Case and Comment

LIABILITY OF BAILEES — GARAGE KEEPER — MASTER AND SERVANT. — The recent decision of the Supreme Court of Ontario in *Darling Ladies' Wear Limited* v. *Hickey*[1] presents an age-old problem — the liability of a bailee for the acts of his servants. The trial judgment, which at the time of this writing is under appeal, stands for the following proposition: a bailee is liable to a bailor if the bailee's employee, who has access to the premises where the bailed chattel is kept, acting outside the scope of his employment, takes the chattel on a frolic of his own and causes damage to it.

The facts as found by the trial judge were these. O, the owner of an automobile, left it to be symonized, and to have a tire and tube changed, at a garage owned by G. It was arranged that O would call for his car Thursday evening, but when he arrived that evening he was informed that the car was not yet ready. It was agreed between O and G that O should call again for the car on Friday morning. G immediately instructed his servant, E, to finish the work on the car. This E apparently did about 8:30 in the evening. In the words of the trial judge: "He [the servant] quit work at 8:30 p.m. on the day in question".[2] E locked up the garage and left as soon as he quit work. Soon after 9 p.m., however, E returned to the garage and let himself in with a key which he had obtained some weeks before from G. E had been drinking and apparently did not know why he returned to the garage. It would appear from the evidence that E did not return to the garage to work on the car and the only conclusion one can reach is that the car must have been completely attended to before his return. It is unfortunate that the trial judge did not indicate in his judgment whether the work in fact had been completed. From the garage, E drove O's car forth into the night on a frolic of his own and later demolished it.

In these circumstances the first legal question to be determined is the status of the garage owner. There seems to be little

[1] [1949] O.W.N. 180; [1949] O.R. 189.
[2] [1949] O.R. at p. 191.

doubt that G was a bailee for reward and the trial judge so held. Once it had been determined that G was a bailee for reward it became important to consider his liability in relation to the bailor. Although the decided cases do not put them clearly, it is submitted from a close reading of the cases that the following three principles of law can be distinguished.

1. If a bailor delivers a car to a bailee and the servant of the latter takes the car out on a frolic of his own, thereby acting outside the scope of his employment, and runs down a third party, the bailee will not be liable for the negligence of the servant to that third party. This is nothing more than a simple application of the law of master and servant and the question of bailment only confuses the issue.

2. If a bailor delivers a car to a bailee who delegates the custody of the car to a particular servant and while having the custody of the car that servant goes out on a frolic of his own, acting outside the scope of his employment, and damages the car in question, the bailee will be liable to the bailor for the resulting damages. This principle involves then the question of what the servant failed to do and not what he did. That is to say, the issue is the failure of the servant safely to keep the car, in that the servant had custody of it. It is not a question of the servant acting in any positive manner either within or without the scope of his employment.

3. If a bailor delivers a car to a bailee and, while the car is in the bailee's custody, one of his servants to whom custody has not been given takes the car out on a frolic of his own, acting outside the scope of his employment, and damages the car, the bailee will not be liable to the bailor unless the bailee himself was negligent by his own acts or omissions, or was negligent in hiring or keeping in his employ that particular servant. This principle involves the question of what the servant did rather than what the servant did not do.

The difference in result between Class 2 and Class 3 is based solely upon the question of the custody of the car. If the servant who damaged it had the custody of the car, then the bailee is liable to the bailor. If he did not have the custody of the car, then the bailee is not liable to the bailor if the servant acting outside the scope of his employment goes on a frolic of his own; to hold otherwise would be to place the bailee in the category of an insurer for the acts of all servants in his employ.

The case law does not clearly set out the different categories and liabilities of the bailee, and authorities such as Halsbury

tend to suggest that there is only one principle governing a bailee's liability, which applies whether the question is one of tort or contract. Apart from certain authorities, which will be referred to later, there seems to be little doubt that Class 1 and Class 3 exist in law. Reference should be made particularly to *The Central Motors Limited* v. *Cessnock Garage*[3] in which both Lord Sand and Lord Cullen clearly indicate the difference between Class 1 and Class 2. The distinction was continued, although it may have been improper to have done so, in the case of *Van Geel* v. *Warrington*[4] by both Middleton J.A. and Masten J.A., and also in the strong dissenting judgment in *Fireman's Fund Insurance Co.* v. *Schreiber*[5] and in other cases such as *The Coupe Company* v. *Maddick*.[6]

Class 3 can best be distinguished by comparing cases such as *Sanderson* v. *Collins*,[7] *Storey* v. *Ashton*,[8] and *Mitchell* v. *Crasweller*,[9] with cases such as *The Coupe Company* v. *Maddick* (*supra*) and *The Central Motors Limited* v. *Cessnock Garage* (*supra*). In the first three cases the bailee was not held liable for the acts of a servant whereas in the last two he was. The simple difference between the two groups of cases, it is submitted, was the question of custody.

The trial judge in *Darling Ladies' Wear Limited* v. *Hickey* (*supra*) referred liberally to *Van Geel* v. *Warrington* (*supra*), but unfortunately the judgments in the *Van Geel* case are rather confusing. It is submitted that the decision in *Van Geel* v. *Warrington* has been much misunderstood and that the case does not stand for the principle of law which appears to have been drawn from it by the trial judge in *Darling Ladies' Wear Limited* v. *Hickey*. Several of the judges in *Van Geel* relied on entirely different principles of law. Latchford C.J. found that the servant was acting within the scope of his employment and rested his decision partly upon that basis and partly upon the basis that the bailee had been negligent in hiring the servant. Masten J.A. and Middleton J.A., on the other hand, although discussing scope of employment and, perhaps, resting their judgments on that basis, continued throughout their judgments to refer to the question of the delegation of the custody of the automobile.

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[3] [1925] Sess. Cas. 796. The decision was referred to with approval in *Aitchison* v. *Pape Motors Ltd.* (1935), 52 T.L.R. 137.
[4] (1928), 63 O.L.R. 143.
[5] (1912), 150 Wis. 42.
[6] [1891] 2 Q.B. 413.
[7] [1904] 1 K.B. 628.
[8] (1869), L.R. 4 Q.B. 476.
[9] (1853), 13 C.B. 237.

One must be extremely careful therefore when extracting the law from the decision in *Van Geel* v. *Warrington*. It is submitted that the final result of the decision was quite correct, but the avenue by which it was reached and the language used *en route* was not only confusing but in places would appear to be contrary to accepted principles of the law of bailment.

At this stage of the discussion reference should be made to Halsbury: "A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailee. The standard of care and diligence imposed on him is higher than that required by a gratuitous depository and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances."[10] Such a statement of the law, when viewed closely, loses much of its value because of its loose generality, and it is a difficult test to apply to any specific set of facts. Halsbury goes on to state that a bailee for reward is not an insurer apart from special contract and therefore, in the absence of negligence on his part, he is not liable for loss or damage due to some accident, fire, the acts of third parties or the unauthorized acts of his servants acting outside the scope of their employment. More specifically, Halsbury indicates that "a bailee is liable to the owner of a chattel for the negligence of his servants or agents and for their acts of fraud or other wrongful acts, *provided* that such acts were committed by them within the apparent scope of their authority or within the course of their employment".[11] Such a statement is true, it is submitted, so long as the statement is made applicable to the types of cases referred to in Classes 1 and 3, but not to the specialized type of cases referred to as Class 2, where the custody of the chattel is delegated to a servant by the bailee.

In Class 2, the bailee cannot be heard to say that he should not be liable for the acts of a servant to whom he has given the custody of a chattel which he himself was under an obligation to protect. The question of scope of employment or the frolic of a servant is not relevant when it has been determined that a bailee has delegated the custody of a chattel to a specific servant. As Riddell J.A. said in *Van Geel* v. *Warrington*: "The defendant put the agent in his place to do that class of acts and he must be answerable for the manner in which that agent has conducted

[10] Vol. 1 (2nd ed., 1931) at p. 748.
[11] *Ibid.*, at p. 750; the italics are mine.

himself in doing the business which it was the act of his master to place him in".[12]

Therefore the issue now before the Court of Appeal in *Darling Ladies' Wear Limited* v. *Hickey* is to determine, firstly, whether the servant had the custody of the car when he went on a frolic of his own and acted outside the scope of his employment. If he did, then the bailee should be held liable to the bailor. Secondly, if the servant did not have the custody of the car when he took the car from the garage, was the servant on a frolic of his own, acting outside the scope of his employment. If he was, then the bailee should not be liable to the bailor. The latter proposition of course again depends upon the question of whether the bailee was negligent in employing the particular servant.[13]

In *Van Geel* v. *Warrington* Middleton J.A. said: "A master is liable for the conduct of his servant, the agent whom he selects and puts in his place to discharge the duty he has undertaken, and this law is applicable in the case of bailment. The conduct of the servant is then the conduct of the master, and the master is liable to the bailor."[14] It is submitted that such a statement of the law is correct so long as it is confined to the case of bailee and bailor where the bailee has delegated the custody of the chattel to his servant, but if the statement is to be applied to a bailment where no custody has been given to the defaulting servant, it is incorrect. Middleton J.A. further stated: "The finding that as a matter of law the keeper of a garage can escape liability for the loss of a car placed in his garage by its owner, upon the proof that the car was improperly removed from the garage and kept by an employee who, contrary to his master's orders, took it from the garage upon a frolic of his own seems so shocking and repugnant to one's ideas of justice as to invite the closest scrutiny. I am glad to arrive at the conclusion that this doctrine rests on no solid foundation."[15] With the greatest respect, this statement of the law is correct but only if it is applied to a set of facts where a servant has been delegated the custody of a car. One should note, however, that, although Middelton J.A. referred to the improper removal of a car from a garage, the car was not improperly removed in *Van Geel* v. *Warrington* and his statement is obiter dictum. In that case the employee removed the car from the premises upon the express instructions of the bailee and furthermore the employee had

[12] (1928), 63 O.L.R. at p. 152.
[13] *Williams* v. *Curzan Syndicate* (1919), 35 T.L.R. 475.
[14] (1928), 63 O.L.R. at p. 152.
[15] *Idem.*

been delegated the custody of the car. Whereas in *Darling Ladies' Wear Limited* v. *Hickey* the employee removed the car without the instructions of the bailee and he did not have the custody of the car.

Again, in *Central Motors Limited* v. *Cessnock Garage* the judgment states: "The keepers were liable because they had delegated their duty of keeping the car safely to their servant. They were liable for the servant's failure in performance." Here the court is not discussing the question of scope of employment, or the frolic of a servant, but is holding the bailee liable because he had delegated the duty of keeping the car safely to the servant, and the servant failed to do so.

Therefore the question of custody must form the foundation upon which the Court of Appeal in *Darling Ladies' Wear Limited* v. *Hickey* will rest its decision. The following is the only specific reference by the trial judge in his judgment to the question of custody: "On the other hand, Dainard had been entrusted with some work on the automobile in question".[16] It is not clear from such a statement whether the trial judge based his judgment on the finding of delegation of duty or whether the statement was merely part of his reasons. Unfortunately he did not determine whether the servant actually did have the custody of the car when the frolic commenced and it is respectfully submitted that without such a determination the judgment is in error. The servant admitted and the trial judge found that the servant had "quit work". The trial judge should have found whether the work upon the car had been completed. Since the car was to be ready by the next morning and since the servant quit work, locked the garage and left the premises, and furthermore did not know why he returned after 9 o'clock in the evening, we must presume that the work upon the car had been completed. This being so, the custody of the car by the servant ended when the work was finished, the day ended, and the premises quitted and locked behind.

To hold otherwise would be unfortunate indeed. Let us assume, for example, the following facts. A brings in his car to the garage on Monday morning to be repaired. B, the owner of the garage, delegates the custody of the car to his servant. The servant finishes work on the car Monday evening. The owner does not call for his car until Thursday evening. In the meantime, on Wednesday evening, the same servant who had worked on the car three days before takes it out on a frolic of his own.

[16] [1949] O.R. 189, at p. 191.

Surely it could not be said that the servant who had worked on the car on Monday still had the custody of the car on Wednesday. Yet from the judgment of the trial judge in *Darling Ladies' Wear Limited* v. *Hickey* it is difficult to draw any other conclusion. Merely because a servant has the custody of a car at one time does not mean that he has the custody of it until it is reclaimed by the owner. Custody by the servant must end at sometime before the owner re-claims it. How? By the close of a day; by the passing of time; by the movement of the clock — by such mechanical yardsticks? It is submitted that the custody by a particular servant must end when that particular servant completes the work which he was to do upon the car and leaves the car properly on the premises. What other period can one select? When the servant finished his work, locked the garage and left the premises, he lost the custody in law of the car because his work was complete, and at that stage the custody of the car returned to the bailee. When the servant later returned, he was no longer the custodian of the car, but merely an employee. This being so, we must look at the servant and ask ourselves: What did the servant do? not, What did he fail to do? The answer clearly is that a servant who did not have custody of the car acted outside the scope of his employment on a frolic of his own. Therefore the bailee should not be liable to the bailor for the resulting damage, provided however that the bailee was not himself negligent, which he was not in this case, and provided the bailee was not negligent in employing the servant. The trial judge held specifically that the bailee was not negligent in employing the servant in the first instance and presumably he was not negligent in retaining the servant in his employ.

The trial judge dwelt upon two other aspects of the evidence, and these should be referred to before concluding. The judgment states, "He had a key which was in his possession with the authority of his employer and he had been authorized to do some work in the garage at night".[17] Presumably the judge was not referring specifically to the night in question, but to any night. The inference is that if the servant did any work at night, he would be acting within the scope of his employment. However, it was found as a fact that the servant on the night in question was acting outside the scope of his employment and therefore presumably the servant was not working on the car, nor had he returned to work on the car, for by the longest stretch of the imagination a car which has been placed in a garage to be symo-

[17] *Idem.*

nized does not require a road test. There would seem to be no relevance in the finding that the servant was authorized to work in the garage at night, and particularly on the night in question, when the judge found on the other hand that the servant was acting outside the scope of his employment. Furthermore it would seem incorrect to infer that the servant was authorized to work in the garage at night merely from the fact that he had a key to the premises.

Should the trial judge's decision have turned in any way upon the matter of the key? The key would have been relevant had he found that the bailee had been negligent in employing the servant or had been negligent in retaining the servant in his employ. But the judge specifically found against such negligence, and therefore the key was not relevant to the decision in the case. The key would only be relevant if the employee was not a trusted employee, because in that case it would have been negligence on the part of the bailee to give a key to an employee of bad reputation.

In conclusion it is submitted that the facts in *Darling Ladies' Wear Limited* v. *Hickey*, as apparently found, did not warrant the trial judge holding the bailee liable to the bailor. A bailee should not be liable to a bailor if a servant is acting outside the scope of his employment unless the servant has been given the custody of the chattel and had the custody of the chattel at the time he damaged it. Since the servant in this case does not appear to have had the custody of the chattel at the time the chattel was damaged and was acting outside the scope of his employment, the bailee should not have been held liable to the bailor.

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BONA VACANTIA — THE CROWN'S LIABILITY FOR DEBTS OF DECEASED — RIGHTS OF CREDITORS.—*In re Hole Estate*,[1] a decision of the Court of King's Bench of Manitoba, mainly dealt with a problem in the Conflict of Laws. That aspect of the case has already been noted in this Review.[2] There are, however, other interesting aspects to this case. The portions of the judgment of Dysart J. dealing with the doctrine of *bona vacantia* and the claims of creditors on the assets of a person dying

[1] [1948] 2 W.W.R. 754.
[2] (1949), 27 Can. Bar Rev. 225.

intestate and without next of kin are of some importance and deserve comment.

The relevant facts may be briefly stated. Mrs. Hole died intestate and without next of kin in 1944. At the time of her death she was domiciled in Manitoba. She left considerable property, one asset being her interest as vendor in an agreement for sale of land situated in Saskatchewan. There was no dispute about her property being *bona vacantia;* but the administrator submitted to the court the question whether His Majesty the King took the whole or any part of the assets in the right of the Dominion of Canada, or the province of Manitoba or the province of Saskatchewan. On this point Dysart J. held that the province of Manitoba was entitled to the whole estate. There was then a further question. Were the creditors of the deceased entitled to have their claims paid out of the *bona vacantia?* Is the province of Manitoba, on becoming the declared owner of all the assets, bound to pay the debts of the deceased? At page 773, Dysart J. said this:

> The answer to this question must be in the negative. The debts are not in any way secured by or attached to the assets. Mrs. Hole's death separated the assets from her liabilities. The Crown has taken the assets but is under no obligation to take her liabilities — the latter remain unwanted.

And what about expenses incurred by the administrator (*e.g.*, in trying to find next of kin) since Mrs. Hole's death? Again it was held that the province need not pay them. The only remedy available to the administrator and to the creditors was to throw themselves upon the mercy of the Crown. That is clear from a statement at page 774:

> As regards all the debts and obligations, the province, acting in the name of the sovereign, will be assumed to act fairly towards these creditors, and I fully expect that — as an an act of grace, if nothing more — the province will settle and pay all these debts.

These conclusions are most surprising. Nothing appears to be more remote from justice than this rule that a creditor of a person who dies intestate and without next of kin should have no legal or equitable right to have his debt paid out of the assets of the estate, but should be left at the mercy of a government. What is the basis of such a decision? How did Dysart J. reach it? And is it sound law?

It is substantially accurate to say that "the doctrine of *bona vacantia* is founded upon the common-law theory that all property must be in the ownership of some one at all times

without interruption" and that "when the owner of the property dies, the property must instantly vest in some stranger to it; and, by long-established law, the reigning sovereign is the person in whom it . . . does so vest".[3] But does it necessarily follow that the legal title to the property automatically vests in the Crown, or that the beneficial interest in it automatically vests in the Crown, completely separated from the deceased's liabilities? I submit that such a result is not a logical necessity; that it goes beyond what is required to fulfil the purpose of the doctrine of *bona vacantia* (the only purpose of the rule is to prevent certain property from becoming "ownerless" and it was never intended to defeat the claims of creditors); and that it is contrary to many statements in the decided cases which support the principle that there is an estate to be administered and that the administrator, usually a nominee of the Crown, *must* pay the debts of the deceased.

If one needs authority for the proposition that the legal title to the property does not "instantly vest" in the Crown on the death of an intestate without next of kin, one can turn to *Manning* v. *Napp*,[4] an old case on the subject of *bona vacantia*. There we find this statement:

> . . . the property of goods till administration was in the Ordinary . . . the King's appointment [of an administrator] by letters patent was but a kind of recommendation.

Dyke v. *Walford*[5] is the leading case on the history of *bona vacantia* and makes it clear that the property on death vested in the Ordinary; and it is implicit in the cases to be mentioned later that to-day, so far as the passing of the property on death is concerned, there is no distinction between *bona vacantia* and other property of an intestate: it all vests in the first instance in the judge of the court of probate.[6]

There are many cases with statements supporting our thesis that there is an administration of the estate of a person dying intestate and without next of kin and that the Crown must pay his debts. In *Megit* v. *Johnson*[7] one Lowe had committed suicide and his property was thus forfeited to the Crown. Lord Mansfield C.J. held that the defendant who was the administrator nominated by the Crown must pay Lowe's debt to the plaintiff; and at page 584 he said:

[3] At p. 758.
[4] (1692), 1 Salk. 37; 91 E.R. 38.
[5] (1846), 5 Moo. P.C. 434.
[6] See *Megit* v. *Johnson* (1780), 2 Doug. K.B. 542; 99 E.R. 344.
[7] *Ibid.*

> Suppose Lowe had been a bastard, or, being legitimate, had died without any next of kin. The King, in such case, would have taken, as ultimus haeres, but subject to the debts of the intestate.

This may be said to be *obiter dicta;* but it is very much in point, as there is no real distinction between *bona vacantia* and property passing to the Crown on forfeiture.

This opinion of Lord Mansfield is frequently echoed in the law reports. In *Re Dewell*[8] Kindersley V.C., in speaking of an administration of *bona vacantia* by a nominee of the Crown, put it thus:

> When the administrator is once constituted, he is liable to all claims by persons who are entitled to claim against the estate.

And again, in *In re Sir Thomas Spencer Wells,* Lawrence L.J., sitting in the English Court of Appeal, uttered this dictum:[9]

> As the right of administration follows the right of property, letters of administration in the case of an intestate dying without next of kin are granted to the nominee of the Crown, but subject to the usual condition of paying the administration expenses and debts of the intestate.

Indeed, we even find support for our view in the very case which formed the basis of the decision of Dysart J. on this point. He quoted from *In re Barnett's Trust* at page 857. On that page Kekewick J. was dealing with the argument that the Crown takes *bona vacantia* as "heir" and that the administrator nominated by the Crown is the "legal personal representative" of the deceased. He rejected it in the following words:

> He does not represent the deceased at all, except that by our law he is put in his place to defend actions by creditors or by persons claiming the estate against him.

There is a decision of the Appellate Division of the Supreme Court of Alberta which is relevant: *In re Butterworth.*[11] Butterworth, the owner of certain land, had set off for the Yukon and had not been heard of for many years. Accordingly, he was presumed to be dead. Since he had no next of kin, letters of administration were granted to the National Trust Co. Ltd. as public trustee. This grant was opposed by Cranston who contended that, because the land had escheated to the Crown, there was no estate to administer. To this argument Stuart J., who delivered the judgment of the court, said:[12]

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[8] (1858), 4 Drew. 269, at p. 272.
[9] [1933] Ch. 29.
[10] [1902] 1 Ch. 847.
[11] [1920] 1 W.W.R. 852.
[12] At p. 853.

> Assuming that there has been an escheat still there is nevertheless an estate to be administered. The Court cannot yet assume that there are no creditors until the recognized method of enquiry for these has been adopted. An escheat to the Crown is always subject to debts.

He later pointed out that escheat and *bona vacantia* are now subject to the same rules, so that his remarks on escheated land are applicable to *bona vacantia.*

Now, it may be strongly argued that all the statements that have been quoted are more in the nature of *obiter dicta* than the *ratio decidendi* of the cases from which they are taken. And one may quote from the judgment of the Privy Council in *In re Wudwud*[13] to show that it is still an open question; for in that case Lord Buckmaster said:[14]

> . . . the question whether they [escheated lands] can be sold and used for payment of debts, which has been left open, is not material . . .

But such an argument is not convincing in the face of the impressive weight of judicial opinion in support of the view that the Crown is bound to discharge the liabilities of the deceased. It is regrettable that Dysart J. reached a different conclusion. Let us hope that the creditors will not be left without remedy when the question again comes before the courts.

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ARBITRATION — FORCE OF A PROMISE TO ARBITRATE — CLAUSE COMPROMISSOIRE — QUEBEC.— In the October 1948 issue of the Review, at page 1244, I commented on the decision of the Superior Court, Montreal, in the action of *B. Kaplan Construction Co. Ltd.* v. *Auto Fabric Products Co., Ltd.*, which dismissed a motion to suspend the action and to order the plaintiff to proceed meanwhile by arbitration of the difference between the parties. Unfortunately, I had before me at the time only the bare judgment, recited in the former comment, which did not indicate that the motion was to suspend and not to dismiss the action, and I described it as a motion to dismiss. The difference is important, as the sequel will show; though the Superior Court did not notice it, and rejected the motion on the broader ground that the promise to arbitrate and thereby to by-pass

[13] [1928] 3 W.W.R. 97.
[14] At p. 100.

the courts was illegal and null. That decision and the authorities relied upon were commented upon.

The judgment was appealed and the appeal in due course dismissed,[1] on the new and technical ground that a motion to suspend the action was not the proper procedure in the circumstances. The opinions in appeal, however, introduce some doubts and hesitation which do not assist a clear view of the place of the promise to arbitrate.

The contractor, Kaplan, sought payment of a large balance of the contract price. The owner raised objections against various amounts. Hence the dispute. The owner wrote, referring to the arbitration clause and offering to arbitrate "the alleged dispute which has arisen between the parties", but without result. The action followed. In the motion to suspend, the arbitration clause, the letter and the continuing desire of the owner-defendant to arbitrate were alleged, without stating the points of dispute.

In appeal, Judge Bissonnette was of opinion that the court below had pronounced prematurely on the nullity of the clause, but that the motion must stand dismissed on the following grounds.

1. The motion asserts that, by virtue of the clause, the difference between the parties must be exclusively decided by a board of arbitrators. That assumes that the clause is valid and legally binding. If it is, then the court has no jurisdiction; in which case it was illogical and contradictory to ask the court to suspend an action which it has no right to decide at present or to continue with after an arbitration has taken place. And his Lordship reserved the owner's right to raise the issue in a plea to the merits.

2. Further, the motion was insufficient in form and grounds. The owner, said his Lordship, should have alleged the point or points of dispute which it pretended existed when the action was issued — at least the nature of the dispute, the respective contentions of the parties, the refusal of the owner to respect the condition of the clause as called for by the letter offering to arbitrate — in a word, the object of the desired arbitration. That, said his Lordship, means that the motion should have disclosed the existence of an actual and binding *compromis* (arbitration agreement — as distinct from a promise to arbitrate), under which the plaintiff declined to proceed. And all that was matter for proof, whereas before the court is only the letter of

[1] *Auto Fabric Products Co. Ltd.* v. *B. Kaplan Construction Co. Ltd.*, [1949] K.B. 241.

the owner's lawyers indicating that there was an undefined difference which the owner was willing to arbitrate.

By way of comment, and with respect, it is submitted that if the motion was illogical and hence unfounded, it stood dismissed on that ground alone, and the rest is *obiter*. Secondly, to say that there must be a *compromis* in existence, alleged and proved, is equivalent to saying that the promise to arbitrate has in itself no legal validity. The whole purpose of a valid promise to arbitrate is to compel one party, at the instance of the other requesting arbitration, to join in formulating a *compromis* or agreement of arbitration which will in precise form settle the points in dispute which are to be arbitrated. This was the intention of the clause, so as to settle disputes quickly, to avoid the expense and uncertainty of having cases held up in courts for three and four years, while witnesses die and memories become hazy and the work in dispute is covered up. The clause in question stipulated that procedure relating to the arbitration was to conform to the laws of the province, and that "in the case of any dispute . . . either party shall give to the other notice of such dispute". Notice that there was a dispute, an unwillingness to pay the amount demanded, and of willingness to arbitrate, was given by letter, as we have seen — apparently without response of any kind except the service of the action. But upon receipt of that letter, the contractor was bound under its contract and as a matter of good faith to reply — yes, we have to arbitrate, let us now formulate our agreement of arbitration, naming our arbitrators and defining the points in dispute. Then only could there exist an agreement of arbitration. If the contractor refused thus to implement its covenant, its action would be premature. But it is surely not a defect in the owner's position that, having requested an arbitration, the contractor has by its silence refused, so that no agreement of arbitration has been made possible.

Nor is it ordinarily possible for the owner to define, in asking for an arbitration, the points in dispute upon which both parties disagree. Refusal to pay the amount demanded is evidence of an existing difference which must be resolved. But Judge Bissonnette's notes ignore those difficulties, for he says (translated):

> Nowhere in the correspondence of record does it appear what may have been the nature and object of the dispute to be resolved by an arbitral decision; hence the notice [*i.e.*, the letter asking for arbitration must be held insufficient, for, certainly, to give to a promise of arbitration such elasticity that a mere lawyer's letter could raise a dispute and compel the other party both to recognize its existence and proceed

> to arbitrate it, especially when the clause is vague, not precise, and incomplete, would be to submit the free and special covenants of parties upon which courts must exercise their supreme authority, to the caprice, the whim, and the delaying tactics of a contracting party, just as he might be inclined.

If one may be permitted, with respect, to say so — that begs the whole question: the promise to arbitrate is null because it does not define the actual dispute, which may never arise; there must be an agreement of arbitration because then the court will have before it a clear-cut contract upon which to exercise its supreme authority; there must be no room for delaying tactics, though the administration of law as regards millions of other contracts is similarly harassed. The fact remains that the parties have deliberately and expressly covenanted that they will arbitrate and in doing so will follow the procedure of the province — that is, will formulate an agreement of arbitration and will abide by the result.

3. Again, Judge Bissonnette argues that so soon as the owner sought to stand on the promise to arbitrate, it was bound to take the initiative and hence to comply with article 1434 of the Code of Civil Procedure. Now that article reads:

> Deeds of submission [*i.e.*, agreements of arbitration] made out of court must state the names and additions of the parties and arbitrators, the objects in dispute and the delay within which the award of the arbitrators must be given.

But such an agreement is bilateral, and must and can only be prepared at the instance and with the collaboration of both parties. One party cannot *ex parte* prepare and execute such an agreement. He gives notice that he disputes a proferred claim and requests arbitration. By so doing, he indicates his willingness to formulate an agreement of arbitration, and automatically puts the other in default to recognize his obligation and to assist in formulating the agreement.

Judge Pratte, in his opinion, rejected the motion on the ground that, asking only to suspend the action, it was illogical and contradictory, as was held by Judge Bissonnette.

Judge Casey, while also of that opinion, made a further distinction — that, if the clause were null on its face, it would have been the right and the duty of the court so to declare; but that if the nullity were only relative, so that to establish its existence one must view it in the light of its surrounding circumstances, then the court is neither entitled nor obliged to decide the question until all the necessary facts are before it and the parties are given the opportunity of meeting the issue.

Judge Barclay concurred in the opinion of Judge Casey; Judge Marchand in that of Judge Bissonnette.

What is meant by "viewing the clause in the light of its surrounding circumstances" is not clear. As between the clause being absolutely or only relatively null, there is, it is submitted, only one legal and practical view of the matter — that the parties promised with their eyes open, and to induce a huge and complex building contract, replete with possibility of differences, to arbitrate those differences. Such a covenant was legal, binding, necessary, salutary — and the parties should be held to honour it.

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STARE DECISIS — AUTHORITY OF COURT OF APPEAL DECISIONS FROM ENGLAND OR ANOTHER CANADIAN PROVINCE.— In last month's issue, reference was made to a statement in the case of *Lethbridge Lodge No 2, I.O.O.F.* v. *Afaganis*[1] to the effect that a trial court in the province of Alberta felt itself bound by a decision of the Court of Appeal in British Columbia. An error appeared in the comment in that it stated that the trial judge and trial court concerned were Sissons J. of the Trial Division of the Supreme Court of Alberta. Judge Sissons is a member of the District Court. However, it is submitted that the principles set forth in the comment apply equally to a judge of either court, and also to a judge of the District Court when sitting as a local judge of the higher court. His Honour has been good enough to bring this matter to my attention, and at the same time to refer me to the case of *Veley and Joslin* v. *Burder*[2] where it is said:

> . . . obedience to a superior court is one of the first duties that an inferior Judge has to perform, as the presumption of law is that the Judge of the superior court is not only a superior in rank and station, but in judgment also and ability.

This is undoubtedly true with respect to decisions of courts higher than the District Court in the province of Alberta, but with great respect it is submitted that decisions of the Court of Appeal in British Columbia or of Ireland or of Washington State are not binding upon Alberta judges, and they are at liberty to depart from them if, as Sissons D.C.J. had, the judge has good reason to do so, much as uniformity, particularly in the provinces of Canada, may be desired.

G.D.K.

[1] [1949] W.W.R. 314 (Alta., Sissons, D.C.J.). The judge was inadvertently referred to in the report as "Sissons J."

[2] (1837), 1 Curt. 372, at p. 390; 163 E.R. 127, at p. 133.