclose a *prima facie* case in support of the offence charged against the present respondent. What does or does not amount to obstruction of course depends upon the particular facts and circumstances of the case. It is clear that it is not even necessary in all cases that there should be any physical interference with the activities of the person said to have been obstructed." *Auburn Municipal Council* v. *Ivanoff* (1964), 10 L. G. R. A. 258, *per* Maguire, J., at p. 259.

Police obstructed in execution of duty

[Section 2 of the Prevention of Crimes Amendment Act 1885 (repealed; see now s. 51 (3) of the Police Act 1964) extended the Prevention of Crimes Act 1871, s. 12 (under which a person convicted of an assault on a constable was guilty of an offence under that Act), to all cases of resisting or wilfully "obstructing" any constable or police officer when in the execution of his duty.] "In my opinion a man who, finding that a car is breaking the law, warns the driver, so that the speed of the car is slackened, and the police are thereby prevented from ascertaining the speed and so are prevented from obtaining the only evidence upon which, according to our experience, Courts will act with confidence, is obstructing the police in the execution of their duty. . . . However, nothing that I now say must be construed to mean that the mere giving of a warning to a passing car that the driver must look out as there is a police trap ahead will amount to an obstruction of the police in the execution of their duty in the absence of evidence that the car was going at an illegal speed at the time of the warning given." *Betts* v. *Stevens*, [1910] 1 K. B. 1, D. C., *per* Lord Alverstone, C.J., at pp. 6, 7.

"Did the appellant, in doing what he did, wilfully obstruct the police in the execution of their duty? . . . The policeman Pyke was endeavouring to collect evidence of what was the pace of the cars before the measured distance was entered on by ascertaining what was the pace of the cars within the measured distance. The appellant in effect advised the drivers of those cars which were proceeding at an unlawful speed not to go on committing an unlawful act. If that advice were given simply with a view to prevent the continuance of the unlawful act and procure observance of the law, I should say that there would not be an obstruction of the police in the execution of their duty of collecting evidence beyond the point at which the appellant intervened. The gist of the offence to my mind lies in the intention with which the thing is done. In my judgment in

Bastable v. *Little* [[1907] 1 K. B. 59, D. C.] I used these words: 'In my opinion it is quite easy to distinguish the cases where a warning is given with the object of preventing the commission of a crime from the cases in which the crime is being committed and the warning is given in order that the commission of the crime may be suspended while there is danger of detection.' I desire to repeat those words. Here I think it is perfectly plain upon the facts found by the magistrates in this case that the object of Betts' intervention was that the offence which was being committed should be suspended or desisted from merely whilst there was danger of the police detecting it and taking evidence of it, and that therefore he was obstructing the police in their duty to collect evidence of an offence which had been committed and was being committed. He did that wilfully in order to obstruct them in their duty, and not in order to assist them in the performance of their duty, nor in order to prevent a motorist upon the road from committing an offence. I think the decision at which the magistrates arrived was correct, and that the conviction should be affirmed." *Ibid.*, *per* Darling, J., at pp. 8, 9.

"I think that the police, in the execution of their duty, intended to get into the inn. They wanted to get in before anybody in the inn had an opportunity of putting things away, and if they had knocked at the door and the licensee had not opened the door for several minutes, the justices could have found that the licensee was obstructing the police. 'Obstructing' [within s. 2 of the Prevention of Crimes Amendment Act 1885 (repealed; see *supra*)] means, for this purpose, making it more difficult for the police to carry out their duties." *Hinchliffe* v. *Sheldon*, [1955] 3 All E. R. 406, *per* Lord Goddard, C.J., at p. 408.

"It is an offence by statute wilfully to obstruct any constable or peace officer when in the execution of his duty. This offence is not confined to physical obstruction. If a policeman was investigating a crime, and someone wilfully misled him by false information, he might well be guilty of this offence. But it is one thing to obstruct a policeman. It is another thing to refuse to help him. Take the case in Australia where a man, who was shot and wounded in an affray, refused to disclose to the police the name of the person who had shot him. It would seem that he was engaged in gang warfare, for he said that he would 'cop it sweet' if he did disclose the name. He said he would attend to the matter himself, that is, take his own revenge. No civilised community can tolerate such behaviour. But his offence is not obstructing the police. It is misprision of felony: see *R.* v. *Crimmins* [[1959] V. L. R. 270]." *Sykes* v. *Director of Public Prosecutions*, [1961] 3 All E. R. 33, H. L., *per* Lord Denning, at p. 41.

OBSTRUCTION

Of floor

[Section 28 (1) of the Factories Act 1961 provides that factory floors shall be kept free from any "obstruction". The plaintiff was injured while taking a reel of paper from a rack.] "The word 'obstruction' is not capable of precise definition, and I do not think it wise to attempt it. In one sense anything that is on a floor is an obstruction. If you want to walk straight across a room, even a table or a chair may be an obstruction in your path. If you carried it thus far, you might say that a machine on a factory floor was an obstruction. Even one of these racks in this storeroom would be an obstruction. That would be absurd. In this section, an 'obstruction' is something on the floor that has no business to be there, and which is a source of risk to persons ordinarily using the floor." *Pengelley* v. *Bell Punch Co., Ltd.*, [1964] 2 All E. R. 945, C. A., *per* Lord Denning, M.R., at p. 946.

Of highway

The placing of an obstacle on, or such an improper use of a highway as amounts to an obstruction of the traffic on it constitutes a nuisance at common law. In some cases obstruction of the highway may be authorised by law or agreement. It may be either temporary or permanent. Where it is temporary, there is a duty, breach of which is an act of negligence, to remove the obstruction as soon as possible, and to see that it is so guarded that the risk to persons using the highway is reduced as far as possible. Where it is permanent, there is a duty, breach of which is an act of negligence, to maintain it in such a state of security as persons using the highway have become accustomed to expect. There is no duty to take special care to protect persons suffering from an infirmity, for example, blindness, who, but for their infirmity, would probably not have been injured by the obstruction (28 Halsbury's Laws (3rd Edn.) 62, 63).

"I am bound to administer the law according to the legal rights of the public as they now exist, and which are thus aptly defined in the language of pleading—to pass and repass, on foot and with horses and carriages, at their free will and pleasure, over the said highway, i.e. over every part of it at their free will and pleasure. Every obstruction which, to a substantial degree, renders the exercise of that right unsafe or inconvenient, is a violation of that right. And I think the authority of parliament is necessary to legalise such a dealing with the highway, as deprives any class of passengers, whether on foot or with horses and

carriages, of the use of any part of it." *R.* v. *Train* (1862), 3 F. & F. 22, *per* Erle, C.J., at p. 27.

"For a person merely to stand still, or to cause his horse and cart to stand still, in the roadway is not causing an obstruction. An obstruction will only be caused if there is an unreasonable use of the road by stopping." *Gill* v. *Carson & Nield*, [1917] 2 K. B. 674, D. C., *per* Lord Reading, C.J., at pp. 677, 678.

"The law as regards obstructions to highways is conveniently stated in a passage in Salmond on Torts (11th Edn.), at p. 303: 'A nuisance to a highway consists either in obstructing it or in rendering it dangerous', and then a number of examples are given. I will not take up time reading them, but a reference to these examples seems to me to show that *prima facie*, at any rate, when one speaks of an obstruction to a highway one means something which permanently or temporarily removes the whole or part of the highway from public use altogether. To take the simplest and most obvious case, if I erect a fence or a wall halfway across the road, I obstruct it, because to that extent the road ceases to be usable at that point as such. The alternative in the text which I read ('or in rendering it dangerous') adds a different conception of wrongful interference, viz., the putting on a highway of something which, though it does not obstruct, that is, bar the highway in the sense that I have already mentioned, yet is liable to make it dangerous. Again, one example will suffice: if I make a small hole in the highway difficult to see, or put some greasy substance on it, so that treading in the hole or on the substance is liable to cause a man as a natural consequence to fall, then it may be that I have caused a nuisance to the highway, not by obstructing it, but by rendering it dangerous." *Trevett* v. *Lee*, [1955] 1 All E. R. 406, C. A., *per* Evershed, M.R., at p. 409.

[Section 69 (1) of the London County Council (General Powers) Act 1933 (as amended), enables the Greater London Council to refuse consent to the establishment of a petroleum-filling station if it would cause "obstruction" to traffic.] "I think that the words 'obstruction to traffic' in s. 69 (1) are really synonymous with 'interference with traffic'; they are not dealing at all with obstruction on the highway in the common-law sense." *London County Council* v. *Cutts*, [1961] All E. R. 600, *per* Lord Parker, C.J., at p. 603.

[The appellants, who were garage proprietors, parked five vehicles for three and a half hours in part of a street that had been designated as a parking space. They were charged with causing an unnecessary "obstruction" contrary to reg. 89 of the Motor Vehicles (Construction and Use) Regulations 1955 (revoked; see now reg. 93 of the Motor Vehicles (Construction and Use) Regulations 1966).] "In my judgment . . . the word 'obstruction' falls to be construed in a purely objective sense. The motive or purpose underlying the act alleged to constitute an obstruction is irrelevant. An act which in fact causes an obstruction cannot be justified by the motive or purpose which inspires or induces its commission and, conversely, a lawful act cannot amount to an obstruction merely because the motive or purpose which leads to its commission is one which does not commend itself to the court, for example, because it is selfish, or may cause inconvenience to other persons who would themselves have desired to park their vehicles where the appellants had already parked the five motor cars in question." *Anderson (W. R.) (Motors), Ltd.* v. *Hargreaves*, [1962] 1 All E. R. 129, *per* Slade, J., at p. 132.

Australia. — " 'Obstruction' . . . is not a term of art nor has it acquired any special meaning, but it is always used in describing a particular kind of nuisance, viz. the obstruction of a highway. What is obstruction of a highway? It is not only an obstruction which actually prevents someone from exercising his right on the highway; it is any obstruction which interferes to an appreciable practical extent with the right which every member of the public has to use the highway, and to use it at all times and under all circumstances. The right of each person is not restricted to the particular part of the highway which may happen not to be in use by others at the time; it extends to the whole of the highway. Everybody has the right to use the whole of the highway at any time he thinks fit for the purpose of passing and repassing, and anything which appreciably and practically interferes with that right is an obstruction of the highway." *Haywood* v. *Mumford* (1908), 7 C. L. R. 133, *per* O'Connor, J., at pp. 140, 141.

Of road in mine

[In an action by a dependent of one of the deceased, it was contended by the plaintiff that the death of two repairers had been caused by a breach of the statutory duty imposed on the defendants by s. 47 of the Coal Mines Act 1911 (repealed; see now s. 34 (1) (*b*) of the Mines and Quarries Act 1954), which required that every haulage road should be kept clear as far as possible of pieces of coal and other "obstruction".] "In our opinion, the argument of counsel for the defendants that the section is not a traffic regulation is right; it is intended to deal with the condition or state of the haulage way. A truck left on or across the line, either negligently or deliberately, would, we think, fairly come within the meaning of

obstruction as used in the section. It would then be as much an obstruction as a piece of coal or a baulk of timber. But a section which requires the way to be left clear of pieces of coal or other obstruction does not appear to us to be intended to deal with the case of a truck, or line of trucks, which is being legitimately moved along the rails, but owing to a failure to signal, or to a disregard of signals, causes a collision." *Alexander* v. *Tredegar Iron & Coal Co., Ltd.*, [1944] 1 All E. R. 451, C. A., *per* Goddard, L.J., at p. 452.

OBSTRUCTIVE BUILDING. *See* BUILDING

OBTAIN

For purposes of this section [which deals with the obtaining of property by deception] a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain (Theft Act 1968, s. 15 (2)).

[Section 33 of the Larceny Act 1916 (repealed; cf. now s. 15 of the Theft Act 1968 (*supra*)) made a person, who received any property knowing the same to have been "obtained" in any way whatsoever under circumstances which amounted to an offence under the Act, guilty of an offence of the like degree.] "The word 'obtained' in s. 33, sub-s. 1 of the Larceny Act 1916, is sought to be construed as if it were wide enough to apply to a particular change of intention on the part of a person into whose hands goods have lawfully come. But by 'obtained' an actual and physical obtaining is meant, and what is referred to is such obtaining as occurs in the case of an obtaining by false pretences." *R.* v. *Missell, Ringle & Errington* (1926), 19 Cr. App. Rep. 109, C. C. A., *per* Lord Hewart, C.J., at p. 111.

Australia. — "According to the Oxford Dictionary 'obtain' means primarily to come into possession or enjoyment of (something) by one's own effort or by request; to procure or gain as the result of purpose and effort, hence generally to acquire or get." *Re Woods, Woods* v. *Woods*, [1941] St. R. Qd. 129, *per* Philp, J., at p. 137.

OBVIOUS

"In my judgment 'obvious' means something which, as soon as you look at it, strikes one at once as being so like the original design, the registered design, as to be almost unmistakable. I think an obvious imitation is something which is very close to the original design, the resemblance to the original design being immediately apparent to the eye looking at the two." *Dunlop Rubber Co., Ltd.* v. *Golf Ball Developments, Ltd.* (1931), 48 R. P. C. 268, *per* Farwell, J., at p. 279.

Canada. — "In order that a thing shall be 'obvious' it must be something that would directly occur to some one who was searching for something novel, a new manufacture or whatever it might be, without the necessity of his having to do any experimenting or research, whether the research be in the laboratory or amongst literature." *J. R. Short Milling Co. (Canada), Ltd.* v. *Geo. Weston Bread & Cakes, Ltd.*, [1941] Ex. C. R. 69, *per* Maclean, J., at p. 86; *affd.*, 2 Fox Pat. C. 103.

OBVIOUS IMITATION.
See FRAUDULENT IMITATION

OCCASION

"The expression 'on the occasion of' . . . is not equivalent in meaning to the phrase ' on the same date as'. An 'occasion' is not a period of twenty-four hours. If we say that a man took out an assurance policy on the occasion of his marriage, we do not mean 'on the day of his marriage', but rather 'at or about the time of his marriage', with the implication that the coincidence in time was designed and not accidental." *Ideal Life Assurance Co., Ltd.* v. *Hirschfield (H. J.) & Hirschfield (A. H.)*, [1943] 1 K. B. 442, C. A., *per cur.*, at p. 446.

New Zealand. — [A proviso to s. 88 (*b*) of the Land and Income Tax Act 1954 deems to be income only five per cent. of any bonus, gratuity or retiring allowance paid in a lump sum on the "occasion" of the retirement of a taxpayer from his employment.] "In the context of s. 88 (*b*) the proviso requires that there be a direct relationship between retirement and payment, the payment must be due to or a consequence of the retirement. I suggest that the purpose of the proviso is to give tax relief in cases where special provision is made for a taxpayer on and because of his retirement. There must be a causal as well as a temporal connection between the two. In ordinary usage the word 'occasion' may be used in a causal sense. Had a temporal connection between retirement and payment been regarded as sufficient the words 'the occasion of' in the proviso should have been omitted. In this case the payment was in respect of leave which preceded retirement." *Rathbun* v. *A.-G.*, [1966] N. Z. L. R. 428, C. A., *per cur.*, at p. 439.

"As occasion may require"

"One of the most important of these questions relates to the validity of r. 32 [of a benefit

building society], which gives the directors power, from time to time, as occasion may require, to borrow money from the society's banker or from any other banker or person. In both the Courts below it was assumed to be settled law that the rule was invalid, because it does not impose any limit upon the amount which the directors are authorised to borrow. It cannot with strict accuracy be said that the power conferred is absolutely without limit, seeing that it is only to be exercised 'as occasion may require' which plainly implies that it is not to be exercised at all except in the case of a loan being needed for the purposes of the society in the course of its legitimate transactions as a benefit building society." *Murray* v. *Scott*, *Agnew* v. *Murray*, *Brimelow* v. *Murray*, (1884), 9 App. Cas. 519, *per* Lord Watson, at pp. 556, 557.

Occasioned by

[Section 2 (1) (*b*) of the Workmen's Compensation Act 1906 (repealed) enacted that the failure to make a claim within the proper period should not be a bar to the maintenance of proceedings, if the failure was "occasioned by" mistake, absence from the United Kingdom, or other reasonable cause.] "Counsel has made some point of the learned County Court Judge using the words 'due to', which, he says, are words which have not the same effect as the actual words of the statute which are 'occasioned by'. I do not find any difference in those two expressions." *Dight* v. *Craster Hall* (*Owners*) (1913), 6 B. W. C. C. 674, C. A., *per* Cozens-Hardy, M.R., at p. 676.

OCCUPANCY. *See also* OWNERSHIP

Ownership may be acquired by occupancy of a thing without an owner, for example, the capture of wild animals; the appropriation of free natural elements, such as air and water; the lawful severance of a thing, for example, corn or other emblements, from the soil; and, perhaps, the finding of a thing absolutely abandoned or irretrievably lost. It has been said that when the species of a thing is changed, as by making wine, oil, bread, or malt out of the grapes, olives, wheat, or barley of another, the title of the owner is destroyed and the operator, though liable in damages, acquires title by virtue of this possession; but it appears that, in modern law, alterations to a chattel divest the owner's title only when the chattel has been worked into the property of another, or is no longer identifiable (29 Halsbury's Laws (3rd Edn.) 377).

OCCUPATION (Calling)

[Section 1 of the Bills of Sale Act 1854 (repealed; see now Bills of Sale Act 1878, s. 12) required a bill of sale to be filed together with an affidavit stating (*inter alia*) the "occupation" of the maker. An affidavit described the maker of a bill as "gentleman".] "The Act says that the bill of sale shall not be valid unless there be filed with it an affidavit containing a description of the residence and occupation of the person making or giving the same. Here the person making it had an occupation, being employed by a certain house to buy silk for them. He thereby earned his living, and it was therefore clearly his occupation within the ordinary meaning of that word, and the definitions of it given by the dictionaries." *Adams* v. *Graham* (1864), 3 New Rep. 372, *per* Cockburn, C.J., at p. 373.

"This is a question of the meaning to be put upon the word 'occupation' in the Act of Parliament [Bills of Sale Act 1854 (repealed; see *supra*)]. In my opinion, it means the trade or calling by which the maker of the bill of sale ordinarily seeks to get his livelihood. In this case the maker of the bill of sale had been married a short time to the master of the workhouse, who, a month or so before his death, had taken a farm, and who died leaving the farm as part of his assets. It thus came into her hands as executrix of his will, and she was put to the alternative of abandoning it altogether, or sowing it with seed and cultivating it till disposed of. She did not do this personally, her previous life and habits rendering her incapable of so doing; but she employed a bailiff to carry on the farm for her. I do not think she could be, with the least propriety, described as a farmer; she did not carry on the business of farming as her ordinary means of livelihood, and that, I think, is what the Act means by the term 'occupation'." *Luckin* v. *Hamlyn* (1869), 21 L. T. 366, *per* Kelly, C.B., at p. 366.

"The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is, that such a description should be given that if inquiry be made in the place where the person resides, he may be easily identified." *Ibid.*, *per* Martin, B., at p. 366.

[The lease of a house contained a covenant not to use the premises thereby demised, or any part thereof, or permit the same or any part thereof to be used in the exercise or carrying on of any art, trade, or business, "occupation", or calling whatsoever.] "The question is what is the meaning of 'any occupation or calling whatsoever'. It is suggested on the part of the defendants that that means where you get a profit. I cannot accede to that. I do not think profit is the test, but the use of the house for the purpose. A man may have an occupation from which he does not get any profit, and

never intends to get any profit. He may have as an occupation the printing and publishing of papers, or books, or pamphlets, for a charitable society for which he charges nothing. It may be carried on, as it is in some cases, by an officer of the society who is not paid, and who does it from charitable and benevolent motives. Can that make any difference? The using of the house for that purpose is a using it for some occupation or calling. The occupation of the man's life may be that, and no other. I have heard of a man occupying his time, in fact, making the occupation of his life, the practice of philanthropy. When you come to look at the meaning of the word 'occupation', it is, such an occupation that you can use a house for it, that is, something done in the course of the user of the house which shows that it is used for that occupation. It would be very ridiculous to say that opening a bookseller's shop by a man is the using of a house within the meaning of the words 'exercise or carry on any art, trade, or business, occupation, or calling whatsoever', and at the same time to say that the identical user, in every respect, except that a man does it from benevolence or charitable motives, is not to be so treated. . . . The physician who uses the consulting room for the purposes of seeing his patients there is clearly using it for the purpose of his occupation or art. Suppose that, instead of seeing his patients at his own rooms, he is a physician to a public dispensary, or the physician in charge of the out-patients in any of our large hospitals. He then goes, not to his own consulting rooms, but to the room of the dispensary or hospital. Does not he use that room for the purpose of his occupation? And suppose he has no other practice—some of them have no other practice—for what purpose does he use the consulting room of the hospital? Surely in the exercise of his occupation or calling, his calling being that of a physician. It cannot make any difference that he gets no fees; that he does not get paid, and does not attempt to get paid. He still uses that room for the purpose of his calling or occupation." *Portman* v. *Home Hospital Assocn.* (1879), 27 Ch. D. 81 n., *per* Jessel, M.R., at pp. 82, 83.

Canada. — "It is suggested here that the duties of a housewife do not amount to an 'occupation'. The term 'occupation' has not as far as I can find any technical meaning. It ordinarily means that which engages the time and attention. I think no housewife would be prepared to admit that her housewifely duties do not engage her time and attention." *Northern Trusts Co.* v. *Eckert*, [1942] 2 W. W. R. 382, *per* Ewing, J.A., at p. 387.

See, generally, 3 Halsbury's Laws (3rd Edn.) 303, 304.

OCCUPATION (Of property). *See also* BENEFICIAL OCCUPATION; EXCLUSIVE OCCUPATION; RATEABLE OCCUPATION

Generally

An occupier is one who actually exercises the rights of an owner in possession. The primary element of occupation is possession, but it includes something more, for mere legal possession cannot constitute an occupation. The owner of a vacant house is in possession, though not in occupation; but if he furnishes the house and keeps it ready for habitation, he is an occupier, though he may not have resided in it for a considerable time. . . . So a trader occupies premises by merely keeping his stock, tools, vehicles or other goods upon those premises. A merchant or business man occupies an office or counting house by using it during ordinary business hours by himself or his clerks for the purpose of his business (14 Halsbury's Laws (3rd Edn.) 15).

"There is a material difference between a holding and an occupation. A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another: he does not necessarily occupy. In order to occupy, a party must be personally resident by himself or his family." *R.* v. *Ditcheat* (*Inhabitants*) (1829), 9 B. & C. 176, *per* Littledale, J., at pp. 183, 184.

"The first question is, what is the meaning of a person being in possession of property under a lease? Is it to be said that a man is not in occupation of property comprised in that lease unless he be actively using and enjoying it? I apprehend the true meaning of the words 'occupation under a lease' is not actual personal use and occupation, but occupation to which he is entitled under the instrument by which the right of possession was granted." *Whittington* v. *Corder* (1852), 20 L. T. O. S. 175, *per* Turner, V.-C., at p. 175.

[A testator, after providing for the upkeep of his house and its contents and grounds as a residence for his family until the youngest came of age, gave to his eldest son, as soon as that event took place, the option to "occupy and enjoy the use of" the house, rent-free, for life.] "I am not disposed to agree that this was a gift of an option to the son to reside only; the words used are an option 'to occupy and enjoy the use of', and unless there be something to show that the meaning of those words is restricted, they extend to something beyond residence, as has been decided in many cases. In this case I do not myself see anything to limit the words. I agree that the idea in the testator's mind was probably that his children should reside in the house. The difference between the words 'reside' and 'occupy and enjoy the use of' is perfectly well known. If he

meant to restrict it to residence I do not see the reason for his not using the appropriate word 'reside'." *Re Gibbons, Gibbons* v. *Gibbons*, [1920] 1 Ch. 372, C. A., *per* Lord Sterndale, M.R., at p. 379.

"What is meant by occupying and enjoying the use of a house and chattels during a man's life? It is said that according to the true construction of this will it means that he is only to enjoy the use of either the house or the chattels so long as he personally resides in the house. To test that I first look at the words themselves. . . . He is to have the right of occupying and enjoying the use of a house and chattels. There are more ways than one in which a man may enjoy the use of a house; one way of enjoying the use of a house is to let somebody else occupy it and pay you rent. So with regard to chattels, he may enjoy the use of a bed whether he sleeps in a particular house or in some other house, enjoying the use of the furniture is not confined to enjoying its use in a particular place. It seems to me therefore that so far as that clause is concerned there is plainly no limitation of his right to enjoy the use of the house and furniture wherever he desires to enjoy that use." *Ibid.*, *per* Warrington, L.J., at pp. 380, 381.

"'Occupation' means that the owner is in actual physical enjoyment of the house, property or estate by himself, his agents or servants. Strictly speaking 'occupation' by the owner cannot include the case of sub-tenants for the actual occupation is in them. A limited form of occupation is 'residence' which involves the dwelling for some period of the year on the premises personally of the owner or his family, or alternatively, at least, of his domestic servants." *Martin Estates Co., Ltd.* v. *Watt & Hunter*, [1925] N. I. 79, *per* Moore, L.J., at p. 85.

"It is never true to say that a mere intention to occupy, in hypothetical circumstances which may never come into existence, is equivalent to occupation." *Hampstead Borough Council* v. *Associated Cinema Properties, Ltd.*, [1944] 1 All E. R. 436, C. A., *per cur.*, at p. 438.

"Legal possession is not the same as occupation. Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering. . . . There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as 'occupied' by anyone; but everyone would say that a farmer 'occupies' the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another." *Newcastle City Council* v. *Royal Newcastle Hospital*, [1959] 1 All E. R. 734, P. C., *per* Lord Denning, at p. 736; also reported [1959] A. C. 248, at p. 255.

"'Occupiers' have been entered in the valuation roll since 1854 in virtue of the first section of the Valuation Act of that year, but the Lands Valuation Acts have provided no definition of the term. Section 379 of the Act [Local Government (Scotland) Act 1947] defines 'occupier' as meaning the tenant or sub-tenant or any person in the actual occupation of the land. The words 'actual occupation of land' seem to me to have been used to make plain that the occupation which is necessary to make the occupier liable to pay rates is *de facto* occupation as opposed to *de jure* occupation, the kind of constructive occupation which might be held to flow from mere ownership of land in as much as the right to possess is a cardinal attribute of the ownership of land. It would appear that for the purposes of the Act of 1947 an owner of land must have made some actual use of the premises during the relevant year before he had been called on to pay the occupier's rates leviable in respect of the land." *Greenock Corpn.* v. *Arbuckle Smith & Co., Ltd.*, [1960] S. L. T. 49, *per* Lord Patrick, at p. 52; *revd. on appeal*, but above dictum approved: *see* [1960] S. L. T. 123, H. L., *per* Viscount Kilmuir, L.C., at p. 124.

Australia. — "The word 'occupation' has been several times defined, but I do not think its meaning is more clearly set out anywhere than in the passage . . . in the judgment of Lush, J., in the case of *The Queen* v. *St. Pancras Assessment Committee* [(1877), 2 Q. B. D. 581], where he says: 'Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against anyone who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go into it, he is an occupier, though he may not reside in it one day in a year. On the other hand, a person who, without having any title, takes actual possession of a house or piece of land whether by leave of the owner or against his will, is the occupier of it.' It is of course a question of fact in each case. If a man is merely there for a night or two, as in the case of a tramp sleeping in an outhouse—he is not in occupation. But if he is living on the land for a continuous period of time the magistrates may properly draw the conclusion that he is in occupation of it." *Poowong Shire* v. *Gillen*, [1907] V. L. R. 37, *per* Hood, J., at p. 40.

Australia. — "Regulation 63 (of the National Security (Landlord and Tenant) Regulations) provides that on the hearing of such an application as the present the court shall take into consideration, in addition to all other relevant